

16 July 2021

Mr Scott Ellis
ADRP Member
Anti-Dumping Review Panel
GPO Box 2013
Canberra ACT 2601

Email: ADRP@industry.gov.au

Dear Mr Ellis

Dyno Nobel Asia Pacific Application for Review of Minister's decision on Report 565 – ammonium nitrate exported from the Russian Federation

We refer to the conference that was held on 15 July 2021 with Dyno Nobel Asia Pacific Pty Ltd's ("DNAP") Mr Greg Hayne (President) and Mr Jason Pavy (Senior Counsel). As requested, DNAP sets out below its written reasons in relation to Mr Ellis' question as to whether the Panel is able to consider evidence of events that have occurred after the Minister's decision.

Section 269ZZHA(1) provides that at any time after receiving an application for a review, the Panel is able to hold a conference of such persons it considers appropriate for the purpose of obtaining the relevant information. Section 269ZZHA(2)(a) provides that in making any recommendation to the Minister to either affirm or revoke the Minister's decision, the Panel may also have regard to "that further information to the extent that it relates to the relevant information."

Section 269ZZHA(2) does not include any caveat or limitation that excludes consideration of information by reference to when that information came into existence or the timing of events that it describes. Nor does any such limitation arise from the context or purpose of the provision. Rather, the only limitation is that the new information must "relate to" the "relevant information". That condition is met so long as the new information tends to support or undermine an aspect of the relevant information or the conclusions that have been drawn from it.

In so far as questions arise as to whether dumping *has occurred*, the Act provides expressly that such questions are to be determined by reference to goods exported to Australia during the "investigation period" (s 269TACB(1), and see s 269T(2AD), (2AE)). Even there, there is no logical reason why information that comes into existence at a later time could not shed light on the export price or normal value of goods exported during the investigation period.

However, no such limitation is imposed on the determination of whether material injury is occurring (s 269TAE); or (relevantly here) whether dumping, or material injury, *will occur or is likely to occur* (the questions posed by s 269ZHF(2)). Those issues involve prediction and there is no logical reason why they should be answered by reference only to events occurring before a particular date. Absent some express language, therefore, the powers of the Panel to receive and consider new information should not be read as if they were subject to such a limitation.

Nor could it be said that the Panel, in reviewing conclusions reached by the Commissioner under s 269ZHF(2), is required to proceed as if it were making the necessary predictions at the time of the Minister's decision (or some earlier time), making events that have occurred since that time irrelevant. That would require the Panel to defy reality. It would also create an unexpressed exception from the normal rule that a merits review body is to decide whether relevant criteria are met at the time of its decision and on the evidence before it (*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286).

The further information referred to by DNAP in its letter dated 13 July 2021 meets the threshold for consideration, as:

- (a) the information in relation to approaches [*commercially sensitive – to party or parties*] directly undermines the assertions made in the inquiry that Russian exports would be confined to the Russian domestic industry and spot tonnes only; and
- (b) the information in relation to the commissioning of additional capacity confirms information provided to the Commission that such developments were in train.

DNAP therefore contends that the ADRP member is not prevented from considering the new and relevant information provided by DNAP in its submission of 13 July 2021.

If you have any questions concerning this submission please do not hesitate to contact me on (07) 3026 3900.

Yours sincerely



Greg Hayne
PRESIDENT