

MinterEllison

18 February 2022

BY EMAIL – <investigations1@adcommission.gov.au>

Director, Investigations Unit 1
Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601
AUSTRALIA

Received: 18 February 2022

Dear Director

Statement of Essential Facts (SEF) 588 – A4 Copy Paper in the nominal basis weight range of 70 to 100 gsm (subject goods) exported from China by UPM-AP.

We represent UPM Asia Pacific Pte Ltd and associated UPM entities (UPM) in relation to the current inquiry into whether the anti-dumping measures applying to the above goods should be continued for a further five years. We make this submission in response to the publication on 11 February 2022 of a submission by Opal Australian Paper (**OAP**) containing a series of unfounded allegations concerning our client's current and future position as a supplier of copy paper to the Australian market.

In view of the scurrilous nature of some of those allegations, we also take this opportunity to remind the Commission that the history since 1994 of the attempts by OAP and its related corporate ancestors to seek the protection afforded by Australia's anti-dumping system does nothing to instil confidence in the credibility of its submissions. Features of that history include the high proportion of applications for dumping duty notices by OAP that have resulted in rejection by the Minister, termination by the Commissioner or otherwise denied following administrative or judicial review and the persistent practice of including in such applications claims of dumping margin levels that have subsequently been found to be grossly exaggerated. The serious threat to competition posed by this conduct was recognised by the ACCC some years ago when it took the unique action of requiring the then Australian manufacturer, Paperlinx, to seek its permission before making an application for anti-dumping measures. Most recently, as documented in our earlier submissions to this inquiry, OAP omitted from its application for anti-dumping measures significant relevant information that was inimical to a claim for the continuation of those measures.

We turn now to consideration of some of the specific allegations made by OAP in its latest submission.

...it is OAP's contention that UPM seeks to distract and delay the Commission from making its final recommendation to the Minister in a timely manner.

This is a perfect example of a 'black kettle' contention. It has taken OAP thirty days to respond to our client's latest submission. Unlike the applicant, UPM has complied with all timelines required by the Commission. Furthermore, UPM has no conceivable interest in delaying the Commission's procedures or otherwise "distracting" the Commission.

UPM suggests that even if a sales agreement is 'non-binding', the relevant parties cannot reasonably discontinue the relationship at their discretion. OAP finds this statement to be an illogical contradiction to the evidence provided to the Commission

NON-CONFIDENTIAL

by OAP during the course of the inquiry, namely the supply arrangement between [customer] and OAP. As confirmed during the industry verification the agreement between the parties expressly stipulates in clause 2(e) Addendum that; “[customer] is under no obligation to order any minimum quantity of Goods from the Supplier”. Price reviews by negotiation are also a feature of the agreement, which in effect means that should [customer] not agree to a required price increase, there is no obligation or exclusivity within the agreement which prevents them from ordering zero tonnes from OAP, nor preventing them from purchasing like goods from UPM or any other exporter to Australia. In seeking to counter this fact, UPM provides no evidence to support its claims.

The evidence in support of UPM's characterisation of an agreement between a vendor and purchaser is the common commercial practice of adopting the law of contract to establish agreed terms and conditions applying to their proposed transactions that protect their respective interests and provide a degree of confidence that the joint trading aspirations of the parties will be realised. Those terms and conditions may apply in absolute terms to any transactions that are consummated such as warranty provisions or they may be expressed in permissive terms such as a purchasers' right not to purchase goods while at the same time in accordance with the terms of the contract being obliged to accept delivery of goods after having placed a specific order with the vendor and received notice of acceptance of that order.

The Commissioner's task in the present matter is to make an informed judgement on the likelihood of Officeworks changing its choice of supplier to an overseas vendor in the reasonably foreseeable future. Although Officeworks could legally refrain from purchasing the subject goods from OAP no explanation is offered as to why the purchaser after undertaking a major change in sourcing would choose not to place any orders on OAP or as to where else it could source its copy paper requirements at competitive prices. Purchasers enter into agreements to ensure security of supply and do not, as implied by OAP, abandon such security capriciously.

In the context of the statutory test set out in *s269ZHF(2) of the Customs Act 1901* requiring the Commissioner to be positively satisfied that within a reasonably foreseeable future Officeworks was likely to revert to sourcing from overseas, we submit that it is clear from any reasonable analysis of the evidence that there is no likelihood of such a reversion occurring in that time frame.

The submission subsequently claims that there are “a range of practical constraints in establishing new supply lines that can delay the timing and implementation of changes in sourcing to a degree that goes beyond the periods specified in an agreement.” However, UPM does not state what these ‘practical constraints’ may be, let alone provide any evidence in support of same.

In the present matter we estimate that at least nine months elapsed between the commencement of the internal review by Officeworks of its sourcing options and the delivery of OAP product. The practical constraints that can stretch timelines beyond those set out in a commercial agreement include the settling of the terms of an Agreement, developing new artwork and packaging, visits to production facilities and the introduction of new packaging and delivery configurations. In addition, in a case where a new agreement has only been entered into very recently, there is a natural commercial reluctance to embark on further sourcing changes in the short to medium term. We submit that a realistic assessment of the competitive conditions in the market support a conclusion that Officeworks is unlikely to switch suppliers of the subject goods within the next two years.

NON-CONFIDENTIAL

UPM further asserts that it attempted to pass on a price increase to [customer] in 2021, and appears to further the claim that this should, for an unstated reason, ensure the absence of any recurrence of dumping and injury in contradiction to the Commission's analysis.

Our client did not "assert"; it provided the Commission with incontrovertible documentary proof of the proposed price increase and its transmission to Officeworks.

Notice of the increase proposed to be implemented in June 2021 was provided to Officeworks on 10 March 2021. That timing strongly supports the view that the pricing assessment undertaken by Officeworks was based on UPM's higher proposed prices and that allegations of price undercutting are without foundation. In the absence of price undercutting, the likelihood of any recurrence of material injury is eliminated.

A search on the [customer] website reveals that UPM continues to trade with [customer] and continues to price product at a level which undercuts the domestic industry. Further, UPM employs a tactic of offering lower GSM paper (70gsm) for sale at a lower price point in order to reduce the dumping margin per tonne sold (given that there will be less tonnes imported per container, pallet, box, and ream by virtue of the fact that the paper is lighter). The lower GSM allows UPM to justify a lower price point, which undercuts the Australian market prices.

We will deal below with the false allegation that our client continues to trade with Officeworks.

On the issue of 70gsm paper, UPM produces and sells the product in a wide range of markets around the world. However, because of the very limited demand for the product in Australia, sales to Officeworks have been miniscule¹ and were discontinued in October 2021. OAP itself has acknowledged that it withdrew from production of 70gsm product in 2005 ...*due to poor sales*² ...and has recently observed that ...*sales volumes and market acceptance has been minimal*³.

Sales or the lack thereof of 70gsm paper has no relevance to the issues to be determined in the application of the statutory test. It is not a product available from Australian manufacture and it is not a 'directly competitive' good for the purposes of s8(7) of the *Customs Tariff(Anti-Dumping) Act 1975*

UPM claims that it ceased exports from China in October 2021, however, as demonstrated above, this is simply not correct. Furthermore, the import statistics available to OAP (and to the Commission) support an estimate that UPM has exported between 1,000 – 330 tonnes per month since October 2021. Given that the export of dumped goods continues, it is clear that the likelihood of future injury being 'reasonably foreseeable' from future exports is satisfied.

The assertion by OAP is false. UPM ceased all exports of the subject goods in October 2021 as evidenced in Confidential Attachment 1 to this submission that details monthly exports of the subject goods for the period January 2021 to February 2022.

The assertion by OAP is claimed to be based on 'import statistics' and these may include some shipments exported by UPM from China in October 2021. They may also include imports of 68gsm A4 copy paper as well any exports of the subject goods by other Chinese producers.

¹ Less than 0.5% of the market in 2021

² EPR 588/1 p.7

³ id.

NON-CONFIDENTIAL

Whatever the reason behind OAP's misleading statistics, its central claim that the export of dumped goods [by UPM] continues is untrue and provides no support for a claim that the likelihood of material injury is reasonably foreseeable.

UPM's submission borders on the farcical when it suggests that OAP has "achieved an unquestioned market share of around 95%". In fact, UPM's repeated misrepresentation of OAP's market share has been repeatedly discredited in several submissions by OAP to the Commission, not to mention via verified data supplied during the Australian Industry verification process, all of which has been analysed at length by the Commission in SEF 588. Most recent data available to OAP tells a very different story, namely that OAP's market share on a 12 month rolling average basis is approximately 69 per cent, substantially less than the 95 per cent claimed in UPM's misguided or misrepresented line of argument.

Whatever the projected market share for OAP to be estimated by the Commission in its final report, it will represent a position of market dominance verging on a near monopoly. The Commission has estimated OAP's market share at about 88% in 2018 and approximately 85% in 2019⁴. In the current SEF the Commission's estimate for 2020 has reduced to around 72%⁵ with the decline attributable to an increase in exports from UPM and other exporters subject to anti-dumping measures resulting from Investigation 341. We estimate that depending on the size of the total market in 2022 OAP will achieve an annual market share of around 90% to 95%.

... its [UPM's] claim that high shipping costs will necessarily and indefinitely render exports to Australia null/void is also unrealistic to say the least. Swings in exchange rates and global shipping costs move with relative volatility and it is not unusual for these costs to fluctuate in a cyclical nature. Therefore, any rise in costs is just as likely to be eroded or reversed by other external factors, including exchange rate movements etc. There is no guarantee whatsoever that shipping rates will remain high and UPM has not submitted any evidence to confirm that this will be the case, nor could they. Furthermore, if history is anything to go by, rates will fall precipitately once international borders reopen and global trade tensions are relieved. Notwithstanding these likely scenarios, shipping cost do not in any way relate to OAP's material injury, or the extent to which UPM is exporting at dumped prices.

UPM is not claiming that shipping or other external cost factors are permanent or indefinite. The statutory test requires consideration of trends in current factors and assessments of the likely course of those trends in the reasonably foreseeable future. As shipping costs continue to accelerate (as evidenced in Confidential Attachment 3 to our submission of 11 January 2022 and by today's announcement by the ACCC that ... [F]reight rates on key global trade routes are currently about seven times higher than they were two years ago⁶), the strong likelihood is that for the reasonably foreseeable future OAP will enjoy a substantially enhanced competitive position that eliminates any probability in the same period that there will be a recurrence of material injury caused by dumped imports of the subject goods if the anti-dumping measures expire.

Again, the evidence provided in this submission (and previous submissions) shows that UPM continues to export the goods to Australia at prices which undercut OAP despite existing dumping margins and despite its claims that "the barriers are almost insurmountable". It is therefore abundantly clear that the claims made by UPM are misrepresented and should be considered unconvincing by the Commission.

UPM does not continue to export the subject goods to Australia and its last proposed prices for the subject goods did not undercut OAP's prices

⁴ SEF 588: p.29

⁵ id.

⁶ <https://www.accc.gov.au/media-release/five-eyes-competition-authorities-to-focus-on-collusion-in-international-trade>

Yours faithfully
MinterEllison

A handwritten signature in dark ink, appearing to read 'John Cosgrave', with a long horizontal flourish extending to the right.

John Cosgrave
Director, Trade Measures

Contact: John Cosgrave T: +61 419 254 974
john.cosgrave@minterellison.com
Partner: Michael Brennan T: +61 2 6225 3043
OUR REF: MRB/JPC 778010852