

**APPLICATION FOR REVIEW OF A DECISION OF THE MINISTER WHETHER
TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY
NOTICE**

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

- ✓ to publish : Ⓜ a dumping duty notice(s), and/or
 Ⓜ a countervailing duty notice(s)

OR

- ~~not to publish : Ⓜ a dumping duty notice(s), and/or~~
~~Ⓜ a countervailing duty notice(s)~~

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- - provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application
- - provides reasonable grounds for the decision not being the correct or preferable decision, and
- - is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

- ✓ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

Please see Attachment A

- ✓ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

Please see Attachment A

- ✓ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

Please see Attachment A

- ✓ Full description of the imported goods to which the application relates.

Please see Attachment A

- ✓ The tariff classification/statistical code of the imported goods.

Please see Attachment A

- ✓ A copy of the reviewable decision.

Please see Attachment A

- ✓ Date of notification of the reviewable decision and the method of the notification.

- ✓ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

Please see Appendix 1 – Commercial in Confidence

Please see Appendix 2 – For Public Record

- ✓ A statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

Please see Appendix 3

Signature:.....

Name: John Cosgrave

Position: Lawyer, Minter Ellison Lawyers on behalf of

Applicant Company/Entity: UPM Kymmene Pty Ltd

Date: 1 / 06 /2015

APPLICATION TO THE ANTI-DUMPING REVIEW PANEL FOR REVIEW OF A DECISION TO PUBLISH DUMPING DUTY NOTICES APPLYING TO EXPORTS OF NEWSPRINT FROM FRANCE

Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

*UPM Kymmene Pty Ltd
Level 6, 53 Berry Street
North Sydney, NSW 2060
Company*

Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

*Marcus Lindh
Managing Director
Ph. 02 9334 5050; Fax 02 9334 5051
Email: marcus.lindh@upm.com*

Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

Mr John Cosgrave, Minter Ellison Lawyers



UPM-Kymmene Pty Ltd

To whom it may concern

Application for Review of a Decision to publish dumping duty notices applying to exports of newsprint from France.

UPM Australia Pty Ltd appoints Minter Ellison Lawyers to act on its behalf in relation to the above Application for Review to the Anti-Dumping Review Panel.

Yours sincerely


Marcus Lindh
Managing Director

29th May 2015

UPM-Kymmene Pty Ltd
A.B.N. 99 001 218 901
Level 6, 53 Berry Street
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Sydney Australia
Tel: 61 (0) 2 9334 5000
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Full description of the imported goods to which the application relates.

Newsprint from France in roll or sheet form having a weight within the range 40 grams per square metre (gsm) to 46 gsm (inclusive) and brightness below a measure of 70 ISO.

The tariff classification/statistical code of the imported goods.

The goods are classified to the following tariff subheadings in Schedule 3 to the Customs Tariff Act 1995:

- *tariff subheading 4801.00.20 with statistical code 02;*
- *tariff subheading 4801.00.31 with statistical code 04; and*
- *tariff subheading 4801.00.39 with statistical code 19.*

A copy of the reviewable decision.

Customs Act 1901 – Part XVB

Newsprint Exported from France and the Republic of Korea
Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG (1) and (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of newsprint (the goods) exported to Australia from France and the Republic of Korea (Korea).

The goods are classified to the following tariff subheadings in Schedule 3 of the *Customs Tariff Act 1995*:

- tariff subheading 4801.00.20 with statistical code 02;
- tariff subheading 4801.00.31 with statistical code 04; and
- tariff subheading 4801.00.39 with statistical code 19.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2014/34, which is available on the internet at www.adcommission.gov.au

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 242* (REP 242). REP 242 outlines how the Anti-Dumping Commission (the Commission) carried out the investigation and recommends the publication of a dumping duty notice in respect of the goods.

On 20 March 2015, the Commissioner terminated part of the investigation into the goods exported from Korea. *Termination Report No. 242* (TER 242) sets out the reasons for this termination, and is available on the internet at www.adcommission.gov.au.

I have considered REP 242 and have accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings.

The method used to compare export prices and normal values to establish the dumping margin was to compare the weighted average export prices with corresponding normal values over the investigation period in terms of subsection 269TACB(2)(a) of the *Customs Act 1901* (the Act). The normal value was established under subsection 269TAC(1) of the Act. The export price was established under subsection 269TAB(1)(c) of the Act.

Particulars of the dumping margin that has been established in respect of newsprint exported from France is set out in the table below.

Country	Manufacturer/ exporter	Dumping margin and effective rate of duty	Duty method
France	All exporters	5.1%	Fixed and variable

The effective rate of duty that has been determined is an amount worked out in accordance with the fixed and variable duty method, as detailed in the table above.

I, KAREN LESLEY ANDREWS, Parliamentary Secretary to the Minister for Industry and Science, have 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.

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.

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

This declaration applies in relation to all exporters of the goods and like goods from France. Measures apply to goods that are exported to Australia after publication of this notice. Measures also apply to goods that were exported to Australia after the Commissioner made a preliminary affirmative determination to the day before my decision was published. The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on Australian industry prices and the consequent impact on the Australian industry including reduced sales, reduced revenues, price depression, price suppression, reduced profits and reduced profitability.

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

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

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

Clarification about how anti-dumping measures are applied to 'goods on the water' is available in Australian Customs Dumping Notice No. 2012/34, available at www.adcommission.gov.au.

REP 242 and other documents included in the public record may be examined at the Commission's office by contacting the case manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2428, fax number +61 3 8539 2499 or email at operations1@adcommission.gov.au.

Dated this 20th day of April 2015

KAREN LESLEY ANDREWS

Parliamentary Secretary to the Minister for Industry and Science

Date of notification of the reviewable decision and the method of the notification.

30 April 2015 in the Australian Newspaper

For Public Record

Statement by UPM Kymmene Pty Ltd relating to decisions of the Parliamentary Secretary under s.269TG(1) and (2) to issue dumping duty notices published on 30 April 2015 that apply to newsprint exported from France.

A. INTRODUCTION

1. UPM Kymmene Pty Ltd (**UPM**) is an interested party that has been directly concerned with the importation and exportation to Australia of newsprint from France. UPM is a member of a group of associated companies directly concerned with the manufacture, importation and exportation of newsprint from France to Australia and referred to collectively herein as UPM.
2. On 30 April 2015 the Parliamentary Secretary, pursuant to s.269TG(1) and (2) of the *Customs Act 1901 (Cth)* (**Act**), published dumping duty notices in the *Commonwealth Gazette* No. C2015G00620 declaring that s.8 of the *Customs Tariff (Anti-Dumping) Act 1975 (Anti-Dumping Act)* applies to newsprint exported from France. The Parliamentary Secretary's declaration is based on Final Report No. 242 (**Report**) and acceptance of the recommendations and reasons for recommendations, including all the material findings of facts or law, set out in that report by the Commissioner of the Anti-Dumping Commission (**Commission**).
3. We request that, pursuant to paragraph 269ZZA(1)(a) of the Act, the Review Panel reviews the decision to publish dumping duty notices and recommends to the Parliamentary Secretary under paragraph 269ZZK(1)(b) that she revoke the decision and substitute a new decision specifying that exports from France did not cause material injury to the Australian industry.
4. Grounds in support of our submission that the Minister's decision is not the correct or preferable decision and our requests for revocation and substitution are set out in Section D of this submission.

B. PRELIMINARY REQUEST

5. We specifically request that the Panel makes a recommendation on each of the elements of the Minister's decision identified in this submission as incorrect or non-preferred. This is

necessary to avoid the risk of the right of review of UPM being thwarted if the Review Panel, purporting to exercise the administrative equivalent of 'judicial economy', concludes that because of a proposed recommendation in relation to one or more findings it is unnecessary to address other findings challenged in the application. In the event that the Minister rejects a recommendation of the Panel, there is in effect no review of those other findings. This was the unfortunate outcome resulting from a recent rejection by the Parliamentary Secretary of a recommendation of the Review Panel.¹ In our submission this event compromised the rights of review intended by the legislation which, we submit, justifies an inference under s.269ZZK(2) that the report of the Review Panel will address, and make recommendations in relation to, each of the 'reasons' required by s269ZZE(2) to be contained in the applicant's statement.

C. BACKGROUND

6. An application for dumping duty notices applying to exports of newsprint from Korea and France was made by the sole Australian producer, Norske Skog Industries Australia Limited (**NSIA**), on 24 March 2014. UPM is the sole exporter from France and while there are a number of exporters from Korea, Jeonju Paper Corporation (**Jeonju**) was the source of most of the exports from that country². In accepting NSIA's application on 22 April 2013 the Commission specified that the injury investigation period would run from 1 April 2010 and the dumping investigation period would be from 1 April 2013 to 31 March 2014
7. The market for Newsprint in Australia is dominated by the requirements of the four major newspaper publishers – News Limited, Fairfax, WAN and APN – that collectively account for over 95% of total sales of newsprint in Australia³. WAN operates only in the Western Australian market while APN publishes in regional Queensland and Northern NSW. News and Fairfax publications are overwhelmingly concentrated in the eastern states with the former accounting for almost 70% of national weekday readership⁴ and sourcing about 90% of its newsprint from NSIA⁵, which has also been the incumbent supplier on long term contracts to Fairfax⁶ over many years. The balance of News'

¹ *Food Service Industrial Pineapple Exported from the Kingdom of Thailand* (18 February 2014)– Dole Thailand Limited

² Report: Section 5.4.2, p.19

³ *ibid.* Section 5.2; p.18

⁴ Public Record 242, item 016, p.8

⁵ *ibid.*

⁶ *ibid.* item 001, p26

requirements, formerly supplied by NSIA, have been sourced since mid-2013⁷ from Jeonju⁸ on a spot basis. At a meeting with the Commission on 4 June 2014 APN advised that they had ceased sourcing from Jeonju⁹, had recently entered into a long term contract with NSIA¹⁰ and were sourcing their remaining requirements from a country not specified in the dumping application.¹¹

8. Prior to 2010/11 financial year NSIA had been the long term supplier of newsprint to WAN. Following the supply in 2010 of trial shipments for evaluation purposes UPM, along with Jeonju and NSIA responded to WAN's request for tender and UPM was successful in being awarded a contract to supply a minor proportion (■%) of the publisher's requirements. Supply under this tender continued until 30 June 2014 with WAN sourcing the remainder of its newsprint from Jeonju. Although NSIA was unsuccessful in retaining its supplier status to WAN, it stated in its application that its lack of success had not resulted in material injury to Australian production and that material injury caused by exports from Korea and France did not commence until 2013/2014¹². In August 2013 WAN issued a new request for tender for the future supply of newsprint over a three year period commencing on 1 July 2014. NSIA, Jeonju and UPM responded and the outcome was similar to the first tender but with UPM's share of WAN's business reduced to ■%. Contrary to the reported claim by NSIA, price was not the reason for its lack of success as is demonstrated by the fact that the public record does not contain any evidence of a single example of price undercutting by UPM or any other importer.
9. Over the injury investigation period UPM's sales to WAN fell from ■ tonnes in financial year 2010-11 to ■ tonnes in 2013-14 with further significant decreases down to ■ tonnes in 2017 under the current contract. During the injury investigation period the price per tonne increased from AUD ■ to AUD ■.

⁷ *ibid.*

⁸ *ibid.* item 016, p.8

⁹ *ibid.* item 018, p10

¹⁰ *ibid.* p.8

¹¹ *ibid.*

¹² *ibid.* item 001, p.23

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

10. 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.
11. 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.
12. As illustrated in an earlier public submission¹³ 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.
13. 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.

II. *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**

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

¹³ *ibid.*, document #009, p.21

(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;

15. 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.

Price Undercutting

16. 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.

17. 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.

Price Depression

18. The Commission observes that *...Price depression occurs when a company, for some reason, lowers its prices¹⁴ ...and gives as an example a situation where ...the local producer is forced to reduce prices in order to compete with the imported goods¹⁵.* 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 period¹⁶ and this acknowledgement merely reflects the data provided by NSIA in its application¹⁷:

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

19. 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 non-existent price depression. This necessarily involves shifting the goal posts to counter the absence of any price depression over the whole injury investigation period by focussing 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 observed¹⁸, it was in 2012/13 that NSIA's traditional customers – News and Fairfax – requested a renegotiation of prices for

¹⁴ Report: p.31

¹⁵ Dumping & Subsidy Manual: p.15

¹⁶ Report: Section 7.4.1, p31

¹⁷ Public Record 242: item 001, p.24.

¹⁸ Report: Section 8.6, p.38

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 non-competing 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.

20. UPM did respond to the APN tender of August 2013 with an undumped price of [REDACTED] [REDACTED]/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.

21. 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 dumping*¹⁹. 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.

Price Suppression

22. Price suppression is said to occur when price increases that would have occurred for Australian products are for some reason not implemented²¹. 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

¹⁹ *ibid.* Section 10.2, p.48-49

²⁰ Public Record: item 001, p23.

²¹ Report: Section 7.4.1, p.31

information provided in NSIA's application²² 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.

23. 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.
24. 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.

III 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

25. While the Australian market for newsprint decreased in volume terms over the injury investigation period by 37%²³ NSIA's sales volume only reduced by 25%²⁴. 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*²⁵ ...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 imports²⁶. 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

²² Public Record 242: item 001, p.23

²³ Report. Section 7.3.1, p.30

²⁴ *ibid.*

²⁵ *ibid.* Section 8.5.2, p.37

²⁶ *ibid.*

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 █%, 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.

26. 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, 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.
27. 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.
28. We submit that the Commission's finding that NSIA's reduced sales volume was caused by UPM's sales to WAN cannot be sustained.

Sales Revenue

29. 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.

30. 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.
31. 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.

IV 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.

Profits and Profitability

32. 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.
33. 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.

V 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.

The Terms of s.269TG(1) & (2)

34. 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 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.

35. 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.

36. 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.
37. 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.
38. 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.

39. 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.
40. 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 mischaracterises UPM's 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.
41. 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.

Causation

42. 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.

43. 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 quantitative assessment of UPM's impact on the market in volume and price terms is that the company's market share has hovered around █% 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.
44. 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.
45. 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 policy²⁷ 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.

²⁷ Public Record: item 013, p.14

46. 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.
47. 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.

Materiality

48. 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.*
49. 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.

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Statement by UPM Kymmene Pty Ltd identifying what the applicant considers should be the correct or preferable decision by the Parliamentary Secretary in relation to the alleged dumping of newsprint exported from France.

The correct and preferable decision resulting from the acceptance of the grounds raised in Appendix 1 to this application is that the Parliamentary Secretary's decision to publish dumping duty notices under s.269TG(1) &(2) applying to newsprint exported from France should be revoked and substituted by a decision that dumping duty notices should not apply to those exports.

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