# MinterEllison

9 February 2017

**FOR PUBLIC RECORD**

**BY EMAIL: operations2@adcommission.gov.au**

Director - Operations 2
Anti-Dumping Commission
GPO Box 1632
Melbourne VIC 3001
AUSTRALIA

Dear Sir

**A4 COPY PAPER FROM CHINA – STATEMENT OF ESSENTIAL FACTS (SEF) No. 341**

1. We represent UPM Asia Pacific Pte Ltd (**UPM AP**), UPM China Co., Ltd (**UPM China**) and UPM Kymmene Pty Ltd (**UPM Kymmene**) [collectively **UPM**] in relation to the above matter.

2. We refer to paragraph 27 of our submission of 29 December 2016 in response to SEF 341in which we formally requested that an opportunity be provided to our client, prior to giving the Minister a final report under s.269TEA of the *Customs Act 1901* (**Act**), to comment on any proposed modifications, revisions or additions to the Commission's interpretation and application of the statutory provisions relevant to the assessment or determination of UPM's export price.

3. We repeat our contention that any failure to provide such an opportunity would constitute an actionable breach of the rules of natural justice. Furthermore, such failure would be inconsistent with Australia's obligations under Article 6.4 and 6.9 of the Anti-Dumping Agreement.

4. In view of the magnitude of the change in the preliminary dumping margin attributed to our client between PAD 341 and the SEF, there can be no doubt that the assessment of export price in this matter is a 'critical issue or factor'[1]. As pointed out in our earlier submission, it is unclear from the public record in general and the SEF in particular which entities are identified by the Commission as the exporter and importer under s.269TAB and which provisions of that section are being invoked to determine export price. In addition the

[1] *Kioa v West* (1985) 159 CLR 550 at 587; *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309 at 329-323; *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs* [2008] FCA 443 at [113];

inconsistencies and contradictions in the variety of views expressed in relevant documents prepared by the Commission make it impossible to identify any rationale or supporting analysis that the Commission may be relying on to formulate a final recommendation to the Minister. Obviously the Commission must attempt to remedy these deficiencies in its final report to the Minister.

5. We note from a recent judgement of the Federal Court[2] that the Commissioner has expressed his commitment to being 'open and transparent' and to 'not blind side' interested parties. In the light of these laudable aspirations to facilitate procedural fairness, we look forward to the opportunity of commenting on the Commission's remediated position in the very near future.

Yours sincerely
**MINTER ELLISON**

John Cosgrave
Director, Trade Measures


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[2] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309 at [26]