



# Application for review of a Ministerial decision

## *Customs Act 1901 s 269ZZE*

This is the approved<sup>1</sup> form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 11 July 2018 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party<sup>2</sup> may lodge an application for review to the ADRP of a review of a Ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

### **Time**

Applications must be made within 30 days after public notice of the reviewable decision is first published.

### **Conferences**

The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

### **Further application information**

You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10 and/or 11 of this application form (s269ZZG(1)). See the ADRP website for more information.

### **Withdrawal**

You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

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<sup>1</sup> By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

<sup>2</sup> As defined in section 269ZX *Customs Act 1901*.

## **Contact**

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email [adrp@industry.gov.au](mailto:adrp@industry.gov.au).

## PART A: APPLICANT INFORMATION

### 1. Applicant's details

Applicant's name:	Hankuk Paper Mfg. Co., Ltd
Address:	40 Wonsan-ro Onsan-eup Ulju-gun Unsan City Korea
Type of entity (trade union, corporation, government etc.):	Hankuk Paper Mfg. Co., Ltd (hereinafter "Hankuk") is a listed company (joint-stock corporation) in the Republic of Korea.

### 2. Contact person for applicant

Full name:	Alistair Bridges
Position:	Senior Associate
Email address:	alistair.bridges@moulislegal.com
Telephone number:	+61 2 6163 1000

### 3. Set out the basis on which the applicant considers it is an interested party:

Pursuant to Section 269ZZC of the Customs Act 1901 ("the Act") a person who is an interested party in relation to a reviewable decision may apply for a review of that decision.

The reviewable decision in this case relates to an application made to the Commissioner under Section 269TB requesting that the Minister publish a dumping duty notice.

Under Section 269T of the Act an "interested party" for the purpose of that kind of a reviewable decision is defined as including, amongst others, any person who is or is likely to be directly concerned with the importation or exportation into Australia of the goods the subject of the application; any person who has been or is likely to be directly concerned with the importation or exportation into Australia of like goods; and any person who is or is likely to be directly concerned with the production or manufacture of the goods the subject of the application or of like goods that have been, or are likely to be, exported to Australia.

Hankuk is a manufacturer of the goods to which the decision relates, namely A4 copy paper which were exported to Australia from Korea during the investigation period. Hankuk is thus an "interested party" for the purposes of the Act and this application.

### 4. Is the applicant represented?

Yes ☒ No ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

***\*It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.\****

## PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

### 5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☒ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) – decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

### 6. Provide a full description of the goods which were the subject of the reviewable decision:

The goods the subject of the reviewable decision are:

*uncoated white paper of a type used for writing, printing or other graphic purposes, in the nominal basis weight range of 70 to 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).*

The Anti-Dumping Commission also advised interested parties that:

*The paper is not coated, watermarked or embossed and is subjectively white. It is made mainly from bleached chemical pulp and/or from pulp obtained by a mechanical or chemi-mechanical process and/or from recycled pulp.*

### 7. Provide the tariff classifications/statistical codes of the imported goods:

The goods are classified to the following tariff subheadings:

- 4802.56.10 (statistical code 03); and
- 4802.56.10 (statistical code 09)

of Schedule 3 to the Customs Tariff Act 1995.

### 8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number:	<b>Anti-Dumping Notice No 2019/37</b>
Date ADN was published:	<b>10/04/2019</b>

***\*Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application\****

**Please refer to Attachment 1 – ADN 2019/37.**

## PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

**9. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

See Attachment 2.

**10. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

See Attachment 2.

**11. Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:**

See Attachment 2.

## PART D: DECLARATION

The applicant authorised representative declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:

A handwritten signature in black ink, appearing to read 'Alistair Bridges', is written over a light blue horizontal line.

Name:

**Alistair Bridges**

Position:

**Senior Associate**

Organisation:

**Moulis Legal**

Date:

**10 May 2019**



## PART E: AUTHORISED REPRESENTATIVE

*This section must only be completed if you answered yes to question 4.*

**Provide details of the applicant's authorised representative:**

Full name of representative:	Alistair Bridges
Organisation:	Moulis Legal
Address:	6/2 Brindabella Circuit Brindabella Business Park Canberra International Airport Australian Capital Territory 2609 Australia
Email address:	alistair.bridges@moulislegal.com
Telephone number:	+61 2 6163 1000

**Representative's authority to act**

***\*A separate letter of authority may be attached in lieu of the applicant signing this section\****

See Attachment 3 – letter of authority

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date:     /     /



Australian Government  
Department of Industry,  
Innovation and Science

## Anti-Dumping Commission

*Customs Act 1901 – Part XVB*

### A4 Copy Paper

Exported from Austria, Finland, the Republic of Korea, the  
Russian Federation and the Slovak Republic

### Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG (1) and (2) of the *Customs Act 1901*<sup>1</sup>

#### *Anti-Dumping Notice (ADN) 2019/37*

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of A4 copy paper, exported to Australia from Austria, Finland, the Republic of Korea (Korea), the Russian Federation (Russia) and the Slovak Republic (Slovakia).

On 15 March 2019, the Commissioner terminated his dumping investigation into the goods exported from Austria. Anti-Dumping Notice (ADN) 2019/36 sets out the reasons for this termination. This ADN is available at [www.adcommission.gov.au](http://www.adcommission.gov.au).

The goods the subject of the investigation (the goods) are:

*uncoated white paper of a type used for writing, printing or other graphic purposes, in the nominal basis weight range of 70 to 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).*

Further information on the goods:

*The paper is not coated, watermarked or embossed and is subjectively white. It is made mainly from bleached chemical pulp and/or from pulp obtained by a mechanical or chemi-mechanical process and/or from recycled pulp.*

The goods are generally, but not exclusively, classified to the following tariff classifications in Schedule 3 to the *Customs Tariff Act 1995*:

Tariff classification (Schedule 3 of the <i>Customs Tariff Act 1995</i> ) <sup>2</sup>				
Tariff code	Statistical code	Unit	Description	Duty rate*
4802.56.10	03	Tonnes	A4 paper 40-89 gsm white	5%
4802.56.10	09	Tonnes	A4 paper 90 to less than 150 gsm	5%

<sup>1</sup> All legislative references are to the *Customs Act 1901* (the Act), unless otherwise stated.

<sup>2</sup> Source – Schedule 3 of the *Customs Tariff Act 1995*.

\* Imports of the goods from Korea are not subject to duties.

These tariff classifications and statistical codes may include goods that are both subject and not subject to this investigation. The listing of these tariff classifications and statistical codes are for convenience or reference only and do not form part of the goods description.

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 463* (REP 463), in which he outlines the investigation carried out and recommends the publication of a dumping duty notice in respect of the goods. The report is available at [www.adcommission.gov.au](http://www.adcommission.gov.au).

Particulars of the dumping margins established and an explanation of the methods used to compare export prices and normal values to establish each dumping margin are set out in the following table:

Country	Exporter (and other exporters)	Dumping Margin	Method to establish dumping margin
Austria	Mondi Neusiedler GmbH	1.7%	Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in terms of subsection 269TACB(2)(a) of the Customs Act 1901.
	Uncooperative and all other exporters	4.2%	
Finland	Uncooperative and all other exporters	16.3%	
Korea	Hankuk Paper Mfg. Co. Ltd	3.8%	
	Uncooperative and all other exporters	16.4%	
Russia	Uncooperative and all other exporters	14.4%	
Slovakia	Mondi SCP a.s.	5.8%	
	Uncooperative and all other exporters	14.6%	

I, KAREN ANDREWS, Minister for Industry, Science and Technology, have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 463.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) and section 45 of the *Customs Act 1901* (the Act), I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

- (i) the goods; and
- (ii) like goods that were exported to Australia four months prior to the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and, because of that, material injury to the Australian industry producing like goods is being caused. Therefore under subsection 269TG(2) of the Act, I DECLARE that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from Finland, Korea, Russia and Slovakia.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices in the Australian market in the form of price undercutting and the consequent impact on the Australian industry, including:

- price suppression in 2017 and 2018;
- price depression in 2017;
- reduced revenue in 2017 and 2018;
- decreased profits and profitability in 2017 and 2018;
- reinvestment unattractiveness; and
- reduced return on investment/sales.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures securities are applied to 'goods on the water' is available in ACDN 2012/34, available at [www.adcommission.gov.au](http://www.adcommission.gov.au).

REP 463 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at [www.adcommission.gov.au](http://www.adcommission.gov.au).

Enquiries about this notice may be directed to the case manager on telephone number, fax number +61 3 8539 2477 or [investigations2@adcommission.gov.au](mailto:investigations2@adcommission.gov.au).

Dated this 2<sup>nd</sup> day of April 2019



KAREN ANDREWS

Minister for Industry, Science and Technology



## In the Anti-Dumping Review Panel

### **Application for review A4 copy paper from Korea**

## Hankuk Paper Mfg. Co., Ltd

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## Introduction

By way of a notice published on 19 March 2018, the Anti-Dumping Commission (“the Commission”) initiated an anti-dumping investigation regarding exports of A4 Copy Paper from Austria, Finland, Korea, Russia & Slovakia. This investigation was based upon an application lodged by Paper Australia Pty Ltd (“Paper Australia”) which alleged such exports were dumped, and because of that Paper Australia had suffered material injury.

On 19 November 2018, the Commission published a Statement of Essential Facts (“the SEF”).<sup>1</sup> The SEF made the finding that “*dumped imports caused material injury to the Australian industry during the investigation period*”.<sup>2</sup> It did however, find that material injury was foreseeable and imminent unless dumping measures were imposed. In other words, it found that material injury was “threatened” for the purpose of Section 269TG(2)(b) of the *Customs Act 1901* (Cth) (“the Act”).<sup>3</sup>

Subsequent to this, the Commission completed its final report<sup>4</sup> (“the Report”) and provided it to the Minister for Industry, Science and Technology (“the Minister”). It was not until 10 April 2019 that the Minister’s decision was announced. The Minister accepted the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact which the recommendations are based and the evidence relied on to support those findings included in the Report.<sup>5</sup>

In a substantial departure from the SEF, the Report recommended that anti-dumping measures be imposed against the subject exports on the basis that they were causing material injury to paper Australia. Interested parties were not made aware of this new recommendation, nor the reasons for the

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<sup>1</sup> *Statement of Essential Facts No. 463 Alleged Dumping of A4 Copy Paper Exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic.*

<sup>2</sup> SEF, page 60.

<sup>3</sup> A reference in this Application to “the Act”, or to a “Section”, “Subsection” or “Subparagraph” is a reference to a Section, Subsection or Subparagraph of the Act, unless otherwise specified.

<sup>4</sup> *Report No.463 – Alleged Dumping of A4 Copy Paper Exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic.*

<sup>5</sup> As per, *A4 Copy paper exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic – Findings in Relation to a Dumping Investigation – Public Notice under subsections 269TG(1) and (2) of the Customs Act.*

recommendation, the material findings of fact which the recommendations are based and the evidence relied on to support those findings until the Minister's decision was announced.

Hankuk Paper Mfg Co., Ltd ("Hankuk") is a Korean manufacturer and exporter of A4 copy paper.

As outlined in this application, Hankuk seeks review by the Anti-Dumping Review Panel ("ADRP"), under Section 269ZZA(1)(a) and 269ZZC of the Act, of the decision made by the Minister to impose anti-dumping measures against the exportation of the goods by Hankuk from Korea to Australia.

We now address the requirements of both the form of application that has been approved by the Senior Member of the Review Panel under Section 269ZY, and of Section 269ZZE(2), in relation to our client's grounds of review, being those requirements not already addressed within the text of the approved form itself, which we have also completed and lodged with the ADRP.

## **A First ground – injury to the Australian industry has not been caused because of Hankuk's exports**

### **9 Grounds**

**Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

The Report finds that Paper Australia did not suffer material injury as a result of the dumped imports during the period of investigation. However, the Report looks beyond the period of investigation, to calendar year 2018, and concludes as follows:

*However, the Commissioner concludes that the dumped imports from Finland, Korea, Russia and Slovakia in 2017 materially injured Australian Paper's performance recovery in 2018, as:*

- *price review mechanisms set with reference to suppressed market prices from imports in 2017, suppressed Australian Paper's prices that came into effect in 2018;*
- *the price reviews conducted in 2017 and 2018 for effect in 2018, impacted 35 per cent of Australian Paper's business in 2018, causing Australian Paper's weighted average unit price to be 2 per cent lower than it otherwise should have been;*
- *the lower unit price achieved in 2018 caused Australian Paper to forgo revenue for the volumes it sold in 2018; and*

- *the forgone revenue contributed to Australian Paper's unprofitability, causing reinvestment unattractiveness and reduced return on PPE.*<sup>6</sup>

The analysis that leads to this conclusion is wrong in a number of aspects, as will be elucidated throughout this application. However, as a conceptual matter, we find this approach to causation to be erroneous.

The way in which the subject exports have been said to have caused material injury is because “*price review mechanisms*” were “*set with reference to suppressed market prices from imports in 2017*” and so suppressed Paper Australia's prices. This explanation needs to be further unpacked:

- These price review mechanisms are set out in the contracts between Paper Australia and its customers. Such contracts are freely entered into between Paper Australia and its customers on the basis of negotiations between those parties. Hankuk has no insight into why Paper Australia accepted the terms of these agreements, nor any clear understanding of the terms of such agreements. However Hankuk would note, generally, that such contracts generally balance the commercial interests of the parties, and that a supplier would not choose to enter any such agreement unless it considered the terms to be beneficial to it.
- Hankuk was not a party to the negotiations through which the terms of the supply agreements were set. Indeed, all of the contracts referred to in the Report were entered into prior to 2017,<sup>7</sup> when exports from the subject countries were said to be “negligible”.<sup>8</sup> Hankuk has no knowledge of the operation of these contracts beyond the little that was disclosed on the public record during the investigation.
- The conclusion above overstates the prevalence of import prices in price review mechanisms. Elsewhere the Report discloses that:

*Price reviews are set periodically over the life of a contract and offer a mechanism to increase or decrease the contract price of the goods. Depending on contracted calculation methodologies, paper prices can be reviewed with reference to:*

- *price and volume of imports;*
- *price and volume of Australian Paper's exports;*
- *Australian Paper's costs of production; or*

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<sup>6</sup> Page 82.

<sup>7</sup> Page 106.

<sup>8</sup> Page 102.



- *any other method.*<sup>9</sup>

As will be discussed in more detail in the Second Ground, the particulars of the evidence upon which the recommendation was said to be based reveal that the influence of import prices on price review mechanisms is not as absolute as the above conclusions state them to be. The evidence tends to suggest there are a multitude of differing circumstances that may be considered when prices are reviewed.

We must admit to some disquiet about the expansion of the anti-dumping mechanism into private matters between discrete parties. We note that these contracts are between the Australian industry and its customers. These customers may not be interested parties for the purpose of these investigations, and so it may prove difficult to get a complete and objective picture of the operation of contracts or contract negotiations. Indeed, it appears in this case that the Commission does not have all pertinent and relevant information that would presumably be available to Paper Australia.

Nonetheless, the only connection between Hankuk's exports and Paper Australia's sales in 2018 is that:

- Paper Australia entered into contracts with its customers prior to 2017 which included some form of an annual or biannual price review mechanism.
- These price review mechanisms may (but also may not – depending on the terms of the specific supply agreement) refer to data concerning the price and/or volume of imports. It is unclear whether the data referred to needs to relate to imports in a specific period.
- Hankuk exported A4 copy paper to Australia in 2017 that has been found to have been dumped, by a small margin.
- Paper Australia and its customers *may* have obtained data regarding Hankuk's exports through undisclosed sources and without Hankuk's knowledge.
- In 2018, Paper Australia sold A4 copy paper to its customers under the terms of the pre-existing supply agreements.

That is it. There is no direct competition between Hankuk and Paper Australia evident. Hankuk is not seeking to displace Paper Australia as the supplier to those customers. Hankuk's data is merely recorded and then may be *referred* to in a price review of which Hankuk has no awareness and to which Hankuk is not a party and does not influence.

Section 269TG(2)(b) requires that any material injury upon which the imposition of measures is based, must be *because* of dumping. Hankuk does not accept that the prices Paper Australia received in 2018 can be said to have occurred because of the subject imports in these factual circumstances.

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<sup>9</sup> Page 22.

## 10 Correct or preferable decision

**Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

The correct and preferable decision is that Paper Australia's prices were not lower in 2018 than they otherwise would have been *because* of Hankuk's exports of A4 copy paper to Australia in 2017. Accordingly, the Minister cannot be satisfied that there is a basis to impose measures in relation to exports of A4 copy paper from Korea under Section 269TG(2) of the Act.

Accordingly, the reviewable decision should be revoked.

## 11 Material difference between the decisions

**Set out the reasons why the proposed decisions provided in response to question 10 is materially different from the reviewable decision:**

The proposed decision is materially different to the reviewable decision, because the proposed decision does not provide any basis for the imposition of dumping measures.

## B Second ground – evidence does not support the causation finding

### 9 Grounds

**Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

To reiterate what is stated above, the "causation" finding is essentially that:

- *price review mechanisms set with reference to suppressed market prices from imports in 2017, suppressed Australian Paper's prices that came into effect in 2018;*
- *the price reviews conducted in 2017 and 2018 for effect in 2018, impacted 35 per cent of Australian Paper's business in 2018, causing Australian Paper's weighted average unit price to be 2 per cent lower than it otherwise should have been*

As we have already set out, the proposition that all pricing mechanisms refer to imports is not supported by the findings elsewhere in the Report. Specifically, the Report notes as follows:

*Price reviews are set periodically over the life of a contract and offer a mechanism to increase or decrease the contract price of the goods. Depending on contracted calculation methodologies, paper prices can be reviewed with reference to:*

- *price and volume of imports;*
- *price and volume of Australian Paper's exports;*
- *Australian Paper's costs of production; or*
- *any other method.<sup>10</sup>*

So, a price variation mechanism might refer to the price and volume of imports, or it might refer to any number of other factors. The precise factors will be specified in the contract. It would therefore be inaccurate to assume that any price variation will be influenced by import prices. The evidence in the Report also indicates that things are a lot more complex than the causation finding indicates.

Before we look at that evidence, it is important to recall that the Report is required to:

*...include a statement of the Commissioner's reasons for any recommendation contained in the report that:*

- (a) sets out the material findings of fact on which that recommendation is based; and*
- (b) provides particulars of the evidence relied on to support those findings.*

The drafting of the report is opaque. However, the following evidence is referred to in the Report.

The Report lists direct evidence regarding price setting between Paper Australia and three of its largest customers – Officeworks, Customer B and the OPANZ customers. With regard to the impact of import prices on these negotiations, the Report provides as follows:

<b>Officeworks</b>	<ul style="list-style-type: none"> <li>• Price reviews are contracted to occur annually;</li> <li>• Prices for 2017 supply were set in 2016 and the calculation methodology used weighted average import prices as one of the inputs.</li> <li>• Prices for 2018 were agreed to in 2017.<sup>11</sup></li> </ul>
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<sup>10</sup> Page 75.

<sup>11</sup> Page 52.

<b>OPANZ</b>	<ul style="list-style-type: none"> <li>Under the supply contract, price increases can be calculated based on increases in costs of production – this was done in 2017.</li> </ul>
<b>Customer B</b>	<ul style="list-style-type: none"> <li>The price review mechanism in the supply agreement between Paper Australia and Customer B was not advised to the Commission, however an analysis of Customer B's prices demonstrates that Customer B's prices did not materially change from 2015 to 2017.<sup>12</sup></li> <li>As new supply agreement negotiations were underway in 2018 for supply in 2019, Australian Paper and Customer B agreed interim price increases with effect in 2018.<sup>13</sup></li> <li>There is no evidence or information provided that Australian Paper set prices with respect to imports.<sup>14</sup></li> </ul> <p>With regard to the price negotiation for the new supply agreement, Paper Australia provided information that Customer B had stated that it had an undisclosed alternate supply source that was willing to manufacture and sell its private label brands to Customer B at the prices it proposed to Australian Paper. However, Paper Australia provided prices on 6 December 2018 which demonstrated that it and Customer B had negotiated higher prices than Customer B's initial proposal (i.e. higher than the prices from the undisclosed alternate supply source).</p>

On the basis of this evidence, the Report cites one instance where import prices were an input in a previously agreed pricing mechanism, one instance where prices were varied on the basis of cost increases (again, in accordance with a contractual price mechanism) and one instance where no evidence or information has been provided that prices were set with regard to imports. Additionally, to the extent that Customer B used the spectre of an undisclosed alternate supply to anchor its price proposal, this (a) cannot be assumed to have related to the goods subject to this investigation, (b) does not relate to a period in which Paper Australia has been found to have been injured, and (c) ultimately did not prevent a higher price being agreed to between the parties.

The Report also analyses other customers. What is interesting in relation to these other customers is an absolute dearth of any references to evidence, or even an explanation as to how prices were reviewed for those customers. For example:

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<sup>12</sup> Page 53.

<sup>13</sup> *Ibid.*

<sup>14</sup> Page 105.

- Appendix 3 refers to Customers X, Y and Z all of whom had price reviews in 2017 for prices in 2018. There is no reference in the Report to the terms of the underlying supply agreements, nor the mechanisms they set in place for price review – it would seem as though the Commission was not provided, or has not reviewed this critical information. Instead, the Report *“considers that 2017 market prices were used as an input for the negotiation of a price increase and that dumped import pricing suppressed the prices Australian Paper was able to negotiate with these customers”*.<sup>15</sup> On what basis was this *“consideration”* made? It is certainly not evident from the more detailed information surrounding price reviews with Officeworks, Customer B and OPANZ. It appears to be purely speculative.
- Appendix 3 refers to entire classes of customers about which the Commission has no information other than their prices in 2018. For example, with regard to *“contracted customers paying below WA import price”* the Report states that *“...the Commission did not have specific contract or agreement information”* and that *“they are likely to have supply agreements”*.<sup>16</sup> Further, a group of customers characterised as to be *“uncontracted customers”* are described as being customers *“who do not appear to have a formal supply agreement in place”*.<sup>17</sup>

In some instances in the Act, the Minister is given the power to make determinations on the basis of *“all relevant information”* where sufficient information has not been furnished or is not available.<sup>18</sup> Section 269TAE does not provide any such power. It provides strict requirements for an injury determination, specifically that such a determination:

*...must be based on facts and not merely on allegations, conjecture or remote possibilities.*<sup>19</sup>

If the Commission does not have sufficient information to establish the facts after a long investigative process it cannot recommend that the Minister be satisfied that injury was caused by dumping. Ultimately, if Paper Australia has in fact been materially injured because of the subject imports, it should be able to provide the evidence to show this. That has not been done.

The only real evidence referred to in the Report regarding price review practices relates to Officeworks, Customer B and OPANZ. Only in one instance are import prices relevant to the price review mechanism, and only as one of a number of inputs. All other findings relating to other customers, the reasons for their prices and the terms of any contract amount to nothing more than guess work. It is speculative, it is conjecture. It does not remotely support the causation finding. Accordingly, the finding that:

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<sup>15</sup> Page 106.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> See in particular, Section 269TAC(3) and 269TAB(6).

<sup>19</sup> Section 269TAE(2AA)

- *price review mechanisms set with reference to suppressed market prices from imports in 2017, suppressed Australian Paper's prices that came into effect in 2018;*
- *the price reviews conducted in 2017 and 2018 for effect in 2018, impacted 35 per cent of Australian Paper's business in 2018, causing Australian Paper's weighted average unit price to be 2 per cent lower than it otherwise should have been,*

are not based on fact and do not meet the requirements of Section 269TAE(2AA).

## 10 Correct or preferable decision

**Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

The correct and preferable decision is that, on the basis of the particulars of evidence disclosed in the Report, it cannot be factually determined that Paper Australia was materially injured because of the subject exports. Accordingly, the Minister cannot be satisfied that there is a basis to impose measures under Section 269TG(2) of the Act.

Accordingly, the reviewable decision should be revoked.

## 11 Material difference between the decisions

**Set out the reasons why the proposed decisions provided in response to question 10 is materially different from the reviewable decision:**

The proposed decision is materially different to the reviewable decision, because the proposed decision does not provide any basis for the imposition of dumping measures.

## C Third ground – injury to Australian industry has not been established

### 9 Grounds

**Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

The Minister was satisfied that injury to the Australian industry producing like goods - Paper Australia - is being caused injury because of dumping, in accordance with the recommendations of the Commissioner of the Anti-Dumping Commission in the Report.<sup>20</sup>

To reach the requisite satisfaction for Section 269TG(2)(b), the Minister must be satisfied, on the basis of facts, that (a) the Australian industry has suffered material injury and (b) that material injury occurred because of dumping. Allegations, conjecture, or remote possibilities will not suffice as a basis for that satisfaction.<sup>21</sup> The recommendation in the Report falls far short of this requirement.

This is a somewhat bizarre case. The Report finds that Paper Australia did not suffer material injury in the period of investigation, but that Paper Australia has suffered injury following the investigation period, on the basis of the conclusion extracted in ground 1 above.<sup>22</sup> We have already addressed the “causation” portion of the finding. We will now address the finding that “material injury” was in fact suffered.

The injury finding is based on the proposition that 35% of Paper Australia’s business in 2018 was impacted by some form of price review which resulted in Paper Australia’s weighted average unit price being 2% lower than it “otherwise would have been”.<sup>23</sup> The Report determines *what otherwise would have been* by creating a “counterfactual” scenario in order to determine the impact of dumping.<sup>24</sup>

This process is described in the following table:

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<sup>20</sup> Page 98.

<sup>21</sup> Section 269TAE(2A).

<sup>22</sup> Page 82.

<sup>23</sup> We must admit, the conclusions in the Report are opaquely stated. It is also possible that the finding is that it is only the weighted average of the 35% of Paper Australia’s sales said to be impacted by price renegotiations that is 2% lower than it otherwise would be. But if this was the case we simply could not see a basis for the injury to be considered.

<sup>24</sup> Page 59.



Input	Calculation	Application: Counterfactual Price (CP)
WA recovered selling price (AUD/MT) – FIS by Australian Paper Private label and manufacturer brands “Recovered unit price”	<ul style="list-style-type: none"> <li>Identified that prior to the dumping occurring in 2015, Australian Paper consistently achieved profitability X%;</li> <li>Applied the profitability X% to the Factual unit CTMS to calculate a “recovered unit price”;</li> <li>The Commission determined that achieving this profitability would signal the recovery from the 2015 dumping;</li> <li>Single annual unit price (net) for each customer and product grouping identified in Non-Confidential Appendices 2 and 3</li> </ul>	<p><b>IF: Factual unit price &gt; WA import price, BUT: Factual unit price &lt; Recovered unit price, CP = Factual unit price</b>  <i>If Australian Paper are able to sell above the WA import price, then the depressing or suppressing effect of dumped imports is immaterial.</i></p> <p><b>IF: Factual unit price &lt; Recovered unit price, AND: the Factual unit price &lt; WA import price, AND: the customer group is uncontracted, CP = WA import price</b>  <i>If there are no contractual limitations to raising prices, Australian Paper should at a minimum achieve the WA import price.</i></p> <p><b>IF: Factual unit price &lt; Recovered unit price, AND: the Factual unit price &lt; WA import price, AND: the customer group is contracted, CP = WA import price ± contractual limitations</b>  <i>Australian Paper should at a minimum achieve the WA import price, however there may be contractual limitations regarding the price review mechanism and the setting of the base price which limits the ability to achieve the WA import price.</i></p>
WA selling price (AUD/MT) – FIS by Australian Paper Private label and manufacturer brands “Factual unit price”	<ul style="list-style-type: none"> <li>Single annual unit price (net) for each customer and product grouping.</li> </ul>	<p><b>IF: the Factual unit price &gt; Recovered unit price, CP = Factual unit price</b>  <i>If Australian Paper are able to achieve a price higher than the Recovered unit price, then the depressing or suppressing effect of dumped imports is immaterial.</i></p>
WA unit selling price (AUD/MT) – FIS from imported sources Private label and manufacturer brands “WA import price”	<ul style="list-style-type: none"> <li>Price undercutting methodology used (see section 8.8 below);</li> <li>Single annual price including imports from all countries of origin; and</li> <li>The dumping margin applied to countries found to be dumping.</li> </ul>	<p><b>IF: <math>\Delta</math> Reflex unit price is relative to <math>\Delta</math> Factual unit price, CP = Reflex unit price + % import suppression/depression</b>  <i>If the price of Reflex lowers and Australian Paper is unable to maintain product line pricing, then the suppressing or depressing effect of dumped imports on non-Reflex brands is remedied against Reflex unit price. Applies to Officeworks only as no evidence was provided regarding Reflex price negotiations for other customers.</i></p>
WA unit selling price (AUD/MT) – FIS - Reflex “Reflex unit price”	<ul style="list-style-type: none"> <li>Reflex has a different price point in the market;</li> <li>Price negotiations are not specifically set with reference to the WA import price;</li> <li>Prices are set with reference to the change in the Factual unit price for private label and manufacturer brands to maintain relative price gaps in product line pricing.</li> </ul>	<p><b>IF: no change to Reflex pricing or prices have increased relative to Factual unit price, CP = Reflex unit price</b>  <i>If Australian Paper have achieved a higher price than prior years or have not experienced a change in its product line pricing, the effect of dumped imports is immaterial.</i></p>

Table 10: Calculation and application of the counterfactual price

The exact methodology is not well explained. However, it appears as though the Commission has considered all of Paper Australia’s sales in 2018 and determined, on the basis of the above metric, whether the factual prices – being those actually received by Paper Australia – were more than or less than prices that the Commission considers Paper Australia should have received (referred to as the “counterfactual price”). Where the factual prices were less than the counterfactual price, the Commission has replaced the factual price with the counterfactual price. The Report considers that the “*difference between the factual and counterfactual price determined the level of price injury caused by dumping*”<sup>25</sup> on which basis the “material injury” (being the 2% lower figure referred to above) was ascertained.

This is a complex analysis; however, that complexity does not mean it is legally sound.

First of all, although it is trite to say, “counterfactual” is not factual. The entire analysis speculates about a different outcome, based on certain value judgements about what Paper Australia should have received. It then concludes that Paper Australia, not having received what the Report considers it should have, has been materially injured. This falls far short of the requirements of Section 269TAE(2AA).

Beyond that, the Report’s stated belief that “*the price counterfactual is the lowest price that Paper Australia should have been able to achieve in the absence of dumping*”<sup>26</sup> does not appear to be

<sup>25</sup> Page 62.

<sup>26</sup> Page 59.



supported by the broader context set out in the Report. There are two different types of “*counterfactual prices*” used in the Report, being

- a weighted average (“WA”) import price – a single annual price including imports from countries of all origin with dumping margins applied to those found to be dumping. This may further be subject to contractual limitations stated in the supply agreement with the particular customer, however given our concerns regarding the lack of information about such agreements it is doubtful that all contract limitations have been observed;<sup>27</sup> and
- Reflex unit price + % import suppression or depression.<sup>28</sup>

A WA import price is not the “*lowest price Paper Australia could expect to receive*” in the absence of dumping. As we know, the injury supposedly suffered in 2018 is based on the operation of price review mechanisms in 2017. The counterfactual analysis assumes that these mechanisms all refer to import prices, an assumption that is not supported by fact or evidence. Even if this were not the case, Paper Australia would only be able to achieve something resembling the WA import price if the pricing mechanisms were directly pegged to import prices. There are no facts in the Report or on the public record to support such a conclusion. So, the characterisation of the WA import price as the lowest price Paper Australia could expect to achieve absent dumping is not supported by the findings of fact in the Report.

The methodology of “*adding a % of import price suppression to the reflex unit price*” is similarly untethered. The “*% of import price suppression*” is said to be the suppressing or depressing effect of non-Reflex brands. However, the counterfactual is to assess the effect of the subject exports on Paper Australia’s products. Adding the % of import price suppression is circular and will almost certainly lead to a finding that Reflex brands were sold for less than they could have been.<sup>29</sup> In any regard, there is no basis for asserting that this amount is the lowest price Paper Australia could expect to receive on its sales of Reflex.

Critically, the counterfactual analysis is based on the assumption that dumping is the cause of instances where factual prices are less than counterfactual prices. That is not consistent with the findings of fact in the Report. The Report finds that each supply agreement states a base price that “*can be dependent on a range of inputs*”.<sup>30</sup> We note that the relevant supply agreements are found to have terms ranging

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<sup>27</sup> Indeed, based on the information in non-confidential appendix 3 it appears that it is only the OPANZ customers to which any contractual limitations have been applied.

<sup>28</sup> Page 59.

<sup>29</sup> We note that this specific counterfactual price is only relevant to Paper Australia’s sales of reflex to Officeworks. We again recall the finding of fact on page 52 of the Report that the pricing review mechanism used in the relevant agreement used import values as only one input in assessing the new price. The counterfactual price does not reflect this at all.

<sup>30</sup> Page 22.

between one to eight years.<sup>31</sup> From this, we can infer that different supply agreements contain different base prices. Some might be lower, some might be higher. This will impact whether or not the revised price will be above or below the counterfactual price.

	Customer 1	Customer 2
Base Price pre-2017	90	100
Price review adjustment 2017 (5%)	4.5	5
Reviewed price 2018	94.5	105
Counterfactual	102	102
“impacted” by dumping	Yes	No

On the counterfactual analysis, Customer 1 would be said to have been impacted by dumping, despite the fact that its price has been adjusted by the same percentage as Customer 2. However, that is not the case. Customer 2 simply had a higher price to begin with, which could have occurred for one of any number of reasons.<sup>32</sup>

Ultimately, all the counterfactual analysis does is impose a theoretical price floor (the operation of which is not factually sound) and then assumes that any prices that are below that price floor are so because of dumping. This is purely speculation. This is the manner in which the material injury caused by dumping was supposedly determined. Accordingly, the supposed material injury, being that Australian Paper’s weighted average unit price was found to *“2 per cent lower than it otherwise should have been”* is also purely speculative and does not meet the requirements of Section 269TAE(2AA).

## 10 Correct or preferable decision

**Identify what, in the applicant’s opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

The correct and preferable decision is that, on the basis of the particulars of evidence disclosed in the Report, it cannot be factually determined that Paper Australia was materially injured because of the

<sup>31</sup> Page 54.

<sup>32</sup> One reason excluded from this is the impact of dumping. The base prices were all set prior to 2017. Imports from the subject counties were negligible at that time. In addition to which, Section 269T(2AE) bars a determination that dumping has occurred prior to the period of investigation.

subject exports. Accordingly, the Minister cannot be satisfied that there is a basis to impose measures under Section 269TG(2) of the Act.

Accordingly, the reviewable decision should be revoked.

## 11 Material difference between the decisions

**Set out the reasons why the proposed decisions provided in response to question 10 is materially different from the reviewable decision:**

The proposed decision is materially different to the reviewable decision, because the proposed decision does not provide any basis for the imposition of dumping measures.

Alistair Bridges  
Senior Associate