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By Email

Mr Justin Wickes
Director, Investigations 2
Anti-Dumping Commission
Melbourne VIC 3000

Dear Mr Wickes,

RE: Review 551 – Exports of A4 Copy Paper Statement of Essential Facts – Submission by Australian Paper

I refer to Australian Paper's submission of 15 April 2021 in response to the Anti-Dumping Commission's (**Commission**) preliminary findings of fact in its Statement of Essential Facts (**SEF**) for Review 551.

That submission reveals more about the nature of Australian Paper than the submissions it makes. It also ignores a number of fundamental findings of the Commission in the SEF.

To begin with, the submission ignores the Commission's finding that Australian Paper, with its market dominance and control of distribution channels in the Australian A4 Copy Paper market, as well as the often referred to 'price sensitive' nature of the market, is undercutting the prices of APRIL's exports of A4 Copy Paper in that market and not the other way around. Any injury being caused to the Australian A4 Copy Paper market is being caused by Australian Paper to APRIL through price undercutting.

Presumably, this is also occurring with respect to other participants in the Australian A4 Copy Paper market given the Commission's findings on this issue in the SEF and, especially, when regard is had to Jackeroo Pty Ltd's submissions on the non-injurious price. That is, Australian Paper's imports of A4 Copy Paper have been undercutting the prices of its own locally produced products, as well as those of other participants in the market, and inflicting injury on itself as well as others.

Australian Paper's submission that the anti-dumping measures have ceased to be effective must be seen in this context. In addition, no evidence is provided by Australian Paper as to when and why the measures have ceased to be effective and what injury has been caused as a result of the measures purportedly ceasing to be effective notwithstanding Australian Paper's dominant position in the market. This submission is thus mere assertion on Australian Paper's part unsupported by evidence. It has not been incurring injury from 'dumped' exports but, instead, inflicting injury on itself and others.

However, Australian Paper's submission supports APRIL's submission to the Commission that the scope of the review of the anti-dumping measures in Review 551 must extend beyond whether the variable factors

may have changed. If any alteration of the rate of the tax (i.e. dumping duty) may be required due to a change in the variable factors, which set the rate of the tax, then this requires an inquiry into and assessment of whether the tax has been effective and, if not, why not. Such inquiry must include whether any alteration to the rate of the tax will render the tax (i.e. measures) effective in achieving its policy objective of preventing or removing injury to the Australian A4 Copy Paper market caused through the effects of dumping.

As the Ministerial Direction on Material Injury (copy **attached**) states, it cannot simply be assumed or asserted that because dumping may exist, injury automatically follows. There is currently no evidence that injury is being incurred by the Australian industry during the review period, nor, if any, to what extent, let alone what may be causing it. No doubt the Commissioner would comply with that direction in recommending any alteration to the rate of tax (i.e. due to alteration to the variable factors)[1], and no doubt the Minister would wish to ensure his compliance with that Ministerial Direction.

Further, such an inquiry assessment also is required by Article 11.1 of the *WTO Agreement on the Implementation of Article VI of GATT 1994* (**WTO Anti-Dumping Agreement**). Under this provision, an "*anti-dumping duty shall remain in force only ... to the extent necessary to counteract dumping which is causing injury*". This means that in exercising the powers conferred on the Minister by Section 269ZDB of the *Customs Act 1901*, the Minister must have regard to the fact that the rate of tax (i.e. dumping duty) may be altered only to the "*extent necessary to counteract dumping which is causing injury*".[2]

That inquiry and assessment has not occurred. There is no evidence to support a continuation of or change in the rate of the tax (i.e. dumping duty) even if the variable factors may have changed.

This leads to the question based on the Commission's findings in the SEF as to why Australian customers are paying higher prices for A4 Copy Paper than prices available in other countries and globally, especially given Australian Paper's dominance of the Australian market. Why have the Australian industry's cost to make and sell and prices of A4 Copy Paper not been 'benchmarked' against those in the region or globally as part of Review 551? Why are Australian consumers paying to their detriment higher prices in the Australian A4 Copy Paper market that is dominated by one local participant when lower prices are available globally? Given the Commission's findings in the SEF of higher prices in the Australian market compared with other countries globally, why has this not been referred to relevant Australian government agencies, such as the Australian Competition and Consumer Commission and/or the Productivity Commission, for inquiry? These are questions that Australian customers and other interested parties should be asking of Australian Paper and the Australian Government.

Finally, it is evident from the Commission's findings in the SEF that the anti-dumping measures are no longer warranted. Putting aside the fact that:

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[1] Section 269TA of the *Customs Act 1901*.

[2] The statutory provisions in Division 5 of Part XVB of the *Customs Act 1901* are, of course, to be construed in accordance with Australian's international obligations under Article 11.1 of the WTO Anti-Dumping Agreement: refer Section 15AB of the *Acts Interpretation Act 1901* and *Pilkington (Aust) Ltd v Minister for Justice and Customs* [2002] FCAFC423; (2002) 127 FCR 92; 71 ALD 301. In this regard, Article 11.1 of the WTO Anti-Dumping Agreement is a 'relevant matter' for the Commissioner and the Minister to have regard to as required by Sections 269ZDA(3)(b) and 269ZDB(1) of the *Customs Act 1901* in the exercise of their respective statutory discretions.

- APRIL's prices of A4 Copy Paper are not undercutting those of Australian Paper, but, rather, it is the other way around;
- Australian Paper's prices, whether of locally produced or imported A4 Copy Paper, appear to be also undercutting those of other participants in the Australian A4 Copy Paper market according to the Commission's findings in the SEF and Jackaroo's submissions; and
- there is no evidence justifying the continuation of, or any alteration to, the rate of tax (i.e. dumping duty) to achieve the policy objective of the tax preventing injury to a domestic industry caused through the effects of dumping;

anti-dumping measures are not intended nor warranted to protect a domestic industry with market dominance by a sole domestic producer, largely obtained by acquisitions as determined by the Commission, with high cost to make and sell in a market with higher prices as compared with prices in markets in other countries and globally at the expense of Australian consumers of A4 Copy Paper and, consequently, the Australian economy generally. These 'other economic factors' clearly evidence that the anti-dumping measures are no longer warranted.[3]

Any recommendation by the Anti-Dumping Commissioner to the Minister, therefore, should be either that the measures be revoked or that the Minister directs that a review be undertaken to determine that the measures are no longer warranted. Such recommendation should be made as soon as possible.

Please contact me if you have any queries or concerns or require clarification on any of the foregoing.

Yours sincerely,

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[3] See also Section 269TAE(2A) of the *Customs Act 1901*, especially paragraphs (a), (c), (d) and (f), and Article 3.5 of the WTO Anti-Dumping Agreement.

Australian Government
Australian Customs and Border Protection Service

AUSTRALIAN CUSTOMS DUMPING NOTICE NO.2012/24

New Ministerial Direction on Material Injury

On 22 June 2011, the Australian Government announced its '*Streamlining Australia's anti-dumping system*' policy. This announcement included a commitment to revise the current Ministerial Direction on Material Injury to confirm that profits foregone and loss of market share in an expanding market are relevant injury considerations.

The previous guidance on material injury was based on a Ministerial Direction from former Minister Beddall in 1990 and two letters from then Minister Button and Minister Vanstone in 1991 and 2000 respectively. In an effort to consolidate the previous guidance, and deliver on the Government's commitment to streamline the anti-dumping system, the Minister for Home Affairs has issued a new Ministerial Direction under section 269TA of the *Customs Act 1901* (the Act).

The new Ministerial Direction includes the following key points from the previous guidance:

- material injury is injury which is not immaterial, insubstantial or insignificant;
- the injury must be greater than that likely to occur in the normal ebb and flow of business;
- identifying material injury will depend on the circumstances of each case;
- injury caused by other factors must not be attributed to dumping or subsidisation, however dumping or subsidisation need not be the sole cause of injury to the industry; and
- it is important to consider regional dumping, the greater impact of injury during periods of economic downturn and reduced rates of growth as an element of injury.

The new Ministerial Direction also recognises that there may be circumstances where dumping or subsidisation may still result in injury where it has caused the rate of an industry's growth to slow, without causing it to contract, or where an industry suffers a loss of market share in a growing market, without a decline in profits.

Under the terms of subsection 269TA(1) of the Act, the Chief Executive Officer of the Australian Customs and Border Protection Service is bound to comply with the new Ministerial Direction, a copy of which is attached for reference.

Further information

Enquiries concerning this notice may be directed to the Customs liaison hotline on telephone number (02) 6275 6066, fax number (02) 6275 6888 or email tmliaison@customs.gov.au.

Kim Farrant
National Manager
International Trade Remedies Branch
CANBERRA ACT

1 June 2012

MINISTERIAL DIRECTION ON MATERIAL INJURY 2012

SUBSECTION 269TA(1) OF THE *CUSTOMS ACT 1901*

COMMONWEALTH OF AUSTRALIA

I, JASON CLARE, Minister for Home Affairs, under subsection 269TA(1) of the *Customs Act 1901*, give the following directions to the Chief Executive Officer of Customs relating to the determination of material injury to an Australian industry under section 269TAE of the *Customs Act 1901*.

On 22 June 2011 the Australian Government announced its '*Streamlining Australia's anti-dumping system*' policy. This included a commitment to revise the current Ministerial Direction on material injury to confirm that profits foregone and loss of market share in an expanding market are relevant injury considerations.

The previous guidance on material injury is contained within former Minister Beddall's direction under section 269TA of the Customs Act dated 4 September 1990, a letter from the then Minister Button to the Comptroller-General of Customs dated 16 December 1991 and a letter from the then Minister Vanstone to the CEO of Customs sent in December 2000 ('the previous guidance'). It is timely to clarify certain aspects of, and to consolidate, the previous guidance. This direction is intended to replace the previous guidance so far as it relates to material injury.
I now direct you as follows in connection with carrying out or giving effect to your powers and duties under Part XVB of the Act.

My direction is to be construed as subject always to the law, including Part XVB. Consistently with section 269TA(2) my direction does not deal with the carrying out or the giving effect to your powers or duties in relation to a particular consignment of goods or to like goods to goods in a particular consignment but deals instead with the general principles for carrying out or giving effect to your powers. You must still have regard to the facts of the individual case. It is not enough to assert that because there is dumping or subsidisation injury automatically follows.

I direct that identification of material injury be based on facts and not on assertions unsupported by facts.

Consistent with Australia's international trade obligations under the World Trade Organization's *Anti-Dumping Agreement* and *Agreement on Subsidies and Countervailing Measures*, I would expect it to be shown that the industry is suffering injury, and that the injury caused by dumping or subsidisation is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business.

Subject always to the law, I direct you to consider material injury to be injury that is not immaterial, insubstantial or insignificant. I direct that there is no threshold amount that is capable of general application. Rather, identifying material injury will

depend upon the circumstances of each case and will differ from industry to industry and from time to time. A material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance.

In the past some uncertainty has arisen over establishing the requirements for material injury where other factors may be contributing to injury suffered by the industry. Injury caused by other factors must not be attributed to dumping or subsidisation. However, I direct that dumping or subsidisation need not be the sole cause of injury to the industry.

Whether dumping or subsidisation is the sole cause of injury or whether there are other contributing factors, I direct that the injury caused by dumping or subsidisation must be material in degree. This is consistent with Australia's international trade obligations under the World Trade Organization's *Anti-Dumping Agreement* and *Agreement on Subsidies and Countervailing Measures*.

I note that relevant economic factors to be considered when assessing material injury are referenced at subsection 269TAE(3) of the Customs Act. These include, but are not limited to the quantity of goods of the kind in question, or like goods, produced or manufactured in the industry; the value of sales of, or forward orders for, goods of that kind or like goods, produced or manufactured in the industry; the level of profits earned in the industry, that are attributable to the production or manufacture of goods of the kind in question, or like goods; the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of the goods in question, or like goods; the terms and conditions of employment (including the number of hours worked) of persons employed in the industry; and investment in the industry.

I understand that the law does not prevent judging the materiality of injury caused by a given degree of dumping or subsidisation differently, depending on the current economic condition of the Australian industry suffering the injury. In considering the circumstances of each case I direct that you consider that an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped or subsidised products in the market, could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping or subsidisation.

I note that anti-dumping or countervailing action is possible in cases where an industry has been expanding its market rapidly, and dumping or subsidisation has merely slowed the rate of the industry's growth, without causing it to contract. In cases where it is asserted that an Australian industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in an industry's rate of growth may be just as relevant as the movement of an industry from growth to decline. I direct that it is possible to find material injury where an industry suffers a loss of market share in a growing market without a decline in profits. As in all cases, a loss of market share cannot alone be

decisive. I direct that a loss of market share should be considered with a range of relevant injury indicators before material injury may be established.

I note that in cases where the dumped or subsidised imports hold a small share of the Australian market, it may be difficult to demonstrate material injury. I direct that no minimum standard should be used to determine whether dumped or subsidised imports have a sufficient share of the Australian market to cause material injury.

In considering cases with regional implications I direct that you bear in mind that an industry's vulnerability to dumped or subsidised imports may be confined to a specific region of Australia. Injury may be occurring in the part of the industry located in that region, without directly affecting the rest of the Australian industry. In this circumstance it is still possible to take account of regional injury of this kind and, in appropriate circumstances, to judge such injury to be material to the industry as a whole.

I direct that the above directions be adapted and applied by you to consideration of claims of threatened material injury or hindrance to the establishment of an industry.

The Ministerial Direction on Material Injury dated 4 September 1990, is revoked.

This instrument takes effect on the day after it is signed.

Dated: 27 April 2012

JASON CLARE
Minister for Home Affairs