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Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Ms Leora Blumberg
Panel Member, Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Ms Blumberg

Ammonium nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the Act) published on 20 September 2019, advising of your intention to review the decision of the Minister for Industry, Science and Technology to publish a notice under subsections 269TG(1) and 269TG(2) of the Act (the Reviewable Decision). This notice was published on the website of the Anti-Dumping Commission (the Commission) on 3 June 2019, as Anti-Dumping Notice (ADN) No. 2019/57.

I understand that the Commission has provided you with the information that was requested of me in your correspondence of 20 September 2019, that is:

1. confidential attachments to the Statement of Essential Facts (SEF);
2. submissions to the Commission commenting on the SEF, including confidential attachments relevant to the grounds of the applications for review;
3. confidential attachments to *Anti-Dumping Commission Report No. 473*; and
4. other relevant information (as defined in section 269ZZK of the Act) pertinent to the grounds of review raised by the Applicants, including:
    a. the verification visit reports for the two Australian industry members and any confidential attachments;
    b. all importer verification reports, including confidential attachments; and
    c. the exporter verification report relevant to Yara AB, including its response to the exporter questionnaire.

I have considered the applications submitted by Downer EDI Mining - Blasting Services Pty Ltd (DBS), Glencore Coal Assets Australia Pty Ltd (Glencore) and Yara AB (Yara) for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Act, at **Attachment A**.

The Commission has also responded to certain questions raised by Glencore in its submission made following a conference held on 4 September 2019. A list of the relevant questions and the Commission's responses is at **Attachment B.**

A confidential version of the submission has been provided.

The Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely

Dale Seymour
Commissioner
Anti-Dumping Commission

21 October 2019

Attachment A

Background

1. On 29 March 2019, CSBP Limited (CSBP), Orica Australia Pty Ltd (Orica) and Queensland Nitrates Pty Ltd (QNP) lodged an application under section 269TB(1) of the *Customs Act 1901* (Cth) (the Act)[1] for the publication of a dumping duty notice in respect of ammonium nitrate (the goods) exported to Australia from the People's Republic of China (China), Sweden and the Kingdom of Thailand (Thailand).[2]

2. The Commissioner of the Anti-Dumping Commission (the Commissioner) subsequently initiated an investigation on 25 June 2018.[3]

3. On 3 June 2019, the Anti-Dumping Commission (the Commission) published a notice signed by the Minister for Industry, Science and Technology (the Minister) in which she decided to declare the goods, or like goods, to be goods to which section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (the Dumping Duty Act) applies in respect to China, Sweden and Thailand (the subject countries).[4] This notice was published pursuant to sections 269TG(1) and (2) of the Act (the Reviewable Decision).

4. In the Reviewable Decision, the Minister stated that she made the Reviewable Decision following consideration, and acceptance of, recommendations made by the Commissioner on 18 April 2019, as set out in *Anti-Dumping Commission Report No. 473* (REP 473).[5] This report outlined the Commissioner's investigations, material findings of fact and law on which his recommendations were based and evidence relied upon to support those findings.

5. Downer EDI Mining – Blasting Services Pty Ltd (DBS), Glencore Coal Assets Australia Pty Ltd (Glencore) and Yara AB (Yara) made separate applications for review of the Reviewable Decision by the ADRP.

Application of Review submitted by DBS

Ground 1: Finding that material injury has been or is being caused to the Australian industry

6. In its application to the ADRP for review of the Reviewable Decision, DBS submits that the correct or preferable decision is that the Minister should not be satisfied that material injury has been caused and is being caused by dumped imports.[6] Specifically, DBS submits the following:
   (a) material injury was not caused by dumping;
   (b) mandatory injury factors were not considered over the injury investigation

[1] All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') unless otherwise indicated.

[2] A non-confidential copy of the application is available on the electronic public record (EPR) for Investigation 473.

[3] Anti-Dumping Notice (ADN) No. 2018/103 refers.

[4] ADN No. 2019/57 refers.

[5] REP 473 - document no. 65 on EPR 473 refers.

[6] DBS' application to the ADRP, page 12 refers.

period; and

(c) the 'but for' test was incorrectly and inappropriately applied.

7. For the reasons explained below, the Commissioner disagrees with DBS' assertions. The Commissioner submits that the Minister made the correct or preferable decisions in finding that material injury to an Australian industry producing like goods was caused by the goods exported from China, Sweden and Thailand to Australia at significantly dumped prices.

(a) Material injury has been caused by dumping

8. DBS submits that the injury caused by dumping is insubstantial and insignificant.[7] DBS further submits that "material injury must have been caused, by dumping, in the period in which injury is assessed".[8]

9. The Commissioner disagrees with DBS' assertions.

10. As outlined in REP 473, the Commission has found that the majority of the Australian industry applicants' sales made in the investigation period were in accordance with fixed-term contracts negotiated several years prior to the investigation period and before the volumes of the dumped goods increased substantially.

11. In assessing whether material injury has been or is being caused to the Australian industry, it is important to note that the injury factors or indicators assessed in Chapter 8 of REP 473, are reflective of the Australian industry applicants' sales made in accordance with fixed-term contracts or supply agreements negotiated several years prior to the investigation period. Therefore, the trends observed for each injury indicator assessed in Chapter 8 of REP 473 reflect the contract terms, including prices and volumes, negotiated and agreed before the investigation period.

12. Given the nature of sales in the Australian ammonium nitrate market (being in accordance with fixed-term contracts), the Commission does not consider that a 'coincidence analysis' is appropriate in these circumstances in order to demonstrate a causal relationship between the dumped imports and the injury to the Australian industry.

13. The Commission instead considers that a causal relationship between the dumped imports and the injury to the Australian industry can be determined and established at the time contracts are negotiated.

14. In Chapter 7 of REP 473, the Commission explained its approach in assessing injury and causation, noting that the Act does not prescribe a mandatory or indicative methodology for conducting such assessment.

[7] Ibid, page 8 refers.

[8] Ibid, page 4 refers.

15. The Dumping and Subsidy Manual states that, where a 'coincidence analysis' is not possible, the Commission may undertake an alternate analytical method, such as a 'but for' analysis (or counterfactual) when examining causal effects.[9]

16. As outlined in section 9.2.1 of REP 473, the Commission assessed 13 examples of contract negotiations submitted by the Australian industry applicants in support of their claims that the goods dumped during the investigation period affected pricing and volumes.[10] The Commission considers that it was open to the Minister to have regard to these. That is, the Minister was not precluded from assessing individual contracts for the purposes of determining injury and causation, noting that subsection 269TAE(1) of the Act is broad in terms of the matters the Minister may have regard to when determining whether material injury to an Australian industry has been or is being caused. Further, given the nature of the sales in the Australian ammonium nitrate market, the Commissioner maintains that it was appropriate to assess the examples provided by each Australian industry applicant in relation to specific occurrences of injury experienced during contract negotiations in order to determine whether material injury has been caused by dumping.

17. Further, in Chapter 9 of REP 473, the Commission explained the methodology it used to determine that the injury caused by dumping is material. The Commission also provided a step by step outline of the methodology it adopted in a conference convened by the ADRP on 4 September 2019, at which DBS was one of the participants.

18. Lastly, the Commissioner clarifies that in determining whether material injury was caused by dumping, the Commissioner only considered injury factors within the injury analysis period, being from 1 April 2014. As evidenced in the Commission's methodology adopted in REP 473, the Commission did not consider the impacts of dumping for a future unspecified period.

19. For these reasons, the Commissioner maintains that material injury to the Australian industry has been caused by dumped goods exported from China, Sweden and Thailand.

(b) Injury factors were considered over the injury assessment period

20. DBS submits that the Commission has not considered "mandatory" injury factors identified in Article 3.4 of the World Trade Organization *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the Anti-Dumping Agreement).

21. For the publication of a dumping duty notice under section 269TG(2), the Minister must be satisfied, among other things, that because of the dumping, material injury to an Australian industry producing like goods has been or is being caused or is threatened. This requires the Commission to undertake an assessment of the

[9] Dumping and Subsidy Manual (November 2018), page 131 refers.

[10] Refer document nos. 013, 016 and 019 on EPR 473.

material injury to industry in accordance with section 269TAE of the Act, and with regard to the *Ministerial Direction on Material Injury 2012*.[11]

22. Pursuant to the Act, the Commission assessed the following factors in Chapter 8 of REP 473:
    - the quantity of like goods produced by the Australian industry;[12]
    - the degree of utilisation of the capacity of the Australian industry to produce like goods;[13]
    - the quantity of like goods produced by the Australian industry that are held as stock;[14]
    - the value (price and revenue) of sales of like goods produced by the Australian industry;[15]
    - the level of profits earned in the Australian industry that is attributable to the production of like goods;[16]
    - the level of return on investment in the Australian industry;[17]
    - cash flow in the Australian industry;[18]
    - the number of persons employed, and the level of wages paid to persons employed including the terms and conditions of employment, in the industry in relation to the production of like goods;[19]
    - the share of the market in Australia for like goods produced by the Australian industry;[20]
    - the ability of the industry to raise capital in relation to the production of like goods;[21] and
    - investment in the industry, including capital investment and investment in research and development.[22]

23. This assessment was undertaken using information and data obtained from the Australia industry applicants and other sources identified in Chapter 8 of REP 473.

24. The factors and indices that are relevant to demonstrate the consequent impact of dumped imports on the Australian industry will vary depending on the nature of the allegations and the industry itself.

[11] *Ministerial Direction on Material Injury 2012*, 27 April 2012.

[12] Subsection 269TAE(3)(a). Pages 54 to 55 of REP 473 refer.

[13] Subsection 269TAE(3)(b). Pages 66 to 67 of REP 473 refer.

[14] Subsection 269TAE(3)(c)(ii). Page 69 of REP 473 refers.

[15] Subsection 269TAE(3)(d). Pages 60 to 63, and pages 65 to 66 of REP 473 refer.

[16] Subsection 269TAE(3)(e). Pages 63 to 64 of REP 473 refer.

[17] Subsection 269TAE(3)(f). Page 66 of REP 473 refers.

[18] Subsection 269TAE(3)(g). Page 69 of REP 473 refers.

[19] Subsections 269TAE(3)(h) and 269TAE(3)(ha). Pages 67 to 69 of REP 473 refer.

[20] Subsection 269TAE(3)(j). Page 30, and pages 57 to 59 of REP 473 refer.

[21] Subsection 269TAE(3)(k). Pages 66 and 68 of REP 473 refer.

[22] Subsection 269TAE(3)(m). Page 68 of REP 473 refers.

25. As noted in Chapters 7, 8 and 9 of REP 473, the Commission did not consider it appropriate to undertake a coincidence analysis where the majority of sales are reflective of contract terms negotiated many years prior to the investigation period.

26. In assessing whether there is a causal relationship between the dumped imports and the injury to the Australian industry, the Commission narrowed its assessment to the injury factors as claimed by the Australian industry applicants (CSBP, Orica and QNP), and assessed whether there was sufficient evidence to establish a causal relationship between the dumped imports and the claimed injury, mainly in the form of price depression, reduction in revenue and reduction in profit.

27. As such, the Commissioner does not consider that the Minister erred in her analysis of the relevant injury factors, pursuant to section 269TAE and for the purposes of the publication of a notice under section 269TG(2).

(c) Correct and appropriate application of 'but for' test

28. DBS submits that the 'but for' test is inappropriate because it assumes that all other things remain equal; it disregards other injury factors; and it does not take into account multiple causes of injury.[23]

29. The Commissioner disagrees with DBS' claims.

30. As noted at paragraph 15 in this submission, it is open to the Commission to undertake a 'but for' assessment given the circumstances of this particular case. The Act does not prescribe a mandatory or indicative methodology for conducting assessments of injury and causation.

31. The Dumping and Subsidy Manual,[24] and the Commission's *Economic Framework for Injury and Causation Analysis*,[25] outlines that under a 'but for' (counterfactual) analytical method, it may be possible to compare the current state of the Australian industry to the state the Australian industry would likely have been in the absence of dumping.

32. In undertaking a 'but for' assessment in Investigation 473, the Commission compared the actual prices achieved by the Australian industry with counterfactual prices, or prices in the absence of dumping.

33. As stated in sections 9.2.1 and 9.2.2 of Chapter 9 of REP 473, the Commission only had regard to examples where there was evidence that the prices and volumes of the Australian industry were affected by dumping. The Commission assessed 13 examples provided by the Australian industry applicants, as outlined in section 9.2.1 of REP 473. Out of the 13 examples, six examples did not or could not demonstrate that injury (in the form of price depression or loss of sales volumes) was caused by dumping. Therefore, the Commission did not include these examples in its assessment of injury, including in the 'but for' or counterfactual assessment.

[23] DBS' application to the ADRP, page 11 refers.

[24] Dumping and Subsidy Manual (November 2018), page 131 refers.

[25] Available at https://www.industry.gov.au/sites/default/files/acd_injury_and_causation_framework_overview.pdf.

34. For the examples where there was evidence that the dumped prices did affect the Australian industry applicants' prices, the Commission then determined what those prices would have been in the absence of dumping (referred to as the counterfactual or 'but for' assessment), as outlined in section 9.2.2 of REP 473.

35. Importantly, the 'but for' assessment was informed by and based on evidence provided by each Australian industry applicant that directly linked the dumped goods to the Australian industry's prices. This included copies of contracts and price offers, correspondences between the Australian industry applicants and their customers, and ABS and other trade data used by the applicants, including documentation relevant to other market intelligence relating to competitor pricing in the Australian market, including pricing based on imports of the goods from some countries subject to the investigation.[26] The Commission has also obtained positive evidence that in certain circumstances the customer has insisted that the Australian industry match an import parity price based on dumped pricing from a particular country the subject of the investigation.[27]

36. The Commissioner considers that this information demonstrates a causal relationship between the dumped imports and the injury to the Australian industry.

37. Based on the assessment outlined in section 9.2.2 of REP 473, 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, in the absence of dumping, the Australian industry's prices would be on average approximately 17.8 per cent higher than the negotiated prices. This is the best estimate, quantitatively, of the effect of dumping on the Australian industry's prices, based on all relevant facts and evidence before the Commission during the investigation.

38. The Commissioner considers that this approach is conservative, as it only assesses the relevant contracts where prices have been affected by dumping, assesses the degree to which dumping has affected these prices, and has not attributed factors other than dumping to the price reductions.

39. Given the above, the Commissioner considers that, while there appear to be factors other than dumping that may also have contributed to the reductions in prices, dumping has still caused a significant reduction in prices which resulted in material injury to the Australian industry, noting that dumping need not be the sole cause of injury.[28] Therefore, DBS' claim that the Commission did not take into consideration other factors that may have caused injury is incorrect.

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[26] REP 473, Confidential Attachment 15 refers.

[27] The Commission also had regard to verified information and data from the importers of the goods exported from each subject country (including information provided by the importers relevant to their bids for contracts in 2017 and 2018), verified information from Yara, ABF import data, and information obtained from certain end-users of ammonium nitrate in Australia.

[28] As per the Ministerial Direction on Material Injury 2012, 27 April 2012.

Ground 2: Cumulation of exports from Sweden with other exports to Australia

40. DBS submits that the conditions of competition between exports of the goods from Sweden and exports of the goods from China and Thailand were such that it was not appropriate to cumulate the effects of exports in assessing material injury to the Australian industry.

41. DBS further submits that because it was the only supplier and importer of the goods exported from Sweden, and because [redacted],[29] it is inappropriate to cumulate the exportations of the goods from Sweden with exports from other countries.

42. Subsection 269TAE(2C) prescribes the factors that the Minister must be satisfied of in determining whether to consider the cumulative effect of the exportations from different countries of export.

43. One of the factors that the Minister must consider is the conditions of competition between the exported goods from the subject countries, and the conditions of competition between the exported goods[30] and like goods that are domestically produced.[31]

44. As stated in the Dumping and Subsidy Manual, and as noted by DBS in its application, an assessment of the conditions of competition may entail the following considerations:
    - Physical characteristics and uses of the domestic like product and imports from each of the countries whose imports may be cumulated, as well as the degree of interchangeability, fungibility, or substitutability. Considerations of customer perception, specific customer requirements and tariff classification may be relevant in this regard;
    - For the purpose of analysing threat of material injury, the levels and trends in the volume of imports from each of the countries whose imports may otherwise be cumulated, either in absolute terms or relative to production or consumption in the importing country; and
    - The existence of sales of the domestic like product and imports from each of the countries whose imports may otherwise be cumulated. Examples of this are:
        - through common or similar channels of distribution;
        - during the period of investigation;
        - the trends of prices for the domestic like product and imports from each of the countries whose imports may be cumulated;
        - the levels and trends of price undercutting by imports from each of the countries whose imports may otherwise be cumulated during the period of the dumping investigation.[32]

[29] DBS' application to the ADRP, page 15 refers.

[30] Subsection 269TAE(2C)(e)(i).

[31] Subsection 269TAE(2C)(e)(ii).

[32] Dumping and Subsidy Manual (November 2018), pages 134 and 135 refer.

45. In relation to the goods exported from Sweden, the Commissioner considers that the conditions of competition are as follows:
    - the goods exported from Sweden were purchased by DBS and on-sold by DBS to customers in the Australian market that also imported the goods from certain countries subject to the application and purchased like goods from the Australian industry.[33] The Commissioner considers that this similarity in distribution channel and customers supports a finding that the goods from the subject countries are physically, functionally and commercially alike, are substitutable and used for the same end-uses in the market;
    - the goods exported from Sweden and imported by DBS, and [redacted].[34] The Commissioner considers that this similarity in end-user demonstrates that the goods are used for the same purpose, are interchangeable and substitutable;
    - [redacted], members of the Australian industry and other entities, including other blasting services providers that import the goods from the other subject countries, all bid for [redacted]. The Commissioner considers that this demonstrates that the goods are physically, functionally and commercially alike and are used for the same purpose;[35] and
    - the Australian industry applicants have provided evidence to the Commission that they take into consideration import prices from the subject countries, 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.[36]

46. Further, in Chapter 5 of REP 473, the Commission described the nature of competition in the Australian ammonium nitrate market, and found that bulk explosives and associated services providers, such as DBS, either source ammonium nitrate from the Australian industry, or import the goods from various countries, including the subject countries. The Commission found that bulk explosives and associated services providers that source ammonium nitrate from the Australian industry directly compete with other providers that import the goods, such as DBS, which also compete amongst themselves. Ammonium nitrate is ultimately sold to end-users (mining and quarrying entities) which consume ammonium nitrate as a raw material in commercial explosives.

47. The Commission also found that ammonium nitrate is a commodity product and end users are unlikely to discern significant physical or functional differences. Given that there is little product differentiation, the Commissioner considers that the products are highly substitutable and interchangeable and therefore considers it appropriate to cumulate the exports from Sweden with exports from China and Thailand, given that these goods compete on price.

48. The Commissioner further disagrees with DBS's claim that, because the goods exported from Sweden are purchased in accordance with [redacted]

[33] As evidenced by DBS' sales listing provided in its response to the importer questionnaire.

[34] As evidenced by DBS' supply agreements with customers and suppliers, and DBS' response to the importer questionnaire.

[35] Refer Confidential Attachment 15 of REP 473 for details.

[36] Ibid.

[redacted], the goods should not be cumulated with goods exported from China and Thailand. The Commission considers that despite these goods being imported by DBS [redacted], this does not mean that the goods exported from Sweden are not:

- physically like to the goods exported from China and Thailand, and like goods supplied by the Australian industry;
- sold in the same market and used for the same purpose as the goods exported from China and Thailand, and like goods supplied by the Australian industry;
- interchangeable or substitutable with goods exported from China and Thailand, and like goods supplied by the Australian industry; and
- supplied to common or similar customers that import goods from China and Thailand, and that purchase like goods from the Australian industry.

49. The Commission found that DBS has imported the goods at significantly dumped prices from Sweden in accordance with [redacted] [commercial arrangements].

50. Therefore, the Commissioner does not agree with DBS' assertion that it is inappropriate to cumulate the exports from Sweden with exports from China and Thailand, based on the condition of competition between those goods, and between those goods and like goods that are domestically produced.

51. Lastly, the Commissioner draws the ADRP's attention to the Minister's satisfaction of the remaining criteria under section 269TAE(2C) of the Act, which has not been disputed by DBS:
    (a) each of the exportations considered by the Commission were subject to Investigation 473;[37]
    (b) all of the investigations of those exportations resulted from an application under section 269TB of the Act lodged on the same day;[38]
    (c) the dumping margin worked out under section 269TACB of the Act for each exporter is at least 2 per cent;[39] and
    (d) the volume of the goods the subject of the application that have been, or may be, exported to Australian over a reasonable examination period, which in this case the Commission determined to be the investigation period, from the country of export and dumped is not taken to be negligible.[40]

52. Based on this, the Commissioner submits that the Minister made the correct or preferable decision to consider the cumulative effect of the dumped exports from China, Sweden and Thailand.

[37] Subsection 269TAE(2C)(a) of the Act.

[38] Subsection 269TAE(2C)(b)(i) of the Act.

[39] Subsection 269TAE(2C)(c) of the Act.

[40] Subsection 269TAE(2C)(d) of the Act.

Application of Review submitted by Glencore

Ground 1: By confining its attention to 7 contracts, the ADC failed to consider whether dumped imports caused material injury to the Australian industry as a whole, contrary to the requirements of section 269TG(1) and (2) of the Act

53. Glencore submits that the Commission has not considered whether the Australian industry as a whole has suffered material injury from dumping. Specifically, Glencore claims that the Commission has not extrapolated from the contracts negotiated by the Australian industry to determine whether dumped imports had an impact on the Australian industry as a whole.[41]

54. The Commissioner does not agree with Glencore's suggestion that, by having regard to seven examples of contract negotiations, the Commission had failed to consider whether dumping caused material injury to the Australian industry as a whole.

55. As stated in REP 473, the Commissioner submits that the Minister is not required to establish that all the applicants or members of the Australian industry were injured from dumped imports.[42] The Minister is instead required to consider whether material injury has been or is being caused to the Australian industry by the dumped goods as a whole. The Commissioner considers the following comments of Justice Lockhart in in *Swan Portland Cement*[43] supports this view:

> the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria.[44]

56. In relation to the examples of contract negotiations that the Commission referred to in assessing the materiality of injury, the affected Australian industry applicants are part of the Australian industry and comprise a significant proportion of the total production and profit of the Australian industry and are therefore sufficiently representative of the Australian industry as a whole.

57. The Commissioner further considers that it is open to the Minister to determine materiality in the context of profits of the industry as a whole, given that the Act does not prescribe a mandatory or indicative methodology for conducting such an assessment.

58. The Commission's *Economic Framework for Injury and Causation Analysis* states that the central link between the injury indicators (such as prices and volumes) is the loss of *profits* to the Australian industry, and that the injury analysis should draw a link between the factors causing injury (such as dumping) and the impact on the

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[41] Glencore's application to the ADRP, pages 2 and 3 refer.

[42] Section 9.7 of REP 473 refers.

[43] *Re Swan Portland Cement Limited and Cockburn Cement Limited v the Minister for Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49 ('*Swan Portland Cement')*.

[44] [39]. The Commission also notes that in that case, Justice Lockhart, at [38], also noted Justice Wilcox's finding that 'the words "Australian industry"…referred to the industry in particular goods in Australia as a whole; but….this did not require that material injury be caused or threatened to each individual participant in the industry'.

Australian industry through to its *impact on profit*.[45] Given this, the Commission determined the materiality of the injury to the Australian industry as a whole by having regard to the profit forgone as a percentage of the total profit of the Australian industry.

59. The Commission is also not precluded from looking at individual contracts or supply agreements. Section 269TAE(1) of the Act is broad and does not constrain the Commission in what it may or may not have regard to in assessing whether material injury to an Australian industry has been or is being caused.

60. As noted in paragraph 17 of this submission, in Chapter 9 of REP 473, the Commission has explained the methodology it used to determine that the injury caused by dumping is material when considering the profit forgone (caused by dumping) as a percentage of the Australian industry's profit. The Commission also provided a step by step outline of the methodology it adopted in a conference convened by the ADRP on 4 September 2019, at which Glencore was one of the participants.

61. Based on the assessment outlined in Chapter 9 of REP 473 and Confidential Attachment 17, and contrary to Glencore's assertions, the Commission found that material injury to the Australian industry has been caused by dumped goods exported from China, Sweden and Thailand.

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

62. Glencore submits the Commission misconstrued "price" in subsection 269TAE(1)(f) of the Act, and that the price the Commission should have considered was the price or prices for which ammonium nitrate was being sold by the Australian industry members in the four distinct ammonium nitrate markets in Australia.[46]

63. As outlined in Chapter 9 of REP 473, the Commissioner maintains that the relevant examples of prices negotiated are relevant to the price paid in the relevant market and that those prices were depressed by the dumped goods. The affected Australian industry members do not operate in a vacuum—they sell the goods in their respective markets. Therefore, the Commissioner considers that the negotiated contracted price represents the price paid for like goods produced by the relevant Australian industry member and sold in that particular market in Australia. The Commissioner considers this approach is consistent with the comments of Justice Lockhart in *Swan Portland Cement*,[47] as referred to by Glencore.[48]

[45] Available at https://www.industry.gov.au/sites/default/files/acd_injury_and_causation_framework_overview.pdf, page 4 refers.

[46] Glencore's application to the ADRP, pages 3 and 4 refer.

[47] [44].

[48] Glencore's application to the ADRP, page 4 refers.

64. For these reasons, the Commissioner submits that the Minister did not err in considering the price paid for the exported goods, pursuant to subsection 29TAE(1)(f).

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

65. Glencore submits that the mere fact that dumped prices were used as a negotiating benchmark did not absolve the Commission from considering whether the prices paid in the seven contracts were the result of factors other than dumping.[49]

66. The Commissioner disagrees with Glencore's suggestion that it failed to adequately consider whether injury was caused by factors other than dumping.

67. In undertaking its injury analysis, the Commission assessed 13 examples provided by the Australian industry applicants, as outlined in section 9.2.1 of REP 473. Out of the 13 examples, six examples did not or could not demonstrate that injury (in the form of price depression or loss of sales volumes) was caused by dumping. Therefore, the Commission did not include these examples in its assessment of injury, including in the 'but for' or counterfactual assessment.

68. In relation to the remaining seven examples, the Australian industry applicants have provided data and information in support of their claims that dumping has caused injury to the Australian industry.[50] The Commissioner considered that this information demonstrated a link between dumping and its effect on the Australian industry's prices and volumes. Therefore, the Commission's 'but for' or counterfactual assessment is based on these examples and the evidence provided in relation to these.

69. Further, the Frontier Report[51] that Glencore refers to presents an *opinion* and not a counterfactual or estimate of actual pricing achieved in the absence of dumping. Nevertheless, the Commissioner observes that this report supports the Commission's approach in assessing injury to the Australian industry, in that it advocates for an approach that requires a comparison between outcomes that have occurred as a result of dumping (the factual) to those that would have occurred in the absence of dumping (the counterfactual).[52]

70. Contrary to Glencore's intimations, the Commissioner considers that the average of the 'undumped prices' determined by the Commission is not unreasonable when compared to the Australian industry's unsuppressed selling price (USP). As explained in section 11.3 of REP 473, the USP is the price that the Australian

[49] Glencore's application to the ADRP, page 4 refers.

[50] REP 473, Confidential Attachment 15 refers.

[51] *Opinion of Preliminary Affirmative Determination* (the Frontier Report), a report commissioned and submitted by BHP Billiton Iron Ore Pty Ltd – item no. 032 on EPR 473 refers.

[52] The Frontier Report, pages 2 and 11 refer.

industry might reasonably sell its product in a market unaffected by dumping. This price was based on CSBP's, QNP's and Orica's prices.

71. The Commissioner also disagrees with Glencore's suggestion that the "first step would have been to consider whether prices in the seven contracts were the same as the prices for other contracts negotiated during the investigation period".[53] As explained in REP 473, the Australian industry applicants have had to reduce their prices to secure contracts or renew existing contracts. This is supported by the evidence provided by the Australian industry applicants.

72. The Commissioner considers that it is reasonable, based on all relevant facts and evidence, and based on the significance of the dumping margins determined in respect of the goods exported from China, Sweden and Thailand (39.3 per cent, 51.1 per cent and 32.7 per cent respectively), that the prices in the absence of dumping would have been higher. The counterfactual assessment presented at section 9.2.2 of REP 473 outlines the methodology adopted by the Commission in estimating the prices in the absence of dumping. Based on this assessment, the Commissioner considers that, while there appear to be factors other than dumping that have caused reductions in the Australian industry's prices, dumping has still caused a significant reduction in prices.

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

73. Glencore submits that the Commission has not considered whether the injury was caused by the volume and prices of goods that are not dumped.[54]

74. The Commissioner disagrees with Glencore's assertion.

75. The information obtained by the Commission indicates that the market share of imports from countries not subject to the investigation has decreased over the injury analysis period, from 5.6 per cent in 2014-15, to 3 per cent in 2017-18.[55] The market share of the imports from China, Sweden and Thailand increased over the same period to comprise 3.1 per cent of the total volume in 2017-18.[56]

76. Further, and as stated on page 80 of REP 473, the Commission found that the exports from the subject countries during the investigation period comprised 74 and 73 per cent of the total import volume into Western Australia and Queensland respectively. The volumes imported into Western Australia are via Fremantle and therefore directly supply the ammonium nitrate market that CSBP and its customers supply.[57]

[53] Glencore's application to the ADRP, page 4 refers.

[54] Glencore's application to the ADRP, page 5 refers.

[55] Period from 1 April to 31 March.

[56] REP 473, page 57 refers.

[57] REP 473, Confidential Attachment 11 refers.

77. The contracts Glencore refers to at paragraph 31 of its application relate to supply in Queensland. The Commission found that the import volumes into Queensland (via Gladstone) in the relevant period were predominately imports from China and Sweden. The Commission also found that the prices of the goods from the subject countries, particularly from Sweden, were the lowest import prices in the period. Therefore, the dumped goods had a significant and greater impact on QNP's prices relative to other imports into Queensland.[58]

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

78. Glencore submits that there is "no basis given" for the conclusion that in the absence of dumping the price negotiated in relation to the seven contracts would have been the import price adjusted for the dumping margin. Glencore further submits that the conclusion that, but for the dumped goods, customers would have paid the 'undumped' price is nothing more than conjecture.[59]

79. The Commissioner maintains that the relevant Australian industry applicants have provided evidence to demonstrate a causal relationship between the dumped imports and the injury to the Australian industry.

80. As noted throughout chapter 9 of REP 473, in relation to the seven examples, the relevant Australian industry applicants have provided data and information in support of their claims that dumping has caused injury to the Australian industry. Therefore, contrary to Glencore's claims, the Commissioner considers that the Commission's assessment of the Australian industry's prices is not based on allegations, conjecture or remote possibilities.

81. In relation to the 'undumped' price determined and used by the Commission in its 'but for' or counterfactual assessment, it is important to observe that the main reason the Commission undertook the 'but for' or counterfactual assessment was to quantify the effects of dumping on the Australian industry's prices.

82. The assessment of prices in the absence of dumping is explained in section 9.2.2 of REP 473, and is based on the information and data provided by the relevant Australian industry applicant in relation to each example referred to in the assessment. The assessment of prices in the absence of dumping is detailed and considers all information available before the Commission, as demonstrated in Confidential Attachment 16 to REP 473. Therefore, the Commissioner considers that the Commission's assessment of prices is not based on conjecture, as claimed by Glencore.

[58] REP 473, Confidential Attachments 15 and 16 to refer.

[59] Glencore's application to the ADRP, page 6 refers.

83. The Commissioner considers that it is reasonable, based on all relevant facts and evidence, and based on the significance of the dumping margins determined in respect of the goods exported from China, Sweden and Thailand (39.3 per cent, 51.1 per cent and 32.7 per cent respectively), that the prices in the absence of dumping would have been higher.

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

84. Glencore submits that the Minister could not be satisfied that the Australian industry suffered material injury as a result of dumped imports for the following reasons:
    - the only evidence of any injury pertain to the seven contract negotiations and even then satisfaction could not be reached that the prices were affected by dumped imports;
    - the dumped imports could not have had any credible impact on price, given that there are structural impediments to import large volumes of ammonium nitrate into Australia;
    - the seven contracts are not "the entirety of the Australian industry";
    - Glencore identified examples of recent negotiations with Australian ammonium nitrate manufacturers where dumped imports did not have a price impact;
    - the relative market share held by the dumped imports comprised between 2.7 and 3.1 per cent of the market during the injury analysis period and it is unlikely that imports could have influenced prices in the market;
    - the proportionate increase in dumped imports relative to the increase in sales by the Australian industry, is not large relative to the increase in sales by the Australian industry; and
    - any injury found to have been suffered by the Australian industry would need to exceed the bounds of ebbs and flows outlined in the Frontier Report[60].[61]

85. The Commissioner disagrees with Glencore' submissions.

86. The Commissioner considers that it is reasonable, based on all relevant facts and evidence, and based on the significance of the dumping margins determined in respect of the goods exported from China, Sweden and Thailand (39.3 per cent, 51.1 per cent and 32.7 per cent respectively), that the Australian industry's prices and volumes, in certain instances, have been affected by the dumped goods and that this has caused material injury to the Australian industry. The Commission findings in relation to the materiality of the injury experienced by the Australia industry are outlined in section 9.6 of REP 473.

87. As explained earlier in this submission, given the circumstances of this case, it was open to the Commission to use a 'but for' analysis in assessing injury and causation. The Commission assessed 13 examples of contract negotiations submitted by the Australian industry applicants in support of their claims that the goods dumped during the investigation period affected pricing and volumes. The Commission considers

[60] *Opinion of Preliminary Affirmative Determination*, a report commissioned and submitted by BHP Billiton Iron Ore Pty Ltd – item no. 032 on EPR 473 refers.

[61] Glencore's application to the ADRP, pages 6 to 8 refer.

that it was open to the Commission to have regard to these—it is not precluded from assessing individual contracts in assessing injury and causation, noting that subsection 269TAE(1) of the Act is broad in terms of the matters the Minister may have regard to in assessing whether material injury to an Australian industry has been or is being caused.

88. The Commission also disagrees with Glencore's claim that the dumped goods did not have any effect on price because there are impediments to importing ammonium nitrate into Australia. The Commission has addressed these claims in section 9.5.3 of REP 473.

89. The Commission found that most explosives manufacturers and associated services providers in Australia have established import supply chains. Further, the importers of the dumped goods directly compete with other explosives manufacturers that source ammonium nitrate from the Australian industry; therefore, the price that the Australian industry producers offer their customers has to be competitive and at parity with import prices otherwise their customers will not be competitive with the explosives manufacturers that import ammonium nitrate into Australia.

90. Further, the Commission has obtained information that an import parity price is often referred to in negotiations of contract prices.[62] Regardless of the total volume of ammonium nitrate imported into Australia, the Commissioner considers that the existence of the goods from the countries subject to the investigation at significantly dumped prices in the investigation period has resulted in the applicants reducing their prices to secure contracts, or losing volumes in competition with importers offering ammonium nitrate at dumped prices. The Commissioner also considers that imports do not need to replace the entirety of the ammonium nitrate supplied by Australian industry to cause price-related injury to the Australian industry.

91. The Commissioner disagrees with Glencore's view that material injury has not been caused to the Australia industry as a whole because the seven contracts "are not the entirety of the Australian industry".[63] As stated above in paragraph 55, in the Commissioner's view, the Minister does not need to be satisfied that all the applicants or members of the Australian industry were injured by dumped imports to find that material injury to the Australian industry has been caused. Instead, the Minister is required to consider whether the injury is material to the industry as a whole.

92. Further, and as stated in the Ministerial Direction on Material Injury,[64] there is no minimum standard that is used to determine whether dumped imports have a sufficient share of the Australian market to cause material injury.

93. As noted in paragraph 60 of this submission, the Commission has explained the methodology it used to determine that the injury caused by dumping is material to the industry as a whole when considering the profit forgone (caused by dumping) as a percentage of the Australian industry's profit. The Commission also provided a step

[62] REP 473, Confidential Attachment 15 refers.

[63] Glencore's application to the ADRP, page 7 refers.

[64] *Ministerial Direction on Material Injury 2012*, 27 April 2012.

by step outline of the methodology it adopted in a conference convened by the ADRP on 4 September 2019, at which Glencore was one of the participants.

94. In section 9.5.7 of REP 473, the Commission has also addressed the examples provided by Glencore in its submission dated 17 March 2019. The Commission has not attributed the injury to dumping in relation to these examples, based on the information available at the time REP 473 was prepared. This does not inevitably lead to the conclusion that dumping did not cause injury in other instances where contracts were negotiated or renegotiated.

95. In addition, the Commission has examined injury indicators in terms of volume effects in section 8.2 of REP 473. This includes a consideration of whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption. The Commission found that there was an increase in the volume of dumped goods from the countries subject to the investigation in the investigation period (an increase of 19.1 per cent in absolute terms). The Commission considers this increase is substantial.

96. Based on this, the Commissioner maintains that there has been an increase in the volume of dumped imports of the goods from the subject countries. The Commission has assessed the materiality of injury in section 9.6 of REP 473.

97. Lastly, as has been raised by various parties throughout the investigation, there are a range of factors that also impacted on the Australian industry's profit from 2014. Some of these are discussed in chapter 8 and section 9.5 of REP 473, including variations in input prices. These variations in input prices are typically mitigated by price variation clauses included in the supply contracts.

98. The Frontier Report[65] (pages 20 to 23 refer) that Glencore refers to at paragraph 46 of its application outline the variations observed in bulk ammonium nitrate, ammonia and gas benchmark prices. The Commissioner considers that these observations do not inform the Minister's consideration of the profit forgone that is caused by dumping nor demonstrates that the injury experienced by the Australian industry is greater than that likely to occur in the normal ebb and flow of business.

99. The Commissioner also disagrees with Glencore's statement that the ammonium nitrate market is characterised by "large contract price variations including, in 2017, a difference of more than 40% between upper and lower price bounds"[66]. The information in the Frontier Report referred to by Glencore relates to the variation in monthly Baltic Free on Board prices for bulk ammonium nitrate.[67] The Commission does not consider that this index of prices demonstrates that the injury experienced by the Australian industry is greater than that likely to occur in the normal ebb and flow of business.

[65] *Opinion of Preliminary Affirmative Determination*, a report commissioned and submitted by BHP Billiton Iron Ore Pty Ltd – item no. 032 on EPR 473.

[66] Glencore's application to the ADRP, paragraph 46(b) on page 8 refers.

[67] *Opinion of Preliminary Affirmative Determination*, a report commissioned and submitted by BHP Billiton Iron Ore Pty Ltd – item no. 032 on EPR 473, page 21 refers.

100. The Commissioner 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 REP 473. As the assessment isolates the injury caused by dumping, the Commissioner is satisfied that the injury to the Australian industry is greater than that likely to occur in the normal ebb and flow of business.

Ground 7: The Commission erred in finding that it cannot "carve out" certain states from the dumping duty notice and the Minister should have exempted exports to NSW or the Pilbara from the dumping notice based on evidence of no material injury in those markets

101. Glencore submits that the Commission should have imposed different duties in respect of ammonium nitrate exported to New South Wales (NSW) and the Pilbara region, for the following reasons:
    - ammonium nitrate destined for one regional market does not typically enter other regional markets;
    - the seven contracts comprising the alleged injury do not relate to the NSW market; and
    - the dumped imports made up less than 1 per cent of the NSW market.[68]

102. Glencore referenced Justice Lockhart's comments in *Swan Portland Cement*. However, the Commissioner considers that the full extract of Justice Lockhart's comments, as quoted below, does not support exempting NSW or the Pilbara region from the notice. Justice Lockhhart's comments appear only to be directed at imposing different levels of dumping duty, not the exemption of certain regions from a dumping duty notice.

> [44]…The "price" in s.269TAE(1)(e) can easily be read (and often will be read) as "prices". Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures. The present case is an example of that difference of injury but as I have said, such a situation may still lead, in certain cases, to a determination by the Minister that the Australian industry is being materially injured.
>
> [45] Thirdly, once it is accepted that there may be different levels of injury determined under s.269TAE(1)(e) then it is logical that different levels of dumping duty may have to be imposed on a foreign exporter depending on the market in which the goods are dumped. Section 8 of the Anti-Dumping Act allows dumping duty to be imposed pursuant to s.269TG of the Customs Act declaration equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods. The level of dumping duty may be varied in accordance with s.8(5) but s.s8(5A) must be taken into account when this is done. There is no reason in s.8 why the Minister has to impose one level of dumping duty. The Minister has the power to impose different levels of dumping duty in particular cases depending on the injury or injuries involved.

102. As stated state above in paragraph 55, and in REP 473, the Commissioner submits it is not required to establish that all the applicants or members of the Australian industry were injured from dumped imports.[69] The Commission is instead required to

[68] Glencore's application to the ADRP, pages 8-9 refer.

[69] Section 9.7 of REP 473 refers.

consider whether material injury has been or is being caused to the Australian industry by the dumped goods as a whole. The Commissioner considers that Justice Lockhart's comments that 'the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria' supports this view.

103. Further, the Commissioner maintains that it cannot recommend the imposition of dumping duties on a regional basis, for example by 'carving out' NSW, and there is no mechanism in the Act or Dumping Duty Act by which to do this. The *Ministerial Direction on Material Injury 2012* contemplates there may be instances where injury is confined to a specific region of Australia and this may still amount to material injury to the Australian industry as a whole. The Commissioner does not consider this statement implies that the Minister may impose differential duties to a specific region.

104. This is in contrast to the explicit power of the Minister to impose dumping duties in respect of goods and like goods exported from a particular country or by a particular exporter as provided for in section 269TP of the Act.

105. The Commissioner also notes that because there were no cooperating exporters from China and Thailand, the Commission could not determine separate dumping duty margins in respect of individual exporters from China and Thailand. The Commission could only determine a separate rate for Yara, an exporter from Sweden, which exported to most states in Australia.

106. For these reasons, the Commissioner submits that the Minister did not err in not exempting exports to NSW or the Pilbara region.

Application of Review submitted by Yara

Ground 1: Yara's exports have not caused injury to the Australian industry

107. Yara submits that it was not a party to the seven contract negotiations outlined in section 9.2.1 of REP 473, and therefore the determination that the exports from Yara have caused material injury is neither correct nor preferable.[70]

108. The Commissioner disagrees with Yara's assertions.

109. Subsection 269TAE(2C) of the Act states that the Minister should consider the cumulative effects of the exportation of goods to Australia where those exportations are subject to the investigation, the exporter's dumping margin is not *de minimis*, the volume from each country is not negligible and it is appropriate to do so having regard to the conditions of competition between the exported goods, and the exported goods and the Australian industry's like goods.

110. The Commissioner is satisfied that the facts supported an assessment of the cumulative effects of the exports from the subject countries. In particular, the Commissioner found that Yara's dumping margin was greater than two per cent, the

[70] Yara's application to the ADRP, page 11 refers.

volume of dumped imports from each of the subject countries was not negligible and greater than three per cent, and the conditions of competition were such that it was appropriate to cumulate the effects of those exportations (refer paragraphs 40 to 52 above).

111. Having cumulated the effects of exportations from the subject countries, the Minister is not required to find material injury caused by exports from Sweden, or specifically in relation to Yara, alone. Notwithstanding, the Commissioner does not dispute that Yara was not a party to the seven contract negotiations and [redacted]. However, [redacted] [commercial arrangements], and DBS competes with other bulk explosives and associated services providers that purchase ammonium nitrate from the Australian industry applicants.

112. The Commission accepts that Yara would not be privy to negotiations [redacted] [commercial details].

113. Evidence before the Commission demonstrates that the Australian industry reduced prices in response to dumped prices. The applicants have provided the Commission with information that they used to arrive at their prices in order to remain competitive with imports.

114. As outlined in section 9.2.3 of REP 473, the dumped prices at which Yara has supplied the market—being the lowest prices during the investigation period—have been used to inform or arrive at Australian industry price offers, either directly or by an average of import prices in the period.

115. For these reasons, the Commissioner submits that the Minister did not err in making her finding that, because of any circumstances in relation to the exportation of the goods to Australia from Sweden, and subject to subsection 269TAE(2C), material injury has been or is being caused to the Australian industry producing like goods, pursuant to section 269TG(2)(b) of the Act. As a result, it was the correct and preferable decision for the Minister to publish a notice under section 269TG(2) of the Act with respect to exports of ammonium nitrate from Yara.

Ground 2: The effect of Yara's exports should not be cumulated with exports from China and Thailand

116. Yara submits that the decision to cumulate the effect of the exportations of the goods from Sweden by Yara with the exportations from China and Thailand for the purposes of section 269TAE(1) is neither correct or preferable. The Commission observes that Yara's claim corresponds to the claim made by DBS.

117. The Commissioner disagrees with Yara's claims.

118. Subsection 269TAE(2C) of the Act states that the Minister should consider the cumulative effects of the exportation of goods to Australia where those exportations are subject to the investigation, the exporter's dumping margin is not *de minimis*, the volume from each country is not negligible and it is appropriate to do so having regard to the conditions of competition between the exported goods, and the exported goods and the Australian industry's like goods.

119. At paragraphs 40 to 52 of this submission, and in section 7.5.1 of REP 473, the Commission has outlined the reasons why it was appropriate to cumulate the exportations of the goods from Sweden with the exportations from China and Thailand.

120. The Commissioner is satisfied that the facts supported an assessment of the cumulative effects of the exports from the subject countries. In particular, the Commission found that Yara's dumping margin was greater than two per cent, the volume of dumped imports from each of the subject countries was not negligible, and the conditions of competition were such that it was appropriate to cumulate the effects of those exportations.

121. Further, and consistent with the statement at paragraph 48 of this submission, the Commissioner does not consider that [redacted] [commercial arrangements], precludes the Commission from considering the cumulative effect of the goods exported from Sweden. Subsection 269TAE(1) specifically allows the determination of material injury to an Australian because of *any circumstances* in relation to the exportation of the goods to Australia from the country of export. This encompasses the "unique circumstances" relevant to the goods exported from Sweden.

122. The Commissioner disagrees with Yara's claim that it is "mere speculation" that Yara has competed directly with certain Australian industry members for a significant contract during the investigation period.[71]

123. The Commission found that [redacted] [commercial details].

124. The Commissioner also disagrees with Yara's claim that, because it has not been awarded this contract, it has not competed in this tender. At the time of preparing the SEF, to the Commission's knowledge, [redacted] [commercial detail].

125. Further, the Commissioner considers that Yara's claim that the Commission has "not conducted an investigation such that it can actually state prices offered were at dumped prices"[72] is incorrect. The Commission's assessment is at **Confidential**

[71] Yara's application to the ADRP, page 16 refers.

[72] Yara's application to the ADRP, page 16 refers.

Attachment 2 to this submission, and demonstrates that Yara's bids were at significantly dumped prices.

Ground 3: The price effects and volume effects have not been correctly determined

126. Yara submits that the injury found to have occurred to the Australian industry is hypothetical and is based on allegation, conjecture and remote possibility rather than fact.[73]

127. The Commissioner disagrees with Yara's assertions and draws the ADRP's attention to the fact that the relevant Australian industry applicants have provided evidence to demonstrate a causal relationship between the dumped imports and the injury to the Australian industry.[74]

128. As noted throughout chapter 9 of REP 473, in relation to the seven examples, the relevant Australian industry applicants have provided data and information in support of their claims that dumping has caused injury to the Australian industry. Where possible, this information was cross-checked with information provided by importers and other entities in the Australian market. Therefore, contrary to Yarra's claims, the Commission's assessment of the Australian industry's prices is not based on allegations, conjecture and remote possibilities.[75]

129. In relation to the 'undumped' price determined and used by the Commission in its 'but for' or counterfactual assessment, it is important to note that the main reason the Commission undertook a 'but for' or counterfactual assessment was to quantify the effects of dumping on the Australian industry's prices.

130. The assessment of prices in the absence of dumping is explained in section 9.2.2 of REP 473, and is based on the information and data provided by the relevant Australian industry applicant in relation to each example referred to in the assessment. The assessment of prices in the absence of dumping is detailed and considers all information available before the Commission, as demonstrated in Confidential Attachment 16 to REP 473. Therefore, the Commission's assessment of prices is not based on conjecture, as claimed by Yara.

131. Further, the Commission has found that the Australian industry experienced injury in the form of price depression and loss of sales volumes in respect of the contracts assessed in section 9.2.1 of REP 473. The Commission found that the negotiated prices were, on average, approximately 24.3 per cent lower than the contract prices existing at the time of the negotiation, and that in the absence of dumping, the prices would be 17.8 per cent higher, on average.

132. In relation to Yara's claims that the Commission could not be certain that any of the examples provided by QNP would have been supplied by its own production, the Commission observes that the plant shutdowns in the June 2017 and March 2019

[73] Yara's application to the ADRP, page 21 refers.

[74] REP 473, Confidential Attachment 15 refers.

[75] Ibid.

quarters were short in duration and did not affect the negotiations for fixed-term supply contracts.

133. Further, the Commission understands that QNP's scheduled plant maintenance (referred to as 'turnaround') occurred in late 2018. The relevant contract negotiations found to have been affected by dumping were negotiated before July 2018. Nevertheless, unplanned and unscheduled plant shutdowns do occur sporadically in the industry from time to time (as they occur in any manufacturing industry), and are usually short in duration. These shutdowns do not have any bearing on the negotiations conducted in relation to fixed-term contracts for supply of ammonium nitrate produced by the Australian industry.

134. Lastly, there is no prescribed nor legislated methodology for assessing injury and causation and it is open to the Commission to have regard to contracts when assessing injury to the Australian industry.

Ground 4: The injury is not material

135. Yara submits that the Minister has not made the correct or preferable decision in determining that the Australian industry has suffered material injury.[76]

136. In Chapter 9 of REP 473, the Commission explained the methodology it used to determine that the injury caused by dumping is material. The Commission also provided a step by step outline of the methodology it adopted in a conference convened by the ADRP on 4 September 2019, at which Yara was one of the participants.

137. The Commissioner considers that the assessment of material injury, as outlined in section 9.6 of REP 473, is conservative given that it took into consideration all three Australian industry applicants' profit, and in the absence of Dyno Nobel's and Yara Pilbara Nitrate's[77] profit, also adjusted for the relative production volumes of the three applicants relative to the Australian industry's total production volume.

138. Further, in response to Yara's claim that it is not the correct or preferable decision that the Australian industry has suffered material injury because imports constituted 3.1 per cent of market, the Commission observes that there is no minimum standard that should be used to determine whether dumped imports have a sufficient share of the Australian market to cause material injury.[78]

139. Based on the assessment outlined in Chapter 9 of REP 473 and Confidential Attachment 17, the Commissioner considers that the injury is material and is not negligible, insubstantial nor insignificant. The Commissioner considers that the Minister made the correct or preferable decision in finding that material industry to

[76] Yara's application to the ADRP, page 25 refers.

[77] As noted in REP 473, Yara Pilbara Nitrate's production has been adversely affected during the investigation period, which indicates that Yara Pilbara Nitrates could not cover its fixed costs and likely made no operating profit on any sales made in this period.

[78] As per the Ministerial Direction on Material Injury 2012, 27 April 2012.

the Australian industry producing like goods has been or is being caused because of ammonium nitrate exported to Australia at dumped prices from the subject countries.

Ground 5: The injury is not greater than that likely to occur in the normal ebb and flow of business

140. Yara submits that the level of injury is immaterial, insubstantial and insignificant, and that the level of injury is "not outside the normal ebb and flow of business".[79]

141. The Commissioner disagrees with Yara's assertions.

142. As noted in section 9.7 of REP 473, Yara duplicated the index of profit variations from the Australian industry applicants' application for a dumping duty notice, which shows a 12.5 per cent reduction in the applicants' aggregated profit from 2014 to 2017.[80]

143. The Commissioner reiterates that the 'profit foregone', as estimated on a per annum basis 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 REP 473. 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.

[79] Yara's application to the ADRP, page 28 refers.

[80] Refer document 001 on EPR 473.

Attachment B

Following the conference convened by the ADRP on 4 September 2019, Glencore provided additional comments relevant to the Commission's determination of material injury.

The Commission addresses each of Glencore's comments as follows.

1. **There is an error in the Commission's estimate of profit forgone**

The Commission does not consider that Glencore's workings, as presented in its submission following the conference on 4 September 2019, show or prove that the Commission's estimate of profit forgone is inaccurate.

The Commission observes that Glencore's workings are based on assumptions. The Commission's own estimate is based on actual data provided by the applicants, including data relevant to actual production, profit and prices. Based on this information, the Commission maintains that the profit forgone amounts to [redacted] per cent and is based on the most reliable and relevant information available.

2. **Has the Commission properly accounted for the impact of varying prices of ammonia in comparing the contract price and the "undumped" price in the seven contracts identified in section 9.2.1?**

The Commission understands that sales are typically made in accordance with fixed-term contracts in the Australian ammonium nitrate market. The Commission further understands that contracted prices are adjusted on a periodic basis (in accordance with formulas stipulated in these supply agreements referred to as 'rise and fall' provisions) to reflect movements in raw materials and other cost and price indices. Therefore, the Commission has not simply compared contract prices by reference to headline prices as alluded to by Glencore.

As explained in section 9.2.2 of REP 473, the Commission has adjusted the actual data underpinning the price formulations, as provided by the applicants, in relation to the relevant contracts. Therefore, the comparison already reflects the same ammonia prices.

3. **Is there double-counting of production volumes within, and post, the investigation period?**

The Commission confirms that there is no double counting of production volumes or sales volumes, as demonstrated in Confidential Attachment 17 to REP 473.

4. **Has the application of a ratio for each example in column AC of Worksheet 1 been properly undertaken, and has this enlarged the size of the profit?**

As explained in section 9.6 of REP 473 and at the conference held on 4 September 2019, the Commission has undertaken this step to derive a conservative estimate of profit forgone, given that it did not have Dyno Nobel's and Yara Pilbara Nitrate's profit.

As shown in Confidential Attachment 17, the application of the ratio decreases the profit, not enlarges it.

5. **Has profit from ammonium nitrate production alone been accounted for?**

The Commission confirms that the profit used only applies to ammonium nitrate produced and sold in Australia and does not relate to emulsion, initiating systems or services.

6. **Has tax and profitability been accounted for consistently?**

The Commission confirms that all three Australian industry applicants were required to report their cost to make and sell, and profitability, in a consistent format (in Appendix A6.1, as required by the application form available on the Commission's website. This data is at Confidential Attachment 12 to REP 473).

7. **Have one-off losses been backed out of the profit numbers? For example, Orica's third party purchases of ammonia.**

The profit was determined using data relevant to each Australian industry applicants' cost to make and sell (fully absorbed cost) and the sales revenue, as reported in Appendix A6.1 to the application for the publication of a dumping duty notice.

The Commission does not consider that the example Glencore refers to relates to "one-off losses".

Ammonia is consumed as a raw material in the production of ammonium nitrate, and therefore, purchases of ammonia from third-parties relate to normal operating costs (i.e. not "one-off losses"). All three Australian industry applicants were required to report their fully absorbed costs relevant to the manufacture of ammonium nitrate. This includes the costs relevant to ammonia consumed in the manufacture of ammonium nitrate, whether it is produced and consumed internally or purchased from third parties. Therefore, the Commission does not consider that it is appropriate to exclude these variable manufacturing costs from the cost to make and sell (and therefore profit), given that they are relevant to the production of the like goods in Australia.

8. **Have increased costs been "backed out" of the profit numbers? For example, Orica's increased natural gas costs**

As explained above, the profit was determined using data relevant to each Australian industry applicants' cost to make and sell (fully absorbed cost) and the sales revenue, as reported in Appendix A6.1.

The Commission considers that natural gas costs are a normal operating cost incurred in the manufacture of ammonia, which is used as an input in the production of ammonium nitrate. Therefore, if natural gas prices increase, this will consequently lead to an increase in the production costs relevant to ammonia and therefore ammonium nitrate.

All three Australian industry applicants were required to report their fully absorbed costs relevant to the manufacture of like goods. This includes the costs relevant to the natural gas consumed in the manufacture of ammonia. Therefore, the Commission does not consider that it is appropriate to exclude variable manufacturing costs, such as natural gas, from the cost to make and sell (and therefore profit), given that this input is relevant to the production of the like goods in Australia.

9. Have reduced margins been taken into account in circumstances where a manufacturer has chosen to import instead of produce domestically?

As explained above, the profit was determined using each Australian industry applicants' cost to make and sell (fully absorbed costing) relevant to the goods manufactured and sold in Australia, as reported in Appendix A6.1. Given that the data relates to the goods produced in Australia, this excludes any consideration of sales of imports in the Australian market made by the Australian industry.