

Non-Confidential

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Date: 25 January 2022

By Email

Mr Gavin Crooks
Assistant Director, Investigations 1
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

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Dear Gavin,

RE: Continuation inquiry 588 – Statement of Essential Facts – Concise Restatement Submission

I refer to the submission made on 17 January 2022 (**Original Submission**) in response to the Statement of Essential Facts (**SEF**) in the abovementioned continuation inquiry on behalf of APRIL Far East (Malaysia) Sdn Bhd (**AFEM**) and PT Riau Andalan Kertas (**RAK**) (collectively, **APRIL**).

That submission addressed two key issues in the SEF, amongst others, namely:

- (i) the finding that certain deductions made in deriving prices between AFEM and RAK did not comply with the transfer pricing guidelines set out in a study by Deloitte for arm's length transactions; and
- (ii) the 'timing adjustments' of certain domestic selling prices of A4 Copy Paper in Indonesia in the determination of normal values,

which findings APRIL did not and continues not to agree with.

Accordingly, this concise restatement submission:

- sets out the information and evidence in support of the Original Submission that the above findings in the SEF are not correct; and
- restates principal submissions in the Original Submission in a concise form to assist given the detailed reasoning in the Original Submission.¹

1. Transfer pricing deductions

At Section 7.4.5 of the SEF, it was stated that:

¹ Note: this submission neither supersedes nor replaces the Original Submission or contentions contained therein and shall be read in conjunction with the Original Submission.

“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.”
(at page 43)

As stated in the Original Submission, APRIL disagrees with this finding. In particular, following review of the relevant documentation, APRIL has reconfirmed that the ‘price inputs’ in question did in fact meet the criteria set out in the Deloitte study and, therefore, did meet the arm’s length criteria in the Deloitte study. That is, those price inputs fell within the range of prices referred to in the Deloitte study and, as such, met the arm’s length criteria.

Attached are **confidential** sample invoices relating to such transactions that set out the calculation of the ‘input prices’. As is evident, those prices fell within the range in the Deloitte study. Accordingly, it is unclear how or why the Commission would or could reach a different conclusion.

If the Commission requires, invoices for the other transactions can be readily provided, along with the calculation of the ‘input prices’, to confirm and verify APRIL’s submission.

Hence, those ‘input prices’ did meet the criteria in the Deloitte study and, therefore, reflect market arm’s length amounts. Accordingly, the above extracted finding from the SEF is not correct and not supported by the evidence, and requires rectification.

If the Commission is of a different view, please provide an explanation as well as the details.

APRIL notes that this issue is relevant only if the Commission (erroneously) persists with its position that the ‘export prices’ are the prices payable in the transactions between AFEM and RAK, as opposed to the prices payable by AFEM’s Australian customers to AFEM.

In the Original Submission, APRIL submitted that the prices in the transactions between AFEM and RAK were at arm’s length for the purposes of Australia’s anti-dumping regime not only having regard to the above but also to the Federal Court judgement in *Wilson v ADRP*. There was no evidence that those prices did not represent market prices whereas those proposed by the Commission did.

2. ‘Timing adjustments’

The calculation of the ‘timing adjustments’ were set out in Tab (g) of Confidential Attachment 7 ‘RAK Normal Value’, which, according to the SEF, were calculated as follows:

“For these MCCs, the commission relied on the normal value of the relevant MCC sold in the quarter nearest to the relevant export quarter with an adjustment for timing differences applied pursuant to section 269TAC(8). 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.” (at page 47)

In comparing the adjusted amounts in Tab (g) of Confidential Attachment 7 with actual domestic selling prices of A4 Copy Paper, it was found that the adjusted amounts significantly overstated the domestic selling prices for the relevant MCCs. They do not represent comparable prices at which those MCCs of A4 Copy Paper are sold in the ordinary course of trade for consumption in Indonesia.²

At **Confidential Attachment A** is a summary of domestic selling prices of A4 Copy Paper by MCC for the first half of 2021 by members of the APRIL corporate group. As is evident, those prices are significantly less than the corresponding amounts in Tab (g). That is, the normal values set out in Tab (g) of Confidential Attachment 7 over-state the value of the relevant MCCs of A4 Copy Paper sold into the Indonesian A4 Copy Paper market, which also are the highest sales volumes. Consequently, those normal values do not represent the prices at which those products are sold for domestic consumption in Indonesia.³

It is noted, that both in this inquiry and in Review 551, information provided by APRIL to the Commission has consistently been verified as complete and accurate and where there have been concerns, they were clarified to the satisfaction of the verification teams, as the verification reports indicate. However, should the Commission so require, additional information and evidence, including source documents, can be readily provided to further substantiate APRIL's submissions on this point.

Hence, the normal value calculations require rectification to address this over-statement of normal values,

3. **Summary of submissions addressing main issues in the Original Submission**

The Original Submission comprised the following submissions amongst others:

(a) *scope of findings in the SEF:*

the Commission's approach in the SEF was largely formulaic, that is, confined to whether the expiry of the anti-dumping measures would lead to or be likely to lead to the continuation or recurrence of dumping and the material injury that these measures were intended to prevent;

accordingly, the SEF did not address issues relating to the nature of and prevailing conditions in the Australian A4 Copy Paper market and the economic performance of Australian Paper in that market and reasons therefor, including, such as:

- why had Australian Paper incurred injury in the form of unprofitability and progressively increasing unprofitability since the anti-dumping measures were imposed despite the imposition of such measures;
- why had prices for A4 Copy Paper in the Australian A4 Copy Paper market not increased materially since the anti-dumping measures were imposed and why were they higher and remaining higher than in other jurisdictions such as Indonesia;

² Refer Article 2.1 of the WTO Anti-Dumping Agreement.

³ Ibid.

- to what extent did Australian Paper's unprofitable export sales contribute to the overall unprofitability of the Australian industry;
- why did Australian Paper's sales volumes remain relatively constant throughout the period from 2015 to date in a contracting Australian A4 Copy Paper market without Australian Paper materially reducing its prices during this period;
- whether and, if so, to what extent could Australian Paper have increased its prices in the Australian A4 Copy Paper market given prevailing conditions, whether in the presence of or without the presence of dumped imports, and/or the presence or absence of the anti-dumping measures;
- to what extent would Australian Paper need to increase prices in its Australian A4 Copy Paper business for that business to return to profitability with or without any increase in sales volumes;
- whether and to what extent was any alleged price undercutting by dumped exports from subject countries attributable to such dumping at the point of competition between the exports and Australian Paper's products, namely at the 'end-users' or consumers level of trade given that A4 Copy Paper is a consumer commodity product;
- to what extent would such purchasers switch brands of A4 Copy Paper due solely to price and switch from one MCC to another based on price given that Australian Paper only produced 80 GSM A4 Copy Paper and

a formulaic approach assumes that anti-dumping measures operate in a vacuum absent matters such as those referred to above, which even the Ministerial Direction on Material Injury acknowledges is not the case;

(b) ***determination of dumping for APRIL's exports:***

the determination of dumping for APRIL's exports in the SEF was erroneous for the reasons set out in the Original Submission, being in summary:

- ***(export prices)***: export prices were wrongly determined⁴ and should have been the prices payable by AFEM's customers less post-exportation charges, such as overseas freight and insurance, regardless of whom the exporter was determined to be, consistent with the ADRP's findings in its Review 138, but not including a deduction for AFEM's 'trading margin' because (i) such margin was not a post-exportation expense, nor an 'expense', (ii) its deduction was not necessary for establishing an FOB price, and the price at which APRIL's exports entered into the commerce of Australia was precisely the same whether or not that margin was deducted, and (iii) those prices would not and could not be determined to be dumped prices if that margin were deducted and it has not been so determined that those prices were dumped. Further, the finding that the

⁴ APRIL maintains its position that AFEM, not RAK, is the 'exporter' for the reasons set out in the Original Submission. It would seem that the Commission's approach to identification of an 'exporter' is a pseudo-Marxist approach, that is, the owner of the means of production determines who is an 'exporter' or, in other words, identification of 'exporter' follows the assets employed to produce the product in question.

prices in the transactions between AFEM and RAK were influenced by the relationship between the parties and, therefore, were not at arm's length was not correct for the reasons set out in the Original Submission some of which were summarised earlier;

'export prices' as determined by the Commission to be the prices paid or payable by AFEM to RAK necessarily resulted in the margin of dumping, as applied, being in excess of the full dumping margin because it was applied to the landed value, that is, 'customs value', of APRIL's exports that included AFEM's 'trading margin', whereas the determination of the dumping margin did not, which resulted in the 'uplift' of a price that was not the 'export price' nor a dumped price in an amount in excess of that necessary to remove the injurious effects of dumping'. In addition, because the 'ascertained export price' was based on the prices paid or payable by AFEM to RAK, it necessarily results in working out any interim dumping duty payable using the fixed and variable method being unlawful and, in particular, application of the fixed component of that method. This because that component relies on the determination of the 'export price' of each consignment of 'particular goods' on clearance of the consignment through customs to work out the interim dumping duty payable, as opposed to applying that *ad valorem* fixed rate to the 'actual export price', which is the customs value of each such consignment of 'particular goods' declared in the relevant import declaration;

in consequence of the foregoing, the appropriate method for working out any interim dumping duty payable, if the anti-dumping measures are continued, requires re-consideration; and

- **(normal values)**: normal values were wrongly determined because (i) the 'fair comparison' adjustments should not have been made in the circumstances as the categories and amounts of those adjustments did not modify differently the prices in domestic Indonesian and export sales to Australia of APRIL's A4 Copy Paper and there was no evidence that they had any such effect, including that they modified such prices at all, and (ii) the 'timing adjustments' made in the calculation of certain normal values resulted in those normal values being overstated and not reflecting selling prices in Indonesia of A4 Copy Paper of the relevant MCC during the relevant periods for the reasons set out earlier,

hence the determination of dumping and dumping margin for APRIL's exports requires re-determination; and

further, if cost to make and sell differences modify export and domestic prices differently and the normal value calculations include adjustments to eliminate such differences, then, taken to its logical conclusion, the only difference between export and domestic prices can be the margin of profit as all other differences would have been 'accounted' for, that is, eliminated. This would seem to be the logical conclusion to an approach to normal value calculation and adjustments for 'fair comparison' based on cost accounting differences in

the cost to make and sell, as opposed to factors actually modifying export and domestic prices differently, which modifications to prices are supported by evidence;

(c) material injury and causation:

the injury incurred by Australian Paper, its unprofitability, was caused by its increased cost to make due to increased costs of inputs to manufacture, that it was unable to recover through either increased prices and/or sales volumes but as such injury was found not to be (sales) volume related, presumably because it maintained sales volumes in a contracting market, then it could only have been price-related, namely, price suppression and/or depression. As Australian Paper's prices remained relatively stable, it must have been due to price suppression and, if so, the question arises as to whether and to what extent that price suppression was caused by price undercutting attributable to dumping of exports from the subject countries. However, the required analysis was not undertaken as the price undercutting analysis was not undertaken at the appropriate level of trade, namely, at the 'end-user' level where it was determined that the exports competed with Australian Paper's products. Were that analysis undertaken, it would need to have demonstrated, supported by evidence, that any dumping of the subject exports flowed through and the extent to which it flowed through to the prices of the subject exports at that level of trade and that this had a sufficient effect on prices to cause Australian businesses and consumers to switch brands and to switch to different MCCs given that Australian Paper produced 80 gsm A4 Copy Paper only; and

absent this analysis, it cannot be determined to what extent, if any, the injury incurred by Australian Paper was attributable to dumping of the subject exports from the subject countries and not solely due to prevailing conditions in the Australian A4 Copy Paper market that precluded Australian Paper from increasing its prices and/or increasing them sufficiently to recover its increased costs to manufacture;

(d) materiality of injury:

the assessment of the materiality of the injury incurred by Australian Paper as set out in the SEF did not assess whether and to what extent that injury was greater than that which would have been incurred in the normal ebb and flow of business in a market with prevailing conditions such as those in the Australian A4 Copy Paper market⁵, as ought to have been done consistently with the Ministerial Direction on Material Injury. Accordingly, whether the injury incurred by Australian Paper was greater than that which would be incurred in the normal ebb and flow of business was not assessed and, hence, no conclusions can be drawn on the 'materiality' of any such injury for the purposes of this inquiry;

⁵ Note: the normal ebb and flow of business in the Australian A4 Copy Paper market would not include, for example, the pandemic and its effects, but would include, for example, bush-fires and changes in technology and the effects flowing therefrom.

(e) national interest:

the Minister is expressly required to take into account 'other information' that the Minister considers relevant to his decision whether to continue the anti-dumping measures for a further five (5) years and such matters would include the 'national interest' in continuing a tax in the form of the anti-dumping measures.⁶ However, the Commission did not consider the matter of national interest and accordingly, the SEF did not address this issue. Whether continuing the anti-dumping measures for a further five (5) years in the circumstances would require that this issue be addressed, that is:

'assuming that the anti-dumping measures, if continued, prevented material injury to the domestic industry attributable to dumping of A4 Copy Paper from the subject countries from occurring or recurring, then, in the prevailing circumstances of Australia's A4 Copy Paper market and those of the Australian industry, for whose benefit and at whose and what cost would the continuation of the measures be and why would that be in Australia's national interest?'

the benefit would seem considerably limited and the detriment significantly extensive. That is, continuation of the measures would seem to be at the cost of Australian businesses and consumers in the continuation of high prices and, possibly, higher prices for A4 Copy paper with corresponding increased cost of living but for what and to whose benefit given that the domestic industry is producing an increasingly otiose product?;

(f) final observation – the counter-factual:

assuming that somehow Australian Paper acquired 100% market share of the Australian A4 Copy Paper market, then would not the question be whether:

'an unprofitable and progressively increasing unprofitable producer of A4 Copy Paper in Australia, namely, Australian Paper, being the sole producer of A4 Copy Paper in Australia with a commercially and financially unviable business model, is supplying the entire 'high priced' Australian market, presumably due to tariff protection and commercial self-interest, that is not responsive to market conditions, as evidenced by the absence of any material changes in prices since and because of the imposition of the anti-dumping measures in April 2017 and the imposition of additional measures in April 2019 and the contracting size of the Australian market due to technological change, namely, digitalisation (fall in demand) and the increasing over-supply of A4 Copy Paper due to excessive production by Australian paper (increased supply), and, therefore, Australian Paper being subsidised through the high prices by Australian businesses and consumers in their consumption of the commodity product the

⁶ Note: if the matters that the Minister is required to consider in deciding whether or not to continue the anti-dumping measures is limited to whether the expiry of the measures would lead to or be likely to lead to the continuation of dumping and the material injury that the measures are intended to prevent, what is the 'other information' that section 269ZHG of the Customs Act 1901 expressly permits the Minister to have regard to and why would it expressly permit the Minister to have regard to such 'other information', which presumably would include the 'national interest'.

parent company, Nippon Paper Industries, having made the decision to switch Australian Paper's core business to fibre packaging';

what measures would then be required in such circumstances to address the continuing unprofitability of that industry and at whose cost? Consequently, what then would have been achieved by the continuation of the anti-dumping measures; and

(g) conclusion:

for the reasons stated in the Original Submission and as summarised above, there is no basis, supported by evidence, that warrants the continuation of the anti-dumping measures and the Commissioner should therefore recommend to the Minister that these measures be allowed to expire.

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

Yours sincerely,

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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Confidential Attachment A

Domestic Selling Prices of A4 Copy Paper in Indonesia in First Half of 2021

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