PUBLIC VERSION

Lhoist (Malaysia) Sdn Bhd (762963-K)

A Lhoist Group Company

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BY EMAIL, FAX & POST

Dear Mr Jeyarajah

Exporter's submission by Lhoist (Malaysia) Sdn. Bhd regarding ADC Investigation ADC 348: Investigation into the alleged dumping of quicklime exported to Australia from Malaysia, the Kingdom of Thailand and the Socialist Republic of Vietnam

We refer to the application by Cockburn Cement Limited ('***Cockburn Cement***') under s 269TB(1) of the *Customs Act 1901 (Cth)* for the publication of dumping and/or countervailing duty notices in respect of quicklime[1] exported to Australia from Malaysia, the Kingdom of Thailand and the Socialist Republic of Vietnam (***the 'Application'***) and to the Anti-Dumping Commission's (***'Commission'***) Consideration Report published on 11 April 2016 (***the 'Consideration Report'***).

This submission addresses a number of issues raised in the Application and the Consideration Report. In summary, we contend as follows:

- Lhoist did not export any quicklime to Australia in the period 1 January 2015 to 31 December 2015 (***the 'Investigation Period'***) at dumped prices. Exports by companies to Australia by Lhoist were only for lime quality integrity tests and logistics handling/unloading in port shipping test purposes (***'shipping trial'***) only;
- to the extent that quicklime has been exported by any other Malaysian producer at dumped prices, Lhoist submits that the Australian industry as a whole has not sustained material injury. In particular, Lhoist submits that:
  - there has been no injury to the alumina sector, since that market is subject to long-term supply agreements with Cockburn Cement;
  - there has been no injury to the industry outside of Western Australia; and

[1] Classified as tariff subheading 2522.10.00 statistical code 26 of Schedule 3 to the *Customs Tariff Act 1995* (Cth).

- if any injury has been sustained in the non-alumina sector (which is not accepted and is challenged) it has not been caused by the exportation of quicklime to Australia by Malaysian exporters.

This submission contains information which is confidential to Lhoist and Lhoist Group. Please ensure that all the information provided and in particular all financial, pricing and customer names, is kept confidential.

1 Background to Lhoist

During the investigation period, Lhoist operated via three related companies:

- Megah Jaya Industries Sdn Bhd ('***MJI***');
- Lhoist SPN Sdn. Bhd. ('***Lhoist SPN***'); and
- Lhoist PG Sdn. Bhd ('***Lhoist PG***').

All three subsidiaries are owned (directly or indirectly) by Lhoist (Malaysia) Sdn. Bhd. (***Lhoist Malaysia***). Lhoist Malaysia acquired Lhoist SPN and Lhoist PG from NSL Chemicals Ltd in February 2015.

During the investigation period, Lhoist Group had no entity in Australia. Lhoist Australia Pty Ltd, a sister company of Lhoist Malaysia, was incorporated in February 2016 but has not engaged in any trading activity to date. At this time, Lhoist Group does not have any production facilities in Australia. Lhoist intends to increase its activity in Australia.

Lhoist's inquiries have confirmed that no subsidiary of Lhoist made exports to Australia during the investigation period for use by industrial producers in Australia. MJI exported a small volume of quicklime to Australia on a shipping trial basis only and, following the shipping trials, the quicklime was returned to Malaysia.

Lhoist considers the Australian quicklime industry to be uncompetitive. Importantly, Lhoist notes that to the detriment of Australian industrial users, competition from imports of quicklime has been very low. In particular, as far as Western Australia is concerned, with 5% of estimated imports into Western Australia, Cockburn remains sole domestic producer with estimated 95% market share. This is even more relevant taking whole Australia industry taken as a whole. Lhoist welcomes the opportunity to participate in the Commission's investigation to ensure that dumping duties are not imposed inappropriately to the detriment of increased competition in the Australian market for the production and supply of quicklime.

2 Quicklime exports by Lhoist

2.1 Lhoist exported quicklime to Australia for shipping trial purposes only

As detailed in the supporting data provided and outlined in the previous submission, Lhoist has not made any exports of quicklime to Australia for the purposes of industrial production utilisation. During the investigation period, MJI conducted two shipping trials of quicklime to the Port of Fremantle, Western Australia. These exports were made in order to evaluate quicklime integrity during shipment and handling. The quicklime was returned to Malaysia within a month and the container did not leave the Port whilst in Australia. The two shipping trials were as follows:

- [Quantity] containers with [quantity of quicklime] on 15 April 2015 (returned to Malaysia 21 May 2015); and
- [Quantity] containers with [quantity of quicklime] on 27 May 2015 (returned to Malaysia on 28 June 2015).

[Company name] was named as the importing entity for the purposes of customs. Following the shipping trials, [Company name] arranged for the quicklime to be returned to Malaysia. The managing director of [Company name] is a consultant to Lhoist Group for the purposes of market analysis and development in Australia.

No payment was made between [Company name] and MJI or Lhoist. The costs of the shipping trials were fully covered by MJI.

Lhoist submits that, on the basis that no payment was made between [Company name] and Lhoist or MJI for the quicklime exported by MJI, there is no 'export price', constructed or otherwise, for these shipping trials.

2.2 The exported quicklime was not sold at dumped prices

Lhoist has not exported quicklime at dumped prices. This is because there has been no sale made of any quicklime exported by Lhoist to Australia. It is therefore not necessary to calculate the normal value with respect to Lhoist's shipping trials of quicklime.

With respect to the normal value assigned to quicklime in Malaysia more generally, Lhoist notes that:

- for the purposes of the Application, Cockburn Cement calculated normal values on a constructed cost basis and assessed the normal value of quicklime in Malaysia at A$142 per metric tonne (see pages 31 to 34 and 37 of the Application);
- the Commission tested Cockburn Cement's calculations by reference to the cost data used in Cockburn Cement's previous application for dumping duties in respect of quicklime exported to Australia from Thailand. The Commission applied an inflation factor to account for increased costs since the previous application, while noting that the cost of raw materials such as fuel may have increased at a greater rate than inflation; and
- in the absence of other information, the Commission accepted Cockburn Cement's calculations for the purposes of the Consideration Report on the basis that Cockburn Cement's methodology was reasonable in the circumstances.

Lhoist submits that the calculation of the normal value will require careful consideration by the Commission as it progresses its investigation. In particular, Lhoist submits that the use of cost data from Thailand as a basis for calculation of the normal value in Malaysia is not appropriate. For instance, while the Commission noted that the cost of raw materials such as fuel may have increased at a greater rate than inflation in Thailand, Lhoist submits that in Malaysia, the price of fuel, both coal and diesel, has decreased significantly. Moreover, Lhoist submits that the cost of producing lime in Thailand is higher than in Malaysia. Cockburn Cement's approach to derive the normal value of quicklime in Malaysia based on Thailand values is therefore not appropriate.

Based on Lhoist's revenue analysis as attached, the normal prices of quicklime in Malaysia (as defined by Price to FOB) are as follows:

		SPN	MJI
Domestic Ex-works Normal Price excluding intercompany sales (per MT)	RM	[price]	[price]
Normal cost to FOB - Port Klang (per MT)	RM	[price]	[price]
Normal Price + cost to FOB (per MT)	RM	[price]	[price]
Equivalent to USD @ RM3.9073 (per MT)	USD	[price]	[price]
Equivalent to AUD (using Bank Negara Malaysia average 2015 exchange rates) (per MT)	AUD	[price]	[price]

Lhoist submits that Cockburn Cement's constructed normal value of quicklime in Malaysia of A$142, at page 37 of the Application, therefore exceeds the actual normal value, calculated based on Lhoist's revenue analysis.

3 No material injury

3.1 Framework for assessing material injury

Anti-dumping duties may only be imposed when dumping causes, or threatens to cause, material injury to an Australian industry. Before assessing whether there has been injury, it is necessary to identify the Australian industry which is alleged to have sustained injury. Section 269T of the Act defines 'industry' in terms of production of like goods. This definition is from Article 4 of the WTO ADA and Article 16 of the WTO SCM. Both identify a domestic industry to be:

> domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products.

In the Commission's termination of investigation report in relation to the previous application by Cockburn Cement, the Commission acknowledged that it is required to consider injury to the whole Australian industry:

> The Commission's consideration of any material injury involves weighing all of the relevant factors in the context of the Australian domestic market as a whole. This approach reflects that Ministerial Direction on Material Injury and legislative requirements in the (Customs) Act which are consistent with the WTO ADA.

Similarly, in *Swan Portland Cement Limited and Cockburn Cement Limited v The Minister for Small Business and Customs and The Anti-Dumping Authority* [1991] FCA 49, Lockhart J at p 451 held that:

> ...the expression "domestic industry" in the context of the antidumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, where it be determined by geographic, market or other criteria.

In light of this framework, Lhoist submits that the Commission must analyse injury by reference to the Australian industry for the production and supply of quicklime as a whole. Although sectoral or regional impacts may in certain instances be of relevance,[2] Lhoist submits that the Commission's policy and the applicable law is that such impacts must still be considered in light of the impact on the Australian industry as a whole and must not be considered in isolation.

3.2 Sectoral or regional impacts must be assessed in terms of the industry as a whole

In the Application, Cockburn Cement relies on the injury allegedly suffered by the non-alumina sector in Western Australia as a sufficient basis for the Commission to determine there has been material injury to the Australian industry as a whole. Lhoist submits this is inappropriate, as the non-alumina industry is not representative of the industry as a whole.

The Commission's *Dumping and Subsidy Manual* stipulates that production, not sales, defines an industry. Market sectors, differing end uses and downstream market structure are irrelevant determinants of an industry as a whole.[3] A sectoral analysis is only appropriate 'if it yields a better understanding of the effects of imports and a more thorough analysis and conclusion.'[4] In particular, the Manual states that:

> In respect of injury to a sector (or sectors) being judged as injury to industry as a whole, a conclusion that there is injury, or threat of injury, to a specific sector may be indicative of injury to the industry as a whole <u>only where the sector in question is sufficiently representative of the industry concerned</u>.[5]

The non-alumina sector is not representative of the Australian industry. As noted in the Application, the majority (70%) of Cockburn Cement's supplies are to the alumina sector. Lhoist submits that the correct approach is to assess injury by reference to a combination of both the alumina and non-alumina sectors, since an assessment of the non-alumina sector in isolation is not representative of the industry and distorts the effect of imports.

Lhoist also notes Cockburn Cement's claims that it retained its long term contracts with customers in the alumina industry notwithstanding intense competition from alleged dumped imports at the time of price negotiation in 2011/2012 (page 19 of the Application).

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[2] Australian Customs Dumping Notice No. 2012/24 (New Ministerial Direction on Material Injury).

[3] *Dumping and Subsidy Manual,* page 19.

[4] *Dumping and Subsidy Manual*, page 19.

[5] *Dumping and Subsidy Manual*, page 20.

To the extent that dumped imports (if any) have impacted price negotiations for long term alumina contracts, this further underscores the need to take into account both the alumina and non-alumina sectors during the investigation.

The Application concedes that 'all dumped and injurious imports of quicklime have entered the WA market where Cockburn Cement operates two production facilities' (page 26 of the Application). Lhoist submits that, in determining whether the industry as a whole has suffered material injury, the Commission must consider the Australian market in its entirety and not only Western Australia nor a specific sector of sales.

3.3 No material injury

Lhoist submits that once regard is had to the Australian quicklime industry as a whole, as opposed to merely the non-alumina sector in Western Australia, there can be no finding that industry has suffered material injury. Lhoist submits that, with regard to the factors relevant to determining whether material injury has been caused to an Australian industry under section 269TAE of the Act:

- Lhoist has only exported quicklime to Australia on two occasions for the purpose of shipping trials. No payment was made for these exports and these shipments were shortly returned to Malaysia. No injury can be said to have been caused to the Australian industry by this shipping trial;
- imported quicklime from Malaysia, Thailand and Vietnam more generally accounts for only a small volume of the Australian quicklime market. This is particularly so when the Australian market is considered as a whole, not limited to the Western Australian non-alumina sector. Outside of Western Australia, the volume of imports has not changed remarkably during the period 1 January 2012 to 31 December 2015;
- the Australian quicklime market is dominated by Australian producers, who account for 92.7% of the market, with Cockburn Cement representing 62.5% of production of quicklime in Australia;[6]
- to the extent that there has been any price depression or price suppression between the period 1 January 2012 to 31 December 2015 (which is not admitted and is challenged), the price effects are limited to the Western Australian market, specifically in Cockburn Cement's Dongara Plant, and are not applicable to the Australian market as a whole. Moreover, Lhoist submits that such price effects are not caused by any alleged dumping, but rather other factors, as explained in section 3.4 of this submission; and
- the import of quicklime from Malaysia, Thailand and Vietnam has not created a price effect in the alumina sector, given that selling prices are subject to long-term contracts in this sector.

[6] Consideration Report 348, 11 April 2016, page 19.

Lhoist therefore submits that there has been no material injury suffered by the Australian quicklime industry as a whole. There has clearly been no material injury suffered by the alumina sector, and, to the extent that any injury has been suffered by the non-alumina sector in Western Australia, this is not due to dumped imports.

3.4 No causation

Even if it is to be accepted that there has been injury to the non-alumina sector in Western Australia (which is not accepted and is challenged), it needs to be shown that the dumped imports are the cause of the injury. A causation finding is expressly required by the terms of the Act. The causation requirements in sections 269TG(1) and (2) of the Act reflect Australia's implementation of Article VI(6)(a) of the GATT:

> No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

The Ministerial Direction on Material Injury makes clear that injury caused by other factors must not be attributed to dumping or subsidisation. Section 269TAE(2A) of the Act expressly states that the Minister must consider whether any injury to an industry is caused or threatened by a factor other than the dumping of those goods, such as:

- the volume and prices of imported like goods that are not dumped;
- contractions in demand or changes in patterns of consumption;
- restrictive trade practices of, and competition between, foreign and Australian producers of like goods;
- developments in technology; or
- the export performance and productivity of the Australian industry.

Lhoist submits that there are other causes for the volume and price effects Cockburn Cement has experienced in this sector and these should not be attributed to import competition. In particular, Lhoist notes the following matters for consideration by the Commission:

- there are likely to be inefficiencies in productions costs at Cockburn Cement's Dongara Plant, particularly given its remote location (400km from Perth). In addition, the method of production using long rotary kiln (compared to shaft kilns used in Asia) also impact production costs in particular in terms of fuel consumption impact.
- The 2015 Annual Report of the Adelaide and Brighton Group Limited (which owns Cockburn Cement) (***2015 Annual Report***) notes that continued improvements in the operating efficiency of production facilities in Western Australia remain a key operational priority.
- Western Australian producers experienced higher energy costs in 2014-2015 due to a disruption in coal supply. A key coal supplier in the region, Griffin Coal, was forced to suspend mining operations after its mining contractor, Carna Civil and Mining, withdrew its workforce following a dispute over payment. Cockburn Cement came

under pressure to seek alternative supplies and it is thought to have ordered a maiden shipment of Indonesian coal in January 2015.[7] The 2015 Annual Report notes that:

> Energy costs increased by $3.5 million due to a short term (now resolved) interruption to coal supply. A new lower priced gas contract effective 1 January 2016 and normalisation of coal supply is expected to reduce energy costs in Western Australia in 2016.[8]

- The majority of Cockburn Cement's supplies to the non-alumina sector are delivered to gold processing users.[9] The drop of demand in the non-alumina sector for quicklime from Cockburn Cement during the investigation period is amongst others attributed to gold industry. Tough economic conditions in the gold industry has led to closure of gold mines and gold producing companies.
  - Bronzewing Gold Mine, owned by Navigator Resources Limited, is, since March 2013, in care and maintenance after its owner went into administration.
  - Norseman Gold Mine, operated by Norseman Gold Plc, was placed in care and maintenance from 1 July 2014.
- Several smaller nickel producers have closed down, which has led to contractions in the non-ferrous, non-alumina industry.
  - Process changes with some nickel operations (for example the BHP NiWest Kambalda operation) have seen them cut back on production. Process changes to cut cost have resulted in lower usage of quicklime or hydrated lime. In some cases process changes have totally eliminated the need for quicklime. For example the closure of Iluka Resources mineral sands SR plant in Dongera which had an original supply agreement in 2001 to supply 30kT per annum, has possibly resulted in reduced off-take of quicklime.
- The lack of competition and choice of supplier in the quicklime market for several decades in WA means that the market is open and receptive to new entrants with different offerings to what it had been used to for several decades. In particular, quicklime that is produced by Lhoist is of very different quality than quicklime offered by Cockburn Cement (higher quality due to higher CaO content and less impurities), which also explains that local market is open and receptive to new entrants with different offerings. Lhoist submits that competition is healthy and drives innovation and efficiencies.

3.5 Conclusion

Lhoist exported quicklime to Australia only for the purposes of shipping trials, and without any payments made for the export. It has therefore not exported quicklime to Australia at

[7] Usman Azad and Peter Klinger, 'Worsley mulls coal import fix' *The Western Australian*, 31 March 2015. See also Adelaide Brighton's annual report at page 12.

[8] 2015 Annual Report of the Adelaide and Brighton Group Limited, page 12

[9] Application for publication of dumping and/or countervailing duty notices in respect of quicklime exported to Australia from Malaysia, the Kingdom of Thailand and the Socialist Republic of Vietnam, page 12.

dumped prices and accordingly should not be subject to any dumping duties. Further, to the extent any other producers have exported quicklime to Australia at dumped prices, Lhoist submits that the Australian industry as a whole has not suffered material injury. Moreover, the price and volume effects experienced by Cockburn Cement in the non-alumina sector in Western Australia may be explained by other factors that are not attributable to import competition and these require careful consideration during the investigation.

Lhoist is concerned to ensure that dumping duties are not imposed inappropriately to the detriment of increased competition in the Australian quicklime market.

Lhoist would be happy to assist the Commission with any further queries during the course of its investigation. Please do not hesitate to contact our Finance Director to discuss this letter or your further queries.

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Yours sincerely,

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