ADRP Report No. 2017-55A

Reconsideration of A4 Copy Paper exported from the People's Republic of China by UPM Asia Pacific Pte Ltd.

February 2019

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADA	World Trade Organization Anti-Dumping Agreement
ADC	Anti-Dumping Commission
Assistant Minister	Assistant Minister to the Minister for Jobs and Innovation
AUD	Australian Dollar
Australian Paper	Paper Australia Pty Ltd
ACBPS	Australian Customs and Border Protection Service (now Australian Border Force)
CTMS	Cost to Make and Sell
China	People's Republic of China
CIO Reg	*Customs (International Obligations) Regulation 2015*
CIF	Cost, insurance and freight
Commissioner	The Commissioner of the Anti-Dumping Commission
DDP	Delivered Duty Paid
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act, 1975*
FOB	Free on board
FXA	Fuji Xerox Australia Pty Ltd
GAAP	Generally accepted accounting principles
A4 Copy Paper or the goods	The goods that are the subject of the application. A4 Copy Paper is described as 'uncoated white paper of a type used for writing, printing or other graphic purposes, in the nominal basis weight range of 70 - 100 gsm and cut to sheets of metric size A4 (210mm x 297mm), also commonly referred to as cut sheet paper, copy paper, office paper or laser paper'
GSM	Grams per square metre

Manual	Dumping and Subsidy Manual April 2017
Minister	Minister for Jobs and Innovation
NSD 532/2018	Application to the Federal Court of Australia by UPM-AP
PAD	Preliminary Affirmative Determination
Parliamentary Secretary	Assistant Minister for Science, Jobs and Innovation
REP 341	The report published by the Commission in relation to A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand dated March 2017
Reviewable Decision	The decision of the Parliamentary Secretary made on 18 April 2017 and published on 19 April 2017.
Review Panel	Anti-Dumping Review Panel
Report 55	ADRP Report No 55 A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand
SEF 341	Statement of Essential Facts in relation to A4 Copy Paper exported from Brazil, China, Indonesia and Thailand
SGA	Selling, general and administrative expenses
UPM-AP	UPM Asia Pacific Pte Ltd
UPM China	UPM (China) Co., Ltd
UPM-Australia	UPM-Kymmene Pty Ltd
WTO	The World Trade Organization

Summary

1. This report, ADRP No 55A, has been prepared following Orders in Federal Court of Australia matter NSD 532/2018, dated 8 October 2018, which set aside the decision of the Anti-Dumping Review Panel (Review Panel) in ADRP Report No 55 and the decision of the Assistant Minister for Science, Jobs and Innovation, in relation to anti-dumping measures on exports of A4 Copy Paper from the People's Republic of China (China) by UPM Asia Pacific Pte Ltd (UPM-AP). The Court ordered that the matter be remitted back to the Review Panel for reconsideration in accordance with law.

2. The Review Panel has reconsidered the reviewable decision in relation to UPM-AP's exports of A4 Copy Paper from China. This included the information that was previously before the Review Panel as well as further information and conclusions (drawn from that further information), obtained from conferences convened with UPM-AP, Fuji Xerox Australia Pty Ltd (FXA) and the Anti-Dumping Commission (ADC) (pursuant to s.269ZZHA of the *Customs Act 1901* (the Act).

3. The Review Panel has concluded that the transactions between UPM-AP and FXA should be treated as arms length transactions. On this basis, the export price for FXA should be determined under s.269TAB(1)(a) of the Act. For other export transactions made by UPM-AP as Delivered Duty Paid (DDP), the export price should be determined under s.269TAB(1)(c) of the Act. It is recommended that these export prices be based on the selling price of UPM-AP less any parts of those prices that represent charges in respects of transport charges after exportation or other charges incurred after exportation. These changes will impact the reviewable decision by reducing the dumping margin to four percent.

4. The Review Panel recommends that the Minister revoke the reviewable decision and substitute a new decision for exports of A4 Copy Paper from China by UPM-AP.

Introduction

5. On 8 October 2018, Consent Orders NSD 532/2018 set aside the decision of the Anti-Dumping Review Panel (Review Panel) made on 10 January 2018 in ADRP Report No

55 (Report 55), and the decision of the Assistant Minister for Science, Jobs and Innovation on 9 March 2018, in relation to the declarations pursuant to sub-sections 269TG(1) and (2) of the Customs Act 1901 (the Act) for exports of A4 Copy Paper from China by UPM-AP. The Court ordered that the matter be remitted back to the Review Panel for reconsideration in accordance with law.[1]

6. The Court noted that the Respondents accepted in the circumstances of this matter, that the Review Panel denied UPM-AP procedural fairness by failing to give it an opportunity to comment on two issues as defined in Ground Two of the Originating Application (lodged by UPM-AP). These issues were referred to as “Reduced Visibility Information” and “Full Access Information”.[2]

7. UPM-AP wrote to the Senior Member of the Review Panel on 23 October 2018 proposing a process for the reconsideration. The Senior Panel Member responded advising that the responsible Review Panel Member would contact UPM-AP directly.

8. The Senior Panel Member of the Review Panel had previously (for the purposes of the A4 Copy Paper review) directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel be constituted by me. This direction remained valid.

9. UPM-AP was advised by letter dated 5 November 2018 of the process the Review Panel proposed to follow in reconsidering this review.

10. A notice was placed on the Review Panel’s website on 11 January 2019 advising that the reconsideration had commenced.

Background

11. The Australian industry, Paper Australia, lodged an application for the publication of anti-dumping measures in respect of A4 Copy Paper exported from the Federative Republic of Brazil, the People’s Republic of China, the Republic of Indonesia and the Kingdom of

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[1] Federal Court of Australian No NSD 532/2018, Flick J., UPM Asia Pacific Pte Ltd v Assistant Minister for Science, Jobs and Innovation and others, 8 October 2018.
[2] See also UPM-AP’s application to the Federal Court of Australia, Ground Two of NSD 532/2018 for additional details relating to the two issues.

Thailand on 24 February 2016. The Anti-Dumping Commission (ADC) undertook an investigation considering the investigation period 1 January 2015 to 31 December 2015. It was noted that there had been an earlier investigation in 2013 (Investigation 225) into the alleged dumping of uncoated A4 and A3 cut sheet paper exported to Australia from China, which had been terminated on 7 August 2014.[3]

12. On 9 December 2016, the ADC published its Statement of Essential Facts ("SEF 341").[4]

13. The ADC presented its final report (REP 341) to the Minister in March 2017.[5] The Commissioner, in REP 341, recommended that anti-dumping measures be imposed on exports of A4 Copy Paper from the abovementioned countries (see paragraph 11). The then Assistant Minister published his decision in relation to the Commissioner's report on 19 April 2017.

14. Ten applications for review of the Assistant Minister's decision to impose anti-dumping measures (pursuant to s.269TG(1) and (2)) on exports of A4 Copy Paper were received by the Review Panel. They included an application from UPM-AP and one from FXA. The Review Panel commenced a review of the decision of the Assistant Minister to impose anti-dumping measures (the reviewable decision) in respect of A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand on 6 July 2017.

15. Submissions were received by interested parties, details of which were included in ADRP Report 55 at Appendix Two. Neither UPM-AP nor FXA lodged submissions.

16. On 4 September 2017, the Review Panel required the ADC to undertake a reinvestigation (pursuant to s.269ZZL) in relation to certain grounds raised by UPM-AP and FXA, and other applicants. The Reinvestigation Report 341 was provided to the

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[3] The Commissioner having determined in Investigation 225 that the goods (subject to the investigation) had not been dumped, the dumping margin was negligible and/or that the total volume of exporters that had been dumped was negligible.
[4] ADC Report SEF 341 Statement of Essential Facts in relation to A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand. The ADC also issued a number of Preliminary Affirmative Determinations (PAD 341 on 29 September 2016, PAD 341A on 4 November 2016, and PAD 341B on 16 December 2016).
[5] ADC Report 341 Alleged Dumping of A4 Copy Paper Bar exported from Brazil, China, Indonesia and Thailand and the Alleged Subsidisation of A4 Copy Paper exported from China and Indonesia.

Review Panel on 11 December 2017. A copy of the confidential version of the Reinvestigation Report is attached.

17. Conferences were convened, pursuant to s.269ZZHA of the Act, during ADRP Review 55 with non-confidential summaries placed on the Review Panel website. (Appendix One of ADRP Report No 55 provides a complete list of conferences).

18. On 10 January 2018, the Review Panel provided ADRP Report No 55 - A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand (Report 55) to the Assistant Minister for Science, Jobs and Innovation (Parliamentary Secretary). The recommendations included that the applicants, UPM-AP and FXA, had failed to demonstrate that the decision of the Assistant Minister (of 18 April 2017) was not the correct or preferable decision and that the reviewable decision in relation to exports of A4 Copy Paper from China by UPM-AP be affirmed.

19. The then Parliamentary Secretary accepted the recommendations and published his decision on 9 March 2018.

20. UPM-AP lodged an application for judicial review on 6 April 2018 listing five grounds (NSD 532/2018 refers).

Conduct of the Review

21. The process is not a new review application, but rather a reconsideration of review 55 having regard to the evidence and relevant information previously before the Review Panel in relation to exports from China by UPM-AP.

22. Following the Court Orders, there was correspondence between the Review Panel and UPM-AP regarding the process for reconsideration of this review. In the absence of a specific Court direction as to how the reconsideration should proceed, the Review Panel decided (and advised UPM-AP of its intention) to align its processes with those prescribed in Division Nine of Part XVB of the Act.[6] An invitation was issued to UPM-AP

[6] Review Panel letter to UPM-AP dated 5 November 2018.

to participate in a conference pursuant to s.269ZZHA of the Act to obtain further information.

23. UPM-AP disagreed with the proposed approach, suggesting that the Review Panel had more flexibility to undertake the reconsideration pursuant to its powers under s.269ZN.

24. Division Eight of Part of XVB outlines the establishment and administration of the Review Panel in terms of appointment arrangements, resourcing and powers to undertake the functions of the Review Panel. Section 269ZN (Review Panel's powers) sits within this Division.

25. Division Nine, on the other hand, specifies the procedures to be followed by the Review Panel in undertaking reviews. It outlines what is a reviewable decision, how submissions can be made to the Review Panel, what information can be considered and, importantly what must be included in a report to the Minister in dealing with a reviewable decision.

26. Given the procedural fairness issue arose in relation to certain matters included in the Reinvestigation Report (and the subsequent conference convened to clarify information in the Reinvestigation Report),[7] I formed the view that the process of the reconsideration should be aligned with Review Panel procedures as outlined in Division Nine of Part XVB of the Act. Division Nine defines the scope of the Review Panel's powers with respect to the review. In my opinion, it provides an appropriate manner to deal with the process of undertaking a reconsideration of a reviewable decision. The Review Panel therefore considered itself bound to follow the procedures set out in Division Nine.

27. If UPM-AP had been provided the opportunity, subsequent to the Reinvestigation Report, to address the two "information issues" stated in the Reinvestigation Report, this would have been conducted by the Review Panel through the conference process. Accordingly, I proceeded on the basis of reconsidering the reviewable decision from a 'notional' stage immediately following the Reinvestigation Report. I considered this would align with the process that would otherwise have been adopted in ADRP Review 55.

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[7] Reinvestigation report No 341 dated 12 December 2017

This provided UPM-AP with the opportunity to comment on the matters giving rise to procedural fairness obligations identified in its Court Application.[8]

28. UPM-AP does not fully agree with this approach.[9] Notwithstanding, UPM-AP agreed to participate in conferences convened by the Review Panel (to be held in accordance with s.269ZZHA of the Act) as part of the reconsideration process but it did so reserving its rights to make further application for judicial review.[10]

29. During the conference (held on 11 December 2018), UPM-AP further commented that it did not agree that the conference could only be framed to deal with procedural fairness issues relating to Ground 2 of the Originating Application. UPM-AP reiterated that the ADRP should adopt a broader process as it considered the powers of the Review Panel, pursuant to s.269ZN, provided greater flexibility than that allowed under Division Nine of Part XVB of the Act. As outlined in paragraph 26 the Review Panel confirmed the process it had adopted.

30. FXA was a major importer of UPM-AP goods. The finding on export price was influenced by the decision on the non-arms length nature of the export transactions between UPM-AP and FXA. Given this relationship, the Review Panel invited FXA to the conference (held on 11 December 2018) with UPM-AP and the ADC to gather further information in relating to the procedural fairness issues referred to in the UPM-AP Court Application.

31. On 11 January 2019, public notification of the reconsideration of the review was placed on the Review Panel's website.

32. Following this, FXA wrote to the Review Panel, challenging certain aspects of the conduct of the reconsideration.[11] A response was sent to FXA on 18 January 2019 confirming the approach being adopted by the Review Panel.[12]

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[8] "Reduced Visibility Information" and "Full Access Information" as defined in Ground 2 of the Originating Application (to the Federal Court).
[9] Letter from UPM-AP dated 23 November 2018.
[10] Letter from UPM-AP dated 23 November 2018.
[11] Email from FXA dated 16 January 2019.
[12] Email to FXA dated 18 January 2019.

33. Other processes followed by the Review Panel and advised in the public notification (and at the conferences held in December 2018 with UPM-AP, FXA and the ADC) included:

- Notification of the reconsideration to be placed on the Review Panel's website (and referred to as Report No 55A);

- Conferences would be held in accordance with s.269ZZHA of the Act;

- The Review Panel may have regard to further information obtained through a conference, pursuant to s.269ZZHA, to the extent that it relates to relevant information (which is defined in s.269ZZK of the Act). It may also have regard to conclusions based on relevant information;

- Non-confidential summaries of conferences convened under s.269ZZHA to be placed on the website;

- Written submissions would not be accepted by the Review Panel in relation to the reconsideration of the reviewable decision. (s.269ZZJ of the Act provides who can make a submission and the timeframe in which such submissions can be made);

- A link to the consent orders to be placed on the website;

- Notification that the Review Panel intended to finalise its report to the Minister within 30 days of the conference summary (of 11 December 2018) being published on the website (to mirror the requirement that a report is normally provided within 30 days of a Reinvestigation Report being received);

- The Review Panel's report would be given to the Minister as required by s.269ZZK(1) of the Act; and

- The report would be published on the Review Panel's website after the Minister's decision is made.

34. As previously stated, conferences may be held pursuant to s.269ZZHA of the Act. Conferences were held as part of this reconsideration. They are summarised at Appendix One to this report.

35. At the conference held on the 11 December 2018, UPM-AP provided information that related to:
    - the procedural fairness issues (the subject of the Consent Orders);
    - 'calculation errors' relating to the deductive export price; and
    - information regarding its interpretation of the relevant provisions, particularly in relation to s.269TAA (arms length transactions).

36. FXA also commented on the legislative provisions relating to s.269TAA of the Act.

37. One of the 'calculation errors' identified related to a formula correction in the deductive export price. The other 'calculation errors' were claims regarding the correctness of the approach adopted by the ADC in relation to the amounts used in the deductive export price pursuant to s.269TAB(2). UPM-AP provided explanations as to why it considered the approach adopted by the ADC (regarding arms length transactions) was flawed.

38. In my opinion, given the reviewable decision has been set aside it is appropriate, in making a recommendation on the reviewable decision to the Minister, to correct any calculation errors as well as other issues identified (subject to s.269ZZK) to ensure that the decision is the correct or preferable decision. If it was information that the Commissioner had regard to or was required to have regard to in making his findings in the report to the Minister (pursuant to s.269TEA), and related to the original grounds submitted by UPM-AP and FXA,[13] this would have been available to the Review Panel, during the review process. On this basis, I have had regard to this further information and considered it 'relevant information'.[14] This information as well as the procedural fairness issues have been considered in this report.

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[13] Section 269ZZK(6(a) of the Act.
[14] See non-confidential conference summary of 11 December 2018 and comments in paragraphs 146 to 153 of this report.

39. Following the conference held on 11 December 2018, the ADC provided the adjusted calculation of the deductive export price which was given to FXA. Subsequently, and following the conference of the 20 December 2018, it was also provided to the legal representatives of UPM-AP on a confidential basis.

40. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister (in this case, the Assistant Minister) either affirm the decision under review, or revoke it, and substitute a new specified decision. In addition, s.269ZZK(1A) of the Act requires that, if the Review Panel is recommending a new specified decision, it must be materially different from the reviewable decision.

41. Section 269ZZ(1) of the Act requires the Review Panel, in determining a matter, to do so in a like manner to the Minister and to have regard to the same considerations the Minister would.

42. In carrying out its function the Review Panel is not to have regard to any information other than to "relevant information" as that expression is defined in s.269ZZK(6). For the purpose of the review, the relevant information is that which the ADC had, or was required to have, regard to when making the findings set out in the report to the Minister.[15] In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that is contained in the application for review and any submissions received under s.269ZZJ.[16]

43. In accordance with s.269ZZK(4) of the Act, I have had regard in this reconsideration of the review only to relevant information as defined in s.269ZZK(6) as follows:

- (Unless otherwise indicated) to the original applications (including documents submitted with the applications or referenced in the application/s);

- Submissions received pursuant to s.269ZZJ from the original Review 55, insofar as they contained conclusions based on relevant information;

[15] s.269ZZK(6)(a).
[16] s.269ZZK(4).

- REP 341, information relevant to the review referenced in REP 341, and information created during the investigation, such as verification reports (including information in SEF 341);

- Information gathered from conferences insofar as it related to relevant information in the original review and the reconsideration of the review (see Appendix One for a listing of relevant conferences);

- Reinvestigation Report 341 (dated 11 December 2017).[17] A confidential version of this report is attached; and

- Findings in Report 55.

44. I consider it worth repeating the words of the former Senior Member of the Review Panel (The Hon Michael Moore) as to the role, scope and powers of the Review Panel: as discussed in the Power Transformers review.[18] They provide an outline of the approach I adopted in the original review and in this reconsideration of the review:

> 'It seems to me that having regard to the fact that the Panel will ordinarily have to undertake a review in a comparatively short time frame against a background where the Commissioner will have ordinarily undertaken an extensive process of investigation and reporting, and also having regard to the fact that the Panel can require the Commissioner to reinvestigate, the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgment. I do not see the Panel's role as involving this type of evaluation afresh.
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> **Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been**

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[17] Pursuant to s.269ZZK(4A) of the Act, I have had regard to the reinvestigation report
[18] Extract from ADRP Report No. 24 – Power Transformers – Former Senior Panel Member of the Anti-Dumping Review Panel, Michael Moore.

miscalculations or the misconstruction or misapplication of the Act or relevant regulations.

The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arises if the reviewable decision was either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done.' [emphasis added]

Grounds for Review

45. The following paragraphs outline the original grounds submitted by UPM-AP and FXA in relation to the reviewable decision.

FXA Australia Pty Ltd (FXA)

46. Original ground:
    - The Commission and the Assistant Minister erred in relation to the determination of export price in assessing that the transactions between UPM and FXA were not arms length.

UPM Asia Pacific Pte Ltd (UPM-AP)

47. Original grounds:
    - The export price has been incorrectly determined for sales to FXA Australia;
    - The determination of exporter and importer is incorrect; and
    - The upward adjustment to the normal value for the cost of the export VAT is incorrect.

48. The following is Ground Two of UPM-AP's Court Application:[19]

[19] UPM-AP also made other claims in its Court Application. However, it was only agreed that there was an error in respect of Ground Two.

- UPM-AP claimed that in determining whether the transaction was arms length between UPM-AP and FXA, the Review Panel relied on information from the ADC Reinvestigation Report (11 December 2017) and a conference held with the ADC on 18 December 2017. UPM-AP stated it had not been afforded an opportunity to make submissions on this information and was denied procedural fairness. This information related to two aspects, namely;

  (i) [redacted] (the Reduced Visibility Information); and

  (ii) [redacted] (the Full Access Information).[20] (Confidential UPM-AP information.)

49. The primary focus of this reconsideration is the export price finding, namely:
    1. whether the correct legislative approach has been adopted in the assessment of the export price, including whether UPM-AP should be considered both the exporter and importer;
    2. the arms length nature of the transactions between UPM-AP and FXA; and
    3. if the transactions between UPM and FXA are not arms length, whether the deductive export price has been calculated correctly.

Relevant Legislation

50. The relevant provision dealing with export price is s.269TAB:

    (1) For the purposes of this Part, the export price of any goods exported to Australia is:

    (a) Where:

[20] Extract from UPM-AP Originating application for judicial review page 4

(i) the goods have been exported to Australian otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was an arms length transaction;

the price paid or payable for the goods by the importer, other than any part of the price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation; or

(b) Where:

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was not an arms length transaction; and

(iii) the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer;

the price at which the goods were so sold by the importer to that person less the prescribed deductions; or

(c) *in any other case — the price that the Minister determines having regard to all the circumstances of the exportation.*

51. Section 269TAA outlines the provisions associated with the sale or purchase of goods not being treated as arms length transactions. Section 269TAA (1) of the Act (dealing with arms-length transactions) provides that:

(1) For the purposes of this part, a purchase or sale of goods shall not be treated as an arms length transaction if:

(a) there is any consideration payable for or in respect of the goods other than their price; or

(b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or

(c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed,

compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

52. Section 269TAA(2) of the Act provides that the Minister has a discretion to treat sales at a loss as indicating the importer (or an associate) will be reimbursed or compensated. In so doing, regard must be had to s.269TAA(3) of the Act.

    Section 269TAA(2) of the Act:

    … without limiting the generality of subsection (1), where:

    (a) Goods are exported to Australia otherwise than by the importer and are purchased by the importer from the exporter (whether before or after exportation) for a particular price;

    and

    (b) The Minister is satisfied that the importer, whether directly or through an associate or associates, sells those goods in Australia (whether in the condition in which they were imported or otherwise) at a loss;

    ***the Minister may, for the purposes of paragraph(1)(c),** treat the sale of those goods at a loss as indicating that the importer or an associate of the importer will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or a part of the price. (Emphasis added)*

53. Section 269TAA(3) provides what the Minister must have regard to in considering whether goods are sold by the importer at a loss. The Minister has a broad discretion to consider whether there is a likelihood of losses being recovered within a reasonable time and also to take into account other matters considered relevant (s.269TAA(3)(d)).

54. Article 2.3 of the Anti-Dumping Agreement (ADA), the source of the legislative provisions dealing with arms-length transactions and deductive export price (namely Sections 269TAA and 269TAB(1)(b) and (2) of the Act) in Australia's legislation states:[21]

[21] World Trade Organization Anti-Dumping Agreement, Article 2.3

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

55. Under s.269T of the Act, the definition of importer is as follows:

"importer" in relation to goods exported to Australia, means:(a) if paragraph (b) or (d) does not apply—the beneficial owner of the goods at the time of their arrival within the limits of the port or airport in Australia at which they have landed;

"country of export", in relation to goods exported to Australia, means a country outside Australia from which those goods are exported to Australia, whether or not it is the country where those goods are produced or manufactured.

56. Under s.4 of the Act, the definition of owner is as follows:

"owner" in respect of goods includes any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.

57. Neither exporter nor export is defined in the Customs Act. The Macquarie Dictionary defines export as 'to send (commodities) to other countries or places for sale, exchange etc'.

Reconsideration of the Reviewable Decision

58. The reviewable decision is the decision to apply s.269TG(1) and TG(2) notices to exports of A4 Copy Paper from China by UPM-AP. As outlined in paragraph 49, the primary focus of this reconsideration is the export price finding made for the purposes of the s.269TG (1) and (2) notices. It is necessary to consider whether the legislation has

been correctly applied in relation to the export price finding, and whether relevant information was considered, and an appropriate judgment made.[22] The reconsideration of the reviewable decision requires that the Review Panel make a recommendation to the Minister on whether the reviewable decision is correct or preferable.

Export Price - Exporter and Importer

59. Export price can only be determined as the price paid or payable under s.269TAB(1)(a) of the Act if the exporter sells to the importer in arms length transactions (see paragraph 50). The determination of the exporter and the importer requires a consideration of the facts relating to who performs particular exportation functions and, in terms of the importer, who is the 'beneficial owner' of the goods at the time of their arrival within Australia, respectively.

Exporter:

60. In ADRP Report No 55, the Review Panel examined the exports of A4 Copy Paper and determined that UPM-AP (rather than UPM China) was capable of being treated as the exporter.[23] In reaching this decision, reference was had to the judgments in Expo Trade, Pilkington and Companhia Votorantium de Celluse e Paper.[24] No additional claims have been made that this finding is incorrect. For the purposes of the reconsideration of this review, in my opinion, UPM-AP is capable of being treated as the exporter.

Importer:

61. The legislation provides that the 'importer' is the beneficial owner at the time of arrival at an Australian port (see paragraph 55). UPM-AP maintains that it should be treated as the Australian importer of A4 Copy Paper as it retains beneficial ownership at the time of importation as evidenced in Clause 6 of its 'uniform terms and conditions' to all sales made to Australia.

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[22] See also the former Senior Panel Member's outline of the role of the Review Panel in paragraph 44.
[23] ADRP Report No 55 paragraph 560.
[24] *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA [1995], [11]–[13], *Expo-Trade Pty Ltd v Minister of State for Justice and Customs* [2003] FCA 1421, [23] and *Companhia Votorantium de Celluse e Paper v Anti-Dumping Authority* [1996] 141 ALR 297.

62. The ADC, in REP 341, stated that UPM sold A4 Copy Paper to a range of Australian customers during the investigation period and considered these customers as the beneficial owners of the goods at the time of import, and accordingly, the importers.[25]

63. The reasons for the original review finding, relating to FXA being the importer, are outlined in paragraphs 561 to 568 of Report 55.

64. For the purposes of the reconsideration of the review, I note for the sales by UPM-AP to FXA, that:

(confidential importation details)

65. I have reviewed the FXA response to the importer questionnaire (and the importer verification visit report) and the UPM-AP response to the exporter questionnaire (and the exporter verification report). None of these documents suggested the contract of sale between UPM-AP and FXA was other than as stated in the invoice. I have also re-

[25] ADC REP 341 Section 6.8.2.2, page 42.
[26] It is noted that it is general custom and practice in international trade as reflected in the use of standard Incoterms to recognise the party who negotiates the purchase of the goods and undertakes clearance through the regulatory processes as the importer.

examined the claims made by UPM-AP regarding why it should be considered the 'importer'.

66. UPM-AP, subsequent to the SEF report, made a submission to the ADC referring to the 'uniform terms and conditions of sale' as being relevant to all its sales to Australia. It made similar claims to the Review Panel. This information was not referred to in its response to the exporter questionnaire nor at the verification visit. It is also relevant, in my opinion, that FXA did not, at any stage, seek to highlight to either the ADC or the Review Panel, that it did not consider itself the 'beneficial owner' of the imported goods at the time of arrival into an Australian port. While I have reconsidered the 'uniform terms and conditions of sale' information, I continue to view it as having little evidentiary weight compared with the verified transactions with FXA (invoices, payments and shipping information).

67. In summary, FXA caused the goods to be imported; the terms of the invoice [redacted] (confidential importation information); FXA behaved in a manner [redacted] as it had full responsibility for the goods on arrival; [redacted] (confidential importation information); and had entitlement to sell these goods (set price and quantity to customers in Australia).

68. Accordingly, I consider the ADC correctly determined that FXA was the 'beneficial owner' and hence the importer, and this remains my finding in the reconsideration of the review.

69. In re-examining the verification report for UPM Kymmene (UPM Australia), the Australian sales agent for UPM-AP, it is apparent that there are transactions made by UPM-AP to other Australian customers that are made on a Delivered Duty Paid (DDP) basis.

70. In the circumstances of these DDP transactions I agree with UPM-AP's view that it is both the exporter and importer. If export price cannot be determined under either s.269TAB(1)(a) or (1)(b) (and assuming there is sufficient information available), then s.269TAB(1)(c) provides that the price is the one determined by the Minister having regard to 'all the circumstances of the exportation'. The ADC has indicated in REP 341

that it generally uses whichever methodology of either s.269TAB(1)(a) or (1)(b) is appropriate in recommending a price under s.269TAB(1)(c).

71. In my opinion, the price would be the price paid or payable by the Australian customer 'other than any part of that price that represents a charge in relation to transport of the goods after exportation or in respect of any other matter arising after exportation'.[27]

72. My conclusion is that for the transactions between UPM-AP and FXA, the importer is FXA. However, for the transactions between UPM-AP and Australian customers (other than FXA) that are termed DDP invoices, UPM-AP should be considered the importer. In practical terms, this makes no difference as the amount of export price will remain the same for these transactions.

Export Price - Arms length transactions between UPM-AP and FXA

73. In ADRP Review 55, both UPM-AP and FXA submitted grounds that the Minister had erred in determining the export price under s.269TAB(1)(b) of the Act. FXA considers that the export price should have been assessed under s.269TAB(1)(a) based on the export selling price from UPM-AP to FXA. UPM-AP considers it should have been assessed under s.269TAB(1)(c) but with a value that would accord with the export price based on the methodology of s.269TAB(1)(a). In other words, UPM-AP and FXA agree it should be the same amount but differ on which paragraph of s.269TAB it should be determined under.

74. REP 341 indicates that the ADC considers the purchases of UPM-AP A4 Copy Paper by FXA were not arms length transactions because the goods were sold by FXA to unrelated parties in Australia at a loss and such losses were not recoverable within a reasonable period of time.

75. The ADC determined the export price in accordance with s.269TAB(1)(b) of the Act, based on FXA's selling price in Australia less the prescribed deductions. The ADC determined that the export price for other importers buying from UPM-AP was based on

[27] Section 269TAB(1)(a) of the Act.

s.269TAB(1)(a) of the Act, that is, the invoiced price less transport and other charges arising after exportation.[28]

76. Details of the claims made by UPM-AP and FXA, the submissions from the ADC and the Australian industry, as well as the conferences held on the determination of export price for UPM-AP, are included in paragraphs 322 to 345 of Report 55.

77. As referred to earlier, I required that the ADC reinvestigate the arms length nature of the transactions between UPM and FXA and provide an outline of its considerations in exercising the discretion available under s.269TAA(2) of the Act (the Minister may treat the sales at a loss as indicating a reimbursement etc).[29]

78. The ADC provided its Reinvestigation Report 341 and affirmed its findings in relation to the non-arms length nature of the transactions, and the finding that the export price should be determined under s.269TAB(1)(b).

79. For the purposes of this reconsideration of the review, I have included an extract of Report 55 that dealt with this issue:[30]

> ‘340. The ADC provided its Reinvestigation Report and affirmed its finding that the export price should be determined under s.269TAB(1)(b) of the Act.[31]
>
> 341. The ADC provided a detailed summary of its considerations as to why it recommended to the Minister that he exercise his discretion to treat the transactions between UPM and FXA as not arms length. These were summarised as follows:
>
>> ‘FXA’s losses were very significant, sustained, understated by FXA and unlikely to be recovered in a reasonable period; FXA understated the losses; reasons given by FXA for the losses were not supported by evidence and relevant information held by FXA was not provided to the Commission;

[28] See also paragraph 70 re DDP sales made by UPM-AP
[29] Letter to the ADC requiring a reinvestigation dated 4 September 2017.
[30] ADRP Report No. 55 pages 102 to 104.
[31] Reinvestigation report dated 11 December 2017, pages 13-26.

The verification team had reduced visibility of the role of UPM-AP because the verification team did not undertake an onsite verification of UPM-AP. This was because:

- UPM initially maintained that UPM-AP and its directors were based in Singapore;
- the Commission's verification team visited UPM in China; and
- following the verification visit to China the verification team sought to visit UPM-AP in Singapore but at that time UPM stated that directors and staff of UPM-AP were not in Singapore but in China.

The Commission considers that exercise of the discretion in this case falls within the proper scope of the discretion in s.269TAA(2). The Commission's assessment of the scope and nature of the discretion is set out in section 4.4.2 (of the Reinvestigation Report). In summary the Commission considers that:

- the discretion in s.269TAA(2) must have a scope that operates in circumstances where there is insufficient factual basis for a finding either under TAA(1) or that transactions were not arms length (in the ordinary sense);
- case law on s.269TAA primarily concerns the operation of s.269TAA(1) and provides limited assistance in assessing how the discretion in s.269TAA(2) operates;
- the statutory discretion in s.269TAA(2) plays an important practical role in the Commission's investigations and fills what in many cases would be a significant evidential gap; and
- while the ability to "assume" reimbursement is discretional the Commission should not decline to exercise that discretion because of an evidential gap that could be addressed by the importer.[32]

342. It provided a lengthy explanation of the scope and nature of s.269TAA(2) and in particular its view about the exercise of the discretion:

'The Commission further notes judicial authority on how the scope of a statutory discretion is usually determined; that judicial authority states that the scope of a

[32] Reinvestigation report dated 11 December 2017, page 15.

statutory discretion is usually defined **negatively** by reference to the instrument conferring the discretion. In other words the scope of the discretion is defined by what the discretion is not; and what the discretion is not is determined by reference to the conferring statute.'[33] (Relevant references are provided in the footnotes to the report.)

343. The ADC proceeds to explain what it considers are the relevant provisions that guide the interpretation of the discretion.

344. The ADC also places particular emphasis on the importance of the power of s269TAA(2) as an investigative tool, given the Commission has no powers to compel interested parties to provide information and evidence. It allows certain transactions to be treated as non-arms length, in cases where there may otherwise be an 'evidential gap'.[34]

345. I held a further conference with the ADC, in light of its comments regarding what information it considered had not been provided by FXA regarding its losses.[35] The ADC indicated that, in its view, FXA could have provided more recent financial records demonstrating that the losses were being recovered. The ADC also referred to the fact that it had not be granted full access to UPM-AP financial records. It considered this a relevant evidential gap.'

Procedural Fairness

80. The Consent Orders that set aside the decisions (of the Review Panel and the Minister) noted that the Respondents accepted, in the circumstances of this matter, the Review Panel denied UPM-AP procedural fairness by failing to give it an opportunity to comment on two issues as defined in Ground Two of the Originating Application (lodged by UPM-AP). It considered these two issues impacted on the finding on the arms length nature of the transactions between UPM-AP and FXA.

81. As referred to above, the ADC made comments in Reinvestigation Report 341 regarding reduced visibility of the role of UPM-AP because the verification team did not undertake an onsite verification of UPM-AP and that this prevented full access to UPM-AP's

[33] Reinvestigation report dated 11 December 2017, page 19.
[34] Reinvestigation report dated 11 December 2017, page 26.
[35] Non-confidential summary of conference held with the ADC on 18 December 2017.

financial records. The ADC said this was because the verification team visited China and when they sought to visit UPM-AP in Singapore (location of the registered office), they were told that the directors and staff of UPM-AP were in China.[36]

82. The ADC indicated it was able to do a more limited form of verification through the Sydney office of UPM Australia, than would otherwise have been undertaken, if the ADC had been on site. It considered it had reduced visibility for this reason.

83. In order to provide the opportunity for UPM-AP to provide comment on these issues, a conference was convened with UPM-AP, FXA and the ADC on 11 December 2018. A description of its comments on the two procedural fairness issues is contained in the conference summary.[37]

84. The main points claimed are that UPM-AP considered it fully co-operated with the ADC investigation and provided full and complete access to its financial records. It does not consider there was any evidential gap that could be attributed to its behavior in Investigation 341. It also provided the Review Panel with email correspondence between ADC and UPM Australia that indicated the required information could be sourced through the verification visit with the UPM Australia (Sydney office). Further, following that verification visit at the UPM Australia office, the ADC indicated it was satisfied with the information provided and would not need to undertake an additional visit to China to verify UPM-AP financial records.[38]

85. UPM-AP stated that it had not been made clear in the Reinvestigation Report that the ADC had been offered the opportunity to undertake a further visit with UPM-AP in China but had decided to proceed by accessing records through the Sydney office.

86. UPM-AP also claimed that there should not have been any uncertainty as to the location of its financial records given:

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[36] Reinvestigation report 341 pages 15 and 18.
[37] Non-confidential summary of conference held with UPM-AP, FXA, ADC on 11 December 2018.
[38] Copy of email correspondence between UPM Australia and ADC in June/July 2016 provided to the Review Panel at the conference on 11 December 2018.

- It was identified in its response to the exporter questionnaire (dated 19 May 2016);

- The ADC had undertaken a verification visit to UPM in China in relation to Investigation 225 (an earlier A3/A4 Copy Paper investigation that had been terminated) and had obtained relevant UPM-AP records from China; and

- The verification visit undertaken by the ADC for investigation 341 had obtained UPM-AP records while visiting the China office.

87. On this basis, UPM-AP claimed that no reliance should be placed on the ADC's comments in the Reinvestigation Report (or at the subsequent conference held on 18 December 2017) regarding lack of access to financial records or that the location of records had been misrepresented to the ADC. It states that no inference should be drawn from either "reduced visibility" or "Full Access Information" on the arms length nature of the transactions.

88. The ADC indicated at the conference (11 December 2018) that it stands by the statements it made in Reinvestigation Report 341.

89. It appears that there has been a misunderstanding and miscommunication between the ADC and UPM-AP regarding the location of the relevant financial records and whether full access was granted.

90. Having considered this information, I understand that the ADC did not consider it had been provided with full access and opportunity to verify UPM-AP records. From its perspective (rightly or wrongly), it had not been made clear that these records were available and accessible at the China office, where the verification visit had occurred.

91. I further accept that UPM-AP considered it had co-operated fully and provided access to requested records to the ADC.

92. As pointed out by UPM-AP, the access to information and lack of visit to the UPM-AP Singapore office was not significant in the original ADC findings and recommendations in Report 341.There is no mention of it in the analysis undertaken by the ADC regarding UPM-AP's export price. On this basis, it is reasonable to assume that it did not influence

the original recommendation to the Minister on the decision on the export price (and arms length nature of the transaction between UPM-AP and FXA).

93. The two issues, (full access and reduced visibility), were however referred to in the ADC Reinvestigation Report 341 (and in the 18 December 2017 conference). It was part of the explanation given by the ADC in for affirming its findings of the non-arms length nature of the transactions between UPM-AP and FXA.

94. The first reason outlined by the ADC in Reinvestigation Report 341 for finding that the transactions were not arms length was that substantial losses were made by FXA and it was unlikely that these would be recovered within a reasonable period of time. This reflected the reasons given in REP 341. The ADC also stated in the Reinvestigation Report, that it considered the evidence gap could have been addressed by the importer, FXA. Given this was the reason given in REP 341, the focus of its comments in the Reinvestigation Report, and that s.269TAA(2) provides that 'sales at a loss' lead to the decision on s.269TAA(1), it was determinative of the conclusions drawn in Report 55.

95. While the statements regarding lack of full access and the location of records were also given as reasons in Reinvestigation Report 341, they were not persuasive as to whether the transactions should be treated as arms length in terms of s.269TAA of the Act. The comments appeared more as observations by the ADC rather than as key reasons for its findings. The facts surrounding whether the sales were at a loss and unrecoverable led to the original decision in relation to s.269TAA(2) and the export price finding recommendation to the Minister. The comments made in Reinvestigation Report 341 in relation to UPM-AP were not of great substance in the Review Panel's recommendation on the reviewable decision.[39]

96. The reconsideration of the Report No 55 requires that I reassess this information. The Review Panel is not able to deal with whether miscommunications or misunderstandings occurred. Its role is to review the reviewable decision based on relevant information. For the purposes of the reconsideration of this review, I have placed no reliance on the comments made by the ADC in the Reinvestigation Report 341 regarding the access to

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[39] See also paragraph 79 above.

or location of UPM-AP financial records in assessing whether the transactions were arms length and am considering the information that was before the Commissioner.

Sales at a Loss and the Treatment Discretion under s.269TAA(2)

97. The following paragraphs contain an extract from ADRP Report 55 dealing with the export price analysis and the decision relating to sales at a loss (pursuant to s.269TAA(2)).

> ‘351. I have reviewed the analysis on the legal issues in the Reinvestigation Report in some detail. While I do not agree with all of the inferences and conclusions drawn by the ADC in its lengthy analysis, I consider the primary issue is whether the discretion contained in s.269TAA(2) has been correctly outlined. The ADC, in my view, correctly points out that the Minister does have the ability to ‘assume the existence of a reimbursement arrangement where a loss arises’. This is the effect of s.269TAA(2). The ADC states that it provides an ‘important and practical investigative tool’ to address ‘what in many cases would be a significant evidential gap’.[40]
>
> 353. However, I do not think this means that a decision-maker should ignore compelling evidence as to why sales were made at a loss or how these losses might be recovered within a reasonable period of time. I have considered the explanation on the evidence provided by FXA and UPM included in the ADC Reinvestigation Report. I have also considered the FXA information submitted to the ADC as part of the investigation process. The ADC’s concerns on the evidential gap relate to the:
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> - large losses over an extended period of time by FXA;
> - lack of supporting evidence regarding the explanation of losses;
> - lack of supporting evidence on its plans for recovery of these losses; and
> - limited access to UPM-AP records for verification purposes.
>
> 353. On this basis, I do not agree with Fuji Xerox’s argument that the Minister has erred in his decision under s.269TAA(2) of the Act.

[40] Reinvestigation report dated 11 December 2017, page 26.

354. I have concluded that the ADC evidence expectations were not unreasonable. In my view, it has considered the information provided on the 'sales at a loss' by FXA and UPM-AP in an appropriate manner and made a reasonable judgment. Accordingly, I find that the ADC has considered the relevant evidence in an appropriate manner in its recommendation to the Minister to exercise his discretion regarding s.269TAA(2). Its decision-making process could have been explained more comprehensively in its initial report to the Minister.

355. I noted the comments by the ADC about the importance of s.269TAA(2) as an investigative tool and the challenges it faces in relying on interested parties to supply information that may be detrimental to their position. In this case, I think the ADC has correctly interpreted the provision and made an appropriate judgment on the available evidence in its recommendation to the Minister.'

98. The reconsideration of Report 55 requires I re-assess the claims by UPM and FXA.

99. Both have provided a range of arguments in their original applications to the Review Panel as to why they both consider the ADC misapplied or conflated the provisions of s.269TAA. The main arguments contended in the original review related to:

1. whether there was any evidence of a compensatory arrangement between UPM-AP and FXA;

2. statements that the two companies are unrelated, and that neither could enter into compensatory arrangements given their respective corporate governance and legal obligations;

3. that while s.269TAA(2) confers a statutory discretion to treat transactions by the importer as falling within s.269TAA(1)(c), this statutory discretion must still be exercised in accordance with administrative law principles;

4. that the report to the Minister (REP 341) failed to fully explain the facts surrounding the 'sales at a loss' and on this basis, the decision is flawed;

5. FXA's sales in Australia of A4 Copy Paper were negotiated at arms length and were commercial decisions made by FXA;

6. there was no evidence of 'hidden dumping' between FXA and UPM-AP; and

7. international jurisprudence and domestic law and jurisprudence in relation to sales dumping do not support the interpretation adopted by the ADC. UPM-AP cites Article 2.3 of the Anti-Dumping Agreement, as well as the Powerlift and Nordland cases, as providing the relevant principles that should be followed in the consideration of arms length transactions. UPM-AP claims that the ADC had not applied s.269TAA correctly.

100. Further information provided by UPM-AP and FXA at the recent conference 11 December 2018) is outlined below:

UPM-AP stated that:

- Report 341 did not contain sufficient information to enable the Parliamentary Secretary to be satisfied that the transactions between UPM-AP and FXA were not arms length and that the Parliamentary Secretary had not formed an opinion under s.269TAA(1)(c);

- The ADC had conflated its consideration of the matters in TAA(3) with the exercise of the discretion under s.269TAA(2);

- The judgment in the Powerlift case suggests that the ADC must engage with evidence of whether there has been any reimbursement and the likelihood that there has or will be reimbursement;

- Positive evidence supporting the view that reimbursements had not been made had been ignored by the ADC. UPM-AP indicated that statutory declarations provided in the course of Investigation 225 (and referred to in its submission to Investigation 341 and to the application to the Review Panel) had been ignored;

- There are other dumping investigations involving sales at a loss which the ADC has accepted relate to market pressures;

- Too much weight had been placed on the existence of irrecoverable losses and evidence of no probative value;

- The amount of Selling, General and Administrative expenses (SGA) applied in the deductive export price (█%) appeared incorrect given the FXA 2015 Profit and Loss Statement for A4 Copy Paper sales revealed a much lower percentage (█%).

- The excessively high (in UPM-AP's opinion) SGA percentage, was more likely to be the cause of the substantial losses being experienced by FXA in 2015. UPM-AP claimed that FXA's business practices should not lead to a finding of the transactions being treated as non-arms length for the purposes of the export price. It also suggested that the FXA SGA should be compared with the SGA of other importers in order to ascertain whether the FXA SGA is excessively high; and

- Given FXA had purchased A4 Copy Paper from other sources during 2015 and it appeared that losses had been similarly made in respect of these products, that this situation should be further considered by the Panel. It claimed that if FXA was making losses on sales from all sources (not just UPM-AP products) it was implausible that all sources were 'reimbursing or compensating' FXA. UPM-AP questioned the basis for exercising the discretion in such circumstances.

FXA stated that the determination of UPM-AP's export price was based on a misconception and misconstruction of the legislation. It stated that no reimbursements or compensation were paid by UPM-AP to FXA and there was no evidence of sales dumping (sometimes referred to as hidden dumping).

101. It is important to recognise that anti-dumping legislative provisions are to give effect to Australia's obligations under Article VI of the General Agreement on Tariffs and Trade (and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade).

102. As outlined in the Nordland Papier judgment, His Honour considered Article 2.3 was the 'genesis of par (b) and (c) of s.269TAA(1). He went on to say:

‘What is sought to be encompassed, I think, is a series of circumstances where price, ascertained in accordance with ordinary principles, is an unreliable indicator because there is an arrangement between the parties under which price is set at a particular level but the buyer, having agreed to pay the price so established, is to receive some offsetting compensation or benefit or (directly or indirectly) to receive reimbursement of all or some of the price.[41]‘

103. In the Powerlift judgment, His Honour discussed sales dumping:

‘The most normal case of sales dumping will occur where the goods under review have not entered Australia at a price less than the normal value in the country of export, but have thereafter been “dumped” by being sold at a loss by the importer, under an arrangement that the exporter will reimburse the importer for that loss. The significance of s.269TAA(2) is that it permits the Minister, in effect, to assume the existence of a reimbursement agreement, where a loss arises.[42]‘

104. The above-mentioned judgments do not directly deal with ‘sales dumping’ or s.269TAA(2) of the Act. However, both suggest that part of the intent of s.269TAA is to deal with circumstances of ‘sales dumping’ as well as other methods by which the price is not representing the true amount paid or payable in relation to the transaction, thus causing it to be non-arms length. They provide context as to the application and interpretation of arms length transactions.

105. The issue was also dealt with by the ADC in Reinvestigation Report 341. The treatment discretion in s.269TAA(2) does provide that the Minister may, for the purposes of s.269TAA(1)(c) treat sales at a loss by an importer, as indicating that the importer will be reimbursed (compensated or otherwise receive a benefit) for the whole or a part of the price. This enables such transactions to be treated as non-arms length. There is a lengthy description of the application of the legislation and the supporting case law in pages 18 to 26 of the Reinvestigation Report 341 (a copy of which is attached to this report).[43] I do not need to repeat this.

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[41] FCA Nordland Papier AG v ADA [1999] FCA 10.
[42] Powerlift (Nissan) P/l and another v Minister for Small Business, Construction and Customs and others, 113 ALR 339, page 368.
[43] Reinvestigation report 341 pages 18 to 26.

106. I have reconsidered the analysis undertaken by the ADC on its interpretation of s.269TAA. I remain of the opinion that the ADC interpretation of s.269TAA(2) and s.269TAA(1)(c) is correct. I also agree the case law cited by the ADC supports its approach. For this reason, I do not agree with FXA that there is a need for positive evidence of a reimbursement (or compensation or benefit) for s.269TAA(2) to be enlivened.

107. In my opinion, when there is evidence of a consideration, or relationship affecting the price, or reimbursement, compensation or benefit, it is clear that s.269TAA(1) applies. Positive evidence is required to enliven s.269TAA(1)(a) and (1)(b).

108. However, s.269TAA(2) requires that when the Minister is satisfied that the sales are at a loss, a discretion exists that the Minister **may** for the purposes of s.269TAA(1)(c) treat the sales at a loss as indicating that the importer will be compensated or reimbursed. The Minister forming the requisite satisfaction of sales at a loss enables these sales to be deemed to have met the conditions of s.269TAA(1)(c). Such an opinion does not require positive evidence of reimbursement but rather requires the Minister to be satisfied regarding the sales at a loss. As expressed in Powerlift, it 'enables the Minister to assume the existence of a reimbursement agreement'.

109. UPM-AP's claim is similar to FXA's but focuses on the argument that the existence of sales at a loss does not automatically establish the existence of reimbursement. To the extent that a discretion does exist in s.269TAA(2) ("***the Minister may, for the purposes of paragraph(1)(c),*** *treat the sale of those goods at a loss as indicating that the importer or an associate of the importer will, directly or indirectly, be reimbursed"*) I agree with UPM-AP that it is not automatic.

110. However, UPM-AP also suggests that there must be 'evidence sufficient to support an inference that there is a likelihood of reimbursements' to enliven s.269TAA(2). For the reasons outlined in the Reinvestigation Report 341 regarding the operation of s.269TAA(2) and my comments in paragraph 108, I do not agree with this view. Section 269TAA(2) enables a decision to be taken with respect to whether transactions should be treated as non-arms length where there is no clear evidence of any of the 'indicators' outlined in s.269TAA(1) being evident.

111. Accordingly, I do not agree with UPM-AP regarding evidence to 'support the inference of a reimbursement' being required.

112. UPM-AP also claim that REP 341 failed to provide any analysis of its consideration of s.269TAA(2) in relation to FXA transactions. I agree that REP 341 did not provide sufficient analysis of the ADC's recommendation that that sales should be treated as arms length, and this is one of the reasons that the reinvestigation was required in Review 55. The ADC addressed its reasons in greater detail in Reinvestigation Report 341. I need not deal further with this claim.

113. Section 269TAA(2) provides the Minister with a discretion. This discretion allows the Minister to consider whether there are other substantive reasons (other than reimbursements or compensation etc.) that explain the loss that should be taken into account in making the decision relating to whether s.269TAA(1)(c) should be considered.

114. The ADC, in Reinvestigation Report 341, provides limited analysis on whether other reasons were considered. The ADC makes the comment in this report that 'while the ability to "assume" reimbursement is discretionary the Commission should not decline to exercise that discretion because of an evidential gap that could be addressed by the importer'.[44]

115. UPM-AP proposed that there are other reasons that should have been explored by the ADC prior to making its recommendation on the arms length nature of the transactions. These were:

- That FXA were sourcing A4 Copy Paper from other sources and were making losses on these sales, UPM-AP consider it implausible that all such sources were 'reimbursing' FXA. It proposes that FXA business practices have led to its losses (*losses on all sales*);

- The high level of SGA incurred by FXA. UPM-AP proposes that the losses are being caused by the particular business model and suggests that a comparison be

[44] Reinvestigation report 341, section 4.4, page 15.

undertaken with other importers' SGA to ascertain what is a 'normal' rate of SGA (*SGA*); and

- additional analysis of the reasons given by FXA as to its losses was required (*FXA reasons*).

116. As part of this reconsideration of the review, I have further considered FXA's 2015 Profit and Loss Statement and its sales and costings as well as the reasons provided by FXA as to its losses. I have also revisited the prices of UPM-AP sales to other Australian importers.

117. This information was before the Commissioner in the original investigation and can be considered 'relevant information' in terms of s.269ZZK(6).

<u>Losses on all sales</u>

118. REP 341 was clear that the transactions between UPM-AP and FXA were determined to be non-arms length due to the substantial losses made by FXA on its sales.

119. At the conference held on 18 January 2019, the ADC provided the weighted average quarterly selling prices for each supplier of all FXA sales of A4 Copy Paper during 2015.[45] This information revealed that the selling prices followed similar trends during 2015 and, while not identical, were in a similar range. When analysis is undertaken of FXA sales of other sourced products (other than UPM-AP products) it is evident that FXA made losses on sales during 2015. While the ADC did not have detailed information on the costs to import and sell from all sources, and so could not undertake profitability analysis on individual transactions, it confirmed that the FXA 2015 monthly Profit and Loss Statements showed losses throughout the period.[46]

120. Exports of A4 Copy Paper from one of the sources, though in minor volumes, had already been found by the ADC to be arms length transactions through analysis of a

[45] Conference summary dated 18 January 2019.
[46] Conference summary dated 18 January 2019.

different exporter and importer combination. While these sales by FXA may have been at a loss, they were not considered non-arms length transactions.

121. The products from another source, while in larger volumes than those referred to in the previous paragraph, were not as large as UPM-AP volumes. The ADC had undertaken a partial verification of the cost to import and sell one of these shipments and found it too, to be at a loss. The loss was at a similar level to the losses ascertained for UPM-AP products. It is reasonable to assume that these volumes would have impacted on FXA's revenue and profitability.

122. Not all UPM-AP shipments for which the cost to import and sell were verified by the ADC, were found to be at a loss. The majority were, and the losses were relatively high. Overall, the losses during 2015 by FXA, as revealed in its 2015 Profit and Loss statement, were as stated by the ADC in REP 341. Therefore, FXA was making losses throughout the year, and an inference can be drawn that it was on sales from all sources, not only UPM-AP products.

123. UPM-AP's claim regarding the 'implausibility' of all sources 'reimbursing' FXA has some credence, particularly when one source has already been found to have undertaken arms length transactions of its products (although its sales volumes to FXA have been in smaller quantities). The other source did not co-operate with the investigation. Given limited verified information, it is not possible to determine the full status of these transactions. However, losses were made overall on FXA sales during 2015.

SGA

124. The SGA issue is also discussed in further detail in paragraphs 151 to 153. UPM-AP questions whether the correct SGA was used in the deductive export price calculation. I note that FXA was given the opportunity to comment on this calculation during the original investigation and it did not raise any issues related to SGA. The SGA percentage provided in the original response to the importer questionnaire was subject

to verification by the ADC. I remain satisfied that the SGA percentage used in the deductive export price calculation is the appropriate amount.[47]

125. However, I requested that the ADC provide details of the SGA percentages for other importers for comparison purposes. The ADC advised that there was a wide range of SGA percentages for the other verified importers. These varying percentages were explained as relating to the type of importer being examined, that is, its level of trade. The ADC indicated there was one importer found to operate in a similar manner to FXA during the investigation. It also had a comparatively high SGA percentage compared to other importers.[48] (confidential exporter and importer information)

126. REP 341 provides a description of the Australian market and the nature of competition and sales channels.[49] The ADC found that the market was highly competitive and price sensitive. It commented that 'there were multiple instances where suppliers operating in these sectors were sourcing a range of papers from a variety of import sources and also from the local source. There were also instances where A4 Copy Paper from one exporter was being distributed through intermediaries.'[50]

127. Based on this information, as well as the differences in SGA incurred, there does appear to be a variety of business models in operation for A4 Copy Paper sales in Australia. It is not possible to draw any conclusions as to what a 'normal' SGA would be for importers given the differing range of functions performed. However, it is clear that FXA incurred significant amounts on (confidential FXA financial information) and hence it has a higher SGA than the majority of other importers.

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[47] See commentary on this issue from the conferences held on 11 December 2018, 20 December 2018 and 8 January 2019.
[48] Conference summary dated 19 January 2019.
[49] REP 341 pages 30 and 98, respectively.
[50] REP 341, Section 9.4.4.3

128. It is apparent from REP 341, that the Australian market is highly price competitive. This has impacted some importers more than others, due to, I expect, the different business models in operation. This of itself is not unusual in the business world. However, it does suggest that the level of SGA expenditure is having a significant impact on the profitability of sales for certain importers.

129. It provides an additional dimension to the question as to whether the FXA losses were more likely to be business-related and market-related, particularly in the context of comments by the ADC in REP 341 on Price Effects in the Australian market.[51]

Reasons provided by FXA

130. In its submission to the ADC, dated 3 June 2016, FXA provided its explanation of the losses experienced in 2015. It provided the following reasons, together with the steps it was taking to improve profits and profitability in the future. The specific details of the losses and steps to address profitability are confidential. The losses were also referred to in the FXA importer verification report (public file version) as follows:

> ‘However, the verification team considers that, as it was found the goods were sold at a loss by FXA, it should be treated as indicating that the importer will directly or indirectly be reimbursed, be compensated or otherwise receive a benefit for whole or any part of the price. The verification team considered the response FXA gave for making sales at a loss and the steps FXA claimed it is taking to return to profitability (also provided in FXA submission dated 3 June 2016), however the verification team notes that the losses are significant and consistent throughout the entire investigation period. In its submission of 3 June 2016, FXA submitted that it planned to recover only a portion of its losses by the end of ████ …
>
> FXA disputes this finding and the facts upon which it is made. According to FXA:
>
> 1. There is no evidence there was any consideration payable for, or in respect of, the goods other than its price; or the price was influenced by a commercial or other relationship

[51] REP 341, pages 105 to 108.

between the buyer, or an associate of the buyer, and the seller, or an associate of the seller;

2. All transactions that are the subject to the investigation which involve FXA were at arms length;

3. FXA has put plans in place to return the relevant part of its supplies business to profit in …; and

4. Any losses will be recovered within a reasonable period of time.'[52]

131. The ADC in REP 341 indicated that it had determined that the transactions between UPM-AP and FXA were not arms length, because the goods were sold at a loss by FXA and the losses were unrecoverable.[53] It also expressed this view in Statement of Essential Facts 341 (SEF 341) and outlined that FXA had made a submission in response to Preliminary Affirmative Determination in relation to the finding regarding the non-arms length nature of the transactions. The submission suggested that there must be evidence of a reimbursement. The ADC explained that it did not agree with the interpretation of s.269TAA proposed by FXA.[54]

132. The confidential reasons for the losses submitted by FXA were:

[52] FXA Importer Verification Report (dated July 2016) published in October 2016.
[53] REP 341 section 6.8.2.2.1, page 42.
[54] SEF 341 page 38.

(confidential reasons provided by FXA as to the losses)

133. FXA also provided an outline of the steps being taken to return to profitability.[55] It is not possible for the Review Panel to ascertain the success or otherwise of the steps being taken by FXA to address the losses, as no information was provided by FXA on this. Part of the comments made by the ADC in Reinvestigation Report 341 related to the fact that FXA had not provided further evidence supporting its explanatory statements and that there was 'an evidence gap that could have been addressed by the importer'. The ADC stated (Confidential FXA financial information)[56] The ADC confirmed these statements regarding the evidence gap being referred to in Reinvestigation Report 341 at the conference held on 18 December 2017.[57]

134. It is not possible to draw any conclusions as to why FXA did not supply additional evidence to the ADC to support its position regarding the positive steps it was taking to return to profitability.

135. As stated in Report 55, I do not think the ADC's evidence expectations were unreasonable. Nor do I consider its interpretation of sub-sections 269TAA(2) and 269TAA(1), as explained in Reinvestigation Report 341, are incorrect. However, upon reconsideration of the original information, together with the further information obtained as a result of the conferences held pursuant to s.269ZZHA, it is my view that insufficient analysis was undertaken in REP 341 of the factors that could be causing the losses. It should be noted, however, as the ADC has pointed out that evidence was not provided by FXA to support its claims regarding losses. Insufficient analysis by the ADC of the factors causing the losses was more persuasive than the fact that evidence was not provided by FXA to support its claims regarding the losses.

[55] FXA submission dated 3 June 2016.
[56] Reinvestigation report 341, page 16.
[57] Conference summary 18 December 2017.

136. The information referred to by UPM-AP raised questions as to the underlying nature of the losses for consideration rather than assuming reimbursement (or compensation).

137. UPM-AP proposed that regard should have been had to the statutory declarations provided to the ADC in an earlier investigation (Review 225) and referred to in its submission to the ADC in the original inquiry and as a footnote in its application to the Review Panel. It considered this a failure to consider relevant information. I do not agree.

138. This evidence related:

- to an earlier inquiry by the ADC; and
- a different and earlier investigation period.

Also:

- different "like goods" were under consideration (A3 Copy Paper and A4 Copy Paper);
- no information was provided as to whether it related to the same customers.

139. In these circumstances, the Review Panel gave the statutory declarations little weight as evidence in the earlier review and continues to hold this view in the reconsideration.

140. I had previously concluded in Report 55 that the ADC had considered the relevant evidence in an appropriate manner in making its recommendation to the Minister in REP 341. However, additional information suggests that a fuller consideration of all FXA sales, FXA's SGA as well as the nature of the price competition occurring in the Australian market presents a different perspective as to whether the transactions should be considered non-arms length.

141. On balance, I consider it more likely than not that the losses experienced by FXA were due to the highly competitive market in Australia (contributed to by the dumped imports), as well as the particular business operations of FXA. This is evidenced by:

- the sales at a loss regardless of source;
- the unlikelihood that all suppliers were reimbursing FXA for these losses; and
- the comparative SGA revealing that FXA incurred substantial expenditure on [redacted] as well as other SGA elements, and other importers did not necessarily incur similar SGA; this reflects the different business operations conducted by importers of A4 Copy Paper.

142. While there is no legal requirement to find positive evidence of a reimbursement or compensatory arrangement to rely on s.269TAA(2), there remains a discretion as to whether the Minister should treat those loss-making transactions as indicating reimbursement. In my opinion, this does require consideration, analysis and judgment regarding the reasons submitted on the losses. It should not be or appear to be an automatic outcome.

143. I have also taken into consideration that, while not explicit, part of the underlying intent of s.269TAA is to address sales (or hidden) dumping. In the circumstances of this case, sales dumping does not appear evident. (An explanation regarding sales dumping has been dealt with in paragraphs 102 to 104.)

144. For the reasons stated, notwithstanding that FXA did make sales at a loss during the investigation period (January to December 2015) with little likelihood that they would be recovered within a reasonable period, I am not persuaded, upon reconsideration of the review and in the circumstances of this matter, that sales dumping was the cause of the losses experienced by FXA.

145. In summary, there is further information before the Review Panel that raises additional reasons for FXA losses. This information is 'relevant information'. In my opinion, there were other reasons at play that explained FXA losses. These were not apparent in the original review. For the reasons outlined above, the transactions between UPM-AP and FXA should be treated as arms length.

Calculation Errors in the Deductive Export Price determined under s.269TAB(1)(b)

146. Given the Minister may not agree with the recommendation regarding the treatment of the transactions between UPM-AP and FXA as arms length, I have also considered the calculation errors identified by UPM-AP relating to the deductive export price calculation in REP 341 and advised at the conference held on 11 December 2018. They are as follows:

    (a) The confidential attachment in Report No 341 detailing the deductive method for determining UPM-AP's export price contained an error. A cell relating to 4th quarter figures was a number, whereas cells providing that information for the 1st - 3rd quarters contained formulas. The number relating to the 4th quarter was incorrect.

147. The ADC confirmed that an error had occurred and provided an adjusted spreadsheet (information provided at the conference held on 20 December 2018). This increased the deductive export price and reduced the dumping margin by a small amount.

    (b) Deductions were made for a hypothetical profit margin in the deductive export price. UPM-AP argued that this should not have been done as FXA did not make any profit. UPM-AP highlighted that deductions can be made pursuant to s.269TAB(2)(c) of the Act in respect of 'the profit, if any, on the sale by the importer'. UPM-AP also highlighted that there did not appear to be a legal direction regarding the profit as required by s.269TAB(2)(c) of the Act.

148. The ADC had derived the profit margin in this case from data of the cooperating importers. In the circumstances of the case, I agree with UPM-AP that it is unnecessary to include a profit. Section 269TAB(2) outlines the prescribed deductions that can be used to determine a deductive export price. Paragraph (c) states 'the profit, if any, on the sale by the importer, or where the Minister so directs …'. It is apparent that there were very different SGA and profit rates for importers of A4 Copy Paper, with some importers operating at a loss. The SGA and profit rates appear to relate to the different levels of trade, that is, they are linked to the functions and activities performed by each particular importer.

149. As the only other importer identified by the ADC as operating at a similar level to FXA [redacted] for FXA given the

level of trade differences. (confidential financial information for certain importers). It is recommended that no profit direction be given by the Minister if a deductive export price is required under s.269TAB(1)(b).

150. This would have the effect of increasing the export price and decreasing the dumping margin.

(c) UPM-AP proposed that the SGA was incorrect as there was a different figure shown in the 2015 Profit and Loss Statement.

151. See paragraph 124 that deals with this issue. I consider the SGA percentage used by the ADC in the deductive export price calculation is correct.

(d) UPM-AP proposed that an incorrect inclusion of the costs related to a consignment (from a different supplier) was used in the deductive export price calculation. UPM-AP claimed it is an incorrect calculation process to include the prices and costs of this shipment in a deductive export price for UPM-AP dumping margin calculation.

152. At the conference held on 11 December 2018, the ADC agreed that it had included data relating to goods exported by another party when calculating FXA's importation costs. It explained that the amounts of FXA's importation costs were not intended to be costs specific to imports from UPM-AP, it goes to all sales by FXA. The ADC indicated that its policy is to use the largest possible sample of data to obtain averages, and that breaking down FXA's data to isolate sales of goods exported by particular companies would impose an unreasonable burden on importers. I consider this is an acceptable approach when developing the importer's on-costs. For this reason, I do not agree with UPM-AP that the ADC erred in including the costs relating to other suppliers in FXA's SGA.

153. If the Minister accepts that a deductive export price is correct, the ADC will be required to recalculate it to take into account the identified errors.

Summary

154. While the procedural fairness issues identified by UPM-AP did not of themselves impact on the finding on the reviewable ground, further information obtained during the

reconsideration of the review has revealed that the export price for FXA should have been determined under s.269TAB(1)(a). This has had an impact on the correct determination of the export price and accordingly the dumping margin the subject of the reviewable decision.

155. It is also apparent that transactions made by UPM-AP on a DDP basis should have been determined under s.269TAB(1)(c) of the Act. While this does not have any impact on the value of the export price, it is appropriate to correct this issue in considering the reviewable decision.

Conclusions and Recommendations

156. In my opinion, UPM-AP has demonstrated that the export transactions between UPM-AP and FXA should be treated as arms length. As referred to in paragraph 145, the Review Panel considers for these transactions, the export price should be determined under s.269TAB(1)(a) for FXA. For the other UPM-AP transactions identified as DDP, UPM-AP should be considered the importer and the export price should be determined under s.269TAB(1)(c). It is recommended that the Minister determine the price (pursuant to s.269TAB(1)(c)) based on the selling price by UPM-AP less any charges for transport after exportation, and other matters arising after exportation. The normal value remains as determined by the Minister following the recommendation in REP 341.

157. For the reasons set out above, and pursuant to s.269ZZK(1) and (1A) of the Act, I found that the applicant, UPM-AP has demonstrated that the decision of the Parliamentary Secretary was not the correct or preferable decision. The new decision is materially different from the reviewable decision as the dumping margin decreases from 34.4 to four percent.

158. Accordingly, I recommend that the Minister revoke the decision for UPM-AP and substitute a new decision with a different export price that results in a new dumping margin of four per cent.

Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
11 February 2019

Appendix One

TABLE: List of Conferences held pursuant to s.269ZZHA of the Customs Act 1901 referred to during this reconsideration.

DATE	PARTICIPANTS	PURPOSE
7 August 2017	ADC	To access confidential information regarding Fuji Xerox information on export price and arm's length transactions and Confidential information regarding UPM normal value VAT adjustment and the calculation of the dumping margin.
23 August 2017	ADC	To access confidential information regarding UPM sales terms
18 December 2017	ADC	To obtain further information in relation to issues raised in the ADC Reinvestigation Report 341
11 December 2018	ADC, UPM-AP, FXA	To obtain further information from UPM-AP in relation to the procedural fairness issues in Ground Two of its application to the Federal Court
20 December 2018	ADC, UPM-AP, FXA	To provide the corrected deductive export price and to obtain information regarding the SGA expenses used in the calculation
18 January 2019	ADC, UPM-AP, FXA	To seek further information in relation to the export price finding and the deductive export price calculation