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By Email

Dr Bradley Armstrong PSM
Anti-Dumping Commissioner
Anti-Dumping Commission
Melbourne VIC 3000

Received 17 January 2022 (as extended)

Dear Commissioner,

RE: Continuation Inquiry No 588 – Exports of A4 Copy Paper from the Republic of Indonesia – Submission – Statement of Essential Facts

I refer to Statement of Essential Facts 588 (SEF)¹ in relation to the abovementioned continuation inquiry (**Continuation Inquiry 588**) into exports of A4 Copy Paper from the Federative Republic of Brazil (**Brazil**), the People's Republic of China (**China**), the Republic of Indonesia (**Indonesia**) and the Kingdom of Thailand (**Thailand**) (collectively, **Subject Countries**).

On behalf of my clients, APRIL Far East (Malaysia) Sdn. Bhd (**AFEM**) and PT Riau Andalan Kertas (**RAK**) (collectively, **APRIL**) the following submissions and observations are made in relation to the SEF.

This submission is set out in several sections, namely:

- Section 1: Executive Summary, Statutory Test and Initial Observations
- Section 2: Submission on Dumping Margin Determination for APRIL
- Section 3: Submissions on Analysis Methodology and Findings in SEF
- Section 4: Submission on National Interest and Miscellaneous Matters

Section 1: Executive Summary, Scope of Inquiry, Statutory Test and Initial Observations

1. Executive summary

For the reasons set out in this submission, it is submitted that the findings, information and evidence referred to in the SEF do not support a conclusion that the expiry of the anti-

¹ It is assumed that the SEF is your statement of essential facts as required by section 269ZHE of the *Customs Act 1901* (since this function has been expressly imposed on you by statute by the Federal Parliament), unless, of course, this statutory function has been delegated by you to the Anti-Dumping Commission or one of its officers under section 269SMR of the *Customs Act 1901*, although there is no evidence of such delegation. The Anti-Dumping Commission's function is, of course, to assist you in the performance of your powers and functions, as opposed to performing them: section 269SMD of the *Customs Act 1901*.

dumping measures would lead or would be likely to lead to the continuation or recurrence of the material injury that these measures were intended to prevent.

Specifically:

- the injury incurred by Paper Australia Pty Limited (**Australian Paper**), the sole producer of the Subject Goods in Australia, during the period from 2015 to date (**AD Review Period**) was caused by other economic factors, including in particular, Australian Paper's 'inability' to increase its price for the subject goods to fully recover its cost to make and sell the subject goods in a progressively contracting high priced commodity product market that is over-supplied with domestic production;
- hence, Australian Paper's unprofitability and progressively increasing unprofitability due to its excessive production for the domestic market during the AD Review Period, requiring the excess to be sold in the 'less lucrative' export market also unprofitably, was the only injury it incurred during the AD Review Period and such injury was caused by factors other than any 'dumping' of the Subject Goods from the Subject Countries during the AD Review Period; and
- as such, any injury that Australian Paper has allegedly incurred, cannot be and should not be attributed to 'dumping' of exports of the Subject Goods from the Subject Countries during the AD Review Period.

Consequently, that injury will continue to occur regardless of whether the anti-dumping measures are allowed to expire.

Further, expiry of the anti-dumping measures will not result in the occurrence of material injury separately from that being incurred, nor exacerbate that injury already being incurred by Australian Paper that is caused by other factors. There is no evidence and none referred to in the SEF that expiry of the anti-dumping measures would necessarily have this effect, let alone cause material injury.

For these reasons, APRIL submits that the anti-dumping measures must be and can only be allowed to expire.

2. Purpose of continuation inquiry

The purpose of this continuation inquiry is to ascertain whether the existing anti-dumping measures applying to exports of A4 Copy Paper from the Subject Countries to Australia that are due to expire on 19 April 2022 should be continued for a further five (5) years.

The statutory power enabling the Minister to continue the anti-dumping measures for a further period of five (5) years is set out in section 269ZHG of the *Customs Act 1901*. There is no statutory test requiring that the Minister be satisfied of certain matters in order to continue the measures.

Rather, section 269ZHG of the *Customs Act 1901* requires the Minister to consider the report received from you pursuant to section 269ZHF of the *Customs Act 1901* and any other

‘information that the Minister considers relevant’ and then make a declaration of whether to continue the anti-dumping measures or not and, if the decision is to continue the measures, the measures may be altered in the manner permitted by that section.

Consequently, in deciding whether to continue the anti-dumping measures, the Minister is not confined to considering your report and the recommendations contained therein, but may also take into account any other information that the Minister considers relevant, such as information on whether the continuation of the anti-dumping measures is in the national interest.

The statutory requirement governing your report containing recommendations to the Minister as to whether the anti-dumping measures should be continued is set out in section 269ZHF(2) of the *Customs Act 1901*. That statutory provision expressly prohibits you from recommending the continuation of the anti-dumping measures unless you are satisfied that:

“the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent”.

Section 269ZHF(2) of the *Customs Act 1901* does not preclude your report to the Minister from containing other information. Rather, it simply precludes you from recommending to the Minister that the measures be continued unless the abovementioned conditions are satisfied.

For the reasons set out below, it is submitted that the expiration of the anti-dumping measures in question would not lead, nor would be likely to lead, to a continuation of, or a recurrence of, the material injury that these measures are intended to prevent. Consequently, you are precluded by section 269ZHF(2) of the *Customs Act 1901* from recommending to the Minister that the anti-dumping measures be continued.

3. Legal test for the phrase ‘... would lead, or would be likely to lead ...’ – Siam Polyethylene

In *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 (**Siam Polyethylene**), the Federal Court considered section 269ZHF(2) of the *Customs Act 1901*.

Specifically, His Honour, Rares J considered the ambit of the words “*would lead, or would be likely to lead*”.

His Honour determined that:

- (i) there is a distinction between ‘*would lead*’ and ‘*would be likely to lead*’ with the former being a prediction of something definite (‘*would lead*’) as opposed to something less definite (‘*would be likely to lead*’); and
- (ii) the word ‘*likely*’ in the phrase ‘*would be likely to lead*’ as used in section 269ZHF(2) of the *Customs Act 1901* should be interpreted as meaning ‘more probable than not’. (see paragraphs 48 & 49 of *Siam Polyethylene*).

Further, the statutory provision requires that you be satisfied of a causal link, supported by evidence, between the expiration of the anti-dumping measures and the likelihood of this cessation resulting in *'a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure is intended to prevent'*. The phrase *'... the material injury that the anti-dumping measure is intended to prevent ...'* refers to material injury to the Australian industry producing like goods 'caused' through the injurious effects of dumping occurring at the time of or following the expiration of the anti-dumping measures.

Hence the requirement that you be satisfied of the causal link between any injury found to have been incurred and/or likely to be incurred and the extent of that injury that is attributable to 'dumping' of A4 Copy Paper from the Subject Countries and that such injury so attributable is material.

As previously submitted², Australian Paper in its Application had failed to furnish grounds supported by evidence that showed how the expiration of the anti-dumping measures on 19 April 2022 would lead to, or would more probably than not lead to, *'a continuation of, or a recurrence of, ...'* material injury to the Australian industry producing the Subject Goods.³

Furthermore, it is submitted that no grounds have been established and no evidence put forward and set out in the SEF that indicates that the expiration of the anti-dumping measures on 19 April 2022 would lead, or would more probably than not lead, to *'a continuation of, or a recurrence of ...'* material injury to the Australian industry producing A4 Copy Paper caused by the injurious effects of 'dumping' attributable to exports of A4 Copy Paper from the Subject Countries.

4. Approach in the SEF to the test of 'would lead' or 'would be likely to lead'

Of concern is that the approach in the SEF to the test of whether *'the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent'* is largely formulaic, resulting in a sub-optimal analysis.

Essentially, that formulaic approach consists of asking the following questions:

² See APRIL submission of 6 September 2021 – Document No. 7 on Electronic Public Record.

³ The Commissioner had to be satisfied as to whether the application filed by Australian Paper contained information supported by evidence that established that, on the basis of the application, there *'appeared reasonable grounds for asserting that the expiration of the anti-dumping measures to which the application relates might lead, or might be likely to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent'*: section 269ZHD(2)(b) of the *Customs Act 1901*. The application must contain sufficient information and evidence that support a conclusion that there 'appeared' to be reasonable grounds for the assertion. This does not require a conclusion that there are reasonable grounds, but only that the information and evidence in the application support a conclusion that there *'appeared'* to be reasonable grounds for the assertion. For example, an assertion that a person was killed by a bullet shot to the head does not require an actual bullet shot to the head to support the conclusion that there 'appears' to be reasonable grounds to believe that that is how the victim was killed.

- is there ‘dumping’ of A4 Copy Paper exported from the Subject Countries and is it likely to continue;
- has the Australian industry incurred injury and is that injury likely to continue;
- has the ‘dumping’ caused the ‘injury’ and is this likely to continue; and
- is the injury ‘material’?

Given the findings in Review 551 that A4 Copy Paper were continuing to be exported from the Subject Countries at ‘dumped’ export prices and that it is common knowledge that Australian Paper’s A4 copy Paper business has been unprofitable since the imposition of the anti-dumping measures and that unprofitability was ‘material, which was verified by the Commission in this inquiry, three of the four questions in the above formula would seem to be answered without further inquiry.

Given that both the ‘dumping’ and the ‘injury’ had continued following the imposition of the anti-dumping measures, a finding that the expiration of the anti-dumping measures would not lead to the continuation of the material injury that these measures were intended to prevent would seem remote.

Rather, it would seem probable that a finding that the expiry of the anti-dumping measures would lead to a continuation of the material injury that the measures were intended to prevent would be made. This on the assumption, of course, that the injury being occurred could be attributed to the ‘dumping’ of exports of A4 Copy Paper from the Subject Countries that was continuing to occur notwithstanding the presence of anti-dumping measures that were intended to prevent such occurrence.

The problem with such a formulaic approach is that it assumes that the factors comprised in the test of whether the expiration of anti-dumping measures ‘*would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping ... and the material injury that the anti-dumping measure is intended to prevent*’ operate in isolation from, for example:

- the prevailing market conditions in the Australian A4 Copy Paper market;
- the structure and operation of the Australian market;
- the high price of A4 Copy Paper in the Australian market;
- the commercial motivation of participants in the market;
- changes in technology affecting the Australian A4 Copy Paper market;
- the cost to Australian businesses and consumers of high priced A4 Copy Paper;
- the over-supply of domestic production in the market, and

other factors affecting the Australian A4 Copy Paper market and the economic performance of the Australian industry in that market with those market conditions.

These are all factors relevant to the decision of the Minister whether to continue the anti-dumping measures or not and which the Minister is expressly entitled to take into account in making that decision.

However, these factors have been essentially ignored or, at least, not taken into account in the recommendations made in the SEF. Rather, the proposed recommendations as set out in the SEF appear exclusively based on whether the expiry of the anti-dumping measures *'would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent'*.

5. *Initial observations*

The power conferred on the Minister by section 269ZHG of the *Customs Act 1901* to continue anti-dumping measures is not dependent on the fulfilment of some statutory test. Rather the requirement is that the Minister have regard to the report furnished to him by you and the recommendations contained therein, as well as any other information that the Minister considers relevant.

In this regard, the requirements for a decision to continue anti-dumping measures are not dissimilar to those required for the imposition of anti-dumping measures in the first place. That is, the requirements under section 269ZHG of the *Customs Act 1901* are not dissimilar to the requirements for the publication of a dumping duty notice pursuant to section 269TG(1) and (2) of the *Customs Act 1901*.

You, therefore, would be required to include findings in your report to the Minister as to whether the expiration of the anti-dumping measures *'would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent'* as well as any other information of which you are aware that might be relevant to the Minister's decision.

In the existing circumstances, it would seem that what is critical in such findings is whether a causal link between 'dumping' of A4 Copy Paper by exporters from the Subject Countries and any injury found to have been incurred and/or likely to be incurred by the Australian industry producing A4 Copy Paper is established and, if so, to what extent that injury that is attributable to 'dumping' of A4 Copy Paper from the Subject Countries is material.

In addition to such findings, assuming them to be made, the Minister ought to take into account whether other factors exist that are relevant to whether the anti-dumping measures should be continued or not.

It is submitted that there are such other factors and they can be grouped under the heading 'national interest'.⁴ That is, there are other factors that should be taken into account in the consideration of whether it would be in Australia's national interest for the anti-dumping measures, that is a form of tax, to be continued for a further period of five (5) years

⁴ That the 'national interest' should be taken into account in the imposition of anti-dumping measures was expressly recognised in the Federal Government's *'Streamlining Australia's anti-dumping system: An effective anti-dumping and countervailing system for Australia'* (June 2011) (copy **attached**). This would equally apply to the Minister's discretion in deciding whether to continue anti-dumping measures.

regardless of whether the expiry of the measures *'would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent'*.

For example, would it be in the national interest to continue the anti-dumping measures, that is, a tax, for a further five (5) years to provide tariff protection to an industry that has been unprofitable for the past four (4) years and progressively so, despite such tariff protection, due to the inevitable and progressive technological change in the relevant Australian market as it transitions from paper-based solutions to electronic (digital) solutions? Is it in the national interest to provide that tariff protection to the cost of Australian businesses and consumers in the form of higher prices than otherwise would likely apply and outside of industry policy and budgetary processes? These would seem relevant considerations for the Minister in making the decision to continue the anti-dumping measures or permit them to expire.

These matters are addressed in Sections 3 and 4 of this submission.

In addition, an initial observation is that no recourse has been made in this inquiry to the use of experts providing expert advice on matters relevant to this inquiry such as in relation to the Australian A4 Copy Paper market, including developments in that market, prevailing market conditions in that market and the prognosis of the future of that market, as well as the effect that the imposition of a tax on imports of A4 Copy Paper has had and is likely to have on Australian businesses and consumers and the Australian economy generally.

In its *'Streamlining Australia's anti-dumping system; An effective anti-dumping and countervailing system for Australia'* (June 2011) (copy **attached**), the Federal Government recommended that greater use be made of experts with the requisite skills, qualifications and experience to provide advice and assistance on key issues in investigations, reviews and inquiries.

It is submitted that such expert advice would have been and still would be of benefit in this inquiry.

Section 2: Dumping Margin Determination for APRIL

2.1 Deficient methodology and application

In the SEF, the Anti-Dumping Commission determined a dumping margin of 59.7%.

This obviously is significantly different from the margin of 14.7% determined in Review 551.

The issue, therefore, is what caused the increase in the margin of dumping when there has been no material decrease in prices in the Indonesian A4 Copy Paper market, nor a material increase in prices in the Australian A4 Copy Paper market that could account for such a substantial increase in the dumping margin within approximately twelve (12) months.

To assist in identifying that cause or causes, the following hypothetical margin calculations were undertaken and interim dumping duty payable, which are based on the fixed and variable methodology set out in Section 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013 (Regulation)* and the Commission's explanation in Report 551, both extracted at **Attachment A:**

Hypothetical 1

Assume that:

- the price payable by AFEM to RAK is \$100 (*ascertained export price*);
- the Indonesian domestic selling price is \$120 (*normal value*);
- the dumping margin is \$20 or 20%; and
- the price payable by the Australian customer to AFEM (excluding overseas freight, etc.) is \$150 (*actual export price*).

If the customs value on importation is the actual export price (\$150), then the fixed component of the interim dumping duty payable would be calculated by applying the *ad valorem* rate to the customs value.⁵ The interim dumping duty payable would be \$30 (\$150 x 20%). This calculation would uplift the price payable on importation to \$180, or \$60 above the normal value. This is clearly not the objective of anti-dumping measures and is in breach of the WTO Anti-Dumping Agreement.

However, if the 'export price' of the particular goods is the ascertained export price, as required by Section 5(3)(a)(i) of the Regulation, then the *ad valorem* rate is applied to that price (that is, \$100 x 20%) and the interim dumping duty payable would be \$20⁶. This calculation would uplift the price payable on importation to an amount equal to the normal value, which is the objective of the anti-dumping measures.

Importantly, in the former calculation, part of the interim dumping duty would be payable on a component of the actual export price, namely, AFEM's trading margin, which is not included in the dumping margin determination.

This results in a windfall amount of interim dumping duty being payable to Australian Border Force to which the Federal Government is not entitled because of the incorrect application of the *ad valorem* rate to the actual export price and not to the ascertained export price.

Hypothetical 2

⁵ Refer to Divisions 1 and 2 of Part VIII of the *Customs Act 1901* and the WTO Agreement on the Implementation of Article VI of GATT.

⁶ Note: this calculation assumes the application of the *ad valorem* rate to the customs value (i.e., price payable in import sales transaction between AFEM and Australian customer) as opposed to 'export price' determined by Commissioner under section 269TAB of the *Customs Act 1901*, being the 'export price' referred to in Section 5(3)(a)(i) of the Regulation.

Assume that following the imposition of the anti-dumping measures, there was a change in transfer pricing rules and/or the agreement between RAK and AFEM that had the effect of reducing the price payable by AFEM to RAK, the 'export price' to \$90 but all other amounts remained the same, including the price payable by the Australian customer to AFEM.

The effect of this would be that the interim dumping duty would be calculated as follows:

- fixed component: \$30 ($\$150 \times 20\%$), plus
- variable component: \$10 ($\$90 - \100),
- interim dumping duty payable equals \$40,

thereby uplifting the price payable on importation from \$150 to \$190, or \$70 above the normal value. Again, this is clearly not the objective of anti-dumping measures and is in breach of the WTO Anti-Dumping Agreement.

This is because of the misapplication of the *ad valorem* rate (20%) to the 'actual export price' and not to the 'export price' (that is, the price between AFEM and RAK).

Also, it assumes that the Australian customer is aware of the fall in the 'export price', which would be highly unlikely, and declare it in the import declaration when clearing the particular goods through customs, which again, is highly unlikely.

It would be equally unlikely that the 'export price' of the particular goods would be determined pursuant to section 269TAB of the *Customs Act 1901* as is required to lawfully apply the *ad valorem* rate.

This highlights the assumption that the actual export price and the ascertained export price refer to the same 'price', which is not a correct assumption, at least not in the case of APRIL's exports.

Hypothetical 3

Assume the facts set out in Hypothetical 1 but the importer resells the product in question into the domestic market at \$220 with selling, general and administrative expenses of \$10 and interim dumping duty of \$30. In such scenario, what is to preclude the importer from absorbing the interim dumping margin in its profit margin given there is no statutory obligation to pass on interim dumping duty?

This would indicate that the injury being incurred by the domestic industry is not being caused by the product in question or, at least, not because of 'dumping'. This is because the dumping margin was calculated on an 'export price' that was not the 'price' at which the product in question entered into the commerce of the importing country but was based on a 'price' occurring earlier in the supply chain.

Hypothetical 4

Regrettably, the problems do not end there. Take the scenario in Hypothetical 1 and then calculate the interim dumping duty payable using the fixed and variable methods, which is as follows:

- fixed component: \$30 ($\$150 \times 20\%$), plus
- variable component: \$0 ($\$150 > \100),
- interim dumping duty payable equals \$30,

Then work out the dumping margin for, say, this continuation inquiry using the method adopted by the Commission and assuming that the 'actual export price' of the goods is equal to the 'ascertained export price' (that is, \$100, being the price last determined to be the 'export price') and AFEM's trading margin remains the same (that is, \$30) and the normal value is the same (that is, \$120).

Theoretically this should result in the duty paid price to equal the normal value (that is, \$120) – that is, an un-dumped price on clearance through customs.

However, the calculation of the dumping margin for this continuation inquiry is:

- actual export price (\$100) minus AFEM trading margin (\$30) = \$70 (export price determined in accordance with the Commission's methodology);
- \$70 – normal value (\$120) = \$50 or a dumping margin of approximately 70% of the Commission's export price of \$70.

What has occurred in this Hypothetical is that the exporter has priced its product to the importer at a price exclusive of interim dumping duty but equal to the ascertained export price so that only the fixed component of the interim dumping duty is payable. There is no circumvention.

Further, because that fixed component is based on the ascertained export price, the product enters into the commerce of Australia, after payment of the interim dumping duty, in an amount equal to the normal value (that is, an un-dumped price).

However, if the dumping margin is 're-determined' using the Commission's methodology - namely, the revised actual export price based on the ascertained export price less AFEM's trading margin to derive the price payable by AFEM to RAK (that is, the revised ascertained export price), the resulting 'ascertained export price' is inevitably considerably lower.

Hence the increase in the dumping margin. This is due to the methodology adopted by the Commission. The process is essentially circular.

Conclusion

In light of the above, it can be concluded that:

- (i) the interim dumping duty payable in Hypothetical 1 is artificially increased because the fixed component is calculated on the actual landed value that includes AFEM's

- trading margin, whereas that trading margin is excluded from the dumping margin determination (that is, in the export price between RAK and AFEM); and
- (ii) the dumping margin in Hypothetical 4 is necessarily inflated because it uses as its base price (that is, the actual export price) the ascertained export price, which does not include AFEM's trading margin. An actual export price that equals the ascertained export price is necessarily below the actual export price in Hypothetical 1. In addition, it is reduced below the ascertained export price in Hypothetical 1 due to the deduction of AFEM's trading margin. Hence, the increased dumping margin in Hypothetical 4.

It must be noted that in the case of Hypothetical 4, a landed value equal to the ascertained export price (that is, the export price determined in Hypothetical 1, being the price between RAK and AFEM) has the effect that interim dumping duty is properly calculated on the ascertained export price resulting in the product entering into the commerce of Australia at an 'un-dumped' price due to payment of the interim dumping duty. On a 'dumping duty assessment' it should be determined that the amount of interim dumping duty was the amount properly payable on the ascertained export price (that is, no avoidance).

In any event, it is submitted that the "cause" of the increase in the dumping margin was due to the erroneous methodology adopted by the Commission and its application in working out the interim dumping duty payable. That is, having determined the 'export price' in Review 551 and this continuation inquiry as the price paid or payable by AFEM to RAK (that is, exclusive of not only overseas freight and insurance but also AFEM's "trading margin"), the Commission:

- (i) applied the *ad valorem* fixed duty component to the price payable to AFEM by its Australian customers (that is, the actual export price), instead of to an 'export price' determined under section 269TAB of the *Customs Act 1901* that does not include AFEM's "trading margin" as required by Section 5(3)(a)(i) of the Regulation; and
- (ii) if the actual export price (that is, the price paid by the Australian customers) in the transactions in the review period for this continuation inquiry was equal to or based on the 'ascertained export price' (that is, the price payable by AFEM to RAK and still included a "trading margin" for AFEM), then that would necessarily result in an inflated dumping margin as set out in Hypothetical 4.

Hence, the deficiencies with the Commission's methodology in applying the dumping margin in working out the interim dumping duty payable, which arguably could lead to the resulting implications for the dumping margin determination in this continuation inquiry. Essentially, it would involve a failure to appreciate that in APRIL's case, the 'export price' (that is, price payable by RAK to AFEM) and the 'actual export price' or 'landed export price' (that is, price payable by Australian customers) are separate and different prices of different composition and their application to working out any interim dumping duty payable can lead to unintended and erroneous consequences.

This issue would not arise if the ‘actual export price’ and the ‘ascertained export price’ referred to the same price – that is, the price payable by the importer, which would ordinarily be the case. This is contemplated by Section 5(3)(a) of the Regulation as it contemplates a comparison between two prices, namely, the “export price” of the particular goods, which, by definition is an ‘export price’ determined under section 269TAB of the *Customs Act 1901* and not the ‘customs value’ (that is, actual price payable by the importer in the import sales transaction) of the particular goods and the “ascertained export price”, being the export price determined by the Minister under section 269TAB of the *Customs Act 1901*. In other words, a comparison of ‘like-with-like’. This is not the case for APRIL.

2.2 *Dumping margin determination for APRIL*

Having regard to the analysis in the preceding section, the question is what is the position regarding the dumping determination for exports of A4 Copy Paper from Indonesia by APRIL?

Clearly the reason for the substantial increase in dumping margin from that found in Review 551 was due to a decrease in the ‘actual export price’ (that is, the price payable by AFEM’s Australian customers) as determined by the Commission. This could only be the case as all other relevant factors remained materially unchanged.

The question then is why did the price payable by AFEM’s Australian customers decrease significantly in a relatively short period of time between 2019 and 2020/21 to result in the significantly increased dumping margin?

The answer to this question lies, at least in part, in the determinations of the ‘export price’ and ‘normal value’ and the fact that while they are derived from actual prices, both are calculated amounts. The issues that this raises for each and the consequences that follow are set out below.

Export prices

Because the Commission has (erroneously) determined that the ‘exporter’ is RAK, not AFEM, the ‘export price’ has also been erroneously determined as the price payable by AFEM to RAK for the A4 Copy Paper.

In making this determination, the Commission also has determined that the price payable by AFEM to RAK was not at arm’s length as it appeared to have been influenced by the relationship between the parties. APRIL disagrees with this determination and this is addressed later in this submission.

However, for this reason, the Commission calculated the ‘export price’ payable by AFEM to RAK pursuant to section 269TAC(1)(c) of the *Customs Act 1901*. This was done by taking the arm’s length negotiated and agreed prices between AFEM and its Australian customers and deducting from those prices various amounts to derive a notional Free on Board (**FOB**) (Port Banten, Indonesia) ‘export price’.

Included in those deductions was a deduction for AFEM's 'trading margin', that is, 'profit margin', as appropriate. Why this was deducted from the calculation is unclear.

If AFEM was a mere facilitator of RAK's supposed export transactions to Australia, why was that 'trading margin' deducted and not treated similarly to any other commission and/or service fees payable to entities that assist an exporter in its exports, such as agents, brokers, logistics agents, etc.?

To treat it as a deductible amount suggests or indicates that the Commission considers AFEM's role is not one of mere facilitator. It appears that AFEM's role is different, but precisely what it is has not been elaborated on in the SEF? In any event, however that role is characterised, it would seem AFEM is treated as a principal and, as such, is indicative that AFEM is the 'exporter'.

This notwithstanding, if AFEM is no more than a mere facilitator of RAK's export of A4 Copy Paper from Indonesia to Australia, then the deduction of AFEM's 'trading margin' is clearly inconsistent with that position.

AFEM's 'trading margin' should have been included and not deducted.⁷

Normal values

The determination of the normal value for APRIL's exports was undertaken by the Commission pursuant to section 269TAC(1) of the *Customs Act 1901*. That is, it was based on the actual selling prices of A4 Copy Paper by RAK into the Indonesian A4 Copy Paper market to customers that were exclusively 'distributors' of that product in that market.

Those normal values were calculated by the Commission on an MCC basis, that is, according to GSM⁸ and by adjusting those prices by adding and deducting certain amounts pursuant to section 269TAC(8) of the *Customs Act 1901* to effect, in the Commission's words, a 'fair comparison' with the 'export prices'.

In addition, the Commission made certain calculations, referred to as 'timing adjustments', for those MCC categories for which there were inadequate sales by RAK during a relevant period for normal value purposes.

APRIL contends that there are a number of issues with these adjustments and calculations in the normal value determination that render the dumping and dumping margin determination erroneous and, indeed, unlawful.

⁷ See further Section 2.8 on deduction of the 'trading margin' in 'export price' determinations.

⁸ The determination of normal values on an MCC basis (that is, based on GSM) would indicate that a similar approach is required in the 'material injury' and 'causation' analysis as A4 Copy Paper in different MCC categories (that is, A4 paper with different GSM) would be differently priced and in a price sensitive market, this would influence purchasing decisions. The SEF does not indicate that such an analysis has been undertaken.

First, adjustments in domestic selling prices pursuant to section 269TAC(8) of the *Customs Act 1901* are required where the domestic selling prices of like goods and the 'export prices are:

"modified in different ways by taxes or the terms or circumstances of the sales to which they relate",

so that *"those differences would not affect its comparison with that export price"*.

The adjustments here in question are those set out in Table 19 of the SEF (at page 48).

However, those adjustments relate to various 'costs' incurred in a cost accounting analysis of the cost to make and sell the product in question and, as such, identify differences in the categories of such costs between the domestic and export sales transactions and/or differences in the amounts incurred in such costs.

There is no commercial reason for such costs or the amounts of such costs to have '*modified in different ways*' the selling prices in the domestic and export sales transactions and certainly there is no evidence of any such modifications. This would seem to be an erroneous and unlawful application of differences in a cost to make and sell cost accounting analysis applied to prices without analysis or evidence that such prices have been so modified.

For example, the base price for the determination of the 'export price' is the price payable by AFEM's Australian customers to AFEM. What evidence is there in the negotiation and agreement of those prices that the parties took into account costs such as credit terms, packaging expenses, inland freight in Indonesia and demurrage fees? None, and the prices were not 'modified' by those costs. There is no evidence that they were, nor any explanation why they would be.

Further, given the manner in which the prices between AFEM and RAK are arrived at, there is no basis for such prices to be modified by these costs. Nor is there any evidence that they were.

This reveals a fundamental misconception that the Commission has between 'costs' and 'prices'. The latter is neither affected nor modified by the former, and even if it is, not directly in equal amounts. Further, there is no evidence of this having occurred here.

Such cost accounting analysis of the cost to make and sell a product may be necessary to determine that the product is being sold profitably and, if not, why not. However, it has no necessary effect on 'prices' if these are negotiated at arm's length in an open market, which clearly is and was verified as having been the case here with AFEM's Australian customers that provided the base prices. Hence, the term 'market prices'.

These adjustments, therefore, were erroneously and unlawfully made.

Second, regarding the ‘timing adjustments’, these were apparently required because information concerning certain domestic sales by RAK for certain relevant periods was not available. Essentially, as APRIL understands it, those adjustments were made to prices obtained in domestic sales occurring in an earlier period for the same MCC to account for absence of domestic sales by RAK during a subsequent period and likely changes to pricing in that subsequent period. These timing adjustments were set out in Table 18 of the SEF (at page 47) and were stated to be calculated as follows:

*“The timing adjustments relied on the movement in the normal value for an MCC of the closest product specification or the relevant **export MCC movement in cost of production.**”* (bold added)

This should be unexceptional in the sense that the cost of production of A4 Copy and any movement in such cost of production, would be identical for A4 Copy Paper produced by RAK for domestic and export sales as identical production processes are involved. Hence, why the ‘export’ movement in cost of production’ was used is unclear, as well as why movements in the cost of production were used for this purpose?

Those ‘timing adjustments’ again assumes such costs directly affect and modify the prices in question. That is, an assumption has been made that the prevailing market conditions in which those prices are negotiated are irrelevant. Clearly that is not the case. That is, the assumption that the costs directly affect and modify the prices in question and the assumption that prevailing market conditions in which those prices are negotiated are irrelevant are both erroneous.

APRIL has undertaken an analysis of the amount of such ‘timing adjustments’, that is, the amount by which the relevant normal values are so adjusted with changes in domestic selling prices in the Indonesian A4 Copy Paper market as reflected by domestic sales of A4 Copy Paper of the same MCC in the Indonesian A4 Copy Paper market.

That analysis reveals that the ‘timing adjustments’ significantly exceeded changes in selling prices in the Indonesian A4 Copy Paper market for the relevant periods and, consequently, the normal value so determined did not reflect ‘*comparable prices, in the ordinary course of trade, for the like products when destined for consumption in the exporting country*’ (Article 2.1 of the WTO Anti-Dumping Agreement). In other words, they do not reflect the ‘normal value’ as required by WTO rules.

Significantly, as compared with the pricing of other products, such as, for example, pulp, where the prices of those inputs to manufacture were benchmarked to confirm that they reflected market prices, no such benchmarking was undertaken by the Commission to ensure that the ‘normal values’ produced by the ‘timing adjustments’ reflected market prices. No doubt data could readily have been obtained from organisations such as RISI for this purpose, as has been the Commission’s past practice.

Nor was APRIL's views sought on the reasonableness of such adjustments or to substantiate the reasonableness of such adjustments.

Hence, the deficiencies in such 'timing adjustments' which require their recalculation to accurately reflect changes in prices in the Indonesian A4 Copy Paper market.

Finally, section 269TAC(8)(b) of the *Customs Act 1901* requires that where domestic sales are not in respect of identical goods to those in export sales, adjustment to the domestic selling price is required so that the differences in the product sold domestically do not affect the comparison with the price of the product sold in export sales.

Here, A4 Copy Paper sold domestically, that is, in the Indonesian A4 Copy Paper market is not identical to that sold in export sales to AFEM's Australian customers. The A4 Copy Paper sold domestically is APRIL's premium A4 Copy Paper, known as 'PaperOne' (reference: [Paper Products | Renewable Plantation Fibre | PEFC Certified - APRIL Group \(aprilasia.com\)](#)) and, as such, obtains a premium price in the Indonesian A4 Copy Paper and a higher price than the non-premium APRIL A4 Copy Paper sold in export sales to Australia.

Accordingly, an adjustment is required pursuant to section 269TAC(8)(b) of the *Customs Act 1901* to take account of those differences in prices in domestic and export sales.

Deficiencies with application of working out interim dumping duty and implications

The above analysis also has identified another deficiency. That is, the erroneous application of the fixed and variable method in determining the interim dumping duty by the Commission and, consequently, Australian Border Force and, specifically, the fixed component.

Basically, the *ad valorem* duty rate is applied to the customs value (that is, actual export price) as if AFEM was the 'exporter', when the Commission (wrongly) determined the exporter was RAK. In other words, the Commission applied the fixed and *ad valorem* rates to the wrong 'export price' – either RAK is the exporter or AFEM is the exporter. The Commission's inconsistency in this regard would result the erroneous working out and collection of any interim dumping duty payable.

The *ad valorem* rate is applied to the customs value (that is, actual export price). That is, it is applied to the price paid or payable by the Australian customer to AFEM under the relevant import sales transaction, as opposed to the 'export price'⁹⁹ of the particular goods imported or ascertained export price, whichever is the greater.

Applying the *ad valorem* rate to the customs value (that is, actual export price) means that that rate is applied to a component of the customs value (that is, AFEM's trading margin) not

⁹⁹ The reference to 'export price' of particular goods in Section 5(3)(a)(i) of the Regulation is a reference to an 'export price' determined for the particular goods under section 269TAB of the Customs Act 1901, being where and how 'export prices' are to be determined for the purposes of Australia's anti-dumping regime.

included in the dumping margin determination because it is based on the price between RAK and AFEM that does not include that trading margin.

If that trading margin is, hypothetically, US\$400/MT, then, with an *ad valorem* rate of 14.7%, US\$58.80/MT interim dumping duty is payable that is referable to that component of the customs value (that is, actual export price). That is, US\$58.80/MT that is not lawfully payable as it relates to a component not comprised in the dumping margin determination.

This erroneous application of the *ad valorem* rate in the fixed and variable method of working out the interim dumping duty payable could be simply accommodated by an exporter without circumventing the measures by reducing the customs value (that is, actual export price) to an amount at or above the ascertained export price that still renders prices profitable: see Hypotheticals above. This may be available only where the 'export price' used to determine the dumping margin is not the same price (that is, actual export price) as that to which the *ad valorem* rate is applied in working out the interim dumping duty payable.

Such arrangements would not constitute circumvention as there is no statutory obligation for customs duties to be passed on – merely an expectation that they will be. That such arrangements do not constitute circumvention is because interim dumping duty at the fixed rate remains payable on a customs value (that is, actual export price) equal to or above the ascertained export price, thereby ensuring that the product on being introduced into the commerce of Australia is at an un-dumped price.

Several points of importance flow from this, namely:

- (i) whether in APRIL's circumstances and, in particular, the method of determining the export price and dumping margin, that is, the prices payable in the transactions between AFEM and RAK, the fixed and variable method is the appropriate method of working out interim dumping duty because it is inherently circular in its application – this is discussed further below; and
- (ii) given that, as found by the Commission, APRIL's prices in the Australian A4 Copy Paper market, went from the highest to the lowest but remained profitable, as do the prices of the other exporters, but Australian Paper's A4 Copy Paper business is unprofitable and increasingly so, which unprofitability is due to its increasing high cost to make and sell, the question inevitably arises as to what extent would Australia Paper need to increase its prices to become profitable? This, essentially, is not a cost accounting question but a market question. That is, to what extent could Australian Paper increase its prices to become profitable in an over-supplied market that is in decline due to technological change.

Regarding the issue raised in subparagraph (i) above, it would seem that the fixed and variable method of working out the interim dumping duty payable on APRIL's exports is not administratively workable and has led to or is likely to lead to erroneous of the relevant provisions.

The appropriate alternate method would seem to be the floor price method or, alternatively, the fixed price method:

“Floor price duty method

- (4) A method to work out the difference between:
- (a) the export price of the particular goods; and
 - (b) the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice;
- to obtain the interim dumping duty payable on the goods.”

“Fixed duty method

- (6) A method to:
- (a) work out the difference between:
 - (i) the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and
 - (ii) the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and
 - (b) apply the amount by reference to a measure of the quantity of the particular goods to obtain the interim dumping duty payable on the goods.”

Of these two methods, the former would seem to have inherent to it the same problems as the fixed and variable method. That is, it would require the determination of the ‘export price’ of the particular goods on importation pursuant to section 269TAB of the *Customs Act 1901*.

Therefore, the fixed duty method would seem the preferable method, assuming that the deficiencies in the dumping determination for APRIL’s exports are rectified.

In any event, these matters require further consideration, including the implications of ‘export prices’ being the prices between RAK and AFEM for the application of the fixed and variable method of working out any interim dumping duty payable.

In relation to the point raised in subparagraph (ii) above, the issue there is whether and to what extent Australian Paper could raise its prices in the Australian A4 Copy Paper market

and, if so, to an extent necessary to return to profit. That is essentially not a cost accounting question but a market question.

That is, in an Australian A4 Copy Paper market characterised by:

- progressive decline year-on-year due to technological change and consequent falling sales volumes and demand;
- over-supply from domestic production by Australian Paper;
- import competition in a market unaffected by dumping due to the existence of anti-dumping measures since April 2017,

could Australian Paper increase its prices and, if so, to an extent necessary for its Australian A4 Copy Paper business to become profitable?

The evidence indicates that the answer to that question appears to be a 'no'. That is because historically and even with the presence of anti-dumping measures, Australian Paper has been seemingly unable or unwilling to increase its prices to become profitable.

Further, given the prevailing market conditions in the Australian A4 Copy Paper market, this is unlikely to change regardless of whether the anti-dumping measures are allowed to expire or are continued.

This raises questions concerning to what extent, if any, the injury that Australian Paper has incurred since the imposition of the anti-dumping measures is attributable to exports of A4 Copy Paper from the Subject Countries at 'dumped' export prices and, if so, to what extent. It also raises the question of the determination of a non-injurious price for Australian Paper in the SEF on the basis of an 'unsuppressed selling price' if it is prevailing market conditions, not dumping, precluding it from increasing its prices in the Australian A4 Copy Paper market.

2.3 What is or should be the 'export price'?

The principal point of dispute with the dumping margin determination in the SEF concerns the 'export price' determination and the implications/consequences that follow from these as outlined in the preceding section of this submission.

APRIL not only disagrees with it being determined that RAK, not AFEM, is the 'exporter' of exports of A4 Copy Paper from Indonesia to Australia by APRIL but also the methodology adopted in determining the 'export price' of such exports, regardless of whom is the 'exporter'.

The fundamental question is what is or should be the 'export price' for anti-dumping purposes? Should it be the price payable to the exporter or the price payable by the importer and what is the relevant transaction – the first or last import sales transaction? The answer to these questions has a material effect on a dumping margin determination.

The term 'export price' is not defined in the WTO Anti-Dumping Agreement. However guidance is provided by Article 2.1 of the WTO Anti-Dumping Agreement. That Article refers

to the 'export price' being the 'price at which the product is introduced into the commerce of the importing country':

"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

This would typically be the price payable in the last import sales transaction occurring on or before the importation of the product into the importing country. In Australia, this would in the majority of cases, well in excess of 90%, be the customs value using the 'transaction value' determined under Part VIII of the *Customs Act 1901*.

That this is the 'export price' is consistent with it, or a derivative of it lower down in the supply chain in the importing country, being the price at which the imported product competes on price with the like goods produced by the domestic industry in the importing country.

By whom the 'export price' is payable and to whom the 'export price' is payable would seem of less importance than identifying the 'price' at which the product exported to and imported into the importing country competes with the like good produced by the domestic industry and whether that 'price' is a 'dumped' price and thereby causes injury to the domestic industry in the importing country through the injurious effects of 'dumping'.

This was recognised by Edwin Vermulst, a highly respected and qualified international trade lawyer, in his text *'The WTO Anti-Dumping Agreement, A Commentary'*:

*"It may happen that foreign producers sell the product under consideration to other parties, typically traders, in the exporting country which then resell it to the importing country. On the basis of Article 2.1 it seems clear that the export price then is the price charged by the trader to the importer. Indeed, the transaction between the producer and the trader is an internal sale in the exporting country and in many cases the producer may not even know whether the trader will export the product under consideration, let alone to which destination."*¹⁰

It is submitted that, in determining the 'export price' pursuant to the provisions of section 269TAB of the *Customs Act 1901*, primacy should be afforded to what is the price at which the product in question, namely, A4 Copy Paper, is introduced into the commerce of Australia, as opposed to who pays and who receives payment.

In relation to APRIL's exports of A4 Copy Paper to Australia from Indonesia, that 'price' is the price paid or payable by AFEM's Australian customers in their import sales transactions with AFEM.

¹⁰ E. Vermulst, *'WTO Anti-Dumping Agreement, A Commentary'*, Oxford Commentaries on the GATT/WTO Agreements, Oxford Uni Press, Oxford, 2005, page 14, footnote omitted. For background on Edwin Vermulst, refer: [Edwin Vermulst \(wti.org\)](http://wti.org)

Your and the Commission's approach to this issue is inconsistent. Specifically, for the purposes of determining a dumping margin, the 'exporter' is considered to be RAK and the 'export price' is considered to be the price payable by AFEM to RAK. However, for the purposes of:

- assessing price undercutting – refer to Section 8.6.1. of the SEF; and
- working out the interim dumping duty payable in the application of the fixed and variable method,

the 'exporter' is considered to be AFEM and the 'export price' the price payable by AFEM's Australian customers to AFEM. This is contrary to Section 5(3)(a)(i) of the *Customs Tariff (Anti-Dumping) Regulation 2013* if, as contended by the Commission in the SEF, the 'export price' is the price payable by AFEM to RAK, which would also be the 'export price' for 'particular goods'.

As outlined earlier above, this misconception of the law has and will have unfortunate consequences.

It is submitted that the price between AFEM and its Australian customers is the 'export price' and should be so determined under section 269TAC(1)(c) of the *Customs Act 1901*.¹¹ The unfortunate consequences mentioned above could not and would not eventuate if determinations of the 'exporter' and the 'export price' are corrected.

2.4 Who is the 'exporter'?

Considerable effort has been expended in identifying who is the 'exporter' in relation to the exportation of products to an importing country, that is, to Australia in this case. The reasons for this are largely two-fold, namely:

- (i) anti-dumping essentially concerns the export by 'exporters' of products at prices less than their normal value and because of this cause injury to a domestic industry in the importing country and it is that behaviour of 'exporters' that anti-dumping is intended to influence so that it does not occur; and
- (ii) if the 'exporter' is determined to be an entity other than the producer of the product in question, such as a trading company, then this creates difficulties in obtaining information relevant to the determination of 'normal value', amongst other things.

While this is understandable, it nevertheless remains that it is only the price at which the product is introduced into the commerce of the importing country that is capable of causing injury to a domestic producer of like goods. No antecedent price can do this regardless of to whom it is payable as there is no necessary nexus between that price and the price at which the product enters into the commerce of the importing country.

APRIL's contention is, has been and remains that AFEM is the 'exporter' in the circumstances of its exports of A4 Copy Paper to Australia from Indonesia. This is for the reasons set out below.

¹¹ See further Section 2.8 below regarding the ADRP's approach to this issue.

What does an 'export price' purchase – conveyance from Indonesia to Australia?

The 'export price' is or is supposed to be the 'price' paid or payable for the product in question exported from the exporting country to the importing country, where, on importation it is introduced into the commerce of the importing country at that 'export price'.

This necessarily raises the question of what does an 'export price' purchase and specifically what does the 'export price' determined by the Commission in the SEF for the A4 Copy Paper exported by APRIL pay for?

The ordinary, general meaning of 'price' is an amount, usually expressed in monetary terms, required as payment for the supply of a good and/or service. In legal terms, it is the consideration payable for the supply of the good and/or service that, in the case of goods, results in a legally binding contractual sale of the good between the seller and buyer. So much is trite.

The 'export price' determined by the Commission, that is, the price paid by AFEM to RAK,, obviously purchases the A4 Copy Paper produced at RAK's plant by RAK and its delivery to a place nominated in Indonesia by AFEM, the buyer. That is it. Nothing more. This is not in dispute and has been verified. This also is evident from the Confidential Attachments setting out the Commission's calculation of the 'export price' of the APRIL's exports to Australia.

Hence, as Mr Vermulst states, the transaction between AFEM and RAK, whereby a 'price' is paid in a sale of the product in question, is in the nature of an 'internal sale' within Indonesia. It cannot be other than an internal sale in Indonesia between RAK and AFEM – that is where the sale takes place.¹² The price payable in that sale by AFEM to RAK determined by the Commission includes no amount for the conveyance of the A4 Copy Paper from Indonesia to Australia or anywhere else and RAK has no involvement in any such conveyance of the A4 Copy Paper from Indonesia, as the Commission has repeatedly verified.

The 'export price' determined by the Commission does not purchase or pay for anything that causes that product to be taken from Indonesia and conveyed to Australia, at which point of importation, it is introduced into the commerce of Australia. That is not included in the 'export price' as determined by the Commission.

Rather, that conveyance from Indonesia to Australia is paid for by the Australian customers of AFEM in the 'price' they pay to AFEM for the purchase and export of A4 Copy Paper from AFEM.

Hence, as a matter of common-sense, RAK is no more involved in the exportation of the A4 Copy Paper from Indonesia, let alone to Australia, than the trucking company transporting the A4 Copy Paper from RAK's plant to the shipping company at Port Busan. Also, RAK is

¹² Note; an agreement to sell goods and the sale of the goods are separate transactions whereby it is the sale in which the purchase price is paid and property in the goods passes to the buyer. In relation to the transactions between AFEM and RAK, such 'sales' take place in Indonesia notwithstanding that AFEM is located in Malaysia.

certainly not paying for the conveyance of the A4 Copy Paper from Indonesia to AFEM's customers in Australia and has no involvement in such conveyance. All these have been verified.

What else does the 'export price' determined by Commission purchase or not purchase?

However, what the 'export price' determined by the Commission purchases or pays for does not end there. There also are other things that the 'export price', as so determined by the Commission, does not purchase or pay for that are typically included in the price of a good being purchased.

A purchase price, including the purchase price for a product, will typically purchase and pay for more than only the product itself.

By way of example, assume the purchase of a packet of corn flakes at a supermarket for \$5.00. What does that 'price' of \$5.00 purchase? Obviously the physical packet containing the corn flakes and the corn flakes in that packet. However, it also pays for all of the infrastructure that brought that packet of corn flakes into existence and the establishment and operation of the supermarket enabling that purchase to take at that place at that supermarket at that time. That is, the 'price' pays for more than just the packet of corn flakes but also the necessary infrastructure to enable and facilitate that transaction to take place.

In other words, the purchase price not only pays for the purchase of the physical product, the packet of corn flakes, but also, amongst other things, the services provided by the supermarket and others that enables and facilitates that purchase. They are all built into the 'price' of the product.

So, returning to the 'export price' determined by the Commission, what does it actually purchase?

As noted above, it does not include anything that causes that product to be taken from the place in Indonesia and conveyed to Australia, where it is introduced into the commerce of Australia. The price payable by AFEM to RAK does not pay for that, whether directly or indirectly.

It also does not include anything that brought the product in question, the A4 Copy Paper, into existence for sale by RAK to AFEM and then for sale by AFEM to its Australian customers.

None of the processes that led to the placing of purchase orders by the Australian customers on AFEM (for example, the marketing in Australia, the identification of customers in Australia, the negotiation of the supply of the product to the Australian customers, the placement and acceptance of purchase orders, etc.) nor the subsequent placement of purchase orders on RAK by AFEM for the production and supply of the product to AFEM and so on.

As verified by the Commission, RAK only produces to order both for domestic consumption and for export. RAK maintains no inventory from which requirements to fulfil orders can be

drawn if and when required. Only if purchase orders are placed with and accepted by RAK does RAK produce the A4 Copy Paper necessary to fill those orders.

However, the processes that lead to and result in the placement of such orders are not paid for, nor purchased, by RAK. They are not a component of the purchase price payable by AFEM to RAK, again as verified by the Commission.

In the case of the A4 Copy Paper exported to Australia, these processes that precede and cause the A4 Copy Paper ultimately exported to Australia to be brought into existence are included in the price payable by the Australian customers to AFEM but have been excluded by the Commission in its calculation of the 'price' payable by AFEM to RAK. That is, in the exclusion of AFEM's so-called 'trading margin' in deriving the 'export price' payable by AFEM to RAK.

Effectively, therefore, the 'export price', as determined by the Commission, is principally, if not solely, for the production of A4 Copy Paper by RAK in the fulfillment of the purchase orders placed with it by AFEM. Nothing more. Further, absent such purchase orders placed by AFEM, no A4 Copy Paper would be produced by RAK as there would be no purchase orders for it to fill.

RAK's role, therefore, is solely to produce A4 Copy Paper to order.

Commission's acknowledgment of what the price payable to RAK purchases

Consequently, the Commission recognises in its determination of the 'export price' for APRIL's exports of A4 Copy Paper to Australia that the sole role of RAK is as a 'producer' of A4 Copy Paper and that RAK only produces and sells to AFEM to AFEM's order.

The 'export price' determined by the Commission recognises that this is the extent of RAK's involvement in the exportation of the A4 Copy Paper by APRIL from Indonesia to Australia and what the price payable by AFEM to RAK purchases – that is, the production of the A4 Copy Paper on AFEM's order for sale to AFEM in an internal sale in Indonesia to AFEM and deliver it to a place in Indonesia nominated by AFEM – nothing more.

The entire role and function of AFEM in the supply of A4 Copy Paper to its Australian customers is therefore excluded and not included in the 'export price' determined by the Commission. All that is included is the purchase of a physical product (that is, the A4 Copy Paper) produced at RAK's plant by RAK and its delivery to a place nominated in Indonesia by AFEM, the buyer.

Because none of the infrastructure mentioned above that brought the A4 Copy Paper into being that was purchased by AFEM is included in the 'export price', no A4 Copy Paper is or can be brought into existence that is purchased by the 'export price' payable by AFEM to RAK. The key entity in the transaction involving the export of A4 Copy Paper by APRIL from Indonesia to Australia, therefore, is AFEM, not RAK.

To somehow characterise RAK, not AFEM, as the 'exporter' in such circumstances and that the 'export price' is the price payable by AFEM to RAK defies commercial and factual reality. It also is contradicted by the Commission's own calculation of the 'export price' that

excludes everything other than the production of the A4 Copy Paper and its delivery to AFEM at a place in Indonesia at the behest of AFEM.

Hence, the 'export price', as determined by the Commission, is not and cannot be the 'price' of the A4 Copy Paper exported by APRIL from Indonesia to Australia and at which 'price' it is introduced into the commerce of Australia.

2.5 Judicial and other consideration of who is an 'exporter'?

Support that the Commission may have relied on for the view that the 'exporter' in the above circumstances is RAK, not AFEM, and that the 'export price' is the price payable by AFEM to RAK is the majority decision of the Full Federal Court of Australia in *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority and Others* (1996)¹³ (**Celpav**)¹⁴

However, that case turned on the relevant contract between the buyer and seller being on C&F terms:

"In the present case the relevant contracts were C&F contracts. If anything, that circumstance strengthens the argument that Celpav was the exporter. Under a C&F contract the seller has to arrange the carriage of the goods to the named foreign port of destination at its expense: see Schmitthoff's Export Trade (8th ed) at 48. It must have been Celpav who engaged the ship, in each case, and delivered the goods for loading."

Obviously, that is not the case here. The contracts between RAK and AFEM are on FOB terms. RAK does not engage the shipping company to convey the A4 Copy Paper from Indonesia, nor does it have any involvement in the conveyance of the A4 Copy Paper purchased by AFEM to Australia. RAK's sole obligation in this is to deliver the A4 Copy Paper to the shipping company at the port nominated by AFEM. That is the extent of RAK's contractual obligation in this regard and factually all that it does, as the Commission has repeatedly verified.

Hence, the majority decision in *Celpav* can be distinguished on the facts. Further, based on the facts of the transactions here, both the majority decisions and the minority decision of Northrop J. support the fact that AFEM, not RAK, is the 'exporter'.

[Further support that AFEM, not RAK, is the 'exporter' can be found in a number of Federal Court and High Court cases – see: *Australian Trade Commission v. Goodman Fielder Industries Ltd* (1992) 36 FCR 517; *Wesley-Smith v. Balzary* (1976-77) 14 ALR 681; *Henty v. Bainbridge-Hawker* (1963) 36 ALJR 354]; and *Lyons v Smart* (No 1) [1908] HCA 34; (1908) CLR 143.

¹³ Before a single judge of the Federal Court: *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority and others* (1996) 42 ALD 7; before the Full Court of the Federal Court: *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority and others* (1996) 141 ALR 297

¹⁴ The minority decision supports the position that AFEM is the 'exporter'.

Importantly, His Honour, Finn J., in the *Celpav* case at first instance considered that, in determining who is the 'exporter' for the purposes of Australia's anti-dumping regime, each case was to be considered on its own merits and, while in that case His Honour determined that the manufacturer was also the exporter and not the trading company, he also stated that:

"... DaiEi was, in my view, no more than the facilitator or instrument of Celpav's export of its product to Australia - a market selected by Celpav not by DaiEi. For this reason I am of the opinion that in the result the ADA Report's conclusion that the exporter was Celpav was correct.

Having said this, I would equally suggest that circumstances may exist where a supplier of goods so uses a manufacturer as its instrument in its supply of goods to an importer that the supplier can properly be characterised as the exporter of those goods from the country of origin in question."

Which of the above two scenarios set out in His Honour's judgement applies depends on the circumstances of each case and, in particular, the rights, duties, risks and obligations each party undertakes as well as its role in such transactions.

As set out above, it is AFEM, not RAK, that is responsible for the supply of APRIL products to export markets and making all necessary arrangements for such supply, as verified by the Commission.

In this context, as previously submitted in response to the draft verification report, there continues to be a failure to appreciate the distinction between an 'export trading company' (**ETC**) and an export management corporation (**EMC**) in international trade, which is:

- (i) an ETC is an intermediary that purchases the goods in the exporting country and resells them to a customer in the importing country; the ETC takes title to the goods in the exporting country, making that transaction a domestic transaction in the exporting country; the ETC then transfers title to the importer in the importing country. In such transactions, the goods' foreign origin is not of concern to the buyer in the importing country and the sale of the goods abroad is of no concern to the seller in the exporting country; and
- (ii) an EMC is a different type of intermediary as it operates as an export-oriented manufacturer's representative for the producer/exporter and, as such, it does not take title to the goods being sold for export but, rather, takes a commission on the sale. Because an EMC acts as an agent, the producer/exporter is more involved in transactions with overseas buyers. For example, it will be responsible for the shipping of the goods to the buyer in the overseas destination, invoicing the buyer in

the overseas destination and collecting payment from the buyer. The EMC merely facilitates these transactions.¹⁵

While both ETCs and EMCs are ‘intermediaries’, they are different kinds of ‘intermediaries’ both legally and factually with an ETC being the ‘exporter’ of the goods from the exporting country, and the producer being the ‘exporter’ where an EMC is involved. Obviously, whether an entity is an ETC or EMC will depend upon the particular circumstances of each case.

Clearly, here AFEM is an ETC, not an EMC, for the reasons set out earlier above.

It is stated in the SEF that the reasons why RAK, not AFEM, is the ‘exporter’ were as follows:

“The commission considers RAK to be the exporter of the goods, because:

- RAK and is located in the country of export (Indonesia) and manufactures the goods exported to Australia. [Comment: relevance of RAK’s location and the fact that it manufactures the goods to it being considered the ‘exporter’ is not clear, nor explained. This is not relevant.]
- RAK sold the finished goods to AFEM (an entity incorporated and based in Malaysia), which on-sold the goods to the Australian importer. [Comment: This is a matter of fact. It is not relevant to the issue at hand.]
- RAK was aware that AFEM on-sells the goods to Australia. The sales documents, including the commercial invoices raised by RAK, listing the Australian customer’s name and location, as well as the final Australian port destination. [Comment: RAK’s ‘awareness’ that AFEM on-sells the goods to Australia is irrelevant. It would be of concern that a manufacturer was unaware of the likely destination of its products, especially due to product liability and labelling issues. There were no contractual transactions between RAK and Australian customers as Commission is aware and verified.]
- RAK was responsible for delivering the goods to the port of export in Indonesia on Free on Board (FOB) terms, and was responsible for all logistics and port handling charges to that point. [Comment: Again, this is a factual finding. Query what is its relevance to the exportation of the product from that point out of Indonesia to Australia. This is but a fulfilment of RAK’s delivery obligation under FOB terms fulfilled in Indonesia, not an exportation obligation.]
- The certificate of origin confirmed RAK consigned the goods to the Australian customer and the Australian customer’s names contained in the marks and numbers. [Comment: Certificate of origin certifies country of origin of the product, which is not in question. It does nothing more.]

¹⁵ P. David, *International Logistics, The Management of International Trade Operations*, Cicero Books, 6th Ed., 2021, Berea, USA., pp.123 – 124.

- AFEM did not take physical possession of the goods, and did not possess its own inventory of the goods for distribution and export.” [Comment: This is not correct. AFEM took physical possession on delivery of the product at Port Buatan in Indonesia. That is a function of a bill of lading which AFEM would be in possession of following delivery.]

(at page 42 of the SEF; footnotes omitted and comments in red added)

As is evident from the foregoing, the reasons that the Commission has cited for considering RAK, not AFEM, as the ‘exporter’ do not support such a conclusion, whether logically or legally.

Telling, however, is the fact that no reasons were provided or circumstances referred to that RAK was involved in any way in the conveyance of the A4 Copy Paper from Indonesia to Australia or had any contractual arrangements with the Australian customers or that it had some arrangement with AFEM whereby AFEM was ‘... *no more than the facilitator or instrument*’ of RAK’s export of A4 Copy Paper to Australia such as involvement in and approval of terms and conditions, including price, in the transactions with the Australian customers.

AFEM was supplying A4 Copy Paper produced by RAK to Australia, but RAK was producing that A4 Copy Paper at AFEM’s behest when it produced to AFEM’s order, not the other way around. No evidence has been cited in the SEF or the verification report to the contrary. Hence, APRIL’s contention that AFEM, not RAK, is the ‘exporter’

This is consistent with the view of Mr Vermulst set out in the extract from his book set out above.

Further, reference to entities being ‘intermediaries’ is of itself meaningless. All entities between the producer of a product and the consumer of that product are ‘intermediaries’ of some description. What is relevant is their respective roles in the supply chain. The above extract does not support a finding that RAK, not AFEM, is the ‘exporter’.

It also is noteworthy that the determination of who is the ‘exporter’ changes depending upon the circumstances, as set out above. For the purposes of determining the ‘export price’ and the dumping margin, it is RAK with the ‘export price’ being the price payable by AFEM to RAK. However, for the purposes of the price undercutting analysis and for working out any interim dumping duty payable using the fixed and variable method, AFEM is the ‘exporter’ and the ‘export price’ of the particular goods is the price payable by AFEM’s Australian customers to AFEM.

Having regard to all of the facts and circumstances of the exportation of the A4 Copy Paper to Australia from Indonesia by APRIL, the following statement of His Honour Barton J. in *Lyons v Smart* (No 1) [1908] HCA 34; (1908) CLR 143 (High Court of Australia) is apposite:

“Now, we know what is the meaning of "import" and of "export," and the word "convey" is a word employed very frequently in Imperial and American legislation for the purpose of designating the introduction of goods into, or the taking of goods out of, a country.”

Here, AFEM, not RAK took the A4 Copy Paper delivered to it at Port Buatan in Indonesia and conveyed it out of Indonesia to Australia via Singapore. This is a question of fact supported by verified evidence. RAK did no more than deliver the Subject Goods ultimately destined for Australia to the shipper engaged by AFEM at Port Busan in accordance with RAK’s contractual obligations to AFEM. Upon such delivery, RAK parted with possession of the A4 Copy Paper, which passed into the possession of AFEM in accordance with the contractual terms between the parties. At that point, RAK ceased to have any further involvement in the A4 Copy Paper, including their removal from Indonesia and transportation to Australia.

Hence, both factually and in accordance with Australian jurisprudence, AFEM, not RAK, is the ‘exporter’ of the A4 Copy Paper to Australia.

2.6 *Role of AFEM*

Missing from the analysis and determination that RAK, not AFEM, is the ‘exporter’ and that the price payable by AFEM to RAK is the ‘export price’ is any analysis of AFEM’s role in APRIL’s exportation of A4 Copy Paper from Indonesia to Australia and associated arrangements and transactions.

Apart from the statement that AFEM on-sells the A4 Copy Paper it purchases from RAK to customers in Australia, the SEF is silent on AFEM’s role.

For example, is AFEM’s role similar to that identified by His Honour, Judge Finn in the *Celpav* case that “... *DaiEi* was, in my view, no more than the facilitator or instrument of *Celpav*'s export of its product to Australia” and, if so, what was the basis for such a conclusion.

Further, if AFEM was no more than a facilitator of RAK’s exportations from Indonesia to Australia, what was RAK’s involvement in the exportation of A4 Copy Paper to Australia. Did it extend beyond those matters specifically referred to in the SEF and extracted above and, if so, what were they, why haven’t they been referred to in the SEF and how do they negate AFEM’s role and extend RAK’s role beyond a producer of A4 Copy Paper to order, at least for export markets.

In addition, if AFEM was no more than a ‘facilitator’ why was the price it paid to RAK the ‘export price’, as opposed to the price payable by the Australian customers, and why was AFEM’s ‘trading margin’ excluded from the ‘export price’ and not included as in the nature of a ‘commission’, similarly to commissions payable to agents and other such EMCs.

As set out above, the role, responsibilities, obligations and risks that AFEM possesses in the exportation of A4 Copy Paper from Indonesia extends well beyond that of ‘facilitator’ and is as a principal in its own right. Further, as indicated, but for AFEM there would be no exports of A4 Copy Paper to Australia and none produced by RAK to enable AFEM to fulfill its contractual obligations to its Australian customers.

2.7 Further considerations on 'export price'

It is conceivable that an FOB price could satisfy the requirement in Article 2.1 of the WTO Anti-Dumping Agreement. That is, it is the price at which the goods in question enter into the commerce of the importing country.

For example, where the purchaser of the goods for an FOB price is the importer of the goods into the importing country, and there is no intermediate transaction whereby the purchase price for the goods on their entry into the importing country is not the FOB price paid to the seller in the country of origin.

That obviously is not the case here. Here, the price payable for the A4 Copy Paper on their introduction into the commerce of Australia is the price payable by the Australian customers to AFEM, as has been repeatedly verified. The FOB price paid by AFEM to RAK is not the price at which the A4 Copy Paper is introduced into the commerce of Australia, nor the price payable by the Australian customers for the exportation of the A4 Copy Paper to Australia.

Further, the transactions between RAK and AFEM are not 'sales for export'. Rather, they are sales for delivery of the A4 Copy Paper in Indonesia to the shipper engaged by AFEM at the nominated port in Indonesia. 'E' and 'F' terms in INCOTERMs are not terms of contracts of sale for export as they impose no obligation on the seller to convey and deliver the product being sold to a place in another country. This is the domain of 'C' and 'D' terms in INCOTERMs.

This is consistent with the fixed component of the fixed and variable method for working out the interim duty payable on exports of A4 Copy Paper from the Subject Countries being applied to the 'actual export price' as set out in the Commission's Dumping Commodity Register and in Report 551. That is, those components of interim dumping duty are calculated on and applied to the 'actual export price' (that is, the customs value, being the price in the import sales transaction on importation), not the price payable in some antecedent transaction.

This also is the basis on which the Commission calculated the duty paid and unpaid 'landed export prices' of the export of A4 Copy Paper from the Subject Countries in Section 8.6.1 of the SEF.

First vs Last Sale in import transactions

To adopt the price payable by AFEM to RAK in determining the 'customs value' would be, in customs valuation terms, to adopt what is known as the '*first sale*' rule, as opposed to the '*last sale*' rule.

The application of the '*first sale*' rule is explained by the US International Trade Commission in its booklet "*Use of the 'First Sale Rule' for Customs Valuation of U.S. Imports*" (copy **attached**):

“Generally, the transaction value is the price actually paid or payable for merchandise when sold for exportation to the United States, plus certain statutorily enumerated additions. In practice, the transaction value is usually the price the importer paid for the merchandise. However, in the case of a series of sales as referred to above, the importer may under criteria prescribed by U.S. Customs and Border Protection³ choose a sale that occurred earlier in the chain and use the price paid at that point as long as the importer can establish that the earlier sale was a sale for exportation to the United States. The option to choose the earlier sales price as the transaction value is known as the First Sale rule.” (at page 1-1)

As the US International Trade Commission notes, the effect of applying the ‘first sale’ rule is to reduce the customs value resulting in a lesser amount of customs duty being payable:

“For example, the U.S. importer may assign a product’s customs value based on the transaction between the manufacturer and the middleman (\$A in figure 1.1), instead of the transaction between the middleman and the U.S. importer (\$B in figure 1.1). Consequently, application of the First Sale rule may result in the transaction value being determined on the basis of the price paid by a foreign buyer to a foreign seller. Although \$B will not always be higher than \$A, when the last sale valuation is higher than a first or earlier sale, use of the First Sale rule may reduce the customs value of the product and hence lower the duty assessed on an imported item.” (at page 1-2; figure 1-1 omitted)

Australia’s customs valuation provisions in the *Customs Act 1901* do not provide for the application of the ‘first sale’ rule. Rather, customs values determined under Divisions 1 and 2 of Part VIII of the *Customs Act 1901* are based on the ‘last sale’ occurring prior to the importation of the goods into Australia less costs such as for overseas freight and insurance:

“import sales transaction, in relation to imported goods, means:

(c) where there were 2 or more contracts of sale for the importation of the goods into Australia entered into before they became subject to customs control—whichever of the contracts was made last”. (Section 154(1) of the Customs Act 1901)

Consequently, (erroneously) adopting the price payable by AFEM to RAK for APRIL’s exports of A4 Copy Paper, whether intended or not, has the effect of reducing the amount of the ‘export price’ for comparison with their normal value in the determination of ‘dumping’ and any ‘dumping margin’. However, any resulting dumping margin is applied.

However, in determining any interim dumping duty payable using the fixed and variable method, effectively the ‘last sale’ rule is applied as the *ad valorem* rate is applied to the ‘customs value’ of the imported ‘particular goods’ (that is, the ‘actual export price’ or ‘landed value’). In other words, effectively the ‘first sale’ rule is adopted for determining the dumping margin with its lesser ‘export price’, but the ‘last sale’ rule with its higher value (that is, actual export price) is adopted in determining any interim dumping duty payable.

The lack of consistency is self-evident. Whether this outcome was intended is unclear but, regardless, it is of concern.

It also is in breach of Article 9 of the WTO Anti-Dumping. As applying the ‘last sale’ rule on the ‘actual export price’ of exports of A4 Copy Paper on their importation into Australia automatically and mathematically results in the full dumping margin being exceeded, the margin ‘as applied’ exceeds the amount of dumping duty necessary to remove the injury caused by ‘dumping’, which is in breach of WTO rules.¹⁶

This is necessarily the case because the *ad valorem* rate is applied to the customs value of the particular goods imported, with the result that that rate is applied to an amount included in the customs value, namely, AFEM’s so-called trading margin that is not included in the determination of dumping and dumping margin. In other words, the *ad valorem* rate is applied to an amount not included in the ‘export price’ determined by the Commission for determining dumping and the applicable dumping margin. Clearly this is in breach of WTO rules as well as Australia’s anti-dumping legislation.

There has been no finding that APRIL’s exports of A4 Copy Paper to Australia on importation into Australia were dumped as required by Article 9.2 of the WTO Anti-Dumping Agreement:

“... anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped”.

There has been no finding that the ‘actual export price’, that is, the actual landed price payable by AFEM’s customers for A4 Copy Paper is a ‘dumped’ price or, if it is, the extent of ‘dumping’ in that price. Hence, the application of the fixed and variable method for working out the interim dumping duty payable, if any, and, in particular, application of the fixed component to a ‘price’ on importation that has not been found to be ‘dumped’ is unlawful, being contrary to Section 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013* and Article 9.2 of the WTO Anti-Dumping Agreement.

2.8 *ADRP finding in its review of export prices in Review 551*

The Anti-Dumping Review Panel (**ADRP**) found in its review of the Minister’s decision in Review 551 the following:

“63. I agree with the ADC that RAK is capable of being considered the exporter in relation to the exports of A4 copy paper from Indonesia and that the export price should be determined pursuant to s.269TAB(1)(c) of the Act. However, having considered all the circumstances surrounding the actual exportation, as referred to in paragraph 49 above, I do not agree that the export price should be based on the sales between RAK and AFEM. Rather it is preferable to base the export price on the sales by AFEM to Australian importers with deductions necessary to remove ‘any

¹⁶ See Articles 9.1 and 9.2 of the WTO Anti-Dumping Agreement.

costs of export or any other cost relevant to post export transactions’.” (at page 23 of ADRP Report No. 138: see [2021_138 - a4 copy paper - adrp report no. 138 - public.pdf \(industry.gov.au\)](#))

While APRIL disagrees with the ADRP’s finding that RAK is ‘*capable of being considered to be the exporter*’ for the reasons set out in this submission, it nevertheless agrees that the ‘export price’ should be based on the sales prices between AFEM and AFEM’s Australian customers.

It is noted that in determining the export prices on this basis, the ADRP accepted and deducted from the prices payable by AFEM’s Australian customers to AFEM the amounts representing AFEM’s ‘trading margin’ as determined in accordance with transfer pricing rules and principles.

Importantly, the ADRP accepted the amounts so deducted to derive the price payable by AFEM to RAK and that the resulting prices payable by AFEM to RAK were in transactions that were at arm’s length.

APRIL disagrees that the trading margin was required to derive an FOB price from Indonesia, but that is a different issue, as addressed above. Not only is its deduction not required to derive an FOB price from Indonesia but also it is not a post-exportation expense or charge. It is a ‘trading margin’ or ‘trading profit’ determined in a manner like any other trading margin or profit. It is not a ‘charge’ or ‘expense’ any more than the price payable by AFEM’s Australian customers is a ‘charge’ or ‘expense’.

Hence, the findings of the ADRP do not support the Commission’s position on the determination of ‘export prices’ as determined and calculated in the SEF.

2.9 *Whether transactions between AFEM and RAK were arm’s length transactions?*

In this inquiry, the Commission has determined that the transactions between RAK and AFEM were not at arm’s length for the purposes of determining ‘export prices’ under section 269TAB of the *Customs Act 1901*.

No similar determination was made by the Commission in Review 551. There have been no changes in arrangements between AFEM and RAK that would or could warrant a change in determining whether the transactions were or were not at arm’s length.

However, the determination that the transactions that the Commission claimed were not at arm’s length does not appear to have materially altered the methodology in calculating ‘export prices’. Rather, it simply facilitated the determination of ‘export prices’ under section 269TAC(1)(c) of the *Customs Act 1901*.

The methods for determining an ‘export price’ are set out in section 269TAB(1) of the *Customs Act 1901*.

Given that the Commission's determination that RAK is the 'exporter' and the Australian customer is the 'importer' for the majority of transactions, an 'export price' is to be determined under section 269TAB(1)(c) of the *Customs Act 1901* regardless. That is, the provisions of section 269TAB(1)(a) and (b) of the *Customs Act 1901* do not apply in the circumstances in any event based on who the 'exporter' and 'importer' are according to the Commission.

For those transactions that the Commission has claimed are not on arms' length basis, being DDP transactions, AFEM is the 'importer' and RAK is the 'exporter'. Consequently, the 'export price' should be determined under subsection 269TAB(1)(b) of the *Customs Act 1901*, provided that the transactions between RAK and AFEM were at "arm's length". Determining those transactions not to be at arm's length enabled the 'export price' for such transactions to be determined under section 269TAB(1)(c) of the *Customs Act 1901* as well.

The reasons why the Commission contends that the transactions between AFEM and RAK were not at arm's length were stated to be:

"... the commission found evidence that the price between RAK and AFEM appeared to be influenced by a commercial or other relationship between the buyer (AFEM) and the seller (RAK).

.....

When the commission examined the price inputs for a sample of transactions presented by RAK, they were demonstrably different to the actual amounts reported in Australian sales listing RAK's REQ and did not reflect the arms length amounts recommended in the transfer pricing study. It appeared that RAK's transfer price to AFEM did not meet the criteria for arms length outlined in the study nor did it fluctuate with the real cost of each transaction.¹⁷

Having regard to the circumstances relevant to the sales of the goods by RAK to AFEM the commission finds the following

- the methodology relied on to set the selling price of RAK's goods involved certain considerations affecting price, known to RAK and AFEM, which are not possible to establish or take into account where transactions involved sales between unrelated entities.*
- RAK's selling price to AFEM was not the result of real bargaining.*

¹⁷ Note: the reference to 'price inputs' can only be to the cost of inputs to manufacture and not to the prices payable/paid by AFEM to RAK for A4 Copy Paper. Costs (to manufacture) and prices are different concepts and not one and the same. This was not raised with APRIL in verification and the Commission did not seek an explanation from APRIL as to the apparent discrepancy, contrary to established practice and natural justice.

- *the price at which RAK sold A4 copy paper to AFEM, in relation to goods destined for the Australian market, appeared to be influenced by its relationship with AFEM.”* (page 43 of SEF; Commission’s footnotes omitted)

These assertions appear confused and misconceived.

To begin with, the transactions that are required not to be at ‘arm’s length’ for the purposes of determining ‘export prices’ are the transaction between RAK and AFEM given the (erroneous) determination that RAK is the ‘exporter’. It is the price in those transactions that ‘appear to have been influenced by the relationship between the parties’.

Accordingly, it is assumed that the reference in the above extract to ‘price inputs’ is not to inputs to manufacture, such as pulp, but to ‘inputs’ or certain amounts deducted from the base price payable by AFEM’s Australian customers to derive the transfer price payable between AFEM and RAK. Obviously, transactions between PT Intiguna Primatama (IP) and RAK for the supply by IP of an input to manufacture (that is, pulp) of A4 Copy Paper to RAK is not relevant to the transactions between RAK and AFEM. In particular, whether the transactions between RAK and AFEM were at arm’s length.

This issue is addressed in the following sections of this submission.

2.10 Considerations on whether transactions between AFEM and RAK were arm’s length transactions

As noted above, the price payable by RAK to IP for an input to manufacture is not relevant to whether the transactions between RAK and AFEM were influenced by the relationship between the parties and, in particular, the price in those transactions, and hence they were not at arm’s length.

However, assuming for the sake of argument that such ‘price inputs’ are references to inputs to manufacture and they have not been accurately recorded in the accounts and records of RAK¹⁸ and are to be disregarded or, alternatively, it is AFEM’s ‘trading margin’, then the question is what is the relevance of this given that:

- (i) the price payable by AFEM to RAK for the A4 Copy Paper is derived from the price payable by Australian customers to AFEM for that A4 Copy Paper;
- (ii) the prices payable by the Australian customers to AFEM were obtained through arm’s length negotiations between AFEM and the Australian customers and were uninfluenced by any relationship between the parties, as the Commission has repeatedly verified;
- (iii) there is no suggestion or evidence that the price payable by an Australian customer is other than a market price;

¹⁸ Section 43 of the *Customs (International Obligations) Regulations 2015* and Article 2.2.1.1 Of the WTO Anti-Dumping Agreement.

- (iv) the deduction of post-exportation expenses and a ‘trading margin’ amount in accordance with transfer pricing principles from the prices payable by the Australian customers to derive the prices payable by AFEM to RAK for that A4 Copy Paper does not affect in any way the price payable by the Australian customer as negotiated and agreed between AFEM and the Australian customer;
- (v) the effect of the derivation of the price payable by AFEM to RAK in this manner is, effectively, to allocate the revenue derived from the sales to the Australian customers between AFEM and RAK on transfer pricing principles for income tax purposes, with, again, no impact on the prices payable by the Australian customers;
- (vi) to suggest or assert that the pricing arrangements between AFEM and RAK somehow affect the prices payable by the Australian customers is factually incorrect, as the Commission would be aware, and necessarily circular; and
- (vii) as noted by His Honour Kerr J in the case referred to in the following section, it is the price payable by the Australian customers, being the price at which the A4 Copy Paper enters into the commerce of Australia, that the statutory provisions are directed at.

Hence, for these reasons, any assertion that the prices payable by AFEM to RAK ‘appear to have been relevantly influenced by the relationship’ between AFEM and RAK is misconceived.

Of relevance to this issue is that there is nothing in the Commission’s findings that indicates that the prices paid by AFEM to RAK are other than consistent with market prices. The Commission does not appear to have adopted its usual practice of benchmarking such prices against market prices, such as those published by RISI in the same way that has been done for pulp prices paid by RAK to related bodies corporate.

The Commission does not indicate how and to what extent, supported by evidence, that the prices paid by AFEM to RAK have been influenced by the relationship between the parties and/or do not represent prices resulting from ‘real bargaining’ at ‘arm’s length’. That is, whether and why the prices in the transactions between AFEM and RAK do not reflect market prices because somehow they have actually been influenced by the relationship between the parties or do not reflect market prices due to the absence of ‘real bargaining’ between the parties, whatever that means.

Nor does the Commission refer to any criteria against which it made such an assessment that resulted in its finding that the prices in the transactions between RAK and AFEM did not reflect market prices.

2.11 *Judicial consideration of the term ‘arm’s length transaction’*

His Honour, Kerr J., in his judgement in *Wilson Transformer Company Pty Ltd v Anti-dumping Review Panel (No 2)* [2021] FCA 591 (**Wilson v ADRP**)¹⁹ confirmed the reasons given by the

¹⁹ Note: this case is on appeal to the Full Federal Court of Australia by the Applicant.

Anti-Dumping Review Panel (**ADRP**) for its decisions regarding a review of a decision as to whether the price for certain power transformers appeared to have been influenced by a relationship between the parties. The following extract from the reasoning of the ADRP was cited by His Honour with approval:

“In my opinion, the influence with which s 269TAA(1) is concerned is influence as to price. It is concerned with the appearance of variation from the price that would have been agreed had the sale been negotiated at arms’ length. Any other effect does not provide a reason why the price agreed between the parties should not be adopted as the export price under s 269TAA(1) or result in the transaction not being used for the determination of the normal value under s 269TAC(1).” (at para 33 quoting para 47 of ADRP Report)

His Honour went on to state in his judgement that:

- “64 *The complexity of the Byzantine provisions of Part XVB which provide for a maze of circumstances in which alleged concealed dumping and any home country subsidisation of goods can be identified and quantified, ought not to obscure that the scheme is not directed to instances in which the prices of imported products have neither been subsidised nor sold at an unreliably low export level.*
- 65 *Although in oral argument Mr Borsky disowned the proposition that the mere existence of commercial relationships between related parties in a multinational trade transaction necessarily engages the operation of s 269TAA(1)(b) his submissions were ultimately to the same effect. Thus the Applicant submits even if a price could be proven to be no different to or even higher than that which would have been arrived at in an arms length transaction, if the mechanism setting that price was by way of a policy or guideline that had been applied between related entities, per se, that circumstance necessarily will give rise to there being a relevant “appearance” of the price having been influenced by the relationship of those parties within the meaning of s 269TAA(1)(b).*
- 66 *I reject that submission. If the existence of a relationship per se is insufficient, there must be some benchmark against which an appearance of a price being affected by such relationships can be assessed. If in the facts the Panel is satisfied that a price is commercially reliable and no less than what would be achieved in what would in ordinary parlance be referred to as an arms length transaction there seems no reason for that consideration to be excluded from the Panel’s deliberations.*
- 67 *The expression “arms length transaction” is not a defined term for the purposes of Part XVB of the Customs Act. I reject, in the absence of any foundation in the statute to the contrary, and none is asserted, how it might*

be contended that the export price of goods relative to the normal price of those goods might be said to be unreliable because of an association or compensatory arrangement between the exporter and the importer or a third party in circumstances where there is nothing before a decision maker to suggest that the price was other than would be at least that as would be reached in an arms length transaction. It is to be recalled that save as to the contended for operation of s 296TAA(1)(b) there is no challenge to the Commissioner's finding (or the Panel's on review) that the sales fell within the undefined meaning of an arms length transaction.

68 *To paraphrase Freud, sometimes a cigar is just a cigar: equally sometimes a price will be just a price.*

69 *In assessing whether there is an appearance of a relationship between related parties having influenced the relevant prices at which transformers had been sold I am unpersuaded that as a matter of law, based on the construction of the provision contended for, the Panel must ignore whether or not a price that was actually arrived at by those associated parties is the same as, or less than or greater, than would have been arrived at by an arms-length transaction.*

70 *A construction of s 269TAA(1)(b) as would require such considerations to be excluded as legally irrelevant in assessing whether there is an appearance of influence in the statutory context in which that provision is located should be rejected.” (bold added to paragraph 67)*

Having regard to the judgement of Kerr J in *Wilson v ADRP* and the decisions of the ADRP and the Commissioner in that case, there is no evidence, and none referred to here, that the price paid or payable by AFEM to RAK appears to have been influenced by the relationship between the parties and that the price *‘that was actually arrived at by those associated parties is the same as, or less than or greater, than would have been arrived at by an arms-length transaction’*. There is no evidence and none referred to that the price in the transactions between RAK and AFEM was a price *‘... other than would be at least that as would be reached in an arms’ length transaction’*.

At best, the finding that the prices in question have in some way been influenced by the relationship between AFEM and RAK is mere conjecture. To contend that that price has been so influenced or ‘appears’ to have been so influenced is at odds with not only the decisions of the ADRP in the abovementioned case, referred to in but also your decision on this point in Review 551. For that matter, it is also inconsistent with the acceptance of prices as ‘export prices’ based on transfer pricing principles, as is commonly the practice in dumping investigations, reviews and inquiries, as you would be aware.²⁰

²⁰ See also Section 5 of the Commission's Dumping and Subsidy Manual.

Further and importantly, the reasons for the Commission's finding that the prices in the transactions between RAK and AFEM were not at arm's length were fundamentally flawed. They consisted of the following:

"RAK presented a study concerning transfer-pricing policy between paper manufacturers and paper traders within the APRIL group in support of its transfer price methodology. The transfer price study is relevant as RAK and AFEM are within the APRIL group.

The methodology outlined in the study RAK provided appeared to provide a reasonable basis to establish arms length transfer prices between related entities and satisfy known transfer pricing rules. However, the existence of the transfer price study does not necessarily satisfy the test outlined in section 269TAA.

*When the commission examined **the price inputs** for a sample of transactions presented by RAK, they were demonstrably different to the actual amounts reported in Australian sales listing RAK's REQ and did not reflect the arms length amounts recommended in the transfer pricing study. It appeared that RAK's transfer price to AFEM did not meet the criteria for arms length outlined in the study nor did it fluctuate with the real cost of each transaction." (bold added) (at page 43)*

The study referred to in the extract was a study by Deloitte procured specifically to provide guidance in determining the profit margins in certain transactions between related parties in the APRIL group, such as those between RAK and AFEM, having regard to transfer pricing principles and rules. As indicated in the above extract, the methodology used in the study for this purpose was appropriate.

While it is not clear what 'price inputs' are referred to in the above extract, it presumably was the amount deducted from the price payable by Australian customers as AFEM's 'trading margin' for the purpose of the Commission setting the price payable by AFEM to RAK. Provided that that amount fell within a range specified in the Deloitte report, it represents a 'market' amount consistent with transfer pricing rules and principles.

The Commission apparently considered that the amounts so deducted were not within the range set out in Deloitte's report.

APRIL has undertaken a review of the transactions in question and confirms that all amounts so deducted as the 'trading margin' fell within the range specified in Deloitte's report. Confirmation of this can be readily provided to the Commission. Hence, the deductions were consistent with transfer pricing rules and principles and, therefore, represented 'market' amounts.

This supports a finding that the transactions were at arm's length, consistent with His Honour's Judge Kerr judgement in *Wilson v ADRP* as per the above extract.

It also must be noted that having determined that the transactions between RAK and AFEM were not at arm's length and then calculated 'export prices' as set out in the SEF, neither the deduction of the 'trading margin' nor the resulting price payable by AFEM to RAK was benchmarked to determine whether they represented 'market' prices.

Consequently, if the prices in the transactions between RAK and AFEM were not at arm's length as determined by the Commission for the purposes of Australia's anti-dumping legislation, then how could it be known that the amount deducted as AFEM's trading margin and the price payable by AFEM to RAK represented 'market' amounts?

AFEM's 'trading margin' is the difference between the price payable by AFEM's Australian customers less overseas freight and insurance and the price payable by AFEM to RAK. However, the price payable by AFEM to RAK is only determined and can only be determined after deducting the trading margin. Hence, the logic is circular and in neither case has the amount been determined to be a 'market' amount.

Hence the illogicality of the Commission's reasoning

Conclusion on arm's length

The Commission does not indicate how and to what extent, supported by evidence, that the prices paid by AFEM to RAK have been influenced by the relationship between the parties and/or do not represent prices resulting from 'real bargaining' at 'arm's length'.

There was no basis for the Commission to determine that the transactions between AFEM and RAK were not at arm's length and, more fundamentally, that the prices paid by AFEM to RAK were not representative of market prices.

The Commission's calculation of 'export prices' was fundamentally flawed because the calculation required certain deductions from the prices payable by AFEM's Australian customers, namely, AFEM's trading margin, that could only be known after determining the price payable by AFEM to RAK, or arbitrarily determining the trading margin.

The finding that the prices in the transactions between AFEM and RAK were not at arm's length is erroneous. It also is inconsistent with the ADRP's finding in its review of the determination of export price by the Commission in Review 551, which accepted the trading margin deducted to derive the price payable by AFEM to RAK.

2.12 *Conclusions on determination of dumping margin in the SEF*

The Commission's determination of dumping and the dumping margin for APRIL's exports to Australia is not sustainable, being fundamentally flawed both as to the determination of 'export price' and 'normal value'.

Both 'export price' and 'normal value' require re-determination in accordance with the law, including WTO rules. Consequently, the findings in the SEF regarding whether APRIL's exports to Australia were 'dumped' and, if so, to what extent, also require re-determination.

Under the law, you cannot properly report and make recommendations to the Minister as to whether the anti-dumping measures applying to APRIL's exports should be allowed to expire or be continued until such re-determination is undertaken.

Section 3: Submissions on Analysis and Findings in SEF

The starting point of this continuation inquiry regarding 'material injury' and causation' must be the economic condition of the Australian industry producing A4 Copy Paper during the AD Review Period, including following the imposition of the anti-dumping measures on 19 April 2017. Absent such inquiry, it cannot be known what effect the expiration of the anti-dumping measures will have or be likely to have.

There has been only one Australian producer of A4 Copy Paper in Australia, since at least the original investigation in 2015 to date, namely, Australian Paper, and hence only an analysis of its economic performance during the AD Review Period, that is, from 2015 to date, is required.

3.1. *Economic condition of the Australian industry and other contributing factors*

The following extract from the SEF summarises the economic performance of Australian Paper between 1 January 2015 and 31 December 2020:

5.5 Profit and profitability

Figure 7 charts Paper Australia's profit and profitability for all like goods sales as a percentage of revenue across the period of analysis.

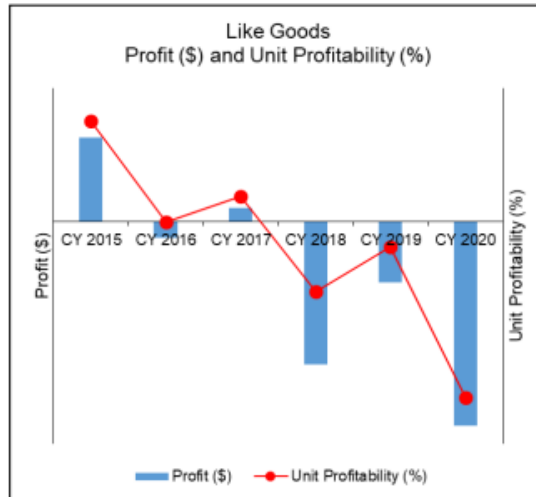


Figure 7 - Profit and profitability²⁹

The chart shows that in the period that was examined for the purpose of Investigation 341, Paper Australia was profitable, notwithstanding that it was found to have experienced injury caused by dumping in 2015.

In contrast, Paper Australia has experienced a significant deterioration of its profit and unit profitability since 2015, particularly in the period following the imposition of anti-dumping measures following Investigation 341 and Investigation 463. The data examined by the verification team for the quarter ending 31 March 2021 indicated that Paper Australia had reduced net losses by 50%.

5.5.1 Conclusion – profit effects

The verification team considers that Paper Australia has experienced a deterioration in its economic condition due to the overall decline in profit and profitability across the period of analysis.

Source: SEF, page 32.

Section 5.5 of the SEF asserts that the above graph reflects the (un)profitability of Australian Paper's A4 Copy Paper business since the anti-dumping measures were imposed. However, it is unclear whether the graph above covers only Australian Paper's domestic A4 Copy Paper business or includes its export business for A4 Copy Paper. In the interests of transparency, the Commission is requested to issue a clarification or at least publish two separate graphs that disclose Australian Paper's A4 Copy Paper export business as well as its domestic A4 Copy Paper business.

This should be set out in your report to the Minister to clearly and precisely reflect both components of the profitability of Australian Paper's A4 Copy Paper business, namely its domestic A4 Copy Paper business and its export A4 Copy Paper business. This is required to enable the factors identified in section 269TAE(2A) of the *Customs Act 1901*, especially paragraph (f) (which is elaborated on below), to be taken into account by the Minister. The relative performance of each component and its effect on the economic performance of Australian Paper (that is, the Australian industry) are, of course, relevant considerations.

Both businesses are relevant to an analysis of the economic performance of the Australian industry producing like goods although only the domestic business would be affected by exports from the Subject Countries at dumped export prices.

In any event, the fundamental question is why Australian Paper has been unprofitable since the imposition of anti-dumping measures in April 2017 and seemingly increasingly so notwithstanding the extension of anti-dumping measures to other countries.

Section 269TAE(2A) of the *Customs Act 1901* provides as follows:

"... the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:

- (a) the volume and prices of imported like goods that are not dumped; or*
- (b) the volume and prices of importations of like goods that are not subsidised; or*
- (c) contractions in demand or changes in patterns of consumption; or*
- (d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or*
- (e) developments in technology; or*
- (f) the export performance and productivity of the Australian industry;*

and any such injury or hindrance must not be attributed to the exportation of those goods."

While all of the paragraphs of this section are relevant in this continuation inquiry, paragraphs (c) to (f) of section 269TAE(2A) of the *Customs Act 1901* are particularly so. These issues were raised in APRIL's submission of 16 December 2021 and are incorporated in this submission by reference.

The Commission has not inquired into these issues and the SEF does not address these issues, as statutorily required. Specifically, the SEF omits to address whether and to what extent the unprofitability of Australian Paper set out in the above extract is due to any one or more of the matters referred to in paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the *Customs Act 1901* and, if so, to what extent.

To the extent that the unprofitability of Australian Paper is attributable to any one or more of the matters referred to in paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the

Customs Act 1901, such unprofitability cannot be attributed to exports from the Subject Countries at ‘dumped’ export prices.

In the absence of inquiry into each of these matters, it cannot be properly determined whether material injury to the Australian A4 Copy Paper industry (if any) is caused by factors other than exports from the Subject Countries at ‘dumped’ export prices and, whether such injury will continue regardless of whether the anti-dumping measures are allowed to expire or not.

In order that paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the *Customs Act 1901* are properly examined, it is necessary to, amongst other things:

- determine whether exports from the Subject Countries have continued to be exported to Australia at ‘dumped’ export prices following the imposition of the subject anti-dumping measures; and
- if so, then determine whether and to what extent these measures were effective or ineffective in preventing the injury that they were intended to prevent, including when this commenced to occur and why, so as not to overlook or mistakenly attribute injury from other causes, such as those factors identified in paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the *Customs Act 1901*;
- include in the abovementioned evaluation why prices in the Australian A4 Copy Paper market did not increase materially, if at all, following the imposition of the anti-dumping measures given that the object of anti-dumping measures is to increase prices in the relevant market so as to remove and prevent the injurious effects of dumping; and
- identify what other economic factors have caused injury, including for example, the factors referred to in paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the *Customs Act 1901* and, if so, to what extent.

APRIL submitted in Review 551 that the review of the anti-dumping measures in that review required, amongst other things, investigation of the effectiveness of the anti-dumping measures to assess whether any change in the rate of dumping duty was warranted to offset the injurious effects of dumping. However, you elected not to do so.²¹ Hence, there was that lacuna in that review of the anti-dumping measures.

As it was determined in Review 551 that exports from the Subject Countries continued to be exported to Australia at ‘dumped’ export prices, but due to different variable factors, including increased ‘dumped’ export prices, it was necessary to identify whether and to what extent, if any, the injury to Australian Paper’s A4 Copy Paper business, in the form of its unprofitability, was caused by such ‘dumping’ as opposed to the factors identified in paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the *Customs Act 1901*.

²¹ See: [551 | Review | Department of Industry, Science, Energy and Resources](#),

Yet, such ‘investigation’ into the effectiveness of the anti-dumping measures since their imposition has not been undertaken by the Commission on your behalf. Hence one reason for the sub-optimal analysis in the SEF. This deficiency should be rectified, and the requisite inquiries carried out, before a conclusion may be properly drawn that the expiration of the anti-dumping measures would lead, or would more probably than not lead, to the continuation of material injury to the Australian A4 Copy Paper industry.

3.2 . *Injury incurred by the Australian industry since 1 January 2015*

In Section 6 of the SEF, the Commission found that the Australian industry had incurred injury during the period from 1 January 2015 to 31 December 2020:

“In what appears to be a longer term issue, Paper Australia was not able to achieve price increases that were sufficient to cover increasing costs during the analysis period. This outcome has had a significant impact on its profit and profitability for a number of years. As a result the commission considers the Australian industry has continued to experience injury in the form of

- *price depression*
- *price suppression*
- *reduced profit and profitability*
- *reduced return on investment (ROI).”* (SEF, page 27)

APRIL makes no submission on whether or not Australian Paper has or has not incurred these ‘forms’ of injury. It does not know and relies on the Commission’s findings in this regard.

Injury resulting from inability to increase prices to cover costs

However, the Commission appears to have assumed that Australian Paper’s inability to ‘... achieve price increases that were sufficient to cover increasing costs during the analysis period ...’ was attributable to ‘dumping’ by the exporters, including APRIL. Even if not and regardless of the cause, the statement raises a number of questions, namely:

- what were the increasing costs during the analysis period and the extent of such increasing costs;
- what price increases would be required by Australian Paper to cover those increasing costs;
- would such price increases be required of both domestic sales and export sales and, if price increases of export sales were not possible or insufficient, what additional price increase would be required of the domestic sales to compensate;

- would such price increase be possible in the Australian A4 Copy Paper market regardless of import competition or taking into account import competition, including whether or not at ‘dumped’ prices, and, if so, to what extent;
- would such price increases to the required extent in the Australian A4 Copy Paper market be possible given the prevailing market forces in that market, including the progressive contraction of that market during the analysis period due to technological change; and
- if price increases were possible, why has it not occurred and/or not occurred in amounts to render Australian Paper’s A4 Copy business profitable over the past four years and, specifically, not occurred in response to the imposition of anti-dumping measures, which is the intended objective of such measures, and thereby remove the injurious effects of dumping.

These are the questions that require addressing to assess whether the unprofitable economic performance was due to factors unrelated to ‘dumping’ and, if attributable to dumping, to what extent. That is, whether and to what extent, if at all, the unprofitability of Australian Paper is or can be attributable to ‘dumping’ of A4 Copy Paper from the Subject Countries.

These questions have not been addressed in the SEF. These questions are addressed below.

What constitutes ‘injury’ and distinction between ‘injury’ and ‘causal links’?

It is also unclear to APRIL how price depression and price suppression are ‘forms’ of injury. That is, do they, of themselves, constitute ‘injury’ and, if so, why?

Price depression and price suppression refer to a reduction in prices and an inability to increase prices respectively and are two price-related occurrences. Why these two price-related occurrences of themselves constitute ‘injury’ is unclear and not explained in the SEF.

Both regularly occur in business and most frequently in the pricing of commodity products and as evidenced most recently in the pricing of commodity products such as, computers, software, mobile phones, whitegoods, etc. Price depression and price suppression would not necessarily be considered to constitute ‘injury’ in these businesses but merely reflect the usual ebb and flow of such businesses through technological change.

This is not to suggest that such price related occurrences are not relevant. Clearly they are. Their relevance is in leading to inquiries as to what caused such price-related occurrences and what effect this has had on the business in question. Both phenomena can help to establish the causal link between the price effects of ‘dumping’ and its economic impact on the industry as seen in the profitability of such industry, assuming both to be occurring.

Such causal links are established by finding, for example, that the product in question is being introduced into the commerce of the importing country at ‘dumped’ export prices and because of that, the prices of that product undercut the prices of the domestic industry’s

products by some magnitude attributable to but not exceeding the margin of dumping. Such price undercutting attributable to the 'dumping' then has the abovementioned price related effects, which, in turn, result in reduced revenues and, therefore, profitability of the domestic industry.

The reduced revenue and profitability constitute the 'injury' incurred by the business. The price related effects – price suppression and price depression – provide the price related causal links from the price undercutting attributable to 'dumping' to the 'injury'. A similar analysis can be and is required to be undertaken in connection with sales volume related injury to establish the causal links between 'dumping' and the injury incurred by the domestic industry that is attributable to dumping.

This causal link between dumping and injury is required by Article 3 of the WTO Anti-Dumping Agreement.

Attribution of injury and extent of injury to 'dumping'

Consequently, of less relevance on one aspect of the analysis in this continuation inquiry is whether the Australian industry, that is, Australian Paper, incurred injury during the period 1 January 2015 to date.

What is of relevance and importance to this continuation inquiry is whether such injury was and is being caused by 'dumping' of exports of A4 Copy Paper from the Subject Countries, or is instead attributable to other economic factors such as those identified in paragraphs (c) to (f) (inclusive) of section 269TAE(2A) of the *Customs Act 1901* and, if so, to what extent. It is only from such analysis that it can be properly determined whether the *'the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, ... the material injury [to the Australian A4 Copy Paper industry] that the anti-dumping measure is intended to prevent'*.

Of relevance, therefore, is the analysis in Section 8 of the SEF on whether the expiry of the anti-dumping measures would lead or would be likely to lead to a continuation or recurrence of the dumping and material injury to Australian A4 Copy Paper Industry that the anti-dumping measures are intended to prevent.

That analysis focused on two issues, namely, price undercutting (Section 8.6.1 of the SEF) and sales volumes (Section 8.6.2 of the SEF).

This is partially consistent with the injury and causation requirements in Article 3 of the WTO Anti-Dumping Agreement. That is, 'profit suppression' and 'price depression' must have been caused by something – for example, price undercutting – and must result in something, such as unprofitability for example. Hence the causal link between price undercutting and injury in the form of unprofitability.

However, it must also be demonstrated that the existence of price undercutting of the exports in question and the extent of such price undercutting was due to 'dumped' export

prices and that such price undercutting and the extent of the price undercutting would not otherwise exist to that extent but for the 'dumping'. The magnitude of price undercutting attributable to 'dumping' must be identified so as to preclude that portion of price undercutting that is otherwise occurring or would otherwise occur that cannot be attributed to 'dumping' being attributed to dumping. This is, of course, in accordance with WTO rules, as well as Australia's anti-dumping system.

Further, such price undercutting attributable to 'dumping' also must be demonstrated at the point of competition between the subject exports and the Australian industry's like goods. As set out in the SEF, this point of competition has been determined to be in the supply to end-users in the Australian A4 Copy Paper market (that is, consumers and businesses – see Figure 1 and box titled "End Users" in the SEF).²²

Relevance of sales volumes analysis when injury price related?

Having said that, it is unclear why the sales volume analysis at Section 8.6.2 was undertaken. As noted above, the injury incurred by Australian Paper during the AD Review Period was 'price related', not 'sales volumes related'. This means that, Australian Paper's unprofitability during the AD Review Period and the progressive increase in such unprofitability was not related to any diminution of its sales volumes during the AD Review Period, whether caused by 'dumping' or otherwise.

Hence, continued 'dumping' of exports of A4 Copy from the Subject Countries during the AD Review Period did not cause Australian Paper sales volume related injury. That is, the unprofitability and progressive increase in unprofitability incurred by Australian Paper was not sales volume related. As Australian Paper's sales volumes remained relatively stable throughout the AD Review Period, its unprofitability cannot be attributed to reduced sales volumes and, consequently, any sales volume being taken by exports of exports of A4 Copy from the Subject Countries, whether at dumped or un-dumped export prices, due to price undercutting.

Rather, it was related solely to Australian Paper's 'inability' or inaction to increase its prices to recover its increased cost to make and sell the Subject Goods it produced, both for domestic and export sale.

This also raises the question why did Australian Paper not incur reduced sales volumes in the contracting Australian A4 Copy Paper market and a market in which exports of exports of A4 Copy from the Subject Countries were continuing to compete and to compete at, apparently, 'dumped' prices as determined in Review 551 and in which prices neither materially increased nor decreased, whether due to 'dumping' or prevailing market conditions? This has not been addressed in the SEF although it is a relevant consideration.

3.3 Price suppression and price depression

²² Refer to Section 5.2.2 of the SEF.

Before examining the analysis of price undercutting in the SEF, it is useful to make some observations regarding the analysis of price suppression and price depression in the SEF.

In the SEF, it is stated that:

“Price suppression occurs when price increases, which otherwise would have occurred, have been prevented. An indicator of price suppression may be the margin between prices and costs.” (at page 31 of the SEF).

As noted earlier above, the question that inevitably arises is what is the evidence that price increases would otherwise have occurred in the Australian A4 Copy Paper market to, for example, meet Australian Paper’s increased cost to make and sell? None is referred to in the SEF.

Indeed, there appear to have been no price increases by Australian Paper throughout the AD Review Period apart from the marginal increase in 2019. For example, the price of A4 Copy Paper sold by Australian Paper in the Australian market apparently has remained relatively consistent from **\$1,428 per tonne in 2015** to **\$1,442 per tonne in 2020**: refer page 45 of Australian Paper’s application for the imposition of anti-dumping measures resulting in Investigation 583.

This absence of price increases no doubt led to Australian Paper not being able to recover its cost to make and sell in full, as referred to in the above extract. Hence, the unprofitability and increasing unprofitability.

The question, therefore, remains as to why Australian Paper was apparently unable to increase its prices? Specifically:

- in a progressively contracting commodity product market that is over-supplied by domestic production, would Australian Paper have been able to increase its prices regardless of
 - (i) the presence of imports at dumped or un-dumped prices and/or
 - (ii) the presence or absence of anti-dumping measures,given the notorious difficulty for suppliers to raise the prices of commodity products in any market where demand is not significantly increasing; and
- if price depression was occurring, as was claimed, would not price suppression inevitably follow in Australian Paper’s circumstances – that is, the operative cause of the unprofitability would be price depression? If so, then does not the existence and extent of the price depression need to be causally linked to ‘dumping’ of exports of A4 Copy Paper from the Subject Countries?

Price depression

Regarding price depression, it is stated in the SEF that:

“Figure 5 shows that Paper Australia experienced reducing selling prices from 2015 to 2017. After implantation (sic) of measures in April 2017, 2018 saw unit price stabilise before increasing in 2019. Prices in 2019 did not persist into 2020. Data

available to the commission shows that prices continued to decline in the quarter ending 31 March 2021.” (at page 30)

That is, Australian Paper’s prices ‘stabilised’ on and from 2017 to 2019 when they increased, following which they declined.

The question that arises, therefore, is, as anti-dumping measures were imposed on exports of A4 Copy Paper from the Subject Countries in April 2017 and expanded in April 2019 to exports from other countries, why did prices in the Australian market and, specifically, Australian Paper’s prices with its 85% or market share, decline and not increase?

The object of anti-dumping measures is to increase prices in the relevant market so as to offset the injurious effects of dumping. So, why did this not occur in the Australian A4 Copy Paper market? No explanation is provided in the SEF.

The obvious conclusion to be drawn is that Australian Paper’s inability to increase its prices to cover its increased cost to make and sell was unrelated to ‘dumping’. That is, it was so prevented by other economic factors and market forces prevailing in the Australian A4 Copy Paper market. The available evidence supports this conclusion.

Nevertheless, perhaps the answer lies, at least in part, in an analysis of price undercutting, which is addressed below.

3.4 Price undercutting

The analysis in the SEF of price undercutting proceeded on the following basis:

“The commission has undertaken the price undercutting analysis below at Figure 15 to inform the likely effect on prices. The analysis compares the landed value of exports from the subject countries (both inclusive and exclusive of anti-dumping duty) and Australian industry’s prices in the period 2019 to 2021.

The commission’s price undercutting analysis compares the prices at which the Australian industry sold like goods and the landed prices paid by importers at an appropriate level of trade. The level of trade relied on for this analysis reflects the point in the supply chain where Australian buyers of A4 copy paper exercise the option of sourcing from the Australian industry or an overseas producer.” (page 77 of the SEF)

The period 2019 to 2020 is a period in which it was found that exports of A4 Copy Paper from the Subject Countries were at ‘dumped’ export prices of varying dumping margin magnitudes.²³

With the exception of exports from Thailand, the Commission apparently found that the subject exports undercut or were comparable with the Australian industry’s prices and ‘that

²³ Refer to Report 551.

duty free fully landed export prices for goods from all Subject Countries would have undercut Australian industry's prices in 2021'.²⁴

Unfortunately, this analysis is defective.

Relevance of 'landed value' and 'appropriate level of trade' to price under cutting analysis

The Commission's analysis proceeds on an evaluation of *'the landed value of exports from the subject countries (both inclusive and exclusive of anti-dumping duty)'*. The 'landed value' of the subject exports is not necessarily the same as the 'export price' of the subject exports.

That is because the 'landed value of exports' used in the analysis is the 'landed price paid by importers', which is not necessarily the same as the 'export price' determined under section 269TAB of the *Customs Act 1901* and on which 'dumping' and the margin of 'dumping' has been determined.

This is obviously the case for APRIL's exports. That is, for the purposes of the dumping margin determination, RAK is the exporter and the 'export price' is the price payable by AFEM to RAK, whereas for the price undercutting analysis it would seem that AFEM is the exporter and its price to its Australian customers is the 'actual export price' or 'landed value'. That 'landed export price' is, of course, the price payable by AFEM's Australian customers to AFEM in the 'import sales transactions' that was declared as the 'customs value' in the relevant import declarations.²⁵

The inconsistency is self-evident and, further, there is no nexus between the price payable by AFEM to RAK with the 'landed value' used in the price analysis, especially given how price between RAK and AFEM is derived. That is, the latter 'drives' the former, not the other way around.

Further, the price paid 'at an appropriate level of trade', whatever that is, is not only not necessarily the same as either the 'landed value' or the 'export price' but also may not reflect whether and, if so, to what extent any dumping margin has flowed through to the price at that level of trade.

The 'landed value' of exports of A4 Copy Paper paid by importers would be the price reported to Australian Border Force in import declarations made in clearing the subject exports through customs. That price is their 'customs value' determined in accordance with Divisions 1 and 2 of Part VIII of the *Customs Act 1901*, being, typically the price paid or payable in the relevant import sales transaction (that is, the 'transaction value').

²⁴ Refer to Section 8.6.1 of the SEF.

²⁵ Refer to definitions of 'price', 'import sales transaction', 'customs value' and 'transaction value' in section 154(1) of the *Customs Act 1901*.

Obviously, therefore, the 'landed value of the exports' used in the analysis is not necessarily the same as the 'export price' used in dumping margin determinations. This clearly would be the case for APRIL's exports.

'Export price' is, of course, a term defined and determined in accordance with section 269TAB of the *Customs Act 1901* for the purposes of Part XVB of the *Customs Act 1901* and cognate legislation and legal instruments.

Although not entirely clear, it would seem that the price comparison has not been between 'dumped' export prices of A4 Copy Paper from the Subject Countries and the Australian industry's prices, whether with or without the payment of interim dumping duties on such exports. Nor apparently has there been any analysis of whether and, if so, to what extent the 'landed value of exports' used in the Commission's analysis differed from the 'export prices' in the dumping margin determinations.

Consequently, the Commission's analysis cannot disclose whether 'dumped' export prices of the subject exports have, because of such 'dumping', undercut the prices of the Australian industry and, if so, the extent to which such price undercutting is attributable to 'dumping'. While the position may differ between exporters depending upon how their dumping margins were determined and, in particular, the export prices in such determinations, in the case of APRIL's exports there is no evidence that the margin of dumping found in the SEF flowed through to the 'landed value' of APRIL's exports and then on to the price of its exports at the 'appropriate level of trade' for the price comparison.

The shortcomings of the price undercutting analysis is compounded when the 'appropriate level of trade' for the price comparison is taken into account. That level at which competition takes place between the exports and Australian Paper's products is at the 'End User' level of trade referred to in Figure 1 in the SEF.

An analysis of pricing at the 'End User' level of trade to assess whether and to what extent any price undercutting occurring at that level of trade can be attributable to 'dumping' of exports of A4 Copy Paper from the Subject Countries requires an assessment of whether and to extent the upstream 'dumping' of export prices has flowed down through the supply chain to the prices at the relevant level of trade in the price undercutting analysis and, if so, to what extent.. That is, to what extent have any dumping margins flowed through to the prices of the exports competing at that level of trade?

Absent that analysis it is difficult to see how any price undercutting at the relevant level of trade, that is, where competition takes place can be attributed to 'dumping'?

Not only does the price undercutting analysis in the SEF not appear to have been undertaken in relation to this level of trade where, as determined by the Commission, competition between exports and Australian Paper's products takes place, but there also

does not appear to have been any assessment of to what extent, if any, have dumping margins flowed through into the prices of exports of A4 Copy Paper from the Subject Countries at this level of trade.

Such an analysis is obviously required in order to assess whether and to what extent price undercutting is occurring at the 'appropriate level of trade' that can be attributed to dumping. Unless and until such an analysis is undertaken, no conclusions can be drawn in this regard.

This sub-optimal analysis of the price undercutting is exemplified by the application of that analysis to APRIL's exports

Price undercutting by APRIL's exports

The Commission found that the 'landed duty inclusive export price' of the A4 Copy Paper from Indonesia undercut Australian industry's prices in 2021 and were the lowest among the subject exporters.²⁶

The Commission (erroneously) determined that APRIL's 'export price' is the price payable by AFEM to RAK. That 'price' is not the price at which exports of A4 Copy Paper by APRIL are imported into Australia, and, therefore, not the 'landed price' at which APRIL's exports are introduced into the commerce of Australia on importation. That 'landed price' is not the 'export price' determined by the Commission (that is, the price payable by AFEM to RAK), but the price paid by the importers for those goods exported to Australia by AFEM (that is, the price payable by AFEM's customers to AFEM). As a simple factual matter that the Commission has repeatedly verified, the 'export price' determined by it is not the 'landed price' in Australia paid by importers for APRIL's exports.

There is no evidence, nor any finding, that the dumping margin determined for APRIL's exports based on an export price between AFEM and RAK flowed through to the price payable by AFEM's Australian customers. This would seem remote given that the prices in the transactions between RAK and AFEM are derived from the prices in the transactions between AFEM and AFEM's Australian customers. The price payable by AFEM to RAK in the export prices as determined by the Commission has no influence nor effect on the price payable by AFEM's Australian customers to AFEM.

Further, there does not appear to have been analysis of whether and to what extent APRIL's dumping margin has flowed through the supply chain to the price of its products at the 'appropriate level of trade' at which it competes with Australian Paper's products, namely, the 'End Users' level of trade.

²⁶ Refer to page 78 of the SEF.

Absent such analysis, any price undercutting cannot be attributed to ‘dumping’.

Consequently, it is unclear why a comparison of the ‘landed price’ for APRIL’s exports, whether with or without payment of interim dumping duty, was undertaken with Australian Paper’s prices as there is no determination that that ‘landed price’ is a ‘dumped price’ or, if it is, the extent to which it is a ‘dumped price’. Even if APRIL’s ‘export prices’ as determined by the Commission are ‘dumped’ export prices, there is no evidence that such ‘dumping’ has ‘flowed through to the ‘landed price’ and, if so, to what extent. There is no finding as such supported by evidence in the SEF.

In addition, the duty paid landed value of APRIL’s exports is misconceived. Whereas for the purposes of determining the dumping margin, the Commission considers that RAK is the ‘exporter’ and the price payable by AFEM to RAK is the export price, in the determination of the landed value of APRIL’s exports, AFEM is effectively treated as the ‘exporter’ and the prices payable by its Australian customers as the ‘export prices’.

It is to those prices payable by AFEM’s Australian customers that the *ad valorem* component of the fixed and variable duty rate is applied to determine the duty paid landed value of those exports by APRIL. However, those prices include amounts representing elements not included in the ‘export prices’ used to determine dumping and the margin of dumping for APRIL’s exports.

Hence the absence of the necessary nexus between the dumping margin determined for APRIL’s exports and the landed value of those exports both duty paid and duty unpaid.

Flow through of dumping into prices in the Australian market

The foregoing, however, identifies another deficiency with the analysis.

The price undercutting analysis is a comparison of the ‘*landed value of exports from the subject countries (both inclusive and exclusive of anti-dumping duty) and Australian industry’s prices*’. Why such a price comparison was undertaken at this level of trade is unclear.

As noted above, the point of competition in the Australian A4 Copy Paper market between exports of A4 Copy Paper from the Subject Countries and the like goods produced by the Australian industry is in the supply to ‘End-Users’.²⁷ If the subject exports are undercutting the prices of the Australian industry’s like goods, it is at this point of competition that it occurs.

At Section 5.2.2 of the SEF, the Commission stated that:

“Sellers of A4 copy paper, particularly in the corporate stationery and retail segments, commonly source a range of A4 copy paper brands and grades from

²⁷ Refer to Section 5.2.2 of the SEF.

multiple sources, both Australian made and imported. Therefore, consumer groups also have access to and consume A4 copy paper from a variety of sources.

Supply channels for A4 copy paper are concentrated through a limited number of national resellers and retailers. Paper Australia and imported sources supply the same end users, via the same supply channels, resulting in direct competition.” (at page 22)

That this is the point of competition would make sense as A4 Copy Paper is sold in the Australian market in retail packaging, as demonstrated in the SEF as well as other documents on the Commission’s public file and as any Internet search of major Australian supermarkets and retailers of stationary products will disclose.

The prices of exports of A4 Copy Paper from the Subject Countries at this point of competition would necessarily include all post-exportation costs and expenses incurred in the supply chain to this point, including the general selling and administrative expenses and profit margins of the Australian importers, distributors, resellers and retailers. This is not reflected in the Commission’s price undercutting analysis in the SEF.

Deficiencies in price undercutting analysis

Accordingly, as is evident from the SEF, the price undercutting analysis is deficient in a number of respects, namely:

- (a) having regard to the distribution channels in the Australian A4 Copy Paper market set out in Figure 1²⁸, the volume of exports and domestically produced A4 Copy Paper, including Australian Paper’s products, do not appear to have been quantified for each distribution channel. Consequently, the extent of competition between A4 Copy Paper exports from the Subject Countries and Australian Paper’s products at each point in the supply chain, if any, is unknown;
- (b) it is also not evident from Figure 1 or Section 5.2.2 of the SEF to what extent Australian Paper dominates each of the distribution channels given its share of the Australian A4 Copy Paper market, nor to what extent A4 Copy Paper exports from the Subject Countries access each of the distribution channels. This would seem a relevant consideration in an injury and price undercutting analysis, especially in a market that, as is often claimed, to be ‘price sensitive’;
- (c) also, having regard to the distribution channels in the Australian A4 Copy Paper market, whether and, if so, to what extent the margins of dumping of exports of A4 Copy Paper from the Subject Countries have ‘flowed through’ to each point in the supply chain has not been quantified. Consequently, it is not known and cannot be known whether and, if so, to what extent any price undercutting can be attributed to the ‘dumping’ of exports of A4 Copy Paper from the Subject Countries. It is therefore not known whether and, if so, to what extent the injury incurred by Australian Paper in the unprofitability of

²⁸ Page 22 of the SEF.

its domestic A4 Copy Paper business can be attributed to ‘dumping’ of exports of A4 Copy Paper from the Subject Countries; and

- (d) because of the deficiency in the analysis as set out above, it is also not known whether the prices of exports of A4 Copy Paper from the Subject Countries would undercut those of Australian Paper’s products at each point of competition in the distribution channels.

Issues such as these could and should have been addressed by making relevant inquiries of interested parties, as opposed to posting a notice of the continuation inquiry on the Commission’s website on the off-chance that interested parties would respond and provide information relevant to these issues and without guidance as to what information and evidence was relevant to the inquiry. An active approach would have been more likely to be productive than the passive approach adopted, which clearly was not productive.

Further issues with price undercutting analysis

The sub-optimal analysis of price undercutting in the SEF does not end there.

While price undercutting by the subject exports has a direct impact on demand and may be a reason for end-users to switch from higher priced domestically produced A4 Copy Paper to lower priced imported A4 Copy Paper, it is also relevant in another respect.

That is:

- in a high-priced Australian A4 Copy Paper market, when compared with prices in overseas markets and globally, as evidenced by Australian Paper’s ‘less lucrative’ export sales, as well as pricing data available from entities such as RISI and, therefore, readily obtainable by the Commission;
- where that high-priced Australian market is progressively contracting due to technological change; and
- that Australian market is over supplied by the domestic producer (Australian Paper) by approximately 50% (by approximately 100,000 tpa); and
- that Australian market is apparently ‘price sensitive’ as is repeatedly claimed, although it does not seemingly respond to market forces,

it is reasonable to expect that price undercutting would lead to a fall in prices in that market over time to the extent of the price undercutting. That is, it should be subject to the same market forces that have been contended exist in Indonesia in relation to a claimed over-supply of pulp and resulting ‘artificially’ low prices in the A4 Copy Paper market that led to the findings of a ‘particular market situation’ in Review 551 and in the original investigation.

That obviously has not occurred: see, for example Figure 5 in the SEF (at page 30). Rather, according to the findings in the SEF, there is some evidence of Australian Paper’s prices increasing during the review period for this continuation inquiry²⁹, although it is suggested in

²⁹ See, for example, Table 24 in the SEF, at page 66, and Figure 17 of the SEF, at page 81.

the SEF that Australian Paper's prices fell in the first quarter of 2021 (see earlier above). If Australian Paper's prices did fall in the first quarter of 2021, why did they fall then and not earlier? What event or events occurred and cause Australian Paper's prices to decline in the first quarter of 2021 that did not previously occur causing a decline in Australian Paper's prices? This has not been addressed although it is a relevant consideration.

In any event, why has the occurrence of price undercutting not led to or resulted in a corresponding reduction in prices in the Australian market? Absent a decline in prices in the Australian A4 Copy Paper market, how is it possible to causally link any 'dumping' of A4 Copy Paper from the Subject Countries to any injury incurred or being incurred by Australian Paper? Further, absent evidence of this occurring, why would it commence to occur with the expiration of the anti-dumping measures?

Australian A4 Copy Paper market immune from market forces

It also seems from the foregoing that the Australian A4 Copy Paper market and Australian Paper are apparently immune from market forces.

Because of the approach adopted in the analysis in the SEF and, specifically, to an analysis that did not focus on market conditions prevailing in the Australian A4 Copy Paper market brought about by technological change and probably accelerated by the pandemic and Australian Paper's economic performance and response to those market conditions, the effect of exports of A4 Copy Paper from the Subject countries on Australian Paper's economic performance and on the Australian A4 Copy Paper market, whether attributable to 'dumping' or otherwise, has not been properly or fully assessed.

Why have A4 Copy Paper prices in the Australian market not fallen due to price undercutting by the subject exports and fallen at least to the lowest priced participant's products in the Australian market, which the Commission has now found to be those of APRIL?³⁰ Alternatively, why have such prices not fallen to prices for A4 Copy Paper prevailing globally in export markets as reflected in Australian Paper's less than lucrative export sales? This would seem the inevitable consequence in an open, price sensitive competitive market but has not occurred in the Australian A4 Copy Paper market. Why not?

Further, there appears to be an assumption that in the absence of import competition, and/or price undercutting by A4 Copy Paper from the Subject Countries, Australian Paper, the sole domestic producer of A4 Copy Paper, would have increased its prices in the Australian A4 Copy Paper market sufficiently to cover its increased cost to make and sell and presumably return to profit. There is no evidence to support this assumption and, indeed, the evidence is to the contrary, as noted earlier above.

First, as was found in Review 551, the 'export prices' of the subject exports increased. This was due to increased input costs such as the cost of pulp. Australian Paper, with 85%

³⁰ Refer to Section 8.6.1 of the SEF at page 78.

market share of the Australian A4 Copy Paper market or more, elected not to increase its prices notwithstanding it also had experienced similar increased input costs. Clearly an increase in prices was possible, although the extent of such price increase and whether it would be sufficient to cover Australian Paper's increased costs remains to be determined.

Why Australian Paper did not increase its prices has not been accounted for. A likely reason is that in a progressively contracting market due to technological change (that is, digitalisation), an increase by Australian Paper in the price of A4 Copy Paper (a commodity product) it supplied to 85% of the market, would lead to more end-users switching to the less costly digital solution for record-keeping with all the technological benefits that it possesses. In other words, it would exacerbate and increase the contraction of the Australian A4 Copy Paper market.

This, obviously, would lead to less sales revenues for Australian Paper and an increase in the unprofitability of its Australian A4 Copy Paper business. Hence, Australian Paper has seemingly made the commercial decision not to increase its prices due to the likely effect that any price increase would have on the market or, when it has done so, only marginally.

The Commission has not inquired into any of the abovementioned issues nor included any analysis on them in the SEF, at least not to any meaningful extent. Again, this would be an issue on which expert analysis and advice from economists would be required. As a result of the deficiency in inquiring into these issues, the analysis and the resulting findings in the SEF are sub-optimal and require rectification before a recommendation can properly be put to the Minister as a material relevant consideration has not been taken into account.

Second, there is considerable discussion in the SEF concerning negotiations conducted between Australian Paper and its customers, principally resellers and retailers, and the use of prices of imports in such negotiations by Australian Paper's customers. It is not surprising that the prices of import competition are used in such negotiations as there is no other competition in the Australian A4 Copy Paper market.

However, query what effect and benefit this has for the resellers and retailers in their negotiations with Australian Paper. It has not led to a fall in prices consistent with the progressive decline in the size of the Australian A4 Copy Paper market during the AD Review Period, which would typically be experienced in an open, price sensitive competitive market for a commodity product. Higher prices, on the other hand, would simply accelerate that decline.

If, as repeatedly contended and apparently accepted by the Commission, the Australian A4 Copy Paper market is a price sensitive open competitive market with purchasers easily able to switch sources and would do so in response to changes in prices, why then have the resellers and retailers, who Australian Paper contends possess the market power in the market, not demanded Australian Paper, the near monopoly supplier, to reduce its prices to, for example, prices consistent with global prices (that is, to Australian Paper's less lucrative

export prices) failing which they would switch to alternate sources, which obviously has not occurred?

As such customers of Australian Paper have not switched from Australian Paper to exporters for their source of A4 Copy Paper, price undercutting notwithstanding, this can only be due to price unrelated reasons. This has not been assessed either in consultation with the relevant resellers and retailers as the Commission acknowledges in the SEF.

Further, it also raises the counter-factual argument³¹, namely, what would occur in the Australian A4 Copy Paper market if Australian Paper decided to increase its prices uniformly across its 85% plus market share by an amount, for example, sufficient to cover its costs to make and sell and make some amount of profit? Would Australian Paper's customers desert it *en masse* and, if so, to whom and at what price and in what quantities?

Conclusion

Obviously questions such as this require expert analysis and advice and, equally obviously, that advice has not been sought, nor the advice and information of other participants in the Australian A4 Copy Paper market, such as resellers and retailers. Consequently, the nature and structure of the Australian A4 Copy Paper market and the market forces prevailing in that market have not been properly or fully identified and assessed.

Absent that analysis, conclusions cannot be made as to what is likely to occur in that market if the anti-dumping measures are allowed to expire.

The Commission's price undercutting analysis, due to its deficiencies, does not allow for conclusions to be drawn as to what would occur or would like to occur in terms of price related effects from 'dumping' of exports of the Subject Goods from the Subject Countries if the anti-dumping measures were allowed to expire. Further, given the absence of findings of price related effects during the AD Review Period attributable to 'dumping', it cannot simply be assumed that the expiry of the measures would have that effect. The Ministerial Direction on Material Injury requires a positive finding supported by evidence of any such finding.

3.5 Sales volumes

At Table 30³² in the SEF (page 82), the Commission disclosed that Australian Paper's sales volumes significantly increased in the period 2016 to 2019 over the base year of 2015 before falling in 2020, but still higher than in the base year.

In a market contracting progressively from 2015, how was it possible for Australian Paper to increase its sales volumes and of a magnitude disclosed in Table 30 and so rapidly, in a single

³¹ See Frontier Economics 'Economic framework for injury and causation analysis' (April 2017) - [Economic framework for injury and causation analysis \(industry.gov.au\)](https://www.industry.gov.au/publications/economic-framework-for-injury-and-causation-analysis)

³² Note: see also Table 7 on page 29 of the SEF

year and to do so without seemingly altering its prices, especially given the findings of price depression and price suppression? This is not explained by the Commission in the SEF.

Organic growth in sales volumes of that magnitude in such a short period of time would normally be extremely difficult, if not impossible, let alone in a commodity product market that has been determined to be progressively contracting.

The Commission observes that this increase in sales volumes coincided with the imposition of the subject anti-dumping measures. Was this mere coincidence? If the imposition of measures excluded some imports from the market, which ones, why and why not others that continued to compete in the market notwithstanding the measures and notwithstanding any apparent increase in prices? Hence the reason for such increase in sales volumes is not known. Mere observation is not evidence of causation, as any statistician who has observed stork and baby numbers in English towns will attest.

There is no evidence one way or the other. Amongst other things, the Commission has not conducted inquiries into such matters, not in Review 551 and not in this continuation inquiry with interested parties whose information and evidence would be relevant, as the Commission itself acknowledges in the SEF. Why such inquiries have not been conducted is not explained in the SEF, but it has resulted in information and evidence relevant to this inquiry not being obtained.

It is, however, common knowledge that Australian Paper acquired significant increased sales volumes in 2016 by purchasing the A4 Copy Paper distribution business of BJ Ball, Edwards Dunlop Office Products. Edwards Dunlop had previously obtained its A4 Copy Paper requirements from APRIL. This was acknowledged in Review 551.³³ No doubt it was the reason for Australian Paper's significant increase in market share at that time.

Hence the increased sales volumes that Australian Paper obtained was obtained through the purchase of an A4 Copy Paper business, as opposed to acquiring the increased sales volumes through organic growth particularly following the imposition of anti-dumping measures in 2017 and the subsequent expansion of these measures to include exports from other countries in 2019.

Of particular significance regarding that acquisition is that that it was an acquisition of a loss-making business. Unbeknown to APRIL, the supplier of A4 Copy Paper to Edwards Dunlop Office Products, which was the A4 Copy Paper distribution business of BJ Ball, Edwards Dunlop was on-selling that A4 Copy Paper to its customers in the Australian A4 Copy Paper market at a loss.³⁴ This ultimately led to the calculation of a deductive export price and a finding of dumping.

Two questions arise.

³³ Refer to Section 4.6.1.1 of Report 551: [551 - 055 - report - final_report - rep_551.pdf \(industry.gov.au\)](#)

³⁴ Refer to Section 6.9.7.1 of Report 341: [221 - report - final_report - rep_341.pdf \(industry.gov.au\)](#)

First, why would APRIL be reimbursing its Australian distributor for losses in its sales of APRIL's products into the Australian market when its Australian distributor was being purchased by a competitor, Australian Paper? This was common knowledge as the acquisition required the approval of the Australian Competition and Consumer Commission (ACCC), which it obtained. Why would APRIL subsidise the purchase price paid by its competitor through such reimbursement? In any event, there was no evidence of any reimbursement and none was referred to in the original investigation.

Second, and of more importance here, is what occurred in the pricing to Edwards Dunlop's customers following its acquisition by Australian Paper? That is, in a 'price sensitive' market, were the loss-making prices increased following the acquisition of that business by Australian Paper and, if so, when and to what extent and if not, for how long did they remain at their loss-making levels? Alternatively, did Australian Paper supply this acquired business with its A4 Copy Paper at a cost that enable that business to on-sell it at the same price as before but no longer at a loss?

The answers to these and other related questions are unknown because they appear not to have been investigated and remain un-investigated. However, it does indicate that it cannot be simply concluded that Australian Paper's increased sales volumes and market share during this period were due to the imposition of the anti-dumping measures without the circumstances and reasons for the increase being fully investigated. The decline in imports could have been due to and largely due to that acquisition. Again, coincidence is not evidence.

In any event, returning to Table 30 in the SEF, the Commission's view of the sales volumes trends disclosed in Table 30 were as follows:

"The commission considers the trend shown in Table 30 above demonstrates the effect on import volumes after ~~implantation~~ implementation (sic)³⁵ of anti-dumping measures. Notwithstanding the market contraction after 2015, demand for A4 copy paper remained, albeit at lower levels. The rate of market contraction was less than the reduction in sales by the subject exporters.

It further appears that the Australian industry met the continued demand in the absence of supply from overseas producers and by doing so increased its sales volumes.

The commission considers it reasonable that the implementation of measures led to reduced sales from the subject exporters as it caused those goods to become more expensive, and thus undesirable, in the price sensitive Australian copy paper market."

³⁵ Embryos, not anti-dumping measures, are 'implanted'.

Given that the ‘rate of market contraction was less than the reduction in sales by the subject exporters’, was the reduction in sales by the subject exporters not due to the acquisition by Australian Paper of APRIL’s distributor, Edwards Dunlop. It is strange that this is not mentioned in the above extract. Why?

In any event, during this period Australian Paper’s prices remained relatively stable notwithstanding the imposition of anti-dumping measures³⁶, the object of which is to increase prices in the relevant market to prevent the injurious effects of dumping:

“Figure 5 shows that Paper Australia experienced reducing selling prices from 2015 to 2017. After implantation (sic) of measures in April 2017, 2018 saw unit price stabilise before increasing in 2019. Prices in 2019 did not persist into 2020. Data available to the commission shows that prices continued to decline in the quarter ending 31 March 2021.” (Page 30 of the SEF)³⁷

The problem with this analysis is that it does not address the question of why did sales volumes of A4 Copy Paper not remain the same or increase if those subject exports continued to undercut the prices of Australian Paper after the imposition of the anti-dumping measures and were profitable to the exporters?

What was preventing exporters of A4 Copy Paper from increasing their sales volumes in the period prior to 2020 when it did not prevent them from increasing sales volumes in 2020 over the base year of 2015, noting that Australian Paper’s sales volumes decreased in 2020? This is not explained in the SEF.

In addition, the Commission reasoned as follows as regards the effect of prices on sales volumes:

“The commission considers the Australian industry’s ability to retain certain customers is largely contingent on customers paying prices that are comparable to the prices available from the subject exporters.

The lower price of the subject goods would likely avail customers to move their source of supply away from the Australian industry in the circumstance that measures expired. A resulting change in the market share held by various suppliers would likely also follow.” (page 83 of the SEF)

This reasoning is unsound. If Australian Paper’s ability to retain customers is contingent upon Australian Paper’s customers paying prices comparable to those available from exporters, this would suggest that exporters’ prices are undercutting the prices of Australian

³⁶ For example, the price of A4 Copy Paper sold by Australian Paper in the Australian market has remained relatively consistent from **\$1,428 per tonne in 2015** to **\$1,442 per tonne in 2020**: refer to page 45 of Australian Paper’s application for the imposition of anti-dumping measures resulting in Investigation 583.

³⁷ Note: see also Figure 17 as to Australian Paper’s pricing over the period 2012 to 2018 (decreasing) 2019 (increasing) and 2020 (decreasing) - at page 81 of the SEF.

Paper notwithstanding the anti-dumping measures. It further would indicate that the extent of the price undercutting was sufficient to persuade end users to switch to exports of A4 Copy Paper.

However, as Australian Paper did not incur sales volume related injury during the AD Review Period, it is evident that its customers did not avail themselves of the opportunity to move their source of supply from Australian Paper to exports, notwithstanding alleged price undercutting by, for example, exports of A4 Copy Paper from the Subject Countries.

Further, the assertion in the above extract that *'lower price of the subject goods would likely avail customers to move their source of supply away from the Australian industry in the circumstance that measures expired'* is mere speculation as it did not occur during the AD Review Period notwithstanding 'dumping' of the Subject Goods as determined in Review 551.

If:

- the point of competition, as the Commission identified at Section 5.2.2 of the SEF, is at the 'End User', consumer/retail level in the supply chain, that is, the bottom sector in Figure 1; and
- those purchasers' choice of A4 Copy Paper is based predominantly on price as opposed to other factors or other factors, such as well-known brand names; and
- this influenced upstream purchasers in their sources of A4 Copy Paper to sell into that market,

then if 'dumping' was influencing those choices, it must be demonstrated how and to what extent the 'dumped margins' flowed through to each level in the supply chain and each distribution channel to the consumer/retail point of competition. This has not been done. Why not is not explained in the SEF notwithstanding that it is the singular most relevant consideration in an analysis as to what is likely to occur on expiration of the anti-dumping measures if they are not continued.

In addition, the Commission acknowledges in the SEF that inquiries were not made by the Commission of importers, distributors, resellers or retailers regarding the economic performance of the Australian A4 Copy Paper market during the review period for this continuation inquiry or at all or of prevailing market conditions in the Australian A4 Copy Paper market. Hence, at best the Commission has only limited information concerning market conditions prevailing in the Australian A4 Copy Paper market during the review period for this continuation inquiry and the performance of participants in that market during that period.

Specifically, the Commission has no or limited information and evidence from such interested parties relating to market conditions prevailing in the Australian A4 Copy Paper market during the review period for this continuation inquiry and the performance of participants in that market, especially the latter part of that period, including reasons why

interested parties did or did not switch their sources of supply of A4 Copy Paper. Absent information and evidence from such interested parties, the reasons for their behaviour in that market is mere speculation.

It, therefore, clear that the Commission's inquiry into whether or not discontinuation of the anti-dumping measures would lead to, or would more probably than not lead to, a continuation or recurrence of material injury to the Australian A4 Copy Paper market is currently incomplete.

Production capacity and sales volumes

To take the sales volume analysis a step further, the Commission opined that:

“Based on the volumes of sales observed for 2020, any one of the subject exporters would individually possess the ability to supply each large Australian customer or a cohort of smaller customers. The likely effect of this being that Australian industry would experience a decline in its sales volumes and market share.” (page 83 of the SEF)

It is clear from Section 8.4.7 of the SEF that producers of A4 Copy Paper in the Subject Countries each had the 'production capacity' to supply the entire Australian market. So also does Australian Paper, as Australian Paper itself acknowledged. Consequently, the relevance of possessing such 'production capacity' is unclear.

However, while the point of such production capacity is unclear, in the case of Australian Paper it is relevant because it results in the domestic production of approximately 200,000 tpa or approximately 50% more than demand in the Australian market.

Hence, there is an over-supply in domestic production by Australian Paper to the Australian market. This over-supply is evidenced by Australian Paper's 'less lucrative' export sales.

Importantly, such over-supply should have led to a fall in prices in the Australian market in a 'price sensitive' open market subject to market forces similar to the claimed over supply of pulp in Indonesia that led to the particular market situation finding for the Indonesian A4 Copy Paper market. Obviously, this over-supply has not had that effect in the Australian A4 Copy Paper market. Why not in a price sensitive, open competitive Australian A4 Copy Paper market? This is not addressed in the SEF.

Further, having substantial production capacity is not the same as having produced excess products. In APRIL's case, as the Commission has repeatedly verified, RAK produces A4 Copy Paper to order and only to order. Hence, APRIL does not have excess production capacity standing idle. This was made evident during verification, namely, that RAK did not possess the production capacity to meet urgent orders and that such orders were required to be satisfied by RAK by alternate means outside of its usual production processes. This was verified by the verification team.

Putting that aside, the question remains as to why, if producers in the Subject Countries each possess the production capacity to flood the Australian market with low priced profitable exports notwithstanding the anti-dumping measures, why has this not occurred?

The answer to this question is relatively simple and straightforward and it has nothing to do with the presence of the anti-dumping measures or otherwise. It simply is not in those exporters' commercial self-interest for them to flood the Australian market with low priced exports. To do so would adversely affect prices in the Australian A4 Copy Paper market, which is a high-priced market³⁸, by reducing prices in that market and, consequently, the profitability of export sales into that market.

Further, a reduction in prices would be difficult to reverse not only because A4 Copy Paper is a commodity product and as such increasing prices is notoriously difficult, but also it would require increasing prices in a contracting commodity product market due to technological change. The likelihood of this occurring would seem remote and, in any event, has not occurred.

In other words, the market forces precluding Australian Paper from increasing its prices also arguably preclude the subject exporters from flooding the Australian market with low priced exports. It is not in their commercial interests to do so as is evidenced by their collective restraint in this regard. This is reflected in the prices and volumes of the subject exports during the AD Review Period.

Again, this is not addressed in the SEF.

Contended effect of expiration of the anti-dumping measures on sales volumes

Essentially the Commission's argument is that if the anti-dumping measures are allowed to expire, prices of the subject exports will fall, further undercutting Australian Paper's prices and thereby reducing its sales volumes, sales revenues and, ultimately, profitability.

The problem with this argument is it raises the obvious question why this has not already occurred notwithstanding the anti-dumping measures? That is:

'in a progressively contracting domestic market for a commodity product (i.e.. A4 Copy Paper) where demand has fallen by approximately 50% between 2015 and 2020 due to changes in technology (i.e., digitalisation) and changing business practices (e.g., effects of the pandemic, working from home, etc.) where domestic production exceeds demand by approximately 50% (i.e., Australian Paper's excess production), why have the high prices in the Australian market not fallen in accordance with market forces along with the Australian industry's sales volumes'?

³⁸ Refer to Report 551.

Surprisingly, this has not been addressed in the SEF, notwithstanding being material to the analysis.

These and similar market related issues require investigation by duly qualified and experienced experts in such market analysis. This required in order that any sensible conclusion can be drawn as to the likely effect the expiration of the anti-dumping measure would have in the Australian A4 Copy Paper market given prevailing market conditions and especially given Australian Paper's economic performance during the AD Review Period and reasons therefor.

Expert advice is required to assess whether the expiration of the anti-dumping measures would lead or be likely to lead the occurrence of injury (that is, unprofitability) due to sales volumes effects and/or price related effects attributable to 'dumping' of A4 Copy Paper from the Subject Countries and not from other causes as was the case during the AD Review Period. That is, why would the expiration of the anti-dumping measures have this effect when this has not occurred during the AD Review Period during which the economic performance of the Australian Industry is largely, if not wholly, due to prevailing market conditions in the Australian A4 Copy Paper market, and cannot be attributed and has not been attributable to 'dumping' of A4 Copy Paper from the Subject Countries.

Such use of experts was a principal recommendation of the Federal Government in its response to the Productivity Commission's inquiry into Australia's anti-dumping regime, namely, its recommendations in "*Streamlining Australia's anti-dumping system; An effective anti-dumping and countervailing system for Australia*" (June 2011) (Recommendation 3.1) (copy **attached**). Obviously the Commission has not taken up this recommendation in this continuation inquiry. It is submitted that the Commission ought to have followed through with this recommendation, especially given the circumstances of and prevailing conditions in Australia's A4 Copy Paper market as found in Review 551.

Conclusion

In light of the foregoing, it is evident that Australian Paper has incurred no reduction in sales volumes during the AD Review Period notwithstanding a progressively contracting Australian A4 Copy Paper market and the presence of 'dumped' exports of A4 Copy Paper from the Subject Countries competing in that market. The maintenance of sales volumes by Australian Paper and the commensurate decline in imports was likely due to Australian Paper's acquisition of market share such as its acquisition of the Edwards Dunlop distribution business, rather than due to the effect of the anti-dumping measures,

The available evidence referred to in the SEF indicates, if not confirms, this to be the case.

Why, therefore, the expiration of the anti-dumping measures would lead or be likely to lead to a decline in sales volumes and resultant injury to the Australian industry attributable to dumping on the expiration of the measures is unexplained and yet to be established.

3.6 *Miscellaneous observations on SEF*

3.6.1 *Technological change*

It is the case that the injury incurred by Australian Paper during the AD Review Period for this continuation inquiry has been unprofitability and progressively increasing unprofitability: see the extract from the SEF at Section 5 of this submission.

The issue, therefore, is what caused that injury, in whole or in part, and, depending upon what that cause is or those causes are, whether the expiration of the anti-dumping measures or their continuance would affect the continuance of that injury?

It is evident that the unprofitability that Australian Paper has incurred during the AD Review Period was caused by an inability for it to fully recover its cost to make and sell, which cost had apparently increased due to increases in input costs such as, for example, the cost of pulp and energy.

That inability to fully recover its cost to make and sell was not due to, apparently, reducing sales volumes, at least according to findings of fact in the SEF. Consequently, it would seem that the inability to fully recover its cost to make and sell was due to an inability to increase prices during the AD Review Period.

According to findings of fact in the SEF, Australian Paper's prices during the review period for this continuation inquiry remained relatively stable throughout this review period, increasing in 2019 marginally and declining in the first quarter of 2021:

"After implantation of measures in April 2017, 2018 saw unit price stabilise before increasing in 2019. Prices in 2019 did not persist into 2020. Data available to the commission shows that prices continued to decline in the quarter ending 31 March 2021." (at page 30 of the SEF)

The principal objective of anti-dumping measures is to increase prices in the affected market equal to the margin of dumping and, thereby, prevent and remove the injurious effects of 'dumping'. Obviously this did not occur with the imposition of the anti-dumping measures following the imposition of the anti-dumping measures in APRIL 2017.

This would suggest that the anti-dumping measures were ineffective in achieving their objective. Why?

The Australian A4 Copy Paper market is without doubt a market in decline and has been at least since 2015 due to technological change. Like other technologies, such as, for example, the floppy disc and the cassette tape, which are now virtually commercially obsolete if not so, paper also is being replaced with digitalisation as the preferred solution for record keeping due to it being more cost-effective, efficient, versatile, and environmentally friendly, than paper-based solutions.

One can draw obvious parallels with the current decline in petrol-powered internal combustion engine passenger motor vehicles, which are being increasingly replaced by electric passenger motor vehicles globally. A number of major passenger motor vehicle manufacturers have already announced that they will cease to manufacture passenger motor vehicles powered by internal combustion engines. That technology is becoming and will become commercially obsolete in the foreseeable future.

The position regarding A4 Copy Paper is no different, especially in technologically advanced economies like Australia. No amount of tariff protection, whether in the form of dumping duties or some other impost on imports, will or can reverse this process.

An increase in A4 Copy Paper prices in Australia would simply accelerate this process. The switch caused by an increase in prices is not a switch from one source of A4 Copy Paper to another, that is, from A4 Copy Paper produced by Australian Paper to imports, but from A4 Copy Paper to digital records because of the benefits that that technology has over paper, as enumerated above.

Hence, the continuance of the anti-dumping measures will not prevent the material injury that those measures are intended to prevent because the injury being incurred by Australian Paper is not caused by exports of A4 Copy Paper from the Subject Countries whether at dumped or un-dumped prices.

Rather, it is caused by technological change that is causing the Australian A4 Copy Paper market to progressively contract and prevent increases in prices in the shrinking market. No trade remedy will prevent that injury. Australian Paper will remain constrained from increasing its prices regardless of whether the anti-dumping measures are allowed to expire or are continued. Consequently, its A4 Copy Paper will continue to be unprofitable and increasingly so as the Australian A4 Copy Paper continues to contract and it is compelled to sell its excess production into the 'less lucrative' export markets.

In fact, the continuance of the anti-dumping measures, as opposed to their lapsing upon expiry, arguably would exacerbate the decline in the Australian A4 Copy Paper market and, therefore, the injury that Australian Paper is already incurring. The continuing high prices of A4 Copy Paper in Australia will simply encourage end-users to switch to the technologically advanced, less costly digitalised recording medium, not to exports of A4 Copy Paper, whether at dumped or un-dumped prices.

3.6.2 *Materiality of the injury*

At Section 8.6 of the SEF reference is made to the *Ministerial Direction on Material Injury 2021* (copy **attached**). It is pointed out that:

"... injury from dumping and subsidisation need not be the sole cause of injury to the industry, where injury caused by dumping and subsidisation is material in degree";
and

“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, be weakened by other events, suffer material injury from the same amount and degree of dumping or subsidisation”.

Both of these statements are obviously true. However, they point to the need to identify that injury that is attributable to ‘dumping’ and not to other economic factors and then assess whether that injury attributable to dumping is ‘material’. This is consistent with WTO rules.

The injury that Australian Paper has incurred over the AD Review Period is its unprofitability and progressively increasing unprofitability. The issue, therefore, is whether and, if so, to what extent such injury is attributable to ‘dumping’ of A4 Copy Paper from the Subject Countries by the relevant exporters and whether that injury so attributable is ‘material’.

The issue of whether and, if so, to what extent such injury is attributable to ‘dumping’ of the A4 Copy Paper from the Subject Countries by the relevant exporters has been addressed earlier above in this submission.

On the ‘materiality’ of injury, the Ministerial Direction goes on to state that:

“... identification of material injury be based on facts and not mere assertion unsupported by facts”; and

“... the injury caused by dumping ... is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business”.

The threshold issue, therefore, is what constitutes the ‘normal ebb and flow of business’ in the Australian A4 Copy Paper market? As the injury caused by dumping must be greater than the injury likely to occur in the normal ebb and flow of business in the Australian A4 Copy Paper market, what is the injury likely to occur the normal ebb and flow of business in the Australian A4 Copy Paper market?

This threshold issue in assessing the materiality of any injury occasioned by dumping was not determined or addressed in the SEF. Instead, the Commission proceeded as follows:

“The commission has therefore analysed the likely effect on price and volume in the current state that dumping and subsidisation of the exported goods continues and in an alternative scenario where the Minister does not secure the continuation of measures.” (at page 77 of the SEF)

As there is no benchmark against which the materiality of any injury attributable to dumping is to be assessed, the relevance of the analysis in Sections 8.6.1. (price effects) and (8.6.2 (sales volumes effects) in the SEF is unclear.

The Commission's analysis of 'materiality' is at Section 8.6.3 of the SEF. It concludes in that Section that:

"The commission therefore considers the expiration of the measures would lead, or would be likely to lead, to a continuation of dumping and subsidisation, and material injury."

Putting aside the fact that the analysis in that Section does not identify what injury is attributable to the 'dumping' of A4 Copy Paper from the Subject Countries, that is, Australian Paper's progressive unprofitability, that injury is not measured against the anti-dumping measure stipulated in the Ministerial Direction as to its 'materiality'.

That is, it is not determined how any injury caused by dumping of exports of A4 Copy Paper from the Subject Countries is greater than the injury likely to occur in the normal ebb and flow of business in the Australian A4 Copy Paper market.

In particular, it has not been assessed what injury is likely to be incurred in the normal ebb and flow of business in the Australian A4 Copy Paper market that is progressively contracting due to technological change and in which supply materially exceeds demand due to excess domestic production of approximately 50% in excess of demand.

Absent such an assessment it is not known and cannot be known what injury is being incurred or is likely to be incurred in the normal ebb and flow of business in the Australian A4 Copy Paper market in the market conditions prevailing in that market. Hence, whether any injury attributable to 'dumping' cannot be assessed against the normal ebb and flow.

Again, this remains outstanding in the analysis in the SEF.

Finally, it must be noted that the Ministerial Determination contemplates the existence of dumping in the relevant market but requires that any injury caused by such dumping must be greater than that likely to occur in the normal ebb and flow of business. That is, the Ministerial Direction proceeds on the assumption that dumping is occurring in the relevant market and then requires that any injury attributable to that dumping must be greater than that normally incurred in the ebb and flow of business in that market to qualify as being 'material'.

That has not been assessed according to the SEF. Hence, contrary to the Ministerial Direction, the conclusion on materiality in section 8.6.3 of the SEF constitutes '*mere assertion unsupported by facts*'.

3.6.3 'All Other Exporters' category

At Section 10.1 of the SEF, the proposed preliminary recommendations to the Minister includes the following:

“in relation to the category of ‘all other exporters’ from Indonesia, the notice is altered to reflect the change in variable factors for exports of the goods from Indonesia to Australia in the period 1 July 2020 to 30 June 2021”.

This category of ‘exporters’ in Indonesia is addressed in Section 7.5 of the SEF as follows:

“The commission’s analysis of goods exported from Indonesia found that RAK remains as the pre-dominant exporter of the goods subject to measures. However, an analysis of ABF import data revealed the identity of the exporter was unclear on certain consignments. This was because the import declaration identified the supplier of goods as being a trading entity rather than a known manufacturer.³⁹ As a result it could not be determined if those goods originated from an exporter this is not subject to measures.

The commission considers that exports of the goods from parties in the all other exporters category continues to be relevant to the collection of anti-dumping duties. On the basis that the commission has information that is contemporaneous to the imports of the goods examined in Review 551, it is appropriate to review the variable factors relevant to all other exporters from Indonesia.” (at pages 48 and 49 of the SEF; footnote omitted)

The question inevitably arises as to what relevance is it that a consignment or consignments of A4 Copy Paper imported into Australia during the AD Review Period ‘could not be determined if they originated from an exporter that was not subject to the anti-dumping measures’?

Is not the question whether the good being imported into Australia is A4 Copy Paper exported from Indonesia by a known exporter? If it is, then that import has dumping duty imposed on it on importation but otherwise not or, at least, that should be the case.

The oft cited *‘Dumping and Subsidies Manual’* usefully states, on page 158, that the category of ‘all other exporters’ referred to in the above extract from the SEF is to ‘exporters’ who are *“not known, or which did not exist, at the time of the investigation”*.

It, therefore, is unclear how the expiration of the anti-dumping measures applying to ‘exporters’ who do not exist and, because they do not exist, who could not have exported A4 Copy Paper to Australia at any time let alone during the AD Review Period *‘will lead to, or be likely to lead to’* the occurrence or recurrence of dumping and the material injury that the

³⁹ That so-called trading entity was in all likelihood AFEM. In any event why would the identification of a ‘known manufacturer’ be made in an import declaration and be relevant to the imposition of anti-dumping measures? Anti-dumping measures are not imposed on known manufacturers and not on entities of any description. Customs duties, including special duties of customs such as dumping duties, are imposed on goods.

measures are intended to prevent? How this is or could be possible is not explained in the SEF.

Also, it is unclear how this category of 'exporters' is different from exporters of A4 Copy Paper from Indonesia who are exempt from the anti-dumping measures, being PT Indah Kiat Pulp & Paper Tbk, PT Pabrik Kertas Tjiwi Kimia Tbk and PT Pindo Deli Pulp & Paper Mills, and exporters of A4 Copy Paper from other countries that are not subject to anti-dumping measures. On what legal basis is the category of 'all other exporters' to be treated any differently from such entities?

Should any entities falling within the 'all other exporters' category commence to export A4 Copy Paper to Australia at prices that the Australian Industry considers to be 'dumped' and because of that causing it material injury, then, no doubt, the Australian industry can avail itself of the remedies available to it under Part XVB of the *Customs Act 1901*. Why the category of 'all other exporters' here is to be treated differently from other entities whose exports are not subject to anti-dumping measures is neither clear or explained, nor is pursuant to what legislative provisions such a category of non-existent exporters and exports exists.

It would seem that the scheme applying to ordinary customs duties is being applied in reverse here. Under the *Customs Tariff Act 1995*, customs duties are imposed on all goods imported into Australia with the general rate of customs duty set out in Schedule 3 to that Act and the concessional rates to those general rates being specified in Schedule 4 to that Act.

Here the general rate of dumping duty is effectively the rate applying to the category of 'all other exporters', with the concessional rate to that general rate being the rate specified for individual, named exporters. Typically the rate applying to exports by the named exporters is less than the 'general rate'.

The objective of this administrative scheme is to ensure that all exports from a particular country are caught by the anti-dumping measures – that is, the anti-dumping measures apply on a 'country-wide' basis.

This, of course is contrary to Article 9.2 of the WTO Anti-Dumping Agreement, which provides that:

"The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."

There is no evidence here that it would be ‘impracticable’ to name the suppliers (that is, exporters) in Indonesia or in the Subject Countries and, in any event, this has been done. Consequently, there is no legal basis under the WTO Anti-Dumping Agreement for the continuation of ‘country-wide’ anti-dumping measures or, indeed, any statutory authority to do so under Part XVB of the *Customs Act 1901* and Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975*.

Further, there is no legislative basis for this scheme in Part XVB of the *Customs Act 1901* or in the *Customs Tariff (Anti-Dumping) Act 1975* nor any reason for such a scheme to be included in such legislation. In addition, given the non-existence of relevant exports by such non-existent exporters, the Minister could not be satisfied of the matters required to be satisfied in order to publish a dumping duty notice nor the continuation of anti-dumping measures pursuant to such a notice. To do so would be unlawful, as would a recommendation to the Minister to do so.

Hence the proposal in the SEF to recommend to the Minister to continue the anti-dumping measures in respect of non-existent exports by non-existent exporters that, due to their non-existence, cannot cause injury to a domestic industry would be *ultra vires* and, consequently, would be unlawful.

Section 4: Submission on National Interest and Miscellaneous Matters

4.1 National interest

In considering the imposition of anti-dumping measures with the publication of a dumping duty notice pursuant to sections 269TG(1) and (2) of the *Customs Act 1901*, the Minister possesses an unfettered discretion that enables the Minister to take into account the national interest.⁴⁰

It essentially was the reason why the Federal Government did not adopt a ‘bounded’ public interest test recommended by the Productivity Commission in its Inquiry Report No. 48, ‘*Australia’s Anti-dumping and Countervailing System*’.

That statutory discretion also exists for the Minister to take into account the national interest in considering whether to continue anti-dumping measures for a further five (5) years pursuant to section 269ZHG of the *Custom Act 1901*. The express provision in section 269ZHG of the *Customs Act 1901* that the Minister may take into account any matters that the Minister considers relevant empowers the Minister to do so, if on no other basis.

APRIL submits that the national interest should be taken into account in the Minister’s consideration of whether to allow the anti-dumping measures to expire or to continue them for a further five years. That is, the Minister should consider whether continuing with the impost of a tax, namely, dumping duties, on exports of A4 Copy Paper from the Subject

⁴⁰ Refer to Sections 6.1. and 6.2 of ‘*Streamlining Australia’s antidumping system; An effective anti-dumping and countervailing system for Australia*’ (June 2011).

Countries on their importation into Australia and the consequent higher prices payable by Australian businesses and consumers is, in the circumstances, in the national interest.

For the reasons set out in the sub-sections to this submission below, APRIL submits that it is not in the national interest to do so. APRIL contends that allowing the anti-dumping measures to expire would, in the circumstances, be in the national interest and that to continue them, would not be.

4.1 *National interest generally*

APRIL has submitted in a previous submission⁴¹ that the continuation of the subject anti-dumping measures would not be in Australia's national interest and that this is a relevant consideration for the Minister in deciding whether to continue the anti-dumping measures for a further period of five (5) years or allow them to expire on 19 April 2022.

The key reasons for this submission that the continuation of the subject anti-dumping measures would not be in Australia's national interest are set out below.

Since 2016, the Australian A4 Copy Paper market can only be characterised as a market in decline due to technological change with digitalisation and electronic record-keeping replacing paper-based solutions, specifically, A4 Copy Paper. This transition to electronic record-keeping is unlikely to abate due to the technical advantages that electronic records have over paper-based records, as evidenced by, amongst other things:

- the Commission's maintenance of an electronic public file for dumping investigations, reviews and inquiries;
- the lower cost of maintaining and transmitting electronic records;
- the ability to revise, amend and retain multiple versions of documents;
- the ability to retain multiple copies of documents without any degradation in multiple secure locations; and
- changes to work-place practices, such as, for example, increased working from home as exemplified during the current pandemic, requiring and facilitating increased use of electronic solutions for documentary records and communications.

Consequently, the Australian A4 Copy Paper market has declined progressively by approximately 2% to 3% per annum according to Australian Paper from approximately 200,000 tpa in 2016 to approximately 130,000 tpa or less to date.

Of current demand for A4 Copy Paper in the Australian market of approximately 130,000 tpa or less currently, Australian Paper estimates that imports account for about 30,000 to 40,000 tpa. This would leave approximately 100,000 tpa to be supplied by the Australian industry, namely, Australian Paper, being the sole producer of A4 Copy Paper in Australia.

⁴¹ See [588 - 021- submission - exporter - april far east malaysia sdn. bhd. - grounds for continuation of measures.pdf \(industry.gov.au\)](#)

Australian Paper has a production capacity of 200,000 tpa of A4 Copy Paper and produces about that amount due to operational requirements at its plant at Maryvale, Victoria. This means that approximately 50% of Australian Paper's production of A4 Copy Paper is in excess of market demand in Australia.

As Australian Paper itself has acknowledged, this excess production is sold by it into export markets at 'less lucrative prices' than those obtained in Australia. This, no doubt, exacerbates the unprofitability of Australian Paper's A4 Copy Paper business and increasingly so as the Australian market contracts and exports presumably take a greater share of Australian Paper's sales volumes.

According to the 'Australian industry verification report' for Australian Paper⁴² as well as the SEF, Australian Paper's A4 Copy Paper business is unprofitable and has been for some time and is increasingly so, as indicated in the extract from the SEF set out earlier in Section 5 of this submission.

This is somewhat surprising given that since 2015 Australian Paper has increased its market share of the Australian A4 Copy Paper market from 44% in 2014 to 85% in 2018⁴³. Further, according to one interested party, that market share has now increased to at least 90% and is probably higher.⁴⁴ This, of course, was accompanied by increased domestic sales volumes by Australian Paper over this period.

Australian Paper has disputed that it holds the market share as claimed by the interested party and asserted that it holds a lesser market share. If that is the case, then it means that more of its production of A4 Copy Paper exceeds demand in Australia. Such increased excess can only be sold into the 'less lucrative' export markets, thereby further exacerbating the unprofitability of Australian Paper's A4 Copy Paper business.

In any event, Australian Paper has maintained its sales volumes of A4 Copy Paper during the AD Review Period in a contracting market without significantly reducing its prices.

Given the foregoing:

- (a) why have prices for A4 Copy Paper in Australia not fallen since 2016 in accordance with market forces, as would be expected with falling demand and increasing over-supply, but instead remained relatively stable or increased marginally?;
- (b) why have prices in the Australian A4 Copy Paper market not responded to prevailing market conditions?; and

⁴² See Document No 15 on the Commission's electronic public file: [588 - 015 - verification report - australian industry - paper australia Pty Ltd.pdf](#)

⁴³ Source: Report 463, Page 27, Table 3: Comparative share of the Australian market: [Microsoft Word - ATT A REP 463 \(industry.gov.au\)](#)

⁴⁴ Source: UPM Pacific Asia Pte Ltd submissions of 10 August 2021 and 3 September 2021 (Documents 4 and 6): [Microsoft Word - 588 Continuation Submission.docx \(industry.gov.au\)](#) and [Microsoft Word - 588 Submission in response to AP..docx \(industry.gov.au\)](#)

- (c) why has Australian Paper's A4 Copy Paper business been consistently unprofitable despite its increase in sales volumes and market share in the Australian A4 Copy Paper market where prices have been observed to be higher than in other markets such as, for example, the Indonesian A4 Copy Paper market as found as a fact by the Commission⁴⁵?

The answers to these questions have been addressed earlier in this submission.

However, it is to be noted in relation to these questions that:

- (i) the price of A4 Copy Paper sold by Australian Paper in the Australian market has remained relatively consistent from [\\$1,428 per tonne in 2015](#) to [\\$1,442 per tonne in 2020](#)⁴⁶; and
- (ii) the Australian A4 Copy Paper market has been a market arguably unaffected by dumping due to the imposition of anti-dumping measures, since April 2017, on exports from the Subject Countries and since April 2019, on exports from Finland, the Republic of Korea, the Russian Federation and the Slovak Republic.

Notwithstanding the imposition of anti-dumping measures in 2017 and their extension in 2019, the Australian industry's A4 Copy Paper business has been unprofitable and increasingly unprofitable. Such unprofitability is clearly attributable to factors other than 'dumping'.

As noted and discussed earlier in this submission, that unprofitability was due to Australian Paper's increased cost to make and sell A4 Copy Paper produced by it and its apparent inability or unwillingness to fully recover such increased cost to make and sell by increasing its prices.

For the reasons set out earlier in this submission, that 'inability' or unwillingness to increase by Australian Paper to increase its prices cannot be attributed to 'dumping' of A4 Copy Paper from the Subject Countries. Rather, this is due to the prevailing market conditions in the Australian A4 Copy Paper market and, in particular, to the technological based change and transition from paper-based solutions to electronic solutions with digitalisation.

Further, it also is evident that the Australian A4 Copy Paper market does not respond to market forces despite it being claimed to be an open, competitive market that is price sensitive. In particular, it has not responded to market forces such as a progressively contracting market due to technological change (that is, decreasing demand) and an oversupply of the domestic production of the Subject Goods (that is, increasing supply) that would normally see a decline in prices as a result.

⁴⁵ Source: Report 551: [551 - 055 - report - final report - rep 551.pdf \(industry.gov.au\)](#).

⁴⁶ Refer to page 45 of Australian Paper's application for the imposition of anti-dumping measures resulting in Investigation 583

Why this has not occurred has not been analysed not explained in the SEF.

While Australian Paper's A4 Copy Paper business has been unprofitable and increasingly so, exports of A4 Copy Paper from the Subject Countries continue to compete in the Australian A4 Copy Paper market and do so profitably.

It would thus appear that Australian businesses and consumers have been subsidising an increasingly unprofitable Australian industry and profitable exporters in a market that does not respond to market conditions protected by (high) tariff barriers in the form of dumping duty. Such subsidisation takes the form of high prices in the Australian A4 Copy Paper market, as was determined by the Commission in Review 551.

That, APRIL submits, would not be in Australia's national interest. To subsidise the sole producer of A4 Copy Paper in Australia with high prices while that producer's A4 Copy Paper business is and continues to be unprofitable despite such high prices paid by Australian businesses and consumers for A4 Copy Paper at a time they are and have been transiting to electronic-based solutions cannot be in the national interest. How is the national interest benefitted in such circumstances?

Further, it would not be in Australia's national interest to provide tariff protection in the form of dumping duties in view of the economic consequences it has for Australia. This is especially so when:

- (i) the anti-dumping measures have not been effective in preventing injury to the Australian industry because such injury (i.e., unprofitability) was caused by factors other than dumping, namely, Australian Paper's increased cost to make and sell that it cannot recover by way of increased prices and/or increased sales volumes due to the progressive contraction of the Australian market caused by technological change and its consequent increasing excess production for that market that it can only sell into the less lucrative export markets; and
- (ii) the possible exit from the unprofitable A4 Copy Paper market by Australian Paper given its recent acquisition of Orora Limited's Australasian Fibre Packaging Business in April 2020 for \$1.72 billion⁴⁷ which according to its parent company's, Nippon Paper Industries, 'Medium Term Business Plan 2025' (14 May 2021) (copy **attached**) and the following statement of the President of that company, that fibre packaging, not A4 Copy Paper, will become the core business of Australian Paper:

"Overseas, we have established Opal, the mainstay business of which is fiber packaging in Australia and New Zealand. We have thus established a comprehensive system covering the process from linerboard and corrugated

⁴⁷ [2924-02230829-3A540433 \(markitdigital.com\)](https://www.markitdigital.com/2924-02230829-3A540433)

medium to box making. We will work to expand the value chain with a view to supplying products in the global market.”⁴⁸

The continuation of the anti-dumping measures for a further five (5) years in such circumstances would not be in the national interest. This would seem especially so where the question of the cessation by Australian Paper of its Australian A4 Copy Paper business is not a question of if but when.

Further, that unprofitability of Australian Paper can only be addressed and rectified by Australian Paper addressing its high cost to make and sell. Increasing domestic selling prices of A4 Copy Paper in Australia would not address the issue or, at least, not sufficiently due to the contracting Australian A4 Copy Paper market. It arguably would only accelerate the transition in the Australian A4 Copy Paper market to electronic solutions in substitution for paper-based solutions.

That addressing its high cost to make and sell A4 Copy Paper was required in order for Australian Paper to return to profitability was acknowledged in the SEF and in the Australian industry verification report where it was stated that Australian Paper had reduced its losses in the first quarter of 2021 by 50% and this despite a decline in prices in 2021. Hence, in the absence of an increase in prices and/or sales volumes, it could only have been due to Australian Paper addressing its high cost to make and sell.

In these circumstance, the expiration of the anti-dumping measures will not lead to or be likely lead to the continuation or recurrence of the material injury that the anti-dumping measures were intended to prevent because the alleged material injury was caused by factors other than exports of A4 Copy Paper at ‘dumped’ export prices from the Subject Countries.⁴⁹

It is therefore submitted that it would not be in Australian national interest for Australian businesses and consumers to subsidise, through the continued impost of a tax on imports from certain countries, an unprofitable and uncompetitive Australian industry which remains unprofitable and uncompetitive despite the provision of tariff protection in the form of dumping duties since April 2017, particularly as the sole Australian producer of A4 Copy Paper now appears to be shifting its core business to fibre packaging.

An analysis of the impact of such restructuring of the Australian industry, that is, Australian Paper’s A4 Copy Paper business and the A4 Copy Paper business, generally would seem a role suited to the Productivity Commission and not one that is appropriate for or can be addressed by trade remedies.

⁴⁸ See: [President's Message | ABOUT US | Nippon Paper Group](#)

⁴⁹ Refer to section 269TAE(2A)(C) to (f) of the *Customs Act 1901* (inclusive)

4.2. *National interest -anti-competitive considerations*

Section 269TAE(2A)(d) of the Customs Act 1901 requires that the “*Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:*

- (d) *restrictive trade practices of, and competition between, foreign and Australian producers of like goods”.*

Given the near monopoly market share of the Australian A4 Copy Paper market possessed by Australian Paper and its unprofitable and progressively increasing unprofitable A4 Copy Paper business due to prevailing market conditions in the Australian A4 Copy Paper conduct of the kind referred to in the above statutory provision is occurring.

No doubt Australian Paper would contend that in applying for and seeking the continuation of the anti-dumping measures it is simply exercising a statutory right conferred on it by Part XVB of the *Customs Act 1901* to apply for the continuation of the subject anti-dumping measures to prevent the injury to itself that the measures are intended to prevent.

It is true that in applying for the continuation of the anti-dumping measures, Australian Paper is exercising a statutory right conferred by Part XVB of the *Customs Act 1901*.

However, the exercise of a statutory right does not, of itself, preclude an entity from engaging in uncompetitive conduct in the exercise of that rights. In *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90; [2004] HCA 48 , the High Court of Australia stated that:

“[T]o suggest that there is a distinction between taking advantage of market power and taking advantage of a property right is to suggest a false dichotomy, which lacks any basis in the language of s.46 ... property rights can be source of market power attracting liability under s. 46 ...” (at para 125).

Obviously, the section being referred to by the High Court is section 46 of the *Competition and Consumer Act 2010* and the prohibition contained in that section and the reference to ‘property rights’ can readily be replaced by ‘statutory rights’ such as, for example:

*“What does it matter whether the source of the ability to engage in discretionary behaviour lies in a contract, statute or intellectual property right? If the result of that right, a corporation has a substantial degree of power in a market and it uses that power to eliminate or substantially damage a competitor or competition in that or any other market, then s.46 will be breached.”*⁵⁰

It is self-evident that Australian Paper has substantial market power in the Australian A4 Copy Paper market. In using that power through the statutory rights conferred by Part XVB

⁵⁰ Alex Bruce, ‘*Australian Competition Law*’, 3rd Ed, LexisNexis Butterworths, Australia, 2018, para. 8.21.

of the *Customs Act 1901* to which it has exclusive use of in relation to the Australian A4 Copy Paper market, being the sole producer of A4 Copy Paper in Australia, to, arguably, substantially lessen competition in that market.

Specifically, given provisions in Part XVB of the *Customs Act 1901* governing who may make an application for the imposition and/or continuation of anti-dumping measures, as well as against whom the economic performance and injury cause by dumping is assessed, it is evident that only an entity or entities with substantial market power are able to do so.

In the circumstances of the Australian A4 Copy Paper industry, that entity is Australian Paper. Only Australian Paper has the discretionary statutory right to seek the imposition and/or continuance of anti-dumping measures in the Australian A4 Copy Paper market..

No doubt it would be contended by Australian Paper that the continuation of the subject anti-dumping measures is being sought to prevent the continuance of the material injury being occasioned by exports at 'dumped' prices. That is, it is simply seeking the continuation of the anti-dumping measures it is incurring because of the dumped exports through the continuation of the anti-dumping measures on the subject exports.

That contention does not seem to be not supported by the facts, as is clear from the above sections of this submission.

In the four years since the subject anti-dumping measures were imposed on exports of A4 Copy Paper to Australia in April 2017, Australia Paper's A4 Copy Paper business has been unprofitable. This has remained so notwithstanding the extension of anti-dumping measures to exports from other countries in addition to those from the Subject Countries. Further, that unprofitability has progressively increased as reflected in the SEF.

The reason for such unprofitability is relatively straightforward, as discussed earlier in the above sections. That is, despite a market share of 85% or more, Australian Paper's sales volumes and/or prices of A4 Copy Paper have not been sufficient to recover its cost to make and sell (CTMS) following increases in the cost of inputs to manufacture (e.g., pulp, electricity, etc.).

The only options available to Australian Paper to rectify this situation and return to profit would seem to be:

- (i) reduce its CTMS, although this may be difficult because, for whatever reason, it apparently is required to operate its plant at its full production capacity of 200,000 tpa and the cost of inputs to manufacture may not be capable of reduction in Australia's high CTM environment as found by you in Review 551⁵¹; and/or
- (ii) increase the prices of its A4 Copy Paper, which also may be difficult in a progressively contracting commodity product market due to technological change with price increases across 85% of the market merely encouraging an increase in the

⁵¹ Refer to Section 4.6 of Report 551.

- transition to digitalised record keeping and electronic documentation with its lower costs and technological advantages; and/or
- (iii) increase its sales volumes in the Australian A4 Copy Paper market, which would be difficult in a progressively contracting market.

As noted, the last option mentioned above would seem likely difficult to achieve and this for the following reasons.

First, increasing sales volumes through acquisitions such as distributors and resellers would seem unlikely due to the need to obtain the approval of the Australian Competition and Consumer Commission (**ACCC**) and such approval unlikely to be forthcoming given its likely effect on competition within the Australian A4 Copy Paper market in which Australian Paper already holds approximately 85% or more market share.

Second, obtaining additional sales volumes by reducing its prices would seem a remote possibility. It would further increase the unprofitability of its A4 Copy Paper business with little opportunity to subsequently increase its prices due to the prevailing conditions in the Australian A4 Copy Paper market and the fact that A4 Copy Paper is a commodity product and the prices of commodity products are notoriously difficult to increase.

Third, obtaining additional sales volumes by excluding import competition from the market by compelling the entry of exports of A4 Copy Paper into the Australian market to be at higher prices through the continuation of the imposition of dumping duties at, preferably, increasing rates.

The third option would seem more probable if the intent were not to return to profitability through increased sales volumes but rather to limit the progressively increasing unprofitably by maintaining sales volumes in a progressively contracting market. Australian Paper has seemingly achieved this by maintaining sales volumes despite the Australian A4 Copy Paper market contracting since 2015. Australian Paper has not experienced a corresponding decline in its sales volumes.

Hence, seemingly, its application for the continuation of the anti-dumping measures, as well as the recent review of variable factors in Review 551, would seem to have its object of maintaining its sales volumes at the expense of imports through continued tariff protection.

Reference may be made in support of this view to the multitude of claims in its various applications and submissions in dumping investigations and reviews of anti-dumping measures regarding import competition, as well as the matters Australian Paper raised in its 'briefing' of the Commission in this continuation inquiry at the 'invitation' of the Commission, including suggestions of corruption ⁵².

⁵² Refer to [588 - 013 - submission - australian industry - paper australia Pty Ltd - pre-verification exporter briefing.pdf](#) and the attachments to that document available at Document 13 on the

Arguably, it is such conduct, namely, the exercise of a statutory right that only Australian Paper, which has a substantial degree of power in the Australian A4 Copy Paper market with an 85% or more market share, that 'has the purpose, or has or is likely to have the effect, of substantially lessening competition in' the Australian A4 Copy Paper market. That is, the exercise of the statutory right(s) conferred by Part XVB of the *Customs Act 1901* to seek the continuance of the anti-dumping measures for this purpose, especially when the injury being incurred is not due to import competition, would seem to be an exercise of conduct for the relevant purpose by an entity with a substantial degree of market power in the Australian A4 Copy Paper market.

It would seem that such conduct is conduct that the prohibition in section 46 of the *Competition and Consumer Act 2010* is intended to address and that the High Court was referring to in *NT Power Generation Pty Ltd v Power and Water Authority*.

If so, it would seem to be in the national interest to promote or further such conduct by continuing the anti-dumping measures.

No doubt Australian Paper would claim that it is not adverse to 'fair' importation competition from 'un-dumped' exports to Australia. That would be a surprising claim given that, amongst other things, its exports to the USA have been found by the US authorities to be at 'dumped' export prices of margins in excess of 200% and its current exports of A4 Copy Paper into export markets at 'less lucrative' prices than those obtainable in Australia, which is a definition of dumping.

To enable you to advise the Minister on this relevant consideration, including in your report to the Minister, consultation with and the advice of the Commonwealth Government agency responsible for and qualified to advise on such matters should be sought and obtained from the Commonwealth Government agency responsible for and qualified to advise on such matters.

5. Conclusion

It is evident that:

- (i) the Australian A4 Copy Paper market is a market in decline as end-users transition to electronic commerce and digital record keeping with all the technological benefits and low cost that this confers over paper-based solutions;
- (ii) the Australian A4 Copy Paper market has progressively declined since 2015 from approximately 200,000 tpa to approximately 130,000 tpa to date or less;
- (iii) notwithstanding the contraction in demand in the Australian A4 Copy Paper market and the over-supply of the Subject Goods to that market due to domestic

- production, Australian Paper's sales volumes of and prices for A4 Copy Paper have remained relatively stable throughout this period;
- (iv) however, since the imposition of the anti-dumping measures in April 2017 and the extension of anti-dumping measures to other countries in April 2019, Australian Paper's A4 Copy Paper business has been unprofitable and progressively increasingly unprofitable;
 - (v) that unprofitability, as determined by the Commission was due to Australian Paper's apparent inability to fully recover its cost to make and sell A4 Copy Paper, which had increased due to increases in inputs to manufacture such as pulp and energy costs;
 - (vi) with the imposition of anti-dumping measures in April 2017, prices of A4 Copy Paper Goods in the Australian A4 Copy Paper market did not increase, that being the objective of the anti-dumping measures – namely, to remove and prevent the injurious price and sales volume effects of dumping due to price undercutting by dumped exports not exceeding the magnitude of the dumping; and

therefore, the question is: what precluded Australian Paper, if anything, from increasing its prices for A4 Copy Paper such as, for example, to the Non-Injurious Price determined by the Commission and becoming profitable, especially when the export prices of exports of A4 Copy Paper from the Subject Countries had increased and remained competitive in the Australian market and profitable.

While in the short term, an increase in price might result in some switching to lower priced imports, but, arguably, the likely effect of a significant increase in the prices of A4 Copy Paper by the principal supplier in the Australian A4 Copy Paper market, Australian Paper, would be an acceleration of the transition to low-cost, technologically advanced digital solutions.

In other words, what has and is preventing Australian Paper from increasing its prices and alleviating its injury in the form of unprofitability is prevailing market forces in the Australian A4 Copy Paper market including in the form of technological change and that alone.

Expiry of the anti-dumping measures will not alter this process but continuation of the measures will lead to and would be likely to lead to an acceleration of this process of transition to low-cost, technologically advanced digital solutions. This is a fact recognised by Australian Paper's parent company, Nippon Paper Industries, in shifting Australian Paper's core business to fibre packaging.

Finally, as noted throughout this submission there are a number of issues that have not been addressed or fully addressed in the SEF. These require rectification and should be properly addressed in the report to the Minister so that the Minister can have regard to and take into account those relevant considerations when making his decision. This obviously should involve obtaining expert advice as required.

If you have any questions, please let me know.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Andrew Percival', with a large, stylized initial 'A' at the start.

Andrew Percival

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Attachment A

Extracts from Customs Tariff (Anti-Dumping) Regulation 2013 and Report 551

Customs Tariff (Anti-Dumping) Regulation 2013

The combined fixed and variable duty method is worked out as follows:

Combination of fixed and variable duty method

(2) *A method is:*

(a) *work out the amount of the difference between:*

(i) *the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and*

(ii) *the normal value of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; and*

(b) *if the export price of the particular goods is less than the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice, work out the amount of the difference; and*

(c) *add the amounts worked out under paragraphs (a) and (b) to obtain the interim dumping duty payable on the goods.*

(3) *The amount worked out under paragraph (2)(a) must be:*

(a) *ascertained as a proportion of the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice, and applied to the greater of:*

(i) *the export price of the particular goods; and*

(ii) *the export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice; or*

(b) *applied by reference to a measure of the quantity of the particular goods; or*

(c) *applied by reference to a combination of a proportion mentioned in paragraph (a) and the quantity mentioned in paragraph (b)."*

(underlining added)

Report 551 – Interim dumping duty calculation

The manner of working out interim dumping duty on APRIL's exports was set out on page 74 of Report 551 as follows:

"Interim duties under the combination method will be worked out as follows:

- *the fixed component would be calculated as the ad valorem rate applied to the **actual export price (i.e. the price paid by the importer)** or the ascertained export price, whichever is greatest; and*
- *the variable component would be calculated as the amount, if any, by which the **actual export price (i.e., the price between AFEM and the importer)** is lower than the **ascertained export price (i.e. the floor price, being the price between AFEM and RAK)**.*

Once the Minister has ascertained the variable factors, the ABF and customs brokers will have access to the ascertained variable factors for the purpose of implementing the anti-dumping measures. The Commission observes that in the current Dumping Commodity Register for A4 copy paper,¹⁴¹ both RAK and AFEM have the same Dumping Specification Number. For the purpose of administering the measures, the Commission does not propose separate Dumping Specification Numbers for RAK and AFEM." (bold & underlining added) (Page 74 of Report 551)

Note: this is the same methodology as set out in the worked examples in the Commission's Dumping Commodity Register: [A4 COPY PAPER \(industry.gov.au\)](https://www.industry.gov.au/publications/a4-copy-paper)