



Australian Government
Department of Industry, Science,
Energy and Resources

Anti-Dumping
Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Member Leora Blumberg
Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Member Blumberg,

**ADRP Review No. 133: A4 Copy Paper exported from the
People's Republic of China**

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the **Customs Act**) published on 28 April 2021. This notice advised of your intention to review the decision of the Minister for Industry, Science and Technology (the Minister) which (the **Reviewable Decision**):

- Altered the descriptions of the goods applying to A4 copy paper exported to Australia from China to include goods in the nominal weight range of 67 to 69 gsm.

I have considered the application submitted by UPM Asia Pacific Pte Ltd for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Customs Act, at **Attachment A** (public version).

The Commission remains at your disposal to assist you in this matter and would be pleased to participate in a conference if you consider it appropriate to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bradley Armstrong'.

Dr Bradley Armstrong PSM
Commissioner, Anti-Dumping Commission

27 May 2020

COMMISSIONER, ANTI-DUMPING COMMISSION SUBMISSIONS

Introduction¹

1. I make these submissions in response to an application by UPM Asia Pacific Pte Ltd (**UPM**) (**UPM's Application**) to the Anti-Dumping Review Panel (the **ADRP**) for review.²
2. The previous Commissioner of the Anti-Dumping Commission (Mr Dale Seymour) received an application from Paper Australia Pty Ltd (ACN 061 583 533) (**Australian Paper**) to carry out an anti-circumvention inquiry in respect of certain A4 copy paper exported from the People's Republic of China (**China**).
3. Anti-dumping measures (through a dumping duty notice³ and countervailing duty notice⁴) were first imposed by the relevant Minister on 19 April 2017 (the **Original Notices**).⁵ The goods, the subject of the Original Notices were described as:

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** [my emphasis] 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).

4. Australian Paper's application was not rejected and an anti-circumvention inquiry was carried out.
5. The result of the anti-circumvention inquiry was that on 17 March 2021, the then Minister for Industry, Science and Technology (the **Minister**) declared, among other things, imports of the goods from China in the nominal basis weight range of **67 to 69 gsm** entered for home consumption on and after 28

¹ All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') unless otherwise indicated.

² ADRP Review 133 – *Anti-Dumping Review Panel, Application* – UPM Asia Pacific Pte Ltd, published 28 April 2021.

³ The dumping duty notice applies to all exporters of A4 copy paper from the subject countries except PT. Indah Kiat Pulp & Paper Tbk, PT. Pabrik Kertas Tjiwi Kimia Tbk and PT. Pindo Deli Pulp & Paper Mills.

⁴ The countervailing duty notice applies to all exporters of A4 copy paper from China except Asia Symbol (Guangdong) Paper Co., Ltd, Greenpoint Global Trading (Macao Commercial Offshore) Ltd, UPM (China) Co., Ltd and UPM Asia Pacific Pte Ltd.

⁵ Anti-dumping measures were imposed after consideration of Anti-Dumping Commission Report No. 341 (REP341). Refer to Anti-Dumping Notice (ADN) Nos. 2017/39 and 2017/40. REP341 and ADN Nos. 2017/39 and 2017/40 are available on the Commission's website. There was a history of litigation however I do not make submissions on the history of Federal Court proceedings and the ADRP reconsideration.

April 2020 will be subject to interim dumping duty and interim countervailing duty. That is unless the exporter of the goods is not subject to the Original Notices (the **Reviewable Decision**).⁶

Grounds for UPM's application

6. Following receipt of UPM's Application, the ADRP published an intention to conduct a review.⁷ In that notice, the ADRP proposed to conduct a review of the Reviewable Decision in relation to the following grounds:⁸
 - (a) Regulation 48 [*Customs (International Obligations) Regulation 2015* (Cth) (the **Regulations**)] has no application to this matter because there are no relevant goods the subject of the application for the purpose of the mandatory comparison described in Regulation 48(3).
 - (b) Even if Regulation 48 applies to this matter the circumvention goods were not slightly modified.
7. I do **not** agree that the original notices should remain unaltered and set out submissions below why UPM's application ought to be rejected.
8. I note however UPM's application refers to section 42 of the Regulations.⁹ I assumed that reference is in error and UPM means to refer to section 48 of the Regulations.

Legislative background behind the anti-circumvention provisions

9. I first address the legislative background behind the anti-circumvention provisions of the Act.
10. The *Customs Amendment (Anti-Dumping Improvements) Act (No 3) 2012* inserted Division 5A of Part XVB into the Act, effective from June 2013.
11. Division 5A of Part XVB:
 - (a) provides for the conduct of anti-circumvention inquiries, leading to a decision by the Minister to alter (or not alter) an existing dumping or countervailing duty notice; and

⁶ The Minister also declared, in respect of the goods exported to Australia from Brazil, Indonesia and Thailand, the description of the goods the subject of the notice under section 269TG(2) will remain unaltered. See EPR 552, document 15. Anti-Dumping Notice No. 2021/024. See also EPR 552 for all relevant reports, notices and questionnaires: <<https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/552>>

⁷ ADRP Review 133 – *Anti-Dumping Review Panel*, Public Notice – Intention to conduct a review, published 28 April 2021.

⁸ These grounds are set out in ADRP Review 133 – *Anti-Dumping Review Panel*, Application – UPM Asia Pacific Pte Ltd, published 28 April 2021 at page 4.

⁹ Refer to ADRP Review 133 – *Anti-Dumping Review Panel*, Application – UPM Asia Pacific Pte Ltd, published 28 April 2021 at page 2 of UPM's submissions.

(b) is directed at activities that avoid measures imposed on goods found to have been dumped or subsidised in circumstances that do not, but should (were it not for those changes and modifications) engage sections 269TG(2) and 269TJ(2).

12. I submit that it is not necessary for me to go into the procedure leading to a decision by the Minister under section 269ZDBH. I however note that it does not expressly require the Minister to be satisfied of particular matters before declaring that an original notice be altered, or remain unaltered. The Minister is required to consider the report of the Commissioner provided pursuant to section 269ZDBH.

13. The issue arises when circumvention activity occurs. Section 269ZDBB sets out when circumvention activity in relation to a notice published under sections 269TG(2) or 269TJ(2) has occurred.

14. The term 'circumvention activity' is defined under section 269T as having a meaning given by section 269ZDBB. While there are a range of different circumvention activities (for example, assembly of parts in third country) that section 269ZDBB contemplates, section 269ZDBB(6) is the most accurate starting point in these circumstances. Section 269ZDBB(6) provides that circumvention activity, in relation to the notice, occurs in the circumstances prescribed by the regulations for the purposes of section 269ZDBB(6).

15. Pausing there, in interpreting the provisions of section 269ZDBB and section 48, the Commission has had regard to the advice provided by Mr Peter RD Gray QC, for the purposes of ADRP decision 38 (published on the ADRP external website).¹⁰

16. The Regulations received Royal Assent on 26 February 2015 and commenced on 1 April 2015. Relevantly, section 48 provides:

(1) For subsection 269ZDBB(6) of the Act, the circumstance set out in subsection (2) of this section is prescribed.

Slight modification of goods exported to Australia

(2) The circumstance is that all of the following apply:

(a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;

¹⁰ Refer to ADRP Report No. 38 Zinc Coated (Galvanized Steel from the Republic of Korea, Taiwan and the People's Republic of China, September 2016 and the attached legal advice dated 29 June 2016: <https://www.industry.gov.au/sites/default/files/adrp/a.2_legal_advice_on_s48_c_io_reg_2015_prdg_29_june_2016.pdf>. Also for the purposes of these submissions, I refer to individual provisions of the Regulations as sections which is consistent with the Regulations. Additionally, where I refer to section 48 that is to be taken as a reference to section 48 of the Regulations.

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- (b) before that export, the circumvention goods are slightly modified;
 - (c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;
 - (d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;
 - (e) section 8 or 10 of the [Dumping Duty Act], as the case requires, does not apply to the export of the circumvention goods to Australia.
- (3) For the purpose of determining whether a circumvention good is slightly modified, the Commissioner must compare the circumvention good and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including any of the following factors:
- (a) each good's general physical characteristics;
 - (b) each good's end use;
 - (c) the interchangeability of each good;
 - (d) differences in the processes used to produce each good;
 - (e) differences in the cost to produce each good;
 - (f) the cost of modification;
 - (g) customer preferences and expectations relating to each good;
 - (h) the way in which each good is marketed;
 - (i) channels of trade and distribution for each good;
 - (j) patterns of trade for each good;
 - (k) changes in the pricing of each good;
 - (l) changes in the export volumes for each good;
 - (m) tariff classifications and statistical codes for each good.

Application of section 269ZDBB and section 48 to the present circumstances

17. I propose first addressing the second ground of UPM's application that the circumvention goods have not been slightly modified.
18. I disagree with the submissions that the circumvention goods have not been slightly modified.
19. In my view, to require that the relevant activity (i.e. the modification to the goods) occur immediately prior to export (for example) would be to divorce the

drafting in Division 5A of Part XVB from its context inappropriately. I submit that the statutory framework does not require anti-circumvention activity undertaken either 'knowingly' or with subjective intent. If that were relevant, it would be set out in Division 5A of Part XVB and the Regulations.

20. I submit it is enough to:

(a) have regard for the marginal differences between:

- (i) the goods as described in the notice; and
- (ii) the goods that are ultimately exported.

(b) observe when in time the slightly modified goods, as a class or type of good, commenced exportation in respect of the notice.

21. The range of complexities that Division 5A of Part XVB and the Regulations were intended to address necessarily vests in the Minister a broad discretion. In other words, the Minister has a wide discretion to:

(a) impose and/or alter measures, acting reasonably, so as to clarify the scope of an existing notice in respect of a class or type of goods; and

(b) ensure the goods description set out in that notice has sufficient scope to address circumvention through minor alterations of the relevant class of goods.

The correct approach to statutory interpretation

22. In interpreting anti-circumvention provisions, I submit that the correct approach is to first look at the meaning of the words used and the context in which they appeared.¹¹

23. In ADRP Report No. 84, *Steel Reinforcing Bar exported from the People's Republic of China*, the Member there relied on the *Acts Interpretation Act 1901* (Cth) to acknowledge a long standing principle of statutory interpretation. That principle provides that '*if the language in the Act is clear, unambiguous and on its face reasonable, having regard to its context and the object and purpose of the legislation,*' secondary materials may not be referenced to introduce another meaning.¹²

24. Further, when interpreting statutory provisions, it is necessary to look at the express terms of the legislation and when interpreting those words it is

¹¹ ADRP Report No. 84, *Steel Reinforcing Bar exporter from the People's Republic of China* (August 2018) [23] (Member O'Connor), citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1988] HCA 28.

¹² ADRP Report No. 84, *Steel Reinforcing Bar exporter from the People's Republic of China* (August 2018) [24]-[25] (Member O'Connor).

necessary to consider which interpretation would best achieve or promote the purpose of the statutory framework (as set out in Part XVB of the Act).¹³

The correct application of section 48 to the present circumstances

25. I submit that a proper construction of section 48(2) requires it be read in context, together with section 48(3). This is because of the temporal and substantive ambiguity that section 48(2) presents when read divorced from context, as UPM appears to contend.
26. I submit that the need to read sections 48(2) and (3) together is intentional. That is because:
- (i) the meaning and operation; and
 - (ii) section
- must also be read and accommodated with the rest of the section.¹⁴
27. Section 48(2) is drafted in terms which suggest a continuing activity. Section 48(2)(a) identifies as one of the prerequisites that will give rise to a circumvention activity, that goods “are exported to Australia”.
28. The opening words of section 48(2) make it clear that the circumstances identified in (a) to (e) are cumulative. Circumvention activities only occur pursuant to section 48, if all of the circumstances set out in section 48(2)(a) to (e) apply.
29. Section 48 requires the consideration of goods exported to Australia by an exporter subject to the notice and provides for an inquiry into those particular kind of goods at different points in time. That inquiry would consider whether the:
- (a) goods were slightly modified “before that export” (as set out in section 48(2)(b)); and
 - (b) use or purpose of the goods were and are the same “before, and after, they are so slightly modified” in section 48(2)(c).
30. I submit the section 48(2) inquiry, viewed in isolation, might support an argument that the provision is about a specific consignment/set of goods that were “slightly modified” just prior to export. However, section 48(3) points to a broader range of circumstances and a less restrictive requirement.
31. Section 48(3) establishes the process by which a determination is made as to “whether a circumvention good is slightly modified”. It requires a comparison

¹³ *Acts Interpretation Act 1901* (Cth) (*‘AIA Act’*) s 15AA.

¹⁴ *Taylor v Public Service Board* (1976) 10 ALR 211 at 215 (Barwick CJ).

between “the circumvention good” and “the good the subject of the notice” (for convenience I will refer to the later as ‘the notice good’).

32. The comparison is not so much between a particular good before and after it underwent modification, but between two different goods: the circumvention good and the notice good.
33. Section 48(3) might apply to a single good and permit a comparison of it, both before and after it was modified, However, I consider its application is broader than that particular circumstance.
34. The preferable construction of section 48(2)(b) is that the sentence specifying that “the circumvention goods are slightly modified” is intended to pick up the enquiry provided by section 48(3). Section 48(2)(b) will be established, if I determine a circumvention good is slightly modified after the circumvention goods and the notice goods are compared.
35. I submit that you should prefer that construction of section 48(2)(b). I submit that it gives greater harmony between sections 48(2) and (3) and promotes the overall purpose of Division 5A of Part XVB. That purpose is to address circumvention activities in response to the imposition of dumping duty and countervailing duty measures.
36. I further submit section 48 allows for a circumvention activity to be found when there are different production processes between the goods and circumvention goods. That only occurs when sections 48(2) and (3) are read together.
37. The words in section 48(2)(b): “*the circumvention goods are slightly modified*” are intended to pick up the enquiry in section 48(3). The circumstance in section 48(2)(b) will be satisfied, if I form the necessary opinion after comparing the circumvention goods and the notice goods.
38. For example, if I (exercising my functions and powers as Commissioner) can identify differences in the production processes for goods which would otherwise have been subject to the dumping duty notice, then there is circumvention activity.
39. UPM submitted there are no material differences between the production processes of the circumvention goods and the goods the subject of the notice. It said the circumvention goods were not modified and the 'necessary criterion' for the application of section 48 is not met. On the contrary, my inquiry found sufficient evidence the production process for the circumvention goods were slightly different to the production process for the notice goods.
40. My inquiry found the production process for the circumvention goods was slightly different to the production process for the notice goods because there was a different bill of materials (or ‘recipe’) formulated and introduced by UPM that resulted in the circumvention goods. The circumvention goods were

manufactured in different production runs than other copy paper products produced by UPM (including the notice goods).

41. I submit UPM is circumventing the measures by producing and exporting A4 copy paper with a lower weight. The modification is a change to the basis weight of A4 copy paper. I compared the circumvention goods and the goods the subject of the notice, in accordance with section 48(3). I am therefore satisfied that an alteration to the original notice required to address the circumvention activity.
42. I dispute the narrow interpretation of circumvention goods in section 48(2) to only mean that 80gsm paper is manufactured first, then modified. The reference to 'circumvention goods' is not used here with precision. It serves as a flexible term for the goods that are to be to the subject of the comparison process mandated by section 48(3).
43. I submit that the different uses of the term 'circumvention goods' across sections 48(2) (a)-(e) requires a more flexible interpretation of what constitutes the circumvention goods, for the provisions to make sense. It is necessary to look at the express terms of the legislation and when interpreting those words consider which interpretation would best achieve or promote the purpose of the statutory framework.¹⁵
44. The reference to different production processes being a factor to be considered when comparing the goods enables a circumvention activity to be found. That is:
- (a) even if changes to 80 gsm paper (the notice goods) are not made before export; provided that
 - (b) the production process for that kind of copy paper is slightly different, so as to manufacture 68gsm paper (a kind of good not subject to measures with the same use or purpose).

Whether section 48 applies to the present circumstances

45. The first ground in UPM's application that section 48 has no application to the circumstances of the present matter, because there are no relevant goods, should be rejected.
46. In this inquiry, I considered that:
- (a) the goods, the subject of the application, set out clearly that the circumvention goods comprised a weight of 68 gsm but otherwise meet the description of the goods the subject of the original notice; and

¹⁵ *Acts Interpretation Act 1901* (Cth) ('AIA Act') s 15AA.

(b) the goods the subject of the original notices are relevant goods for the purpose of the comparison required by section 48(3).

47. After the imposition of measures (including in 2019) these goods were exported by UPM and other exporters to Australia from the countries subject to the Original Notices in 2015 (the original investigation period).
48. The Commission relied upon evidence contained in import consignments in the Australian Border Force import database dating from 1 January 2015, and verified information provided by UPM in its response to the exporter and importer questionnaires. The Commission also assessed information provided by Complete Office Supplies ('COS') in its response to the Commission's questionnaire. It should be noted that the inquiry found COS was the sole customer of the circumvention goods.
49. Based on this information, I found that UPM commenced exporting the circumvention goods in commercial quantities to Australia from China in May 2019. Therefore, pursuant to section 48(2)(a), I was and remain satisfied that the circumvention goods are exported to Australia from a foreign country (China) in respect of which the notice applies.