

ADRP Conference Summary

2017/55A 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. Remittal of matter for reconsideration by the Anti-Dumping Review Panel (Review Panel)

Panel Member	Jaclyne Fisher (Panel Member)
Review type	Review of Minister's decision
Date	11 December 2018
Participants	██████████ (Minter Ellison representing UPM AP), ██████████ (Minter Ellison), Justin Wickes (Anti-Dumping Commission), Steven Spears (Anti-Dumping Commission), ██████████ (Percival Legal representing Fuji Xerox Australia), James English (ADRP Secretariat) Participants met in person except for Mr ██████████ who joined via telephone.
Time opened	9.00 am AEDT
Time closed	1:00 pm AEDT

Purpose

The purpose of this conference is to obtain further information in relation to the resumption of the Review Panel Report No 55 in relation to UPM Asia Pacific Pte Ltd (UPM AP) as ordered by the Federal Court on 8 October 2018. It relates to A4 Copy Paper exported from the People's Republic of China (China) by UPM AP. This report is now referred to as 2017/55A.

The Review Panel is not considering a new review application but rather re-considering the evidence and relevant information previously before it and providing an opportunity for UPM AP to be heard on the issues identified in Ground 2 of its Originating Application relating to procedural fairness (lodged with the Federal Court) in order to make a recommendation on the reviewable decision to the Minister. Fuji Xerox Australia (FXA) is an interested party given it is a party to the export/import transactions with UPM AP the subject of the reviewable decision and has been invited to the conference on that basis.

The conference is being held pursuant to s.269ZZHA of the *Customs Act 1901* (the Act) for a review of a Minister's decision. In particular, it is noted that s.269ZZHA(2) prescribes that the Review Panel may have regard to 'further information' to the extent that it relates to 'relevant information' and conclusions reached at the conference based on the relevant information.

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In the course of the conference, the Review Panel may ask parties to clarify an argument, claim or specific detail contained in the party's application, submission or in relation to the Anti-Dumping Commission (ADC) Reinvestigation Report (dated 11 December 2017) dealing with the issues of the "reduced visibility information" and the "full access information" as defined in Ground 2 of the Originating Application lodged by UPM AP with the Federal Court. This conference is not a formal hearing of the review and is not an opportunity for parties to argue their case before me. It has been convened by the Review Panel to address procedural fairness by enabling UPM AP to provide comment on the above-mentioned two issues in the context of the findings on the determination of export price (in particular, the arms length nature of the transactions) as it relates to the reviewable decision.

The Review Panel may only have regard to information provided at this conference as it relates to relevant information within the meaning of s.269ZZK(6) of the Act. Any conclusions reached at this conference are based on that relevant information. Information that relates to some new argument not previously put in an application or submission is not something that the Review Panel has regard to and is therefore not reflected in this conference summary. However, I will have regard to information related to the procedural fairness issues mentioned above.

Given the nature of this matter, I have decided that the reconsideration, directed by the Court, should be undertaken in accordance with the powers of the Review Panel as outlined in Division 9 of Part XVB of the Act (Review by Review Panel). Essentially, this matter is recommencing from the stage of receipt of the reinvestigation report, on the basis that had the Review Panel sought to obtain further information from UPM AP (or other relevant parties) it would have done so under the powers provided under s.269ZZHA of the Act.

I do not propose to allow parties at this conference to raise other issues, as this may raise procedural fairness issues for other parties. I requested that the answers to questions be framed to address further information in respect of relevant information.

I also outlined for the parties concerned that the following process would be undertaken in conducting this reconsideration:

- Written submissions will not be accepted by the Review Panel (s.269ZZJ details who can make a submission to the Review Panel and the timeframe in which this can be made);

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- A non-confidential summary will be provided to participants within one working day of the conference. Responses as to accuracy and confidentiality should be provided to the Secretariat within two working days, unless a request is made to access the transcript of the conference, in which case additional time will be granted to enable access to the transcript;
- The non-confidential summary is not a full version of the transcript of the conference but rather a summary of the main points of further information discussed.
- A non-confidential version of this conference summary will be placed on the public file via the Review Panel website following confirmation by the participants that it is accurate and does not contain any confidential information;
- The consent orders will also be placed on the public file;
- Should another conference be required, parties are to provide details of their availability over the Christmas/New Year period;
- It is intended to finalise a report to the Minister within 30 days of the conference summary being published (and no later than 60 days);
- The report will not be made public until after the Minister's decision.

I considered it appropriate to extend an invitation to FXA Australia (FXA) on the basis that the substantive issue being raised by UPM AP relates to the 'evidential gap' identified in the ADC reinvestigation report on the arms length nature of the transaction between UPM AP and FXA in ADRP Report No 55.

UPM AP made two additional requests. The first related to a recording of the conference. I advised that this was unnecessary as the Panel uses a third party to record and transcribe the conference. A copy of the transcript could be provided on request to the Secretariat. Secondly, UPM AP sought to ensure that FXA had access to certain information it had received as part of the court proceedings. The Review Panel Member confirmed that FXA had been provided with the unredacted version of the reinvestigation report (11 December 2017) and conference summary of 18 December 2017 in so far as this had information relating to FXA's information. No confidential information relating to UPM AP had been provided to FXA. UPM AP could decide if it wished to provide this information directly.

To the extent that any party to the conference identifies there is confidential information that needs to be provided to the Review Panel, this will be done on confidential basis and needs to be raised prior to the commencement of a discussion.

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Background

- On 9 March 2018, the then Assistant Minister for Science, Jobs and Innovation, accepted the recommendations, and reasons for the recommendations made by the ADRP in ADRP Report No 55. A notice under s.269ZZM(4) advised of this decision.
- UPM AP lodged an application for judicial review on the 10 April 2018 listing five grounds (NSD532/2018).
- On 8 October 2018, by consent, the Court ordered that the decisions of the Assistant Minister for Science, Jobs and Innovation, and the Review Panel be set aside, and the matter be remitted back to the Review Panel for reconsideration in accordance with law (with the Respondents to pay Applicant's costs). The Court noted that, the Respondent's 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, in its Report No 55.
- UPM AP wrote to the Senior Member of the Review Panel on 23 October 2018 proposing a process for this matter to be progressed. The Senior Panel Member responded advising UPM AP that the relevant Review Panel Member would write to them.
- On 5 November 2018 I wrote to UPM AP advising of the way the reconsideration would take place.
- Correspondence between UPM AP and the Review Panel has been underway since that time on the process for the reconsideration being adopted by the Review Panel.

UPM AP Comments

UPM AP noted that the orders require the reconsideration of the reviewable decision according to law. It stated that while the Review Panel's position is that the conference may be framed to deal with procedural fairness issues relating to Ground 2, the reconsideration by the Review Panel is not so limited. UPM AP wished to make clear that the Court did not make any finding as to the grounds in the proceeding NSD532/2018 and that it would be a misrepresentation of the orders to suggest that it did. Further, any limitation of the reconsideration by the Review Panel to just Ground Two misconstrues the effect of the orders.

UPM AP also proposed that the ADRP adopt a process under s.269ZN, notwithstanding that the Review Panel had indicated that it considered it should be guided by Division 9 of Part XVB of the Act. UPM AP suggested that Division 9 did not expressly provide for

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circumstances in which a decision of the Review Panel is set aside and remitted to the Review Panel for reconsideration. UPM AP suggested that s.269ZN provided the Review Panel with broader powers that would allow it to conduct the review other than in strict accordance with Division 9 of Part XVB of the Act.

Discussion

The specific information that the Review Panel sought in this conference relates to UPM AP's issues in relation to reduced visibility information and full access information as referred to above. At various points during the conference, I reminded participants that answers should be given only to the extent that information was relevant and not already referred to in their applications or submissions to the Review Panel.

Response to Reduced Visibility Information and Full Access Information

UPM AP gave the following responses to the Reduced Visibility Information and Full Access Information:

1. The claims contained in the Reduced Visibility Information and Full Access Information were not before the Parliamentary Secretary and could not have been part of the reviewable decision made on 19 April 2017.

The Review Panel noted that the decision of the Parliamentary Secretary in relation to ADC Report No 341 had been subject to review by the Review Panel. The Review Panel had directed the ADC to undertake a reinvestigation of the export price for UPM AP. Section 269ZZL of the Act allows the Review Panel to consider any findings contained in the Reinvestigation Report in making a recommendation to the Minister. UPM AP disagrees with that position.

2. There was no mention of the Reduced Visibility Information and Full Access Information in early documents such as the Statement of Essential Facts, and it was not included in the agenda for any of the verification visits. The Reduced Visibility Information and Full Access Information were not raised in the ADC's submissions to the Review Panel, nor given to the Review Panel when asked about reasons for the inference being drawn in the conference between the ADC and the Review Panel on 7 August 2017. The information was conceived of and constructed after the ADC's reinvestigation report. The discussion at the conference on 18 December 2017 dealt with these "evidence gap" issues, however, UPM AP was not aware of either the

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comments in the reinvestigation report or conclusions drawn at the 18 December 2017 conference until after the Minister's decision. It was therefore unable to address these issues previously.

3. The ADC undertook an onsite verification and had access to all the information it requested. There was no claim by the ADC that it had been unable to scrutinise UPM AP's records in any of its reports or correspondence during its investigation.
4. The summary of correspondence between UPM AP and the ADC in the Reinvestigation Report was incomplete. (UPM AP provided the email chain, which was shown to ADC staff who agreed that they had that correspondence.) UPM AP claimed that the email chain indicated that the ADC did not think it necessary to conduct a verification in Singapore, and that the ADC had misrepresented that correspondence in the Reinvestigation Report.
5. There was no uncertainty about the location of, or access to, UPM AP's financial records. UPM AP indicated that the ADC was aware of, or should have been aware, that UPM AP financial records were available in China during the exporter verification visit. (This information was provided to the ADC at Part A4, Question 2 of UPM's response to the Exporter Questionnaire dated 19 May 2016.)

In summary, UPM AP claimed that no reliance should be placed on the ADC's comments in the reinvestigation report (or at the 18 December 2017 conference) in regard to lack of access to financial records and suggestions that the location of such records had been misrepresented to the ADC.

Calculation errors claimed by UPM AP

UPM AP indicated to the Review Panel that it wished to raise other matters. The Review Panel indicated that it would consider relevant information presented by the parties if that information might alter the dumping margin in the reviewable decision.

UPM AP raised four matters, which it said related to calculation errors:

1. 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.

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The ADC, at the request of the Review Panel, opened the relevant spreadsheet on the projector in the conference room. It confirmed that there appeared to be an error and undertook to confirm the correct figures following the conference. The Review Panel agreed that there appeared to be a calculation error.

2. 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'.

The ADC had derived the profit margin in this case from data of the cooperating importers. UPM AP clarified that it did not take issue with the amount of the constructed importers' profit but disputed its relevance. It said that there should not have been a deduction in this case, for three reasons:

- a. The importer did not make any profit on its sales;
 - b. A selling price, where price is equivalent to costs (a parity sale), by an importer is not sales dumping and does not attract a deductive calculation that includes a profit. It does not agree that a sale at a loss requires the deduction of an amount calculated by reference to an average profit obtained by other importers; and
 - c. The Minister did not direct that a deduction be made in this case (as required by s.269TAB(2)(c)).
3. The deduction made for FXA's selling and general administrative costs (SG&A) was almost █████ (Confidential financial information) of its revenue. UPM AP suggested that this figure was high, and that comparative information would have given the ADC a feel that it was extraordinary. UPM AP said that FXA had provided information to the ADC that FXA's SG&A was approximately █████ (Confidential financial information) of revenue. UPM AP also suggested that if the higher SG&A costs was correct this was an indication that FXA did not receive reimbursements or compensation from UPM AP: rather, the high SG&A indicated that FXA's losses were the result of its own business practices.

The Review Panel requested that the ADC confirm the value of FXA's SG&A.

4. FXA's SG&A was derived from data in relation to eight consignments. Only seven of those consignments related to goods exported by UPM AP: the eighth related to

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goods from another Chinese producer, through a third-party trader. 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.

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 was 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. UPM AP claimed that as the point of the exercise is to determine if FXA was selling goods supplied by UPM AP at a loss, then the calculation should be limited to prices and costs relating to these transactions only. The Review Panel indicated it will give further consideration to whether only prices and costs in relation to the goods exported by UPM AP should have been considered.

The Review Panel noted that of the four claimed calculation errors, only the first was squarely a calculation error. The Review Panel would give further consideration to the other three matters raised by UPM AP as to whether these could be considered calculation errors. UPM AP indicated that, regardless of whether there was a calculation error, these matters were relevant information (for the purposes of s.269ZZHA) and should be considered by the Review Panel when reviewing the reviewable decision. UPM AP claimed it had no way of knowing at the time of its application to the Review Panel that the claimed errors had occurred and these matters should be considered relevant information. It further claimed that any failure to have regard to relevant information would amount to a denial of procedural fairness.

Non-arms length transactions

UPM AP raised an issue as to whether the Parliamentary Secretary had sufficient information to be satisfied that there was a non-arms length transaction in Report No 341. It said that there was no evidence that the Parliamentary Secretary had formed the requisite opinion under s.269TAA(1)(c) of the Act. In particular, UPM AP noted that while the Parliamentary Secretary in Anti-Dumping Notice 2017/39 accepted the reasons of the ADC in Report 341, that report did not include the opinion that FXA would receive a reimbursement as required.

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UPM AP claimed that even if the Parliamentary Secretary had formed the relevant opinion, it was based on a misconception. In particular, it said that the ADC had conflated its consideration of the matters in s.269TAA(3) of the Act with the exercise of the discretion under s.269TAA(2). The Review Panel expressed that it recalled the requisite opinion being mentioned at the end of Report 341, in broad but sufficient terms.

FXA stated that the determination of UPM AP's export price was based on a misconception and misconception of the legislation. It said that as a matter of fact there were no reimbursement arrangements, and that this was verified by the ADC. FXA also claimed that the ADC did not understand commercial reality.

Evidence of reimbursement – Information in the Reinvestigation report

UPM AP indicated that the ADC had conflated sales at a loss and the 'treatment discretion', i.e. the exercise of the discretion in s.269TAA(2) of the Act by treating the sales as indicating that the importer or an associate of the importer will directly or indirectly be reimbursed, be compensated or otherwise receive a benefit in respect of all or part of the price of the goods. UPM AP claimed that s.269TAA(3) established irrecoverable losses as a precondition for the potential exercise of the discretion, but were not in themselves sufficient to justify the exercise of the discretion which requires consideration of all evidence concerning the likelihood of reimbursements other than the issue of irrecoverable losses. UPM AP raised Justice Hill's judgment in the *Powerlift* case as authority that the ADC must engage with evidence of whether there has been any reimbursement and the likelihood that there has or will be reimbursement.

UPM AP said that the amount of losses does not imply that transactions were not at arms length. Those losses were significant, sustained and not easily recoverable in the short term. It referred to Report 190, in which the ADC accepted that sales at a loss were due to market pressures, not transactions that were not arms length, noting that ultimately there was no decision by the Minister on this aspect of Report No 190, given the further report relating to this case.

FXA said that there was no evidence of reimbursement, sales dumping, or hidden dumping, due to no such arrangement occurring.

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The Review Panel indicated that the characterisation of evidence as indicating that transactions were or were not arms length is a matter for the ADC's judgment, and that the Review Panel could review the justice and fairness of that judgment.

UPM AP said that no reasons were given in the reinvestigation report for exercising the treatment discretion in relation to whether the transactions should be treated as arms length. It also said there was no evidence of inconsistent information provided by UPM AP or FXA. UPM AP claimed that the ADC had over-emphasised the number of times that the ADC had used its policy and practice regarding sales at a loss, and when the cases are examined, they do not support the ADC's proposition.

FXA stated that the treatment discretion must be exercised to support the aims of the legislation. It said that the anti-dumping system is a form of price discrimination and wealth transfer that is not in the public interest.

UPM AP then said that positive evidence supporting the view that reimbursements were not made had been ignored by the ADC. Statutory declarations were provided by UPM AP in the course of investigation 225, which UPM AP referred to in its submissions to the ADC and to the Review Panel. In UPM AP's view, there was too little weight given to this positive evidence and too much placed on the existence of irrecoverable losses and evidence of no probative value, such as the "information" set out in Ground 2 of its Originating Application.

UPM also said that the ADC had ignored evidence supporting the view that the payment of reimbursements by UPM AP was implausible.

UPM AP identified that sales by FXA originated from three sources – [REDACTED] (Confidential sales information) – and all were at similar prices, and it appeared that the average selling prices from all three sources represented sales at a loss. UPM AP noted that it could not have raised this information in its application to the Review Panel because it was not aware of it at the time. UPM AP said that it was implausible that the losses by FXA's paper division were being partly caused by all three exporters reimbursing or compensating FXA for these sales: those losses must be the result of FXA's pricing and/or market conditions.

UPM AP noted that the ADC identified the losses incurred by FXA on all paper sales as [REDACTED] (Confidential financial information), whereas the loss on A4 copy paper was approximately [REDACTED] (Confidential financial information). It said that this indicated that

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other factors were involved in causing FXA's losses and gave the impression that losses were of greater significance than was commercially true. UPM AP also raised that Report 341 does not explain why large losses by FXA are indicative of reimbursements and that FXA's high SG&A, if correct, would be relevant to examining the cause of losses, as may other factors.

UPM AP responded to an argument by the ADC in the Reinvestigation Report that s.269TAA(2) of the Act allows it to fill gaps in evidence. It said that the ADC is a powerful investigatory body with broad powers to compel the production of evidence. It stated that it did not consider an evidential gap existed, or alternatively if it did, that the ADC should have sought such evidence.

UPM AP also challenged the ADC's indication that it has a longstanding practice of basing the export price on the methodologies of s.269TAB(1)(a) and (1)(b) when determining the export price under s.269TAB(1)(c) (as referred to in section 6.4.2 of the reinvestigation report). Whereas the ADC pointed to a number of investigations where this had been done, UPM AP said that only three (Reports 190, 368 and 379) of the 21 cases cited in the reinvestigation report involve sales at a loss. Of those three, in Report No 190 the transaction was determined to be arms length despite the importer selling at a loss. Report No 379 involved a series of associated parties and the transactions were determined to be non-arms length under s.269TAA(1)(b) and only Report No 368 involved the application of the treatment discretion. All the cases in which s.269TAB(1)(c) was applied involved sales through an intermediary and none involved sales at a loss.

Circumstances of the exportation – Information in the Reinvestigation report

UPM AP raised two further points on the basis of its argument that UPM AP was both the exporter and the importer of A4 copy paper. It also noted that *Powerlift* is relevant.

First, UPM AP said that sales by FXA were not 'circumstances of the exportation' for the purposes of s.269TAB(1)(c) of the Act. It noted that, that paragraph was described as conferring a broad discretion on the Minister in *Pilkington*. However, it does not follow that sales at a loss following importation are circumstances of the exportation. The Review Panel clarified that, if FXA is the importer, consideration of those sales is allowed by s.269TAA(2). UPM AP indicated its view that the interpretation of the scope of 'all the circumstances of exportation' must be determined according to the ordinary meaning of the words not what may occur in a transaction in which the importer is a different entity.

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Second, UPM AP noted that given it was both the exporter and importer and it did not sell the goods at a loss in its sales to Australian customers (including FXA), it could not have been in receipt of a reimbursement. Accordingly, s.269TAA(2) is not relevant.

Opportunity for participants to provide further information

Prior to closing the conference, the Panel Member provided an opportunity for participants to provide any further information.

The ADC indicated that it stood by its earlier statements to the Review Panel. The ADC rejected the claim that it had been given complete access to UPM AP's records while in China. It therefore felt that it was important to attend UPM AP's offices in Singapore. UPM AP raised that it was evident from the ADC's reports that it had referred to certain of UPM AP's records which had been accessed while undertaking the verification visit in China. The ADC clarified that it was given copies of those records however it was not aware that these were part of UPM AP's records as opposed to UPM China. Additional UPM AP records were provided subsequent to the exporter verification visit during the importer verification meeting in Sydney in July 2016. There was discussion as to whether the ADC should have requested access to UPM AP's records in Changshu. The ADC stated that it was not aware that those records were available in Changshu. UPM AP said it ought to have known from prior investigations as well as its response in the exporter questionnaire provided prior to the China verification visit.

FXA was asked whether it had any further information to provide to the Review Panel. At this point of the conference, Mr [REDACTED] (FXA) did not respond. The Review Panel Secretariat attempted to contact Mr [REDACTED] (FXA) by phone, and then contacted him by email. Following the conclusion of the conference, Mr [REDACTED] (FXA) responded to the Secretariat indicating that he had participated in the conference and was not aware of any further issues.

The Review Panel requested that the ADC provide the following information following the conference:

- The correct calculations at cells F32 and F34 of the spreadsheet showing FXA's deductive export price. *The ADC confirmed that there had been a calculation error with the deductive export price. Once adjusted the dumping margin reduced to 32%.**
- Confirmation of whether there was a ministerial direction with respect to profit. *The ADC indicated that pages 42, 46 and 135 of Report 341 contained an explanation*

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*and discussion of the calculation of the export price. There was no ministerial direction in relation to profit.**

- Confirmation of the value for FXA's SG&A. *The ADC confirmed that the amount of [REDACTED] % for SG& A was provided by FXA in its response to the importer questionnaire.**

All parties indicated their offices are closed between the period 25 Dec and 1 Jan, but contactable before or after that for a conference as necessary.

Jaclyne Fisher

Review Panel Member

Anti-Dumping Review Panel

*Information provided by the ADC to the Review Panel Secretariat by email on 17 December 2018.