PUBLIC RECORD

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

CUSTOMS ACT 1901 - PART XVB

ANTI-DUMPING COMMISSION
REPORT TO THE ANTI-DUMPING REVIEW PANEL

REINVESTIGATION OF CERTAIN FINDINGS IN REPORT 341

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

11 December 2017

CONTENTS

ABBREVIATIONS

$	Australian dollars
The Act	*Customs Act 1901*
ADRP	Anti-Dumping Review Panel
Asia Symbol	Asia Symbol (Guangdong) Paper Co., Ltd
AUD	Australian dollar
Brazil	the Federative Republic of Brazil
China	the People's Republic of China
Commission	Anti-Dumping Commission
CTM	Cost to make
the Commissioner	The Anti-Dumping Commissioner
CTMS	Cost to make & sell
Double A	Double A (1991) Public Company Limited
FOB	Free On Board
Fuji Xerox	Fuji Xerox Australia Pty Ltd
Greenpoint	Greenpoint Global Trading (Macao Commercial Offshore) Limited
Greenpoint/Asia Symbol	Greenpoint Global Trading (Macao Commercial Offshore) Limited and Asia Symbol (Guangdong) Paper Co., Ltd
Indah Kiat	PT Indah Kiat Pulp & Paper Tbk
Indonesia	the Republic of Indonesia
Manual	the Dumping and Subsidy Manual
Parliamentary Secretary	the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science
Pindo Deli	PT Pindo Deli Pulp and Paper Mills
RAK / APRIL	P.T. Riau Andalan Kertas and APRIL International Enterprise Pte Ltd
REP 341	Report No 341
SEF 341	Statement of Essential Facts 341
Sinar Mas	Sinar Mas Pulp and Paper Products
THB	Thai baht

Thailand	the Kingdom of Thailand
the goods	the goods the subject of the application (also referred to as the goods under consideration or GUC)
UPM-AP	UPM Asia Pacific Pte Ltd
UPM China	UPM (China) Co Ltd
UPM-Kymmene	UPM-Kymmene Pty Ltd

1 SUMMARY OF FINDINGS

1.1 Greenpoint / Asia Symbol

The Commission affirms its finding that the normal value relating to Greenpoint Global Trading (Macao Commercial Offshore) Limited (Greenpoint) and Asia Symbol (Guangdong) Paper Co., Ltd (Asia Symbol), (together, Greenpoint/Asia Symbol) should reflect the finding that Asia Symbol's very small quantity of exports to Australia would not attract the quantity rebates and discounts given to Asia Symbol's domestic customers. Accordingly, in calculating normal value, Asia Symbol's net domestic price should be adjusted upwards to account for quantity rebates and discounts given to its domestic customers.

1.2 Fuji Xerox

The Commission affirms its finding that the discretion in s269TAA(2) of the *Customs Act 1901* (the Act) should be exercised to treat transactions between UPM Asia Pacific Pte Ltd (UPM-AP) and Fuji Xerox Australia Pty Ltd (Fuji Xerox) as not arms length for the purposes of determining export price.

1.3 UPM-AP

The Commission affirms its finding that the relevant export price for UPM is determined in accordance with s269TAB(1)(b) for exports to Fuji Xerox (and in accordance with s269TAB(1)(a) for exports to other importers); this finding, together with UPM's export price and dumping margin, would not change in the context of UPM-AP being the exporter rather than UPM-AP and UPM China together being treated as the exporter.

1.4 RAK / APRIL

The Commission affirms its finding that the export price for P.T. Riau Andalan Kertas and APRIL International Enterprise Pte Ltd (together RAK / APRIL) should be determined under s269TAB(1)(c) using a deductive export price methodology.

1.5 Double A

The Commission affirms its finding in relation to Double A (1991) Public Company Limited (Double A) that s269TAF(4) of the Act does not apply to the Thai baht (THB) / Australian dollar (AUD) rate during the A4 copy paper investigation period.

1.6 Sinar Mas

The Commission has found for Sinar Mas Pulp and Paper Products (Sinar Mas) companies PT Pindo Deli Pulp and Paper Mills (Pindo Deli) and PT Indah Kiat Pulp & Paper Tbk (Indah Kiat) that it incorrectly adjusted normal values under s269TAC(8) rather than under s269TAC(9) as it should have done.

Correcting for this error has resulted in no change to Pindo Deli's and Indah Kiat's normal values.

2 BACKGROUND

2.1 Original investigation

On 12 April 2016, the Commissioner of the Anti-Dumping Commission (Commissioner) initiated an investigation into the alleged dumping of A4 copy paper exported to Australia from the Federative Republic of Brazil (Brazil), the People's Republic of China (China), the Republic of Indonesia (Indonesia) and the Kingdom of Thailand (Thailand), and the alleged subsidisation of A4 copy paper exported from China and Indonesia.

The investigation was initiated as a result of an application by Paper Australia Pty Ltd (Australian Paper), the only Australian manufacturer of the goods.

As set out in Report No 341 (REP 341), the Commission found, in broad terms, that:

- exports of A4 copy paper from Brazil, China, Indonesia and Thailand were dumped with dumping margins ranging between 2.9% and 45.1%; and
- uncooperative exporters of A4 copy paper from China were in receipt of countervailable subsidies, with a subsidy margin of 7.0%.

On 18 April 2017, the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (Parliamentary Secretary)[1] accepted the Commissioner's recommendations and decided to impose dumping duties on exports of A4 copy paper from Brazil, China, Indonesia (with the exception of Tjiwi Kimia) and Thailand. A public notice of this decision (dumping duty notice) was published on 19 April 2017.

2.2 Review by the ADRP

The Anti-Dumping Review Panel (ADRP) is conducting a review of the Parliamentary Secretary's decision. The ADRP received applications for review from the following parties:

1. Double A;
2. Fuji Xerox;
3. The Government of Indonesia;
4. Greenpoint/Asia Symbol;
5. International Paper do Brasil Ltda;
6. Jackaroo Paper Pty Ltd;
7. Phoenix Pulp and Paper Company Ltd;
8. RAK / APRIL;
9. Sinar Mas; and
10. UPM-AP.

[1] On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science. For the purposes of this investigation the Minister is the Parliamentary Secretary to the Minister for Industry, Innovation and Science.

2.3 Requirement for reinvestigation

The ADRP required a reinvestigation under s269ZZL(1) of the Act of a number of specific findings that formed the basis of the reviewable decisions in REP 341. The ADRP requested that the Commissioner report the result of the reinvestigation to the ADRP by 3 November 2017. On 2 November 2017 the ADRP granted an extension to the reinvestigation until 11 December 2017.

2.4 Approach to the reinvestigation

The Commissioner must conduct a reinvestigation in accordance with the ADRP's requirements and give the ADRP a report of the reinvestigation concerning the finding or findings within the period specified by the ADRP.[2]

In its report to the ADRP the Commissioner must:[3]

(a) if the Commissioner is of the view that the finding or any of the findings the subject of reinvestigation should be affirmed—affirm the finding or findings; and

(b) set out any new finding or findings that the Commissioner made as a result of the reinvestigation; and

(c) set out the evidence or other material on which the new finding or findings are based; and

(d) set out the reasons for the Commissioner's decision.

[2] The Act at s269ZZL(2).

[3] The Act at s269ZZL(3).

3 GREENPOINT / ASIA SYMBOL

3.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to Greenpoint/Asia Symbol is stated in the following terms:

> In REP 341, the normal value for Asia Symbol has been determined under s.269TAC(1) of the Act as the net domestic selling price with an upward adjustment under s.269TAC(8) for discounts and rebates. I note that these particular adjustments were not described in Table 7 Summary of Adjustments in REP 341.
>
> The Commission used the net domestic selling prices (net of discounts and rebates) to establish whether the domestic sales by Asia Symbol were in the ordinary course of trade as described in the verification report. The domestic selling prices were subsequently modified to establish the normal value.
>
> I require the Commission to reinvestigate the calculation of the normal value.
>
> Please consider the information in the application for review, which contain extracts from the Greenpoint/Asia Symbol earlier submission regarding discounts and rebates following the SEF, dated 29 December 2016, and, also the application to this review which elaborates on the normal value and adjustment provisions to enable a fair comparison between domestic and export sales.
>
> I draw your attention to the case of *Norland Papier AG v Anti-Dumping Authority* [1999] FCA 10 (Norland), which considers whether a rebate (or discount) may be part of the price established between a buyer and seller.
>
> The domestic selling price used in the normal value calculation should, prima facie, be the net price. It is then necessary to consider what adjustments under s.269TAC(8) of the Act, if any, would have been available if the export sale had been made in the domestic market. Asia Symbol has provided its Domestic Sales Rebate Policy document and also examples of customers in the domestic market which it considers equivalent to the export sales to Australia.
>
> Please explain the rationale for any adjustments under s.269TAC(8) of the Act regarding discounts and rebates.
>
> Should the Normal Value be subject to adjustment please re-calculate the dumping margin as required.

3.2 Affirmed or new findings

As a result of its reinvestigation the Commission affirms its finding that Asia Symbol's normal value should reflect the finding that Asia Symbol's very small quantity of exports to Australia would not attract the quantity rebates and discounts given to Asia Symbol's domestic customers. Accordingly, in calculating normal value, Asia Symbol's net domestic price should be adjusted upwards to account for quantity rebates and discounts given to its domestic customers.

3.3 Evidence or other material on which the findings are based

The Commission based its findings on unequivocal statements by Asia Symbol that rebates and discounts given to its domestic customers were based on quantity:

- in Asia Symbol's response to its exporter questionnaire; and
- during on-site verification at Asia Symbol by the Commission.

The Commission has also assessed material provided by Greenpoint/Asia Symbol in its submission dated 29 December 2016.

3.4 Reasons for the Commissioner's decision

The Commission calculated adjustments for Asia Symbol's discounts and rebates as adding discounts and rebates to net domestic prices notwithstanding the Commission's description in REP 341 of its approach as not subtracting discounts and rebates from gross prices (section 3.4.1 below).

The Commission has reassessed the evidence for adjustments under s269TAC(8) regarding Asia Symbol's discounts and rebates and would reaffirm its findings in REP 341 (section 3.4.2 below).

3.4.1 The Commission's approach to calculating adjustments under s269TAC(8) for Asia Symbol's discounts and rebates

The Commission notes that an equivalent normal value for Asia Symbol would result from either:

- *adding* the discounts and rebates to Asia Symbol's *net* domestic price (net price method); or
- *not subtracting* the discounts and rebates from Asia Symbol's *gross* domestic price (gross price method).

The Commission notes that s269TAC(1) is framed in terms of domestic prices that are net of rebates and discounts. On that basis an adjustment made under s269TAC(8) for domestic discounts and rebates that don't apply to exports would be an upward adjustment to net domestic prices (ie using the net price method).

In practice, the Commission often explains its treatment of such discounts and rebates as not adjusting downward the gross domestic price (ie using the gross price method). This is how the Commission described its treatment of Asia Symbol's domestic quantity discounts and rebates during Investigation 341; in particular:

- The Greenpoint/Asia Symbol exporter visit report stated that:[4]
    - Greenpoint/Asia Symbol "submitted amounts for discounts and rebates to apply to and adjust downwards the domestic price"; and
    - The evidence was such that there should be no "downwards adjustment to normal value in these particular circumstances" (those circumstances were that rebates and discounts were "all quantity based" for all domestic sales and "the export quantity is significantly less" than domestic sales); and
- Table 7 of REP 341[5] did not describe its treatment of quantity discounts and rebates as an adjustment made to Asia Symbol's normal value (however the Commission explained in substance its reasons for its treatment of Asia Symbol's domestic discounts and rebates at section 6.8.4.2 of REP 341).

[4] Greenpoint/Asia Symbol Exporter Visit Report at page 12.

[5] REP 341 at section 6.8.3.4.

Notwithstanding its description of adjustments for Asia Symbol's discounts and rebates, the Commission used the net price method (consistent with s269TAC(1) and s269TAC(8)) to make the adjustments. The mechanics of the Commission's calculation (sheet "D sales" in spreadsheet "DM – CN – Greenpoint.xls") show that the Commission calculated a net domestic price by subtracting rebates and discounts (in the column entitled "Net invoice value") for purposes of assessing whether sales were OCOT and arms length. Discounts and rebates (in the column entitled "Discounts and rebates (quantity based on domestic sales)") were subsequently added back to the net price (in the column entitled "Value FOB (RMB)"). These adjustments reflected the substance of the Commission's findings, namely that:[6]

- discounts and rebates were quantity based; and
- the very small amount of Asia Symbol's export sales to Australia would not attract the quantity based discounts and rebates given to Asia Symbol's domestic customers.

3.4.2 Reassessment of the evidence for adjustments under s269TAC(8) regarding Asia Symbol's discounts and rebates

The Commission has reassessed the evidence for adjustments under s269TAC(8) regarding Asia Symbol's discounts and rebates and would affirm its findings concerning treatment of those discounts and rebates.

The Commission may make an adjustment for discounts and rebates where quantity sold has an effect on price comparability and having regard to (see the Dumping and Subsidy Manual (Manual) at page 72):

- any quantity discount given to domestic sales of like goods with similar volumes as the export sales volume to Australia;
- any quantity discount given to the same general category of goods; or
- any other method that is supported by evidence.

The following evidence showed that the quantity sold had an effect on price comparability:

- In its exporter questionnaire response Greenpoint/Asia Symbol stated that "it entered into agreements with some of [its] distributors by which the parties agree that the distributor customer will be given a discount or rebate for reaching certain purchase targets" (see Greenpoint/Asia Symbol Response to Exporter Questionnaire at page 21).
- Greenpoint/Asia Symbol stated during the exporter verification that discounts and rebates were "all quantity based for all goods sold domestically" (see Greenpoint/Asia Symbol Visit Report at page 12).

Greenpoint/Asia Symbol made a submission dated 29 December 2016 following SEF 341 in which it claimed that some discounts and rebates were not based on quantity. Greenpoint/Asia Symbol provided documents with that submission that Greenpoint/Asia Symbol claimed demonstrated that discounts and rebates were given on a basis other

[6] REP 341 at section 6.8.4.2.

than for quantity sold. These documents do not demonstrate that discounts and rebates were given on a basis other than for quantity sold. In particular:

- The domestic customer contracts provided with the submission were in Chinese with only a few English annotations. The English annotations did not show or demonstrate that discounts and rebates were given on a basis other than for quantity sold.
- Another document is described by Greenpoint/Asia Symbol as its "sales discount policy".[7] There are a number of issues with this document:
    - The document does not contain the word "discount" (nor does it contain the word "policy"). The document, on its face, is concerned only with rebates. This is relevant given that Greenpoint/Asia Symbol's systems treat discounts and rebates separately. If the document is evidence of anything it is not evidence of the basis on which *discounts* are given; this is significant given that aggregate discounts given by Asia Symbol are almost four times aggregate rebates given by Asia Symbol.
    - Greenpoint/Asia Symbol made no attempt to show how the policy related to the domestic customer contracts provided with Greenpoint/Asia Symbol's submission (or any other contract between Asia Symbol and its domestic customers). The customer contracts provided are in Chinese and the policy is in English; accordingly it seems clear that the policy was not an annexure or attachment to the customer contracts.

[redacted]

3.4.3 Application of *Nordland* to treatment of rebates paid by Asia Symbol

The Commission understands that *Nordland* is authority for the proposition that rebates are a component of price and that the payment of rebates, without more, does not trigger s269TAA(1)(c). Consistent with *Nordland* the Commission:

- has not treated any rebate as a reimbursement under s269TAA(1)(c); and

---

[7] Attachment B of Greenpoint/Asia Symbol's application for review at pages 15 and 16.

[8] See DM – CN Greenpoint.xls at tabs "Discount Allocation" and "Rebate Allocation".

- treated the rebate as part of the price and subtracted rebates (and discounts) from the gross invoice value prior to testing for arms length and OCOT assessment.

4 FUJI XEROX

4.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to Fuji Xerox is stated in the following terms (footnotes omitted):

> The export price for Fuji Xerox has been determined under s.269TAB(1)(b) of the Act on the basis that the transactions between UPM A-P and Fuji Xerox are not arms-length and for this reason could not be determined under s.269TAB(1)(a).
>
> I require the Commission to reinvestigate its finding that the transactions between UPM A-P and Fuji Xerox are not arms-length for the purposes of determining the export price.
>
> Please reinvestigate this finding in the context of the information provided in the:
>
> - Fuji Xerox submission dated 3 June 2016;
> - information contained in the verification visit report regarding the reasons for the losses; and
> - application for review relating to the arms-length nature of the transaction between UPM-AP and Fuji Xerox, particularly in relation to its explanation of the losses and its plans to address these losses.
>
> S.269TAA(2) of the Act indicates that the Minister has a discretion to treat sales at a loss as indicating the importer (or an associate) will be reimbursed or compensated. In so doing, regard must be had to s. 269TAA(3) of the Act. The Minister has a broad discretion, and under s. 269TAA(3)(d) is able to consider other relevant matters. Please outline the consideration of the discretion under s.269TAA(2) of the Act that enables the Minister to form an opinion that the buyer, Fuji Xerox (or its associate) will receive a benefit after the purchase of the goods.
>
> I draw the Commission's attention to the genesis of the legislative provisions dealing with arms-length transactions and deductive export price (namely Sections 269TAA and 269TAB(1)(b) and (2) of the Act) from Article 2.3 of the Anti-Dumping Agreement:
>
> > 'In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.'
>
> There are also two judgements, *Powerlift (Nissan) P/L & Anor v Minister for Small Business, Construction and Customs* FCA 38 [1993] and Nordland, which I consider relevant. I draw attention to the particular paragraphs:
>
> > "The most normal case of sales dumping will occur where the goods under review have not entered Australia at a price less than the normal value in the country of export, but have thereafter been 'dumped' by being sold at a loss by the importer, under an arrangement that the exporter will reimburse the importer for that loss. The significance of s.269TAA(2) is that it permits the Minister, in effect, to assume the existence of a reimbursement agreement where a loss arises. It does not make it mandatory for the Minister to do so. It may be possible to conceive of 'sales dumping' where no reimbursement arrangement exists." and
> >
> > "However, the mere fact that a sale is at a loss at the dealer level would not necessitate the conclusion that sales dumping was taking place. There might well be legitimate commercial reason as unrelated to dumping which brought about the sales at a loss…No legal prescription binds the decision-maker to assume reimbursement and thereby disregard losses…."

and

"…What is sought to be encompassed, I think, is a series of circumstances where price, ascertained in accordance with ordinary principles, is an unreliable indicator because there is an arrangement between the parties under which price is set at a particular level but the buyer, having agreed to pay the price so established, is to receive some offsetting compensation or benefit… The paragraph, strikingly, is not drawn as one intended to operate mechanically having regard to the form of a transaction; it is broadly drawn and is directed to substance, the substance being derived from Article 2.3 of the Marrakesh Agreement."

I require an outline of the considerations taken in exercising this discretion in relation to Fuji Xerox.

Should the export price be subject to adjustment please re-calculate the dumping margin as required.

4.2 Affirmed or new findings

As a result of its reinvestigation the Commission affirms its finding that the discretion in s269TAA(2) should be exercised to treat transactions between UPM-AP and Fuji Xerox as not arms length for the purposes of determining export price.

4.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- A review of the legislative provisions in s269TAA(3) and s269TAA(1) and how they bear on the discretion in s269TAA(2);
- The case law in *Powerlift* and *Nordland*;
- *Report No 91/23 Re Forklift Trucks from Japan*, Australian Customs Service, December 1991;
- *Statutory Interpretation in Australia*, 8ed, Pearce and Geddes;
- *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves and Weeks;
- Evidence of losses by Fuji Xerox provided during Investigation 341.

4.4 Reasons for the Commissioner's decision

The considerations taken in recommending that the Parliamentary Secretary exercise the discretion in s269TAA(2) to treat transactions between UPM-AP and Fuji Xerox as not arms length are set out in section 4.4.1. In summary these considerations are:

- Fuji Xerox's losses were very significant, sustained, understated by Fuji Xerox and unlikely to be recovered in a reasonable period; Fuji Xerox understated the losses; reasons given by Fuji Xerox for the losses were not supported by evidence and relevant information held by Fuji Xerox was not provided to the Commission;
- The verification team had reduced visibility of the role of UPM-AP because the verification team did not undertake an onsite verification of UPM-AP. This was because :

- UPM[9] initially maintained that UPM-AP and its directors were based in Singapore;
- the Commission's verification team visited UPM China; and
- following the verification visit to UPM China the verification team sought to visit UPM-AP in Singapore but at that time UPM stated that directors and staff of UPM-AP were not in Singapore but in China.

The Commission considers that exercise of the discretion in this case falls within the proper scope of the discretion in s269TAA(2). The Commission's assessment of the scope and nature of the discretion is set out in section 4.4.2. In summary the Commission considers that:

- the discretion in s269TAA(2) must have a scope that operates in circumstances where there is insufficient factual basis for a finding either under s269TAA(1) or that transactions were not arms length (in the ordinary sense);
- case law on s269TAA primarily concerns the operation of s269TAA(1) and provides limited assistance in assessing how the discretion in s269TAA(2) operates;
- the statutory discretion in s269TAA(2) plays an important, practical role in the Commission's investigations and fills what in many cases would be a significant evidential gap; and
- while the ability to "assume" reimbursement[10] is discretionary the Commission should not decline to exercise that discretion because of an evidential gap that could be addressed by the importer.

4.4.1 Considerations in recommending exercise of the discretion in s269TAA(2)

[redacted]

[9] The Commission uses UPM here as it did in REP 341 to refer collectively to UPM-AP, UPM China and Sydney based UPM-Kymmene Pty Ltd (see REP 341 at 2.2.1). The Commission's reinvestigation as it relates to UPM is contained at chapter 5 of this report.

[10] *Powerlift* at page 70.

[11] See Fuji Xerox Importer Visit Report at page 7.

[12] [redacted] This appears to be at odds with statements made by Fuji Xerox during the Commission's importer visit in July 2016 that it bore the foreign exchange risk.

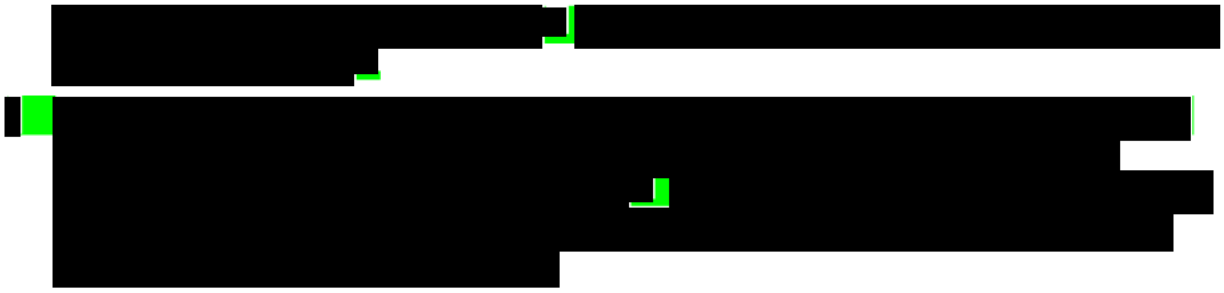
[redacted]

[13] See Fuji Xerox Importer Visit Report at page 7.

[14] See Fuji Xerox submission of 3 June 2016 at page 7.

[15] Fuji Xerox 3 June 2016 submission at page 7.

[16] Fuji Xerox 3 June 2016 submission at page 7.



4.4.1.2 Substantially reduced visibility of the role of UPM-AP

Fuji Xerox's primary supplier, UPM, provided the Commission with an exporter questionnaire response on 19 May 2016 (UPM EQR). The UPM EQR clearly stated that UPM Asia Pacific Pte Ltd (UPM-AP) was the exporter and was based in Singapore with a physical address at 350 Orchard Road, Singapore.[20] The UPM EQR stated:[21]

> UPM Asia Pacific Pte Ltd ("UPM-AP") is a Singapore based company that purchases and provides major imported manufacturing inputs to its wholly owned subsidiary UPM-China for the production of the GUC that it exports to the markets mentioned above.

Concerning the identity and location of directors of UPM-AP and UPM-China the UPM EQR stated (emphasis in original):[22]

> The board of directors of each company (except UPM-Kymmene Oyj, listed parent company located in Helsinki, Finland) are listed below:
>
> | | | |
> |---|---|---|
> | **China** | UPM (China) Co., Ltd | Raul Ikonen (Chairman and legal rep.)
Song Haihai
Jaakko Nikkila
Weng Hairong |
> | **Singapore** | UPM Asia Pacific Pte Ltd | Mikael Stewen
Raul Ikonen
Weng Hairong |

The remainder of the UPM EQR said nothing to suggest that the position was otherwise, describing clearly defined separate and substantive roles for both UPM-AP and UPM-China.

During the Commission's exporter visit to UPM China during 1 to 6 June 2016 UPM maintained its position that UPM-AP was Singapore based. Certainly neither UPM nor its

---

[17] Fuji Xerox 3 June 2016 submission at page 5.

[18] Fuji Xerox 3 June 2016 submission at page 5.

[19] Fuji Xerox 3 June 2016 submission at page 5.

[20] UPM EQR at page 2.

[21] UPM EQR at page 2.

[22] UPM EQR at page 37.

representatives provided any indication during the visit that UPM-AP was not Singapore based or that its directors were not based in Singapore as the UPM EQR had indicated.

Following its visit to UPM China the Commission sought to visit UPM-AP in Singapore to complete its verification of UPM and to this end Steven Spears of the Commission emailed Kirinda Bakker of UPM Australia on 27 June 2016 saying, among other things:[23]

> We would still like to have a short meeting with the directors from the UPM AP to discuss the operations of the Singapore office. Can we please arrange a meeting on the morning of 13 July?

Bakker responded to Spears on 29 June 2016 saying, among other things:[24]

> I refer to your request for a meeting with Directors of UPM A-P to discuss SG&A costs and raw material purchases. While we are happy to provide you with any additional information you require the Directors of the company are located in China as are the UPM employees responsible for the preparation of the relevant information.

The Commission verification team undertook a more limited form of verification of UPM-AP from UPM Australia's Sydney offices. As a result the verification team had reduced visibility of UPM-AP.

Notwithstanding the unforced and unequivocal statement by Bakker on 29 June 2016 to the effect that UPM-AP is, in substance, based in China the Commission observes that UPM more recently has reverted to its initial claims concerning the location of UPM-AP in its May 2017 statement of grounds to the ADRP.[25]

The Commission remains unsure of the substantive location of UPM-AP however the net effect of contradictory statements by UPM concerning the location of UPM-AP meant that the Commission was unable to properly verify UPM-AP. This substantially reduced the visibility of UPM-AP in the investigation.

UPM's assertion in late June 2016 that UPM-AP was in substance based in China, only after the Commission verification team requested that it visit UPM-AP in Singapore, led to the Commission being unable to effectively scrutinise UPM-AP through an onsite verification.

4.4.2 Scope and nature of the discretion in s269TAA(2)

For the reasons below the Commission considers that the scope of the discretion in s269TAA(2) must be defined negatively based on the construction of the Act. On that basis and on normal principles of statutory interpretation the discretion in s269TAA(2) must have a scope of operation that includes circumstances where:

- None of the criteria in s269TAA(1) are satisfied; and

---

[23] Email of 27 June 2016 from Steven Spears to Kirinda Bakker, subject "Further information."

[24] Email of 29 June 2016 from Kirinda Bakker to Steven Spears, subject "RE: Further information"; this assertion was made again in a telephone conversation between Bakker and Spears on 30 June 2016, see *File Note of Conversation: Verification of UPM AP*, 30 June 2016.

[25] Attachment A to UPM's application to the ADRP, 19 May 2017 at [10].

- It would not be open to the Commission to make a finding of fact that transactions were not arms length (in the ordinary sense of that term).

Clearly the discretion in s269TAA(2) may only be exercised if ss269TAA(2)(a) and (b) are satisfied.

Scope of the discretion in s269TAA(2) is defined negatively

The Commission refers to section 10.1 of its submission to the ADRP of 7 August 2017 and, in particular, the Commission's view on the scope of the discretion in s269TAA(2). The Commission observed there that the scope of a statutory discretion depends on the construction of the statute that confers the discretion.[26] The Commission further notes judicial authority on how the scope of a statutory discretion is usually determined; that judicial authority states that the scope of a statutory discretion is usually defined *negatively* by reference to the instrument conferring the discretion.[27] In other words the scope of the discretion is defined by what the discretion is not; and what the discretion is not is determined by reference to the conferring statute. So in *Swan Hill v Bradbury* the High Court stated that:[28]

> But courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument. They must, therefore, concede to the authority a discretion *unlimited by anything but the scope and object of the instrument conferring it. This means that only a negative definition of the grounds governing the discretion may be given*. [emphasis added]

The Commission's assessment of the scope of the discretion in s269TAA(2) has been undertaken primarily on that basis. The Commission considers that s269TAA(1) provides an important indicator of what is not contained in or required to enliven the discretion in s269TAA(2). Judicial comment in *Powerlift* and *Nordland* (discussed in detail below) is primarily concerned with the operation of s269TAA(1) and so the Commission considers that these cases may also assist in assessing what is not contained in or required by the discretion in s269TAA(2).

The effect of s269TAA(1) and its bearing on the discretion in s269TAA(2)

It seems clear that a finding under s269TAA(1) requires an assessment of certain facts that might be available to the Commission that satisfy one of the criteria in ss269TAA(1)(a) to (c). However a finding under s269TAA(1) is not a finding that a transaction has not been arms length, rather if there is a finding that any of the criteria in s269TAA(1) have been satisfied then that transaction "shall not be treated as an arms length transaction"; there is no discretion. As stated in *Nordland*, any transaction that is described in s269TAA(1) is deemed not to be arms length:[29]

> In the ordinary sense of the term, a transaction of a kind described in any of the paragraphs of s 269TAA(1) might, or might not, be an arms length transaction. Even

---

[26] Commission submissions to the ADRP, 7 August 2017 at [10.1]; *Minister for Immigration and Citizenship v Li* (2013) CLR 332 at 364.

[27] *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves and Weeks at [3.50].

[28] *Swan Hill v Bradbury* (1937) 56 CLR 746 at 757 to 758 cited at [3.50] in *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves and Weeks.

[29] *Nordland* at [19].

> paragraph (b), which comes closest to the ordinary concept of "arms length transaction", is not, I think, an exception: the fact that there is a commercial relationship between buyer and seller which influences price does not necessarily result in the purchase or sale being other than an arms length transaction in the ordinary sense. However that may be, the effect of each of the three paragraphs is that, for the purpose of ascertaining normal value, any sale or purchase described by any of the three paragraphs of subs (1) is deemed not to be an arms length transaction.

The Commission considers that the evidential requirements may be low in the circumstances coming within s269TAA(1), for example:

- The criterion in s269TAA(1)(b) requires only that the price *appears* to be influenced by a commercial or other relationship between buyer and seller.[30] This lowering of the normal (civil) standard of proof of the balance of probabilities is consistent with Article 2.3 of the Anti-Dumping Agreement (setting procedures where export price "appears" unreliable)[31] and requires that the Commission approach the issue, as stated in the relevant explanatory memorandum, "based on what the available information *suggests*" (emphasis added).[32]
- A finding of fact that there is a likelihood of reimbursement, compensation or benefit (s269TAA(1)(c)) may be inferred.[33]

Fuji Xerox argues that the discretion in s269TAA(2) cannot be exercised because the "Commission possessed no evidence or information"[34] that parties' transactions were not arms length. A requirement for evidence or information would, in effect, impose the factual inquiry required under s269TAA(1) (or under an assessment of arms length in the ordinary sense) to also be undertaken in order to exercise the discretion under s269TAA(2).

The Commission's submission to the ADRP argued that this requirement, and a requirement of evidence or information establishing arms length, would render s269TAA(2) of no effect;[35] on further consideration the Commission considers that this requirement may effectively extinguish the discretion because evidence or information that supported a finding of fact concerning any of the criteria in s269TAA(1) would *require* the Minister to not treat those transactions as arms length.

To impose a requirement for evidence or information would be contrary the general principle of statutory interpretation that all words must be given meaning and effect and that the courts are not at liberty to treat any word or sentence in statute as superfluous or

---

[30] The *Customs Amendment (Anti-dumping Measures) Act 2013* changed the words in s269TAA(1)(b) "price is" to "price appears to be".

[31] Anti-Dumping Agreement at Article 2.3; Explanatory Memorandum to the *Customs Amendment (Anti-dumping Measures) Bill 2013* at [21]; *Statutory Interpretation of Legislation*, 8ed, Pearce and Geddes at [2.26] that he principle of statutory interpretation that all words in a statute have meaning and effect is "more compelling" if words have been added by amendment.

[32] Explanatory Memorandum to the *Customs Amendment (Anti-dumping Measures) Bill 2013* at [22].

[33] *Powerlift* at page 71.

[34] Fuji Xerox's Application for Review at page 6.

[35] Commission submissions to the ADRP, 7 August 2017 at [10.1].

insignificant.[36] Section 269TAA(2) must be given meaning and effect; neither a court nor the Minister is at liberty to adopt an interpretation of s269TAA(2) that renders it of no effect, superfluous or insignificant.

In addition, as set out later in this section, the Commission has no information gathering powers and so the practical effect of imposing the requirement argued for by Fuji Xerox would allow a party to withhold information to its advantage.

Transactions that are not arms length in the ordinary sense of the term

The term arms length is not defined in s269TAA(1),[37] neither is it defined elsewhere in the section or the Act. The courts follow a well-known rule of interpretation that, in the absence of a definition, terms should be taken to be used in their ordinary sense.[38]

On that basis it would be open to the Commission to make a finding of fact that transactions were not arms length (in the ordinary sense of that term) in a circumstance where none of the criteria in s269TAA(1) were satisfied and s269TAA(2) was not satisfied.

The Commission considers that it would not be difficult to conceive of such a circumstance however to do so in the abstract here would be of limited assistance. Nonetheless the Commission considers it is an important constituent in assessing the (negatively) defined scope of the discretion in s269TAA(2).

The effect of s269TAA(3) and its bearing on the discretion in s269TAA(2)

The Commission considers that the matters in s269TAA(3) are not directly concerned with how the discretion in s269TAA(2) should be exercised. Rather, the matters in s269TAA(3) are expressly concerned with assessing whether, for the purposes of s269TAA(2), goods were sold at a loss; hence s269TAA(3) states: “In determining, for the purposes of subsection (2), whether goods are sold by an importer for a loss, the Minister shall have regard to” the matters in ss269TAA(3)(a)-(d). On that basis the matters in s269TAA(3) bear primarily on the question of profitability, not on how the discretion in s269TAA(2) should be exercised following a finding that goods were sold at a loss.

However the Commission considers that s269TAA(3) assists in interpreting how the parliament intended that s269TAA(2) should operate in practice. The focus of s269TAA(3) on the exercise of determining profitability under s269TAA(2) indicates that s269TAA(2) does not call for any broader inquiry before exercising the discretion.

In addition it was similarly open to the legislature to require the Minister to have regard to certain matters in exercising the discretion in s269TAA(2) but it did not do so; recommending that the Minister must have regard to certain matters in exercising the discretion absent a legislative mandate may unlawfully fetter the discretion.

---

[36] See Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at [2.26]; and among others *Commonwealth v Baume* (1905) 2 CLR 405 at 414, *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [71].

[37] *Nordland* at [17].

[38] *R v Peters* (1886) 16 QBD 636 at 641 as cited in *Statutory Interpretation in Australia*, 8ed, Pearce and Geddes at [3.30].

Case law on s269TAA(2) – Nordland

The Commission considers that *Nordland* is not concerned with the exercise of the discretion in s269TAA(2). Rather the controversy in *Nordland* concerned a direct application of s269TAA(1)(c) and whether the Minister could properly proceed:[39]

> … on the understanding that par (c) [of s269TAA(1)] had the result that if sales were made on terms, or subject to an understanding, that the buyer would receive payment of a rebate (calculated, for example, by reference to quantities of goods purchased over a period) the sales were not arms length transactions.

This is clear from Lehane J's express concern with the words of s269TAA(1)(c) (not s269TAA(2)), stating that (emphasis added):[40]

> In that Article [2.3 of the Anti-Dumping Agreement] there is to be found, I think, at least the genesis of par (b) and par (c) of s 269TAA(1). Unless *the words of par (c)* [of s269TAA(1)] clearly require another construction, authority supports the proposition that the paragraphs should be construed consistently with the terms of the international instruments: *ICI Australia Operations Pty Ltd v Fraser* (1991) 34 FCR 564 at 569, 570; *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406 at 417. The introductory *words of the paragraph* [, ie s269TAA(1)(c),] ("in the opinion of the Minister") and the words "directly or indirectly" provide, in my view, a further clue. What is sought to be encompassed, I think, is a series of circumstances where price, ascertained in accordance with ordinary principles, is an unreliable indicator because there is an arrangement between the parties under which price is set at a particular level but the buyer, having agreed to pay the price so established, is to receive some offsetting compensation or benefit or is (directly or indirectly) to receive reimbursement of all or some of the price. The *paragraph* [, ie s269TAA(1)(c)], strikingly, is not drawn as one intended to operate mechanically having regard to the form of a transaction; it is broadly drawn and is directed to substance, the substance being derived from Article 2.3 of the Marrakesh Agreement.

On that basis the inquiry under s269TAA(1)(c) is a factual inquiry into any circumstances where price, ascertained in accordance with ordinary principles, is an unreliable indicator because there is an arrangement between parties under which price is set at a particular level but the buyer, having agreed to pay the price so established, is to receive some offsetting compensation or benefit or is (directly or indirectly) to receive reimbursement of all or some of the price.

Section 269TAA(2) provides for the Minister to treat sales at a loss as indicating that s269TAA(1)(c) is satisfied; however the Commission considers that there must be no requirement for the factual inquiry required by s269TAA(1)(c) to also be undertaken in order to exercise the discretion under s269TAA(2). This would render s269TAA(2) of no effect. The Commission considers that an interpretation that renders s269TAA(2) of no effect:

---

[39] *Nordland* at [20].

[40] Nordland at [29].

- Would be contrary to case law stating the general principle of statutory interpretation that all words must be given meaning and effect. The courts are not at liberty to treat any word or sentence in statute as superfluous or insignificant.[41]
- Would be contrary to s12 of the *Acts Interpretation Act 1901* which requires that every section of an Act shall have effect as a substantive enactment.[42]

Contrary to Fuji Xerox's argument the Commission considers that s269TAA(2) rather exists for circumstances where there is a dearth of other factual information.

Case law on s269TAA(2) – Powerlift

How the discretion in s269TAA(2) should be exercised was not at issue in *Powerlift*. In *Powerlift* there were findings of fact that the parties were not at arms length[43] and that there was sales dumping;[44] it did not concern the application of s269TAA(2) although the treatment of reimbursement under s269TAA(2) was considered and compared to the case where reimbursement may be found in fact (as was the case in *Powerlift*).

---

[41] See Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at [2.26]; and among others *Commonwealth v Baume* (1905) 2 CLR 405 at 414, *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [71].

[42] There is support for the proposition that just as s12 requires every section of an enactment to do some work, so too should every subsection should do some work. See *Hollis; Secretary, Department of Social Services and (Social services second review)* [2015] AATA 941 (4 December 2015) at [23]-[24]:

> … the Tribunal also has regard to s 12 of the same Act, which provides:
>
> > Every section of an Act shall have effect as a substantive enactment without introductory words.
>
> One could extrapolate that, just as every section of an enactment should do some work, so too should every subsection, indeed every paragraph and subparagraph. One objection to the interpretation of s 49J(2)(b)(ii) offered above is that it leaves the subparagraph with no effect, which Parliament could not have intended.

[43] *Powerlift* at page 46-47; see also findings by the Australian Customs Service (ACS) in *Report No 91/23 Re Forklift Trucks from Japan*, December 1991 at [11.24] to [11.27] of its report:

> The ACS found that sales of gur from Kohfuku to Powerlift were "non – arms length" in terms of sec. 269T AA of the Act. The ACS identified advertising assistance, warranty reimbursements, equity holding and an exclusive distribution franchise. Therefore export price could not be assessed under paragraph 269TAB(l)(a) of the Act.
>
> Furthermore, in the sales between Powerlift and Nomad the ACS identified payment of a salesman's salary and an exclusive distribution franchise. Some modifications were also made to the forklifts as imported. Export price assessment under paragraph 269TAB(l)(b) was therefore also precluded.
>
> The ACS has assessed export prices in accordance with paragraph 269TAB(l)(c) of the Act - utilising a deductive approach with sales to end users as the "starting point".
>
> Export price assessment on this basis reveals significant sales dumping of Nissan forklifts during the periods of inquiry.

The ACS findings were based on legal advice described in *Australian Customs Notice 91/131* at page 2 in the following terms (emphasis added):

> Customs has obtained legal advice concerning the alleged non-arms length nature of domestic sales from manufacturers to dealers in Japan. The advice is to the effect that any "consideration payable for or in respect of the goods other than their price" (e.g. assistance with advertising, warranty, sales promotion) or any "commercial or other relationship" (e.g, exclusive distribution agreements) between buyer and seller renders a transaction "non-arms length" *regardless of the profitability of the transaction*.

[44] *Powerlift* at page 71-72.

Reimbursement was found in fact in *Powerlift*; in comparison Hill J stated that s269TAA(2) would permit the Minister to "assume" reimbursement.[45]

At issue in *Powerlift* was whether losses made by a dealer (an entity purchasing the goods from the importer and selling to consumers) should be disregarded (ie not deducted) in calculating a deductive export price under s269TAB(2) when there was sales dumping by the dealer.[46] It was not in dispute that losses made by the importer should be disregarded in calculating a deductive export price under s269TAB(2) when there was sales dumping.[47]

The Minister's delegate in *Powerlift*, a Mr Beaman, had calculated a deductive export price under s269TAB(2) because of a finding of "the relationship that existed between the importer in this case, Powerlift, and the exporter, and between Powerlift and its dealer".[48] Accordingly Mr Beaman commenced his calculations with the price at which the dealer sold the goods to its customers in arms length sales and then made "a number of deductions to work back to what the arms length price would have been between the exporter and Powerlift if an arms length relationship between those companies had existed".[49]

In calculating the deductive export price Mr Beaman had disregarded losses made by the dealer. Mr Beaman disregarded losses in the sense that he did not "make a deduction for losses" as the importer argued he should have;[50] the deduction or subtraction of losses (a negative number) would have had the effect of increasing the deductive export price and reducing the dumping margin. Mr Beaman had disregarded losses in this way because "to make an adjustment for losses on sales by the dealer would have had the effect of negating the possibility of 'sales dumping'".[51]

At page 70 and 71 of his reasons Hill J describes sales dumping and, in particular, the role of reimbursement in determining whether sales dumping had taken place. Hill J describes the "most normal" case of sales dumping as occurring when there is a reimbursement arrangement, namely:[52]

> … the goods under review have not entered Australia at a price less than the normal value in the country of export, but have thereafter been "dumped" by being sold at a loss by the importer, under an arrangement that the exporter will reimburse the importer for that loss.

Immediately following Hill J stated that s269TAA(2) was "significant" because the effect of that provision was to permit the Minister, "to *assume* the existence of a reimbursement, where a loss arises" (emphasis added);[53] ie no finding in fact of a reimbursement

---

[45] *Powerlift* at page 70.

[46] *Powerlift* at page 66.

[47] *Powerlift* at page 66.

[48] *Powerlift* at page 46.

[49] *Powerlift* at pages 46-47.

[50] *Powerlift* at page 66.

[51] Extract from Mr Beaman's affidavit at *Powerlift* at pages 66-67.

[52] *Powerlift* at page 70.

[53] *Powerlift* at page 70.

arrangement was required in that circumstance. Hill J then addresses the possibility of sales dumping where no reimbursement arrangement exists:[54]

> It may be possible to conceive of "sales dumping" where no reimbursement arrangement exists. *It is a possibility neither addressed by the legislature in s.269TAA(2)*, nor by the parties in argument before me, and I put it to one side here. [emphasis added]

Sales dumping where no reimbursement arrangement exists is not addressed by s269TAA(2) because, as Hill J observed immediately prior, the Minister is permitted in that case to assume reimbursement. Hill J also puts to one side the case where sales dumping may involve no reimbursement.

Hill J continues his discussion of reimbursement, stating that reimbursement may occur, not merely between importer and exporter, but also between exporter and dealer. Sales dumping could occur if the dealer sold at a loss and that loss was to be reimbursed:[55]

> It is obvious enough that a reimbursement arrangement may exist not merely as between importer and exporter, but also as between exporter and more remote parties. So, for example, if importer and dealer are associated, then dumping could occur, notwithstanding that the actual invoiced export price is no less than normal value if the dealer were to sell at a loss and that loss were to be reimbursed.

It is clear that Hill J is here speaking here of reimbursement *in fact*, not the assumed reimbursement of s269TAA(2). Hence it is in the context of reimbursement in fact that Hill J discusses sales at a loss in the immediately following paragraph on page 71 and whether sales at a loss were sufficient to make a finding of fact that reimbursement (and concomitant sales dumping) was occurring. Hill J states that where the decision maker cannot avail him or herself of the ability to assume reimbursement under s269TAA(2) there arises a question of judgement and no legal prescription binds the decision maker to assume reimbursement. This discussion was directed to assessing whether sales dumping has occurred in fact and determining the primary question before him, namely whether losses at the dealer level could be disregarded in calculating a deductive export price (ie the amount of the loss is not added to the deductive export price). Hence Hill J states (emphasis added):

> However, the mere fact that a sale is at a loss at the dealer level would not necessitate the conclusion that sales dumping was taking place. There might well be legitimate commercial reasons unrelated to dumping which brought about the sales at a loss. At least *where the decision-maker is unable to avail him or herself of s.269TAA(2)*, the determination of whether sales dumping has occurred as part of a step in the process of determining an ultimate export price involves a question of judgment. No legal prescription binds the decision-maker to assume reimbursement and thereby disregard losses [in calculating deductive export price]. Given a finding of fact that there is a likelihood of reimbursement, compensation or benefit, he may disregard losses [in calculating deductive export price]. Such a likelihood may often, if not usually, be inferred. Absent consideration of that question, however, the decision-maker would, in my opinion, err in law in disregarding losses [in calculating deductive export price] at the dealer level.

Hill J's discussion of whether there was sales dumping expressly excludes the case where the decision maker can rely on s269TAA(2). The question in this passage of whether losses should be disregarded is not directed toward whether those losses should

---

[54] *Powerlift* at page 70.

[55] *Powerlift* at bottom of page 70 to top of page 71.

be disregarded under a s269TAA(2) assessment but is directed toward whether losses should be subtracted from a deductive export price under s269TAB(2).

Given that *Powerlift* expressly describes the nature of the inquiry where the decision maker is unable to avail him or herself s269TAA(2) the Commission considers that s269TAA(2) must require a different inquiry. To proceed otherwise would render s269TAA(2) of no effect; for the reasons set out above the Commission considers that such an interpretation would be contrary to legal authority.

The role of s269TAA(2) in the Commission's investigations

The statutory discretion in s269TAA(2) plays an important role in the Commission's investigations.

Unlike other investigating agencies[56] the Commission has no powers to compel parties to an investigation to provide information or evidence. Accordingly parties may provide documents or information that supports their claims but are not obliged to provide documents or information that might *detract* from their claims.

The Commission considers that Australia's anti-dumping legislation provides an important and practical investigative tool in s269TAA(2), namely the power to treat certain transactions as non arms length to fill what in many cases would be a significant evidential gap.[57] Without this power parties would be able to withhold information to their advantage.

In this respect the Commission considers that s269TAA(2) does not directly correspond to any part the Anti-Dumping Agreement. Rather the Commission considers that s269TAA(2) is better characterised as part of Australia's implementation of the Anti-Dumping Agreement, reflecting an implementation choice that Australia's anti-dumping investigative body was not provided with evidence gathering powers.

---

[56] See for example s155 of the *Competition and Consumer Act 2010*; the Canadian International Trade Tribunal has powers to direct a party to provide documents or evidence and to summon a person to attend before it to give evidence, *Trade Remedies in North America*, Bowman at [4.17.3.8.3].

[57] Similarly s269TACAB permits the Minister to use different methods for calculating export price and normal value for uncooperative exporters, including those who did not provide information to the Commission within a reasonable time.

5 UPM

5.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to UPM is stated in the following terms:

> This should be read in conjunction with the Fuji Xerox section above. I require the Commission to reinvestigate the export price for the exports to Australia by UPM A-P, in the context of UPM A-P being the exporter.
>
> Should the export prices be modified please re-calculate the dumping margins for UPM.

5.2 Affirmed or new findings

As a result of its reinvestigation the Commission affirms its finding that the relevant export price for UPM is determined in accordance with s269TAB(1)(b) for exports to Fuji Xerox (and in accordance with s269TAB(1)(a) for exports to other importers); this finding, together with UPM's export price and dumping margin, would not change in the context of UPM-AP being the exporter rather than UPM-AP and UPM China together being treated as the exporter.

5.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- The evidence, material and findings in section 4 above;
- Attachment A to UPM's application to the ADRP, May 2017.

5.4 Reasons for the Commissioner's decision

The Commission repeats the reasons in section 4 above for affirming its finding that the relevant export price for UPM is determined in accordance with s269TAB(1)(b) for exports to Fuji Xerox.

The exporter and export price in REP 341

In REP 341, for purposes of determining export price and due to the close relationship between UPM-AP and UPM China in the manufacture and export of A4 copy paper, the Commission treated UPM-AP and UPM China as a single entity and the exporter.[58] For UPM's sales to Fuji Xerox, the conditions of s269TAB(1)(b) were satisfied and the export price was established in accordance with s269TAB(1)(b) based on the price of the goods sold by Fuji Xerox less the deductions prescribed in s269TAB(2).[59] Export price was determined in accordance with s269TAB(1)(a) for exports to other importers.[60]

[58] REP 341 at section 6.8.2.2.

[59] REP 341 at section 6.8.2.2.1.

[60] REP 341 at section 6.8.2.2.2.

UPM-AP as the exporter

If UPM-AP alone is the exporter the Commission considers that the assessment of export price for sales to Fuji Xerox would be the same.[61] In that case the Commission considers that the conditions of s269TAB(1)(b) would be satisfied because:

- UPM-AP would be the exporter and Fuji Xerox the importer;[62]
- the goods were purchased by Fuji Xerox from UPM;
- the purchases by Fuji Xerox were not arms length transactions; and
- the goods were subsequently sold by Fuji Xerox, in the condition in which they were imported, to customers who are not associates of Fuji Xerox.

The Commission considers that this is not in dispute. As UPM states in its application to the ADRP:[63]

> It is only in circumstances in which evidence supports the identification of UPM-AP as the exporter and vendor and FXA as the importer and purchaser and where it can be established according to law that the purchase by FXA was not an arms length transaction, that s269TAB(1)(b) can be applied.

Similarly the basis for calculating export price for other importers would not change from that used in REP 341, namely in accordance with s269TAB(1)(a) based on the invoiced price from UPM-AP to those importers less transport and other charges arising after exportation.[64]

Accordingly the export price and dumping margins for UPM would not change from those determined in REP 341.

---

[61] REP 341 at section 6.8.4.1.

[62] The Commission refers to its submission to the ADRP and supporting evidence concerning the identity of the importer of 7 August 2017 at 10.2 and its analysis of the identity of the importer in REP 341 at 6.8.4.1.1 (the Commission's 7 August 2017 submission incorrectly referenced this as section 6.6.4.4.1).

[63] Attachment A to UPM's application to the ADRP, May 2017 at [19].

[64] REP 341 at section 6.8.2.2.2.

6 RAK / APRIL

6.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to RAK/APRIL is stated in the following terms (footnotes omitted):

> The export price for RAK/APEL has been determined under s.269TAB(1)(c) of the Act on the basis that the transactions were not between the exporter (RAK) and the importers. The Commission indicated that it had formed the view that the transactions between APRIL and its customer BJ Ball were not arms-length as the goods were sold in Australia at substantial losses and these losses were not recoverable within a reasonable period of time. It used the methodology of s269TAB(1)(b) to determine the export price under s.269TAB(1)(c) of the Act.
>
> I require the Commission to reinvestigate the finding of the export price.
>
> Given the judgements of *Companhia Votorantium de Cellulose e Papel v Anti-Dumping Authority* FCA 1048 [1996] and *Expo-Trade Pty Ltd v Minister of State for Justice and Customs* FCA 1421 [2003] it is my view that the Commission has determined correctly that RAK is the exporter and Indonesia is the country of export.
>
> On the basis that RAK is not considered to have made sales to Australian importers, the export price has been determined under s269TAB(1)(c) of the Act. I have noted however that the exporter verification visit was undertaken with April Fine Paper Trading ("APRIL"), and both companies, APRIL and RAK are mentioned in the verification report. It may be appropriate to more closely examine the precise contractual and ownership arrangements between RAK and APRIL in relation to the export transactions.
>
> In REP 341, the Commission has placed reliance on the methodology of deductive export price (s.269TAB(1)(b)) and a finding that the transactions between APRIL and BJ Ball are not arms-length (s269TAA(1)(c) based on s.269TAA(2) and TAA(3)). However, I note that the provisions of sections 269TAB(1)(b), 269TAA(2) and 269TAA(3), require a purchase between the importer and the exporter. In this case, there appears to have been no transactions between the exporter and the importer.
>
> In considering whether the transactions between APRIL and BJ Ball are arms-length, I draw the Commission's attention to the application to the Review Panel by RAK/APEL regarding its claims in relation to the arms-length nature of the transactions, that is, there is no evidence of any reimbursement or benefit being payable to BJ Ball by APRIL, pages 8 - 9 refer.
>
> s.269TAB(1)(c) of the Act requires the Minister to determine a price having regard to all the circumstances of the exportation. I also note the judgement in *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA 205 [1995] which stated:
>
> > 'The primary Judge held that once it was accepted that s.269TAB(1)(c) applied, it was a question of fact for the ADA to determine what items or charges were to be taken into account in the calculation of export price'.
>
> Accordingly, there is a need to consider all the facts surrounding the exportation in determining an appropriate export price.
>
> Should the export price be modified please re-calculate the dumping margin for RAK/APEL.

6.2 Affirmed or new findings

As a result of its reinvestigation the Commission affirms its finding that the export price for RAK/APRIL should be determined under s269TAB(1)(c) using a deductive export price methodology.

6.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- RAK/APRIL's submission to the ADRP;
- *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA 205 [1995] (*Pilkington*);
- *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179 (21 November 1979) (*Drake*);
- *Statutory Interpretation in Australia*, 8ed, Pearce and Geddes;
- *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves and Weeks;
- RAK/APRIL visit report;
- BJ Ball visit report;
- Other case law.

6.4 Reasons for the Commissioner's decision

The Commission has found that:

- The scope of the Minister's discretion in s269TAB(1)(c) is broad, both in the matters to which he or she may have regard and the method used in determining export price (see section 6.4.1 below).
- The policy adopted by the Minister in exercising the discretion under s269TAB(1)(c) to calculate a deductive export price where prices to importers may be unreliable because of arms length issues is lawful and consistent with the statute and with relevant case law (*Drake* and *Pilkington*) (see section 6.4.2 below).
- RAK/APRIL has misconstrued the facts and the law when it claims that the Commission misapplied s269TAA(2) (see section 0 below).

The Commission has reassessed its recommendation in light of this reinvestigation and reaffirms the recommendation it made in REP 341 (see section 6.4.4 below).

6.4.1 The scope of the discretion in s269TAB(1)(c) is broad

RAK/APRIL's submission to the ADRP claims that the Commission misapplied s269TAB(1)(c). The narrow construction of s269TAB(1)(c) proposed by RAK/APRIL is necessary for its arguments concerning the Commission's assessment of arms length and determination of a deductive export price under that provision. The Commission has reviewed the claim and considers that RAK/APRIL's submission to the ADRP wrongly narrows the scope of s269TAB(1)(c).

RAK/APRIL concedes that "a broad discretion is provided for under section 269TAB(3)" where the Minister must have regard to "all relevant information".[65] However RAK/APRIL argues that the matters to which the Minister may have regard in determining a price under s269TAB(1)(c) is circumscribed because the Minister must have regard under that provision to "all the circumstances of the exportation".

The Commission does not accept that the discretion under s269TAB(1)(c) is materially circumscribed by the Minister having regard to "all the circumstances of the exportation" for the following reasons:

- The Full Court of the Federal Court has stated that, once s269TAB(1)(c) applies, the Minister has a broad discretion (the results of the Commission's researches are set out further below).[66]
- Case law states that the term in "all the circumstances" imports a "broad criterion"[67] that is necessarily wide and allows regard to a wide variety of factors.[68]
- Case law states that the phrase "have regard to" does not mean exclusive regard,[69] so a decision maker may have regard to other relevant matters.
- *Companhia Votorantium de Cellulose e Papel v Anti-Dumping Authority FCA 1048 [1996]* is not authority for RAK/APRIL's preferred definition of "exportation" (the results of the Commission's researches concerning *Companhia* and the scope of the term "exportation" are set out further below).
- There is no strict statutory dichotomy between circumstances of exportation and circumstances of importation as argued by RAK/APRIL (the results of the Commission's researches are set out further below).

The Minister has a broad discretion once s269TAB(1)(c) applies: Full Court in Pilkington

The appellant in *Pilkington* readily conceded that the Minister has a broad discretion under s269TAB(1)(c) and the Full Court proceeded on that basis.[70] In that case the Anti-Dumping Authority had applied a test to the determination of export price under s269TAB(1)(c) that was similar to the test under s269TAB(1)(a); the adoption of such a test as a matter of the discretion under s269TAB(1)(c) was not challenged.[71]

---

[65] RAK/APRIL submission to the ADRP at page 14.

[66] *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA 205 [1995], majority judgment at page 11 and elsewhere; Lee J in a minority judgment agreed with the reasons of the majority, see page 1 of Lee J's judgment.

[67] *Foster v Min for Customs* [2000] HCA 38 at [81].

[68] *W4 v Detective Constable Ayscough* [2016] NSWSC 1106 (17 August 2016) at [31].

[69] *Cavanagh v Nominal Defendant* (1958) 100 CLR 375 at 380; *Maritime Services Board (NSW) v Liquor Administration Board* (1990) 21 NSWLR 180 at 195; *Re Galanos and Dept of Immigration and Citizenship* [2010] AATA 1004.

[70] *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA 205 [1995], majority judgment at pages 10 to 12.

[71] *Pilkington*, majority judgment at pages 10 to 11.

The appellant argued however that once the ADA had decided to adopt that specific test for determining export price then the same considerations arose as under s269TAB(1)(a);[72] in particular the appellant argued that the ADA adopted a test for a category of charges to deduct, namely those "incurred after exportation", and then wrongly included a sales commission as such a charge. The court considered whether the test adopted by the ADA in this way "should take on the character of a statutory test and be subjected to the rigours of construction and application which apply to statutes"[73] as would be the case under s269TAB(1)(a).[74]

The court considered that the test under s269TAB(1)(c) should not be subjected to such rigours of construction. The court considered where words are used in a descriptive way by a decision maker exercising a discretion there is no statutory context that would require such an exercise in construction.[75] Further the court considered that to treat the decision maker's description of the test applied as it would a statute would confine the discretion.[76]

Companhia is not authority for RAK/APRIL's preferred definition of "exportation"

RAK/APRIL claims that in *Companhia* the "Full Court of the Federal Court has determined that the word 'export' as it is used in the Act must be given its common meaning" and that accordingly the definition from the Shorter Oxford English Dictionary should apply.[77] On that basis, RAK/APRIL argues, the circumstances of "exportation" should preclude anything downstream of exportation such as the circumstances of importation or sale of the goods by the importer.

The Full Court in *Companhia* made no such determination. RAK/APRIL's citation of *Companhia* is only to the minority judgment of Northrop J. The majority of the Full Court did not agree with Northrop J concerning the identity of the exporter in that case.[78]

In any event *Companhia* concerned the identification of the exporter under s269TAB(1) not the meaning of the term "exportation". Indeed, the majority observed that the terms "exportation" and "export" were also used in the Act but that no party had suggested that usage of those words in the Act cast any light on the use of the term "exporter" in s269TAB(1).[79]

---

[72] *Pilkington*, majority judgment at page 11.

[73] *Pilkington*, majority judgment at page 11.

[74] The court in *Pilkington* also ruled on similar facts for a different exporter where s269TAB(1)(a), not s269TAB(1)(c), applied. The court subjected the test under s269TAB(1)(a) to a rigorous exercise of construction, see *Pilkington*, majority judgment at pages 6 to 9.

[75] *Pilkington*, majority judgment at page 12.

[76] *Pilkington*, majority judgment at page 12.

[77] RAK/APRIL submission to the ADRP at page 14.

[78] Northrop J would have allowed the appeal; the majority of the Full Court, Wilcox and Nicholson JJ dismissed the appeal, agreeing with the trial judge, Finn J, and the Anti-Dumping Authority. The Commission notes that following Northrop J's reasoning, which it does not propose to do, would have had APRIL as the exporter in the current matter.

[79] Majority judgment, *Companhia Votorantium de Cellulose e Papel v AntiDumping Authority* FCA 1048 [1996].

Similarly, the Commission considers that usage of the term "exportation" in the Act means that, notwithstanding RAK/APRIL's attempts, there can be no easy extrapolation from the term "exporter" (even as that term was decided by the majority in *Companhia*) to the term "exportation". Clearly the Act requires that exporter and importer are distinct functions however, as set out elsewhere in this section, the Commission's researches indicate that usage of the term "exportation" in the context of the Act requires that there is no such dichotomy between circumstances of an exportation and circumstances of an importation.

No strict statutory dichotomy between circumstances of exportation and circumstances of importation

RAK/APRIL argues that circumstances of importation or circumstances of sale of the goods by an importer cannot be circumstances of the exportation.[80] The Commission has reviewed the usage of the term "exportation" in the Act and based on normal rules of statutory interpretation the Commission considers it clear that there is no strict statutory dichotomy of the nature argued by RAK/APRIL between circumstances of exportation and circumstances of importation.

Section 269TAE amply demonstrates that there is no strict statutory dichotomy between the terms "exportation" and "importation". Section 269TAE is concerned with the injurious effect on Australian industry of "the exportation" or "those exportations". The term "exportation" occurs 21 times in the section (in either the singular or plural). The term "importation" occurs once in the section in s269TAE(2A)(b) in one of the injury factors not to be attributed to an exportation. If, as RAK/APRIL claims, there is a strict statutory dichotomy between exportation and importation in s269TAB(1)(c) then that must also be true in s269TAE.[81] On that basis s269TAE would provide little or no assistance in determining whether the Australian industry had been injured because exportation alone (absent importation and subsequent sale by the importer) can have no injurious effect on the Australian industry. In short, RAK/APRIL's preferred interpretation of "exportation" would render s269TAE of no effect; the Commission considers that the legislature cannot have intended that and accordingly there must be no strict dichotomy as claimed by RAK/APRIL.[82]

In accordance with the rule of statutory interpretation that reference to a term in one part of a statute should be taken to have the same meaning in all parts of the statute, the Commission considers that the term "exportation" in s269TAB(1)(c) cannot have the narrow interpretation argued by RAK/APRIL.[83]

---

[80] RAK/APRIL submission to the ADRP at page 14.

[81] Reference to a term in one part of a statute should be taken to have the same meaning in all parts of the statute, see Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at [4.6].

[82] That interpretation would be contrary the general principle of statutory interpretation that all words must be given meaning and effect and that the courts are not at liberty to treat any word or sentence in statute as superfluous or insignificant; see Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at [2.26]; and among others *Commonwealth v Baume* (1905) 2 CLR 405 at 414, *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [71].

[83] See Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at [4.6].

6.4.2 The policy adopted in exercising the discretion under s269TAB(1)(c) is lawful and consistent with the legislation

The policy adopted by the Minister in exercising the discretion under s269TAB(1)(c)

In recommending how the Minister exercises the discretion in s269TAB(1)(c) the Commission has regard to all the circumstances of the exportation including having regard to circumstances indicating that the price paid by the importer may have been rendered unreliable by non arms length transactions. The Commission endeavours in every case to obtain an export price that is representative of a reliable export price that is unaffected by any association or compensatory arrangement.[84] As a matter of public record, over a significant number of previous cases, the Commission's policy under s269TAB(1)(c) is to assess whether transactions are arms length,[85] including whether the circumstances described in s269TAA(1) and s269TAA(2) pertain to the case in hand.[86]

If any of the circumstances described in s269TAA(1) and s269TAA(2) do pertain to the case in hand then the Commission's policy is generally to recommend that the Minister determine the export price using a methodology that is analogous to the methodology used under subsection 269TAB(1)(b), namely the price at which the goods are first resold

---

[84] The Manual at page 28.

[85] See for example the following cases where export prices have been assessed under s269TAB(1)(c):

Case Number	References
295	• Report 295, pages 8 to 9
365, 366, 367, 368, 371, 372, 374, 375 and 376	• Report 365, 366, 367, 368, 371, 372, 374, 375 and 376, pages 19, 21, 24 and 45 • Review 368, Verification Visit Report – Importer, CITIC Australia Steel Products Pty Ltd, pages 6 to 7
379	• Verification Visit Report – Importer Steelforce Trading Pty Ltd, pages 7 to 8 • Report 379, pages 20 to 21
239	• Exporter Visit Report - Changzhou Trina Solar Energy Co., Ltd And Trina Solar (Changzhou) Science And Technology Co., Ltd, pages 23 to 25 • Termination Report 239, pages 35, 44
190	• Report 190, pages 66, 68, 86 • Importer Visit Report - OneSteel Trading Pty Ltd, pages 29, 32
159	• Termination Report 159B, page 26 • Exporter Visit Report Indonesia, Pt Asahimas Flat Glass Tbk (AMG) And AGC Flat Glass Asia Pacific Pte Ltd (AFAP), pages 24 to 26
352	• Verification Visit Report – Importer, Milena Australia Pty Ltd, pages 8 to 9
238	• Report 238, pages 46 to 47
378	• Verification Report – Exporter, Zhejiang Yueling Co., Ltd, pages 7 to 8 • Report 378, page 47
198	• Exporter Visit Report, Shandong Iron And Steel Company Limited, page 19
276	• Visit Report – Exporter, Feger Di Gerardo Ferraioli Spa, pages 20 to 21 • Visit Report – Exporter, La Doria S.p.A, page 23 • Report 276, pages 35 and 37
217	• Visit Report – Exporter, De Clemente Conserve S.P.A., pages 36 to 38
177	• Export Visit Report, Dalian Steelforce Hi Tech Co Ltd, pages 16 to 17 • Huludau City Steel Pipe Industrial Co Ltd, pages 17 to 18 • Hengshui Jinghua Steel Pipe Co., Ltd. Exporter Visit Report, page 21

[86] The Commission considers that to depart in s269TAB(1)(c) from the important principle of ensuring that transactions are arms length would invite exporters to drive a horse and carriage through the Act by arranging their transactions to come within s269TAB(1)(c).

to an independent buyer,[87] usually by the importer, less the deductions described in s269TAB(2). The Commission is not bound to make such a recommendation and will not make such a recommendation if other circumstances of the exportation indicate that such a recommendation is not the appropriate one.

The Minister, or his or her delegate, has adopted the above policy in making his or her determinations under s269TAA(1)(c) in every case where it has been recommended.

The Commission considers that its policy is consistent with the statute in that it allows the Commission to take into account the relevant circumstances of the exportation, it does not require the Commission to take into account irrelevant circumstances, and it does not serve a purpose foreign to the purpose for which the discretionary power was created. Case law states that there are powerful considerations in favour of adopting a guiding policy in exercising a discretion, these include consistency and transparency. As stated by Brenner J[88] in the leading case on this point, *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179 (21 November 1979), (emphasis added):

> Sections 12 and 13 of the Migration Act require the Minister to determine whether or not to deport an immigrant or alien whose criminal conviction exposes him to that jeopardy. *The Minister is free to exercise that power without adopting a policy as to the standards and values to which he will have regard in deciding particular cases. He is equally free, in point of law, to adopt such a policy in order to guide him in the exercise of the statutory discretion, provided the policy is consistent with the statute.* In *Stringer v. Minister of Housing and Local Government* [1970] 1 WLR 1281, Cooke J (at p. 1298) held the effect of the relevant authorities to be -
>
> > "that a Minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy in regard to matters which are relevant to those decisions, provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case as it comes up for decision."
>
> *There are powerful considerations in favour of a Minister adopting a guiding policy.* It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another. Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.
>
> *Of course, a policy must be consistent with the statute. It must allow the Minister to take into account the relevant circumstances, it must not require him to take into account irrelevant circumstances, and it must not serve a purpose foreign to the purpose for which the discretionary power was created.* A policy which contravenes these criteria would be inconsistent with the statute (see *Murphyores Incorporated Ltd v The Commonwealth* (1976) 136 CLR I; Drake's case, supra, at p 589, and the cases there cited). Also, it would be inconsistent with ss 12 and 13 of the Migration Act if the Minister's policy sought to preclude consideration of relevant arguments running counter to an adopted policy which might be reasonably advanced in particular cases. The discretions reposed in the Minister

---

[87] See also Anti-Dumping Agreement at Article 2.3.

[88] Brennan J, then a Federal Court judge, served as President of the Administrative Appeals Tribunal before being appointed to the High Court in 1981 where he served until 1998.

> by these sections cannot be exercised according to broad and binding rules (as some discretions may be; see, e.g., *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149). The Minister must decide each of the cases under ss 12 and 13 on its merits. His discretion cannot be so truncated by a policy as to preclude consideration of the merits of specified classes of cases. A fetter of that kind would be objectionable, even though it were adopted by the Minister on his own initiative. A Minister's policy, formed for the purposes of ss 12 and 13 of the Migration Act, must leave him free to consider the unique circumstances of each case, and no part of a lawful policy can determine in advance the decision which the Minister will make in the circumstances of a given case.

The Commission considers that consistent decision making is relevant, not just between different decisions made under s269TAB(1)(c), but also between the determination of export price under s269TAB(1)(c) and the determination of export price under s269TAB(1)(a) and s269TAB(1)(b). Assessing and curing arms length issues with an export price is no less important under s269TAB(1)(c); the Commission considers that its policy of how it assesses and cures arms length issues under s269TAB(1)(c) (namely in a way that is consistent with its approach under s269TAA, s269TAB(1)(a) and s269TAB(1)(b)) is appropriate and informative of the standards and values that the Commission usually applies.[89]

The Commission does not apply its policy under s269TAB(1)(c) as a broad and binding rule and each case is decided on its merits. The policy leaves the Commission free to consider the unique circumstances of each case and it does not determine in advance the recommendation that the Commission will make in the circumstances of a given case.[90]

The Commission considers that its policy under s269TAB(1)(c) comes within the broad scope of the discretion in s269TAB(1)(c) (described in section 6.4.1 above).

The policy is consistent with the exercise of the discretion accepted by the Full Court in Pilkington

The Commission observes that the policy is consistent with the exercise of the discretion accepted by the Full Court in *Pilkington*. In *Pilkington* the Anti-Dumping Authority applied a test in determining export price under s269TAB(1)(c) that was similar to the test under s269TAB(1)(a). The adoption of that test, as a matter of the discretion under s269TAB(1)(c), was not challenged[91] in that case and the Full Court clearly accepted that this was permissible under s269TAB(1)(c).[92]

Goods exported to Australia otherwise than by the exporter and purchased by the importer from the exporter

Whether the goods have been exported to Australia otherwise than by the exporter and purchased by the importer from the exporter (s269TAA(2)(a) and s269TAB(1)(b)(i)) are also circumstances of the exportation in terms of s269TAB(1)(c). The Commission found

---

[89] *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179 (21 November 1979).

[90] *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179 (21 November 1979).

[91] *Pilkington*, majority judgment at pages 10 to 11.

[92] See generally *Pilkington*, majority judgment at pages 10 to 12.

in RAK/APRIL's case that A4 copy paper was exported to Australia otherwise than by the exporter and was not purchased by BJ Ball, the importer, from the exporter.[93]

The exercise of the discretion in s269TAB(1)(c) is not necessarily constrained by whether or not the requirements of s269TAA(2)(a) and s269TAB(1)(b)(i) have been met although in a given case these circumstances may be relevant to the Commission's determination of export price under s269TAB(1)(c). The Full Court in *Pilkington* accepted that the discretion in s269TAB(1)(c) permitted a test "similar to the test under s269TAB(1)(a)" notwithstanding that the goods were not purchased by the importer from the exporter (the exporter and importer were the same entity) and so the condition in s269TAB(1)(a)(i) was not satisfied.[94]

The Commission has had regard to the circumstances of the exportation described in s269TAA(2)(a) and s269TAB(1)(b)(i) during this reinvestigation and does not consider that those circumstances warrant a departure from determining an export price using a deductive methodology as it did in REP 341 (see below at section 6.4.4).

The ADRP and the policy adopted by the Minister in exercising the discretion under s269TAB(1)(c)

In *Drake* Brennan J also considered how the AAT, as the body undertaking merits review of the Minister's exercise of discretion, should treat the policy adopted by the Minister. The Commission considers that Brennan J's reasons may assist the ADRP in how it treats the policy adopted by the Minister in exercising the discretion under s269TAB(1)(c).

Brennan J stated that, in point of law, the merits review body was free to apply or not to apply the policy adopted by the Minister. However in the interests of consistency in decisions, and recognising the review body's limited policy role, Brennan J ruled that where the Minister's policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case would be considered by the AAT but cogent reasons would have to be shown against its application.

Some relevant passages from *Drake* are set out below (emphasis added):[95]

> It is one thing for the Minister to apply his own policy in deciding cases; it is another thing for the Tribunal to apply it. In point of law, the Tribunal is as free as the Minister to apply or not to apply that policy. The Tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the Tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.
>
> In fulfilling its function, the Tribunal, being independent of the Minister, is free to adopt reasoning entirely different from the reasoning which led to the making of the decision under review. But it is not bound to do so. Of course, the Tribunal would be in error to apply an unlawful Ministerial policy to cases it decides, for an application of unlawful policy vitiates the consequential decision. That problem does not arise in the present case.
>
> If the Tribunal applies Ministerial policy, it is because of the assistance which the policy can furnish in arriving at the preferable decision in the circumstances of the case as they appear to the Tribunal. One of the factors to be considered in arriving at the preferable decision in a particular case is its consistency with other decisions in comparable cases,

---

[93] REP 341 at section 6.9.7.1.

[94] *Pilkington*, majority judgment at page 10.

[95] *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179 (21 November 1979).

> and one of the most useful aids in achieving consistency is a guiding policy. An appropriate guiding policy should thus be applied, but what policy should it be?
>
> …
>
> When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. *Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application*, especially if the policy is shown to have been exposed to Parliamentary scrutiny.
>
> The general practice of the Tribunal will not preclude the Tribunal from making appropriate observations on Ministerial policy, and thus contributing the benefit of its experience to the growth or modification of general policy; but the practice is intended to leave to the Minister the political responsibility for broad policy, to permit the Tribunal to function as an adjudicative tribunal rather than as a political policy-maker, and to facilitate the making of consistent decisions in the exercise of the same discretionary power.
>
> The general practice will require the Tribunal to determine whether the policy is lawful, not in order to supervise the exercise by the Minister of his discretion, but in order to determine whether the policy is appropriate for application by the Tribunal in making its own decision on review.

Brennan J's statements in *Drake* remain the position in the AAT. That position has been stated in the leading Australian text on judicial review in the following terms:[96]

> The correct or preferable decision is not to reject lawful government policy unless it is utterly indefensible, nor to refuse to apply it in a particular case unless the demands of justice in the individual case completely overwhelm the countervailing need for consistency in the application of government discretionary powers.

The Commission observes that there are differences between the AAT and the ADRP. For example the ADRP is not, like the AAT, a "generalist body" with a "comparative lack of relevant expertise".[97] Nonetheless the ADRP, like the AAT, reviews the exercise of statutory discretions on the merits where the exercise of those discretions is frequently guided by policies. Other salient similarities include:[98]

- The ADRP may face difficulties undertaking policy review or formulation in a setting where the issues before it may be of narrow compass and controlled by the parties applying for review;
- The ADRP may not have adequate staff and other resources to review and formulate policy;
- There would be extreme undesirability in having two policies governing the area of anti-dumping, one for cases that are reviewed by the ADRP and one for cases that are not;

---

[96] *Judicial Review of Administrative Action and Government Liability*, 6ed at page 174.

[97] *Judicial Review of Administrative Action and Government Liability*, 6ed at page 174.

[98] *Judicial Review of Administrative Action and Government Liability*, 6ed at page 174.

- Policies in anti-dumping are developed and maintained in consultation with relevantly affected interest groups, for example in the International Trade Remedies Forum and revisions to the Manual.

6.4.3 RAK/APRIL has misconstrued the facts and the law when it claims that the Commission misapplied s269TAA(2)

6.4.3.1 RAK/APRIL misconstrues s269TAA(2)

RAK/APRIL argues that the Commission misapplied s269TAA(2) in its case. RAK/APRIL argues that s269TAA(2) provides only an indication of the matters in s269TAA(1)(c) and that such an indication is not "proof positive" that the requirements of s269TAA(1)(c) are met.[99] RAK/APRIL argues, in effect, that something more needs to be shown to establish that s269TAA(1)(c) is satisfied. RAK/APRIL claims in support a passage from the practice section of chapter 5 of the Manual that states sales at a loss are "an indicator only" that a buyer may have been reimbursed.[100]

The Commission considers it clear on normal principles of statutory interpretation that s269TAA(2) does not provide an indication only of the matters in s269TAA(1)(c) and it is not required that more must be shown to establish that s269TAA(1)(c) is satisfied.

The Commission considers that the term "indicating" in s269TAA(2) should be read in its ordinary sense[101] to mean showing or making known.[102] Using the term in its ordinary sense the Minister may treat the sale of goods at a loss as showing or making known that "the importer or an associate of the importer will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or a part of the price" for purposes of s269TAA(1)(c). If this is shown or made known then the Minister can only be of the opinion for purposes of s269TAA(1)(c) that the importer or an associate of the importer will be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or a part of the price. Accordingly, if the discretion in s269TAA(2) is available and the Minister exercises that discretion then s269TAA(1)(c) will be satisfied and the transaction "shall not be treated as an arms length transaction" (s269TAA(1)).

It is inconvenient to RAK/APRIL's preferred interpretation of s269TAA(2) that a statutory discretion must be invoked by the Minister to get merely an indication that s269TAA(1)(c) is satisfied and that more must be shown when this same ability would be open to the Commission absent the discretion. It would be open to the Commission during the course of an investigation to take sales at a loss as an indication plus other evidence to establish that s269TAA(1)(c) was satisfied without any recourse to the discretion in s269TAA(2). On that basis the statutory discretion would add nothing and s269TAA(2) would be rendered superfluous. Accordingly that interpretation would be contrary the general principle of statutory interpretation that all words must be given meaning and effect and

---

[99] RAK/APRIL's submission to the ADRP at page 5.

[100] Manual at section 5.3, page 27.

[101] *R v Peters* (1886) 16 QBD 636 at 641 as cited in *Statutory Interpretation in Australia*, 8ed, Pearce and Geddes at [3.30].

[102] Macquarie Dictionary, definition of "indicate" at definition 3.

that the courts are not at liberty to treat any word or sentence in statute as superfluous or insignificant.[103]

RAK/APRIL cites *Powerlift* and *Nordland* in support of its preferred interpretation of the legislation. However the Commission considers that judicial comment in *Powerlift* and *Nordland* (discussed in detail in section 4.4.2) is primarily concerned with the operation of s269TAA(1) and so the Commission considers that these cases offer only limited assistance where, as here, s269TAB(1)(c) is the operative provision.

The Manual does not provide an interpretation of s269TAA by stating that sales at a loss are "an indicator only"

RAK/APRIL has seized upon a coincidence of language between section 5.3 of the Manual and s269TAA(2) to attribute its preferred interpretation of s269TAA(2) to the Commission. Section 5.3 of the Manual provides guidance as to the Commission's practice in relation to arms length issues, not in relation to the Commission's position on the effect of s269TAA(2). It is not the Commission's position that s269TAA(2) provides an indicator only that s269TAA(1)(c) is satisfied.

The operative provision in determining arms length for RAK/APRIL in REP 341 was s269TAB(1)(c), not s269TAA(2)

The Commission observes in any event that the operative provision in making its arms length assessment for RAK/APRIL in REP 341 was not s269TAA(2) but s269TAB(1)(c). Section 269TAA(2) was not the operative provision because the requirement for exercising the discretion in s269TAA(2)(a) was not satisfied.[104]

As set out in section 6.4.2 above, the Commission's policy under s269TAB(1)(c) is to have regard to the matters in s269TAA in assessing whether there is a risk that transactions are not arms length. The Commission disagrees with RAK/APRIL's interpretation of s269TAA(2) for the reasons stated. However even if RAK/APRIL's interpretation is correct the Commission considers that, consistent with the ruling in *Pilkington*, once s269TAB(1)(c) applies the discretion is broad and the description of the exercise of that discretion should not be subject to the rigours of construction and application that would apply to s269TAA; to do so would confine the discretion conferred by s269TAB(1)(c).[105]

6.4.3.2 RAK/APRIL misconstrues the facts

RAK/APRIL concludes its submission on s269TAA(2) with the claim that there is evidence that established that the transactions between RAK/APRIL and BJ Ball were arms length:[106]

> … the Assistant Minister has failed to consider, or to properly take into account, the evidence and inquiry that established that the transactions were entered into on a commercial basis, that APRIL did not make any such reimbursements or provide any

---

[103] See Pearce and Geddes, *Statutory Interpretation in Australia*, 8ed at [2.26]; and among others *Commonwealth v Baume* (1905) 2 CLR 405 at 414, *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [71].

[104] REP 341 at section 6.9.7.1.

[105] *Pilkington*, majority judgment at pages 10 to 12.

[106] RAK/APRIL's submission to the ADRP at page 13.

> compensation or benefit with respect to the price it charged to BJ Ball, that BJ Ball was not in receipt of any reimbursements, compensation or benefit with respect to the price it paid APRIL for the subject goods, and that there were no agreements for that to happen in the future. In short, there could be no valid suspicions about the commercial legitimacy of the transactions that took place nor about the parties' future intentions.

The Commission's reinvestigation indicates that there was no such evidence. The "evidence" cited by RAK/APRIL consists of statements by verification teams at preliminary stages of the investigation in which those teams state that no evidence was found that indicates that transactions were not arms length. RAK/APRIL argues, in effect, that no evidence found of non arms length transactions positively proves that all transactions were arms length.

Neither verification report cited by RAK/APRIL made a finding that transactions between RAK/APRIL and BJ Ball were arms length. Both reports state on the cover page that the report and the views or recommendations contained are subject to review by the case management team and may not reflect the final position of the Commission. The BJ Ball visit report states four times that its findings are "subject to further inquiries"; the RAK/APRIL visit report expressly states that its findings are "preliminary" and uses that term 11 times.

It is not clear how some material cited by RAK/APRIL is relevant to the question of whether prices to the importer were arms length.

The following table provides the Commission's description of the matters claimed by RAK/APRIL to be evidence indicating that the transactions were arms length.

Claimed by RAK/APRIL to be evidence indicating that the transactions were arms length	**Description of the material claimed by RAK/APRIL to be evidence that the transactions were arms length**
A complete sales listing of APRIL's sales to Australia (including those to BJ Ball), which was verified as being complete, relevant and accurate and which found no evidence that APRIL's sales to Australia were infected by any of the issues identified in Section 269TAA(1)(a) – (c).[107] A downward verification of APRIL's sales to Australia that confirmed that the information in APRIL's Australian sales spreadsheet was accurate.[108]	These claims appear to make the same claim in different ways – both describe the downward verification of APRIL's sales to Australia. The same material is claimed as evidence for both. RAK/APRIL states only that the verification team found no evidence of the matters in s269TAA(1) during its downward verification exercise. This is not evidence that the transactions were arms length. It is not clear that the matters in s269TAA(1) would come to light during the downward verification of a exporter's export sales (or a verification generally). In this respect the Commission notes the following: • The matter in s269TAA(1)(b), being an appearance that price is influenced by a

[107] Entry 1 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the APRIL visit report at page 9.

[108] Entry 2 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the APRIL visit report at page 9.

Claimed by RAK/APRIL to be evidence indicating that the transactions were arms length	Description of the material claimed by RAK/APRIL to be evidence that the transactions were arms length
	commercial or other relationship, would not be evident from sales listings. • The matters in ss269TAA(1)(b) and (c), to the extent that these matters involved associates of the exporter, may well escape the attention of a verification team. In this respect the Commission notes that there are a very large number of companies in the RAK/APRIL group (not even counting the association of RAK/APRIL with Greenpoint/Asia Symbol through the RGE group of companies). RAK/APRIL was unwilling to allow scrutiny of this by interested parties during the investigation insisting that the identity, and even the number of these associates, was highly confidential. • A well-resourced exporter that determined not to disclose adverse facts or data to the Commission might well succeed in doing so (notwithstanding RAK/APRIL's glowing description of the Commission's verification process).
A complete CTMS of APRIL's product to Australia which was verified as being complete, relevant and accurate, and which found no evidence that APRIL's sales to Australia were infected by any of the issues identified in Section 269TAA(1)(a) – (c).[109]	It is unclear to the Commission how the exercise of determining RAK/APRIL's CTMS relates to the matters in s269TAA(1)(a)-(c) for purposes of assessing arms length export prices. An exporter's CTMS is only used in determining normal values.[110]
A discussion during the verification with representatives of the pricing committee regarding how the price is set, and whether any financial assistance is provided to the importer, which contributed to the conclusion	The Commission reached no such conclusion and none is recorded in the verification agenda or any other part of Confidential Appendix 1 to RAK/APRIL's visit report. RAK/APRIL provided no information or document that would have caused the Commission to reach such a conclusion.

[109] Entry 3 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the APRIL visit report at page 11.

[110] Manual at sections 7.3, 8.3, 9.3.

Claimed by RAK/APRIL to be evidence indicating that the transactions were arms length	Description of the material claimed by RAK/APRIL to be evidence that the transactions were arms length
that APRIL's sales to Australia were arm's length.[111]	
A verification of BJ Ball which found no actual evidence that would indicate APRIL's sales to BJ Ball were not arm's length for the purposes of Section 269TAA(1)(a) – (c).[112]	No page reference is given by RAK/APRIL however the Commission notes that: • RAK/APRIL's claim is not that there was a positive finding of no arms length only rather that the Commission did not find evidence indicating sales were not arms length. • The Commission did find evidence that it treated as indicating that APRIL's sales to BJ Ball were not arm's length for the purposes of determining export price under s269TAB(1)(c).[113]
The fact that APRIL and BJ Ball are separate, independent entities, which operate subject to their own commercial imperatives.[114] The fact that APRIL and BJ Ball have no corporate involvement with each other.[115] The fact that APRIL and BJ Ball have no common or related family members holding shares, cross-interests or positions of influence in both companies.[116]	The Commission considers that these claims make the same claim in different ways. The same material is claimed as evidence for all. The RAK/APRIL verification team made no such findings, rather the verification team merely:[117] • "did not identify any Australian customers that may be related to APRIL". • "found no evidence that … price was influenced" by a commercial or other relationship. The BJ Ball verification team made no such findings, rather the verification team merely:[118]

[111] Entry 4 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the verification agenda provided by the Commission, which is presumably included in the Verification work program which is Confidential Appendix 1 to APRIL's verification report.

[112] Entry 5 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the BJ Ball visit report, no page reference given.

[113] BJ Ball visit report at page 6.

[114] Entry 6 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the APRIL visit report at page 9 and the BJ Ball visit report at page 6.

[115] Entry 7 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the APRIL visit report at page 9 and the BJ Ball visit report at page 6.

[116] Entry 8 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; refers to the APRIL visit report at page 9 and the BJ Ball visit report at page 6.

[117] APRIL visit report at page 9.

[118] BJ Ball visit report at page 6.

Claimed by RAK/APRIL to be evidence indicating that the transactions were arms length	Description of the material claimed by RAK/APRIL to be evidence that the transactions were arms length
	• "did not find evidence that BJ Ball is related to its suppliers of A4 copy paper". • "found no direct evidence that … price was influenced" by a commercial or other relationship.
The fact that BJ Ball was purchased by Australian Paper during the investigation, prior to the finding being made that BJ Ball's sales were sold at a loss.[119]	The relevance of this to the question of arms length during the investigation period is unclear and RAK/APRIL's claims are speculative at best. RAK/APRIL: • Appears to argue that BJ Ball was in negotiations to merge with Australian Paper during the time it was unprofitable.[120] It is not at all clear that this is the case, the investigation period was 2015 and the first news of the merger was mid 2016.[121] • Argues that its unprofitability was to gain market share so it could be more attractive in the sales process.[122] The Commission considers that an unprofitable company would rather be distinctly unattractive to a potential buyer. • Argues that it would be helpful to BJ Ball and the Australian industry to have a dumping finding against APRIL.[123] If this were the case RAK/APRIL does not explain why BJ Ball executives argued to the Commission in July 2016 that there was no dumping.[124] RAK/APRIL's claims are contradicted by findings by the ACCC in October 2016 that the Australian paper / BJ Ball merger together with anti-dumping

[119] Entry 9 in the table at page 8-9 of RAK/APRIL's submission to the ADRP; no reference given.

[120] Page 9 of RAK/APRIL's submission to the ADRP.

[121] RAK/APRIL's submission to the ADRP at page 9.

[122] RAK/APRIL's submission to the ADRP at page 9.

[123] RAK/APRIL's submission to the ADRP at page 9.

[124] BJ Ball visit report at page 8.

Claimed by RAK/APRIL to be evidence indicating that the transactions were arms length	Description of the material claimed by RAK/APRIL to be evidence that the transactions were arms length
	measures would not have any substantive effect on the market.[125]

6.4.4 Reassessment of the recommendation under s269TAB(1)(c) in light of the reinvestigation

The Commission has reassessed the recommendation it made concerning RAK/APRIL under s269TAB(1)(c) in REP 341 in light of the reinvestigation. The Commission reaffirms the recommendation it made in REP 341 taking into account all the circumstances of the exportation. The Commission considers that the following circumstances are relevant:

- The importer made significant and sustained losses on sales of A4 copy paper exported by RAK/APRIL.[126]
- The exporter has been unable to point to or provide evidence that transactions between it and the importer were arms length (despite its unsubstantiated claims that there was such evidence).[127]
- There are a very large number of companies associated with the exporter and the exporter was unwilling to allow scrutiny of this by interested parties during the investigation insisting that the identity, and even the number of these associates, was highly confidential.[128]

The Commission considers it prudent to exercise a degree of scepticism in the face of unsubstantiated claims by entities that have significant commercial interests in the Commission's recommendations. In circumstances where the Commission has no powers to compel production of information or documents, the Commission considers that the discretion in s269TAB(1)(c) (and elsewhere in the Act) allows the Minister to address substantial evidential gaps that may result.

[125] See ACCC mergers register at http://registers.accc.gov.au/content/index.phtml/itemId/1199191/fromItemId/751046.

[126] REP 341 at section 6.9.7.1.

[127] RAK/APRIL's submission to the ADRP.

[128] Confidential document provided to the Commission showing the companies in the APRIL group.

7 DOUBLE A

7.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to Double A is stated in the following terms (footnote omitted):

> The dumping margin has been calculated using the exchange rates relating to the date of invoice for the export shipments to Australia.
>
> S.269TAF of the Act provides that if required, the currency conversion should be undertaken using the date of the transaction, in the opinion of the Minister, which best establishes the material terms of the sale of the exported goods. It also provides that where there has been a sustained movement in the rate of exchange between those currencies, the Minister may specify a day to be used for the purposes of the comparison, and which can be used for a period of up to 60 days. This process may be repeated. This is to avoid circumstances of what the Anti-Dumping Manual refers to as dumping of a "technical nature".
>
> I have reviewed the methodology used by the Commission to assess whether there has been a sustained movement in the currency and its conclusions are based on a comparison of the previous 8 weeks (to the date of invoice) on a moving average basis. I understand that this methodology has also been used in a previous investigation.
>
> I have examined the evidence provided by the applicant regarding the exchange rates from August 2014 (noting this is outside the investigation period) until 31 December 2015. Prima facie, it reveals a substantial (and sustained) movement from late in 2014 until midway through April 2015 and some short-term volatility in July 2015. The chart provided by the applicant details the daily plot of exchange rates as well as plots for the moving averages for 60 and 90 days.
>
> Given these analyses reveal quite different outcomes, I require the reinvestigation of the finding by the Commission in relation to whether there has been a sustained movement in the exchange rate, particularly in relation to the period late 2014 until April 2015, and whether s.269TAF(4) of the Act applies. In relation to s.269TAF(1) the date which establishes the material terms of the sale, remains as stated in REP 341, that is, the invoice date.
>
> Should the currency conversion be undertaken under s.269TAF(4) for some part of the investigation period and hence modify the normal value or export price for this period, please re-calculate the dumping margin.

7.2 Affirmed or new findings

As a result of its reinvestigation the Commission affirms its finding that s269TAF(4) of the Act does not apply to the THB / AUD rate during the A4 copy paper investigation period.

7.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- Double A's submission to the ADRP;
- The excel spreadsheet graph provided to the ADRP showing the THB / AUD exchange rate and 60, 90 day moving averages;
- RBA THB / AUD exchange rates for the period November 2014 to December 2015 inclusive.

7.4 Reasons for the Commissioner's decision

7.4.1 Chart based analysis

The Commission has reviewed the chart referred to by the ADRP (**THB / AUD chart**) showing the THB / AUD exchange rate and the underlying data. The Commission has reproduced the THB / AUD chart below.

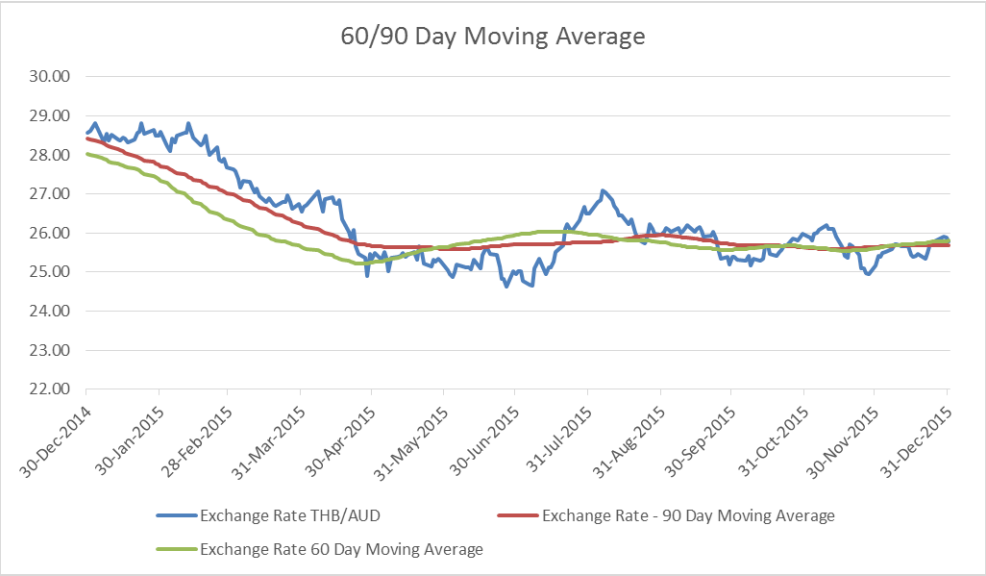


Figure 2 THB / AUD chart (uncorrected)

The Commission believes that the THB / AUD chart was produced as a working document by Commission staff during the Commission's visit to Double A's Thailand premises in September 2016. The THB / AUD chart was not published or relied upon by the Commission. There are a number of issues with the THB / AUD chart:

- The horizontal axis starts at 30 December 2014 however the THB / AUD exchange rate data shown in the blue graph is the exchange rate data starting from 7 October 2017. The resulting, and incorrect, impression is that there was a sustained change in the THB / AUD rate during January to April 2017.
- The 60 and 90 day moving averages are based on the days that the RBA report exchange rates. The RBA does not report exchange rates on weekends or public holidays. As a result the 60 day moving average covers a period of approximately 87 calendar days and the 90 day moving average covers a period of approximately 130 calendar days.
- The 60 and 90 day moving averages are lagged in that the averages are for the relevant period prior to the relevant date, ie the 60 day moving average for a date, *t*, is the average of all observations from *t-60* until *t-1*. Generally a moving average would be centred, ie a 60 day moving average for date *t* would be the average of all observations from *t-30* to *t+29*. A lagged moving average, particularly if it is not made clear that it is lagged, would tend to overemphasise historical observations.

The Commission has corrected the THB / AUD chart for the issues identified and the following corrected chart is the result.

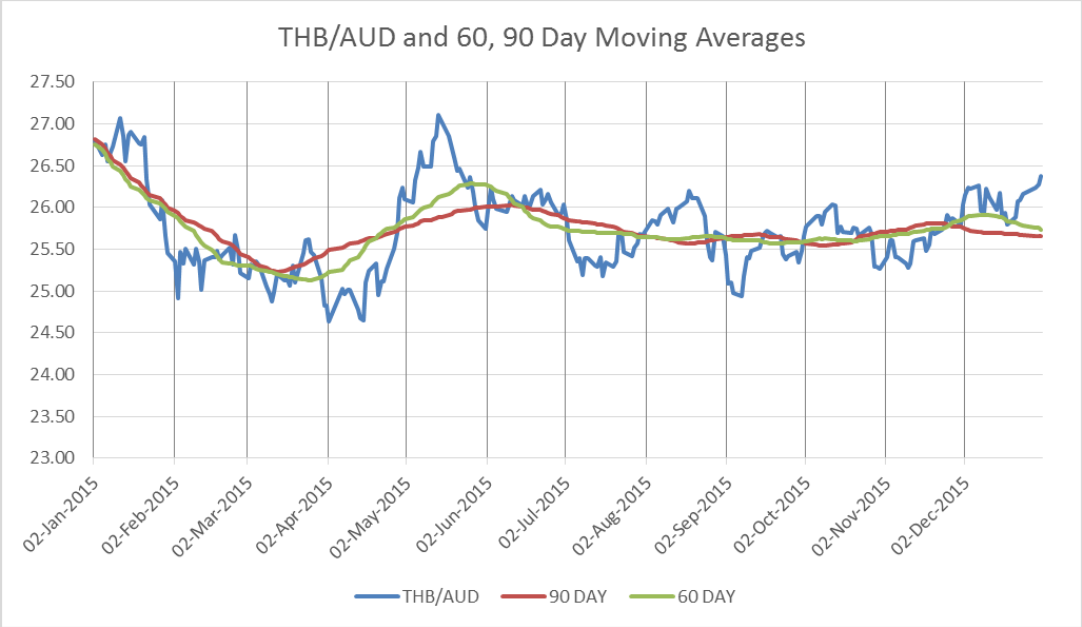


Figure 3 corrected THB / AUD chart

The Commission also observes that the vertical axis of the THB / AUD chart starts at 22 THB. Setting the vertical axis at a value above zero can be useful for observing how different variables interact however it tends to overemphasise the magnitude of changes in observed variables. For this reason the Commission's normal practice is to start the vertical axis at zero and, if it does not do so, to expressly note that it has not done so.

The Commission has recharted the THB / AUD chart with the vertical axis starting at zero (without the moving averages and starting in November 2014) (**zeroed THB / AUD chart**). The result is below.

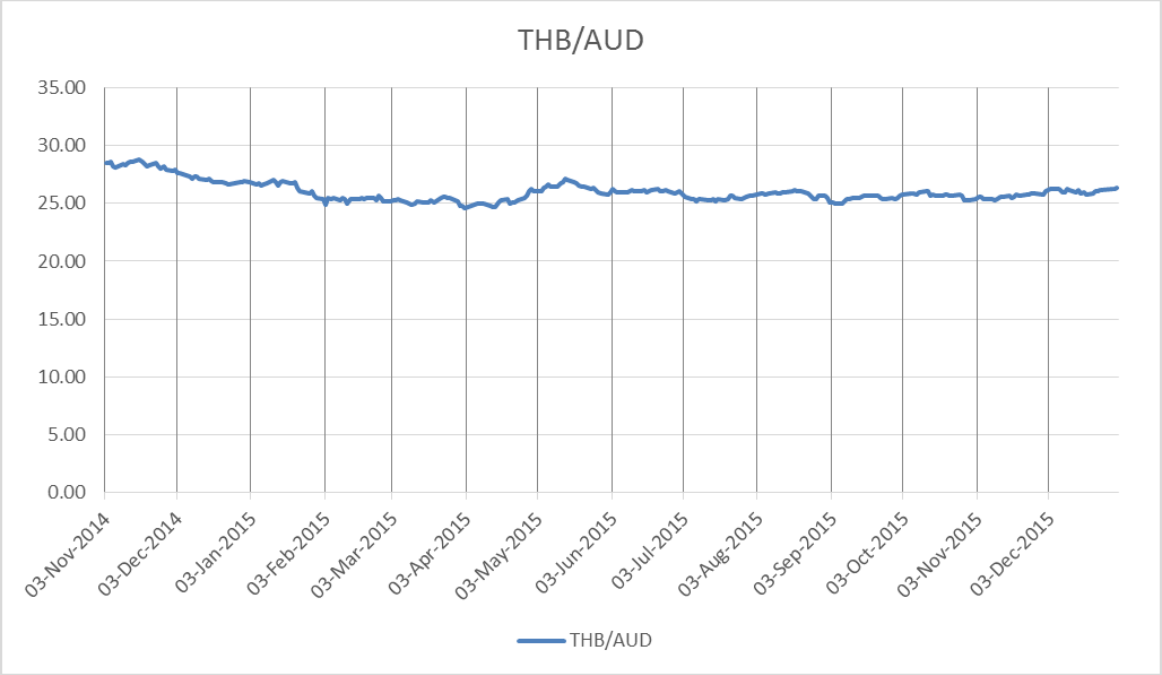


Figure 4 THB / AUD chart, zeroed vertical axis, start 3 November 2014

The Anti-Dumping Agreement and s269TAF allow an exporter 60 days to adjust its export prices in the event of a sustained foreign exchange movement.[129] On that basis the assessment of a sustained foreign exchange movement for the A4 copy paper investigation's 2015 investigation period would look back no further than 60 days, ie to the start of November 2014. Accordingly the Commission has included November and December 2014 in the zeroed THB / AUD chart.

The zeroed THB / AUD chart indicates that the relevant movements in the THB / AUD exchange rates, including those 60 days prior to the 2015 investigation period, are much more muted than they appear in charts where the vertical access is not zeroed.

The Commission has endeavoured to chart the extent of THB / AUD movements over any prior eight week period during the A4 copy paper investigation period (consistent with the Commission's analysis during the A4 copy paper investigation). The following chart shows the THB / AUD exchange rate and the difference in that rate compared to the prior eight weeks.[130] The chart shows that the greatest change in the THB / AUD rate over an eight week period, almost six per cent, was during the eight week period that ended in early February 2015. The chart below shows that that change was not sustained.

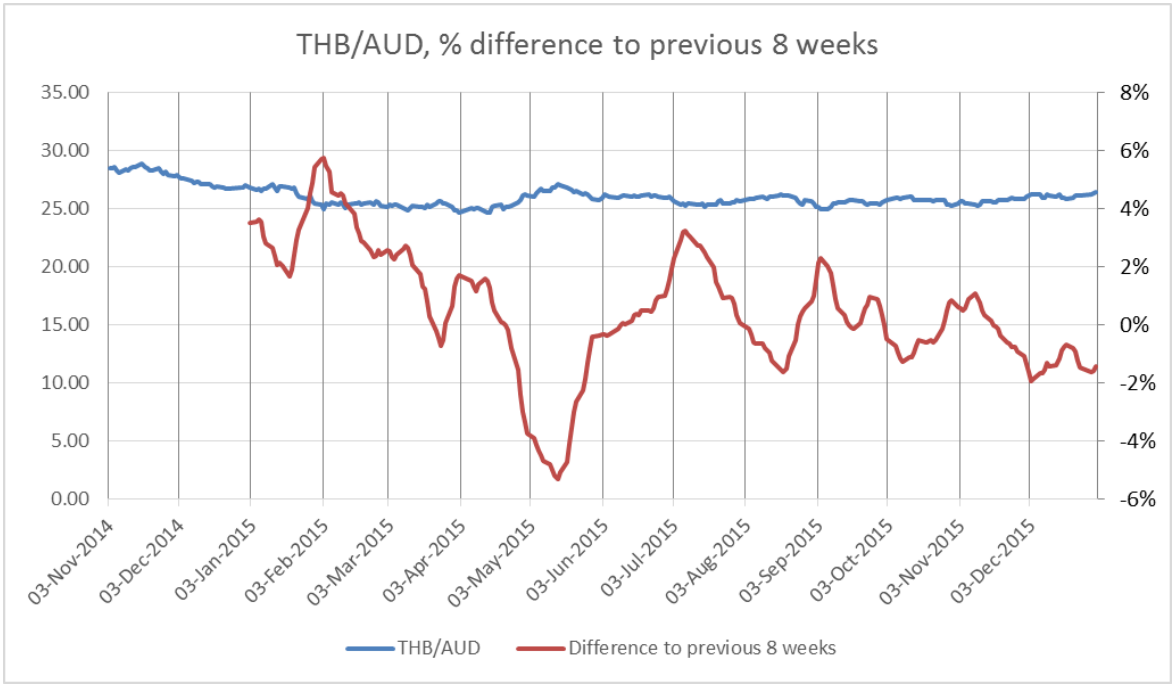


Figure 5 THB / AUD exchange rate and percentage difference to previous eight weeks

[129] The Commission's practice in assessing whether or not the rate of exchange has undergone a sustained movement compares an exchange rate (averaged over a week) with an exchange rate averaged over the previous eight weeks. This period of eight weeks (ie 56 days) approximates the 60 day period of time in s269TAF and in Art 2.4.1 in the Anti-Dumping Agreement. The United States *Enforcement and Compliance Antidumping Manual* also uses an eight week period, see pages 81 to 83.

[130] The Commission measured the percentage difference between weekly moving averages and weekly moving averages of a lagged eight week moving average.

7.4.2 Formal analysis of the THB / AUD rate movement

The Commission has revisited the formal analysis of the THB / AUD exchange rate movement it undertook during the investigation. The Commission's analysis was consistent with the analysis used in an earlier case, Investigation 240, and is based on the methodology used in the United States.[131] The Commission's methodology:

- calculated an eight week moving average of the THB;
- calculated weekly averages of actual daily rates;
- calculated weekly averages of the eight week moving average;
- where the weekly average of actual rates exceeded the weekly average of benchmark rates by more than five per cent that week was identified as a period of unusual movement; and
- counted the number of consecutive weeks of unusual movement.

A sustained movement is considered to be a period of eight consecutive weeks of unusual movement.

The Commission's formal analysis showed that there was only one week of unusual movement during the investigation period. That finding is consistent with the chart based analysis shown above in Figure 5.

The Commission's analysis in this case shows that the THB / AUD currency was not a borderline case of a sustained currency movement. The result in this case is not sensitive to either a change in the percentage difference required or the number of weeks that there is an unusual movement; for example even if the methodology required a four per cent difference sustained for four consecutive weeks there would be no finding of a sustained movement. This is also clear from Figure 5 above which shows that a four per cent difference was sustained only for a period of about three weeks during late January to mid February 2015.

Accordingly the Commission would reaffirm its finding that s269TAF(4) of the Act does not apply to the THB / AUD rate during the A4 copy paper investigation period.

The Commission has taken some guidance from the approach used by the United States in assessing whether there has been a sustained currency movement. However the Commission has not accepted the United States approach uncritically. For example, the Commission is not convinced that the United States practice of using the prevailing exchange rate from the last day of a period of sustained currency movement[132] would cure technical dumping arising from that sustained movement. In this respect the Commission notes that the Australian legislation allows an exchange rate to be selected by that Minister for a day "*after the start* of the sustained movement" (s269TAF(5)). The Commission considers that this question does not arise in this case because s269TAF(4) of the Act does not apply.

---

[131] United States *Enforcement and Compliance Antidumping Manual* at pages 81 to 83.

[132] United States *Enforcement and Compliance Antidumping Manual* at pages 82 to 83.

8 SINAR MAS

8.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to Sinar Mas is stated in the following terms:

> REP 341 states that the normal value has been established for the exporters, Pindo Deli and Indah Kiat, under s.269TAC(2)(c) of the Act with s.269TAC(9) adjustments and in accordance with Regulations 43, 44 and 45 of the *Customs (International Obligations) Regulation 2015* (Regs). Sinar Mas in its review application claims that the full fixed margin for the domestic market sales by its intermediary, CMI, should be made under s.269TAC(9) rather than only the adjustment of the current supermarket shelf rental cost.
>
> I require the Commission to reinvestigate the normal value in relation to its calculation of the selling, general and administrative costs included in its calculation with reference to the requirements in regulation 44(2) of the Regs.
>
> Regulation 44(2), provides that the amount must be worked out by using the information set out in the **exporter's** records. (my emphasis). I draw the attention of the Commission to the finding regarding "collapsing" of related parties, dealt with by the Senior Panel Member in Steel Rebar in ADRP Report No 2016/34 para 62, in relation to its assessment as to who are the exporters in this instance. It is clear that CMI is not considered to be an exporter.
>
> Following the construction of the normal value, it will be necessary to assess what adjustment/s is required under s.269TAC(9) to ensure the 'normal value so ascertained is properly comparable with the export price'. S.269TAC(9) of the Act requires "such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods". This in my view requires that the normal value is constructed to equate to the appropriate level of trade to enable a proper comparison with the export price.
>
> The Commission appears to rely on the practice on related parties ('collapsing') in the Dumping Manual November 2015 (pages 67-68) in relation to these exporters. This in my view, appears to be dealing with situations which arise when assessing a normal value under s.269TAC(1) of the Act. Notwithstanding, it has relevance in establishing the principle that the comparison should be at the same level of trade in both the export and domestic markets.
>
> Please re-calculate the dumping margins should the normal value for these two exporters be adjusted.

8.2 Affirmed or new findings

As a result of its reinvestigation the Commission has found that it incorrectly adjusted Pindo Deli's and Indah Kiat's normal values under s269TAC(8) rather than under s269TAC(9) as it should have done.

Correcting for this error and using reg 44(3)(c) to determine Pindo Deli's and Indah Kiat's domestic administrative, general and selling costs resulted in no change to Pindo Deli's and Indah Kiat's normal values.

8.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- A review of the provisions in reg 44 and how they relate to the relevant provisions in the Act;
- Case law concerning the interpretation of delegate legislation;
- Submissions made by SMG during Investigation 341;
- SMG application to the ADRP.

8.4 Reasons for the Commissioner's decision

The Commission considers that:

- It incorrectly made adjustments to Pindo Deli's and Indah Kiat's normal values under s269TAC(8) when it should have made adjustments under s269TAC(9) (section 8.4.1 below).
- Exporters' records of non arms length transactions do not reasonably reflect the administrative, general and selling costs associated with those transactions (r44(2)(b)(ii)) and the amount of those administrative, general and selling costs should be worked out using another reasonable method and having regard to all relevant information (r44(3)(c)) (section 8.4.2 below).
- Adjusting Pindo Deli's and Indah Kiat's normal values under s269TAC(9) using administrative, general and selling costs worked out under reg 44(3)(c) results in no change to the normal value determined in REP 341 (section 8.4.3 below).

8.4.1 Adjustments to normal value under 2269TAC(9)

The Commission considers that it should have made adjustments to Pindo Deli's and Indah Kiat's normal values under s269TAC(9) rather than under s269TAC(8).

In REP 341 at 6.9.2.1 the Commission stated that in accordance with s269TAC(2)(c) it calculated normal values for each Indonesian exporter in the Sinar Mas group as the sum of (emphasis added):[133]

- the cost to make A4 copy paper based on the pulp benchmark (except for 100% recycled paper) and other manufacturing costs recorded in the exporter's records;
- domestic selling, general and administrative (SG&A) expenses *including adjustments under subsection 269TAC(9)* as noted for each exporter below; and
- an amount for profit determined as the actual profit on domestic sales of like goods in the ordinary course of trade.

However the Commission did not make adjustments under s269TAC(9). Rather at 6.9.4.3 the Commission purported to make adjustments to Indiah Kiat's normal value under s269TAC(8) (emphasis added):[134]

> In order that the matters set out in *subsection 269TAC(8)* would not affect the comparison of normal values and export prices the Commission made the following adjustments to Indah Kiat's normal values:

[133] REP 341 at page 51.

[134] REP 341 at page 52.

Adjustment Type	Deduction/addition
Domestic credit	Deduct the cost of domestic credit
Domestic inland transport	Deduct the cost relating to inland transport
Supermarket shelf rental	Deduct the cost of supermarket shelf rental

Table 8: Summary of adjustments

Similarly at 6.9.5.3 the Commission purported to make adjustments to Pindo Deli's normal value under s269TAC(8).[135]

Section 269TAC(8) states that "[w]here the normal value of goods exported to Australia is *the price paid or payable for like goods*" (emphasis added) and any of the criteria in s269TAC(8)(a) to s269TAC(8)(c) are satisfied then the normal value may be adjusted so that the differences referred to in those criteria would not affect a comparison with the export price.

Accordingly s269TAC(8) is used to adjust normal value determined under s269TAC(1) (as the "price paid or payable for like goods" sold in the ordinary course of trade in arms length sales by the exporter or other sellers). The Commission considers that s269TAC(8) is not available to adjust normal values for normal values determined under s269TAC(2)(c). Rather s269TAC(9) is expressly intended to adjust normal values "[w]here the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c)" (ie under s269TAC(2)(c)).

Pindo Deli's and Indah Kiat's normal values were ascertained in accordance with s269TAC(2)(c) because there was a situation in the market in Indonesia such that sales in that market were not suitable for use in determining a normal value under s269TAC(1) (s269TAC(2)(a)(ii)). Accordingly the Commission considers that it should rather have made adjustments to Pindo Deli's and Indah Kiat's normal values under s269TAC(9).

8.4.2 Use of r44 in determining adjustments under s269TAC(9) for administrative, general and selling costs

Records of non arms length transactions do not reasonably reflect the administrative, general and selling costs associated with those transactions

Regulation 44(2) provides that administrative, general and selling costs must be worked out using the information set out in the exporter's records if, among other things, the exporter's records "*reasonably reflect* the administrative, general and selling costs associated with the sale of the like goods" (r44(2)(b)(ii), emphasis added).

The verification team visiting the SMG companies found that sales by Pindo Deli to CMI were not arms length:[136]

> In respect of domestic sales of A4 copy paper made by Pindo Deli to CMI, a related customer in the domestic market, the verification team found evidence that:
>
> - the price was influenced by a commercial relationship between CMI and Pindo Deli; and

[135] REP 341 at page 54.

[136] Pindo Deli visit report at 5.4.

- CMI was indirectly reimbursed for, or in respect of, the whole or any part of the price.

The verification team therefore considers that all domestic sales by Pindo Deli to CMI during the investigation period were not arms-length transactions.

The verification team found that sales by Indah Kiat to CMI were not arms length for the same reasons.[137]

The Commission considers that identifying arms length issues and ensuring that dumping margins are not affected by any arms length nature of transactions is given primary importance in the Act.[138] The Commission considers that records of transactions found not to be arms length cannot be said to reasonably reflect the administrative, general or selling costs associated with those transactions. The (related) parties to such transactions may set transfer prices associated with such transactions at a level convenient to them regardless of the costs associated with those transactions. If such records were accepted by anti-dumping authorities then it would no doubt be convenient to set those transfer prices at a level that reduced or eliminated dumping margins.

In any event the Commission considers that the likely operation of the reg 44(2) (properly construed) must reasonably be adopted as a means of fulfilling the statutory object of the empowering legislation;[139] in this case that statutory object is to determine a dumping margin that is not rendered unreliable by arms length issues. On that basis if reg44(2) required the Commission and the Minister to use records of the exporter that infected the dumping margin with non arms length issues then the regulation would be invalid. On the Commission's interpretation of reg 44(2), namely that that records of transactions found not to be arms length do not reasonably reflect the administrative, general or selling costs associated with those transactions, there is no such invalidity.

Sales by SMG companies to CMI are not sales for home consumption in the country of export

Regulation 44 is relevant to determining administrative, general and selling costs because s269TAC(5A) requires that the amount determined to be those costs in relation to s269TAC(2)(c)(ii) must be worked out in such manner and taking account of such factors

---

[137] Indah Kiat visit report at 5.4.

[138] Sections 269TAA, 269TAB(1), 269TAC(1).

[139] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 per French CJ at [122]-[123] citing Brenner J in *South Australia v Tanner* [1989] HCA 3 (footnotes omitted):

> … Brennan J emphasised that, where the validity of regulations (or in this appeal a by-law) is concerned, the problem is one of characterisation, which requires ascertainment of the character of the impugned regulation by reference to its operation and legal effect in the circumstances to which it applies. The court must make its "own assessment of the directness and substantiality of the connexion between the likely operation of the regulation and the statutory object to be served". The regulation is invalid if the directness and substantiality of that connection "is *so exiguous* that the regulation *could not reasonably* have been adopted as a means of fulfilling the statutory object" (emphasis added).
>
> The references to "so exiguous" and "could not reasonably have been adopted" demonstrate that the question to be asked and answered is not whether the by-law is a reasonable or a proportionate response to the mischief to which it is directed but whether, in its legal and practical operation, the by-law is authorised by the relevant by-law making power. The question of validity is to be decided by characterising the impugned provisions and assessing the directness and substantiality of the connection between the likely operation of the by-law and the statutory object to be served. Could the by-law, so characterised and assessed, reasonably be adopted as a means of fulfilling that object? No further inquiry into the proportionality of the by-law is permitted or required.

as the regulations provide. Section 269TAC(2)(c)(ii) proceeds on the assumption that "the goods, instead of being exported, *had been sold for home consumption … in the country of export*" (emphasis added). On that basis the Commission considers that where reg 44(2) requires that an exporter's records reasonably reflect those costs "associated with the sale of the like goods" that sale must be a sale of the sort contemplated by s269TAC(2)(c)(ii), namely a sale for home consumption in the country of export.

The Commission considers that sales by SMG companies to CMI are not sales for home consumption in the country of export. Rather the goods are sold for home consumption in Indonesia by CMI. On that basis sales by SMG companies to CMI are not the sales contemplated by reg 44(2)(b)(ii) and reg 44(2) would not require the Commission to work out the amount of the SMG companies' administrative, general and selling costs using only the information set out in the SMG companies' records.

Commission should work out the administrative, general and selling costs using another reasonable method and having regard to all relevant information (reg 44(3)(c))

Regulation 44(3) provides that, if the Commission is unable to work out the amount using the information mentioned in reg 44(2) then the Commission must work out the amount by one of the alternative methods in reg 44(3)(a) to reg 44(3)(c).

The Commission considers that reg 44(3)(c) is a suitable method for working out Pindo Deli's and Indah Kiat's domestic administrative, general and selling costs because:

- reg 44(3)(c) requires the Commission to use another reasonable method and having regard to all relevant information;
- and the Commission has relevant information from Pindo Deli's and Indah Kiat's records and from CMI's records concerning actual amounts of administrative, selling and general costs incurred in the domestic market of Indonesia; the Commission considers that it is reasonable to use this information but not to use transfer pricing information that is unreliable because of arms length issues between the exporters and CMI.

The Commission does not consider that reg 44(3)(a) is a suitable method for working out Pindo Deli's and Indah Kiat's domestic administrative, general and selling costs because:

- reg 44(3)(a) requires the Commission to identify the actual amounts of administrative, selling and general costs incurred by the exporters in the production and sale of the same general category of goods in the domestic market of Indonesia;
- however the exporters do not sell the same general category of goods in the domestic market of Indonesia because CMI, not the exporters, sells that category of goods in the domestic market of Indonesia on behalf of the exporters.

The Commission does not consider that reg 44(3)(b) is a suitable method for working out Pindo Deli's and Indah Kiat's domestic administrative, general and selling costs because:

- reg 44(3)(b) requires the Commission to identify the weighted average of the actual amounts of administrative, selling and general costs incurred by other exporters or producers in the production and sale of like goods in the domestic market of Indonesia;
- however the Commission has information concerning actual amounts of administrative, selling and general costs incurred by only one other exporter of like

goods in the domestic market of Indonesia (namely RAK); the Commission considers that these costs may not reflect the costs of the SMG companies.

SMG claims concerning CMI transactions

During the verification visit and the investigation SMG did not challenge the verification team's finding that sales to CMI were not arms length.[140] Rather SMG argued that the normal value should be adjusted by the entire margin charged by CMI merely because SMG's export prices were direct whereas SMG's domestic prices were through CMI as an intermediary.[141] In its application to the ADRP SMG argues that Indah Kiat's and Pindo Deli's transactions to CMI were arms length transactions and not transfer prices because:[142]

- Indah Kiat and Pindo Deli provided CMI with monthly target prices based on its cost to make and sell plus profit;
- CMI's monthly target prices to its independent domestic customers were these prices plus its fixed sales margin; and
- the actual prices paid by CMI to Indah Kiat and Pindo Deli were CMI's actual selling prices to its independent domestic customers less its fixed sales margin.

However even if these claims are accepted, SMG's conclusion of arms length does not follow from these claims and that the fixed margin charged by CMI to SMG companies reflects an arms length price. The most that can be said is that SMG argues that sales through CMI are arms length by implication. Such an implication cannot displace the express findings by the Commission's verification team that the available evidence showed that transactions between SMG companies and CMI were not arms length.

SMG otherwise appears to argue that the full fixed margin charged by CMI to Pindo Deli and Indah Kiat should be used to adjust Pindo Deli's and Indah Kiat's normal values downward because CMI's fixed margin was exclusively linked to domestic sales in Indonesia.[143] As noted elsewhere the Commission considers that it is not required to, and should not, adjust Pindo Deli's and Indah Kiat's normal values downward by CMI's fixed margin in circumstances where evidence has shown that there are arms length issues between Pindo Deli and Indah Kiat and CMI.

8.4.3 Adjusting Pindo Deli's and Indah Kiat's normal values under s 269TAC(9) using administrative, general and selling costs worked out under reg 44(3)(c)

The Commission has adjusted Pindo Deli's and Indah Kiat's normal values under s269TAC(9) using administrative, general and selling costs worked out under reg 44(3)(c) with adjustments necessary to ensure that their normal values are properly comparable with their respective export prices.

SMG's application to the ADRP appears to argue that the Commission has not made an appropriate level of trade adjustment. SMG's application does not put it in those terms

---

[140] See submissions by SMG dated 29 August 2016, 20 September 2016 and 5 October 2016 (EPR documents 69, 78, 92 respectively).

[141] Submission by SMG dated 5 October 2016 (EPR document 92) at page 1.

[142] SMG application to the ADRP, Attachment C-10 at page 90.

[143] SMG application to the ADRP, Attachment C-10 at pages 90 to 91.

however the diagram at page 91 of Attachment C-10 has been drawn to suggest that Pindo Deli's and Indah Kiat's export customers are at a different level of trade to its domestic customers (supplied through CMI). SMG has not provided or pointed to any evidence that would support its claim for such an adjustment. The Commission has retained the adjustment for the only domestic selling expense for which there was evidence that it would not be incurred for sales to Australia, supermarket shelf rental.

Adjusting Pindo Deli's normal values

Adjusting Pindo Deli's normal values under s 269TAC(9) using administrative, general and selling costs worked out under reg 44(3)(c) the Commission would replace the finding at 6.9.5.3 with the following:

> Pindo Deli's normal values have been ascertained in accordance with s 269TAC(2)(c) and in accordance with s 269TAC(9), in determining the costs to be determined under that provision, the following adjustments are necessary to ensure that the normal value so ascertained is properly comparable with Pindo Deli's export price:

Adjustment Type	Deduction/addition
Domestic credit	Deduct the cost of domestic credit
Domestic inland transport	Deduct the cost relating to domestic inland transport
Export inland transport	Add the cost relating to export inland transport
Supermarket shelf rental	Deduct the cost of supermarket shelf rental

Table 9: Summary of adjustments

On that basis there would be no change to the normal value or dumping margin determined for Pindo Deli in REP 341.

Adjusting Indah Kiat's normal values

Adjusting Indah Kiat's normal values under s 269TAC(9) using administrative, general and selling costs worked out under reg 44(3)(c) the Commission would replace the finding at 6.9.4.3 with the following:

> Indah Kiat's normal values have been ascertained in accordance with s 269TAC(2)(c) and in accordance with s 269TAC(9), in determining the costs to be determined under that provision, the following adjustments are necessary to ensure that the normal value so ascertained is properly comparable with Indah Kiat's export price:

Adjustment Type	Deduction/addition
Domestic credit	Deduct the cost of domestic credit
Domestic inland transport	Deduct the cost relating to inland transport
Supermarket shelf rental	Deduct the cost of supermarket shelf rental

Table 8: Summary of adjustments

On that basis there would be no change to the normal value or dumping margin determined for Indah Kiat in REP 341.