



Anti-Dumping Commission response
Application for Review of Decision relating to
Newsprint Exported From France and the Republic of Korea
(Investigation 242)

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Abbreviations

ACBPS	Australian Customs and Border Protection Service
ADRP	Anti-Dumping Review Panel
the Act	<i>Customs Act 1901</i>
ADN	Anti-Dumping Notice
APN	APN News and Media Ltd
Bowater	Bowater Korea Ltd
ADA	Anti-Dumping Agreement
the Commission	The Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
the goods	the goods the subject of the application (also referred to as the goods under consideration or GUC)
Jeonju	Jeonju Paper Corporation
Korea	Republic of Korea
the Minister	the Minister for Industry and Science
NSIA	Norske Skog Industries Australia Limited
PAD	Preliminary Affirmative Determination
the Parliamentary Secretary	the Parliamentary Secretary to the Minister for Industry and Science
SEF	Statement of Essential Facts
UPM	UPM France S.A.S.
USP	Unsuppressed Selling Price
WAN	West Australian Newspapers Ltd
ACBPS	Australian Customs and Border Protection Service

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Key points of note in reading responses to applicant claims

- (i) Whilst the Anti-Dumping legislation (Part XVB of the *Customs Act 1901* (the Act) and the *Customs Tariff (Anti-Dumping Act) 1975* (the Dumping Duty Act)) refers to the Minister, for the purposes of this response all references to the Minister or Parliamentary Secretary should be considered interchangeably. This approach reflects the Minister for Industry's delegation of responsibility for Ministerial decision-making (under the Act and the Dumping Duty Act) to the Parliamentary Secretary for the Minister for Industry and Science.

- (ii) In drafting responses to the issues raised by the applicants to the Anti-Dumping Review Panel (ADRP), the Anti-Dumping Commission (the Commission) has had regard to all information submitted to it in accordance with legislative timeframes during the investigation up until the day the Final Report 242 (REP 242) was submitted to the Parliamentary Secretary. This information included the Statement of Essential Facts (SEF 242), visit reports and submissions from interested parties. In drafting this response the Commission has also had regard to the analysis the Commission performed during its investigation. The Commission confirms that, in drafting this response, no new information has been considered or further analysis undertaken.

The Commission's responses to the Applicant's claims

The Commission is hereby responding to the Applicant's claims in the order that they have been made in Section D of Confidential Appendix 1 of the Application.

The Commission does not dispute the comments made in Section C of Confidential Appendix 1 of the Application but submits that they should be considered in the context of Final Report 242 and its Appendices as well as in the context of the Comments by the Commission to the Applicant's claims. The Commission notes that the application does not appear to recognise that in Section 8 (see, for example, Section 8.9.1) of the Commissioner's Final Report, the Commission assessed various submissions it had received and considered that the relative size of UPM's market share did not necessarily prevent it from influencing prices.

Grounds from Section D of Confidential Appendix 1 of the Application

1. From a general perspective there is substantial evidence supporting the view that NSIA is not an Australian industry suffering material injury from any source.

Paragraph 10 of the Applicant's claims:

A number of the injury factors established by Article 3 of the Anti-Dumping Agreement and s.269TAE of the Act include such terms as 'increase or likely increase' and 'change or likely change'. Injury in the context of those instruments is not a static concept; it requires both temporal and quantitative comparisons and s.269T(2AD) of the Act allows for an expanded injury investigation period in which to make those comparisons.

Comments by the Commission

The Commission had no need to expand the injury analysis period which was from 1 April 2010 onwards.

Paragraph 11 of the Applicant's claims:

In a global market facing catastrophic reductions in sales volumes, NSIA in Australia is a monopoly producer that is notable for its resilience and relative prosperity. The evidence is clear that the Australian newsprint industry has increased domestic market share (from 70% to over 80% during the injury investigation period), restricted sales volumes losses compared to most other suppliers, broadly maintained costs, prices, profitability, production volumes, production utilisation and employment and substantially increased export volumes.

Comments by the Commission

The applicant is the only *producer* of newsprint in Australia, but competes with importers of newsprint and is therefore not a monopoly *supplier*.

The applicant's performance was considered in Section 7 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report. Its performance was considered over the injury analysis period. The relevance of its performance in relation to other international newsprint producers is not made clear.

The description of some of NSIA's indicators of economic performance, such as *...broadly maintained costs, prices, profitability, production volumes...* is misleading and is not consistent with the analysis in Chapter 7 of the final report.

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Paragraph 12 of the Applicant's claims:

As illustrated in an earlier public submission detailing the applicant's comparative profitability, NSIA's performance profile in the current state of the global newsprint industry would be the envy of other newsprint producers and is incompatible with any claim that the applicant is suffering material injury.

Comments by the Commission

The relevance of *other newsprint producers* is not made clear.

Paragraph 13 of the Applicant's claims:

As NSIA cannot be properly described as an Australian industry suffering from material injury we request that the Review Panel finds that the Parliamentary Secretary's decision to publish dumping duty notices was not the correct or preferable decision and that it recommends that the decision should be revoked and substituted with a decision that dumping duty notices should not apply to exports of newsprint from France.

Comments by the Commission

The analysis in Section 7 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report found that the Australian industry had suffered material injury. The analysis in Section 8 of the Commissioner's Final Report found that material injury suffered by the Australian industry had been caused by dumping.

- 2. Of the six forms of injury that the Commission asserts have been experienced by NSIA there is no evidence of the existence to any significant degree of the two price related forms of injury asserted by the Commission, let alone any evidence of any price related injury being caused by UPM's exports to WAN.**

Price Related Injury

Paragraph 14 of the Applicant's claims:

In considering the issue of price related injury s.269TAE(1) of the Act authorises the Minister to have regard to the following factors:

(aa) – (d)

(e) *the difference between:*

(i) the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and

(ii) the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia; and

(f) the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind or like goods, produced or manufactured in the Australian industry and sold in Australia;

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Comments by the Commission

The Commission's analysis in Sections 7, 8.6 and 8.9 in Confidential Appendix 9 of the Commissioner's Final Report addressed matters in subsection 269TAE(1).

Paragraph 15 of the Applicant's claims:

The factor described in s.269TAE(1)(e) is referred to as price undercutting and the scope of s.269TAE(1)(f) is commonly agreed to cover price depression and price suppression. The provisions reflect the mandatory requirement set out in Article 3.2 of the WTO Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) that:

...the investigating authorities shall consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred.

Comments by the Commission

See the Comments by the Commission in response to Paragraph 16 of the Applicant's claims.

Price Undercutting

Paragraph 16 of the Applicant's claims:

The most striking feature of the application by NSIA for the publication of a dumping duty notice is that it did not allege that exports by UPM or any other exporters had undercut the Australian industry's prices and, as noted above, in the course of the investigation the applicant has not provided any evidence of a single instance of price undercutting. We also note that there is no indication in the public version of the Report that the Commission honoured its unambiguous obligation under the Anti-Dumping Agreement to consider this central issue or that it acknowledged the existence of a significant circumstance that did not support its recommendation to the Parliamentary Secretary. It is clear, however, that the absence of any price undercutting evidence vindicates the claims by UPM and other exporters that NSIA was and is the price setter in the market and that NSIA's rare failures to tender successfully for the business of newspaper publishers were not due to price considerations. In addition, we submit that the silence of the Commission on this matter is at odds with its obligation under Article 3.1 of the Anti-Dumping Agreement to undertake an 'objective examination' of the impact of export prices in the domestic market.

Comments by the Commission

The Commission found that the bidding process in the Australian newsprint market analysis is one whereby suppliers respond to requests to bid for newsprint supply contracts on short, medium or long term bases. Price quoting behaviour in the Australian newsprint market is not characterised as a market practice whereby goods are quoted to potential customers on an *ad hoc* basis. As described in Section 6.6.1 of the Commissioner's Final Report:

... the Australian newsprint market is dominated by four newspaper publishers that enter long term agreements with suppliers to provide a major portion of their needs at an agreed price. These long term agreements provide security of supply arrangements and predictable costs for newspaper publishers. Most of

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the newsprint sold in Australia is under these agreements. As such, prices for most newsprint sold in the Australian newsprint market are established in the negotiation of these agreements.

In Sections 8.6, 8.8 and 8.9 and in Confidential Appendices 7 and 9 of the Commissioner's Final Report the Commission analysed bids made by various parties, including UPM, to West Australian Newspapers. In Section 8.9.1 of the Commissioner's Final Report, the Commission indicated that it found that:

... newspaper publishers evaluate bids on the basis of the total cost of supply over the entire period to which the tender pertains, not only on the first year of that period. Both NSIA and UPM have made bids to supply newsprint over periods longer than one year. The Commission has analysed details of both successful and failed bids and contracts over the entire periods that are relevant. The Commission has determined which newsprint suppliers were the highest and lowest bidders and referred to this analysis of confidential information in its consideration on whether dumping has caused material injury.

This analysis was conducted on the bases of both the supply volumes the bid request specified as well as the supply volumes the Commission considered more accurately reflected the newsprint usage by that customer.

The Commission acknowledges that it did not explicitly refer to market behaviour related to price bidding in the Australian newsprint market as 'price undercutting'. However, in Section 8.6.1 of the Commissioner's Final Report it was noted that the Australian industry had submitted that, in respect of another newspaper publisher, its proposal was unsuccessful and that the only issue was the final price. The Commission's analysis in Sections 8.6.1, 8.6.3 and 8.9 of the Commissioner's Final Report found that the Australian newsprint market is a price sensitive one and that prices, including prices achieved by the Australian industry, were quoted in the context of a process that included bids by UPM. Further, the Commission's analysis of price comparisons at Confidential Appendix 9 supports its finding at Section 8.6.3 that it is reasonable to conclude that NSIA's prices in other contracts were influenced by the competition with these dumped imports from France.

Paragraph 17 of the Applicant's claims:

In the absence of price undercutting, any claim that allegedly dumped imports were causing price related injury required a finding by the Commission after an 'objective examination' that there was 'positive evidence' of price depression and/or price suppression.

Comments by the Commission

The Commission's assessment in Section 8.9.1 explicitly describes how it based its analysis on positive evidence and that this consideration involved an objective examination of the relevant factors.

See the Comments by the Commission in response to Paragraph 16 of the Applicant's claims.

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Price Depression

Paragraph 18 of the Applicant's claims:

The Commission observes that *...Price depression occurs when a company, for some reason, lowers its prices ...and gives as an example a situation where ...the local producer is forced to reduce prices in order to compete with the imported goods.* Evaluation of a claim by NSIA of price depression caused by the allegedly dumped imports over the injury investigation period (April 2010 – March 2014) requires, in the first instance, a finding on an issue of fact - have NSIA's prices reduced over the injury investigation period? The Commission has confirmed that the answer is 'no' in its acknowledgement that prices in 2013/14 were actually higher than at the beginning of the injury investigation period and this acknowledgement merely reflects the data provided by NSIA in its application:

Index of price variations (model, type, grade of goods)

Period	2010/11	2011/12	2012/13	2013/14
NWH420	100			
NWH450	100			
Index	100	104.28	105.34	101.49

Comments by the Commission

The Commission acknowledges that prices achieved by the Australian industry increased slightly over the over entire injury analysis period. However, it notes that in the investigation period when dumping was found, the trend of increasing prices reversed and prices fell (reflecting price depression).

Paragraph 19 of the Applicant's claims:

Consequently in Section 7 of the Report dealing with the 'Economic Condition of the Industry' there is no evidence of any price depression over the whole injury investigation period, at the beginning of which, as the applicant has conceded, it was nor suffering any material injury. In an inversion of the normal objective examination process, the Commission then attempts in Section 8 of the report to identify the cause of the nonexistent price depression. This necessarily involves shifting the goal posts to counter the absence of any price depression over the whole injury investigation period by focusing on 2013/14 during which the Commission observes that *...NSIA reduced its prices or quoted prices that were lower than those that prevailed in the two years prior to the investigation period.* However, as the Commission has observed, it was in 2012/13 that NSIA's traditional customers – News and Fairfax – requested a renegotiation of prices for future periods commencing in 2013/14. This initiative by the dominant customers in the market was obviously intended to achieve lower prices and negotiations may well have been influenced by any market intelligence concerning world prices and available import prices. However, commercial common sense dictates that the publishers would have focussed for leverage on Korean and possibly Indonesian delivered prices as the cheapest alternative prices. Higher prices for much smaller quantities charged by UPM to a noncompeting publisher located 4,000 kilometres away could not provide any assistance to the negotiating position of News and Fairfax and were plainly irrelevant to these negotiations in which UPM played no part.

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Comments by the Commission

The Commission's analysis in Sections 8.6.1, 8.6.3 and 8.9 of the Commissioner's Final Report found that the Australian newsprint market is a price sensitive one and that pricing in occurred in the context of a process that included bids by UPM.

Paragraph 20 of the Applicant's claims:

UPM did respond to the APN tender of August 2013 with an undumped price of **XXXX**/tonne but, as noted above, the publisher's future business was awarded to NSIA and an exporter from a country not included in the dumping investigation. UPM's tendered price was obviously uncompetitive and of no relevance to APN's sourcing decisions.

Comments by the Commission

In Section 8.6.1 of the Commissioner's Final Report, the Commission acknowledged that the Australian industry had been successful in achieving a contract for partial supply to a newspaper publisher. However, the Commission's analysis in Sections 8.6.1, 8.6.3 and 8.9 of the Commissioner's Final Report found that the Australian newsprint market is a price sensitive one and that prices, including prices achieved by the Australian industry, were quoted in the context of a process that included bids by UPM. As such, the Commission does not consider the claim that *UPM's tendered price was obviously uncompetitive and of no relevance to APN's sourcing decisions* is sustainable. Further, in its assessment of dumping margins, the Commission only considered actual prices of like goods that had been achieved by UPM, and did not consider the quoted price referred to by the Applicant in paragraph 20.

Paragraph 21 of the Applicant's claims:

The collective outcome of these renegotiations set out in the NSIA table contained in paragraph 18 above was a price reduction of less than 4% in 2013/14 compared to 2012/13 which the commission found to be a ...period unaffected by dumping¹⁹. This reduction, partly offset by a cost reduction of over 1% for the same period²⁰ cannot be characterised as a depression of prices *...to a significant degree* ...as required by Article 3.2 of the Anti-Dumping Agreement. Furthermore, the detrimental impact, if any, on NSIA of the minor price adjustment cannot be characterised as 'material' for the purposes of s.269TAE and s.269TG of the Act. Finally there is no positive evidence to support a conclusion that any price adjustment resulting from these price negotiations was caused or otherwise influenced by the price of UPM's exports to WAN during the investigation period.

Comments by the Commission

The Commission acknowledges that it did not explicitly state whether it considered that a price reduction of 4 per cent was one of a 'significant degree'. The Commission does note that in a capital intensive industry, such as newsprint manufacturing, such a price reduction may indeed be significant, even if it is partly offset by a 1 per cent reduction in costs. This is particularly so in a declining market such as the Australian newsprint market.

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The Commission also notes that in Article 3.2 of the Anti-Dumping Agreement, the phrase *...to a significant degree...* is used to refer to price depression or the prevention of price increases which would otherwise have occurred. It is relevant to note in this context that the Commission's analysis in Sections 8.6.1, 8.6.3 and 8.9 of the Commissioner's Final Report found that the Australian newsprint market is a price sensitive one and that pricing occurred in the context of a process that included bids by UPM. Specifically, the Commission stated at 8.6.3 of the Commissioner's Final Report:

It is reasonable to consider that those goods were offered at prices in Australia that were lower than they otherwise would have been in the absence of dumping. In a price sensitive market, this competitive advantage allowed UPM to secure sales when competing directly with NSIA. It is also reasonable to conclude that NSIA's prices in other contracts were influenced by the competition with these dumped imports from France.

Price Suppression

Paragraph 22 of the Applicant's claims:

Price suppression is said to occur when price increases that would have occurred for Australian products are for some reason not implemented. A common example of when the 'but for' hypothesis is applied is when prices have not increased commensurate with cost increases. Again, the data provided by NSIA in its application that is illustrated in Figure 2 of Section 7 of the Report does not demonstrate any significant change in the company's price/cost margin over the injury investigation period. The graph is based on information provided in NSIA's application which shows that costs over the period increased by 2% and prices increased by 1.5%, resulting in a net decline in margin of 0.5% and even if the comparison is limited to 2012/13 and 2013/14 the net decline is less than 3%. In either case the reduction cannot be characterised as a suppression of prices *...to a significant degree ...*as required by Article 3.2 of the Anti-Dumping Agreement.

Paragraph 23 of the Applicant's claim: In addition, for the reasons set out above in the analysis of price depression, there are no grounds for claiming that UPM's pricing was the cause of any price suppression either in cases when UPM and NSIA were competing directly or when UPM was not involved in NSIA's negotiations with publishers. Price suppression, if any, suffered by NSIA can only be attributed to either the adoption of faulty market intelligence by NSIA or the prices being offered by suppliers other than UPM, or both.

Comments by the Commission

See comments by the Commission in responses to paragraphs 19, 20 and 21.

Paragraph 24 of the Applicant's claims:

In the absence of evidence of any significant degree of price related injury or evidence of any causal link between UPM's exports to WAN and any such injury, we request that Review Panel finds that the Parliamentary Secretary's decision to publish dumping duty notices was not the correct or preferable decision and that it recommends that the decision should be revoked and substituted with a decision that dumping duty notices should not apply to exports of newsprint from France.

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Comments by the Commission

See the Comments by the Commission in response to Paragraphs 18 to 23 of the Applicant's claims.

3. NSIA's reduced sales volumes and reduced revenues have been caused primarily by the major contraction in the newsprint market, not by imports from France.

Sales Volume

Paragraph 25 of the Applicant's claims:

While the Australian market for newsprint decreased in volume terms over the injury investigation period by 37% NSIA's sales volume only reduced by 25%. As a result the market share of the local industry rose from about 70% to over 80% during the investigation period. In asserting that *...NSIA has suffered injury in the form of reduced sales volume due to dumped imports of newsprint from France...* the Commission has relied in part on the observation that NSIA's decline in sales volume was 'much greater' than the decline in UPM's imports. The observation is incorrect and is presumably based on the same calculations that lie behind the erroneous claim in section 7.3.1 of the Report that UPM's exports have increased by around 45%. The Commission is aware that the WAN agreements require delivery of specified quantities on a financial year basis and that UPM is contracted to supply such quantities in a limited period of each financial year. Most importantly the Commission is also aware that commercial shipments by UPM to WAN did not commence until 2011. Consequently calculations based on data that does not relate to a financial year will inevitably involve distorted and misleading outcomes. The ACBPS data base will confirm the financial year import data referred to in paragraph 9 above. Contrary to the Commission's claims, that data reveals that UPM's volumes have declined by about **XX%**, a similar amount to NSIA's volume decline. A calculation error of this magnitude by the Commission is, in and of itself, sufficient to invalidate the conclusion that UPM's exports were the cause of the local industry's reduced sales volumes.

Comments by the Commission

The Commission does not agree with the assertion that: *calculations based on data that does not relate to a financial year will inevitably involve distorted and misleading outcomes*. The Commission routinely makes appropriate adjustments to data to ensure it compares various elements of data within correct time frames. For example, in Confidential Appendix 1 of the Commissioner's Final Report, the Commission analysed the Australian newsprint market on the basis of years commencing from 1 April to coincide with the investigation period.

In Confidential Appendix 1 of the Commissioner's Final Report, the Commission examined the Australian market using confidential and verified data from industry, exporters and importers as well as data from the Australian Customs and Border Protection Service import data base. As such, it considers its analysis of the Australian newsprint market to be accurate.

Paragraph 26 of the Applicant's claims:

In addition it is only a reduction in sales volumes that constitutes a form of injury and the outcome of the second WAN tender in which NSIA was not an incumbent supplier,

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did not contribute to any reduction in sales to the Australian industry, while in relation to the result of the first WAN tender it has been conceded by the applicant that it did not cause material injury.

Comments by the Commission

The Commission does not agree with the statement that *it is only a reduction in sales volumes that constitutes a form of injury*. The Commission considers that a restriction to achieving higher sales volumes than may have otherwise been achieved may also be a form of injury. In Section 8.5.2 of the Commissioner's Final Report the Commission stated:

The decline in sales volume by NSIA was much greater than the decline of imports from UPM. The Commission has found that sales by UPM to WAN were at dumped prices.

The Commission considers that in the absence of dumping, NSIA would have been in a stronger position to achieve sales to WAN because the UPM price offer would have been less competitive. The Commission considers that NSIA has suffered injury in the form of reduced sales volume due to dumped imports of newsprint from France.

Paragraph 27 of the Applicant's claims:

The other ground for its finding on sales volumes advanced by the Commission is that in the second WAN tender *...in the absence of dumping, NSIA would have been in a stronger position to achieve sales to WAN because the UPM price offer would have been less competitive*. The observation involves two presumptions – UPM was successful because of its delivered price and that NSIA would be WAN's alternative choice to UPM. Neither presumption is correct because UPM was the overbidder in the tender and, if necessary, Jeonju could satisfy all of WAN's volume requirements and product specifications.

Comments by the Commission

The Commission's analysis in Sections 8.6, 8.8 and 8.9 and in Confidential Appendices 7 and 9 of the Commissioner's Final Report analysed bids and the cost of supply over the entire period for which that supply was sought. The Commission determined which newsprint suppliers were the highest and lowest bidders and referred to this analysis of confidential information in its consideration of whether dumping has caused material injury. Further, the Commission's analysis of price comparisons at Confidential Appendix 9 supports its finding at Section 8.6.3 that it is reasonable to conclude that NSIA's prices in other contracts were influenced by the competition with these dumped imports from France. This analysis was conducted on the bases of both the supply volumes specified in the bid request as well as the supply volumes the Commission considered more accurately reflected the newsprint usage of that customer.

In respect of the statement that *Jeonju could satisfy all of WAN's volume requirements and product specifications*, the Commission's analysis in Section 8.8.3.2 of the Commissioner's Final Report found that *some newspaper*

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*publishers have adopted new purchasing policies that require more than one source of newsprint. As such, it is unlikely that WAN would have accepted Jeonju as its sole supplier. However, the Commission found that the Australian industry was also able to meet all of WAN's volume requirements and product specifications. Further, the Commission explained its conclusion in Section 8.8.3.2 of the Commissioner's Final Report that *injury suffered by NSIA has not been caused by requirements to supply newsprint made from a high proportion of recycled paper.**

Paragraph 28 of the Applicant's claims:

We submit that the Commission's finding that NSIA's reduced sales volume was caused by UPM's sales to WAN cannot be sustained.

Comments by the Commission

See the Comments by the Commission in response to Paragraphs 25 to 27 of the Applicant's claims.

Sales Revenue

Paragraph 29 of the Applicant's claims:

While it is not disputed that NSIA's sales revenue declined over the injury investigation period, we note that there is no analysis by the Commission of this form of injury or its causes. There is simply the abrupt and bland announcement at the end of section 8.6.3 of the Report that UPM's exports have caused 'lost sales revenue'. There is no positive evidence of causation advanced by the Commission and no objective examination of the issue. The finding should be set aside on those grounds.

Comments by the Commission

The Commission considered sales revenue in its description of Figure 3 in Section 7.4.1 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report.

The Commission considered causation in Sections 8.6 and 8.8 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report.

Sales revenue is a function of volume and price. The Commission found that NSIA suffered injury in the form of reduced sales volume due to dumped imports of newsprint from France (Section 8.5.2) and it found there is a link between UPM's dumped prices and the adverse price effects experienced by NSIA (Section 8.6.3). As such, the Commission's analysis constituted more than an *abrupt and bland announcement.*

Paragraph 30 of the Applicant's claims:

In addition, we submit that in circumstances such as the present where the margin between unit prices and costs of the Australian industry has not changed significantly over the injury investigation period, sales revenue performance does not constitute a separate form of injury but is in lockstep with sales volume performance. Consequently, the objections set out in the analysis in the preceding paragraphs to attributing reductions in sales volumes to UPM's exports apply equally to sales revenue reductions and consequently the finding concerning that form of injury cannot be sustained.

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Comments by the Commission

The Commission does not agree with the objections set out by the Applicant in the analysis in paragraphs 29 and 30. As noted above, sales revenue is a function of volume and price. It is not a function of margin (between unit prices and costs) and price. The Commission considers it would be inappropriate to set aside a relevant factor merely because it is a function of other relevant factors. If this were the case, it might be said that the Commission need not examine profit and profitability.

Paragraph 31 of the Applicant's claims:

In the absence of any evidence that any sales volume or sales revenue related injury to NSIA was caused by UPM's exports to WAN, we request that Review Panel finds that the Parliamentary Secretary's decision to publish dumping duty notices was not the correct or preferable decision and that it recommends that the decision should be revoked and substituted with a decision that dumping duty notices should not apply to exports of newsprint from France.

Comments by the Commission

See the Comments by the Commission in response to Paragraphs 29 to 30 of the Applicant's claims.

- 4. NSIA's reduced profits have been caused primarily by the major contraction in the newsprint market, not by imports from France; profitability in 2013/14 remained higher than at the beginning of the injury investigation period.**

Profit and Profitability

Paragraph 32 of the Applicant's claims:

The Commission's observations on this issue are contained in section 8.7.3 of the Report and are limited to claiming that the causes of reductions in profits and profitability are price depression, price suppression and reduced sales volumes. We agree that in the present case movements in profits and profitability are not discrete injury factors but merely the consequences of other forms of injury. In particular the percentage reduction in profits in the present matter is matched almost exactly by the percentage decline in sales volumes. However, as that factor cannot be attributed to exports by UPM and there is no evidence of a significant degree of price depression or price suppression, any reductions in profits and profitability cannot be linked to UPM's sales to WAN.

Comments by the Commission

The Commission does not agree with the assertion that there is no evidence of a significant degree of price depression or price suppression. The Commission considered sales revenue in its description of Figure 3 in Section 7.4.1 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report. The Commission considered causation in Sections 8.6 and 8.8 and in Confidential Appendices 6 and 7 of the Final Report.

As such, as such, the Commission does not agree with the assertion that any reductions in profits and profitability cannot be linked to UPM's sales to WAN.

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Paragraph 33 of the Applicant's claims:

In the absence of any evidence of that link, we request that Review Panel finds that the Parliamentary Secretary's decision to publish dumping duty notices was not the correct or preferable decision and that it recommends that the decision should be revoked and substituted with a decision that dumping duty notices should not apply to exports of newsprint from France.

Comments by the Commission

See the Comments by the Commission in response to Paragraph 32 of the Applicant's claims.

- 5. In addition to the specific issues surrounding consideration of price and volume related injury there are further grounds relating to injury, causation and materiality for concluding that the decision of the Parliamentary Secretary to publish notices under s.269TG(1) and (2) was not the correct or preferred decision.**

Paragraph 34 of the Applicant's claims:

Subsections 269TG(1) & (2) of the Act read as follows:

(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:

(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and

(b) because of that:

(i) material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or

(ii) in a case where security has been taken under section 42 in respect of any interim duty that may become payable on the goods under section 8 of the Dumping Duty Act—material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken; the Minister may, by public notice, declare that section 8 of that Act applies:

(c) to the goods in respect of which the Minister is so satisfied; and

(d) to like goods that were exported to Australia after the Commissioner made a preliminary affirmative determination under section 269TD in respect of the goods referred to in paragraph (c) but before the publication of that notice.

(2) Where the Minister is satisfied, as to goods of any kind, that:

(a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and

(b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; the Minister may, by public notice (whether or not he or she has made, or proposes to make, a declaration

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under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice.

Comments by the Commission

The Commission agrees with the Applicant's claims and notes that this is the legislative test in subsections 269TG(1) and (2) of the Act

Paragraph 35 of the Applicant's claims:

In the present matter the references to 'goods' in s.269TG(1)(a) are references to the consignments of newsprint identified by UPM in its exporter questionnaire response as having been exported from France to Australia in the period from 1 April 2013 to 31 March 2014. In the dumping duty notice under s.269TG(1) the Parliamentary Secretary declares she is satisfied that those specific goods have been dumped but she fails to declare that she is satisfied that the dumping of those specific goods has caused material injury. Consequently, in our submission, her declaration that s.8 of the *Dumping Duty Act* applies to those goods is unlawful and must be set aside.

Comments by the Commission

The goods referred to in the notice under subsection 269TG(1) of the Act are described in the notice. The notice does not limit the goods to consignments of newsprint identified by UPM in its exporter questionnaire response as having been exported from France to Australia in the period from 1 April 2013 to 31 March 2014.

In the notice issued under subsections 269TG(1) and (2) of the Act, the Parliamentary Secretary stated that she:

...considered, and accepted, the recommendations of the Commissioner, including the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 242

The Parliamentary Secretary also stated in that notice:

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

- (i) the goods; and
- (ii) like goods that were exported to Australia after 30 January 2015 (when the Commissioner made a preliminary affirmative determination under section 269TD of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before the publication of this notice.

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The Commission considers that the public notice is consistent with subsection 269TG(1) of the Act. In particular, the two options in subsection 269TG(1)(b) are presented as alternatives of which the Parliamentary Secretary may, by public notice, declare that section 8 of the *Dumping Duty Act* applies. For the purposes of subsection 269TG(1)(b)(ii), it is sufficient that the Parliamentary Secretary be satisfied that, as to goods that have been exported to Australia, the amount of the export price of the goods is less than the amount of the normal value of those goods and because of that, material injury to the Australian industry producing like goods would, or might have, been caused if the security had not been taken. The Parliamentary Secretary has specified in the public notice that she is satisfied of this.

The Commission also considers that it is clear that the notice reflects the recommendations of the Commissioner, including the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in the Commissioner's Final Report.

Paragraph 36 of the Applicant's claims:

We further submit that even if the Parliamentary Secretary had turned her mind to the issue of whether the dumping of the specific goods had caused material injury it would not have been open to her to be satisfied that there was a causal link. Both the applicant and the Commission have accepted that NSIA did not suffer any material injury because of its lack of success in the first WAN tender. As the specific goods were supplied by UPM under a contract awarded under that tender we submit that there are no grounds on which she could be satisfied that they caused material injury. Our submission on this point is further supported by the fact that the Commission has accepted that the twelve month period immediately prior to the investigation period was unaffected by dumping. In that earlier period UPM's prices were lower and volumes higher than in the investigation period. If those prices and volumes did not cause material injury it cannot be claimed that the higher prices and lower volumes in the investigation period could have done so.

Comments by the Commission

It is not clear to the Commission what is meant by the claim: *Both the applicant and the Commission have accepted that NSIA did not suffer any material injury because of its lack of success in the first WAN tender.*

Further, the Commission did describe the twelve month period immediately prior to the investigation period as a period unaffected by dumping. However, this was in the context of establishing an unsuppressed selling price for the purposes of calculating a non-injurious price and considering the application of the lesser duty rule, and was not relevant to the consideration of material injury.

The analysis of causal link was not limited to goods that were supplied under any specific contract awarded. As such, the conclusion in Sections 8.10 and 9.2 of the Commissioner's Final Report are sound.

See also the Comments by the Commission in response to Paragraph 35 of the Applicant's claims.

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Paragraph 37 of the Applicant's claims:

The Parliamentary Secretary also declares under s.269TG(1) that because of the dumping of the specific goods exported between 1 April 2013 and 31 March 2014 the export of like goods by UPM between 30 January 2015 and 30 April 2015 might have caused material injury if security had not been taken. There is no evidence that the Commission or the Parliamentary Secretary even considered the causation requirement set out in s.269TG(1)(b)(ii) and we submit, absent any such evidence or persuasive argument, that the mere assertion of a possible injurious impact of exports occurring up to more than two years ago does not satisfy the terms of the legislation, particularly in circumstances where the Commissioner failed to report to the Parliamentary Secretary on more contemporaneous consignments of like goods under s.269TEA(2) of the Act. Again we submit that the declaration purporting to authorise the collection of dumping duties between 30 January and 30 April 2015 must be set aside and all securities taken in that period must be cancelled.

Comments by the Commission

The analysis of causal link was conducted in Section 8 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report.

The analysis of whether dumping and material injury will continue was conducted in Section 9.3 of the Final Report where it states:

The Commission has found that UPM has an agreement in place to supply newsprint at certain prices to a major newspaper publisher. The Commission considers that exports at dumped prices will continue if anti-dumping measures are not imposed.

As described in section 5.3 of this report, contracts that are in place for some major newspaper publishers include a guaranteed proportion of their needs to be supplied by NSIA. Supplying the remaining proportion is open to exporters. The Commission considers that this will allow exports at dumped prices to continue if anti-dumping measures are not imposed.

The Commission has found that some agreements that are in place are for three year terms and, as such, may be best described as being of medium term, rather than long term, agreements. The Commission has also found that some long term agreements that have been in place have been terminated and replaced with new agreements. As such, the Commission considers that further opportunities to supply newsprint will be present and that this will allow exports at dumped prices to continue if anti-dumping measures are not imposed.

The Commission considers that its analysis of the contracts that have been in place, as well as ongoing and occasional opportunities for exporters to negotiate the supply of newsprint to Australian customers, sufficiently addresses and includes imports of like goods in the period referred to in subsection 269TEA(2) of the Act. Considering the Commission's causation argument in its totality would reasonably allow the Parliamentary Secretary to consider and be satisfied

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that the export of like goods by UPM between 30 January 2015 and 30 April 2015 might have caused material injury if security had not been taken.

Paragraph 38 of the Applicant's claims:

In the absence of a valid retrospective dumping duty notice, the Parliamentary Secretary's declaration under s.269TG(2) that the Dumping Duty Act applies to prospective exports of newsprint by UPM cannot be sustained. However, we contend that even if the retrospective notice is valid there are separate grounds on which the prospective notice must be set aside.

Comments by the Commission

A valid notice under subsection 269TG(1) of the Act is not a requirement for the publication of a notice under subsection 269TG(2) of the Act.

See also the Comments by the Commission in response to Paragraph 35-37 and 39-41 of the Applicant's claims.

Paragraph 39 of the Applicant's claims:

Section 269TG(2) requires an examination of the likelihood of future dumping and future material injury caused by such dumping. These issues are considered in section 9.3 of the Report. In the first instance the Commission concludes that dumping will continue but its observations do not support the conclusion. The analysis focuses not on the likelihood of future dumping but whether parties other than NSIA will have future opportunities to supply newsprint to the Australian market and the unremarkable answer is 'yes'. However in considering if dumped exports will continue the central consideration is UPM's future pricing and that is ignored by the Commission even though the evidence before it was that UPM has only one contracted customer, future prices under the contract are undumped and it has never tendered to News or Fairfax.

Comments by the Commission

The Commission found that exports by UPM were at dumped prices. In Section 9.3.1 of the Commissioner's Final Report the Commission indicates its understanding that there will be future opportunities to supply Australian newspaper publishers that are not necessarily exclusive of News Limited or Fairfax and that such supply may be at dumped prices if anti-dumping measures are not imposed. In Section 3 of the Commissioner's Final Report the Commission indicated that it is possible that a newsprint supplier could supply 100 per cent of the requirements of a newspaper publisher, but it is not guaranteed in any case. As such, the lack of previous tenders by UPM to News Limited or Fairfax does not preclude any future offers being made. This point has greater validity in the context of the point in Section 9.3.1 of the Commissioner's Final Report where the Commission notes that newspaper publishers have demonstrated a willingness to seek to re-negotiate existing contracts in order to achieve lower prices.

Paragraph 40 of the Applicant's claims:

In relation to the likelihood of future material injury the Commission concentrates on whether there may be future opportunities for UPM to export to Australia and not on whether any future exports by UPM may cause material injury. It mischaracterizes UPM's

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position by claiming it has contracts in place when it was aware that UPM has only ever had one contract with an Australian newspaper publisher and that over a six year period it has never bid for the business of the two dominant publishers. The Commission also fails to consider the temporal and quantitative comparative aspects that are essential to a proper analysis of material injury. In particular it does not examine how NSIA, six years after losing its position as a supplier to WAN, is likely to suffer future relative detriment because of UPM's future supplies to the publisher at reduced volumes and increased prices.

Comments by the Commission

In Section 9.3.2 of the Commissioner's Final Report, the Commission discusses whether material injury will continue.

In Chapter 8 of the Commissioner's Final Report, the Commission has considered, for the purposes of subsection 269TG of the Act generally, whether material injury has been, or is being, caused by dumping, and this analysis is applicable to subsection 269TG(2)(b) of the Act. In particular, the Commission's analysis in Chapter 8 of the Commissioner's Final Report indicates that the Australian industry faces competition in a market that includes exports at dumped prices when it bids for contracts with newspaper publishers, including WAN. The lack of previous tenders by UPM to News Limited or Fairfax does not preclude any future offers being made of newsprint at dumped prices.

Section 9.3.2 of the Commissioner's final report also finds that that continued dumping may cause further material injury to the Australian industry.

Paragraph 41 of the Applicant's claims:

We submit that this failure to engage with the relevant considerations set out in s.269TG(2)(b) provides additional grounds in support of a conclusion that there were no, or insufficient, grounds for the publication of the prospective notice.

Comments by the Commission

See the Comment by the Commission in response to Paragraphs 39 and 40 of the Applicant's claims.

Causation

Paragraph 42 of the Applicant's claims:

In *ICI Operations Pty Ltd v Fraser & Others*(1992) 106 ALR 257 the Federal Court observed that:

Where the Australian industry under consideration has suffered detriment from a number of causes, it will be necessary for the minister to be satisfied that the industry has suffered detriment sufficient to meet the description "material injury" within the meaning of the legislation in consequence of the dumping of goods that have been exported to Australia, and to quantitatively separate that material injury from detriment caused by other factors.

Paragraph 43 of the Applicant's claims:

While we have already traversed the issue of whether, in a relative sense, NSIA can be said to have suffered any material injury we acknowledge that in absolute terms NSIA can point to some indicators of detriment. Applying the approach set out by the Court the

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quantitative assessment of UPM's impact on the market in volume and price terms is that the company's market share has hovered around X% and that its prices have never undercut those of the Australian industry. This position is to be compared with the cumulative impact of a 37% reduction in the size of the market, undumped imports at prices below UPM's accounting for over 12% of the market, the strong continuing preference of one publisher for newsprint made from recycled paper, the growing practice of dual sourcing by the publishers, the relative freight costs faced by NSIA and the concentration of its traditional business in the eastern states which have been the worst hit by the digital revolution.

Comments by the Commission

The Act does not define 'material injury', but provides circumstances for the Parliamentary Secretary to consider when making a determination relating to material injury (subsection 269TAE).

In addition to considering the circumstances provided for in subsection 269TAE of the Act, the Commission also considered material injury in a manner consistent with the *Ministerial Direction on Material Injury 2012* by the Minister for Home Affairs.

In Section 8.10 of the Commissioner's Final Report, the Commission noted that:

... other factors including un-dumped goods, contractions in demand and changes in patterns of consumption may have contributed to the injury suffered by the Australian industry. However, the Commission considers that these other possible causes of injury do not detract from the assessment that dumping of itself has caused material injury to the Australian industry.

The Commissioner has assessed that exports of newsprint at dumped prices from France have caused material injury to the Australian industry.

Paragraph 44 of the Applicant's claims:

We submit that after accounting for the cumulative impact of these factors on NSIA's business no reasonable person could conclude that the very minor role of UPM in the market could possibly have caused a degree of injury that was material.

Comments by the Commission

In Section 8.10 the Commissioner's Final Report, it was stated that the Commission:

... considers that the relative size of UPM's market share does not necessarily prevent it from influencing prices. The processes of price setting in the Australian newsprint market include requests for tender by newspaper publishers, responses to these requests and subsequent negotiations between newsprint suppliers and newspaper publishers. These processes occur at times dictated by newspaper publishers and require newsprint suppliers to quote prices based on their understanding of prevailing and future prices.

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Paragraph 45 of the Applicant's claims:

Also relevant to the issue of causation is the object of the Act which is to eliminate material injury caused by dumped imports by imposing dumping duties. However in the present matter UPM is a subsidiary supplier under the WAN contract and has been a successful bidder on two occasions because of WAN's dual sourcing policy and our client's capability of supplying newsprint made from recycled paper. In the event that the publication of the dumping duty notices exclude UPM from the market, there is no evidence to suggest that NSIA's sales volumes or selling prices would increase. The exercise of trade remedy powers would not provide a remedy.

Comments by the Commission

In Section 8.8.3.2 of the Commissioner's Final Report, the Commission noted that:

... evidence that the Commission has analysed provides no basis for concluding that newsprint made from a high proportion of recycled paper is superior to newsprint made with little or no recycled paper. The Commission also considers that the lack of explicit requests for newsprint to be produced entirely from recycled paper in proposal requests and product specification requirements, as well as the practice where newspaper publishers may use both types of paper at some sites, leads the Commission to conclude that injury suffered by NSIA has not been caused by requirements to supply newsprint made from a high proportion of recycled paper.

In Section 8.8.3.2 of the Commissioner's Final Report, the Commission also found that:

... some newspaper publishers have adopted new purchasing policies that require more than one source of newsprint. As NSIA is the only Australian producer of newsprint, alternative supply can only be sourced through imports.

The Commission considers that NSIA has suffered injury from changes in purchasing policies by newspaper publishers in the Australian newsprint market. However, the Commission considers that price is an important factor considered by newspaper publishers when choosing either single, or multiple, suppliers.

As such, the Commission considers that by imposing a dumping duty set at the level of the full dumping margin is likely to provide an effective remedy because of the important consideration given to price in the Australian newsprint market.

Paragraph 46 of the Applicant's claims:

We submit that, to the extent that the local industry is suffering any material injury, any claim that the export price of newsprint from France during the investigation period has caused material injury to NSIA is overwhelmed by the detrimental consequences of the other factors to a degree that makes it impossible to conclude that any dumping, in and of itself, caused material injury.

Comments by the Commission

The Commission considered material injury in a manner consistent with the *Ministerial Direction on Material Injury 2012* by the Minister for Home Affairs.

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Paragraph 47 of the Applicant's claims:

In the absence of any persuasive explanation of how UPM's position in the Australian newsprint market caused material injury to NSIA, we request that the Review Panel finds that the Parliamentary Secretary's decision to publish dumping duty notices was not the correct or preferable decision and that it recommends that the decision should be revoked and substituted with a decision that dumping duty notices should not apply to exports of newsprint from France.

Comments by the Commission

See the Comments by the Commission in response to Paragraphs 34 to 47 of the Applicant's claims.

Materiality

Paragraph 48 of the Applicant's claims:

In section 7.1 of the Report the Commission finds that NSIA has experienced injury in six forms but does not examine whether or not the injury is material in relation to each of those forms or, cumulatively, to all six. In sections 8.5.2, 8.6.3 and 8.7.3 the Commission finds that UPM's exports have caused 'injury' to NSIA in terms of sales volumes, price depression, price suppression, lost sales revenue and reduced profit and profitability but again these is no examination or assessment of materiality. The report then segues, without any analysis, to the assertion in section 8.10 of the Report that *...exports of newsprint at dumped prices from France have caused material injury to the Australian industry.*

Comments by the Commission

The Commission found that the Australian industry has suffered injury in various forms. It is not required to consider whether injury in each of these respective forms is material.

The Commission considered causation in Section 8 and in Confidential Appendices 6 and 7 of the Commissioner's Final Report.

Paragraph 49 of the Applicant's claims:

The issue of materiality is a critical component in the Parliamentary Secretary's consideration of the factors in s. 269TG(1) & (2) of which she must be satisfied and, in the absence of any evidence that the issue has been addressed by the Commission, we request that Review Panel finds that the Parliamentary Secretary's decision to publish dumping duty notices was not the correct or preferable decision and that it recommends that the decision should be revoked and substituted with a decision that dumping duty notices should not apply to exports of newsprint from France.

Comments by the Commission

See the Comment by the Commission in response to Paragraph 48 of the Applicant's claims.