

**By Email**

Mr. Paul O'Connor  
Panel Member  
Anti-Dumping Review Panel  
Department of Industry, Innovation and Science  
10 Binara Street  
Canberra City ACT 2601

Dear Mr. O'Connor,

**Re: ADRP Review No 153 - Review of Reviewable Decision – Exports of A4 Copy Paper from Indonesia, China, Brazil and Thailand - Submission**

I refer to the notice published on 26 May 2022 by the Anti-Dumping Review Tribunal (**ADRP**) advising of the initiation of a review of the decision of the then Minister of Industry, Energy and Emissions Reduction (**Minister**) under section 269ZHG(1)(b) of the *Customs Act 1901* to secure the continuation of anti-dumping measures on exports of A4 Copy Paper from Indonesia, China, Brazil and Thailand following applications received from an number of interested parties, including my clients, APRIL Far East (Malaysia) Sdn. Bhd (**AFEM**) and PT Riau Andalan Kertas (**RAK**), collectively known as (**APRIL**).

The following submissions are made by my clients in relation to the abovementioned review.

**1. Scope of the review**

At the outset, it is acknowledged that the grounds in relation to Preferable Decision 3 concerning the decision to use the combination fixed and variable method for working out the interim dumping duty on exports of A4 Copy Paper was rejected. As you advised, this was because that decision was not made under Part XVB of the *Customs Act 1901* and, therefore, the ADRP had no jurisdiction to review that decision.

While whether the ADRP has jurisdiction to review that decision was disputed, the ADRP nevertheless possesses jurisdiction to review the Minister's decision concerning the variable factors applying to exports of A4 Copy Paper from Indonesia and will be doing so in the review.

All other grounds in my clients application, therefore, were accepted pursuant to section 269ZZG(5) of the *Customs Act 1901* and the review was initiated on this basis.

**2. Submission – reviewable decision – correct and preferable decision - summary**

As contended by my clients in their application for a review of the *reviewable decision*:

- (i) the *reviewable decision* was not the correct or preferable decision on the grounds set out in the application and for the reasons as discussed below in this submission; and
- (ii) the correct and preferable decision is, in the alternate, Preferable Decisions 1, 2, or 3.

The reasons why the *reviewable decision* was not the correct or preferable decision are, as set out in the application, because:

- (i) the expiry of the anti-dumping measures on 19 April 2022 would not lead or be likely to lead to a continuation or recurrence of the material injury that the measures were intended to prevent<sup>1</sup> and continuation of the measures was not in the national interest; and/or
- (ii) the expiry of the anti-dumping measures on 19 April 2022 as applying to exports of A4 Copy Paper from Indonesia by APRIL and/or all other exporters would not lead or be likely to lead to a continuation or recurrence of the material injury that the measures were intended to prevent; and/or
- (iii) the determination of the variable factors, that is, export price, normal value and non-injurious price, in relation to exports of A4 Copy Paper from Indonesia by APRIL and/or all other exporters was legally and factually incorrect.

The grounds for why the correct and preferable decision is, in the alternate, Preferable Decisions 1, 2, or 3, are set out in the application as further discussed in this submission.

### **3. Submission 1 - Preliminary observations**

#### **3.1 Objective(s) of the anti-dumping measures - material injury and its prevention**

In the *reviewable decision*, the Minister on the recommendation of the Commissioner secured the continuation of the anti-dumping measures. This ostensibly was to prevent the continuance or recurrence of the material injury to the Australian industry caused by dumping that the measures are intended to prevent.

In making that decision, it is not unreasonable to expect that the Minister and the Commissioner would have considered whether the anti-dumping measures had achieved their intended objective of preventing material injury to the Australian industry caused by dumping by exports of A4 Copy Paper from the subject countries during the five (5) year period the measures were in force since their imposition in 2017.

That is to say, to prevent the material injury that the anti-dumping measures are intended to prevent, that material injury caused by dumping of exports of A4 Copy Paper from Indonesia and the other subject countries must have first occurred and/or be occurring, in order to 'continue' to occur or to 'recur'. If not, then the material injury in question can neither 'continue' to occur nor 'recur'.

Further, given the imposition of the anti-dumping measures during the preceding five-year period presumably to prevent the material injury being caused by dumping, then the measures must have been either effective in preventing the material injury they were intended to prevent during that period, or they were not. In either case, the effectiveness or ineffectiveness of the measures requires examination so as to reasonably foretell what is likely to occur on the expiry of the anti-dumping measures.

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<sup>1</sup> 'Dumping' per se is not actionable. Rather, as stated in Article VI of GATT 94, dumping is only to be condemned (i.e., is actionable) if it causes material injury to a domestic industry in the importing country producing like goods to the goods under consideration. In such circumstances the anti-dumping measures are intended to prevent the material injury by eliminating/offsetting the dumping through the imposition of a special duty of customs known as dumping duty equal to the margin of dumping or less if warranted.

Based on Report 588, neither the Commissioner nor the Minister appears to have considered or sufficiently considered these matters. Notwithstanding this and notwithstanding that:

- (i) there is no evidence or sufficient evidence that the anti-dumping measures had prevented material injury being caused to the Australian industry from dumping of exports of A4 Copy Paper from the subject countries during the five years since their imposition; and/or
- (ii) there is no evidence or sufficient evidence that the material injury incurred by the Australian industry throughout the five-year period during which the measures were imposed was caused by dumping of exports of A4 Copy Paper from the subject countries,

the Minister nevertheless still proceeded to secure the continuation of the anti-dumping measures on the basis of the findings and recommendations of the Commissioner in Report 588.

With respect, this decision is surprising. This is because following the imposition of the anti-dumping measures in 2017, the Australian industry has been unprofitable and has continued to be at all times thereafter but was not unprofitable prior to the imposition of the anti-dumping measures.

That is, since 2017, Paper Australia Pty Limited's (**Australian Paper**) A4 Copy Paper business has been unprofitable, despite being the sole producer of A4 Copy Paper in Australia. In other words, Australian Paper has been operating its A4 Copy Paper business at a loss because it apparently has been unable to recover its cost to make and sell, let alone include an amount for profit in its prices, as verified by the Anti-Dumping Commission (**Commission**). Hence the question of what injury has the anti-dumping measures prevented, or not prevented that they were intended to prevent and will continue to occur or recur due to the expiry of the anti-dumping measures?

What changed that caused Australian Paper's A4 Copy Paper business to be unprofitable and continue to be unprofitable other than the imposition of the anti-dumping measures that are intended to prevent injury such as unprofitability being caused by dumping?

In these circumstances, it is not unreasonable, therefore, to expect that consideration to have been given to the following matters, amongst others, prior to deciding to secure the continuation of the anti-dumping measures:

- (i) why the sole domestic producer of A4 Copy Paper was unprofitable throughout the five-year period that the anti-dumping measures had been imposed and why the extent of unprofitability varied from year to year;
- (ii) why the sole domestic producer of A4 Copy Paper had been unprofitable throughout this period despite having a dominant market share of 85% or more, and despite relatively stable A4 Copy Paper prices and maintaining and increasing its sales volumes during a progressively contracting Australian A4 Copy Paper market to a tonnage per annum (**tpa**) in 2001/21 of approximately half (50%) of what it was in 2015 without reducing its prices;
- (iii) why the anti-dumping measures, including the additional anti-dumping measures imposed in 2019 on exports from other countries, had not prevented the Australian industry from incurring such injury throughout the period they were imposed, and whether they in fact were capable of preventing that injury, that is, whether the injury was caused by other economic factors; and
- (iv) why the only participant in the Australian A4 Copy Paper market, that is, producers, exporters, importers, distributors, resellers, retailers, etc., that was unprofitable was the sole domestic producer, Australian Paper, whose sales volumes increased and prices remained stable?

In short, was the injury incurred by the Australian Industry throughout the five-year period that the anti-dumping measures were imposed attributable to or caused by dumping of exports of A4 Copy Paper from the subject countries including Indonesia? This question was not sufficiently addressed in Report 588 by the Commissioner. Nor the question that, if that was not the injury that the anti-dumping measures were intended to prevent, what was such injury, was it prevented and, if not, why and would it continue to occur or recur due to the expiry of the anti-dumping measures?

This issue is not solely a national interest issue. That is, whether the imposition of a protective customs tariff in the form of the anti-dumping measures to subsidize a high cost, uncompetitive unprofitable business, and as a result, provide little or no incentive for that business to become competitive and profitable with its consequent higher prices for end-users of A4 Copy Paper, namely, Australian businesses and consumers, is in Australia's national interest?

The issue also is whether the anti-dumping measures have achieved their objective of preventing material injury to the Australian industry caused by dumped exports from the subject countries and, if not, as apparently has been the case based on the *reviewable decision*, why not? Alternatively, if the anti-dumping measures have not been able to or are not capable of achieving their intended objective because the injury incurred by the Australian industry has **not** been caused by dumping, then how can the expiry of the measures have any effect on the continuation of that injury?

As the Commissioner and Minister would have been aware, it was found in Review 551 that the Australian industry producing A4 Copy Paper was and is a high-cost industry and the Australian market was a high-priced market especially when compared, in that review, with Indonesia, where the cost to produce A4 Copy Paper and A4 Copy Paper prices were materially lower than in Australia, thereby conferring on Indonesian producers and exporters a comparative advantage. This was the finding in that review.

The effect of such finding is that exports from Indonesia at prices equal to their normal value, that is, at the domestic selling prices in Indonesia, would undercut and, presumably, cause injury to the Australian industry. That is, un-dumped Indonesian exports would cause injury to the Australian industry because the Australian industry could not compete with such imports on price because, being a high-cost industry, it could not compete without selling at prices that were unprofitable and, presumably, at a loss. It would seem reasonable to expect that this is what has occurred, at least in relation to exports from Indonesia. There is no evidence to the contrary.

However, in Review 551, it also was found that exports by APRIL were being undercut by the prices of Australian Paper and those of all other participants in the Australian market. Further, it was also found that such exports from Indonesia by APRIL were being exported to Australia at 14.7% less than their normal value, that is, at export prices that were less than the price such products were being sold in the Indonesian domestic market, being a market where prices were materially less than prices in Australia.

How prices of APRIL's exports to Australia could be higher than the prices of all participants in the Australian A4 Copy Paper market where prices were materially higher than in the Indonesian A4 Copy Paper market and, at the same time, could be less than prices in the Indonesian A4 Copy Paper market, that is, at 'dumped' prices, was not explained in either Review 551 or in the continuation inquiry. Despite such apparent factual impossibility, it nevertheless was evident that prices of APRIL's exports of A4 Copy Paper to Australia were not undercutting the prices of Australian Paper and, consequently, could not be causing injury to it. There was and has been no finding supported by evidence to the contrary.

This gives rise to the question of whether the position is similar as regards exports from the other subject exporting countries and globally. That is, are the costs to produce A4 Copy Paper in China, Brazil and Thailand significantly less than in Australia and, consequently, are prices for A4 Copy Paper in those countries also significantly less than in Australia? If so, what is the commercial incentive for exporters to export to Australia at dumped prices when higher prices can be obtained in the high priced Australian A4 Copy Paper market and, consequently, greater profits? Further, would exports from those countries at prices equal to prices in domestic sales in those countries, that is, their normal value, also undercut the prices of the Australian industry in the Australian A4 Copy Paper market?

If so, does this not indicate that the Australian industry is uncompetitive due to being a high-cost industry when benchmarked against producers of A4 Copy Paper in other jurisdictions? No such assessment appears to have been made or considered by the Commissioner despite the information and evidence necessary to make such an assessment having been provided by exporters for each of the subject countries. Recourse also could have been had to independent experts such as Fastmarkets RISI and Hawker Wright to whom the Commission has often had recourse to for such expert advice in the past.

That prices for A4 Copy Paper in such countries and globally are significantly less than in Australia is evidenced by, amongst other things, Australian Paper's own export sales of its excess production into export markets. By its own admission and as verified by the Commission, those export sales are 'less lucrative' than its domestic sales. In other words, the prices of such exports are significantly less than its domestic prices and, therefore, more unprofitable than its unprofitable domestic sales. In other words, Australian Paper's entire A4 Copy Paper business is and has been operating at a loss and apparently has been doing since the anti-dumping measures were imposed.

It would seem, therefore, that the anti-dumping measures have not achieved the objective of preventing the Australian industry from incurring injury because the injury being incurred was not caused by dumping. Instead, the measures apparently provided a protective tariff to, presumably, subsidize an unprofitable domestic industry through higher prices in the domestic market and also to thereby facilitate the industry's 'less lucrative' exports at dumped prices being less than its domestic prices. This would seem to be the antithesis of the object of anti-dumping measures.

As the Australian industry is not competitive domestically nor globally, the continuation of the anti-dumping measures will not and cannot remedy this, and the injury that flows from it because dumping is not the cause. Hence the continuation of the anti-dumping measures should not have been secured but allowed to expire on the due expiry date.

This has not been addressed in Report 588 by the Commissioner. While identifying that the Australian industry has been unprofitable each year since the imposition of the anti-dumping measures to varying extents of unprofitability each year, there is no finding of fact of the cause(s) of that injury, nor whether it was caused by dumping of exports from the countries in question and, if so, why the anti-dumping measures failed to prevent such injury from being so caused immediately following their imposition and for the following five years. Given the lack of such findings, it would not seem possible to tell what effect the expiry of the anti-dumping measures would have or could have, if any.

This is a material and surprising omission and deficiency in the Commissioner's findings and recommendations in Report 588 that is fundamental to a decision on whether the anti-dumping measures should expire or be continued.

### **3.2 Sufficiency of information and evidence**

Following on from the abovementioned deficiencies in the analysis of the injury incurred by the Australian industry since the imposition of the anti-dumping measures and the effectiveness or otherwise of the anti-dumping measures is the issue of the sufficiency of the evidence on which the Commissioner made his findings of fact and recommendations to the Minister.

As you know, Article 3.1 of the WTO Anti-Dumping Agreement requires that a determination of injury must be based on 'positive evidence' and involve an 'objective examination' of both (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products.

### *3.2.1 Information and evidence on the Australian A4 Copy Paper market*

In the continuation inquiry, it is evident that information and evidence on the Australian A4 Copy Paper market and Australian Paper's performance within that market, being the sole producer of A4 Copy Paper in Australia, and the effect of the allegedly dumped imports in that market, was based primarily, if not solely, on information and evidence provided by Australian Paper, the applicant for the continuation of the measures, and Australian Border Force's (**ABF**) import data.

Having regard to the Commission's diagram of the structure of the Australian A4 Copy Paper market at Figure 1 of Report 588 (page 22), it is evident that information and evidence was only obtained/provided by the first level of the Australian market structure in the diagram, namely, by the exporters and the Australian industry, and only partially with respect to exporters. No information or evidence was provided by interested parties at any of the other levels of trade in the Australian A4 Copy Paper market, such as by importers, distributors, resellers, retailers, etc., who account for the majority of participants in the Australian A4 Copy Paper market, at least according to Report 588.

Further, no evidence or sufficient evidence appears to have been obtained from, or sought from, participants in that part of the Australian A4 Copy Paper market in which competition takes place between imports, and between imports and the domestically produced products, namely, the end-user market segment, nor for that matter from corporate stationary suppliers, resellers and retailers.

In addition, no evidence appears to have been sought from other interested parties such as relevant Federal government agencies including the Department of Industry, the Office of the Chief Economist within that Department, State government agencies including the Victorian Department of Environment, Land Water and Planning and VicForests, and industry associations including the Australian Forest Products Association with its National Pulp and Paper Sustainability Reports, and the Australian Industry and Skills Committee. There appears, at least, to have been no attempt to obtain information and evidence on the performance of the Australian industry from such government and non-government sources.

The point here is not the content and relevance of the matters under considerations here such as the Office of the Chief Economist's views on the digitalisation of the Australian economy, but that no attempt appears to have been obtained to assist in consideration of the matters relevant to the continuation inquiry. For example, by way of analogy, in Investigations 540 and 541 recourse was not had to the financial statements filed by members of the Australian industry with the Australian Securities and Investments Commission (**ASIC**) as required by the *Corporations Act 2001* and publicly available that disclosed that they were profitable, whereas information provided to the Commission by the major producers was that they were unprofitable. While not determinative of the matters there under consideration, recourse to such financial statements clearly indicated that further inquiry was required as to the effects, if any, of imports that were not uniform across the industry. Those financial statements were provided to the then Minister and the Commissioner before the Minister

made his decision in those investigations and were provided in Continuation Inquiry 591. In the Statement of Essential Facts in that inquiry, the Commissioner preliminarily found that there was insufficient evidence concerning material injury and causation to the Australian industry. This highlights the risks in relying on information and evidence from limited sources and sources with particular interests.

It is not clear why relevant information and evidence from other interested parties was not obtained but this means that information relevant to the Australian A4 Copy Paper market was not obtained, nor was assistance obtained from qualified experts with appropriate experience, including within Federal Government Agencies such as the Productivity Commission as well as those identified above as recommended in *'Streamlining Australia's anti-dumping system; an effective anti-dumping and countervailing system for Australia'* (June 2011).

With respect, it is difficult to understand how a determination of material injury and causation could be made on limited, and one-sided, information and evidence, particularly on that market segment where competition between imports and domestically produced products predominantly takes place as found by the Commission, namely, the supply of A4 Copy Paper to end-users such as Australian businesses and consumers, and on the level of trade that supply that market segment:

*"Sellers of A4 copy paper, particularly in the corporate stationery and retail segments, commonly source a range of A4 copy paper brands and grades from multiple sources, both Australian made and imported.*

*Therefore, consumer groups also have access to and consume A4 copy paper from a variety of sources. Supply channels for A4 copy paper are concentrated through a limited number of national resellers and retailers. Paper Australia and imported sources supply the same end users, via the same supply channels, resulting in direct competition."* (Report 588, page 22)

For example, notwithstanding that the Commission contends that the point of competition between imports from the subject countries and the products produced by Australian industry is at the end-user market segment, the price undercutting analysis undertaken by the Commission, as reported in Section 8.6.1 of Report 588, was by comparing *'the prices at which the Australian industry sold like goods on delivered terms and the landed export prices paid by importers'*:

*"The commission's price undercutting analysis also compares the prices at which the Australian industry sold like goods on delivered terms and the landed export prices paid by importers at an appropriate level of trade. The landed price of exports is relevant because this reflects the total cost an importer would incur to have those goods delivered to its destination from the port of arrival in Australia. The examples of price competition outlined further in this section establish that Australian industry and overseas copy paper producers compete for sales to Australian customers. The price undercutting analysis reflects the point in the supply chain, i.e. the level of trade, where Australian buyers of A4 copy paper exercise the option of sourcing from the Australian industry or an overseas producer."* (Underlining added, Section 8.6.1 of Report 588, page 88)

Why the comparison was undertaken at that level or trade is unclear when that is not the principal point of competition between imports from the subject countries and the products produced by Australian industry, which is at the end-user level of trade as found by the Commission. A4 Copy Paper is a 'consumer' product with consumption by end-users such as businesses and consumers who determine the volumes and prices at which the 'consumable' is purchased. Hence the end-user/retail level of trade being the principal point of competition between imports, and between imports and the

domestic like product. The domestic product does not compete with exports for supply to importers. That would entail Australian Paper competing with itself given that both it and importers supply A4 Copy Paper to the other market segments in the supply chain.

In any event, the 'landed export price paid by importers' is not the price at which importers on-sell A4 Copy Paper sourced from overseas into the Australian market. That is the price they pay to purchase A4 Copy Paper from overseas, not the price at which they sell that A4 Copy Paper into the Australian A4 Copy Paper market, which obviously would vary according to which market segment that paper was being sold. The 'landed export prices paid by exporters' is not comparable to the 'prices at which the Australian industry sold like goods on delivered terms' into the various market segments in the Australian A4 Copy Paper market. It is not a like-for-like comparison.

The issue raised here is not the adequacy or otherwise of the price undercutting analysis or its findings. This is addressed later in the submission. It is in respect of the sufficiency of the information and evidence to conduct such an analysis.

That is, this failure to compare like-for-like in the price undercutting analysis gives rise to the question of whether the Commission had information and evidence of the importer's prices and sales volumes of A4 Copy Paper to customers at the various levels of trade/market segments in the Australian A4 Copy Paper and, if it did, from whom was it obtained? Obtaining such information and evidence from participants in the Australian A4 Copy Paper market in addition to Australian Paper would seem necessary given that the only source of competition to the Australian industry were imports supplied by importers and importers supplied all levels of trade according to Figure 1 in Report 588. How was a proper analysis of the Australian A4 Copy Paper market and the effect of imports in that market possible without such information and evidence and obtained from the relevant participants in the market?

As indicated in the first extract above, competition takes place at multiple levels in the supply chain to the end-users. However, there is no analysis of the extent of such competition either between imports and the domestic product or between sellers of A4 Copy Paper at those levels of trade, presumably due to the absence of sufficient information and evidence. Also, if, as contended by Australian Paper, that national resellers and retailers possess market power in the Australian A4 Copy Paper market, then, presumably, a price undercutting analysis at that level of trade and at the end-user/retail level is required to assess whether and to what extent does demand at these levels of trade, in particular, the end-user/retail level of trade where competition predominantly takes place, determines volumes and prices in the Australian A4 Copy Paper market. Was it not undertaken due to an insufficiency of information and/or reliance on information from limited sources with its attendant risks?

Further, the diagram at Figure 1 of Report 588 (page 22) shows that exporters not only supply importers but also corporate stationary suppliers and retail outlets and end-users, as does the Australian industry. There is no assessment of price undercutting at those levels of trade, nor any analysis of the volumes supplied by exporters, importers and the Australian industry to those levels of trade.

There is, in fact, no analysis of the extent of competition at those levels of trade, no doubt due to a dearth of information and evidence. That is, an assessment of competition between imports and the domestically produced products at these levels of trade was not possible because the Commission lacked sufficient information to conduct such assessment and, therefore, to conduct an *'objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on*



*prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products'* at those levels of trade/market segments.

In other words, there appears to be insufficient information and evidence concerning the majority of the Australian A4 Copy Paper market and, in particular, sufficient information and evidence to discharge the obligations under Article 3.1 of the Anti-Dumping Agreement to conduct an 'objective examination' based on 'positive evidence' of the effects of the subject exports in the Australian A4 Copy Paper market on the Australian industry including its sales volumes and prices at each level of trade/market segment.

It was stated in Report 588 that:

*"Paper Australia has previously stated that supply channels of A4 copy paper are concentrated through a limited number of national resellers and retailers. The commission's examination of sales and trade flow information confirmed this to be the case."* (at page 22)

The question is what 'sales and trade flow information' was obtained from whom and verified? That is not apparent from Report 588, nor from the Commission's electronic public file. Nor is it apparent what such 'sales and trade flow information' consisted of? For example, did it include sales volumes by supplier to customer and pricing and terms of trade? If exporters, importers, resellers, distributors, retailers, etc., did not provide and verify such information from whom or where was it obtained and what did it consist of?

This is not disclosed by the Commissioner in Report 588. Given the lack of participation in the continuation inquiry by other participants in the Australian A4 Copy Paper market, it can only be assumed that Australian Paper is the sole source of the information with its attendant risks. Even then, there is insufficient disclosure of what information has been provided that '*contains sufficient detail to allow a reasonable understanding of the substance of the information*' as is required by section 269ZJ of the *Customs Act 1901* and Article 6 of the Anti-Dumping Agreement.

### *3.2.2 Information and evidence on price undercutting*

In addition, in the above extract from Report 588 regarding price undercutting, it was stated that the '*price undercutting analysis reflects the point in the supply chain, i.e. the level of trade, where Australian buyers of A4 copy paper exercise the option of sourcing from the Australian industry or an overseas producer*'. That, of course, is not correct.

Australian importers do not have the option of sourcing from alternate domestic suppliers of A4 Copy Paper. There is only one producer of A4 Copy Paper in Australia, Australian Paper. Were it to supply to importers, then it would be competing against itself as both it and importers supply the other markets segments directly and indirectly. Accordingly, importers have no option but to source from overseas suppliers of A4 Copy Paper, whether they be producers, trading companies or some other entity.

Further, Australian buyers of A4 Copy Paper only have the option of buying from the sole domestic producer of A4 Copy Paper or from importers who obtain A4 Copy Paper from overseas. There are no other options. The effect of this limitation on the Australian A4 Copy Paper market, including pricing and sales volumes, was not assessed in the continuation inquiry, or addressed in Report 588. It is not unreasonable to expect that it would have been in a continuation inquiry, especially when the sole domestic producer was found by the Commission to hold approximately 85% of the market (see Table 3 in Report 463,, page 27: [Microsoft Word - ATT A REP 463 \(industry.gov.au\)](https://www.industry.gov.au/Attachments/ATT_A_REP_463)).

More fundamentally, and probably due the insufficiency of evidence, the analysis undertaken was unlikely to actually reflect pricing in the A4 Copy Paper market and, in particular, price undercutting and its effects, if any. That is, prices are likely to be determined at the end-user level of trade where competition between A4 Copy Paper of all grades/types and from all sources takes place, as found by the Commission. Accordingly, prices at each level of trade above that level of trade need to take into account the prices at the end-user of level of trade –for example, at what price could A4 Copy Paper be sold to a retailer that would enable that retailer to compete in its sales to end-users after adding on its costs plus an amount for profit and the supplier to the retailer would need to set its prices accordingly and so on, up the supply chain?

Being a consumer product, prices are determined upwards from the end-user/retail level of trade and not downwards. This is reflected, as noted earlier above, in Australian Paper’s claim that market power in the Australian A4 Copy Paper market resides with resellers and retailers who, in supplying end-users, determine the volumes and prices at which suppliers to them supply A4 Copy Paper for on-sale by them to end-users.

No inquiry was apparently undertaken by the Commission to establish whether this was or was not the case in the Australian A4 Copy Paper market. Further, Report 588 contains no examination or assessment of the extent to which resellers and retailers compete with one another in the supply of A4 Copy Paper to end-users or with one another in obtaining supplies of A4 Copy Paper for on-supply to end-users. Nor how competition among resellers and retailers affects competition in obtaining supplies of A4 Copy Paper for on-supply, nor what drives such competition among resellers and among retailers?

Consequently, for a price undercutting analysis to be meaningful in assessing the effects of the alleged dumping on competition within the Australian A4 Copy Paper market, that is, upon sales volumes and prices based upon ‘positive evidence’ and an ‘objective examination’, such an analysis needed to be done at the end-user/retail level of trade, being the level of trade in which competition between imports and the domestically produced products actually takes place. This analysis was not undertaken and, no doubt, was not undertaken due to an insufficiency of information and evidence that would permit it being undertaken.

Hence the insufficiency of information and evidence provided to and/or obtained by the Commission has constrained the matters that could be inquired into for the purposes of the continuation inquiry and limited the ability to fully assess whether the expiry of the anti-dumping measures would lead to or be likely to lead to the continuation or recurrence of dumping and the material injury that the measures are intended to prevent.

### **3.3 Evaluation of the Australian market**

#### **3.3.1 Assessment of injury and causation - Articles 3 and 11.3 of the Anti-Dumping Agreement**

Following on from the preceding sections, an assessment of injury and causation for the purposes of a sunset review (continuation inquiry) pursuant to Article 11.3 of the Anti-Dumping Agreement must be consistent with the requirements of Article 3 of the Anti-Dumping Agreement.

Therefore, such assessment, again, must be *‘be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products’*. (Art. 3.1)

The test in Article 3.1, therefore, is (i) identify the volume of dumped exports and then (ii) determine the effect of such dumped exports on prices in the domestic market and, ultimately, (iii) the impact on the domestic industry. It is not apparent from Report 588 whether this undertaken by the Commissioner.

In this regard, there are a number of deficiencies with the depiction of the Australian A4 Copy Paper market in and Figure 1 of Report 588, which provides a 2-dimensional diagrammatic representation of that market, and the analysis of the Australian A4 Copy Paper market in Section 5 of Report 588. Those deficiencies include:

- (i) The depiction of the Australian A4 Copy Paper market in Figure 1 is 2-dimensional when in reality it is 3-dimensional. The structure of the market is not only vertical but also horizontal, stretching throughout Australia to different regions, cities, town, etc. Competition within the market takes place not only vertically but also horizontally, particularly at the end-user/retail level of trade where competition takes place between the different grades/types of A4 Copy Paper from the different sources. Given that A4 Copy Paper is a consumer product, the issue is to what extent does the horizontal structure as well as the vertical structure affect competition within the Australian A4 Copy Paper, to what extent do imports and the domestic product compete horizontally as well as vertically and so on?
- (ii) If, as asserted by Australian Paper, the size of the Australian market is currently approximately 130,000 tpa or less and assuming that Australian Paper supplies approximately 100,000 tpa to the market with the 30,000 tpa balance supplied by exports, then, having regard to the structure of the market as depicted in Figure 1, the question is what volumes of A4 Copy Paper are supplied by exporters to importers, by Australian Paper and importers to corporate stationary suppliers and retailers and by all such entities to end-users, that is, consumers and businesses, and at what prices and where? This is important in understanding the volumes and prices of A4 Copy Paper in competition at the various levels of trade and the flow of not only the volume of A4 Copy Paper through the different channels of distribution but also by whom and to whom and the flow of prices. This is not addressed in Report 588, presumably due to lack of information/evidence.
- (iii) As noted earlier above, Australian Paper does not supply A4 Copy Paper to importers. Importers source their A4 Copy Paper requirements from overseas, that is, from exporters. In any event, in Section 8.6.1 of Report 588, the Commissioner's price undercutting analysis compares the landed prices (duty inclusive and exclusive) with the Australian industry's 'prices'. Effectively, it compares, as noted earlier, the prices paid by importers to exporters for A4 Copy Paper with the 'prices' at which Australian Paper sells into the Australian A4 Copy Paper market. Prices to Corporate Stationary Suppliers, Retailers and to End-Users would be materially different from the landed prices paid by importers because importers would supply customers in those categories from their purchases from exporters after adding their costs plus an amount for their profit. Their prices would need to reflect this and, therefore, their purchases would need to be at prices that enable them to compete at those levels of trade. In other words, there would necessarily be a range of prices at which A4 Copy Paper is sold in the Australian market to reflect the different levels of trade in the market and sellers and buyers at each level of trade.

Apart from the Commission's purported price undercutting analysis, there is no analysis of the volume of imports sold by importers at each level of trade depicted in Figure 1, including in what volumes of different grades/types of A4 Copy Paper, and at what prices, given that these would be different at each level of trade, and to what extent were such imports competing with one another as well as with Australian Paper's 80 gsm A4 Copy Paper products. Hence, the effect of imports on competition at each level of trade, both vertically and horizontally, is unknown and, consequently, the effect on the Australian industry at such levels of trade is also unknown.

Further, as 'dumping' presumably would be occurring in the 'export prices' to importers, either directly or, in the case of APRIL's exports indirectly as determined by the Commission, then the issue is whether and to what extent has such dumping been passed through in each importer's prices to its customers at each level of trade it supplies in the Australian A4 Copy Paper market, especially when such imports are subject to the anti-dumping measures?

In other words, whether and, if so, to what extent has 'dumping' flowed through in the prices at which imported A4 Copy Paper is sold at each level of trade in the Australian A4 Copy Paper market and whether and, if so, to what extent has this affected sales volumes and prices given that interim dumping duty would or should have been paid on such imports and given that sales volumes and prices would be driven by demand at the end-user/retail level of trade?

This has not been assessed, presumably due to a lack of information. Accordingly, it is not known to what extent, if at all, dumping has affected pricing and, consequently, sales volumes at each level of trade in the Australian A4 Copy Paper market since the imposition of the anti-dumping measures, nor whether and to what extent the anti-dumping measures have caused prices at each level of trade in the Australian A4 Copy Paper market to increase.

- (iv) In this context, where exporters, as opposed to importers, supply to Corporate Stationary Suppliers, Retailers and End-Users directly, as set out in Figure 1 in Report 588, they presumably do so at prices that not only compete with Australian Paper's products but also with importers. In other words, the prices would be higher than those at which exporters supply importers. This indicates that prices by exporters at each level of trade would be different, especially when exporters will be competing not only with Australian Paper's products but also with products of other exporters and importers supplied by those exporters, as well as with their own products supplied to importers if being offered for sale to the same buyers by the importer.

Such differences in pricing at the various levels of trade is not addressed in Report 588, nor the effects, if any, of dumping on prices and sales volumes at each such level of trade – that is, there was no evaluation of whether and to what extent dumped export prices have 'flowed through', if at all, to prices at each point of competition in the supply chain in the Australian market. In other words, it is not known whether some or all exporters been supplying customers directly at each level of trade in the Australian A4 Copy Paper market at dumped prices and to what extent has this been offset by the imposition of the anti-dumping measures.

No doubt the absence of such an assessment is due, again, to a dearth of information and evidence.

- (v) Also, given that exporters are supplying each level of trade in the Australian market directly, the question is how is this being done? That is, are exporters supplying Corporate Stationary Suppliers, Retailers and End-Users on a DDP and/or DDU basis? If so, that would render the exporter the 'importer'. Alternatively, if they are supplying Corporate Stationary Suppliers, Retailers and End-Users through an intermediary such as a subsidiary, that would render the subsidiary the 'importer' and the 'importer' in the Commission's diagram in Figure 1. So, the question is how are exporters actually supplying each level of trade in the Australian market directly and at what prices and on what terms, as well as in what volumes? No information is disclosed in Report 588 in this regard, thereby raising the question of whether such an examination was undertaken.
- (vi) Finally, the Australian A4 Copy Paper market also is supplied by exporters who are not subject to anti-dumping measures, including from Indonesia. Given that such imports have not been determined to being introduced into the commerce of Australia at dumped prices, the question is what effect have such imports had on the Australian A4 Copy Paper market, both in terms of sales volumes and prices and, consequently, on the Australian industry since the imposition of the anti-dumping measures in 2017? Obviously the effect of such imports on the Australian A4 Copy Paper market and on the Australian industry cannot be attributed to imports the subject of the anti-dumping measures. This also does not appear to have been sufficiently assessed.

Accordingly, having regard to the test required by Article 3.1 of the Anti-Dumping Agreement and the foregoing, it is evident that:

- (a) there was and is insufficient information and evidence to enable a proper analysis of the Australian A4 Copy Paper market and, as a result, the market has been incorrectly depicted as single dimensional with no analysis of sales volumes or prices at the different levels of trade/market segments or between regions or between competitors at the various levels of trade, whether sourced domestically or imported or between different types/grades of A4 Copy Paper each with its own price points; and
- (b) in the absence of analysis based on sufficient information and evidence, it is not known, amongst other things, what volume of imports is competing with what volume of domestic products and at what prices at each level of trade/market segment in which there is such competition and to what extent this has changed over time, if at all, nor to what extent, if any, dumping has had on either sales volumes or prices or both.

Assuming that exports subject to the anti-dumping measures have been and are being introduced into the commerce of Australia at dumped prices, the question necessarily arises to what extent does the margin of dumping flow through to the prices at which the imports compete with one another and with domestic products at each level of trade and has done so notwithstanding the imposition of the anti-dumping measures? That is, what effect does the volume of imports flowing through each of the supply channels in the Australian market affect prices at each point of competition, especially when:

- (i) interim dumping duties would be payable and paid on such imports; and
- (ii) imports not subject to anti-dumping measures, including from Indonesia, would be entering the Australian A4 Copy Paper market at un-dumped prices; and

- (iii) the major supplier to the Australian A4 Copy Paper market, Australian Paper, has been supplying the market at prices that do not cover its cost to make and sell (CTMS), that is, at a loss, and has been doing so for the five years that that the anti-dumping measures have been imposed.

Further, such analysis would necessarily need to be undertaken for each grade/type of A4 Copy Paper as being relevant not only to the effect on prices of each grade/type of A4 Copy Paper but also an assessment of the price elasticity of demand between grades/types of A4 Copy Paper and import price elasticity of demand. It is understood that there is little, if any, price elasticity of demand between different types/grades of paper, that is, end-users would be unlikely to switch from 70 gsm or 100 gsm A4 Copy Paper to 80 gsm A4 Copy Paper due to price. In any event, this also does not appear to have been assessed in Report 588.

Hence, it cannot be known what effect the exports the subject of the anti-dumping measures have had on prices in the Australian market or on the domestic industry since the imposition of the anti-dumping measures.

In other words, the requirements of Article 3.1 of the Anti-Dumping Agreement have not been satisfied. Again, this is probably due to the insufficiency of information and evidence concerning the Australian A4 Copy Paper market enabling the analysis required by Article 3.1 of the Anti-Dumping Agreement to be undertaken.

This, in turn, would preclude a proper assessment of what effect the expiry of the anti-dumping measures would have or be likely to have in preventing material injury caused by dumping of the subject exports from continuing or recurring.

### **3.4 Conclusion**

In light of the lack of or insufficiency of information and evidence on:

- (i) the causes of the unprofitability of Australian Paper's A4 Copy Paper business since 2017;
- (ii) injury to Australian Paper attributable to dumping by exports from the subject countries, including, in particular, exports from Indonesia by APRIL and/or any exporters falling within the category 'all other exporters';
- (iii) the structure and operation of the Australian A4 Copy Paper market at all levels of trade, including competition between imports and between imports and the domestic like product at each level of trade, especially given Australian Paper's dominant position in the market and its sales at unprofitable prices throughout the period the anti-dumping measures have been in force; and
- (iv) the volume of A4 Copy Paper sold by exporters and importers at each level of trade within the Australian A4 Copy Paper market and at what prices by grade/type of A4 Copy Paper, including the extent any price elasticity of demand between grades/types of A4 Copy Paper, and what effect such sales had, if any, on prices in the Australian A4 Copy Paper market and, consequently, on Australian Paper being a supplier of only 80 gsm A4 Copy Paper products;
- (v) the effectiveness or otherwise of the anti-dumping measures given that A4 Copy Paper exported from the subject countries on which anti-dumping measures are imposed would have attracted interim dumping duty on importation prior to being sold into the Australian A4 Copy Paper market,

it is submitted that there would seem to have been insufficient information and evidence that the expiry of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of the material injury that the measures are intended to prevent.

#### **4. Submission 2 – Expiry of anti-dumping measures would not lead or be likely to lead to a continuation of recurrence of the material injury the measures were intended to prevent**

The reason why the expiry of the anti-dumping measures would not lead or be likely to lead to a continuation or recurrence of the material injury that the measures were intended to prevent is because the material injury that the Australian industry has been incurring and will continue to incur was not caused by, or being caused by, and would not continue to be caused by, dumping of exports from the subject countries or, alternatively, by exports from Indonesia by APRIL and/or all other exporters.

This is due to the grounds set out in the application and reiterated and discussed further below.

##### **4.1 Material injury incurred by the Australian industry**

It is evident from Figure 7 in Report 599 (page 34) that the material injury the Australian industry has incurred since the imposition of the anti-dumping measures on 19 April 2017 has been and continues to consist of being unprofitable.

That is, since the imposition of the anti-dumping measures in 2017, the A4 Copy Paper business of the sole member of the Australian industry, Australian Paper, has been unprofitable. It would seem that, as noted earlier, Australian Paper has been operating its A4 Copy Paper business at a loss in each year since the imposition of the anti-dumping measures because, according to the Commission, its prices were insufficient to cover its cost to make and sell, let alone be profitable.

In this regard, the Commission specifically found that:

*“... Paper Australia experienced a deterioration in its economic condition because of the decline in profit and profitability since 2015.”* (Section 6.5.1 of Report 588, page 34)

The issue, therefore, is what was actually causing Australian Paper’s A4 Copy Paper business to be unprofitable following the imposition of the anti-dumping measures and, for that matter, since 2015 and would this continue regardless of the expiry of the anti-dumping measures. Why was it selling A4 Copy Paper into the Australian market following the imposition of the anti-dumping measures at a loss, that is, less than its CTMS?

This is addressed below.

Importantly in this regard, without knowing what was causing Australian Paper’s A4 Copy Paper business to be unprofitable before the expiry of the anti-dumping measures, it is not possible to determine or foretell whether that unprofitability will or will not continue on the expiry of the anti-dumping measures. That is, whether the expiry of the anti-dumping measures would have any effect on the continuation of that injury that was occurring throughout the duration of the imposition of the measures.

##### **4.2 Causation**

Since the imposition of the anti-dumping measures, Australian Paper has maintained its sales volumes and prices. Indeed, its sales volumes increased. This is evident from Table 8 (sales volumes) and Figure 5 (unit prices) in Report 588.

This is despite a progressively contracting Australian A4 Copy Paper market from approximately 200,000 tonnes per annum (tpa) in 2015 to approximately 130,000 tpa in 2020.<sup>2</sup> This contraction in the Australian A4 Copy Paper market is acknowledged to be due primarily, if not solely, to technological change, that is, digitalization.

In such circumstances, the only reason for Australian Paper's A4 Copy Paper business to be unprofitable, that is, to operate at a loss, is if it is unable to recover its cost to make and sell due to increases in such costs. That this is the case was confirmed by the Commission in, amongst other things, its verification report for Australian Paper in the continuation inquiry. It also was acknowledged as such by Australian Paper in its application in Review 551.

No doubt, this is further confirmed by Australian Paper's audited financial statements filed with the ASIC in accordance with the *Corporations Act 2001* since the imposition of the anti-dumping measures, copies of which were presumably provided to/obtained by the Commission in connection with its investigations, review and inquiry.

The issue, therefore, is why Australian Paper did not increase its prices for A4 Copy Paper since 2017 or, perhaps, 2015, so as to fully recover its cost to make and sell A4 Copy Paper and for its A4 Copy Paper business to return to profit? What prevented it from doing so and/or why did Australian Paper elect not to increase its prices to return to profitability? Unfortunately, this was not addressed by the Commissioner in Report 588.

Given the imposition of the anti-dumping measures in 2017 and the imposition of additional anti-dumping measures in 2019 in respect of exports from a number of other countries, what conditions prevailing in the Australian A4 Copy Paper market precluded an increase in prices for A4 Copy Paper by Australian Paper? No doubt all other participants in that market would be similarly affected.<sup>3</sup> That is, prevailing market conditions would prevent all participants in the Australian A4 Copy Paper market from increasing their prices.

Other participants in the Australian A4 Copy Paper market, including exporters, would seemingly have no incentive to increase their prices as all were profitable as was evident from the findings in Review 551. That is, even with increases in costs to manufacture, such interested parties remained profitable. Price increases, apparently, would only increase profitability. The exception to this was Australian Paper, which was selling at a loss and, presumably, any price increase would increase losses and/or reduce its market share.

This does not appear to have been addressed or sufficiently addressed in Report 588. The Commission's price suppression analysis merely observes that price suppression appears to have occurred since 2017 with Australian Paper's prices not keeping pace with its CTMS. However, the 'cause' of Australian Paper's apparent inability or unwillingness to increase its prices with increases in its CTMS since 2017, and notwithstanding the anti-dumping measures, does not appear to have been investigated or, at least, there is no evidence of it being investigated in Report 588. The analysis at Section 8.6.1 of Report 588 (and elsewhere) does not address this issue. Nevertheless, as indicated above, the reason seems obvious.

Further and importantly, to what extent would Australian Paper need to increase its prices and/or its sales volumes to fully recover its CTMS A4 Copy Paper in the Australian market and return to profit?

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<sup>2</sup> Source: Australian Paper application for the continuation of the anti-dumping measures.

<sup>3</sup> The Commission's Trade Remedy Index reveals that prices of imports from all countries have remained relatively stable throughout the period 2017 to date, although there was a decline in prices with the onset of the COVID pandemic: [Trade Remedy Index | Department of Industry, Science, Energy and Resources](#)



Would a price increase, as well as an increase in sales volumes, be commercially feasible in the Australian A4 Copy Paper market given the prevailing market conditions in that market? Would end-users, that is, consumers and/or businesses be prepared to pay such higher prices, or would it merely exacerbate and accelerate the transition to electronic solutions in preference to paper solutions? If, on the other hand, it was commercially feasible, why did Australian Paper, with at least 85% market share, not increase its prices?

The answer to these questions required an analysis of the Australian A4 Copy Paper market and the market conditions prevailing in that market during the period 2015 or 2017 to the date on which the anti-dumping measures were due to expire. Such an analysis was not undertaken as evidenced by Report 588.

It also requires an answer to the questions of why did Australian Paper's parent company permit its wholly owned Australian subsidiary to operate its A4 Copy Paper business at a loss continuously from the imposition of the anti-dumping measures in 2017 with seemingly little or no opportunity of returning to profit, and what financial and other support did it provide to Australian Paper during this period and/or to what extent was Australian Paper's unprofitable A4 Copy Paper business being cross-subsidized by its profitable business or those within the group? What was the commercial motivation to support the continuance of an unprofitable business for five years and to do so notwithstanding the protection/assistance afforded by anti-dumping measures throughout this period of unprofitability? In such circumstances and, in particular, prevailing market conditions and the unprofitability of Australian Paper's domestic and export sales of A4 Copy Paper, what are Nippon Paper's expectations of Australian Paper's A4 Copy Paper business in the foreseeable future?

That is, to what extent did any such support enable Australian Paper to continue to sell its A4 Copy Paper products into the Australian A4 Copy Paper market at unprofitable prices and, given its dominant market share, thereby acclimatise the market to such prices and thereby preclude opportunity to increase prices to profitable levels notwithstanding the presence of the anti-dumping measures?

#### *4.2.1 Causation and structure of the Australian A4 Copy Paper market*

The Australian A4 Copy Paper market is characterized by being supplied predominantly by the sole domestic producer of A4 Copy Paper, Australian Paper, with a dominant market share estimated at anywhere between 65% to 90%, but probably around 85% as found by the Commission in Investigation 463.<sup>4</sup> The balance of the market would be and could only be supplied by imports, there being no other domestic producer, and predominantly from countries whose exports are currently subject to anti-dumping measures.

Accordingly, any competition in the Australian A4 Copy Paper market is (i) between imports and other imports, whether subject to anti-dumping measures or not, and (ii) between imports and the domestically produced products by the sole producer, Australian Paper.

In a market with a current demand of approximately 130,000 tpa in 2020 and probably less as at the due date of expiry of the anti-dumping measures, this translates into Australian Paper supplying approximately 100,000 to 110,000 tpa to the market, with the balance of <30,000 tpa being met by imports, some of which are not and have not been subject to anti-dumping measures. This also leaves the market with an excess of supply over demand by approximately 50% due to Australian Paper's

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<sup>4</sup> Source Table 3 in Report 463, page 27.

annual production of approximately 200,000 tpa, which excess production it sells into ‘less lucrative’ export markets at a loss and, presumably, at dumped export prices being less than its domestic prices.<sup>5</sup>

As noted earlier above, the structure of the Australian A4 Copy Paper market is set out diagrammatically by the Commission at Figure 1 in Report 588. According to the Commission, competition takes place predominantly at the end-user level of trade, that is, the retail level of trade for consumers and businesses. Presumably it is competition at this level of trade that drives competition at the other levels of trade in the Australian A4 Copy Paper market which supply the end-user/retail level of trade as noted earlier above.

It would seem that the structure of the Australian A4 Copy Paper market in Figure 1 of Report 588 is a simplified representation of the structure of the market as evidenced by Figure 1 in Report 463. The likelihood that the Australian A4 Copy Paper market had been re-structured since Investigation 463 seems remote and there is no evidence that it had. It, therefore, seems that the structure of the market is somewhat more complicated than the simplified version at Figure 1 in Report 588.

However, both diagrams not only disclose that Australian Paper does supply A4 Copy Paper to importers and that both supply customers at all levels of trade in the Australian A4 Copy Paper market but also all A4 Copy Paper from all sources flows through the distribution network depicted in both diagrams and ends in supply to end users, that is, consumers and businesses. Being a ‘consumer product’, this is where it is consumed, that is, where demand for its consumption exists and drives sales volumes and prices through the supply chain. This is the obvious conclusion to be drawn from the diagrams.

It is stated in Report 588 that:

*“Sellers of A4 copy paper, particularly in the corporate stationery and retail segments, commonly source a range of A4 copy paper brands and grades from **multiple sources**, both Australian made and imported. Therefore, consumer groups also have access to and consume A4 copy paper from a **variety of sources**.*

*Supply channels for A4 copy paper are concentrated through a limited number of national resellers and retailers. Paper Australia and imported sources supply the same end users, via the same supply channels, resulting in direct competition.*

*Paper Australia has a network of warehouses across Australia to service a broad range of customers. ...” (bold added, page 22)*

Given the disparity in the volume of A4 Copy Paper supplied into the Australian A4 Copy Paper market by Australian Paper and by importers, it is unclear to what extent at this level of trade, that is, the end-user level of trade where competition takes place, demand is met by, respectively, domestic products and by imports and, if there is a material disparity, the reason for such disparity? Further, the above statement gives no indication as to which grades/types of A4 Copy Paper are predominantly supplied from domestic and imported sources given the different price points for different grades/types of A4 Copy Paper.

If, as is understood to be the case, there is little if any price elasticity of demand between grades/types of A4 Copy Paper, that is, for example, end-users switching from, say, 70 gsm or 100 gsm A4 Copy Paper to 80 gsm A4 Copy Paper due to the differing characteristics of each, then competition would

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<sup>5</sup> Refer Australian Paper’s application for the imposition of anti-dumping measures in Investigation 583, page 29: [APPLICATION \(industry.gov.au\)](https://www.industry.gov.au)

be predominantly in the 80 gsm A4 Copy Paper, this being the only grade of A4 Copy Paper produced by Australian Paper and supplied to the Australian A4 Copy Paper in which it has a dominant market share. That this is the case would seem to be evidenced by the fact that different grades/types of A4 Copy Paper are supplied into the Australian market, each with its own price point. If it were otherwise, why produce and supply different grades/types of A4 Copy Paper?

It also is noted from the structure of the Australian A4 Copy Paper market at Figure 1, exporters and Australian Paper supply all levels of trade in the Australian market other than importers who are supplied only by exporters. Accordingly, the basis and significance for the assertion by the Commission that *'supply channels for A4 Copy Paper are concentrated through a limited number of national resellers and retailers'* and that Australian Paper and imported sources, that is, exporters and importers, *'supply the same end users, via the same supply channels, resulting in direct competition'* is unclear, other than that imports and domestically produced products all compete with one another in the supply to end-users and that this would drive competition at the other levels of trade in the Australian A4 Copy Paper market.

That is:

- (i) to what extent do exporters, importers and Australian Paper directly supply end-users as well as resellers and retailers as indicated in Figure 1 in Report 588 and at what prices given the imposition of anti-dumping measures on certain but not all imports; and
- (ii) to what extent do resellers and retailers source their requirements of A4 Copy Paper from importers and/or exporters in addition to sourcing from Australian Paper or in substitution for Australian Paper; and
- (iii) to what extent has Australian Paper maintained and increased its sales volumes and market share since 2017 by offering its products at unprofitable prices that undercut the prices of other participants in the Australian A4 Copy Paper market at each level of trade in that market; and
- (iv) what terms and conditions are required by resellers and retailers of suppliers in order to range their A4 Copy Paper products and does this vary from region-to-region and city-to-city and what performance metrics are required to be met in order for their products to continue to be included in the range of A4 Copy Paper products offered by the reseller and/or retailer, and
- (v) having regard to matters such as these, how has Australian Paper not only maintained but also increased its sales volumes and market share without reducing its prices in a progressively contracting, over-supplied market. In other words, in a market where demand is progressively contracting due to technological change and supply materially exceeds demand by domestic production with such over-supply progressively increasing as demand progressively contracts, why have Australian Paper's prices and those in the market not fallen and why have its sales volumes increased without a reduction in prices?

Given that competition takes place predominantly at that end-user level of trade, the issue is whether it does so solely or principally on price or on other factors as well and to what extent is there price elasticity of demand between grades/types of A4 Copy Paper at that level of trade and to what extent is there price elasticity of demand within a grade/type of paper (e.g., 80 gsm) resulting in end-users switching between different brands due to price differences between the brands?

Further, to what extent do the prices of imports reflect 'dumped' export prices? That is, if such imports have been exported from the subject countries at dumped export prices, to what extent has this 'flowed down' to the prices at which such imports are sold to end-users notwithstanding the imposition of the anti-dumping measures and to what extent are those prices to end-users affected by the prices of imports as opposed to the prices of the domestically produced product? In other words, what determines prices at the end-user level of trade given that is where competition predominantly takes place between A4 Copy Paper from all sources and where demand drives prices and volumes at the other levels of trade?

Again, if, as claimed by Australian Paper and apparently accepted by the Commissioner, resellers and retailers possess market power in the Australian A4 Copy Paper market, to what extent do they determine prices from their suppliers to enable them to not only maintain but also meet demand for sales volumes and prices to end-users at levels that are profitable to the reseller or retailer. That is, to what extent is A4 Copy Paper similar to 'fast moving consumer goods' (**FMCG**) where sales volumes often take priority over pricing to increase profitability, as opposed to higher prices that can decrease sales volumes and profitability, as is evidenced by the price discounting on a regular basis of such goods to end-users to maintain and, if possible, increase sales volumes that drive profits. This is not addressed by the Commissioner in Report 588, presumably due to an insufficiency of information and evidence from resellers and retailers.

Of interest in this regard, is Australian Paper's frequent provision of anecdotal evidence of resellers and/or retailers advising it of importers offering A4 Copy Paper at lower, competitive prices than those offered by Australian Paper. To the extent such offers occur, they are unsurprising. Where else is competition to come from other than importers and at what prices? Of more significance, is the absence of similar evidence of Australian Paper offering its products at prices lower than its competitors, especially when it has not only maintained but increased sales volumes in a contracting market without, apparently, reducing its prices in a seemingly 'price sensitive' market. There does not appear to be any actual information, evidence and analysis of how sales volumes were maintained and increased in a contracting market with demand falling and an over-supply increasing without a reduction in prices? This, again, highlights the risks of obtaining and relying upon the information and evidence from one interested party who is both the applicant for the continuation of the measures and the dominant supplier in the market.

Further, reference is made in the above extract from Report 588 to Australian Paper's network of warehouses across Australia for the supply of its products including A4 Copy Paper. This thereby raises the question of horizontal competition in the market and whether other suppliers of imported product, such as importers, have similar access to a network of warehouses across Australia and what implications this has for competition within the Australian A4 Copy Paper market. In particular, what are the distribution networks of importers and others across Australia as compared with Australian Paper, both in terms of geographical coverage and volumes of product distributed through the network and what effect does this have on competition within the distribution network?

Nevertheless, as Australian Paper, exporters and importers apparently all supply each level of trade in the Australian market, the question is to what extent does each supply at each level of trade/market segment, to which customers, in what volumes and at what prices? That is, to what extent do each supply corporate stationary suppliers and retailers and to what extent do each supply end-users, either directly or indirectly and, again, in what volumes and at what prices? Also, to what extent does Australian Paper market dominate each of these supply channels and, if so, to what extent and what effect does this have on competition? This would seem a relevant consideration and one that has not

been addressed, at least not from the perspective of importers, resellers and retailers and, ultimately, end-users.

Clearly, issues such as the above possess implications for competition within the Australian A4 Copy Paper market, both between imports and between imports and the domestically produced products at each level of trade in the supply chain in the Australian A4 Copy Paper market. Unfortunately, as can be seen from the Commission's public file and Report 588, information and evidence on the Australian market and prevailing market conditions therein was obtained for the purposes of this inquiry primarily, if not solely, from Australian Paper, apart from import data from ABF's database, and not from other interested parties, such as other participants in the Australian A4 Copy Paper market. Such other sources of information and evidence (currently lacking) would have provided not only more extensive information and evidence on the Australian A4 Copy Paper market but also enabled the 'objective examination' of that market based on 'positive evidence' as well as alternate perspectives on the market and its operation. This is seemingly missing.

#### *4.2.2 Causation and pricing in the Australian A4 Copy Paper market*

The issue of pricing in the Australian A4 Copy Paper market was addressed in Section 5.3 of Report 588, in which it was noted that Australian Paper's products competed with imports in all market segments in the Australian A4 Copy Paper market and, presumably, as did imports with each other.

This is unsurprising given that, as noted earlier, there is only one Australian producer of A4 Copy Paper and, consequently, the only source of competition can be from imports, and imports would compete against each other as well as against the domestically produced products.

Of concern is the number of paragraphs in the abovesaid section of Report 588 that refer only to statements made by Australian Paper (that is, a single source) and the absence of any other statements or points of view from any other participant in the Australian A4 Copy Paper market. Such statements reflect one point of view and possesses the risk referred to in WTO jurisprudence of resulting in a seemingly distorted view of the Australian A4 Copy Paper market and pricing in that market that has not been tested against the views of other participants in the market.<sup>6</sup>

#### *Issues*

Pricing in the Australia A4 Copy Paper market essentially involves a number of issues as identified earlier above, namely:

- (i) to what extent has pricing in the Australian A4 Copy Paper market been affected by economic factors such as: demand progressively contracting due to technological change; supply progressively exceeding the contracting demand due to an over-supply in domestic production; and sales by the Australian industry at a loss, that is, at prices less than its CTMS, continuously since the imposition of the anti-dumping measures, as well as import competition whether at dumped or un-dumped export prices and after payment of any interim dumping duties payable; and
- (ii) to what extent is there price elasticity of demand between different grades/types of A4 Copy Paper within the Australian market and import price elasticity of demand between domestic and imported sources of A4 Copy Paper in the Australian market at the various

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<sup>6</sup> See, for example, *EC – Fasteners (China)* – the risk of distortion referred to by the Appellate Body would apply equally in an assessment of material injury where the domestic industry consists of one producer but there are multiple participants in the market who can and will have a direct effect on the economic performance of the domestic industry.

- levels of trade in the supply chain/network and, in particular, at the end-user/retail level of trade where competition takes place as found by the Commission; and.
- (iii) to what extent do resellers and retailers, who apparently possess market power within the Australian A4 Copy Paper market, set prices at which their suppliers sell them A4 Copy Paper for on-supply to end-users such as consumers and businesses whose demand drives sales volumes and prices;
  - (iv) to what extent have resellers, retailers and end-users been acclimatised to Australian Paper's prices, being unprofitable, loss-making prices since 2017 given Australian Paper's dominance of the Australian A4 Copy Paper market and that imports from the subject and other countries attract liability for payment of interim dumping duty; and
  - (v) to what extent have prices of imports at the end-user/retail level of trade affected sales of imports and the domestic products at that level of trade and driven prices and sales volumes to suppliers of that level of trade such as resellers and retailers or, as is more likely, to what extent has demand from end-users, that is, consumers and businesses driven sales volumes and prices?

These issues are addressed below and, although separately addressed below, are, obviously, interrelated.

#### *Competition between product type/grade and suppliers*

Fundamentally, Section 5.3 of Report 588 failed to address the fact that A4 Copy Paper is not a single, undifferentiated homogenous product. It is a consumer product comprised of different grades and types of paper with different characteristics to meet different end-user preferences and that this is reflected in different price points in the different grades/types of A4 Copy Paper. If that were not the case, then different grades/types of A4 Copy Paper would not be produced, marketed and sold at different price points to meet the demands of different end-users. That this is not the case is evident from a visit to any website of a retailer or other supplier of A4 Copy Paper, particularly to end-users such as Officeworks although, it should be noted that different brands of A4 Copy Paper sold by a retailer may be produced by the same producer such as 'Reflex' and 'J Burrows', with the latter being produced as an OEM product in Australia, presumably by Australian Paper.

The Commission's categorization of A4 Copy Paper into different categories based on their physical characteristics, that is, their weight and whether made from recycled or unrecycled paper, in its Model Control Code (**MCC**) classification also reflects and recognises this.<sup>7</sup>

Such classification by the Commission was for use, apparently, in comparing the goods exported to Australia and the like goods sold domestically in the country of export. However, it is not apparent, nor explained, why the Commission has not migrated the use of its MCC classification or similar in its analysis of competition in the Australian A4 Copy Paper market, particularly, at the end-user level of trade/market segment, when it is apparent that different grades/types of A4 Copy Paper are to meet end-user, that is, consumers and businesses' preferences and, consequently, possess different price points.

In other words, there is no analysis of when an end-user, such as a business or a consumer, would switch from 100 gsm bright white unrecycled A4 Copy Paper to 80 gsm less bright white unrecycled

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<sup>7</sup> It is noted that the Commission's MCC classification is based on physical characteristics and not 'likeness', such as physical, production, commercial and functional/performance 'likeness' that it uses to determine whether domestically produced goods are 'like goods' to those exported to Australia. Why the inconsistency? When is 'likeness' a 'characteristic' of a good?

paper or from 70 gsm less bright white unrecycled paper to 80 gsm white recycled paper. That is, what is the price elasticity of demand between grades/types of A4 Copy Paper such as different MCCs and what is the import price elasticity of demand between domestically and overseas sourced A4 Copy Paper and does this vary according to grade/type of A4 Copy Paper?

It is APRIL's understanding that end-users typically will not switch between types/grades of A4 Copy Paper. For example, an end-user is unlikely to switch from 80 gsm paper to 70 gsm paper or vice versa because of price. This is due to the end-user's preference for the unique characteristics, including performance, of the grade/type of paper. However, end-users are likely to switch between different brands of the same grade/type of paper based on price.

If this is correct, then end-users are unlikely to switch to Australian Paper's 80 gsm A4 Copy Paper from 70 gsm and 100 gsm imported A4 Copy Paper on price but would switch from Australian Paper's 80 gsm A4 Copy Paper to 80 gsm imported A4 Copy Paper and vice versa based on price. On the other hand, end-users would be likely to switch between 80 gsm Reflex and J Burrows brands on price, both being produced in Australia presumably by the same manufacturer with the former the manufacturer's brand and the latter Officework's brand. Effectively, the Australian producer's products are competing with each other in accordance with price elasticity of demand.

However, these issues have not been inquired into but nevertheless raise the question which imports at what prices could cause injury to Australian Paper, especially when it is selling its 80 gsm A4 Copy Paper, whether under its brands or others, at a loss, that is, unprofitably?

There apparently has been no consideration, nor analysis, of the fact that different grades/types of A4 Copy Paper, because of their different physical characteristics, are typically purchased by different end-users for different applications at different price points. For example, as is common knowledge, A4 Copy Paper not only varies according to weight (i.e., gsm) but also finishes (e.g., uncoated, matte, gloss, etc.), whiteness/brightness and fibre content and whether or not it is recycled paper. A4 Copy Paper with a 100 gsm or higher and a high degree of brightness/whiteness is generally preferred by businesses because it is stiffer and less likely to jam high speed photocopiers and is more attractive to clients of the business where presentations of reports and other important/formal documents is important. This to be contrasted with A4 Copy Paper with an 80 gsm or less and less stiffness and brightness, which is likely preferred by consumers for everyday use where the characteristics of higher grades/types of paper are less important<sup>8</sup>.

These differences are reflected in, amongst other things, the different price points for the various grades/types of A4 Copy Paper. No doubt, the marketing data collected by resellers, retailers and distributors in the Australian A4 Copy Paper distribution/supply chain network would provide such information and evidence, but it does not seem to have been obtained in this inquiry. Such information would inform on to what extent import price elasticity of demand exists in the Australian A4 Copy Paper market. That is, to what extent do end-users switch from the domestically produced 80 gsm paper to the higher or lower gsm imported paper, and to what extent do end-users switch from the well-known Australian Paper branded 80 gsm paper to the relatively unknown imported brands of 80 gsm paper or to retailers' brands produced by the sole producer in Australia and supplied to retailers? In other words, it would inform on the extent to which end-users switch between imported and domestically produced A4 Copy Paper.

As Australian Paper apparently produces only unrecycled and recycled 80 gsm A4 Copy Paper, it is competing with imported A4 Copy Paper of different grades, finishes, etc., at different price points, as

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<sup>8</sup> See Officeworks: [Copy Paper Buying Guide | Officeworks](#)

opposed to a single, undifferentiated, homogenous commodity product where price is the sole differentiator. Further, such competition is taking place not only with Australian Paper's own brands but also brands produced by the sole producer in Australia for others such as retailers and sold into the Australian market to end-users. This is not addressed in the Commissioner's report other than in its price under cutting analysis in Section 8.6.1 of Report 588 but unsatisfactorily, as discussed later below.

It follows that the prices of A4 Copy Paper from different suppliers, whether domestic or imported, may simply reflect different product types/grades, that is, different grades/types of A4 Copy Paper. Such price differentials due to product differences is reflected in the Officeworks pricing extracted at page 63 of Report 588. To assess the effect of such differential pricing requires a price elasticity of demand analysis, including import price elasticity of demand, which was not undertaken.

Further, it must be recognised that in an open, competitive market, the object of suppliers to that market is to offer their products for sale in that market and seek to differentiate their products from other competitive products being offered for sale according to the physical characteristics with a price that reflects this – hence it being competitive with other products being offered for sale. This is especially the case at the end-user/retail level of trade where terms and conditions are typically uniform between suppliers and the points of competition are between the characteristics of the products with prices (competitively) reflecting those characteristics. It is such factors that a supplier seeks to convince a purchaser (e.g., business or consumer) to switch its purchasing decision to the product it is offering for sale or, in other words, the price elasticity of demand within and between products.

This invariably and inevitably means that prices between suppliers for the same product (e.g., unrecycled, 80 gsm white matt finish A4 Copy Paper) will vary with some undercutting others depending upon the characteristics being emphasised for the particular product they are offering for sale. In other words, suppliers will seek to convince end-users to switch from other suppliers due to the attributes/characteristics of their product and accompanying price as compared with others, as well as to switch from lower grades/types to higher grades/types (i.e., between MCCs) where feasible.

Hence the question of what is the price elasticity of demand between the different grades/types of A4 Copy Paper at the various levels of trade within the Australian A4 Copy Paper market, particularly the end-user/retail level of? If there is an absence of price elasticity of demand between grades/types of A4 Copy Paper, then this obviously would affect competition between imports and Australian Paper's products given that Australian Paper produces and supplies only 80 gsm A4 Copy Paper. Imported 70, 75 and 100 gsm A4 Copy Paper presumably would not be competing with Australian Paper's products on price and, therefore, should be excluded from the anti-dumping measures.

Import price elasticity of demand may be less likely to be relevant at the end-user/retail level of trade, where brand and reputation may play a more prominent role due to extensive marketing and advertising, but could be at higher levels of trade in the supply chain where terms and conditions of supply could be more important to ensure continuity of supply of sufficient volumes. Nevertheless, pricing at higher levels of trade would be governed, that is, driven by prices at the end-user/retail level of trade. No doubt this is the reason for why Australian Paper contends that market power in the Australian A4 Copy Paper market resides with resellers and retailers, with, presumably, suppliers to them being 'price-takers' as opposed to 'price makers'.

Also, even at the end-user level of trade where brand and reputation may play a more prominent role as well as price, competition between different brands of A4 Copy Paper at this level of trade may be



between the same grade/type of A4 Copy Paper (e.g., 80 gsm) produced by the one producer but marketed and sold under different brands and at different prices. The issue is what effect does this have on the economic performance of the producer of the A4 Copy Paper, that is, Australian Paper?

Hence the need for a more substantive and thorough analysis of the Australian A4 Copy Paper market, including competition within that market. This, of course, requires there being sufficient information and evidence to undertake such an 'objective examination' based on 'positive evidence'.

Report 588 does not evidence this as having been undertaken. That being the case, how can the effect of the expiry of the anti-dumping measures be reasonably foretold?

#### *Effect of economic factors in Australian A4 Copy Paper market on pricing*

In April 2017, anti-dumping measures were imposed on exports of A4 Copy Paper from the subject countries, with additional anti-dumping measures being imposed on exports of A4 Copy Paper from a number of other countries in 2019. In other words, the imports from countries the subject of anti-dumping measures would be entering the Australian market, following payment of any interim dumping duty payable, at un-dumped prices.

Accordingly, from 2017 the Australian market and, in particular, prices in that market would or should have been unaffected by imports from the subject countries because they were either exempt from the anti-dumping measures of, if subject to such measures, had paid the requisite interim dumping duty on importation and from 2019 by imports from the other countries from which exports were subject to anti-dumping measures.

If so, why has Australian Paper's A4 Copy Paper business remained unprofitable notwithstanding the imposition of all such anti-dumping measures? If the reason why its A4 Copy Paper business was unprofitable was because its prices did not cover its CTMS, then, as raised earlier in this submission, what was causing an inability or unwillingness to increase prices in the Australian A4 Copy Paper market? Presumably that price suppression must be due to some other economic factors other than dumping, since anti-dumping measures were still in place.

As previously discussed, that 'cause' would seem to be due to other economic factors, including those of Australian Paper's own making.

First, as is known, the Australian A4 Copy Paper market has been characterised since 2015 as a progressively contracting market, that is, declining demand for A4 Copy Paper, due to technological change and with, as result, an over-supply of product due to excess domestic production by the sole producer, Australian Paper. In short, demand has progressively declined while over-supply has progressively increased as a result.

In such circumstances, prices in an open competitive market should fall. That is, competitive market forces would dictate that prices progressively fall in such circumstances due to a fall in demand, presumably driven by a fall in demand by consumers and businesses at the end-user level of trade. That, obviously, has not occurred. Why not?

For example, is it the case that the anti-dumping measures have (artificially) maintained prices in the Australian A4 Copy Paper market? Would prices have fallen and fallen to global price levels such as those equivalent to Australian Paper's less lucrative export sales and/or the domestic selling prices in countries such as the subject countries where cost to make and sell and prices are materially lower than in Australia? Have the anti-dumping measures prevented this from occurring, but the fact that the Australian A4 Copy Paper market is an over-supplied, contracting market prevented prices from

being increased? That is, would increases in the prices for A4 Copy Paper simply have accelerated the transition to the less costly electronic solutions with its attendant benefits? Have resellers and retailers, who apparently possess market power in the Australian A4 Copy Paper market, resisted price increases for this reason, that is, it would lead to a decrease in sales volumes, whereas discounts/sales may lead to increased sales volumes as is the case for other consumer products that are regularly discounted? These and similar questions do not appear to have been considered by the Commissioner.

Second, given that Australian Paper's A4 Copy Paper has been unprofitable since the imposition of the anti-dumping measures, what effect has this had on price in the market, especially given the prevailing market conditions in the Australian A4 Copy Paper market since the anti-dumping measures were imposed?

That is, what effect have sales at prices at a loss by the dominant supplier to the Australian A4 Copy Paper had on pricing in the Australian A4 Copy Paper market? Given its market dominance and given the often claimed 'price sensitivity' of the Australian market, has Australian Paper's prices acclimatised the market to such loss-making prices and, thereby, prevented material price increases that would secure a return to profit for Australian Paper? Clearly with such market dominance, Australian Paper's prices would have a greater effect on the market than the price of imports. It is noted that there is no evidence to the contrary.

By way of analogy, as discussed earlier it is well known within the FMCG trade that products such as soft drinks, beverages, coffee, etc., are regularly on sale and/or sold at discounts to the 'full price' to increase sales volumes. It is a well-known commercial practice within the FMCG trade where sales volumes, not prices, drive profits and demand is maintained and, if possible, increased by discounting prices. This is such a regular occurrence that consumers have been acclimatised to expect such sales/discounts on a regular basis that they arrange their purchasing according to when the product is on sale at a discount. This can also result in purchasing at different retail outlets in accordance when the product is on sale at a discount in the retail outlet. Similar acclimatisation has occurred/is occurring with other consumer goods as is evident by the frequency of 'sales'.

Hence the question – is A4 Copy Paper any different? Has Australian Paper acclimatised Australian businesses and consumers in a market unaffected by dumping due to the presence of anti-dumping measures to expect certain prices for the different grades/types of A4 Copy Paper? If so, has this precluded Australian Paper and other suppliers to the Australian A4 Copy Paper market from materially increasing their prices? That is, is price suppression in the Australian A4 Copy Paper market due to Australian Paper's sales at prices that do not cover its costs to make and sell, that is, at a loss since the imposition of the anti-dumping measures?

In other words, price suppression within the Australian A4 Copy Paper market is being driven by prevailing market conditions that affects prices for A4 Copy Paper regardless of source and has been so driven since the anti-dumping measures were imposed and perhaps longer. That is, coinciding with the contraction in the Australian A4 Copy Paper market. Hence, being a high-cost producer, this resulted in Australian Paper's declining economic performance since 2015 and its unprofitability since 2017.

This above do not appear to have been addressed in Report 588. Nor does the question of whether and to what extent has Australian Paper's parent company supported Australian Paper's loss making A4 Copy Paper business either financially or otherwise and, if so, why given the likely effect it would have on pricing in the Australian A4 Copy Paper market?

#### *4.2.4 Conclusion*

In light of the foregoing, there is insufficient evidence that the injury incurred and continuing to be incurred by the Australian industry can be attributed to dumping of exports from the subject countries. Such injury, being Australian Paper's unprofitability since the anti-dumping measures were imposed, is clearly attributable to other economic factors unrelated to dumping or exports from the subject countries.

In particular, the cause of Australian Paper's unprofitability, that is, its prices not covering its CTMS let alone including an amount for profit, is seemingly due to price suppression in the Australian A4 Copy Paper market. In turn, this is caused by prevailing market conditions, namely, a market characterised by falling demand due to technological change and progressively increasing oversupply with excess domestic production and acclimatised to low and/or discounted prices at the end-user/retail level of trade.

Accordingly, the anti-dumping measures have not prevented such injury because it is not injury that the measures are intended to prevent due to it not being caused by dumping.

#### **4.3 Will material injury continue or recur?**

Section 8.6 of Report addresses the question of whether material injury will continue or recur. After referring to the *Ministerial Direction on Material Injury 2021*, the Commission stated that it sought to answer this question by undertaking an analysis of:

*"... the likely effect on price and volume in the current state that dumping and subsidisation of the exported goods continues and in an alternative scenario where the Minister does not secure the continuation of measures". (page 87)*

This it undertook by using a price undercutting analysis that compared *"the landed value of exports from the subject countries (both inclusive and exclusive of anti-dumping duty) and Australian industry's prices in the period 2019 to 2021". (page 87)*

Such an approach seems misconceived.

To ascertain the effect on prices if the anti-dumping measures expired would seem relatively straightforward and not require a price undercutting analysis because, if the anti-dumping measures expired, then no interim dumping duty would be payable on imports from the subject countries and importers would be free to price the A4 Copy Paper at prices that did not include an interim dumping duty component.

Whether this would result in a decline in prices is unclear. It would not necessarily do so because export sales by exporters and then by importers to their customers are all profitable notwithstanding payment of interim dumping duty. Therefore, maintaining prices at 'duty inclusive' prices means that amounts that would otherwise be paid to the government as duty would now be received by exporters and importers as profit. There would seem no commercial incentive or imperative for a decrease in prices when higher profits can be made.

Further, given that Australian Paper's prices are unprofitable as not covering its CTMS, the likelihood of it reducing its prices to incur greater losses would seem remote, especially when imports could continue to be sold profitably at lower prices. Rather, any reduction in prices would seem likely to be driven by market demand at the end-user/retail level of trade if the Australian A4 Copy Paper continues to contract. Trade remedies cannot prevent demand from declining due to the market contracting from technological change.

There also is insufficient evidence that prices are driven by imports as opposed to by Australian Paper with a dominant share of the market or by competition/prices at the end-user/retail level of trade by resellers and retailers. The effect, if any, on the expiry of the anti-dumping measures on sales volumes and prices at that level of trade is unknown as is the extent to which dumping is reflected in prices, if at all.

Further, if exporters sold at amounts equal to their normal value, that is, equal to domestic selling prices in the country of export, then they apparently would still be competitive in the Australian market, undercut the prices of the Australian industry and be profitable or, at least this would be the case for APRIL's exports. Why reduce prices to below normal values in such circumstances? It would not be in their commercial self-interest.

In any event, there was insufficient evidence concerning competition at the levels of trade supplied by both imports and Australian Paper, that is, to corporate stationary suppliers, retailers and end-users as per Figure 1 in Report 588. Consequently, there was no analysis of the likely effect, if any, on the expiry of the anti-dumping measures on prices and sales volumes at each such level of trade.

As mentioned at the outset, the question of whether the expiry of the anti-dumping measures will lead or be likely to lead to the continuation of the material injury that the measures were/are intended to prevent necessarily requires first identifying what is causing the material injury that is currently occurring. If the anti-dumping measures are not preventing the material injury that the Australian industry has been incurring prior to the due expiry date of the anti-dumping measures, then the expiry of the measures will have no effect on whether such injury continues or not. The two occurrences – material injury and expiry of the measures – are not causally linked. The expiry of the latter does not affect the occurrence of the former.

In other words, if, as contended, the injury incurred by Australian Industry since the anti-dumping measures were imposed, that is, its continued unprofitability, was not caused by dumping of the subject exports, then that is not injury that the anti-dumping measures are intended to prevent, nor can prevent. Hence the occurrence of that injury and its continuance is unrelated to the anti-dumping measures and, consequently, the expiry of the anti-dumping measures cannot affect the occurrence and continuance of that injury.

It, therefore, is not clear what the Commission's price undercutting analysis was intended to achieve when the causes of material injury to the Australian industry have not been addressed.

#### *4.3.1 Price undercutting by exports from the subject countries*

The Commission's price undercutting analysis was based on whether the 'landed value' of imports from the subject countries, both duty exclusive and inclusive, undercut the prices of the Australian industry during the period 2019 to 2021.

To ensure a 'fair comparison', the Commission apparently compared imported goods and the 'like goods' of the Australian industry in terms of physical specification and made the comparison at the level of trade at which the Australian industry sold like goods on delivered terms and the landed export prices paid by importers as being the appropriate level of trade. This is notwithstanding that the Commission had determined that the point of competition in the market was at the end-user (retail) level of trade.

In any event, the Commission found that in relation to the landed duty inclusive export price of the subject goods from each subject country:

- (i) imports from Brazil and China in 2019, 2020 and 2021 either undercut or were comparable to Australian industry's prices;
- (ii) imports from Indonesia undercut Australian industry's prices in 2021 and were the lowest amongst the subject exporters; and
- (iii) although imports from Thailand did not undercut Australian industry's prices, the 2021 price was below the value of Australian industry's CTMS.

The Commission also found that the *'duty free fully landed export prices for goods from all subject countries would have undercut Australian industry's prices in 2021'*.

With the exception of the finding in relation to Indonesian exports, these findings are unexceptional.

However, what is exceptional is the price undercutting methodology itself. As previously noted, the Commission compared the *'landed export price paid by importers'* with the *'prices at which the Australian industry sold like goods on delivered terms'* into the Australian A4 Copy Paper market.

As discussed earlier, the *'landed export price paid by importers'* is not the price at which importers on-sell A4 Copy Paper sourced from overseas into the Australian market. That is the price they pay to purchase A4 Copy Paper from exporters overseas. It is not the price at which they sell the A4 Copy Paper purchased from exporters into the Australian A4 Copy Paper market.

The price that importers sell A4 Copy Paper into the Australian A4 Copy Paper market would be the cost to them in purchasing that paper, any interim dumping duty and other charges payable on importation plus the importers general administration and selling expenses plus an amount for profit. Such prices would be materially different from the *'landed export price paid by importers'* and would be different in sales at the different levels of trade in the Australian A4 Copy Paper market as described earlier.

In short, the *'landed export prices paid by exporters'* is not comparable to the *'prices at which the Australian industry sold like goods on delivered terms'* into the various levels of trade/market segments in the Australian A4 Copy Paper market. As disclosed in Figure 1 in Report 588, such sales by Australian Paper are to resellers, retailers and end-users at prices that have been and are unprofitable. It is not a like-for-like comparison. This is even reflected in Figure 1 in Report 588. Nor is there any evidence of competition actually taking place as postulated by the Commission's price undertaking place.

Further, the comparison is with profitable prices, that is, the *'landed export price paid by importers'* with unprofitable prices, that is, *'prices at which the Australian industry sold like goods on delivered terms'*. The starting point in assessing injury to the Australian industry is the Australian industry's unprofitable prices, which prices have been unprofitable throughout the five-year period the anti-dumping have been imposed.

A price undercutting analysis does not address the cause of that injury and therein lies a significant deficiency in the continuation inquiry. That is, what injury is the anti-dumping measures intended to prevent, has it prevented that injury and, if it has, what is causing the injury the Australian industry has incurred and continues to incur and, if it has not, why not? What is the injury attributable to dumping by exports from the subject countries that the measures are intended to prevent not being the unprofitability that the Australian industry has incurred and contuse to incur that is caused by other economic factors as set out earlier in this submission, which the measures cannot remedy. Further, will that injury that the anti-dumping measures are intended to prevent recur following the

expiry of the measures assuming the anti-dumping measures have prevented that unidentified injury that the measures are intended to prevent.

The price under cutting methodology is flawed and it is flawed not only for this reason but also because the relevant levels of trade at which such an analysis should be undertaken is the end-user/retail level of trade where competition predominantly takes place and, as a result, where demand drives sales volumes and prices. Hence, it is submitted that the findings made by the Commission can be summarily rejected because the comparison in the analysis is not like-with-like.

Consequently, it is submitted that the findings and recommendations in Report 588 based on this analysis are necessarily unreliable, being based on a deficient and erroneous analysis of price undercutting. That is, the finding that the expiry of the anti-dumping measures would lead or be likely to lead to the material injury that the anti-dumping measures are intended to prevent is necessarily flawed and unsustainable being based on erroneous price undercutting analysis. Further, as the *reviewable decision*, was, in turn, based on such findings and recommendations, it cannot be the correct decision.

A more appropriate and informative price undercutting analysis would have been to compare the 'landed export prices paid by exporters' with Australian Paper's price in its export sales. Both the 'landed export prices paid by exporters' with Australian Paper's price in its export sales would be competing in the same market, the global export market for sales in that market. It would consist of a comparison of export prices, one being export prices to Australia and the other export prices from Australia.

However, such an analysis also would need to be taken into account that Australian Paper's export sales were 'less lucrative' than its domestic sales, meaning that they would be even less profitable. That is, such sales were at a greater loss and causing greater injury to Australian Paper in its A4 Copy Paper business, whereas exporters' export sales have been and are profitable, as found by the Commission.

Nevertheless, it would be indicative of Australian Paper's pricing into a market unaffected by dumping regardless of whether that pricing causes it injury as being sales at a loss due to not covering its CTMS.

For completeness, it should also be recalled that the Australian industry's prices with which the prices of imports from the subject countries are purportedly being compared are unprofitable, loss-making prices in the Commission's price undercutting analysis.

Accordingly, the Commission has compared unprofitable Australian industry prices with duty inclusive and exclusive profitable import prices, as well as prices at different levels of trade. In other words, Australian Paper is already incurring injury because of the unprofitable price at which it is selling its products and has been for some time before the price comparison. Further, what the price comparison demonstrates is that such injury would continue notwithstanding payment of interim dumping duty on the imported product.

The Commission's price undercutting analysis highlights, if anything, the fact that Australian Paper's A4 Copy Paper business has been unprofitable since the anti-dumping measures were imposed due to its prices not recovering its CTMS let alone include an amount for profit and due to other economic factors, as discussed earlier above, it has been unable to increase its prices, as have other participants in the Australian market been unable to do so.

#### *Effect on prices*

The Commission asserted that the reason for undertaking the price undercutting analysis was to assess the likely effect on prices if the anti-dumping measures expired.

Following some anecdotal accounts from Australian Paper when it apparently was required to compete with prices of imported product, the Commission concluded that:

*“The commission considers the above discussion demonstrates that the continued availability of dumped ... goods from the subject exporters will likely prevent Paper Australia increasing its prices if the measures were to expire.”* (Report 588, page 93)

This is, with respect, a surprising conclusion. Australian Paper has been unable or unwilling to increase its prices to recover its CTMS A4 Copy Paper at any time in the preceding five years when the anti-dumping measures were in force. Why could it expect to do so at any time in the future, regardless of whether the measures remained in force or not?

That is, as the cause of the apparent price suppression in the Australian A4 Copy Paper market during the preceding five years when the anti-dumping measures were in force was not examined and identified, which price suppression would have applied to all participants in the Australian A4 Copy Paper market, how could the effect of the expiry of the anti-dumping measures on price suppression in the Australian A4 Copy Paper market be reasonably foreseen or foretold?

The substantive issue that was not addressed in this analysis was who determined prices in the Australian A4 Copy Paper market given that competition between A4 Copy Paper products, whether imported or domestic, took place at the end-user/retail level of trade. As discussed earlier above, prices in the Australian A4 Copy Paper market were governed by the prices that resellers and retailers could obtain in sales to end-users, that is, to businesses and consumers in retail sales. However, there was no price analysis at this level of trade due to a dearth of information and evidence that would permit such an ‘objective examination’ based on ‘positive evidence’.

Apart from the fundamental problem with the Commission’s price undercutting analysis identified earlier above, it also is that it simply observed the existence of price undercutting. There is no demonstration that any such price undercutting would or could have an effect on prices in the Australian A4 Copy Paper market given the nature and structure of that market and prevailing market conditions within that market.

Mere observation that price undercutting may be occurring does not mean that it is having any effect or, if it is, the extent of that effect and such effects can all be attributed to dumping. An ‘objective examination’ based on ‘positive evidence’ would be necessary to establish this and at the relevant levels of trade.

This deficiency in analysis was due, again, no doubt to the insufficiency of information and evidence concerning the market from participants in the market other than the applicant for the continuation of the anti-dumping measures, namely, Australian Paper. Information and evidence from other participants would likely have provided a different view of the market.

Consequently, the Commission’s conclusions from its price undercutting analysis again:

- (i) was based on anecdotal evidence concerning only one purchaser of A4 Copy Paper, a retailer, and no other purchasers of A4 Copy Paper in the Australian market (i.e., importers, distributors, re-sellers, etc.); and

- (ii) did not address why other customers of Australian Paper had not switched to sourcing their requirements for A4 Copy Paper from imports but rather had maintained and presumably increased purchases due to the increase in sales volumes by Australian Paper;
- (iii) did not address what effect, if any, the price undercutting had on prices on the 85% or more of the Australian market held by Australian Paper and/or sales volumes; and
- (iv) did not address why prices in the Australian market had remained relatively stable since the imposition of the anti-dumping measures were imposed notwithstanding the apparent occurrence of price undercutting by all participants in the Australian A4 Copy Paper market; and
- (v) did not address how Australian Paper was able to increase its sales volumes since the anti-dumping measures were imposed despite the progressive contraction of the Australian A4 Copy Paper market and the apparent occurrence of price undercutting by all participants in that market.

These deficiencies no doubt reflect the dearth of information and evidence that the Commission had obtained concerning the Australian market and its operation, including from key participants in that market, but, instead, were reliant primarily on information provided by the applicant, Australian Paper, then only on information of occurrences favourable (unsurprisingly) to Australian Paper's.

If prices in the Australian A4 Copy Paper market are already suppressed due to other economic factors prevailing in the Australian market, it is unclear what additional price effect the expiry of the measures would or could have. Again, this was not addressed in Report 588.

#### *4.3.2 Price undercutting by APRIL's exports*

In addition to the foregoing, the Commission's findings on price undercutting regarding APRIL's exports are especially problematic.

The Commission noted that APRIL's exports in 2019 were of non-recycled 100 gsm and such exports were found in Review 551 not to undercut the prices of Australian Paper, nor those of any other participant in the Australian A4 Copy Paper market.

The relevance of this finding is unclear as Australian Paper does not produce 100 gsm A4 Copy Paper. Further, in this continuation inquiry, APRIL's exports of 100 gsm A4 Copy Paper were found to be undumped. Clearly exports of 100 gsm A4 Copy Paper by APRIL were not and could not be causing injury. There is apparently no price elasticity of demand between grades/types of A4 Copy Paper or, at least, there is no finding supported by evidence that there is. The question, therefore, is why were they not excluded?

As regards the Commission's finding that the 'landed value' of APRIL's exports inclusive of interim dumping duty undercut the prices of the Australian industry and were the lowest of the subject exporters was, unfortunately, erroneous for the following additional reasons.

The 'landed value' used by the Commission for APRIL's exports in the price undercutting analysis was presumably the 'import price' declared in the import declarations lodged by AFEM's Australian customers with ABF, as indicated by the Commission. The 'landed value' would be the import price payable by the importer for the A4 Copy Paper sourced from APRIL or, in other words, its customs value. Applying the dumping duty rate to that 'value' is incorrect. Whereas customs duties payable under the *Customs Tariff Act 1995* are calculated by applying the customs duty rate under that Act to the customs value, the position is different for dumping duty.



While dumping duty, as a special duty of customs, is payable on the importation of the goods into Australia, as with any other customs duty, this being the taxing point', the amount of duty payable is calculated differently. It is calculated by applying the rate of dumping duty, the *ad valorem* rate, to the 'actual export price' of the imported goods liable for the duty. While in most cases that 'export price' will or may be the same as the customs value declared in import declarations, that is not the case for APRIL's exports. That 'export price' is the price determined by the Commissioner and accepted by the Minister to be the price payable by AFEM to RAK for the A4 Copy Paper. Further, it is not even the actual price paid by AFEM to RAK but an amount calculated by the Commissioner and accepted by the Minister as being the 'export price' paid or payable by AFEM to RAK. It is to that 'export price' to which the *ad valorem* duty rate is to be applied to determine the amount of interim dumping duty payable.<sup>9</sup>

That was not how the 'landed value' of APRIL's exports, duty inclusive, was seemingly calculated. It applied the *ad valorem* duty rate to the customs value, not the 'export price'. Clearly that was not correct and involved a fundamental misunderstanding of the nature of dumping duties and their imposition and, therefore, the application and payment of interim dumping duty. That is, such duties are to increase 'export prices' by amounts not exceeding the dumping margin to offset the injurious effects of dumping.

The application of the rate of dumping duty to the import price, that is, customs value in the case of APRIL's exports, necessarily results in the application of that duty in excess of the margin of dumping.

This is because the import price is a greater amount than an 'actual export price', as the Commission's calculations in Review 551 and this inquiry clearly evidence. Consequently, applying the fixed *ad valorem* component to the import price results in a greater amount of interim dumping duty payable than by properly applying the *ad valorem* rate to the 'export price'. When that amount of interim dumping duty is expressed as a proportion of the 'actual export price' it exceeds the full dumping margin and necessarily does so and in breach of the Anti-Dumping Agreement, as well as subsections 5(2) and (3) of the *Customs Tariff (Anti-Dumping) Regulation 2013* in its application to the customs value and not the 'actual export price'.

In addition, given the determination that the 'export price' of APRIL's exports to Australia is the price paid by AFEM to RAK and is an amount determined or to be determined under section 269TAB(1)(c) of the *Customs Act 1901*, the administrative difficulties of applying the combined fixed and variable rate of duty in accordance with subsections 5(2) and (3) of the *Customs Tariff (Anti-Dumping) Regulation 2013* are self-evident. The determination of the 'export price' between AFEM and RAK for a particular shipment would require access to confidential information of AFEM and RAK that neither has any obligation to provide. Therefore, how is an importer to discharge its obligations by calculating and paying the correct amount of interim dumping duty?

This incorrect administrative application of the combination fixed and variable duty rate in working out the interim dumping duty payable was addressed in detail in my client's application for this review. My clients reiterate that that method of working out interim dumping duty payable was incorrectly applied and further, could not be properly applied because it required access to confidential information not available to the importer making the relevant import declarations.

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<sup>9</sup> The incorrect application of the combination fixed and variable duty method for determining the amount of interim dumping duty payable is further examined later below under Submission 3: see Section 5 hereunder.

However, this is not the only deficiency with the Commission's price undercutting analysis as regards APRIL's exports. That price under cutting analysis was (erroneously) based on the 'landed value' of APRIL's exports. Why the 'landed value' of APRIL's exports was used is not self-evident nor explained.

The 'landed value' of APRIL's exports is the import price paid or payable by AFEM's Australian customers. As has been repeatedly verified, such prices are negotiated between AFEM and AFEM's Australian customers at arm's length. They are negotiated and agreed in advance of any purchase order being placed by AFEM with RAK and any price payable for the purchase of the A4 Copy Paper the subject of such a purchase order, which is determined subsequently in accordance with transfer pricing principles to reflect a market price. In other words, the 'landed value', that is the import price paid by AFEM's Australian customers, and the 'actual export price' paid by AFEM to RAK are two distinct and separate 'prices' unrelated to one another.

The question is why did the Commission use the 'landed value' of APRIL's exports in its price undercutting analysis when it was not the 'export price' determined to being 'dumped'? There is, in fact, no finding by the Commissioner nor the Minister that that 'import price' paid by AFEM's Australian customers is in fact a 'dumped' price.

Hence its use in the Commission's price undercutting analysis to assess the effect that expiry of the anti-dumping measures would have or likely have on prices is unclear when it is not a 'dumped' price'. Further, applying interim dumping duty to that price for the purposes of the price undercutting analysis is unclear when that price has not been determined to be a 'dumped' price. There is no analysis or finding of fact supported by evidence in this regard.

In other words, there is no evidence that any price undercutting by APRIL's exports in the Australian A4 Copy Paper was due to 'dumping' and, if it was, to what extent. Hence no conclusions can be drawn on the effects of 'dumping' of APRIL's exports on the Australian A4 Copy Paper market or the Australian industry.

For present purposes, the Commission's price undercutting analysis in so far as it relates to APRIL's exports is, with respect, necessarily deficient for these reasons as well as those set out earlier above. Hence the findings and recommendations of the Commissioner regarding APRIL's exports based on such analysis must be rejected for these reasons as well as those set out earlier above.

#### *4.3.3 Cumulation of APRIL's exports*

During the period following the imposition of the anti-dumping measures, it has only been found in relation to APRIL's exports that:

- (i) while APRIL's exports in 2019 were found to be at dumped prices, the prices of APRIL's exports in the Australian A4 Copy Paper market did not undercut those of the participants in the market including those of Australian Paper;
- (ii) while the 'export price' of APRIL's exports was (erroneously) found to be 'dumped' prices, there was no finding that the price paid or payable by AFEM's Australian customers for APRIL's exports, being the price at which such exports are introduced into the commerce of Australia, were 'dumped' prices;
- (iii) APRIL's exports consisting of 100 gsm A4 Copy Paper during the investigation period in the continuation inquiry were not at dumped prices;
- (iv) APRIL's exports were limited during the investigation period and ceased in February 2021;

- (v) there was no evidence that APRIL's exports to its Australian customers or, if on-sold by its Australian customers into the Australian A4 Copy Paper market, actually competed with Australian Paper's products.

Therefore, even if APRIL's exports were exported to Australia at 'dumped' prices, there is no evidence such exports at 'dumped' prices caused material injury and, if they purportedly did, when and how.

Further, no consideration was given to the basis on which APRIL's exports could properly be cumulated with exports from the other subject countries in assessing material injury being caused by such exports through the injurious effects of dumping as required by paragraph (b) of Article 3.3 of the Anti-Dumping Agreement. That requirement does not appear to have been considered.

It is submitted that the '*conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product*' do not warrant such cumulation. That is, the dominance of the Australian A4 Copy Paper market by the sole Australian producer and its sales at unprofitable prices mitigate against cumulation. In such conditions of competition, imports are likely to supply niche customers and market segments where price is less determinative of the source of supply and where other characteristics of the grades/types of A4 Copy Paper to be supplied and circumstances of supply are more determinative of the purchasing decision.

In any event, as there was no inquiry into whether exports from the subject countries should be cumulated, that is, whether circumstances so warranted, the issue is moot. Unless and until that inquiry is undertaken and evidence obtained supporting cumulation, exports from the subject countries should not be accumulated for the purposes of assessing the likelihood of material injury caused by dumping occurring or recurring. Each must be considered on its own merits separately from the others.

Accordingly, the injury incurred by Australian Paper at any time after the imposition of the anti-dumping measures cannot be attributed to APRIL's exports at dumped prices whether cumulated with exports from the subject countries or not.

#### 4.3.4 Conclusion

In light of the above, there is insufficient evidence that the expiry of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of the material injury that the measures are intended to prevent.

Rather, based on the available evidence, the expiry of the anti-dumping measures would have no effect on the continuation of the injury, that is, the unprofitability of the Australian industry. There is insufficient evidence that the expiration of the measures would have any effect on prices in the Australian A4 Copy Paper market or on Australian Paper's economic performance. The evidence is to the contrary. That is, Australian Paper's A4 Copy Paper business will continue to be unprofitable, that is, to continue to operate at a loss regardless of the expiration of the anti-dumping measures.

Further, even if the *reviewable decision* as regards the continuation of the anti-dumping measures were to be affirmed, APRIL's exports should nevertheless be excluded. There is insufficient evidence that such exports would cause material injury to the Australian industry following the expiry of the anti-dumping measures as they have not caused injury to the Australian industry in the preceding five years and the likelihood of this occurring somehow in the future given the prevailing conditions in the Australian A4 Copy Paper market is remote at best.

## 5. Submission 3 – Alteration of variable factors incorrect

The *reviewable decision* in so far as it related to alteration of the variable factors applying to exports from Indonesia by APRIL and/or all other exporters was neither the correct nor the preferable decision. This is because the findings on which those decisions were based were factually and legally incorrect.

Specifically:

- (i) the determination that the ‘export price’ is the price payable by AFEM to RAK for the purchase of A4 Copy Paper, including its delivery to AFEM at a port in Indonesia nominated by AFEM, is factually and legally incorrect because it is clearly **not** the price at which the A4 Copy Paper purchased by AFEM is introduced into the commerce of Australia and at which it competes with the like product produced by the Australian industry on price;
- (ii) even if the ‘export price’ is the price payable by AFEM to RAK, that price was wrongly determined to be unreliable because it appeared to have been influenced by an association between the parties and, therefore, the transactions between AFEM and RAK were not arm’s length transactions;
- (iii) the subsequent amount determined to be the ‘export price’ was legally and factually incorrect because it was not actually a ‘price’, in that it was not an amount payable by AFEM to RAK for the purchase of A4 Copy Paper, it was not an amount for taking the A4 Copy Paper from Indonesia and transporting it to Australia and nor was it the ‘price’ at which the A4 Copy Paper was introduced into the commerce of Australia and at which it competes with the like product produced by the Australian industry on price;
- (iv) the normal value of the A4 Copy Paper exported from Indonesia by APRIL and/or all other exporters was factually and legally incorrect because certain normal values were not prices at which the A4 Copy Paper in question was sold in Indonesia;
- (v) the comparison of ‘export prices’ with normal value was not a ‘proper comparison’ because it was not a comparison of actual export prices, that is, the price at which the A4 Copy Paper in question was introduced into the commerce of Australia, with the comparable price in domestic sales of like goods in Indonesia with appropriate adjustments to ensure a ‘fair comparison’; and
- (vi) in addition, the non-injurious price was factually and legally incorrectly considered to be the unsuppressed selling price (**USP**) as determined by the Commissioner, which, in any event, was not a price that could be obtained in the Australian A4 Copy Paper market due to the Australian industry’s sales at a loss since the imposition of the anti-dumping that had affected prices within the market.

Detailed reasons are set out in the application for this review and discussed further below.

## **5.1 Detailed reasons – export price, normal value and proper comparison**

### **5.1.1 Exporter and export price**

Whether RAK or AFEM is the ‘exporter’ of the A4 Copy Paper produced in Indonesia remains an unresolved issue and in dispute between APRIL and the Commission.

The Commission has not accepted APRIL’s contention that AFEM is the ‘exporter’ for the reasons it has set out in SEF 588 and in Report 588. APRIL, for its part, remains of its view that AFEM, not RAK, is the ‘exporter’ for the reasons it has submitted, and it remains unconvinced by the Commission’s reasoning in SEF 588 and Report 588 that RAK, not AFEM, is the ‘exporter’.

As indicated in the footnote in APRIL's application, while not conceding on this issue, it is not pressing the issue as to who is the 'exporter' in this review. This for the reason, as discussed in our conference, that the more fundamental issue is what is the 'export price' of APRIL's exports from Indonesia to Australia? Who is the 'exporter' can inform what is the 'export price' but is not necessarily determinative of that issue. APRIL contends that this is the case here for the reasons discussed below.

APRIL's contention is that the 'export price' is the price payable by AFEM's Australian customers to AFEM for the purchase and delivery of A4 Copy Paper to the customers in Australia. This is the 'price' and the only 'price' at which the A4 Copy Paper in question is introduced into the commerce of Australia. This has consistently been its contention.

'Dumping' is defined in Article 2.1 of the WTO Anti-Dumping Agreement as follows:

*"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."*

The 'price' at which A4 Copy Paper exported from Indonesia by APRIL is introduced into Australia cannot be the price payable by AFEM to RAK for the purchase of A4 Copy Paper by AFEM from RAK for delivery to AFEM outside of Australia. It is not the price at which the A4 Copy Paper in question is introduced into the commerce of Australia. That is an undisputable fact.

It also must be noted that the transactions between AFEM and RAK are between an Indonesian producer of A4 Copy Paper and a Malaysian trading company that are entered into and completed outside of Australia. Once RAK delivers to AFEM at the nominated place for delivery the A4 Copy Paper being purchased by AFEM from RAK and AFEM pays the purchase price to RAK, their respective contractual obligations are discharged by performance. Neither has any further contractual or other obligations to the other with respect to the A4 Copy Paper so purchased by AFEM.

This leaves the question of pursuant to what contractual arrangements and at whose cost is the A4 Copy Paper AFEM has purchased from RAK removed from Indonesia, transported to Australia and delivered to the Australian customer in Australia? Clearly, those contractual arrangement are those between AFEM and AFEM's Australian customers. There are no other arrangements for taking the A4 Copy Paper from Indonesia and delivering it to AFEM's Australian customers in Australia, as the Commission has repeatedly verified.

In this regard, nowhere in Report 588 does the Commissioner explain how the A4 Copy Paper is taken from Indonesia, transported to Australia and delivered to AFEM's Australian customers in Australia, at whose cost and pursuant to what contractual arrangements if not by AFEM at the cost of the Australian customer, which is paid for in the price paid by the customer to AFEM. There, therefore, is a lacuna in the Commission's analysis from delivery of A4 Copy Paper in Indonesia by RAK to AFEM to delivery of the same A4 Copy Paper by AFEM to its customers in Australia and the cost/price in doing so. How the A4 Copy Paper is taken from Indonesia and delivered to AFEM's Australian customers in Australia is unaccounted for in the 'export price' determined by the Commissioner.

There is no explanation as to what happened to all of the costs that were deducted from the price paid by AFEM's Australian customers to AFEM in the calculation of the so-called 'export price' payable by AFEM to RAK and why those costs were not relevant to the price at which the A4 Copy Paper in question was introduced into the commerce of Australia on delivery to the Australian customer. That

is, those costs have seemingly disappeared and have not been accounted for in the Commission's analysis of APRIL's exports to Australia, not included in the 'export price' determined by the Minister on the recommendation of the Commissioner. They remain unaccounted for and have seemingly disappeared in the Commissioner's determination of the 'export price' in relation to APRIL's exports.

However, the cost of removing the A4 Copy Paper from Indonesia and delivering it to AFEM's Australian customers in Australia does re-appear. It does so in the Commission's price undercutting analysis in Section 8.6.1 of Report 588.

Notwithstanding that it has consistently not been considered to be the 'export price' by the Commission and there being no finding that it is a 'dumped' price, the Commission used the price paid by AFEM's Australian customers for the importation of the A4 Copy Paper into Australia as the price, that is, the 'landed value', for the price undercutting analysis set out in Section 8.6.1 of Report 588.

That is, the costs that were deducted from the prices paid by AFEM's Australia customers to AFEM in the determination of the 'export price' between AFEM and RAK re-appear in the price used by the Commission in its price undercutting analysis, that is, the 'landed prices' of APRIL's exports. Effectively, this recognises that the price at which APRIL's exports compete with the products of the Australian industry on 'price' is not the 'export price' determined by the Commissioner, but the actual 'landed price' at which such exports are introduced into the commerce of Australia although that analysis is flawed for the reasons set out earlier above.

However, that 'landed price' has not been found to be a 'dumped' price. There is no analysis in this regard and, consequently, to finding of fact supported by evidence that APRIL's exports are introduced into the commerce of Australia at 'dumped' prices and compete in the Australian A4 Copy Paper market at 'dumped' prices at all levels of trade in that market. Nor is that price a price that is negotiated and agreed with the Australian customer by the 'exporter', RAK.

It would seem that the Commission has, on the one hand, one approach to the 'export price' in the determination of 'dumping' for APRIL's exports and on the other hand, a different approach in the determination of the 'price' at which APRIL's exports are introduced into the commerce of Australia and compete with Australian Paper's products on 'price' for the purposes of its price undercutting analysis to assess the likely effect the expiry of the anti-dumping measures would have on prices in the Australian A4 Copy Paper market.

They are, of course, different 'prices' and unrelated to one another given how each is determined. In particular, the price paid by AFEM's Australian customers is not only independently negotiated and agreed at arm's length between the parties (along with other terms and conditions of sale and prior to the determination of the price payable by AFEM to RAK), as the Commission has repeatedly verified, it also has not been determined to be a 'dumped' price. There is no finding by the Minister on the recommendation of the Commissioner that the prices paid by AFEM's Australian customers to AFEM for the A4 Copy Paper they have purchased and imported into Australia is a 'dumped' price.

Not only is the price paid by AFEM to RAK not the price at which the A4 Copy Paper is introduced into the commerce of Australia, but also it does not govern or otherwise determine the price at which the A4 Copy Paper is introduced into Australia, that is, the price payable by AFEM's Australian customers to AFEM. Rather, as the Commission's own calculations evidence and as it has verified repeatedly, prices between AFEM and RAK are derived from the prices agreed by AFEM with its customers through application of transfer pricing principles not the other way around.

Further, given that the prices paid by AFEM and RAK are determined in accordance with transfer pricing principles to represent market prices based on representative market prices within a number of acceptable price ranges, there is no necessary nexus between the prices paid by AFEM to RAK with those paid by AFEM's Australian customers to AFEM. Both, effectively, represent market prices and are determined independently of each other.

Why, therefore, the Commission included the 'landed value' of APRIL's exports, that is, the 'import price' paid by AFEM's Australian customers for the A4 Copy Paper they imported and declared in import declarations made with ABF in its price under cutting analysis is unclear. It is not the relevant 'price' because it is not the 'export price' determined to be the 'dumped' price.

Further, the price paid by AFEM to RAK, if determined to be the 'export price' and, as such, a 'dumped' price, it cannot cause injury to the Australian industry because it is not the price at which the A4 Copy Paper exported from Indonesia is introduced into the commerce of Australia and at which it competes with the Australian industry's product and others on price.

There is no finding that that 'export price' was introduced into the commerce of Australia and through the effects of 'dumping' causing material injury to the Australian industry, nor any analysis supported by evidence from which such a finding could be made. No nexus has been established between the claimed 'dumped export price' between AFEM and RAK and the 'prices' at which the A4 Copy Paper from Indonesia competes in Australia with Australian Paper's products in the Australian A4 Copy Paper market on price.

Finally, the following must also be noted:

- (a) that the price at which the product in question is introduced into the commerce of Australia as being the relevant price in the determination of 'export prices' is confirmed by sections 269TAB(1)(a) and (b) of the *Customs Act 1901* that refer to the relevant price being the price payable by the importer, which reference would also inform the Minister in the exercise of his discretion under section 269TAB(1)(c) of the *Customs Act 1901* where the price payable by the importer was not payable to the exporter; and
- (b) while section 269TAB(1)(c) of the *Customs Act 1901* confers a wide discretion on the Minister in determining an 'export price', it nevertheless requires the Minister to exercise that discretion to determine a 'price' payable for A4 Copy Paper, being a 'price' payable by an importer for the importation into Australia of A4 Copy Paper. For the reasons set out in APRIL's application for this review, the 'export price' so determined by the Minister is not such a 'price' and was not determined in accordance with the law; and
- (c) the Commissioner's diagrammatical depiction of the structure of the Australian A4 Copy Paper industry at Figure 1 in Report 588 does not include sales by RAK to AFEM as being part of that market. It is clearly not, which the Commissioner himself thereby acknowledges, which supports the view that the relevant price is the price at which APRIL's exports are introduced into the commerce of Australia.

For these reasons, regardless of which entity is the 'exporter', the price and the only relevant price is the price actually paid or payable by AFEM's Australian customers to AFEM, being the price at which APRIL's exports are introduced into the commerce of Australia. As has been submitted, it is only this price, being the price at which APRIL's exports are introduced into the commerce of Australia, can cause injury to the Australian industry. This is because it is only this price, following entry into the commerce of Australia, that competes with the domestic industry's products and on price.

Whether injury is caused by such exports through the injurious effects of dumping requires a determination, that is, a finding supported by evidence, that that price is a 'dumped' price and the extent of such dumping flows through into the prices at which such exports compete with the domestic product on price at the points of competition in the Australian A4 Copy Paper market. There has been no such finding, nor has such an assessment been undertaken.

The relevance, therefore, of that 'export price', being the 'ascertained export price' as determined by the Minister on the recommendation of the Commissioner, to the issues of material injury and causation to the Australian industry is unclear and unexplained by the Commissioner in Report 588. Certainly, there is no evidence that that 'export price' between AFEM and RAK has caused injury to the Australian industry regardless of whether or not it is a 'dumped' price or even that it competes with the Australian industry's products in the Australian A4 Copy Paper market on price.

Accordingly, APRIL remains of the view and contends that both factually and legally the 'export price' of APRIL's exports is to be properly determined as the price paid or payable by AFEM's Australian customers to AFEM for the A4 Copy Paper exported from Indonesia. It is the price and the only price at which such A4 Copy Paper is introduced into the commerce of Australia and competes with the domestic product, amongst others, on price in the Australian A4 Copy Paper market.

#### 5.1.2 *The Minister's determination of 'export price'*

Because it was considered that the 'exporter' was RAK, the 'export price' of the A4 Copy Paper produced by RAK and exported from Indonesia was determined to be the price paid or payable by AFEM to RAK in the *reviewable decision*.

However, the Commissioner considered that the actual prices paid by AFEM to RAK were 'unreliable' because they did not reflect arm's length transactions and this was because the relationship between AFEM and RAK appeared to have influenced those prices.

It is submitted that the Commissioner's reasoning on this point is incorrect or, at least, unclear.

Specifically, precisely why the prices paid by AFEM to RAK for the A4 Copy Paper purchased from RAK was 'unreliable' is not evident from the Commissioner's explanation, when:

- (i) the prices paid by AFEM to RAK were actually paid and recorded in the records and accounts of AFEM and RAK, which were audited, and payment of those amounts were verified by the Commission as having been paid; and
- (ii) the Commission verified that those prices were determined in accordance with transfer pricing principles so as to represent market prices and there was no evidence that the prices did not reflect market prices, nor was this tested by appropriate benchmarking; and
- (iii) to the extent that the prices did not comply with transfer pricing principles, which is disputed by APRIL and the independent certifier, Deloitte & Touch LLP, certified that they did, it is unclear how any non-compliance with the transfer pricing principles for income tax purposes rendered the prices as not reflecting market prices and there was no evidence or inquiry that they did not reflect market prices.

It also is unclear from Report 588 how the relationship between AFEM and RAK 'appeared to influence' the prices payable and paid by AFEM to RAK for A4 Copy Paper. Specifically, what made the amounts actually paid and verified as being paid for the A4 Copy Paper by AFEM to RAK as being 'unreliable'. Against what benchmark was such 'unreliability', that is, the 'appearance of influence', to be assessed and was actually assessed?



Is not the issue whether the prices agreed between AFEM and RAK to be payable were the prices actually paid by AFEM to RAK and whether such prices actually paid were less than the normal value of APRIL's exports regardless of whether there was any non-compliance with transfer pricing principles in the determination of the prices payable and paid by AFEM to RAK, and APRIL disputes any claims of non-compliance, and regardless of how such prices were ultimately determined?

In the absence of any evidence of the prices between AFEM and RAK being artificially inflated in some way to produce an un-dumped export price or attempts to do so, how can it 'appear' that such prices have been influenced by the relationship between the parties – in what ways, to what extent and for what purposes? Further, given that:

- (i) APRIL has consistently maintained that the prices payable and paid by AFEM's Australian customers to AFEM is the 'export price' for APRIL's exports; and
- (ii) the prices payable and paid by AFEM to RAK are independently audited for compliance with transfer pricing principles,

there would seem little incentive or opportunity for AFEM and RAK to seek, through their relationship, to influence prices that in some unspecified way rendered them 'unreliable' for anti-dumping purposes. No reason has been provided by the Commission why and how AFEM and RAK would do so, especially when they would be aware that APRIL's exports could be scrutinised for anti-dumping purposes.

Putting aside such deficiencies in the analysis and acknowledging, as stated earlier above, that the Minister has a wide discretion under section 269TAB(1)(c) of the *Customs Act 1901* in determining an 'export price', that discretion is nonetheless to determine a 'price' being the price at which the product in question is introduced into the commerce of the importing country.

However, instead of determining a 'price', being the 'price' at which the A4 Copy Paper exported from Indonesia was introduced into the commerce of Australia, the Minister calculated an amount by deduction from the prices paid by AFEM's Australian customers to derive an amount that the Minister determined was the 'export price' for the sale of A4 Copy Paper by RAK to AFEM.

While section 269TAB(1)(c) of the *Customs Act 1901* does not prescribe any particular methodology for the Minister to employ in the exercise of his discretion, that methodology must nevertheless be one that properly determines a 'price', being the 'price' at which the A4 Copy Paper exported from Indonesia was introduced into the commerce of Australia.

A 'price' is an amount that a willing seller is prepared to sell a good and a willing buyer is prepared to buy a good that is agreed between the parties in arm's length negotiations in a market. An exercise in cost accounting by deducting various 'costs' from a price paid in another transaction does not produce a 'price' nor represents a 'price' negotiated between two parties in a transaction for the sale and purchase of A4 Copy Paper in Indonesia, that is, that is entered into and takes place in Indonesia. It is submitted that this arbitrary and artificially constructed amount cannot be the "price" of the goods.

Further, the deductive amount that replaces the amount actually payable by AFEM to RAK is no more 'reliable'. Surprisingly, amounts (costs) deducted are amounts that are the product of the 'transfer prices' payable to RAK by AFEM and hence necessarily taint the deductive amount calculated by the Commissioner and accepted by the Minister as being equally 'unreliable' for the same reasons as found by the Commissioner.

Further, there is no evidence that the deductive amount calculated by the Commissioner represented a market price agreed or would be agreed between two parties negotiating at arm's length for the sale and purchase of A4 Copy Paper in a transaction entered into and performed in Indonesia in RAK's and AFEM's circumstances. Such lack of evidence and inquiry is reminiscent of the lack of proper comparison in *'Australia – Anti-Dumping Measures on A4 Copy Paper'* (WT/DS529/R) (4 December 2019). Here a 'price' has not been determined as the 'export price' as required by section 269TAB(1)(c) of the *Customs Act 1901*.

For these reasons in addition to those set out in the application, the decision by the Minister in the *reviewable decision* regarding the 'export price' for APRIL's exports of A4 Copy Paper to Australia is not the correct or preferred decision.

Rather, as contended in the application, the correct and preferable decision in this regard is Preferable Decision 3, that is, the 'export price' is properly the price paid or payable by AFEM's Australian customers to AFEM less any overseas freight and insurance, being the 'price' at which the A4 Copy Paper is introduced into Australia and ultimately at which that A4 Copy Paper competes with the domestic product on price to the extent that they do in fact compete on price.

### *5.1.3 ADRP review of export price in Review 551*

As set out in the application of this review, APRIL does not disagree with the ADRP's finding in its review of the determination of the 'export prices' for APRIL's exports in Review 551.

For the reasons set out in the application and earlier above, APRIL concurs that the relevant price is the price payable by AFEM's Australian customers less amounts comprised in such prices as actually representing overseas freight and insurance, where applicable, to derive an FOB 'export price'.

However, APRIL disagrees with the deduction of AFEM's costs and profit from such determination of 'export prices'. It was argued that such deduction was necessary to reflect an 'export price' had RAK sold directly to AFEM's Australian customers.

Putting aside that leaves unanswered the characterisation of the amounts deducted for AFEM's costs and profit in the transactions, which issue was discussed earlier above in relation to this inquiry, that deduction operates on the assumption that RAK would negotiate a lower purchase price with an Australian customer than that negotiated by AFEM. Why RAK would do so or why that would necessarily be the case is not explained.

As stated, the prices negotiated with its Australian customers by AFEM were independently negotiated at arm's length and reflect market prices that the Australian customer is willing to pay and that would enable it to on-sell into the Australian A4 Copy Paper market at competitive prices that would earn it an acceptable profit. From whom in the APRIL group of companies that the Australian customer purchases the A4 Copy Paper would be irrelevant to the price that the customer is willing to pay. Whether it is from AFEM or RAK or anyone else would seemingly be irrelevant to the price is willing to pay and no reason has been advanced as to from whom the A4 Copy Paper is purchased in the APRIL group of companies determines the price payable by the Australian customer.

Nor has any reason been given as to commercially why RAK would negotiate and agree to a lower price if it were to deal directly with the Australian customers. It would seem inimical to its commercial interests to do so. Further, were it to do so it would incur many of the costs incurred by AFEM that, no doubt, it would seek to recover in its price as well as be remunerated by a suitable profit due to the additional time and expenditure it necessarily would need to expend in securing such sales to Australian customers.

Hence the reasons why APRIL disagrees with the deduction of AFEM's costs and expenses in the determination of 'export prices' recommended by the ADRP in Review 138. Again, APRIL considers that the proper determination of 'export prices' to be the prices paid by AFEM's Australian customers less any overseas freight and insurance represented in that price.

#### 5.1.4 Normal value

As set out in the application for this review, the *reviewable decision* concerning the determination of the normal value for exports from Indonesia by APRIL and/or all other exporters was not the correct or preferred decision.

This is because there was no basis for the Commissioner to adopt the so-called 'timing adjustments' to determine normal values for grades of A4 Copy Paper for which there no domestic sales by RAK at relevant times during the investigation period.

While there may have been no such domestic sales by RAK, there were sales in the Indonesian market by other sellers of A4 Copy Paper. Such other sellers included other members of the APRIL group of companies, details of whose sales were provided to the Commission.

Further, given the Commission's inquiries and findings concerning the Indonesian A4 Copy Paper market in Review 551 and the ongoing Investigation 583, the Commissioner was aware or ought to have been aware that there existed other sellers of 'like goods' in Indonesia at all relevant times. If additional information and evidence of such sales was required, it could have been requested but it was not, at least not from APRIL.

The issue, therefore, is whether the Minister had sufficient information and evidence to determine the normal value of exports of A4 Copy Paper from Indonesia by APRIL and/or all other exporters based on domestic sales in Indonesia. Given the method recommended by the Commissioner for determining normal values and accepted by the Minister, it would appear not. This is notwithstanding the information provided by APRIL during the inquiry regarding prices in domestic sales in Indonesia by members of the APRIL group of companies, in addition to information on RAK's domestic sales.

It is APRIL's contention that there was sufficient information available to the Minister, being information provided to the Commission, that could have been used to determine normal values for each relevant grade/type of A4 Copy Paper exported to Australia during the investigation period. There was no need for recourse to 'timing adjustments' in the determination of normal values and no basis on which to do so or in preference to actual sales.

The information that APRIL supplied to the Commission regarding domestic sales of A4 Copy Paper in Indonesia by members of the APRIL group of companies for those times when there no domestic sales by RAK of certain grades/types of A4 Copy Paper was complete and accurate and, if required, verifiable. There was no reason to believe otherwise, especially when information provided by APRIL in this inquiry and in Review 551 was found to be complete and accurate, as reflected in Reports 588 and 551. It is not clear why the Commission preferred speculative calculations in the form of 'timing adjustments' with no verification that they reflected prevailing market prices, over factual domestic sales data.

Normal values based on that factual data would have resulted in normal values that were substantially less than those determined by the Commissioner and accepted by the Minister. For example, in the case of 80 gsm paper the normal value determined by the Commission would have been lower by approximately 20%. When the revised normal value is then compared with the unit FOB price payable by AFEM's Australian customers as set out in the Commission's calculations, the margin of dumping

falls substantially and lower than determined in the both the original investigation and in Review 551 as subsequently reduced by the ADRP in Review 138.<sup>10</sup>

#### 5.1.5 Adjustments for a 'fair comparison'

Where the export price and normal value are '*modified in different ways by taxes or the terms or circumstances of the sales to which they relate*', then section 269TAC(8)(c) of the *Customs Act 1901* requires the normal value to be adjusted so that those differences do not affect its comparison with that export price. This reflects Article 2.4 of the WTO Anti-Dumping Agreement.

If the 'export prices' are the prices paid or payable by AFEM to RAK, then a normal value based on sales by RAK to distributors in Indonesia requires adjustment to take account of the fact that the export price and normal value are modified in different ways by the terms and circumstances of the sales to which they relate.

This is especially the case if the 'export prices' are not the actual prices paid by AFEM to RAK for the purchase and delivery of A4 Copy Paper but the amounts determined by the Minister as constituting the 'export prices'. Clearly such 'export prices' are modified in different ways by the terms and circumstances of the sales to which they relate as evidenced by the revised terms of the sales between AFEM and RAK by the Minister in his determination of 'export prices'.

Specifically, the sales to the Indonesian distributors and the sales to AFEM, an intermediary, are at different levels of trade and hence modified differently by such differences in the terms and circumstances of their respective sales. The sales by RAK to its Indonesian customers are to distributors of A4 Copy Paper in the Indonesian A4 Copy Paper market. Sales by RAK to AFEM, on the other hand, are to a trading company whose business is to sell the A4 Copy Paper it orders and purchase from RAK to importers in other countries, such as Australia, where such importers are distributors of A4 Copy Paper in the importing country.

This also is reflected in the fact that sales by RAK to Indonesian distributors are sales at which the A4 Copy Paper so sold is thereby introduced into the commerce of Indonesia, whereas the sales in which A4 Copy Paper is sold to AFEM are not sales in which the A4 Copy Paper is introduced into the commerce of Australia. That occurs in a subsequent sale by AFEM to its Australian customers.

Such differences in the levels of trade of such sales is reflected in the prices. This is because the prices at which RAK sells A4 Copy Paper to, respectively, Indonesian distributors and to AFEM would need to be prices at which those entities could on-sell the A4 Copy Paper profitably. In the case of the Indonesian distributors, this would be negotiated prices and, in the case of AFEM, at prices determined in accordance with transfer pricing principles so as to ensure that they reflected market prices at that level of trade. Looked at from RAK's point of view, the prices, of necessity, must be different to ensure that its customers can operate their respective businesses profitably, that is, sell the A4 Copy Paper purchased from RAK profitably.

Alternatively, assessment of a dumping margin without such adjustment is, in substance, no different from comparing the difference between the 'export prices' as determined by the Commissioner with the price paid by AFEM's Australian customers and expressing that difference as a proportion (i.e.,

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<sup>10</sup> The data enabling such calculations, that is, the revised normal values, export prices based on prices paid by AFEM's Australian customers and revised dumping margins are contained in the Commission's confidential spreadsheets in its calculation of export prices, normal values and the dumping margin for RAK and in the spreadsheet submitted to the Commission by APRIL setting out domestic sales Indonesia by members of the APRIL group.

percentage) of those 'export prices'. Clearly the differences would be significant and that would be because the comparison is at different levels of trade.

That is in fact what has occurred. The domestic sales in Indonesia are to distributors and, therefore, reflect that level of trade and being the price to which the APRIL's A4 Copy Paper is introduced into the commerce of Indonesia, whereas sales to AFEM are to a trading company who supplies distributors in countries such as Australia. Comparing the prices in such sales necessarily results in comparing prices at different levels of trade with the inevitable (erroneous) outcome. An appropriate adjustment is, therefore, needed to effect a 'fair comparison'.

Finally, for completeness it should be noted that, if the prices payable by AFEM to RAK and the prices payable by AFEM's Australian customers to AFEM are increased by an amount equal to the dumping of margin as determined by the Commissioner and accepted by the Minister, then given that all sales of APRIL's exports at each point in the supply chain are profitable, the margin of profit on each such sale would increase by over 60%. In other words, based on the Commissioner's findings as accepted by the Minister, the margin of profit on domestic sales in Indonesia by RAK must be in excess of 60% given that the cost to make and sell in such transactions would be the same as for export sales due to the 'fair comparison adjustments' to the normal value.

That is, given that RAK's CTMS A4 Copy Paper sold in domestic and export sales would be the same following the adjustments for a 'fair comparison' so that the only difference was in the margin of profit, to increase the 'export price' to equal the normal value of such APRIL's exports must mean that the margin of profit in RAK's export sales is approximately 60% greater than its export sales. Surprisingly, this is not reflected in RAK's audited accounts, nor in the Commission's own calculations.

Hence the necessity for adjustment to the normal value to ensure a 'fair comparison' where the export prices are determined to be the prices paid by AFEM to RAK.

#### 5.1.7 Conclusion

As contended in my clients' application for this review and for the reasons set out about, the *reviewable decision* as concerning the variable factors applying to APRIL's exports was not the correct or preferable decision, but the correct and preferable decision in this regard is Preferable Decision 3.

Specifically, that:

- (i) the ascertained export price be set aside and that the prices paid or payable to AFEM by its Australian customers less any overseas freight and insurance be the 'export price', being the price at which APRIL's exports are introduced into the commerce of Australia; and
- (ii) to the extent that there were not sales by RAK in Indonesia at relevant times during the investigation period for certain grades/types of A4 Copy Paper, the normal value for such grades/types of A4 Copy Paper for those periods be based on the prices in sales of A4 Copy Paper in Indonesia by other sellers, namely, other members of the APRIL group details of whose sales were provided to the Commission; and
- (iii) the dumping margin for APRIL's exports be recalculated on this basis with any necessary adjustments to the normal value so determined to ensure a 'fair comparison'.

Further, it is submitted that the dumping margin should have been and be calculated and determined for each grade/type of A4 Copy Paper exported to Australia from Indonesia by APRIL, as opposed to a weighted average 'product' margin in the absence of it being established that there is any or sufficient price elasticity of demand between grades/types of A4 Copy Paper. Absent a finding of price elasticity

of demand between grades/types of A4 Copy Paper, a 'product' dumping margin is inappropriate. Rather a dumping margin for each relevant grade/type is appropriate and should be adopted.

## 5.2 Detailed reasons – non-injurious price

As stated in the application for this review, the rejection of a non-injurious price in the *reviewable decision* was not the correct or preferred decision.

In making his recommendation to the Minister for the rejection of a non-injurious price, a non-injurious price was calculated as follows:

*“... the commission has calculated a revised NIP for RAK from Indonesia by having regard to:*

- (i) Paper Australia’s USP based on its submitted data for the period of inquiry*
- (ii) ocean freight and marine insurance expenses reported in RAK’s REQ*
- (iii) importation expenses on relevant sales reported in RAK’s REQ*
- (iv) the most efficient selling, general and administration expense reported by importers of the goods in Review 551.” (Report 588, page 109)*

It was found that the non-injurious price was greater than the normal value of APRIL’s exports. On this basis the adoption of a non-injurious price was rejected, and the Commissioner recommended accordingly.

However, this assessment misconceived the object of a non-injurious price. The object of a non-injurious price is the minimum price of exports of the product in question necessary to prevent injury to the domestic industry in the importing country: see section 269TACA of the *Customs Act 1901*. If that price is less than the full margin of dumping, then the lesser amount necessary to prevent injury is to be adopted, that is, the ‘lesser duty rule’.

Given that Australian Paper’s prices for A4 Copy Paper are insufficient to recover its CTMS A4 Copy Paper, not only are its own prices are injurious because they are less than not only its own CTMS but also the unsuppressed selling price calculated by the Commission. As discussed earlier above, any price suppression preventing Australian Paper from increasing its prices so as to recover its costs to make and sell is due to other factors and not due to allegedly dumped imports, including, in particular, imports of APRIL’s products.

The suggestion that the unsuppressed selling price is the price that the Australian industry could reasonably expect to obtain in a market unaffected by dumping is, with respect, clearly absurd and not supported by evidence. Australian Paper, the sole member of the Australian industry, has not profitably sold A4 Copy Paper in Australia or for export since the anti-dumping measures were imposed. That is, in a market unaffected by dumping due to the imposition of the anti-dumping measures, Australian Paper has not sold A4 Copy Paper profitably, let alone at the unsuppressed selling price calculated by the Commission. Nor has it sold A4 Copy Paper in export sales profitably.

Importantly, for the reasons set out earlier the prevailing conditions in the Australian A4 Copy Paper market, as opposed to imports, have precluded Australian Paper from increasing its prices in an amount sufficient to cover its CTMS let alone to include an amount for profit since 2017 and, possibly, since 2015. In such circumstances it is unclear why the Commission considered that Australian Paper could increase its prices let alone increase its prices in an amount to equal the unsuppressed selling price.

Given that Australian Paper has not sold A4 Copy Paper either domestically or for export at prices that recover its CTMS and are profitable, it is arguable that there is no minimum price that would prevent injury from exports when Australian Paper's own prices are causing it injury. Imposition of a minimum price on exports would not prevent Australian Paper from causing injury to itself. In fact, anti-dumping measures cannot prevent Australian Paper from inflicting injury on itself by selling its products unprofitably. There is no evidence that indicates otherwise.

Simply calculating a so-called unsuppressed selling price and stating that it is a price that Australian Paper could reasonably expect to obtain in a market unaffected by dumping does not mean that that price could actually be obtained even in such circumstances. It has not been tested whether obtaining that price is actually commercially feasible given the prevailing conditions in the Australian A4 Copy Paper market. It is mere speculation.

For the reasons set out earlier in this submission, other economic factors are preventing Australian Paper from increasing its prices and, even it could and did increase its prices, there is no evidence that it could increase its prices sufficiently in the prevailing market conditions in the Australian A4 Copy Paper market to sell its products profitably. That is in a market where demand has been contracting progressively year-on-year due to technological change to where it is currently approximately half of what it was in 2015 and being a market where supply materially exceeds demand due to domestic production significantly exceeding domestic demand and in which the dominant supplier, the sole domestic producer has been supplying the market at prices that are at a loss due to not recovering its CTMS, there is no evidence that in such prevailing market conditions Australian Paper could increase its prices and increase its prices sufficiently for its A4 Copy Paper to become profitable. Certainly, there was no or insufficient inquiry on this issue in the continuation inquiry.

Hence in such circumstances there may be no minimum price for exports and, in particular, APRIL's exports that could prevent injury to Australian Paper.

However, if the object of a non-injurious price is to prevent injury to the domestic industry caused by dumping and un-dumped export prices will cause injury to the domestic industry because such un-dumped prices are less than the domestic industry's unsuppressed selling price or, at least, the Australian industry's CTMS, then the non-injurious price should be the un-dumped export price, that is, the normal value of the exports in question as determined as set out earlier above.

However, in the case of APRIL's exports, this would be problematic if the 'export price' is the price paid or payable by AFEM to RAK for the reasons discussed earlier above. This is because the administrative practice of ABF, presumably on advice from the Commission, is for interim dumping duty to be calculated by reference to the customs value of imports using the combination fixed and variable duty method. Such application of the anti-dumping measures to APRIL's exports is clearly erroneous. The duty rate is to be levied on the 'export price' of APRIL's exports, not their customs value.

Further, to calculate interim dumping duty on APRIL's exports based on their 'export prices', that is, the 'prices' between AFEM and RAK, would require access to confidential information concerning the transactions between AFEM and RAK, as well as confidential information concerning AFEM, none of which would be available to the Australian importer nor required by statute to be provided by AFEM and RAK. In other words, as set out earlier, neither the Australian importer nor ABF would possess the information necessary to calculate the interim duty payable based on the 'export prices' of APRIL's exports.

Nevertheless, because the non-injurious price is the minimum price to prevent injury to the domestic industry in the importing country, then that non-injurious price must be the price at which the product in question is introduced into the commerce of the importing country. On this basis, if the non-injurious price were to be a 'floor price' based on the normal value of APRIL's exports and applying to the import price payable by importers of APRIL's exports, then if the customs value of such imports is not less than that floor price, no-interim dumping duty would be payable. This is because, by definition, that import price (that is, customs value) would not be a 'dumped' price. Hence, even if it causes injury to the Australian industry, it would not be because of 'dumping'.

For these reasons, it is APRIL's contention that if the decision is that the decision to secure the continuation of the anti-dumping measures, the applicable dumping duty rate should be the non-injurious price and that non-injurious should be a 'floor price' based on the normal value of APRIL's exports.

## 6. Submission 4 – all other exporters

Regarding the *reviewable decision* concerning the category 'all other exporters' for exports of A4 Copy Paper from Indonesia, the submissions set out above, and in APRIL's application, apply equally to such 'all other exporters' given that the Commissioner's findings and recommendations regarding that category of 'exporters' are based on those for APRIL's exports.

In addition, there was no legal or factual basis for the securing the continuation of the anti-dumping measures in relation to that category of 'exporters'. This is because, in the absence of (a) such 'exporters' or any 'exports' by such 'exporters' at any time either before or after the imposition of the anti-dumping measures and (b) evidence of any exports by any such 'exporters' being reasonably foreseeable or imminent following the expiry of the anti-dumping measures, the expiry of the anti-dumping measures would not and could not lead or be likely to lead to the 'continuation' or 'recurrence' of material injury that the measures are intended to prevent. Such injury has never occurred and it has never occurred because of the absence of exports by any such exporters and, therefore, no material injury caused by dumping of such exports can 'continue' or 'recur' never having occurred.

Hence, there was no basis supported by evidence to secure the continuation of the anti-dumping measures in relation to that category of 'exporters'. Nor is there any legal basis for the continuation of the anti-dumping measures in respect of that category of 'exporters' in Division 6A of Part XVB of the *Customs Act 1901*.

In this regard, it also is noted that references to 'all other exporters' in WTO jurisprudence refers to exporters who do exist and who have actually exported to the importing country but whose exports were not investigated. That is, to exporters who actually exist and who have exported to the importing country and done so during the relevant investigation period. That obviously is not the case here.

For these reasons, as set out in my clients' application for this review, the correct and preferable decision concerning exports from Indonesia by 'all other exporters' was not securing the continuation of the anti-dumping measures to exports by such exporters. Rather the correct and preferable decision is that the anti-dumping measures applying to exports from Indonesia by 'all other exporters' be allowed to expire on the expiry date.

## 7. Conclusion

As set out in my clients' application for this review and for the grounds set out therein the *reviewable decision* was not the correct or preferred decision.



Securing the continuation of the anti-dumping measures, it is submitted, would not achieve its stated object of preventing material injury to the Australian industry caused by dumping by exports from the subject, including, in particular, Indonesia, because the injury that the Australian industry has incurred and has continued to incur since the imposition of the measures in 2017 is not attributable to such exports but was and is being caused by other economic factors. Anti-dumping measures cannot prevent that injury from continuing and no other injury has been identified attributable to dumping from the subject countries that would recur on the expiration of the measures that the measures are intended to prevent.

The correct and preferable decision for the grounds set out in the application as further discussed above is, in the alternate, Preferable Decisions 1, 2 and 3.

Accordingly, it is submitted that the ADRP recommend that the *reviewable decision* be revoked and, again in the alternate, Preferable Decisions 1, 2 or 3 be substituted as appropriate.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Andrew Percival', with a large, stylized initial 'A' at the start.

Andrew Percival  
Principal