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17 November 2016

Mr T King
Assistant Director
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Tim

APRIL Fine Paper Trading Pte Ltd
Comments concerning BJ Ball importer visit report

1 On behalf of APRIL Fine Paper Trading Pte Ltd and PT Riau Andalan Kertas (collectively, "APRIL"), we wish to make the following submissions regarding the verification report of BJ Ball Pty Ltd ("BJ Ball")[1]:

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A Introduction

2 APRIL is perturbed by the recommendation that sales between APRIL and BJ Ball were not "arm's length", based merely on the finding that BJ Ball's sales *in the Australian market* of A4 copy paper *exported to Australia* by APRIL were not profitable. We submit that such a recommendation is incorrect and, ultimately, unsustainable. The mere fact that BJ Ball *may* have sold APRIL A4 copy paper at a loss cannot support an inference that transactions between APRIL and BJ Ball were not at arm's length.[2] None of the other facts available to the Commission support that inference: in fact they all militate against it. In particular we note:

[1] http://www.adcommission.gov.au/cases/EPR%20301%20%20350/EPR%20341/104%20-%20Verification%20Report%20-%20Importer%20-%20BJ%20Ball.pdf

[2] Having reviewed the available information regarding the methodology used by the Commission to come to this finding, APRIL is concerned regarding the accuracy of this finding, as is discussed in greater detail in section E of this submission.

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a) APRIL and BJ Ball are separate, independent entities, which operate subject to their own commercial imperatives.

b) They have no corporate involvement with each other.

c) They have no common or related family members holding shares, cross-interests or positions of influence in both companies.

d) There is no evidence of non-commercial dealings between the parties.

3 When the Commission properly considers all pertinent circumstances, the irrefutable position is that BJ Ball's loss-making sales (if that be the case) give no support to a proposition that APRIL's sales to BJ Ball were not at arm's length. The suggested finding in BJ Ball's visit report is contrary to the finding made in APRIL's own visit report. In stark contrast to the Commission's policy, no true *consideration* of the issue is demonstrated in the BJ Ball visit report.

4 BJ Ball's sales of A4 copy paper in the Australian market are a domestic competition issue, which has nothing to do with APRIL or APRIL's commercial or corporate behaviour. Below cost A4 copy paper sales by an A4 copy paper distributor in competition with Paper Australia Pty Ltd ("Paper Australia") do not of themselves constitute actionable dumping by either that distributor or its foreign supplier, in the same sense that below cost sales by a second A4 copy paper manufacturer based in Australia (if there was one) would not either.

B Importer's sales at a loss do not legally compel a non-arm's length finding

5 Section 269TAA(2) of the *Custom Act 1901* (Cth) ("the Act") provides that the Minister ***may*** treat a finding that an importer resells goods in Australia at a loss as ***indicating*** that the importer will directly, or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or part of the price.

6 It is trite law that it is not mandatory for the Minister to treat an importer's loss as indicating some form of reimbursement. In any event, Section 269TAA(2A) is of very limited effect. The very most that can be said of an importer's unprofitable sales is that they are an ***indicator*** that there ***may*** be a reimbursement. That circumstance by itself is not positive proof that APRIL reimbursed or compensated BJ Ball in any way. This is consistent with the Commission's *Dumping and Subsidy Manual*, which clearly and unambiguously states:

> *Sales at a loss are an indicator only that the buyer may have been reimbursed, compensated or otherwise provided with a benefit. Sales that are at a loss do not compel a finding that the sales are not arms length.*[3]

7 The Commission's policy – consistent with the actual terms of the Act – is that it is not enough to base a non-arm's length finding simply on a determination that an importer's sales of the goods under consideration were made at a loss. Section 269TAA(2A) is not a statutory assumption in and of itself. It requires factual support – some other acts, matters or things – to give it credible sustenance. Even if the Commission disagrees with this framing, the "indication" is clearly rebuttable by the facts that have come to light in the process of this investigation.

8 Such an approach is the only appropriate construction of Section 269TAA(2A). Reading that section as a mandatory provision would clearly conflict with the express and unambiguous terms of that section, and would cause undue prejudice to the interests of exporters as well

[3] Page 25.

as to provide an unfair advantage to local producers. It would cause the Commission to depart from the province of cross-border price discrimination, and to trespass into the province of domestic competition.

C APRIL's sales to BJ Ball were most clearly at arm's length

9 The BJ Ball visit report has absolutely no detail regarding the considerations said to give substance to a proposed "non-arm's length" recommendation. Every indication is that the proposed recommendation is based solely and singly on a finding that BJ Ball was unable to sell the goods under consideration at a profitable level. Therefore the proposed recommendation is *prima facie* in breach of the terms of the Act and the Commission's own policy. It does not take into account the following important facts:

(a) APRIL's pricing practices were fully disclosed and discussed with the Commission during its verification [CONFIDENTIAL INFORMATION DELETED – APRIL's pricing practices].

(b) After a forensically detailed verification, which spent a significant amount of time considering APRIL's sales practices and commercial relationships with its customers, the Commission expressly concluded that sales between APRIL and BJ Ball *were arm's length*.[4]

10 APRIL submits that the verified facts clearly rebut any "indication" apprehended under Section 269TAA(2). APRIL has nothing to do with the business decisions of BJ Ball, and certainly does not provide BJ Ball with any form of reimbursement, compensation, or benefit in the terms of that Section. The fact that APRIL has such a high no dumping margin on its own merits also contradicts a concern that there might be some kind of common endeavour on the part of APRIL and BJ Ball.

D Implications arising from sale of BJ Ball's EDOP division to Paper Australia

11 BJ Ball's Edward Dunlop Office Products business division ("the EDOP division") - which is responsible for importation and sale of the copy paper subject to this investigation - has been purchased by the applicant in this investigation, namely Paper Australia. This is a highly relevant fact, as is explained in detail below. It is a matter of serious concern to APRIL that the Commission has not mentioned this fact in its visit report because that would mean either that the Commission has chosen not to report a fact that is highly significant to this investigation, or that the applicant itself and BJ Ball have each decided, independently or collusively, not to inform the Commission of that fact.

12 We direct the Commission's attention to the attached article from *Stationary News* which announces Paper Australia's acquisition of the EDOP division. Notably, the Sales Director of Paper Australia publicly states, in that document:

> *Over time, we anticipate replacing the paper that is currently imported by EDOP with locally-manufactured, competitively-priced office paper*

[CONFIDENTIAL INFORMATION DELETED – APRIL's concern regarding this transaction]. The Australian Competition and Consumer Commission was concerned to the extent of informally reviewing the proposed acquisition, but without ultimately opposing it.

13 The relevance of these circumstances is as follows:

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[4] Page 12.

(a) It can readily be implied from this fact that APRIL and BJ Ball have a completely arm's length relationship. If the two companies were in some sort of cooperative relationship, why would one of them sell the entire operation which the two companies were alleged to be jointly operating or collaborating in? It certainly would be an odd thing for APRIL to "subsidise" or "reimburse" BJ Ball such that BJ Ball would then return the "favour" by entering into a transaction with Paper Australia with the stated purpose of supplanting APRIL's sales to the Australian market.[5]

(b) It is not beyond the realms of business strategy to consider that BJ Ball would seek to add value to the sale of the EDOP division itself by trying to "buy" as much market share as it could in the lead up to the negotiations and eventual moment of that sale. One way of achieving this could be to sell copy paper cheaply (so as to increase its market share). The sudden addition of a double digit percentage (i.e. CONFIDENTIAL INFORMATION DELETED – number]) of the Australian market to Paper Australia's throughput would provide a huge competitive advantage to Paper Australia. In this context, loss-making sales by BJ Ball should not be considered as evidence of a reimbursement by APRIL, or at the very least the Commission should look for solid, contrary and probative evidence as to APRIL's alleged role in BJ Ball's decision to make sales as a loss. Such evidence is, however, not available because APRIL has not encouraged or facilitated BJ Ball's sales behaviour and has not reimbursed its losses at all. The better view is that BJ Ball's loss making sales are evidence of a different and entirely independent commercial strategy of BJ Ball that has had absolutely nothing to do with APRIL.

(c) BJ Ball's verification visit apparently took place in July 2016. However, the visit report was not finalised until some three months later (i.e. on 24 October 2016). It is not inconceivable that, during this period of negotiation and consummation of the sale of the EDOP division to Paper Australia, it became apparent to either or both of the sale parties that a dumping finding against APRIL was in the best commercial interests of Paper Australia, and that the outcome of the Commission's verification of BJ Ball was relevant to those interests. Even if a collaboration of this sophistication is not present, one could at least expect that BJ Ball would have very little interest in establishing that it was profitable during the POI or that it would be profitable thereafter in a way that might cause losses to be recovered.

14 Given these circumstances, we consider that all evidence points to the fact that sales between APRIL and BJ Ball were at arm's length. Contrary to law and policy, the proposed recommendation in the visit report that they not be treated as having been at arm's length is based only upon the sole finding that BJ Ball apparently sold its goods unprofitably.[6] All actual evidence is to the contrary. Sales at a loss *may* be an indication of a reimbursement, but in this case they are not. The Commission must consider, in particular, the fact that EDOP, which imported and sold APRIL's A4 copy paper, is linked arm-in-arm with the applicant in this investigation, and probably has been for quite a long period of time. Accordingly, BJ Ball's unprofitable sales cannot be simply taken as an "indication" that the sales are not at arm's length, because there is ample evidence to the contrary.

E Accuracy of the finding that BJ Ball's sales were loss-making

15 We submit that it is irrefutable that the sales are at arm's length, or at the very least, that there is no indication to the contrary.

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[5] As per paragraph 12, APRIL objected to the acquisition. Further, as disclosed by footnote 6, the two companies are presently engaged in litigation.

[6] Moreover, this appears to have been based only on a sampling of only 10 out of hundreds of import transactions – as to which, see Section E below.

16 If, the Commission does not accept APRIL's proposition above, it would then be required to carefully examine the proposition that BJ Ball's sales of APRIL's A4 copy paper were indeed loss-making. The following submissions are therefore made in the alternative, in that we see no reason why the Commission would not accept APRIL's proposition above that the sales are at arm's length.

17 As stated above in paragraph 13(c), there would have been no incentive for BJ Ball to defend itself against a finding that its sales were loss-making in the circumstances of the acquisition of its EDOP division by the applicant.

18 The visit report has little detail as to how it was determined that BJ Ball's sales of APRIL's A4 copy paper were loss-making. In order to ensure that the finding is accurate and to provide proper insights into this finding for the benefit of interested parties, we request the Commission to review and confirm the following:

(a) Whether the Commission's finding that BJ Ball's sales are "at a loss", based upon an analysis of only 10 import transactions, is sound and correct? We note that during the POI APRIL issued some **[CONFIDENTIAL INFORMATION DELETED – number]** invoices to BJ Ball. Given this, APRIL does not consider that it is appropriate to find that BJ Ball sold *all* of its paper at a loss, on the basis of only 10 import transactions.

(b) Whether any "cost to import" items were excluded from BJ Ball's SG&A? In our experience, if one is not careful, SG&A may be based on an allocation of all costs, including those individually reported in the importer questionnaire spreadsheet as being costs to import and sell. Such an outcome would mean that BJ Ball's costs are overstated.

(c) Whether a very simple top-line averaging of SG&A has been adopted in working out the SG&A percentage for the EDOP division itself, in circumstances where other divisions of BJ Ball consume much higher amounts of SG&A than the EDOP division, because of the nature of the products and the activities that those other divisions are involved with?

(d) Whether SG&A has been properly allocated based on sales effort and the particular channel concerned? We note the reference in the BJ Ball visit report to certain sales being sold directly to customers, rather than being kept in stock. Clearly direct sales will incur much less cost, as they do not need to be unpacked and stored, and presumably have different transportation costs as well. This should be reflected in the SG&A costs applicable to those sales.

(e) Whether the prices used to determine BJ Ball's profitability were specific to APRIL's product? In this regard, APRIL expects that BJ Ball purchases A4 paper from a number of sources, both Australian and imported. It is important that the Commission appropriately takes into account these matters when determining the resale price. For example, the Commission should check BJ Ball's product coding and volumes to ensure that cheaper product has not been sold under the same brand name as certain APRIL copy paper.[7]

(f) Whether there has been any consideration of the recoverability of BJ Ball's purported losses? In line with the Commission's policy, if a loss is recoverable, the sales should not be said to have taken place at a loss. Indeed, we submit that the sale price of the

[7] This is not an idle concern. APRIL recently initiated litigation against BJ Ball, effectively in relation to the improper registration of an APRIL trademark (*APRIL Fine Paper Trading Pte Ltd v BJ Ball Pty Ltd ACN 005 190 036* (NSD1885/2016)).

EDOP division to Paper Australia should be attributed wholly and directly to the recovery of any demonstrated loss on BJ Ball's sales in the POI.

(g) We respectfully submit that the Commission should also confirm if BJ Ball's sales of all A4 copy paper (whether subject to this investigation or not) are profitable.

19 We reiterate that APRIL does not agree with the finding that BJ Ball's sales were loss-making to be capable of establishing that APRIL's sales to BJ Ball were not arm's length. However if the Commission does not agree with APRIL, it is legally required that the loss-making finding be fully scrutinised, to ensure accuracy, transparency and natural justice.

F Conclusion

20 When all circumstances are considered, we feel that it is abundantly clear that APRIL's sales to BJ Ball were at arm's length at all relevant times. There is no basis to adopt a deductive export price.

21 APRIL did not engage in dumping during the POI, and did not receive any subsidies from the Government of Indonesia. With respect, this should be entirely plain to the Commission by now. In the meantime, APRIL is faced with the loss of the business of its Australian customer to Paper Australia, and the need to rebuild its market position in Australia.

22 We respectfully request that this investigation be terminated as it relates to APRIL immediately.

Yours sincerely

Daniel Moulis
Principal Partner

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