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House of Representatives Standing Committee on Agriculture and Industry  
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CANBERRA ACT 2600

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**Orica Submission**

**Inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures**

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Orica Australia Pty Ltd ("Orica") is the Australian operations of Orica Limited, the world's largest supplier of commercial explosives and blasting systems to the mining industry.

As a member of the Australian industry manufacturing ammonium nitrate, Orica has been involved with the Anti-Dumping System commencing in 2000.

Orica welcomes the opportunity to provide this submission to the Committee's inquiry into Australia's anti-circumvention framework for anti-dumping measures.

If you have any questions concerning this submission, please do not hesitate to contact me

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## **Key Recommendations:**

Orica's recent involvement with Australia's Anti-Dumping System as an applicant company commenced in 2000 when it participated in an industry application for anti-dumping measures on ammonium nitrate ("AN") exported from the Russian Federation. Anti-Dumping measures have remained in place since May 2001, with Orica's ongoing involvement in Anti-Dumping Review and Continuation inquiries.

Orica has been committed to the ongoing effectiveness of the measures. Orica has, on occasions, encountered attempts by exporters to circumvent the measures. The learning from these experiences qualifies Orica to comment on the recently introduced anti-circumvention framework.

The introduction of the Division 5A of the Customs Act 1901 anti-circumvention provisions will assist in deterring exporters and importers from engaging in such activities. It will, however, be difficult to measure the overall success of the new provisions in delivering this outcome. From Orica's experience, the new provisions will assist certain industries in limiting the circumvention of measures. There remains certain areas where enhancements to the Division 5A provisions is required, including:

- addressing "minor" modifications of exported goods the subject of measures;
- extending measures to exports of goods from third countries immediately following the imposition of measures on exports from the original source country;
- extending measures to transshipment activities of exports the subject of measures through one or more countries;
- limiting the circumvention of measures where the exporter absorbs the anti-dumping measure and is reimbursed by the exporter; and
- making full use of the provisions – including retrospective measures – to deter circumvention activities.

Orica welcomes the recent reforms including the establishment of the Anti-Dumping Commission ("the Commission"). Additional fine-tuning of the Anti-Dumping System is required, including:

- improving timely access to measures (provisional measures from Day 60);
- limiting timeframe extensions to exporters for the completion of Exporter Questionnaire Responses ("EQRs");
- reinforcing the Parliament's commitment to complete investigations within the 155-day legislated timeframe;
- limiting timeframe extensions to the Statement of Essential Facts ("SEF") to a single request by the Commission of the Minister during the course of the inquiry; and
- the abolition of the lesser duty rule.

## **1.0 Orica's role in anti-dumping**

Orica has been involved as an applicant industry member in inquiries since 2000. Prior to this, the Australian AN industry was subjected to material injury from dumped exports from the Russian Federation ("Russia"). Russia today remains the largest manufacturer and supplier of AN products on the global market, with available artificially low, government-influenced gas prices contributing to low-AN export prices.

Anti-Dumping measures on Russian AN have existed in many other jurisdictions including the European union ("EU"), the United States ("US"), and Mexico. As a growth market, Australia was an obvious market of choice for Russian AN producers.

The anti-dumping measures on AN have been effective in limiting injurious Russian exports into the Australian market. This has enabled the Australian industry to re-invest in AN manufacturing infrastructure, continuing to the present time. AN production capacity in 2014 is approximately 3 times the annual of production capacity of installed assets operating in 2001.

The AN measures have been extended on two occasions (in 2006 and 2011) and are due to expire in May 2016. Reviews of the measures have also been conducted at periodic times.

Orica has witnessed a number of attempts by exporters to circumvent the anti-dumping measures. The circumvention activities have occurred in Australia and in other jurisdictions. It is from this background and role as a manufacturer of AN that Orica provides the following insight into certain anti-circumvention activities that may not be covered by the recent Division 5A activities.

## **2.0 Circumvention activities of foreign exporters and local importers**

The circumvention of anti-dumping measures is a major cause of reduced confidence in the Anti-Dumping System. Circumvention activities contribute to "leakage" that undermines the intent of the measures to remedy past unfair trading practices.

### **2.1 *Minor alterations to goods***

The EU AN industry was concerned about changes in exporter activity following the imposition of measures on AN exported from Russia. Producers/exporters altered the products through the addition of minimal amounts of calcium. The goods were then identified as "mixtures" of AN, and it was asserted that the "mixture" goods were not the subject of the measures.

The European Commission ("EC") concluded that the AN mixtures were alike to AN the subject of the measures and extended the goods description to include mixtures of AN where it is evident that the slightly altered goods have essentially

the same physical characteristics as the original goods, are sold via the same distribution channels to the same end-use customers, and are used in the same end-use applications, as the "goods".

Orica is concerned by recent developments in the steel industry (that appear to replicate problems of the US steel industry a decade ago) where a low-cost alloy is incorporated into the steel making process. The modified goods are then referred to as "alloyed" steel, and potentially are not covered by the measures. The US Department of Commerce has determined that the alloyed steel products (e.g. pipe & tube) fall within the scope of the original goods description and are therefore covered by the measures (with physical appearance, distribution channel, end-use, all relevant considerations).

The Division 5A anti-circumvention provisions do not address minor modifications of the goods exported to Australia. Orica views this as a concern as (just as in steel products imported into the US) it is a possible circumvention avenue for exporters of AN the subject of measures.

AN is a commodity product and there are significant volumes exported from Russia and the former Russian states. The low production cost associated with Russian AN makes it all the more realistic that additives can be incorporated into the finished AN at minimal cost. Orica does not consider that the present anti-circumvention activities included within Division 5A adequately address the problem of exporters modifying goods to avoid anti-dumping measures in the importing country.

Orica is seeking the Committee to recommend the inclusion of the minor modification of goods within the circumvention activities listed in Division 5A.

## **2.2 Exports from third countries**

Following the imposition of measures it is not uncommon for importers to seek-out new sources for supply. This is particularly the case where the market opportunities in Australia are significant. Following the imposition of measures on AN, Orica observed the emergence of AN imports from the Ukraine. Whereas the Ukraine is a major producer and exporter of AN, it is Orica's understanding that some of the AN exported from the Ukraine has been manufactured in Russia.

The emergence of the Ukraine as a source of supply to Australia could, at the time, be attributed to the imposition of measures on AN of Russian origin.

The anti-circumvention provisions of Division 5A do not address exports from a third country (i.e. country-hopping). It is Orica's understanding that the EU's anti-circumvention provisions do allow for extending the scope of the measures to a new country, however, it would be expected that there is a time limitation associated with the relativity of the emergence of the new source country and the imposition of the measures.

It is further understood that country-hopping activities could potentially be limited to circumstances where the exporter in the country to which the measures apply, commences exports to Australia from a related-party in a third country. Orica views the role of the Australian importer in country-hopping activities as pivotal in the commencement of exports to Australia from a new source country. Orica does not view it as reasonable to limit country-hopping activities to only associated parties of the exporter. Exports from third countries that emerge following the imposition of measures on exports from the first country are just as easily to have been elicited by the Australian importer.

The Division 5A anti-circumvention provisions should extend to the activities of foreign exporters and Australian importers to elicit exports of goods (including slightly modified goods) from a third country following the imposition of measures on the exporting country.

### **2.3 Transshipment activities**

S.269ZDBB(4) includes provisions to address the export of goods through one or more third countries. The provision provides:

- “(4) Circumvention activity, in relation to a notice, occurs if the following apply:*
- (a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice does not apply;*
  - (b) before the export, there were one or more other exports of the goods from a foreign country to another foreign country;*
  - (c) the first of those other exports was from a foreign country in respect in respect of which the notice applies;*
  - (d) the circumvention goods would be the subject of the notice if they were exported to Australia by an exporter in respect of which the notice applies;*
  - (e) section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia.”*

The foregoing addresses circumstances where the exporter the subject of the measures exports the subject goods via another country for eventual export to Australia. Orica has encountered such circumstances recently with the export of AN to Australia that has been declared as of Malaysian origin. Orica is aware that Malaysia does not have AN manufacturing facilities and it is understood that the exported goods are of Russian origin.

This practice has occurred prior to the commencement of the Division 5A provisions. Orica has previously raised its concerns that the anti-dumping measures were being circumvented with the Australian Customs and Border Protection Service (“ACBPS”). Additionally, Orica has raised the incorrect country of origin issue with the Australian Bureau of Statistics (“ABS”) so that the imports can be correctly identified.

The nature of AN exporting activities involving Russian AN involves large shipments transported to port locations in Russia and the Ukraine (as well as other former Russian States locations) prior to re-allocation for export to another importing country. In some instances, AN of Russian origin can be transported to the Ukraine and the forwarded to Malaysia where it “enters the commerce” of Malaysia. The goods may then be further re-directed to Australia.

The low commercial cost of producing AN in Russia (due to the government’s role in fixing raw material gas prices) permits AN to be transshipped via one or more countries for eventual export to Australia. The transshipped goods therefore lose their origin in the process.

Orica does not consider that the provisions contained in Division 5A as they relate to transshipped goods addresses all situations involving the movement of the exported goods to Australia, particularly where the movements result in the goods reclassification concerning origin.

#### **2.4 Duty absorption**

The absorption of the anti-dumping measure by the importer of the goods is a further concern associated with circumvention activities. The importer can forego profit or secure a subsequent disbursement from the exporter to compensate for the absorption of the duty in the final selling price of the goods the subject of the measures.

Orica notes the inclusion of s.269ZDBB(5) that addresses the avoidance of the intended effect of the anti-dumping measure. This provision is predicated on the “increasing the price commensurate with the total amount of duty payable” on the circumvented goods. However, duty absorption is not solely limited to the circumstance contained in s.269ZDBB(5). In certain circumstances, the importer may absorb a proportion of the anti-dumping measure, thereby discounting eligibility under s.269ZDBB(5) as the **total** duty payable is not reflected in the selling price.

Orica is also aware of recent developments with the Parliamentary Secretary accepting the recommendations of the Commission to apply measures on an *ad valorem* basis. The rationale for *ad valorem* measures is based upon the Commission’s understanding that *ad valorem* measures are the most common form of measure in other jurisdictions. It should be noted that *ad valorem* measures are readily circumvented by exporters via further reductions in the export price.

Orica therefore does not support the application of *ad valorem* measures as the exporter is able to avoid the intended impact of the measure by further reducing the export price (as well as achieving a reduction in the duty liability). Where the exported goods are readily available at dumped prices (e.g. AN) measures that are based upon the *ad valorem* form of duty are likely to be ineffective. It is Orica’s considered position that the most appropriate form of measure is that based upon the combination method (i.e. involving a fixed and variable components) that

addresses reductions in the export price below the Ascertained Export price ("AEP") to limit further injury to the applicant industry.

## **2.5 Provisions to deter circumvention**

It has been Orica's experience that anti-dumping measures are readily circumvented. Where this occurs, the Customs Act 1901 includes penalties that may be levied on the incorrect declaration of goods upon entry into Australia. In order to actively discourage circumvention activities, Orica considers that the new Division 5A requires further provisions to address minor modification, country-hopping, and duty absorption.

Further procedural enhancements can be included to apply provisional measures at Day 60 of an investigation where country-hopping has occurred following a new application by the applicant industry. Additionally, retrospective measures could be considered to permit penalties to be collected retrospectively from Day one of a new investigation into the dumping of exports from the third country.

It is Orica's view that the full extent of the anti-dumping remedies have not been actively applied by the Commission and the Minister. Retrospective measures can be readily applied in some circumstances to bolster the effectiveness of the Anti-Dumping System.

## **3.0 Operation of Division 5A anti-circumvention framework**

The anti-circumvention framework contained in Division 5A was introduced in June 2013. The Commission has commenced only one anti-circumvention investigation into exports of aluminium extrusions from P R China since commencement of the new provisions. The investigation is examining claims that imports of the goods the subject of the measures have been sold at a loss in Australia.

The investigation is incomplete as at the date of this submission. It is premature to comment on the new provision in the absence of any outcome on the sole investigation undertaken thus far.

## **4.0 Anti-circumvention practices of other jurisdictions**

As mentioned above, the EU has anti-circumvention provisions contained in Article 13 of the EU Regulations. The provisions address:

- exports from third countries;
- the minor modification of goods; and
- exports of parts of goods (including sub-assembly of goods).

The EU has conducted anti-circumvention inquiries into goods that have been slightly modified to the goods the subject of the measures. The provisions address circumstances of country-hopping. Importantly, circumvention is defined as:

“..a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition the duty, and **where there is evidence of injury or that the remedial effects of the duty are being undermined** in terms of the prices and/or quantities of the like product..” (emphasis added).

It is Orica’s view that the EU’s anti-circumvention provisions are far more reaching than the current provisions included in Division 5A. The EU provisions provide for greater clarity as to coverage and do not exclude activities such as minor modification and country hopping.

The US also has anti-circumvention regulations that address the avoidance of measures. These are referred to as “Scope Determination” provisions that address the following activities:

- Goods completed or assembled in the U.S. (i.e. parts, components and sub-assemblies of goods);
- Goods completed or assembled in third countries;
- The slight modification of goods; and
- ‘later-developed’ goods.

As with the EU, the US is able to address activities associated with the minor modification of goods the subject of measures.

The Canadian anti-circumvention provisions are included in a broad-ranging regulation that permits the administration to investigate “any matter” associated or related to the goods the subject of the measures. The Canadian investigations are “review” investigations that can include anti-circumvention activities.

The anti-circumvention activities of other major jurisdictions (EU, Canada and the US) include provisions to address the minor modification of goods the subject of measures. The EU anti-circumvention provisions extend to exports from third countries. Orica requests the Committee to recommend that the anti-circumvention provisions of Division 5A be extended to include the minor modification of goods, exports from third countries (i.e. country-hopping) by both foreign exporters and Australian importers, and all transshipment and duty absorption activities.

Additionally, Orica encourages the Committee to further recommend that the Commission reform policies to permit the full use of available remedies to address circumvention activities (including provisional measures from Day 60 and retrospective measures where possible). The introduction of these further enhancements to the anti-circumvention provisions of Division 5A will strengthen the provisions an act as an adequate deterrent to further circumvention activities.



## 5.0 Further improvements to the Anti-Dumping System

Access to relief from injurious dumping in a timely manner is a key objective of the Anti-Dumping System. Additionally, the measures must be effective in delivering on this outcome. It is of concern to applicant industries that recent delays in accessing remedies are becoming more frequent, raising concerns about the administration of the System.

Orica has observed delays in investigations in each of the following key stages of the application/investigation process:

- the “screening” of the application extends beyond 20 days;
- the granting of extensions to exporters to complete EQRs, in some instances by as much as 21 days to the initial 40-day period;
- access to a Preliminary Affirmative Determination (“PAD”) and provisional measures is extending beyond Day 110 of the investigation timeframe;
- the publication of the SEF is extended to periods well in excess of the legislated 110 days; and
- further delays are emerging post the SEF and report to the Minister.

The increasing delays in key milestones of the application/investigation process reduces the applicant industry’s confidence in the ability of the Anti-Dumping System to adequately address dumping in a timely manner. The circumvention activities employed by foreign exporters and Australian importers post the imposition of measures, further reduces the stakeholder’s confidence in the System.

It is a frustration to applicants that the intent of the Parliament to deliver anti-dumping outcomes in a timely manner to reduce exposure to material injury is hampered by administrative delays in the investigation process. The delays in accessing measures often are as costly as exporters and importers circumventing measures.

Finally, Orica encourages the Committee to consider a reform associated with the use of the ‘Lesser Duty Rule’. In other jurisdictions the use of the lesser duty rule is less prominent (e.g. Canada and the EU) and certainly does not impact the final measures in such a manner as in Australia. Orica notes the impact of measures in the recent decision on Quenched and Tempered Plate Steel exported from Finland, Japan and Sweden where the dumping margins for two of the three countries of 28.9 and 39.8 per cent had “effective” measures applied of 15.4 per cent and 13.6 per cent respectively due to the application of the lesser duty rule.

Orica does not support the application of the lesser duty rule in every investigation. Where exporters are found to have exported at dumped prices and caused material injury to the Australian industry, anti-dumping measures based upon the full margin of dumping should be applied.