Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

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

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

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

Time

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

Conferences

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

Further application information

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

Withdrawal

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

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

Contact

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

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name:	**Downer EDI Mining – Blasting Services Pty Ltd ("DBS")**
Address:	**135 Coronation Drive** **Milton** **Queensland 4064**
Type of entity (trade union, corporation, government etc.):	**DBS is a company.**

2. Contact person for applicant

Full name:	**Daniel Moulis**
Position:	**Partner Director**
Email address:	**daniel.moulis@moulislegal.com**
Telephone number:	**+61 2 6163 1000**

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

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

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

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

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

4. Is the applicant represented?

Yes ☒ **No** ☐

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

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

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

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

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

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

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

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

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

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

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

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

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

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

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

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

The goods are classified to the tariff subheading 3102.30.00, statistical code 05, of Schedule 3 to the *Customs Tariff Act 1995*.

8. Anti-Dumping Notice details:

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

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

Please refer to Attachment 1.

PART C: GROUNDS FOR THE APPLICATION

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

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

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

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

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

See Attachment 2.

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

See Attachment 2.

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

See Attachment 2.

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

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

See Attachment 2.

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

The attachments provided in support of this application are:

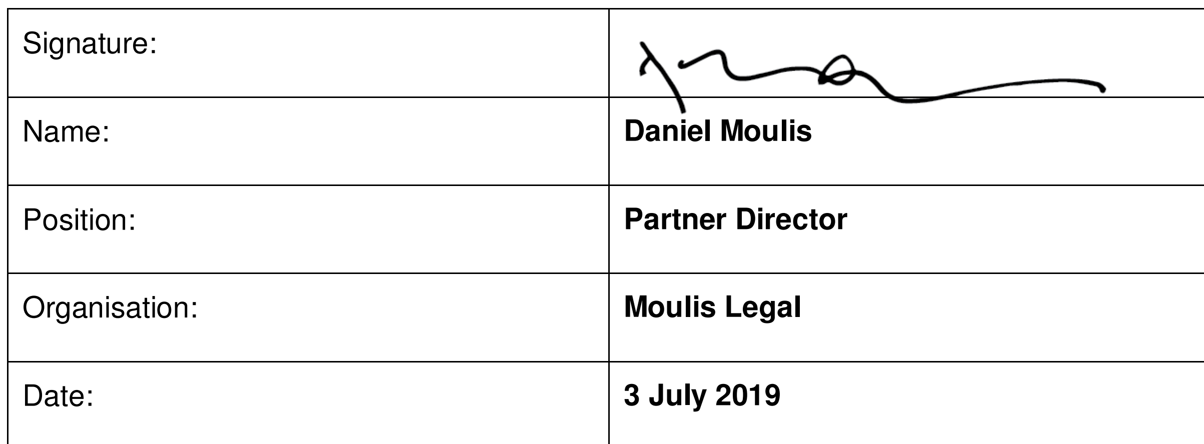
- **Attachment 1 – DBS ADRP application - ADN 2019/57**
- **Attachment 2 – DBS ADRP application - grounds – confidential**
- **Attachment 2 – DBS ADRP application - grounds – non-confidential**
- **Attachment 3 – DBS ADRP application - letter of authority**

PART D: DECLARATION

The the applicant's authorised representative declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and

- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.



Signature:	
Name:	**Daniel Moulis**
Position:	**Partner Director**
Organisation:	**Moulis Legal**
Date:	**3 July 2019**

PART E: AUTHORISED REPRESENTATIVE

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

Provide details of the applicant's authorised representative:

Full name of representative:	**Daniel Moulis**
Organisation:	**Moulis Legal**
Address:	**6/2 Brindabella Circuit** **Brindabella Business Park** **Canberra International Airport** **ACT 2609**
Email address:	**Daniel.Moulis@moulislegal.com**
Telephone number:	**+61 2 6163 1000**

Representative's authority to act

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

Please refer to Attachment 3.

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

Signature:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date: / /

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Customs Act 1901 – Part XVB

Ammonium nitrate - 473

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

Findings in Relation to a Dumping Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 29th day of May 2019

KAREN ANDREWS
Minister for Industry, Science and Technology

3 July 2019

In the Anti-Dumping Review Panel

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

Downer EDI Mining – Blasting Services Pty Ltd

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A Introduction

By way of an application to the Anti-Dumping Commission ("the Commission") dated "March 2018" CSBP Limited ("CSBP"), Orica Australia Pty Ltd ("Orica") and Queensland Nitrates Pty Ltd ("QNP"), (collectively "the applicants") applied for a dumping investigation into imports of ammonium nitrate from the People's Republic of China, Sweden and the Kingdom of Thailand.

Moulis Legal Pty Limited ACN 614 584 539

In response to that application, the Commission initiated the subject anti-dumping investigation in respect of ammonium nitrate exported from the subject countries on 25 June 2018.

Downer EDI Mining – Blasting Services ("DBS") is an importer of ammonium nitrate, and imported ammonium nitrate from Sweden during the investigation period.

At the conclusion of the investigation, in a decision published on 3 June 2019, the Minister for Industry, Science and Technology ("the Minister") decided to impose dumping duties on ammonium nitrate exported to Australia from, *inter alia*, Sweden.[1] Specifically, the Minister published a notice or notices under Sections 269TG(1) and (2) of the *Customs Act 1901* ("the Act") declaring that Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applied in relation to ammonium nitrate exported from Sweden.[2] These notices had the effect of imposing dumping duties on the importation into Australia of Swedish exports of ammonium nitrate.

DBS seeks review by the Anti-Dumping Review Panel ("the Review Panel"), under Sections 269ZZA(1)(a) and 269ZZC, of the decision (or decisions) made by the Minister to impose dumping measures against Swedish exports of ammonium nitrate to Australia, as outlined in this application.

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

B First ground – not correct or preferable to find that material injury "has been" or "is being" caused to the Australian industry

9 Grounds

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

For the purposes of publishing a dumping duty notice or notices under Section 269TG(1) and (2), the Minister must be satisfied that material injury to the Australian industry has been or is being caused or threatened.

In Report 473, the Commissioner was satisfied that material injury had been caused to the Australian industry in the form of price depression, decreased profit and profitability, and loss of sales volumes[3]

1 Based on the recommendations contained in *Report No.473, Alleged Dumping of Ammonium Nitrate Exported from the People's Republic Of China, Sweden and the Kingdom of Thailand* ("Report 473")

2 A reference in this Application to "the Act", or to a "Section", "Subsection" or "Subparagraph" is a reference to a Section, Subsection or Subparagraph of the Act, unless otherwise specified.

3 See Report 473, page 9

and that this injury was caused by exports from those countries subject to the investigation, including Sweden.

In summary, the finding was expressed thus:

> *The Commissioner found that the applicants reduced their prices following contract negotiations conducted during the investigation period and following the investigation period. The Commissioner undertook a 'but for' analysis in order to compare the Australian industry's negotiated prices with prices in the absence of dumping in order to assess whether the injury caused by dumping is material to the Australian industry. While factors other than dumping may also have caused injury to the Australian industry, the Commission found that the reduction in price that is attributable to dumping is significant. The Commissioner found that the injury caused by dumping is material.*[4]

DBS submits that the finding that material injury was caused by dumped exports in the scenario postulated by Report 473 was neither correct nor preferable, and that the way in which the contrary decision was made by the Minister, on the recommendation of the Commission, was wrong at law.

a. Material injury was not caused by dumping

We submit that if any injury was caused by the dumped exports, which is denied, it cannot be considered to meet any reasonable appreciation of the term "material". If there was any injury, it can only have been immaterial, insubstantial and insignificant.

The Commission must determine material injury by reference to Section 269TAE and the *Ministerial Direction on Material Injury 2012*.[5] According to that Direction, injury *"must… be greater than that likely to occur in the normal ebb and flow of business*" and must not be "*immaterial, insubstantial or insignificant"*.

The injury and causation finding in Report 473 is ultimately based upon the Commission's consideration of the Australian industry's pricing behaviour with respect to the negotiations for certain contracts. We reiterate that the heads of injury relied upon by the Commission in its ultimate finding were only *"price depression, decreased profit and profitability, and loss of sales volumes"* with respect to those contracts

DBS submits that based on the massive size of the Australian industry and its high profitability, the limited number of allegedly reduced-price contracts, and the time over which and at which they were entered into, the impact on the Australian industry of entering into those contracts cannot be classified as having been material.

The first thing to recognise here is that it is the injury in the period of investigation that must be material. This is not to say that the period in which injury is assessed cannot extend beyond (i.e., in a period after)

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4 See Report 473, page 93.

5 Ministerial Direction on Material Injury 2012, 27 April 2012; https://www.industry.gov.au/sites/default/files/2019-05/acd_ministerial_direction_on_material_injury.pdf

the period of investigation for the purposes of determining whether there has been dumping of the goods as was announced at the time of initiation of the investigation. But the conclusion that is unavoidable, based on the very words of Sections 269TG(1) and (2), is that material injury must have been caused, by dumping, in the period in which injury is assessed. The impacts of dumping in a future period are legally irrelevant, except in the case of a finding of threat of material injury, which has not been made in this case.

The words of the relevant Sections are clear – they associate "dumping" with "material injury" that "has been" or "is being" caused. Injury that might flow in the future, from actions and reactions to dumped imports in the past, is not relevant. Report 473 only finds *"price depression, decreased profit and profitability, and loss of sales volumes"* emanating from the prices agreed by the Australian industry under those contracts. But the "emanation" we are talking about here can only be the "emanation" in the past period that was assessed by the investigating authority.

In its analysis, the Commission determined that the applicants collectively represented 94% of the sales of ammonium nitrate in the Australian market in the period of investigation, and that imports from the countries subject to this investigation constituted 3.1% of the Australian market in totality.[6] A fair proportion of those imports were imported by the Australian industry itself. Our client's estimation of the market share of the countries subject to investigation but not imported by the Australian industry was advised to the Commission early in the investigation as being **[CONFIDENTIAL TEXT DELETED – number]**%.[7]

At the same time, Report 473 shows, for the Australian industry applicants, between 2016/17 and 2017/18;

- production volumes were steady;
- sales volumes overall were relatively steady, given the comparative size of the three applicants, and in the context of a reduction in sales volumes of CSBP by reason of factors not related to imports;
- prices were up in the case of CSBP and QNP;
- there were profit and profitability reductions, also explained by factors unrelated to imports, and that the industry was still profitable; and
- improved capacity utilisation.

The picture presented in Report 473 is of a large scale domestic industry, selling to its domestic customers under long term fixed price contracts. The prices under those contracts appear to have

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6 See Report 473, page 57, Table 6.
7 EPR 473, doc 4.

caused fluctuations in performance depending on the degree to which production was committed to such contracts and the price conditions stipulated therein. For example, Report 473 refers to:

> *…unfavourable movements in variables (such as ammonia) used to adjust contract prices, result[ing] in lower observed average prices.*[8]

And:

> *…decreases in… prices observed since 2014-15 is partly due to contract renewals (i.e. renewal of existing contracts where Orica is the incumbent supplier) that resulted in relatively lower re-negotiated base prices.*[9]

Other factors, such as breakdowns, are referenced as having impacted on the Australian industry. It is again important to note that what is not mentioned, in explaining changes that occurred in the investigation period for dumping as compared to the previous year, is imports. That consideration is only raised in respect of seven contracts for which the Australian industry applicants competed, with those contracts entered into at various, largely unspecified times over what we assume was an up-to 22 month period comprising the period of investigation for dumping and an unspecified time afterwards, which cannot have extended after the date of the Statement of Essential Facts ("SEF 473").[10]

Our reading of Report 473 is that each of the Australian industry applicants was profitable in the investigation period for dumping. There were increased prices in the period of investigation and increased sales volumes, all of which contributed to the profit that the Australian industry enjoyed during this time.

We submit on behalf of our client that a finding that an Australian industry has suffered material injury at all is not maintainable in circumstances where it is so dominant in the market, and is so profitable, and where the imports are so minimal, and where the factors causing it injury are admitted not to have been dumping-related except in the case of seven contracts, being contracts that were newly entered into over a 22 month period of economic activity that was otherwise unaffected by imports. A finding that those imports caused material injury, in and of themselves, is equally unmaintainable.

The dominant themes of Report 473, which are competition between large domestic market competitors, the vicissitudes of fixed price contracts, and changing costs, are fully embraced by the concept of the ebb and flow of business, as per the relevant Ministerial Direction.

We now turn to an examination of the finding that Report 473 claims "links" dumped imports to "material injury" to the Australian industry.

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8 Report 473, page 64.

9 Report, page 64.

10 Report 473 states that the investigation was extended to encompass *"negotiations that continued subsequent to the investigation period and were finalised post-investigation period"*, and that it was *"relevant to assess whether dumping found during the investigation period [ ] influenced those negotiations"*. See Report 473, page 48.

The Commission examined a serious of contract negotiations during the investigation period. There were seven examples that were determined to be considered appropriate for an injury assessment, out of a total of 13 examples. These examples were provided by the applicants, and:

> *Each applicant alleged that these examples demonstrate specific instances where they lowered their prices in response to the dumped goods to secure supply contracts, or where they matched import parity pricing as customers cited the availability and pricing of imported ammonium nitrate.*[11]

The Commission then considered what the specific applicant's price would have been in the absence of dumping for each contract example and concluded that:

> *…while there appear to be factors other than dumping that have also caused the reductions in prices, dumping has still caused a significant reduction in prices.*[12]

The Commission then ultimately concluded that, to the exclusion of these contract examples provided in Report 473, there were no other indications that material injury had been suffered as a result of the imports under investigation. Nor does it appear that the Commission based its injury conclusions on any other factors or evidence:

> *…the Commission found that the applicants reduced their prices (or matched dumped prices from certain countries the subject of the application) following contract negotiations conducted in the investigation period and following the investigation period.*
>
> *While there also appear to be factors other than dumping that have contributed to the price reductions, the Commission considers that the reduction in price that is attributable to dumping is significant*[13]

Consequently, the Commission found that the pricing in those contracts sufficient to constitute material injury to the Australian industry.

This injury "picture", said to evidence materiality of injury caused by dumping, is an important one. It involves these critical factors:

- only seven contracts able to be used, potentially, as evidence of injury caused by dumping;
- the contracts having been entered into at different times over a (say) 22 month period, from 1 April 2017 (the commencement of the investigation period for dumping) to 25 February 2019 (the date of the SEF 473, after which no new facts or inquiries took place for the purposes of the Report 473);

11 See Report 473, page 70.

12 See Report 473, page 79.

13 See Report 473, page 90.

- the admission by the Commission that factors other than dumping contributed to the price reductions;
- no finding that material injury in the form of lost revenue was caused by the imports under investigation.

In drawing this "picture", the Commission has not explained its analysis of the volume of the sales made under the contracts, in the extended investigation period, as compared to the overall volume of sales, in order to test the proposition that any revenue loss was material. It has not indicated whether the Australian industry applicants were accepting the same prices under their long term contracts.

The high level of competition between the Australian industry members themselves was discussed by the Commission at section 9.5.7 of the Report. This competition arose from certain of the applicants trying to expand their territory and markets into other areas traditionally claimed by other manufacturers, and the onset of higher capacity in the Australian industry because of the establishment of a new production facility at Burrup (Yara Pilbara Nitrate, or "YPN"). When examining price levels and price changes, we submit that pricing was largely affected by the competition between the applicants themselves. These issues were elaborated on by Moncourt in its submission published 20 August 2018[14] and Glencore in its submission dated 17 March 2019.[15] It is this strong competition in the Australian industry that has contributed to the changing and decreasing price levels of ammonium nitrate.

In contrast, Report 473 rather casually attributes "significance" to prices alleged to be available from importers as a determinant of the prices offered by the applicants. With respect this assessment lacks rigour, when it is more likely that the highly competitive nature of the Australian industry is a far more important determinant of prices. For example, it is simply not possible for importers to ship high volumes of ammonium nitrate into Australia. Reliability of supply is another important factor, something which importers are less able to guarantee. These matters were raised for the Commission's consideration but do not appear to have featured in the Report. Also not established by Report 473 is precisely whose "import prices" are being referred to when alleged "import price parity" demands were made by the customers concerned – whether they were only those of the countries under investigation, or of other countries as well, or whether they included the Australian industry's own imports.

We submit that the other factors to which we have referred must have caused injury to the Australian market to a greater extent than the impact of import prices on prices under seven contracts. These other factors extended to the production situation of the Australian industry applicants and to all their other sales and contracts over the 22 month period, whereas the impact of import prices only applied to seven contracts, and where the impact was admitted not to be to the exclusion of other factors.

For these reasons we request the Review Panel to determine that Report 473 does not substantiate the accusation that injury was caused by dumped imports. In our view this is not a determination for which any extent of reinvestigation by the Commission is necessary. Report 473 sets out the facts and the

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14 See EPR 473, Doc 011.

15 See EPR 473, Doc 051.

underlying reasons advanced by the Commission, and in our submission they do not support the recommendation made to the Minister.

The better view, and the correct and preferable decision, is that the level of injury that could be said to have been caused by dumping - pricing under seven contracts only, with respect only to the price "gap" between the Australian industry applicant's "desired" price and the customer's claimed "import parity price", and only with respect to the volume sold under those contracts, over the extended period of investigation for injury purposes and not extending after the date of SEF 473, in circumstances where the Commission admits that other very powerful incentives to lower price were in place (namely, excess capacity and competition between the applicants themselves), and when at the same time the Australian industry was operating profitably and was attracting major investment, could only be insubstantial and insignificant in the overall picture presented by the accepted evidence.

b. Mandatory injury factors not considered over injury investigation period

We have mentioned that the Commission extended the in investigation period for the purposes of determining whether material injury had been caused to the Australian industry (and, resultantly, whether material injury was caused by dumping) to a date some time prior to the publication of SEF 473 on 25 February 2019. We assume that this extended-out the period of consideration to 22 months, although the precise extent of that extension is not made clear in Report 473.

In this regard Report 473 provides as follows:

> *Notwithstanding that some of these negotiations continued subsequent to the investigation period and were finalised post-investigation period, the Commission considers that the Act does not define the injury analysis period or prescribe a minimum or maximum period for an injury analysis.*
>
> *In assessing whether dumping has caused material injury to the Australian industry, the Commission considers it relevant to assess whether dumping found during the investigation period has influenced these negotiations.*
>
> *Accordingly, the Commission has considered information and data from 1 April 2014 in assessing the economic condition of the Australian industry and the evidence which demonstrates that the Australian industry has been or is being injured because of dumped imports from the subject countries.*[16] [underlining supplied]

World Trade Organisation jurisprudence establishes that the injury factors under Article 3.4 of the Anti-Dumping Agreement are mandatory, and that each of them must be evaluated over the period of investigation, such that reasoned, objective conclusions can be drawn by the investigating authority concerned, and in a manner that is consistent with the Anti-Dumping Agreement. Article 3.4 states:

> *The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state*

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16 Report 473, page 48.

of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. [17]

In the present case it seems to be self-evident that the Commission has undertaken a traditional analysis of injury during a 12 month investigation period. It has then extended-out that period – as it is entitled to do – to take into account a consideration of certain negotiations and their culmination (in the act of contracts being entered into such as then crystallises whatever injury is claimed to have occurred thereby). It appears to us that in the extended part of the period the required analysis of each of the Article 3.4 factors has not been accomplished.

This failure is signalled by statements such as these, taken from the respective Australian industry visit reports:

Accordingly, the verification team considers Orica's sales data in Appendix A4 (and Appendix A3) are suitable for analysing the economic performance of its ammonium nitrate operations from 1 April 2014 to 31 March 2018.[18]

And:

Accordingly, the verification team considers CSBP's sales data is suitable for analysing the economic performance of its ammonium nitrate operations from 1 April 2014 to 31 March 2018.[19]

We refer to the Panel report in *Argentina – Poultry Anti-Dumping Duties*:

It is well-established in WTO dispute settlement proceedings that an investigating authority must analyse each of the factors enumerated in Article 3.4. We note that both the EC – Bed Linen panel, and the Mexico – Corn Syrup panel to which it referred, have found that Article 3.4 is a mandatory provision, that every Article 3.4 factor must be considered, and that the nature of the investigating authority's consideration must be apparent.[20]

Further, in the same Panel report:

…there is a prima facie case that an investigating authority fails to conduct an "objective" examination <u>if it examines different injury factors using different periods</u>. Such a prima facie case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors).[21] [underlining supplied]

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17 See Anti-Dumping Agreement, article 3.4

18 EPR 473, doc 40, at page 15.

19 EPR 463, doc 42, at page 14.

20 Panel Report, *Argentina – Definitive Anti-Dumping Duties On Poultry From Brazil*, para 7.314:

21 Ibid, para. 7.283.

Therefore, we submit that the Commission has not properly undertaken the exercise of assessing whether material injury has been caused to the Australian industry overall, in all relevant respects of that consideration. An extended and holistic examination would have been of great importance in this case, not only because it is legally required, but also because the contracts concerned appear to be minor in their significance in the sense we have already explained. Therefore, we submit that it was necessary to accompany the price reduction analysis engaged in by the Commission with a consideration of profitability/profits; output; market share; productivity; return on investments; utilization of capacity; factors affecting domestic prices (ignored in the "but for" test that was undertaken, as to which see (c) below); and effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and to undertake this consideration over the extended period and not just within a shorter 12 month period.

In summary, then, we submit that the Commission should have considered all factors that are relevant to the economic condition of the Australian industry within the same time period. It appears not to have done so, and therefore the recommendations made to the Minister in Report 473 were not based on the nature and degree of "positive evidence" required, and did not involve an "objective examination", contrary to the requirements of Article 3.1 of the Anti-Dumping Agreement.

c. Incorrect and inappropriate application of "but for" test

Our third concern with respect to the injury and causal link finding made in Report 473 is the circumstances of the application of a "but for" test to determine the effects on the Australian industry's prices of the dumped imports, as applied by the Commission. The use of this test is explained in Report 473 as follows:

> *The Commission also found that the majority of the applicants' sales during the investigation period were made in accordance with contracts negotiated several years prior to the investigation period, and, in some instances, before the volume of the goods exported from China, Sweden and Thailand increased substantially. Therefore, the applicants' selling prices and volumes observed during the investigation period reflect the contract terms, including prices and volumes, negotiated and agreed to before the investigation period.*
>
> *Given that the majority of ammonium nitrate in the Australian market is sold and purchased in accordance with fixed-term contracts, and given the numerous other factors that have caused injury to the Australian industry since April 2014 (refer Chapter 9 of this report), the Commission does not consider that a 'coincidence analysis' is appropriate in these circumstances.*
>
> *The 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. Under a 'but for' analytical method, it may be possible to compare the current state of the Australian industry to the state that the Australian industry would likely have been in the absence of dumping.*
>
> *To establish a causal link between injury to the Australian industry and the dumped goods, the Commission assessed the information provided by the applicants to support their claims that prices and the increasing volumes of the goods imported from the subject countries during the*

> *investigation period have impacted contract prices and volumes that were negotiated. This injury may be either in the form of price depression or loss of sales volumes (loss of contract).*
>
> *The Commission undertook an assessment by comparing the applicants' actual price offers and re-negotiated prices to what the prices might have been in the absence of dumping, all other factors being equal. In relation to injury in the form of loss of sales volumes, this was only attributed to dumping in certain instances where it could be established that these sales volumes were directly displaced by the dumped goods. This is further discussed in Chapter 9 of this report.*[22] [footnotes omitted]

We submit that this test is inappropriate in a number of respects, each of which is related to the others:

- it assumes that all other things remain equal;
- it therefore disregards an assessment of other injury factors;
- it does not take into account multiple causes of injury.

A "but for" test fundamentally assumes that all other factors are equal, but for the dumping. It is the very purpose of the test. It does not take into account factors other than dumping, or changes in the condition of the Australian industry in other respects. In attributing the entirety of any price difference to dumping, it also disregards the other factors that Report 473 freely and honestly admits were also relevant to the prices offered and agreed to by the Australian industry applicants in the period of investigation.

In this regard we have already drawn attention to a statement in Report 473 to this effect:

> *The Commission considers that two of these factors discussed above, namely excess capacity in the Australian market and competition between Australian industry producers may also have caused injury to the Australian industry during the injury analysis period; however, the Ministerial Direction on Material Injury provides that dumping need not be the sole cause of injury to the industry.*[23]

In adopting a "but for" test, the Commission made no allowance for other factors that it equally felt had some implications for the prices that were ultimately agreed. While dumping does not have to be the sole cause of the injury, "correlation" cannot be equated to "causation".[24]

Thus, for this reason as well, we consider that the decision was not correct or preferable, on the basis that it was not holistically arrived at in the manner required by law.

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22 See Report 473, page 48.

23 See Report 473, page 89-90.

24 Section 269TAE(2A) of the Act

10 Correct or preferable decision

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

We submit that the correct and preferable decision is that material injury has not been caused and was not being caused by dumped imports at the relevant times.

Accordingly, we submit that the decision made under Sections 269TG(1) and (2), which is to the contrary effect, should be revoked.

11 Grounds in support of the decision

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

The grounds raised in question 9 support the making of the proposed correct or preferable decision by demonstrating the incorrect summation and interpretation of the evidence as presented in Report 473.

The grounds above support and demonstrate that injury did not occur to the applicants and/or that the contrary proposition was not properly established.

12 Material difference between the decisions

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

The proposed decision is materially different to the reviewable decision, as the proposed decision involves the revocation of the notices published under Sections 269TG(1) and (2) of the Act.

C Second ground – not correct or preferable to find that the exports from Sweden should be cumulated with other exports

9 Grounds

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

The Commission determined in Report 473 that it was appropriate to examine the cumulative effect of exports of ammonium nitrate from all the countries subject to the investigation, and said that this was in accordance with Section 269TAE(2C).[25]

We submit that in arriving at his finding Report 473 has incorrectly conflated the concept of "competition" *per se* with the different concept of the "*conditions of* competition" under Section 269TAE(2C).

Report 473 looked to the competition in the Australian market for supply contracts, and determined that because ammonium nitrate exported from Sweden was offered in competition with ammonium nitrate offered by Australian industry members during the period it should be cumulated with other exports in an "effects" determination. We submit that this is not the correct test to be applied, and that the decision to cumulate Swedish imports with the other imports was not the correct or preferable decision.

The Commission's analysis simply examined whether the goods compete, and not whether the conditions of competition in the relevant period were the same or different. Subsection 269TAE(1) specifies that to determine the effect of exports to Australia from different countries, the Minister should consider the cumulative effect of those exports only if appropriate to do so in the context of Section 269TAE(2C).

Subsection 269TAE(2C) states:

> *(2C) In determining, for the purposes referred to in subsection (1) or (2), the effect of the exportations of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that:*
>
> ...
>
> *(e) it is appropriate to consider the cumulative effect of those exportations, having regard to:*
>
> > *(i) the conditions of competition between those goods; and*
> >
> > *(ii) the conditions of competition between those goods and like goods that are domestically produced.*

The Commission's Dumping and Subsidy Manual states that:

> *The conditions of competition are assessed between the goods imported from all countries and the conditions of competition between the exported goods and like goods that are locally produced by the Australian industry. Such assessment might be, but is not confined to:*
>
> - *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*

[25] See Report 473.

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.*
- *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.*

The Commission will not have regard to data collected outside the injury analysis period in assessing the conditions of competition.[26]

In Report 473, the Commission determined:

> *…that the conditions of competition between the goods, and between the goods and like goods that are domestically produced, are similar.*[27] [underlining supplied]

In its more detailed explanation of this finding, it stated:

> *The Commission considers that the goods exported from Sweden compete with goods exported from China and Thailand, and like goods that are domestically produced given that these goods are sold to the same or similar customers and are interchangeable in end-use applications*[28] [underlining supplied]

We submit that this, more detailed expression of the Commission's views represents its frame of reference for the decision that was made – i.e., that there was "competition" between exports from Sweden and those of other exporters and the Australian industry, and that the "competition" was enough to justify a decision to cumulate Swedish exports with the other exports.

However, we submit to the Review Panel that the conditions of competition between exports from Sweden and exports from other countries and the Australian industry's sales are demonstrably different.

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26 See ADC Dumping and Subsidy Manual, page 133 to 134.

27 See Report 473, page 49.

28 See Report 473, page 51.

We put this proposition on two bases, each of which is explained and elaborated in our submission to the Commission dated 19 March 2019.[29]

For the purposes of complying with the requirements of form under the Act for this application to the Review Panel, we reference those bases as follows, and otherwise refer the Review Panel to our submission dated 19 March 2019.

- The first basis relates to **[CONFIDENTIAL TEXT DELETED – commercial arrangements]**.[30] Our client was the only supplier and importer of Swedish ammonium nitrate in the period concerned. **[CONFIDENTIAL TEXT DELETED – commercial arrangements]**. We respectfully submit that the Commission's consideration of the significance of these factors downplays their importance. **[CONFIDENTIAL TEXT DELETED – commercial motivation and market position]**.

- The second basis is that the Commission made a direct finding, we believe, that ammonium nitrate exported from Sweden was relevant to only two of the 13 contract examples employed in the causal link analysis. Those examples were not deemed relevant to the injury assessment because one of the contracts had not been concluded (example 8) and because the other was not seen to be evidence of injury caused by dumped imports (example 9).[31] Indeed, Example 9 indicates that the different "conditions of competition" **[CONFIDENTIAL TEXT DELETED – commercial arrangements]**. This is because the Commission finds, with respect to that example:

  > *The Commission observes that the information provided by Orica indicates that the main price competition was from other Australian industry members (rather than imports). There was no incentive for Orica to reduce its price to match import pricing.*[32]

  [CONFIDENTIAL TEXT DELETED – commercial arrangements].

The **[CONFIDENTIAL TEXT DELETED – commercial arrangements]** are relevant to the differentiation of Swedish exports from those of other counties under investigation. They were imported by one party only **[CONFIDENTIAL TEXT DELETED – – commercial motivation and market position]**. It appears to us to finding of injury was made by the Commission with respect to those imports at all.

Thus, we submit on behalf of our client that the conditions of competition as related to imports from Sweden were demonstrably different to the conditions of competition that applied to exports from China and Thailand and to the sales of the Australian industry applicants, and that they should not be cumulated with the exports from the other countries for the purposes of arriving at an injury finding.

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29 Confidential version of EPR 473, doc 58.

30 Ibid

31 Ibid

32 Report 473, at page 76.

10 Correct or preferable decision

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

The correct or preferable decision is that exports from Sweden should not be cumulated with those from China and Thailand for the purposes of a material injury determination under Section 269TAE(1).

If it is the case, as we have submitted, that only two of the contract examples related to imports from Sweden, and given that no injury was found to have been caused by Swedish imports in their own right in those examples, the notices under Sections 269TG(1) and (2) should be revoked as against Sweden.

11 Grounds in support of decision

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

The grounds in question 9 support the making of the proposed correct or preferable decision by demonstrating that the conditions of competition determination in Report 473 was not arrived at in a properly considered manner, and that Swedish imports should not be cumulated with other exports for the purposes of the injury and causation determination required under the relevant Sections.

12 Material difference between the decisions

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

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

That independent examination was undertaken by the Commission, with the outcome being that Swedish imports did not, we believe, cause injury in any of the contract examples referred to by the Commission.

The proposed decision would therefore result in the revocation of the relevant notices with respect to exports from Sweden.

D Conclusion and request

The decision to which this application refers is a reviewable decision under Section 269ZZA of the Act.

Where references are made to the Commission and its recommendations, it is those recommendations which were accepted by the Minister and form part of the reviewable decision that DBS seeks to have reviewed.

DBS is an interested party in relation to the reviewable decision.

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

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

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

The correct or preferable decisions that should result from the grounds that DBS has raised in the application are dealt with in B and C above.

Accordingly, being fully compliant with the requirements of the Act, DBS requests the Review Panel to undertake the review of the reviewable decision, as requested by this application, under Section 269ZZK of the Act.

The Review Panel is requested to recommend to the Minister that, in accordance with Section 269ZZM, the reviewable decision (being the decision to publish notices under Sections 269TG(1) and (2)):

- in the event that the Review Panel finds that material injury was not caused by exports of ammonium nitrate from the subject countries - be revoked with effect from 25 June 2019; or, alternatively
- in the event that the Review Panel finds that material injury was not caused by exports of ammonium nitrate from Sweden - be substituted by a decision to publish a notice or notices in the same terms as made on 25 June 2019 and with effect from that date but amended so as to exclude from the notice exports of ammonium nitrate from Sweden.

Lodged for and on behalf of Downer EDI Mining – Blasting Services Pty Ltd by:

Daniel Moulis
Partner Director