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BY EMAIL

Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra, ACT 2601
AUSTRALIA

PUBLIC RECORD

Attention: Director Operations, Trade Measures Branch

Dear Joanne Reid

RE: RESUMED INVESTIGATION - CLEAR FLOAT GLASS FROM THE PEOPLE'S REPUBLIC OF CHINA, INDONESIA AND THAILAND

1. This Submission should be read in conjunction with the TMRO Review Application (and its attachments) which was supplied to Customs and Border Protection with our email of 8 April 2011. Extracts from the Review Application have been included in this Submission together with additional comments where appropriate. This Submission does not attempt to address all of the comments in the TMRO's report and any omissions from the TMRO report should not be taken as agreement or disagreement with the comments in the TMRO's report.

2. The TMRO review of the decision to terminate the investigation into clear float glass of certain sizes concluded that Customs and Border Protection should give particular attention to a number of areas set out in paragraph 123 of the TMRO's report.

3. The TMRO noted that Customs and Border Protection should give particular attention:

   a. in relation to 'market share': the portion of any decline in market size/volume that was due to diversion to internal processing by Viridian Upstream (ie, consumption of clear float glass without being recorded as an internal transfer, and removal from the data set on internal transfers), whether any decline in internal transfers left over might be attributable to dumping or any other factors, and if so whether that amounted to a material injury

4. In making this observation we suggest the following from the TMRO report is relevant:

36. I was unable to follow how Customs and Border Protection attempted to derive a reliable estimate of the proportion of the loss of 'market share' that was due to the removal from the calculation of the glass that Viridian Upstream processed, and the proportion of the volume loss that might be left over and might be attributable to dumping, or to other factors. If the information on internal processing had been factored in, it could well be that the analysis would demonstrate that some of the loss of volumes was attributable to dumping, or to other factors. Such an analysis would have assisted in determining whether dumping has caused material injury in the form of lost market share.

5. The Termination Report appeared to mistakenly believe that the different business structure within Viridian was the primary reason for the reduction in CFG volumes. In our email of 9 June 2011 the tables in the Review Application were updated and these are reproduced below as provided.

7.15 Because import statistics are only collected by square metres this dictates the use of square metres in some of the analysis.

Table 2

Viridian's Total Sales (including Imports) and CUC Imports
m2 ('000)

YEM	2007	2008	2009	2010	2010 Amended
External Sales	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Internal Transfers	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total Viridian Sales	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
CUC Imports	[redacted]	[redacted]	[redacted]	[redacted]	
Other Imports	[redacted]	[redacted]	[redacted]	[redacted]	
TOTAL MARKET	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Change YOY					
External Sales		[redacted]	[redacted]	[redacted]	[redacted]
Internal Transfers		[redacted]	[redacted]	[redacted]	[redacted]
Total Viridian Sales		[redacted]	[redacted]	[redacted]	[redacted]
CUC Imports		[redacted]	[redacted]	[redacted]	
Other Imports		[redacted]	[redacted]	[redacted]	
TOTAL MARKET		[redacted]	[redacted]	[redacted]	[redacted]
Change YOY (%)					
External Sales		[redacted]	[redacted]	[redacted]	[redacted]
Internal Transfers		[redacted]	[redacted]	[redacted]	[redacted]
Total Viridian Sales		[redacted]	[redacted]	[redacted]	[redacted]
CUC Imports		[redacted]	[redacted]	[redacted]	
Other Imports		[redacted]	[redacted]	[redacted]	
TOTAL MARKET		[redacted]	[redacted]	[redacted]	
Volume Market %					
External Sales	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Internal Transfers	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total Viridian Sales	[redacted]	[redacted]	[redacted]	[redacted]	
CUC Imports	[redacted]	[redacted]	[redacted]	[redacted]	
Other Imports	[redacted]	[redacted]	[redacted]	[redacted]	
TOTAL MARKET	100	100	100	100	
(Source: Confidential Attachments 07-09, ABS (2007-2009 as of March 2010, 2010 as at May 2010))					

7.16 The 12 month analysis assists in a better understanding of the relationship between internal and external sales than in the quarterly analysis used in the Termination Report. In YEM 2009 external sales decreased, reflecting the first full 12 months of the DMS acquisition and there was an increase in internal transfers. Total Viridian sales decreased by [redacted] million square metres in YEM 2009 and at the same time imports grew by [redacted] square metres. In this period Viridian's volume market share fell from [redacted] in YEM 2008 to [redacted] in YEM 2009. In a declining market CUC volume market share increased from [redacted] percent in YEM 2008 to [redacted] percent in YEM 2009.

7.17 In YEM 2010 despite a small growth in external sales, total Viridian sales decreased as a result of internal transfers declining substantially in YEM 2010. In YEM 2010 volume market share of both Viridian's total sales and CUC imports increased at the expense of the volume market share of other imports.

7.18 To check the conclusion in the termination report that: "Viridian's lost volume was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements within Viridian" a comparison of the movement in external sales and internal transfers with the volumes transferred for further processing was undertaken. The first table examines Viridian's total sales and transfers and internal processing volumes in square metres.

7.19 The external sales and internal transfers are the same figures used by Customs and Border Protection in its attachment.

Table 3

Viridian's YEM m2('000) (Including Imports)

YEM	2007	2008	2009	2009 Amended	2010	2010 Amended
3-12mm						
Internal Processing	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	
Internal Transfers	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]
External Sales	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]
TOTAL	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Change YOY						
Internal Processing		[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Internal Transfers		[redacted]	[redacted]		[redacted]	[redacted]
External Sales		[redacted]	[redacted]		[redacted]	[redacted]
TOTAL		[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Viridian Total Sales/Transfers	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]
		[redacted]	[redacted]		[redacted]	[redacted]

(Source: Confidential Attachments 07-09, 21)

7.20 In YEM 2009 internal processing volumes did not significantly change from YEM 2008. This suggests that "operational changes" in YEM 2009 did not explain Viridian's overall volume loss of [redacted] million square metres. Therefore this analysis shows that Viridian did experience injury in the form of lost sales volume to its overall external sales volume in YEM 2009. Internal transfers reduced in YEM 2010 and of this around [redacted] square metres (assuming normal growth of [redacted] square metres based on YEM 2009) was possibly attributable to the volume diverted to internal processing. The result was that in taking into account the internal processing transfers there was still evidence of lost sales volume in internal transfers of around [redacted] million square metres [redacted]. [Previously [redacted] million square metres [redacted]]

7.21 It can therefore be demonstrated that Viridian experienced a loss of volume in total sales and transfers and this volume loss was over and above the amounts diverted to internal processing.

7.22 The total sales and transfers volume lost in YEM 2009 saw Viridian's volume market share decline by [redacted] percentage points in that year while the CUC volume market share increased by [redacted] percentage points – this movement in a market that fell by [redacted] percent in YEM 2009. Put another way Viridian's total sales fell [redacted] million square metres in YEM 2009 while imports from CUC increased by [redacted] square metres.

In YEM 2010, after taking into account an amount transferred at cost for internal processing ([redacted] square metres, see paragraph 7.20), total Viridian sales declined in YEM 2010 by around [redacted] million square metres. [Previously [redacted] million square metres] Therefore while it can be said that "Viridian's lost volume was primarily related to its internal transfers to Viridian Downstream..." (see paragraph 7.12) it is not correct to conclude "... which in turn can be explained by operational changes to Viridian Downstream".

7.23 Doing the same comparison with the movement between internal processing and internal transfers and external sales using tonnes as a measure of volume depicts a similar result when using square metres. This is shown in Table 4.

Table 4

Viridian's YEM Tonnes (Including Imports)

YEM	2007	2008	2009	2010
3-12mm				
Internal Processing	[redacted]	[redacted]	[redacted]	[redacted]
Internal Transfers	[redacted]	[redacted]	[redacted]	[redacted]
External Sales	[redacted]	[redacted]	[redacted]	[redacted]
TOTAL	[redacted]	[redacted]	[redacted]	[redacted]
Change YOY				
Internal Processing		[redacted]	[redacted]	[redacted]
Internal Transfers		[redacted]	[redacted]	[redacted]
External Sales		[redacted]	[redacted]	[redacted]
TOTAL		[redacted]	[redacted]	[redacted]
Viridian Total Sales/Transfers	[redacted]	[redacted]	[redacted]	[redacted]
		[redacted]	[redacted]	[redacted]

(Source: Confidential Attachments 07-09, 21)

7.24 It has now been established that the fall in internal sales cannot be solely explained by the increase in transfers for further processing. In both YEM 2009 and YEM 2010 Viridian's total sales and transfers have decreased due to the effects of dumped imports. The downward trend of sales in YEM 2010 should also be noted. A recommenced investigation should re-examine the conclusion that Viridian's "operational arrangements" explains the decline in internal transfers.

6. The point here is that the fall in CFG volumes in YEM2010 was not entirely attributable to the change in the volumes consumed by Viridian upstream for further processing. Viridian's volume of CFG sold decreased by at least [redacted] million square metres taking into account the increased amount consumed by internal processing. Or as Table 4 in the above extract demonstrates, if the normal level of transfers to internal processing is the average of the changes in YEM2008 and YEM2009, then this means that [redacted] tonnes [redacted] was the maximum amount that could be considered to be transferred to internal processing instead of being treated as an internal transfer in the investigation period. This means that of the fall in internal transfers of [redacted] tonnes it is reasonable to observe that at least (and, in reality probably more) [redacted] tonnes decreased due to the effects of the dumping and the smaller market in YEM2010 for 3-12mm CFG.

7. Table 4 also demonstrates that during the injury analysis period internal processing volumes increased as did the volume of internal transfers in YEM2008 and 2009. The increase in internal transfers in YEM2009 reflected the increased volumes further to the acquisition of Don Mathieson and Staff Glass Pty Limited in YEM2008. DMS was previously treated as an external customer. The trend in internal processing and internal transfers in 2007-2009 again suggests that internal processing was not the primary reason for the decline in internal transfers in YEM2010. In YEM2009 Viridian upstream ceased selling glass to the laminating plant which was then part of Viridian downstream. This meant that volumes previously

recorded as internal transfers are now treated as internal processing. However, as can be seen, the different treatment of these volumes does not explain the decline in the volumes of internal transfers in YEM2010. There is no automatic offsetting of volumes between internal transfer and internal processing as the demand for products made by internal processing (laminated glass, toughened door panels, mirrors) will vary.

8. It is accepted that the transfer of clear float glass to internal processing is not part of the industry being examined in the investigation. However, to further examine the conclusion in the Termination Report, internal processing volumes have been compared with all clear float glass, 3-12mm thicknesses produced by Viridian and sold (on the assumption that what is produced and imported is sold) during the injury analysis period.

9. As a reminder, the Termination Report, under the heading "Materiality of Injury Caused by Dumping" noted:

> "As discussed above, injury to Viridian in the form of lost sales volume and lost market share was primarily related to its internal transfers to Viridian downstream, which in turn can be explained by changes in operational arrangements within Viridian. (page 54, Termination Report)

10. The Termination Report, under the same heading, then went on to explain the reasons for adjusting costs based on the volumes recorded in the business in YEM2007 and YEM2008:

> "As discussed in Section 8.9.3 above, an analysis was undertaken of Viridian's costs adjusted to remove the effects of higher unit fixed costs due to Viridian's volume being lower during the investigation period (Confidential Attachment 23). As it was found that other factors, and not dumping, were the cause of Viridian's lost sales it is reasonable to adjust the costs to remove the proportion attributed to lower sales and transfer volumes. These adjusted costs can be compared with Viridian's prices to assist in assessing price suppression. (page 55, Termination Report)

11. As previously noted in the Review Application (paragraph 7.15 onwards) Viridian's volume market share showed a slight improvement in YEM2010, reflecting aggressive pricing undertaken by Viridian. At the same time the volume market share of imports from the countries under investigation increased. But volumes for both Viridian and imports declined in YEM2010.

12. The following table (which was not in the TMRO Review Application) includes internal processing volumes in examining production and imports of 3-12mm CFG. If the conclusion that lost volumes related to "... changes in operational arrangements within Viridian" then it would be expected that Viridian's total CFG would be similar over the injury analysis period. However, as can be seen in the following table total CFG 3-12mm volumes in YEM2010 recorded a significant decline despite internal processing volumes increasing. This reinforces our earlier comments that the reduction in total Viridian sales in YEM2010 (external sales and internal transfers) as shown in Table 2 (TMRO Review Application) is not adequately explained by "changes in operational arrangements".

Viridian's Total CFG 3-12mm Production (including Imports) and CUC Imports
m2 ('000)

YEM	2007	2008	2009	2010 Amended	
Internal Processing	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
External Sales	[redacted]	[redacted]	[redacted]	[redacted]	
Internal Transfers	[redacted]	[redacted]	[redacted]	[redacted]	
Total Viridian Production	[redacted]	[redacted]	[redacted]	[redacted]	
CUC Imports	[redacted]	[redacted]	[redacted]	[redacted]	
Other Imports	[redacted]	[redacted]	[redacted]	[redacted]	
TOTAL CFG	[redacted]	[redacted]	[redacted]	[redacted]	
Change YOY					
Internal Processing		[redacted]	[redacted]	[redacted]	
External Sales		[redacted]	[redacted]	[redacted]	
Internal Transfers		[redacted]	[redacted]	[redacted]	
Total Viridian Production		[redacted]	[redacted]	[redacted]	
CUC Imports		[redacted]	[redacted]	[redacted]	
Other Imports		[redacted]	[redacted]	[redacted]	
TOTAL CFG		[redacted]	[redacted]	[redacted]	
Change YOY (%)					
Internal Processing		[redacted]	[redacted]	[redacted]	
External Sales		[redacted]	[redacted]	[redacted]	
Internal Transfers		[redacted]	[redacted]	[redacted]	
Total Viridian Production		[redacted]	[redacted]	[redacted]	
CUC Imports		[redacted]	[redacted]	[redacted]	
Other Imports		[redacted]	[redacted]	[redacted]	
TOTAL CFG		[redacted]	[redacted]	[redacted]	
Volume CFG %					
Internal Processing	[redacted]	[redacted]	[redacted]	[redacted]	
External Sales	[redacted]	[redacted]	[redacted]	[redacted]	
Internal Transfers	[redacted]	[redacted]	[redacted]	[redacted]	
Total Viridian Production	[redacted]	[redacted]	[redacted]	[redacted]	
CUC Imports	[redacted]	[redacted]	[redacted]	[redacted]	
Other Imports	[redacted]	[redacted]	[redacted]	[redacted]	
TOTAL CFG	100	100	100	100	

(Source: Confidential Attachments 07-09, ABS (2007-2009 as of March 2010, 2010 as at May 2010) email 9 June 2011)

13. After taking into account the organic growth in internal processing volumes and adjusting the increased volumes consumed by internal processing in YEM2010, then it can be seen that Viridian's volumes of CFG (3-12mm) declined significantly independent of the effects of internal processing. The above analysis strongly indicates that the reliance in the Termination Report on YEM2007 and YEM2008 volumes to calculate fixed costs is wrong and it is not "reasonable" to adopt such an approach.

14. In also considering the conclusion in paragraph a. the TMRO made reference to the following:

> 39. Customs and Border Protection appears to have considered, and discussed with Viridian, the idea that dumping could have led to decreases in demand from Viridian Downstream and thus effected an 'indirect' injury to Viridian Upstream.[1]
>
> 40. This is reflected in paragraphs 8.5 and 8.6 of the Termination Report, which state Customs and Border Protection's understanding that Viridian was not claiming there was any injury to Viridian Downstream due to any issues associated with Viridian Downstream's sales or decreased demand for CFG from Viridian Upstream. However, those paragraphs do not indicate whether this was the reason for not enquiring further into possible factors that could explain a decline in volumes of internal transfers to Viridian Downstream.
>
> 41. While the lack of further examination of whether any volume or market share injury was attributable to dumping or to other factors may have reflected an understanding that Viridian did not claim an injury caused by dumping in respect of the change in internal transfer volumes, this is not clear from the Termination Report. I also note that this still appears to be disputed by the Applicant as evidenced by their ground of appeal that the fall in internal transfers/sales cannot be solely explained by a change in practices and is at least in part attributable to dumping.[2]
>
> 42. As will be discussed further below, the causation analysis in the Termination Report appears to have been based on the premise that it was 'reasonable' to recalculate *costs* to 'remove the proportion attributed to lower sales and transfer volumes' and that 'these recalculated costs can be compared with Viridian's prices to assist in assessing price suppression'.[3] An explanation of any analysis of why the lower internal transfer volumes were or were not attributable to dumping would significantly have assisted in clarifying why it was 'reasonable' to remove the proportion attributed to lower sales and transfer volumes.
>
> 43. Therefore, I consider it would have been helpful if Customs and Border Protection had provided a further explanation of its market share/volume analysis to avoid any appearance that it had not considered the factors leading to the decreases in internal volume transfers.

15. Viridian responded to a request from Customs and Border Protection for information on sales by Viridian downstream in a submission dated 20 October 2010 (Public Record, attached). This submission sought to ensure that the correct analysis of material injury was confined to the sales by Viridian upstream to the customers of Viridian upstream and not to the customers of one of Viridian upstream's customers (either Virdian downstream branches or independent customers).

16. The Application for Review sought to demonstrate that the premise prompting Customs and Border Protection to adjust the business to the volumes in YEM2007 and YEM2008 was incorrect. Not only had the business changed significantly as set out in the Review Application since YEM2007, but the total market for CFG 3-12mm had shown a significant decline.

17. In the original investigation it was settled that sales to Viridian downstream were impacted by dumping through price effects. This submission has also drawn attention to

[1] Customs and Border Protection public file ref. 2010/045929-01 (folio 24).

[2] Application, paragraph 7.24.

[3] Termination Report 159B, page 55.

volume effects. Because of the strong evidence supporting price effects in the Termination Report it is not intended to revisit this aspect in this submission.

18. If a proper analysis had been done of the reasons for the reduction in volumes of CFG then Customs and Border Protection would not have needed to progress to its adjusted volume analysis.

19. The TMRO report outlined that Customs and Border Protection should give particular attention to:

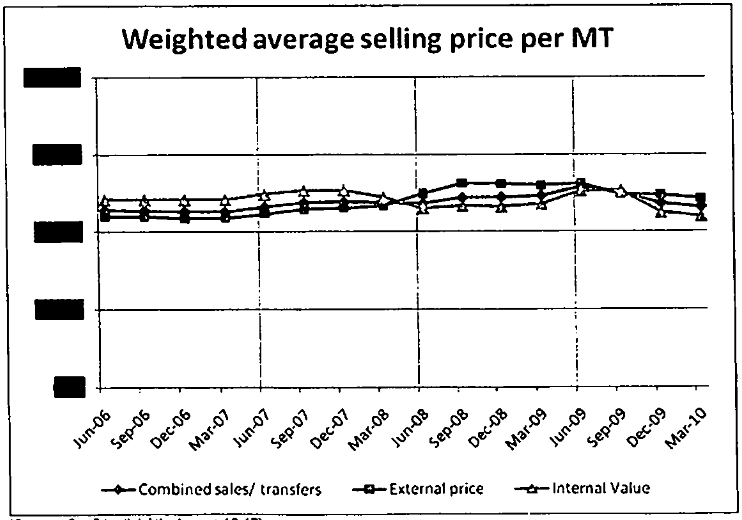
> b. in relation to price depression: whether there was price depression and if so whether this constitutes material injury that might be attributable to dumping or any other factors

20. The Review Application prompted the above observation commencing at paragraph 10 and this is reproduced below:

> **10 The conclusion on price depression was incorrectly based on an observation of trends since June 2006 and did not observe the recent and verifiable price depression in YEM 2010 both at the total level and that of individual customers.**

> 10.1 The Termination Report used the following graph to examine price depression.

Graph 6



(Source: Confidential Attachment 16-17)

> 10.2 The Termination Report noted that:

The graph shows that Viridian's weighted average unit price for its external sales and combined sales price and transfer value trended slightly upwards in the injury analysis period. However, the unit prices for external sales and internal transfer values trended downwards within the investigation period. Weighted average unit prices for external sales in the investigation period were higher than in the YEM 2007 while weighted average internal transfer value in the investigation period were lower than in the YEM 2007.

Viridian claimed that selling prices to certain external customers had decreased over the injury analysis period. However, the graph indicates that the quarterly weighted average sales price was reasonably stable during the injury analysis period (p43).

10.3 Comparing prices between YEM 2010 and YEM 2007 is not a strong indicator of price depression given the changes in the business, input costs and product mix changes.

10.4 The Termination Report as mentioned in the above extract, concluded that the "... weighted average sales price was reasonably stable during the injury analysis period." The relevancy of comparing average selling prices over a four year period is questionable.

10.5 However, what is more relevant is the downward trend from June 2009. The values used in constructing graph 6 are shown in the following table.

Table 7

Viridian's Weighted Average Selling Price per MT			
Period	External Price/MT	Internal Value/MT	Combined/MT
June 2009	[redacted]	[redacted]	[redacted]
September 2009	[redacted]	[redacted]	[redacted]
December 2009	[redacted]	[redacted]	[redacted]
March 2010	[redacted]	[redacted]	[redacted]

(Source: Confidential Attachment 16-17)

10.6 Examining actual weighted average prices over the four quarters in YEM 2010 demonstrates a different picture to that found by Customs and Border Protection.

10.7 The Termination Report concluded in Summary - Price depression:

While Viridian may have experienced price depression to specific customers, it has not experienced injury in the form of price depression overall during the injury analysis period, whether measured for external sales prices, internal transfer values, or a combination of external sales and internal transfers (p43).

10.8 Viridian notes that relevantly in the investigation period (April 2009 – March 2010) price depression was clear and reflected the price depression evidence provided to Customs and Border Protection. A resumed investigation should examine this price depression.

21. The decline in the average selling price (as shown in Table 7 of the above extract) is a strong indicator of price depression. The reduction in the weighted average selling price is also a factor in the increasing cost price ratio in the last three quarter periods in YEM2010.

22. The TMRO report also noted that Customs and Border Protection should give particular attention to:

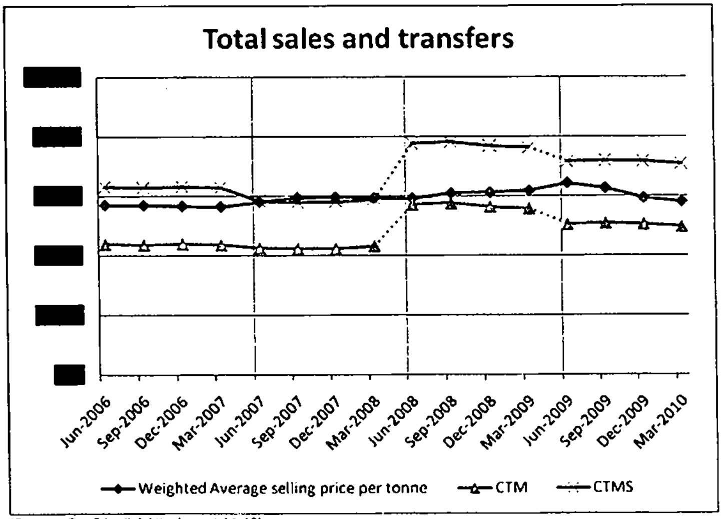
c. in relation to price suppression: the proportion of undercutting due to competitive prices or any other factors and the proportion of the price suppression that might be attributable to dumping and if any such part of the injury is material, and

23. The Application for Review discussed this matter commencing at paragraph 11:

11. The analysis on price suppression did not adequately identify the increasing price suppression in YEM 2010.

11.1 The Termination Report used the following graph to examine the existence of price suppression.

Graph 7



(Source: Confidential Attachment 11-13)

11.2 The Termination Report noted:

The graph above shows that Viridian's costs increased during the latter half of the injury analysis period however prices did not increase by the same rate, indicating price suppression.

The increase in costs occurred primarily during the Dandenong Plant refurbishment. Nonetheless, in comparing its fully absorbed CTMS with its prices throughout the injury analysis period, the graph shows that Viridian's prices have not been able to fully recover its costs except for the period YEM 2008 (p44).

11.3 But what the Termination Report did not apparently give sufficient consideration to was the price suppression per tonne in YEM 2010.

11.4 This is best demonstrated in the following table of the values used in graph 7.

Table 8

Viridian's Cost to Make and Sell and Selling Price			
Period	CTMS/MT	Selling Price/MT	Difference
June 2009	[redacted]	[redacted]	[redacted]
September 2009	[redacted]	[redacted]	[redacted]
December 2009	[redacted]	[redacted]	[redacted]
March 2010	[redacted]	[redacted]	[redacted]

(Source: Confidential Attachment 16-17)

11.5 The Termination Report then examined price suppression for external sales and internal transfers and in the Summary–Price suppression it was noted:

> Viridian has experienced injury in the form of price suppression in relation to both its sales to its external customers and its internal transfers to Viridian Downstream. (P. 44)

11.6 Despite the cost improvements in the business following the Dandenong refurbishment YEM 2010 was a period in which the business was showing significant price suppression, which in part, reflected the substantial undercutting found during the investigation period.

11.7 It should be noted that Customs and Border Protection had already observed that the effects of the refurbishment in YEM 2009 meant that the costs related to this period "...must be used with caution" (page 32 Visit Report, Confidential Attachment C).

11.8 The recognition of the distorted costs in YEM 2009 points to a more accurate analysis of price suppression concentrating on YEM 2010 and not over the four year injury period.

11.9 This finding of actual price suppression in YEM 2010 is important given the analysis by Customs and Border Protection which seeks to override the factual data by calculating an artificial cost to make and sell.

11.10 A recommenced investigation should examine actual price suppression and such an examination should not be overtaken by incorrect calculations of a theoretical cost to make and sell. (See Section 14).

24. The findings in price suppression were influenced by the analysis in the Termination Report under the heading "Materiality of Injury Caused by Dumping". The premise for undertaking this analysis was incorrect and the Termination Report's finding on price suppression was inconsistent with the analysis in Table 8 of the above extract (paragraph 11.4).

25. The TMRO report noted that Customs and Border Protection should give particular attention to:

d. in relation to the attempt to adjust for the Dandenong plant refurbishment, the analysis should also take into account changes to the industry that might affect volumes and prices, the impact of other factors, and whether any part of the remaining injury was material.

26. The TMRO report appears to discuss the areas leading to the conclusion in paragraph d. commencing at the TMRO report's paragraph 96:

> *Review by the TMRO*
>
> 96. The analysis does not seem to distinguish the factors that might have caused the various injury elements and whether a material part of the injury might be attributable to dumping. It is not clear from the reasoning whether Customs and Border Protection took into account those factors it describes as also having contributed to price effects, namely that:
>
> > The global financial crisis and weak market conditions would have affected market prices of CFG. In addition, the comparative cost advantages of one or more exporters relative to Viridian's costs and the strength of the Australian dollar contributed to the competitiveness of the imported CFG.[4]
>
> 97. Customs and Border Protection indicated only that these would have had an effect, but does not appear to have factored these into their calculations.
>
> 98 For example, as noted above, the determination of injury in relation to price suppression noted only that some of the injury could be attributed to competition. There is no indication what proportion of the injury could be attributed to competition or whether a part that could be attributed to dumping was a material part of the injury. It would have been helpful if the Report provided an indication whether the part of the price effect injuries that might be attributable to dumping was material.
>
> 99 Nor is there an indication in the Report of the part of the 'market share' 'injury' that was due to the reporting anomaly that occurred with the diversion of some previously transferred CFG into internal processing, whether the remaining part of the 'injury' might be attributable to dumping, and if so, whether this was material. I do not mean to suggest that this should be done in a quantitative way, but a qualitative indication would have helped an understanding of the analysis.
>
> 100. Rather, Customs and Border Protection appears to have seen the only relevant enquiry to be in relation to *price suppression*, and for that question to be relevantly answered by determining what the costs *would have been* had Viridian continued to operate as it had prior to the period in which the Dandenong plant refurbishment occurred. While the analysis concentrates on the injury in relation to price suppression, and attempts to model what would have happened in the year ending March 2009 and the year ending March 2010 if Viridian had operated as it did during the years ending March 2007 and March 2008, there is no discussion of relevant changes, particularly volume changes, as described in the Application at pages 4–6.[5]

[4] Termination Report 159B, page 55.
[5] Application, paragraphs 6.1–6.4.

101. Viridian provided Customs and Border Protection with Operating Statements for the investigation period. The Applicant has submitted that '[i]nformation was before Customs and Border Protection which would have allowed it to immediately answer the comments in the second paragraph from the above extract [from page 52 of the Termination Report, cited at Application paragraph 14.3]'.[6]

102. It is not clear to me why Customs and Border Protection felt it was reasonable to account for the 'lower sales' volumes by altering the data on costs, without seeming to determine whether such decline in volumes (which, as discussed in relation to 'market share' above, appears to have been affected by a reporting gap) might be attributable to dumping. This is particularly the case when the information was before it that would have allowed it to make a reliable estimation of volumes diverted to internal processing.

103. In relation to the first methodology used by Customs and Border Protection in determining whether injury in the form of price suppression was attributable to dumping, this may replicate the fact that sales/transfer volumes that may have been distorted when stock was diverted to internal processing, as discussed at paragraphs 34–36 above. Given that Viridian provided information in relation to the sales/transfer volumes that may have been diverted to internal processing,[7] it would be useful to use those figures in the first methodology in this analysis as well as in the 'market share' analysis. This does not appear to have been done.

104 I note that Customs and Border Protection appears to have used information on 'total float sales and transfer volumes', namely 'all production at Viridian's float plants [which] includes the goods, CFG less than 3mm, CFG greater than 12 mm, tinted glass and coated CFG'[8] – that is, apparently including goods that are not 'like' the imported dumped goods. Customs and Border Protection notes that 'glass with the following characteristics is not the goods: - coating, colour, tint or opaqueness... toughened (tempered) or laminated)'.[9] It is possible that more highly processed goods or goods of different sizes to the goods might have different cost profiles. I am not convinced that the 'recalculation' based on 'all production' is very persuasive when attempting to compare costs of production of clear float glass of sizes 3mm – 12 mm, not laminated or tinted.

105. I consider that it would have been helpful if the Termination Report had set out sufficient reasoning to explain whether there has been negligible injury caused by dumping on the basis of the information before Customs and Border Protection.

27. The movements in internal processing, internal transfers and external sales volumes have already been discussed in this Submission. The misplaced analysis using YEM2007 and YEM2008 volumes was put to Viridian late in the investigation (as noted in the TMRO's report). Customs and Border Protection appear to have taken some comfort in its adjusted volume analysis by the similarity of cost/price trends. This was apparent when Customs and Border Protection advised Viridian in an email of Tuesday 14 December 2010 (prior to the Final Report being due on Monday 20 December) that:

[6] Application, paragraph 14.5.
[7] Application, paragraph 7.19, Termination Report 159B confidential attachments 07–09 and 21.
[8] Termination Report 159B, page 55.
[9] Termination Report 199B, page 12.

"Quite apart from Viridian's own calculation of USP, we have been exploring USP options and we have also been considering alternatives for assessing cost trends (and relationship to price) over the injury analysis period. I believe it is very important that we meet with you to discuss some of our analysis.

28. At the time of the above email, it was apparent that Customs and Border Protection had, without any involvement from Viridian, been examining different "what if" scenarios based on volume differences. The above email suggests that Customs and Border Protection was focusing on the effect of different volumes on its analysis of cost/price ratios. This mindset appears to have ignored the similarity of cost/price ratios in YEM2007 (the period said to be unaffected by dumping) and YEM2010 (in which Customs was adjusting volumes). Furthermore, all three methods' cost price ratios in YEM2010 are significantly different from YEM2007. This alone should have prompted Customs and Border Protection to critically examine whether this approach was reasonable. As part of the Review Application these cost price ratios were examined in paragraph 14.30 which is in the following extract from the Application:

14. The use of YEM 2007 and YEM 2008 volumes to analyse the "Materiality of injury caused by dumping" ignores changes to the industry over the injury period and Customs and Border Protection has chosen a method which is unfair and does not produce a meaningful result. The methodology has resulted in wrong calculations of an unsuppressed selling price.

14.1 In the SEF under the heading of "Materiality of injury caused by dumping" was the following:

As discussed above, injury to Viridian in the form of lost sales volume and lost market share was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements within Viridian.

However, the price pressure from dumped CFG has prevented Viridian from increasing its prices, which otherwise would have occurred in the absence of dumping, resulting in price suppression and consequently lost profit and profitability suffered by Viridian.

Other factors have also caused Viridian to experience price suppression and lost profit and profitability. The global financial crisis and weak market conditions would have affected market prices of CFG. The Dandenong plant refurbishment resulted in higher depreciation and financing costs, although a comparison of Viridian prices with costs adjusted to remove increases in fixed costs still indicates price suppression in the investigation period. The comparative cost advantages of one or more exporters relative to Viridian costs, and the strength of the Australian dollar contributes to the competitiveness of the imported CFG, but does not fully explain the significant levels of price undercutting.

Notwithstanding the likelihood that factors other than dumping have caused injury to Viridian, it is evident that the CFG exported to Australia from China, Indonesia and Thailand at dumped prices have also had an injurious effect on Viridian.

The magnitude of the dumping margins has contributed to the ability of CFG exporters from China, Indonesia and Thailand to significantly undercut Viridian's prices. In order to maintain volumes in a price sensitive and transparent market, Viridian did not increase prices despite increased costs. Therefore the dumping prevented Viridian price increases, which would have occurred, to a significant degree.

As a consequence, Viridian lost profits and profitability. Therefore, exports of CFG to Australia from China, Indonesia and Thailand have caused material injury to the Australian industry producing like goods. (P. 49)

14.2 In the Termination Report the first two paragraphs from the SEF above were repeated and the remaining paragraphs were deleted and replaced by:

Other factors have also caused Viridian to experience price suppression and lost profit and profitability. The global financial crisis and weak market conditions would have affected market prices of CFG. In addition, the comparative cost advantages are of one or more exporters relative to Viridian's costs and the strength of the Australian dollar contributed to the competitiveness of the imported CFG. (P. 55)

14.3 The Termination Report then continues with an analysis which was not in the SEF. The paragraph explaining the reason for this analysis is in section 8.9.3 "Higher fixed costs due to lower volumes" which is reproduced below:

8.9.3 Higher fixed costs due to lower volumes

In response to the SEF, JELD-WEN submitted that Viridian did not achieve the anticipated volumes during the investigation period resulting in higher unit fixed costs. It notes that Viridian was able to recover its costs during YEM 2008 when it increased CFG production just prior to the Dandenong plant shutdown.

The lower sales and production volume of CFG during the investigation period has resulted in higher unit fixed costs and SG&A expenses. It is reasonable to suggest that if Viridian's CFG production volume remained at similar levels to the first half of the injury analysis period, Viridian's unit cost during the investigation period would have been lower.

An analysis of Viridian's costs after taking into account the effects of higher unit fixed costs due to lower volumes is discussed in section 8.10 below. (P. 52)

14.4 Importantly, Customs and Border Protection appears to accept the observation that production was increased in YEM 2008. This means that production volumes in 2008 are not in the usual course of business which later on in this section Customs and Border Protection has relied upon volumes in this year to calculate adjusted costs.

14.5 Information was before Customs and Border Protection which would have allowed it to immediately answer the comments in the second paragraph from the above extract in paragraph 14.3. This information would also have allowed Customs and Border Protection to discuss any concerns it may have had regarding the statement with Viridian well before its volume analysis was presented to Viridian only days before the Final Report was due. Customs and Border Protection would have been able to examine manufacturing variances in YEM 2010 and note that those variances did not reflect volume differences as was the case in YEM 2009 and that YEM 2010 variances indicated that the business was producing at volumes relevant to YEM 2010 expectations. The volume variances are shown in Table 11.

The Industry Producing CFG

14.6 Before examining Custom's methodology to assess "Materiality of injury" we provide a brief overview of the Australian industry producing CFG.

Table 11

Viridian's Indicators ($000)				
YEM	2007	2008	2009	2010
Fixed Costs	[redacted]	[redacted]	[redacted]	[redacted]
CTM				
SG & A				
Manufacturing Variances				
Local Production (incl imports) (tonnes)				

(Source: Confidential Attachment 11-13, CTMS tab)

14.7 The local production includes imports of 3-12mm CFG as imports were part of the stock buildup to continue supplying customers during the refurbishment of the plant in YEM 2009.

14.8 As previously mentioned, the business underwent significant changes in the three years prior to YEM 2010 and these were outlined in paragraph 6.3.

The reasons for changes in production volumes are explained in section 7.

14.9 The analysis used by Customs and Border Protection to assess the effects of reduced volumes is based on the premise that YEM 2007 and YEM 2008 are "model" years. However, it has been pointed out that the volumes in YEM 2008 were distorted by preparing for the plant refurbishment in YEM 2009, the plant in YEM 2008 was at the end of its life and the effects of the refurbishment in YEM 2009 affected total fixed costs (as identified in the Visit Report). In addition the business had undergone significant changes.

14.10 The Termination Report's reference to: "The Dandenong plant refurbishment resulted in higher depreciation and financing costs..." is not correct as can be seen in the above table where total fixed costs actually reduced. (YEM 2009 fixed costs and manufacturing variances have been affected by the refurbishment and are not included in this comparison.) Late during the investigation when Customs and Border Protection presented Viridian with its volume analysis (received Tuesday 14 December and discussed with Customs and Border Protection on Friday 17 December) it was pointed out that in fact the refurbishment resulted in cost savings to Viridian. This was set out in Viridian's interim response to Customs' argument prior to the meeting on Friday 17 December (Confidential Attachment E, Tab 22).

14.11 As can be seen from Viridian's interim assessment, the methodology used in the Termination Report effectively removed around [redacted] million annually in costs. This is because there is a reduced calculated fixed cost which is at a large variance to the actual fixed cost.

14.12 Having incorrectly chosen YEM 2007 and YEM 2008 as "model" years (for an industry that has changed significantly over the four year injury analysis period) Customs and Border Protection then calculates unit costs based on volumes relating to YEM 2007 and YEM 2008. The approach in the Termination Report is outlined in the following paragraphs.

14.13 The periods for which adjustments have been made are YEM 2009 and YEM 2010. The earlier years (YEM 2007 and YEM 2008) have not been adjusted.

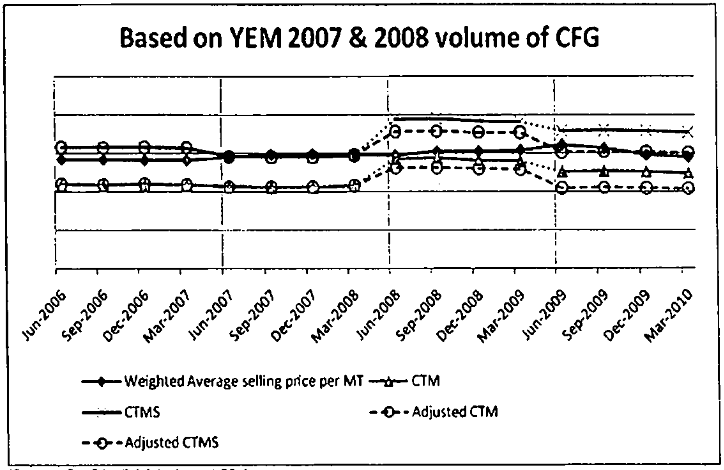
14.14 The lines in the three graphs for YEM 2009 and YEM 2010 are surprisingly similar, reflecting the poor assumptions used in constructing the methods.

14.15 The following comments relate to the methods described in the Termination Report.

Method 1.

This uses the actual fixed manufacturing cost for YEM 2009 or YEM 2010 and adjusts it by the average CFG volumes in YEM 2007 and YEM 2008.

Graph 9



(Source: Confidential Attachment 23a)

14.16 In discussing the effects of the refurbishments in YEM 2009 Customs and Border Protection noted in the Visit Report that:

> Upon analysing the manufacturing variances over the injury analysis period, we note that these spiked in YEM 2009, inflating unit costs. Viridian explained that the manufacturing variances for YEM 2009 were abnormal due to the refurbishment of the Dandenong float plant. Therefore, we note that the cost to make and sell for YEM 2009 must be used with caution. (Confidential Attachment C, P. 32).
>
> We have verified the cost to make and sell data provided by Viridian and are satisfied that it is a complete, relevant and accurate reflection of the cost to manufacture and sell CFG. However, we note that the cost to make and sell data for YEM 2009 must be used with caution. (Confidential Attachment G, P. 35).

14.17 And in the SEF Customs and Border Protection noted:

> It is acknowledged that the Dandenong plant refurbishment had an impact on Viridian's costs in YEM 2009 and this was addressed in Section 7.5 above (Page 47).

14.18 The large variances in YEM 2009 were not taken into account in Custom's methods. These variances primarily relate to under recovery of fixed costs (as do most variances within other periods). The under recovery of fixed costs in YEM 2009 was directly related to lower volumes.

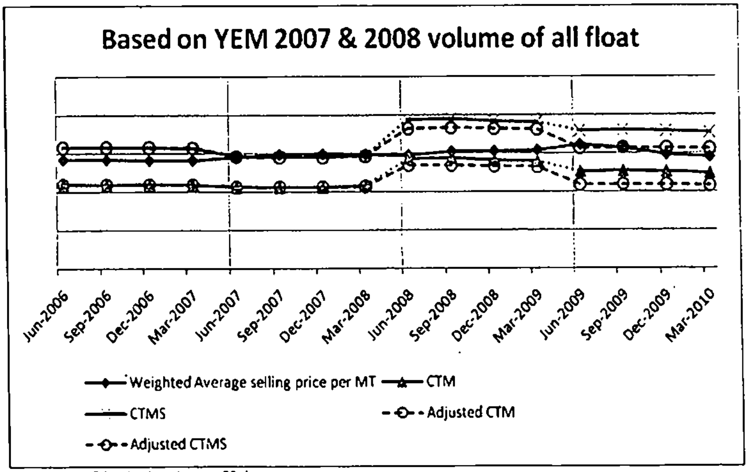
14.19 The formula used in the Method 1 spreadsheet for calculating fixed costs took the sum of all fixed costs (excluding variances) in the four quarters in YEM 2009 (or YEM 2010) multiplied this by two and divided by the total of the eight quarters in YEM 2007 and YEM 2008. This results in the adjusted fixed manufacturing costs being the same for each quarter in YEM 2009 (or YEM 2010).

14.20 An alternative and more accurate calculation would have been to calculate the fixed costs in the relevant quarter (e.g. June 2006 and June 2007) and divide this sum by the volumes sold in those two quarters. This would then have given a different adjusted fixed manufacturing cost for each quarter in YEM 2009 and YEM 2010. Actual fixed costs vary by quarter. A similar formula applied to the Selling, General and Administration (SG & A) cost calculation.

14.21 However making these changes to Customs and Border Protection's calculations does not materially change the shape of the graphs.

Method 2

Graph 10



(Source: Confidential Attachment 23a)

14.22 This calculates adjusted unit fixed manufacturing costs by taking the actual unit fixed manufacturing cost for the four quarters in YEM 2009 (or YEM 2010) and multiplies this figure by the total float volume to get a theoretical total fixed cost. This is then divided by average float volumes (CFG and other float products and imported products) in YEM 2007 and YEM 2008.

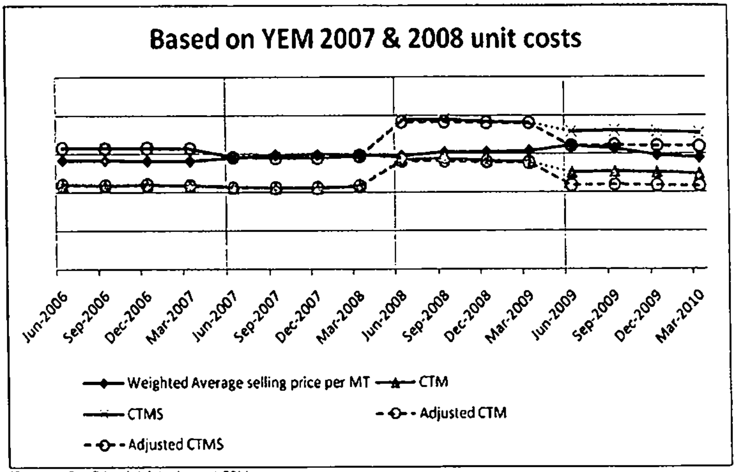
14.23 This results in a fixed cost value which is the same for each quarter in YEM 2009 and YEM 2010.

14.24 Our comments about calculating actual quarter fixed costs as a method also apply here as do the comments on the calculation of the SG & A figure.

14.25 This method takes total float volumes from one of Viridian's Management Reports [redacted] The total float volume in this Report includes all float volumes sold whether or not the float glass was manufactured in Australia or not. This means that in all four periods a significant number of imported tonnes are used to allocate a total fixed cost value. Import volumes do not incur a fixed cost value but have been allocated that cost through Customs and Border Protection's methodology.

Method 3

Graph 11



(Source: Confidential Attachment 23b)

14.26 This calculates a fixed manufacturing cost based on the total unit fixed manufacturing cost in YEM 2007 and YEM 2008. This value is then applied as a fixed manufacturing cost for YEM 2009 and YEM 2010. The same fixed manufacturing cost value is used for YEM 2009 and YEM 2010 although actual fixed manufacturing costs vary by quarter. Customs and Border Protection's adjusted fixed manufacturing cost could have been calculated by quarter to give different values per quarter in YEM 2009 and YEM 2010.

The same comments apply to the SG & A calculation.

Analysis of the Graphs

14.27 The Termination Report notes that:

The graphs above highlight the difference between the actual costs and the adjusted costs during the investigation period. This difference can be attributed to factors other than dumping, namely higher unit fixed costs caused by lower sales and transfer volumes for Viridian during the investigation period.

The magnitude of the difference can depend on the method on which the calculation is based. The first method, which bases the adjusted costs on YEM 2007 and 2008 CFG volumes, shows that Viridian would have broken even during the investigation period. However, the other two methods show that Viridian would have still operated at a loss. In all three cases, the cost-price relationship in YEM 2010 has improved in relation to YEM 2007, a year unaffected by dumping. (P. 58)

14.28 It is to be expected that there would be a difference between actual costs and adjusted costs in YEM 2010. This is because lower fixed costs were allocated over much higher volumes. For example, Method 2, which was used to calculate an unsuppressed selling price calculated a total fixed cost figure based on the actual unit fixed costs in YEM 2010 multiplied by the total float volumes in YEM 2010 (all float products, not just 3-12mm float products, including all imports) and divided by the average total float volumes in YEM 2007 and YEM 2008. Customs and Border Protection did not acknowledge the reduced market for total float in YEM 2010. The movement in total float volumes is shown in Confidential Attachment 23a and shown in the following table:

Table 12

Viridian's Sales of Total Float Volumes			
	MT	YOY Change	% Change
YEM 2007	[redacted]		
YEM 2008	[redacted]	[redacted]	[redacted]
YEM 2009	[redacted]	[redacted]	[redacted]
YEM 2010	[redacted]	[redacted]	[redacted]

(Source: Confidential Attachment 23a)

14.29 The calculation of adjusted fixed costs is wrong. It makes no sense to adjust fixed costs as has been done in any of the three methods.

Tables 2 and 3 have shown that the observation by Customs and Border Protection that: "Viridian's lost volume was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements within Viridian" (p40) – was not entirely correct. Certainly Table 3 shows a gain in external sales in YEM 2010 and a fall in internal transfer volumes. But only an estimated [redacted] square metres (linked to operational arrangements) is attributable to the overall volume loss of [redacted] million square metres (previously [redacted] million square metres). The remaining internal transfer volume loss of [redacted] million square metres (previously [redacted] million square metres) has resulted from the overall decline in the market for CFG and the presence of dumped imports.

14.30 Having concluded that the reduced volumes in YEM 2010 were the result of Viridian transferring volumes of CFG out of the 3-12mm CFG business (which Table 3 shows to be only partially correct), Customs and Border Protection then embarked on an analysis which sought to view the 3-12mm CFG business based on volumes in YEM 2007 and YEM 2008.

After this analysis one conclusion was: "In all three cases, the cost-price relationship in YEM 2010 has improved in relation to YEM 2007, a year unaffected by dumping" (Termination Report p58).

The cost-price ratio is summarized in the following table:

Table 13

Cost/Price Ratio per MT

CTMS compared with weighted average selling price

Quarter	Method 1			Method 2		Method 3	
	Actual	Adjusted	%Difference	Adjusted	%Difference	Adjusted	%Difference
Jun-2006	[redacted]						
Sep-2006	[redacted]						
Dec-2006	[redacted]						
Mar-2007	[redacted]						
Jun-2007	[redacted]						
Sep-2007	[redacted]						
Dec-2007	[redacted]						
Mar-2008	[redacted]						
Jun – 2008	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Sep – 2008	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Dec –2008	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Mar – 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Jun – 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Sep – 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Dec – 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Mar – 2010	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(Source: Confidential Attachments 23a-23b)

14.31 The percentage difference column shows the percentage by which the actual cost is higher than the adjusted cost. But in using this ratio to analyse the business, Customs and Border Protection should have seen that in the June quarter 2009 (YEM 2010) the cost-price ratio [redacted] was the same as in the June quarter 2006 (YEM 2007, the year stated to be unaffected by dumping). This comparison suggests that the volume effects analysis need have gone no further. In the first three months of YEM 2010 there was no indication that the volume effects Customs and Border Protection were erroneously pursuing existed. The increase in the cost-price relationship for the remainder of YEM 2010 can be explained by the presence of dumped imports and the price depression shown in Table 7.

As explained in paragraph 14.5 the changes in manufacturing variances should also have raised questions about the need to pursue the volume analysis.

14.32 We recall in the volume analysis in section 7 of this application that "lower sales and transfer volumes" had been incorrectly assessed by Customs and Border Protection. In addition, there is a fundamental problem with the assumptions used by Customs and Border Protection which are further analysed in the next section. Having obtained a theoretical cost to make and sell this figure is then used to calculate an unsuppressed price.

The Methodology Used to Calculate an Unsuppressed Selling Price

14.33 The Termination Report shows that an unsuppressed selling price was calculated using the adjusted cost to make and sell using Method 2. The weighted average unit price in YEM 2007 (a year considered by Customs and Border Protection to be unaffected by dumping) was indexed up by the percentage difference between:

> ...the weighted average CTMS in YEM 2007; and
> ...the adjusted CTMS based on Method 2 over the investigation period for each thickness.
>
> Method 2 was considered the most appropriate as it included Viridian's actual total fixed cost and
> SG & A amount for YEM 2009 and 2010 and it was adjusted to Viridian's total float production, not just CFG.
>
> This price was then compared to Viridian's actual weighted average unit price achieved for each thickness in YEM 2010. This analysis found that for all thicknesses, Viridian's YEM 2010 prices were actually higher by between 3% and 9% than the corresponding unsuppressed selling price. Aggregating all thicknesses Viridian's YEM 2010 weighted average selling price was 9% higher than the corresponding unsuppressed selling price.
>
> In other words, the unsuppressed selling price calculated above is a price unaffected by dumping, with the factors causing injury to Viridian other than dumping removed. However, Viridian's YEM 2010 weighted average selling price achieved was above the unsuppressed selling price, indicating that dumping has caused negligible price suppression to Viridian. (P. 59)

14.34 Viridian does not believe that obtaining a fixed manufacturing value using total float volumes in YEM 2010 with YEM 2010 unit costs and dividing by average total float volumes in YEM 2007 and YEM 2008 is an objective evaluation of the domestic industry based on positive evidence. (Viridian's comments on Method 2 are also, in general, applicable to Method 1 and Method 3).

14.35 The assumption that the industry will forever and a day be producing volumes achieved in YEM 2007 and YEM 2008 underscores the fragility of Customs and Border Protection's approach. Industries change through acquisitions and reorganizations and the fact that these events occurred during the injury period should not be considered as "self injury". Of course there are also years, such as YEM 2010, when markets contract (Termination Report p39). If Customs and Border Protection had not used its methodology then dumping, material injury and causality would have been found as was strongly indicated in the SEF. Absurdly, Customs and Border Protection is suggesting that an industry should operate in denial of commercial opportunities if it was ever to consider addressing the impact of dumped imports.

This would mean that Viridian is being told to ignore the use of trade remedies until the end of YEM 2012 (this would give a three year injury period) as this would remove the distortions caused, particularly in YEM 2009, of the refurbishment and reorganization. Viridian would also have to be mindful of the next scheduled refurbishment at Dandenong which would probably occur from 2019 onwards.

14.36 An objective analysis should not have a predetermined outcome. In the Termination Report this predetermined outcome was clearly signalled when Customs was looking at calculating unit costs on a reduced level of fixed costs (particularly in YEM 2010) and applying unrelated and higher volumes which resulted in lower unit costs.

Using such a blunt tool to isolate "other factors" is not analytically sound or commercially realistic and cannot be relied upon to achieve its purpose.

14.37 Had Viridian not refurbished the float line (which was well beyond its end use date) extended its production to include coated CFG, invested in distribution (through which significant gains had been made) and restructured its business (to clearly define operational and financing objectives) then the industry producing CFG in Australia would be in a worse position.

There seems to be an extraordinary jump from establishing significant price undercutting to declaring the industry's costs are artificially inflated.

14.38 Customs and Border Protection was prompted to look at unit costs by interested parties who, given the "cross pollination" within the Industry, had a surprisingly poor understanding (or poor recollection) of Viridian's business. It is not uncommon in dumping investigations to have interested parties argue against causal link by criticising the domestic industry and the industry's business strategy (as guessed at).

14.39 This business strategy argument was raised recently in a WTO Panel Report (US-Tires). The following extract is not completely relevant to the current application but does demonstrate that such arguments need to be carefully examined:

> 7.320 The Panel was confronted with the fact that the majority of the USITC and the dissenting commissioners drew precisely the opposite conclusions on the issue of business strategy. The majority took the view that the strategy to reduce U.S. production and locate production in China was itself a response to increased imports and thus it was not an alternative cause that prevented the increasing imports from China to be a significant cause.
>
> The dissenting commissioners took the view that the business strategy of relocating production to China was an independent business strategy that began before imports were increasing.
>
> Yet both considered precisely the same evidence. There was no evidence considered by the dissenting commissioners that was not also considered by the majority. And, no further evidence that might have been considered by the majority but was not was (sic) adduced in this case.
>
> 7.321 In these circumstances, it would be inappropriate for the Panel simply to make a choice between the views of the majority and the dissenting commissioners. In fact, our own assessment of the record indicates that it is difficult to separate out the business strategy from the increasing imports. It may well be, as the dissenting commissioners say, that the strategy of relocating to China began before 2004 and before the substantial increases in subject imports. But it is also true that plant closures occurred after the increase in imports and may well have been linked to the competition from imports. Indeed, the decision to locate production in China might have been the result on an independent business strategy, but the decisions to close plants might well have been a response to Imports.
>
> 7.322 In the light of these considerations, the Panel can see no basis for determining that the USITC's analysis of the alternative business strategy was in error. It was for China to establish a prima facie case of such error and it failed to do so. (United States – Measures affecting imports of certain passenger vehicle and light truck tires from China WT/DS399/R, 13 December 2010).

14.40 The mathematical certainty of obtaining lower costs by using out of period volumes demonstrates an inherent unfairness in the investigation. The concept of objective examination was analysed in US-Hot Rolled Steel and the Appellate Body noted:

> The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. (United States – Anti-Dumping Measures on certain hot-rolled steel products from Japan, WT/D5184/AB/R, 24 July 2001, para 145).

14.41 The predetermined outcome of the methodology used by Customs and Border Protection falls well below the standards expected of a factual determination. The methodology used is not a well reasoned and meaningful analysis of the industry producing CFG in Australia. A resumed investigation should reject this methodology.

29. Viridian has already demonstrated that the volumes transferred to internal processing, particularly in the investigation period, were not sufficient to justify injury (and the unsuppressed selling price) being assessed using YEM2007 and YEM2008 volumes.

30. The recalculated fixed costs using total float volume in YEM2007 and YEM2008 used a fixed cost calculated on YEM2010 sales of clear float glass 3-12mm. Total float includes not only 3-12mm but also CFG less than 3mm, CFG greater than 12mm, tinted glass and coated CFG. The fixed costs for producing glass vary across thicknesses and specification. For example, there are substantial set-up costs in manufacturing tinted glass which are included in the cost to make tinted glass. Viridian advised Customs and Border Protection in an email dated 18 October 2010:

> Jeld-Wen suggests that the cost of glass per tonne is the same for all thicknesses. This is not true, as the thicker substances have significantly lower yields due to higher set-up times, higher edge losses, and higher specifications. This drives the higher cost and hence higher desired price. Also, the thicker substances will generally require more processing and hence greater value added.

31. This point was commented on in the TMRO report (paragraph 104, page 14 of this submission).

32. Part of Customs and Border Protection's justification for using YEM2007 and YEM2008 volumes, being the cost price ratios, has been found to be incorrect – the cost price ratio in the first half of YEM2007 [redacted] (the period chosen to be unaffected by dumping) is the same as in the first quarter of YEM2010. The cost price ratio in the second half of YEM2007 is higher [redacted] than the first quarter of YEM2010 [redacted] The similarity of these ratios should have alerted Customs and Border Protection to the possibility that its volume adjusted methodology was misplaced and yielding inconsistent findings.

But, importantly, all three methods result in a price ratio that is significantly different from the year said to be unaffected by dumping – YEM2007. Had this been properly considered then the unreasonableness of this volume adjustment would have been apparent.

33. In using YEM2007 and YEM2008 volumes Customs and Border Protection is implicitly suggesting that the volumes achieved in those years could be produced and sold by Viridian in the current state of the market and Viridian's reorganised business. This fails to take into account the substantial changes in the business since YEM2007 which were outlined in the Review Application and are reproduced below:

> 6.3 In the four years to YEM 2010 the industry producing clear float glass underwent significant changes which included the following:
>
> - The refurbishment of the Dandenong plant in YEM 2009 (May – Nov 2009). At the end of YEM 2008 the Dandenong plant was near the end of its economic life. It is common practice worldwide for clear float glass plants to be refurbished/rebuilt on a 10-15 year cycle.
> - During this refurbishment Viridian imported glass in YEM 2008, increased production in YEM 2008 and YEM 2009 to cover production shortfalls during the refurbishment and imported glass in YEM 2009. Viridian's other clear float glass plant at Ingelburn, NSW continued to manufacture clear float glass in Australia during the refurbishment.
> - In YEM 2009 standard costs (including fixed costs) were based on YEM 2008 volumes. The under recovery of fixed costs in YEM 2009 reflected lower volumes produced during the refurbishment year.
> - As part of the refurbishment Viridian invested in the technology to produce coated glass in Australia. This resulted in an improved range of products available to Viridian's customers.
> - The Dandenong refurbishment resulted in reduced fixed costs and other cost savings. The refurbishment allowed wider sheets of glass to be manufactured, resulting in cost efficiencies.
> - In the four year period there was a move away from 3mm thick glass to 4mm thick glass following the introduction of a new Australian standard. Lower volumes of 3mm glass were supplied to customers for general use with a greater demand for 3mm glass to be processed into 6.38mm laminated glass.
> - This affected the product mix of 3, 4, 5, 6, 8, 10 and 12mm CFG
> - Significant improvements in distribution through the use of float liners which reduced the time taken to load the glass and also reduced the offloading costs at customer premises.
> - As a result of the refurbishment and investment in the coating facility, Viridian can now provide a wider range of glasses (coated energy efficient glasses) which increases Viridian's position as a one stop shop supplier of all types of glass, including clear float glass.
> - Viridian established separate management and reporting structures for Viridian Upstream and Viridian Downstream which came effective in late 2009. Viridian Upstream sells (or using a Customs and Border Protections terminology: "transfers") clear float glass to Viridian Downstream which is essentially the branch network distributing and processing glass in orders of around [redacted] tonnes or more.
> - Viridian Upstream manufactures clear float glass and sells clear float glass to independent distributors who are at the same level of trade as Viridian Downstream. During YEM 2009 Viridian Upstream ceased selling glass to the laminating plant which was then part of Viridian Downstream. Viridian Upstream now transfers at cost clear float glass (mainly 3mm and 5mm thicknesses to

produce 6.38mm and 10.38mm laminated glass) to the laminating plant which has had an effect (but not as much as stated by Customs and Border Protection) on the volume of clear float glass sold by Viridian Upstream.

- In YEM 2008 a major customer of Viridian Upstream was acquired (Don Mathieson and Staff Glass Pty Ltd (DMS)). Following this acquisition in Oct 2007, DMS, which was previously treated as an external customer, became an internal customer.
- There has been a growth in the number of companies capable of processing glass and the required volumes are such that Viridian Upstream can sell directly to those processers. Previously those processers (when they required smaller volumes of CFG) were customers of Viridian Downstream.
- The refurbishment has resulted in cost savings through production gains, manning reduction, cost reduction and lower energy costs. These savings have offset the higher depreciation costs.

34. YEM2007 and YEM2008 volumes were then used to calculate an unsuppressed selling price. Having demonstrated the inappropriateness of the analysis using YEM2007 and YEM2008 volumes, the unsuppressed selling price should be calculated as presented to Viridian prior to the decision to terminate.

35. The difference in the unsuppressed selling price calculated on the changes in cost to make between YEM2007 and YEM2010 should have also alerted Customs and Border Protection to the possibility that its cost adjustment methodology was not delivering logical results.

Thickness	USP Original $	USP Adjusted $	WA Price YEM10 $
3mm	[redacted]	[redacted]	[redacted]
4mm			
5mm			
6mm			
8mm			
10mm			
12mm			
MT			
USP calculation 24 5/8 TMRO application			

36. These low adjusted USPs reflect the substantial removal of fixed and SG&A costs from the business due to volume adjustments.

37. Each of the three methods shown in the Termination Report resulted in substantial costs being taken out of the business as shown in the following table:

YEM 2010 Fixed and SG&A Costs Taken Out ($)

	Method 1	Method 2	Method 3
Costs Taken Out	[redacted]	[redacted]	[redacted]
Actual Total Costs	[redacted]	[redacted]	[redacted]
Revenue	[redacted]	[redacted]	[redacted]
Costs Taken Out			
% Actual Total Costs	[redacted]	[redacted]	[redacted]
% Revenue	[redacted]	[redacted]	[redacted]
Source: Customs 23a, 23b			

38. It has been demonstrated that the volume adjustment resulting in the cost reductions are not justified. To put in perspective the costs taken out in the above table, Viridian refers to the cost savings spreadsheet, summarised in the following table, (TMRO Confidential Attachment 4 of 6) which shows that the cost savings arising from the investment in rebuilding the Dandenong float plant were considerably less than the volume/cost adjustments.

Cost Savings

Manning reduction due to rebuild [redacted]		[redacted]
Energy – Gas		[redacted]
Energy – Electricity		[redacted]
Energy – Atmospheric Gasses		[redacted]
Maintenance Savings Avg of YEM07/8 vs YEM10		[redacted]
Tank Repair Saving (additional tank maintenance)		[redacted]
Total Savings		[redacted]
Additional Depreciation Costs		[redacted]
Impact on cost base due to DA Rebuilt	Saving / (Additional Cost)	[redacted]

Source: Customs 22 Dandenong plant refurb depreciation cost and savings.xls

39. The reduction in internal transfer volumes that may be attributable to some of the decrease in internal processing volumes is not sufficient to adopt a methodology which is unfair and unreasonable in assessing material injury and causation.

40. In Certain Aluminium Extrusions Exported to Australia from the People's Republic of China (Final Report No.148, 15 April 2010) Customs and Border Protection examined internal sales made by the Applicant (Capral). Under the heading "Capral Internal Transfers" made the following comment:

> Capral based its application on sales made by its production plants, which comprise i) external sales to arms' length customers, and ii) internal transfers to Capral's distribution business by Capral's manufacturing business. (section 8.5, page 65)

41. In the following section of the Final Report Customs and Border Protection also noted:

> G James produces and transfers extrusions to its distribution business and to related companies that produce windows, curtain wall and other products.

> Customs and Border Protection determined that the consolidated sales information provided was suitable for examining sales volume and selling price trends over the injury analysis period. (paragraph 8.6, page 66)

42. In contrast with the CFG investigation, the Aluminium Extrusions Final Report did not separately analyse external and internal sales and did not examine production of other aluminium products not covered by the investigation.

43. The practice by Customs and Border Protection in the Aluminium Extrusions investigation suggests that there should be no issue with examining total sales which include internal transfers and external transfers in the CFG investigation.

44. In the Aluminium Extrusions Final Report under a heading "Submissions to SEF 148" the report noted:

> Jeld-Wen in its submission titled "... On material injury and causal link" dated March 2010, argued that:
>
> > "Reviewing Capral's annual financial reports for the last ten years... they have stated that their financial performance issues have been as a result of failed management initiatives and inefficient production causing loss of customers and an inflated cost base. The first public mention of dumping occurred on 24 April 2009..."
> >
> > "Capral have caused the injury on themselves by poor service and poor management decisions for a long period such that Chinese importers could gain access to the Australian market."

45. Jeld-Wen, as it did during the CFG investigation, drew the attention of Customs and Border Protection in the above extract to the loss of volume (customers) and "an inflated cost base" presumably arising from lower production volumes. However, this did not prompt Customs and Border Protection in the aluminium investigation to undertake an analysis of substituting unit fixed costs as to what, in Customs and Border Protection's view, was an optimum volume in order to determine adjusted costs.

46. The different analysis paths in the Aluminium Extrusions case and the CFG case illustrates the ad hoc analysis and the lack of foundation for undertaking an adjusted cost approach in the CFG investigation.

47. Customs and Border Protection in the original investigation made an error in assuming that the volumes in YEM2007 and YEM2008 were indicative of volumes in a business that has substantially changed.

Other Matters Arising from the TMRO Report

48. In the TMRO report it was noted:

> 5.1 The graph recording Viridian's volumes and the graph recording volumes of imports show fairly similar trends, in spite of the 'spike' noted above. I again note that it is within the discretion of Customs and Border Protection to evaluate whether a

trend is significant or whether it is within the normal ebb and flow of business and I consider that it is not unreasonable to describe these trends as reflecting a relatively stable state. However, the relative shares of the market volume may need to be reassessed once a reliable figure of market volume has been produced, as discussed above. I also note that the relative shares of the market should be assessed against other possible factors to which any changes might be attributed.

49. The market volume characteristics have already been described above. According to Table 2, CUC imports have grown as a percentage of the total market.

50. The TMRO report noted:

> *Review by the TMRO*
>
> 54. I note that section 269TAE(1)(c) of the Act indicates that material injury to an Australian industry can be determined by assessing the change in the proportion of goods either exported to Australia or manufactured in Australia relative to the quantity sold or consumed in Australia. It is not clear from the report how this factor was considered. I note that this may be better determined with a reliable estimate of Viridian Upstream's consumption of clear float glass for processing and what part of the apparent 'injury' was due to that factor might have assisted in analysing whether any left over decline in volumes could be attributable to dumping or to other factors.

51. The consumption of clear float glass for processing has been taken into account in the discussion above in paragraphs 7.14.

52. The TMRO report notes that:

> 62. I am therefore in doubt as to whether Customs and Border Protection has properly considered the degree of the downward trend in prices in making their assessment that there had not been price depression. Further reasoning is required as to why Customs and Border Protection has decided to discount this slight downward trend during the year ending March 2010 investigation period.

53. This has been addressed in the above extracts commencing at paragraph 5.

54. The TMRO report notes that:

> 72. It appears that the Applicant does not seek to challenge the conclusion that the industry had suffered injury in the form of price suppression, but rather challenges the finding that the suppression is not caused by dumping and challenges the causation analysis introduced in the Termination Report, for example making reference to the arguments made under that ground. [10]
>
> 73. This analysis is discussed further under the heading 'Materiality of injury' below.

56. This is discussed above.

[10] Application, paragraph 11.10.

57 The TMRO report notes that:

Review by the TMRO

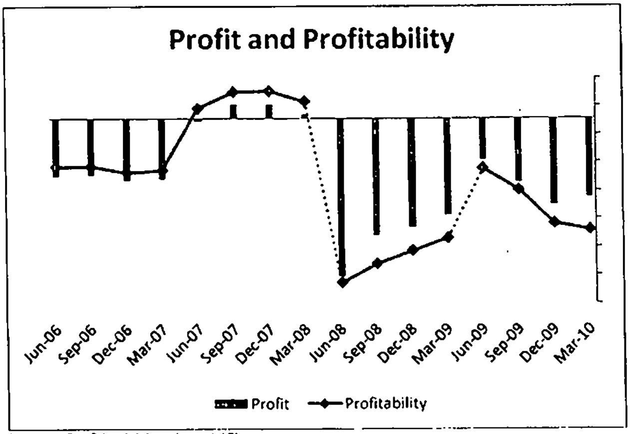
77. Customs and Border Protection does seem to have attempted to compare the losses during the investigation period with a year in which the losses were unaffected by the Dandenong refurbishment – namely, the year ending March 2007. Customs and Border Protection has not fully explained its reasons for not comparing the losses in the investigation period with the profits made in the year ending 2008, a year also unaffected by the Dandenong refurbishment. I consider that this further reasoning is required.

58. The Review Application commented on this in Section 12:

12. The decline in profits and profitability in YEM 2010 was not adequately assessed.

12.1 The Termination Report used the following graph to examine profit effects.

Graph 8



(Source: Confidential Attachment 15)

12.2 The Termination Report noted:

The graph above shows that Viridian Upstream incurred losses in the YEM 2007, which improved to profitable results during the following year. In the YEM 2009, which included the Dandenong plant refurbishment, Viridian experienced its largest losses in the injury analysis period. Viridian's losses continued in the investigation period and, although at an improved level when compared with the previous year, the losses remained at levels similar to that of YEM 2007. (P. 44)

12.3 It is correct that in YEM 2009 Viridian experienced its largest losses in the injury analysis period and this reflected the under recovery of fixed costs as a result of the refurbishment of the Dandenong float plant. However, the annual loss in YEM 2010 was [redacted] which was not similar to the YEM 2007 loss of [redacted] That is the loss in YEM 2010 was more than [redacted] than the annual loss in YEM 2007 or [redacted] worse in YEM 2010.

12.4 There is an error in the spreadsheet used by Customs and Border Protection to analyse profit and profitability. The error is in line six which is the sum of profitability (unit gain or loss divided by unit sales revenue) multiplied by tonnes. Line six should be profitability multiplied by unit revenue multiplied by tonnes. However, the shape of the "profit and profitability" graph does not change. The loss per quarter is shown in Confidential Attachment 15, Tab CTMS.

12.5 The Termination Report examined the lost profit on external sales and internal transfers. The Termination Report noted that profit improved in the first half of the injury analysis period but then:

> It then deteriorated sharply in the June 2008 quarter before recovering, although still making a loss throughout the investigation period. (P. 45)

12.6 As identified in the Visit Report it would be expected that profits in the April 2008-March 2009 period would be affected by the Dandenong refurbishment costs. But the loss in YEM 2010 was substantial as is demonstrated in the following table.

Table 9

Viridian's Losses ($/MT) YEM 2010					
Period	External /MT	Internal/MT	Combined/MT	Total	Correct Total
June 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
September 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
December 2009	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
March 2010	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(Source Confidential Attachment 15, 16-17)

12.7 The Termination Report also examined lost profitability for external sales and internal transfers:

> The analyses show that Viridian Upstream's profitability for both internal transfers and external sales improved during the first half of the injury analysis period, then fell sharply in the June 2008 quarter before recovering, although still resulting in a negative return (Page 45).

12.8 The comparison of profit/profitability in the Termination Report over the four year period is not helpful given the changes in the business. The end point to end point comparison was misleading and the effects of the refurbishment in YEM 2009 were not adequately explained. The significance of the effects of dumping on profit/profitability was demonstrated in YEM 2010.

12.9 Profitability for both external sales and internal transfers and total sales (combined) showed a declining trend in YEM 2010. This is demonstrated in the following table:

Table 10

Profitability %			
Period	External	Internal	Combined
June 2009	[redacted]	[redacted]	[redacted]
September 2009	[redacted]	[redacted]	[redacted]
December 2009	[redacted]	[redacted]	[redacted]
March 2010	[redacted]	[redacted]	[redacted]

(Source Confidential Attachment 15,16-17)

12.10 A recommenced investigation should take into account the decline in profitability in YEM 2010 as being a strong indicator of material injury.

59. In discussing price undercutting the TMRO noted:

Review by the TMRO

80. The Applicant objects what it describes as a wrong assumption that Viridian could achieve a price premium – apparently on top of its present prices. I note that Customs and Border Protection's analysis stated that it had discounted an amount from Viridian's present prices and that despite this, the price of imports, even if corrected for dumping, would still undercut Viridian's prices.

81. The Applicant submits that the existence of factors other than dumping does not necessarily mean that there is no material injury and causality because dumping does not have to be the sole cause of material injury.[11]

82. Irrespective of whether or not the Applicant could achieve a premium, I do consider that the real issue is whether that part of the injury that might be caused by dumping was material. This remains an issue even if part of the injury is attributable to 'other factors', such as competition.

83. Section 269TAE(2A) of the *Customs Act* requires that where other factors are causing the injury, the part of the injury that is caused by those factors must be excluded from the assessment of the materiality of the injury attributable to dumping.

84. The *Customs Act* 1901 relevantly provides at section 269TAE(2A):

... the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as: ...

(c) contractions in demand or changes in patterns of consumption; or

(d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; ...

and any such injury or hindrance must not be attributed to the exportation of those goods.

[11] Application, paragraph 13.9.

85. This provision requires a determination of whether a material part of the price suppression is caused by dumping, and to distinguish this from the part that is caused by factors other than dumping (for example, competitiveness). While Customs and Border Protection may have conducted calculations that determine which part of the undercutting/suppression injury is attributable to dumping, and whether this is material, there does not appear to be an assessment of the materiality of this injury caused by dumping or an indication of whether the whole of the injury is to be excluded pursuant to section 269TAE(2A) of the *Customs Act* 1901.

86. It would have been helpful if the Report provided reasoning to articulate whether the part of the price effect injuries that are caused by 'other factors' such as competition was the sole cause of the injury, or whether any part caused by dumping was material or immaterial. I do not mean to suggest that this should be done in a quantitative way, but a qualitative indication would have helped an understanding of the reasons underlying the price undercutting analysis.

60. In respect of threatened material injury, the TMRO report noted that:

7) Threatened material injury

106 The Applicant seeks review of the finding on threatened material injury on the ground that this was based on incorrect findings of negligible injury.[12] In particular, the Applicant objects to:

- Customs and Border Protection's reference to a price increase occurring in November 2010 (later than the investigation period) without referring to price decreases in the years ending March 2009 and March 2010, and
- the fact that imports have increased in the first two quarters of the year beginning April 2010 (later than the investigation period).

Customs and Border Protection's approach

107. Customs and Border Protection noted that 'as of 1 November 2010, Viridian has increased its prices of CFG by up to 5%' and that this 'indicates that Viridian appears to have the ability to increase prices of CFG into [sic] the Australian market in the absence of anti-dumping measures'.[13] The approach was therefore to attempt to have regard to some facts occurring later than the investigation period.

Review by the TMRO

108. I note the observation in *Pilkington Australia Ltd v Minister of State for Justice & Customs*[14] that the Act only *mandates* an investigation by reference to the investigation period – in this instance the year ending March 2009. It is within Customs and Border Protection's *discretion* to have regard to an injury analysis period preceding that period, as I have already noted above. Customs and Border Protection is not required to have regard to the increased imports occurring beyond March 2010.

[12] Application, paragraph 16.
[13] Termination Report 159B, page 61.
[14] *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* [2002] FCAFC 423 (19 December 2002), at [116]–[118].

> 109. However, I consider that if it was appropriate to have regard to the price increase as relevant, then it would have been likewise appropriate to have regard to whether there have been increased imports.

61. Presumably the TMRO was of a mind to suggest that increased imports should be examined both in terms of volume and price and consequent price effects. Nevertheless, it should be noted that the investigation period ended as at 31 March 2010.

62. The TMRO report summarises the Review Application in relation to the predicted impact of dumping duty as follows:

> ***8) Predicted Impact of dumping duty***
>
> 110. The Applicant claims that Customs and Border Protection erred by incorporating into its decision to terminate the investigation the anticipated impact of the dumping duty and that 'this misplaced speculation has introduced bias and Customs and Border Protection has failed to have proper regard to or draw obvious conclusions from the provided information in examining material injury'.[15]

63. The TMRO concludes:

> 115. It appears that Customs and Border Protection may have considered that other factors such as the Dandenong plant refurbishment influenced changes in volumes and were therefore the major contributor to the 'injury'. However, I do consider that, as noted in the discussion on 'price undercutting' at paragraphs 84–86, it would have been helpful if the Report provided reasoning to articulate whether any part caused by dumping was material or immaterial irrespective of whether an undumped price would still undercut prices.

64. The refurbishment of the Dandenong plant had a minimal impact on Viridian's volume sales as the refurbishment was a planned event. This necessitated stock build-up (from local manufacture and imports) in YEM2008 and YEM2009. It should be recalled however that because of the refurbishment Customs and Border Protection noted that YEM2009 financial figures had to be treated with caution.

65. Customs and Border Protection's decision to make a significant change from the findings in the SEF was commented on by the TMRO:

> ***9) Failure to disclose analysis in SEF and late notice of analysis in Termination Report***
>
> 116. The Applicant claims that the failure to disclose the analysis in the Termination Report (using volumes achieved in earlier years) at the time of the SEF or subsequent to the SEF within a reasonable time removed Viridian's rights to defend its interests. The late notice of this analysis reflects Viridian's concerns that Customs and Border Protection's resources were not adequately managed during the investigation.[16]

[15] Application, paragraph 16.
[16] Application, paragraph 17.

Customs and Border Protection's approach

117. It does appear that Customs and Border Protection came to a different view between its Statement of Essential Facts and its Termination Report.

118. As noted by the Applicant,[17] the Statement of Essential Facts stated that:

> Notwithstanding the likelihood that factors other than dumping have caused injury to Viridian, it is evident that the CFG exported to Australia from China, Indonesia and Thailand at dumped prices have also had an injurious effect on Viridian.[18]

Review by the TMRO

119. It has been observed in the Federal Court in the *Thai Pineapple Canning Industry Corporation Ltd v Minister of State for Justice & Customs (No 1)* case that where 'the Final Report proceeded upon a form of reasoning which involved an undisclosed and significant departure from the rationale proposed in the Statement of Essential Facts [and an interested party] had no notice of it and no opportunity to make any representation about it' they were 'denied an opportunity to deal with 'the critical issue or factor' on which the decision was to turn'.[19]

120. There is material on the confidential file which indicates the change of view. In particular Customs and Border Protection indicated a desire to discuss the analyses, and the fact that the analyses did not sit well with a position that dumping has caused material injury, on Tuesday 14 December 2010. The Applicant was informed of the causation analysis and sent copies of the new graphs for the Termination Report on that date. The Applicant responded with some objections to the analyses and, as indicated in the application, recorded 'its concern at the timing of this analysis... and what appears to be a significant change from the relevant SEF (5 November) conclusions'.[20] The Applicant also attended a meeting concerning the analysis and was informed of the impending issue of the termination notice on Friday 17 December 2010.

121. It may have been helpful if Customs and Border Protection could have afforded the Applicant a greater opportunity to respond to this change in view.

Conclusions

66. The Statement of Essential Facts provided a strong and compelling analysis of the presence of dumping, material injury and a causal link. The reasons for this preliminary finding being overturned were unfounded and wrong.

[17] Application, paragraph 14.1.
[18] Statement of Essential Facts, page 49.
[19] *Thai Pineapple Canning Industry Corporation Ltd v Minister of State for Justice & Customs* [2008] FCA 443 (4 April 2008), at [94], citing *Kioa v West* [1985 HCA 81]; (1985) 159 CLR 550 at 587; and *GTE* at 239–333.
[20] Application, non-confidential Attachment E.

67. In the absence of a proper analysis of the interaction between internal processing and internal transfers (and total sales) a conclusion was reached that price suppression and causation was to be analysed by reconstructing YEM2010 fixed and SG&A costs using volumes relating to YEM2007 and YEM2008.

68. The quantum of costs taken out of the business was substantial and was not critically assessed for reasonableness and consistency.

69. The cost price ratio in the first quarter YEM2007 was the same as in first quarter 2010, suggesting that the volume adjust approach was not reasonable and was unnecessary.

70. The cost price ratios arising from the three methods were vastly different from the year unaffected by dumping, indicating that this analysis was unreasonable and unnecessary.

71. There is therefore no reason to adjust YEM2010 financials using YEM2007 and YEM2008 volumes. This ad hoc approach leads to unexplained results, is analytically unsound and lacks rigour.

72. There is material injury and a causal link identified by volume, price and profit effects.

Yours sincerely

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20 October 2010

An Chew
Supervisor
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Australian Customs and Border Protection Service
Customs House
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AUSTRALIA

PUBLIC RECORD

BY EMAIL

Dear Mr Chew

RE: JELD-WEN SUBMISSION, FOLIO PAGE 127-139

We have reviewed this submission made on behalf of Jeld-Wen (dated 12 October). This was obtained from the electronic Public Record on the morning of Monday 18 October.

The above submission refers to the decision of the Appellate Body in United States Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan (the Hot-Rolled Decision). Extracts from this Appellate Body Decision have already been referred to Customs by other interested parties.

We pointed out in our submission of 19 October that Jeld-Wen's understanding of Viridian's internal and external sales was incorrect. There is no evidence to contradict the position that Viridian's sales to Viridian downstream are impacted by dumped imports. It is incorrect to allege that Viridian's sales to Viridian downstream are "... shielded from direct import competition".

The relevant part of this Appellate Body Decision to the CFG investigation is outlined in paragraph 188:

> 188. Japan appeals the Panel's findings, arguing that the captive production provision on its face, and as applied in this investigation, distorts the USITC's analysis of the domestic industry as a whole because only one part of the market is the subject of special examination. Further, by "focus[ing] primarily" on the merchant market, the USITC focused on the part of the industry which was most likely to be injured. Such an examination is not "objective" under Article 3.1 of the *Anti-Dumping Agreement*. Japan also argues that the Panel misunderstood the meaning of the words "focus primarily" in the United States statute.

In Viridian's internal versus external submission (12 October 2010) it was suggested that an analysis of Viridian upstream's customers should include not only an analysis of the sales of the Viridian downstream customer but also sales of other customers (being external sales).

Interestingly the Hot-Rolled Steel Decision discusses the analysis of a market which appears to have similar characteristics to the sale of CFG by Viridian upstream (ie internal and external sales). The Appellate Body concluded:

> 214. As we have already explained, in the absence of a satisfactory explanation, Article 3.1 of the *Anti-Dumping Agreement* does not entitle investigating authorities to conduct a selective examination of one part of a domestic industry. Rather, where one part of an industry is the subject of separate examination, the other parts should also be examined in like manner. Here, we find that the USITC examined the merchant market, without also examining the captive market in like or comparable manner, and that the USITC provided no adequate explanation for its failure to do so.

We draw to your attention in the above paragraph the reference to "... where one part of the industry is the subject of separate examination, the other parts should also be examined in like manner". In the Hot-Rolled Decision it was the "merchant" market which was examined and not the "captive market".

In the CFG examination Customs has examined both the "captive" and "merchant" markets "for the domestic producers as a whole of the like products". Now, however, Customs is seeking information that is part of a wider economic activity – the performance of one of the industry's (Viridian upstream) customers (Viridian downstream). The above extract from the Hot-Rolled Decision suggests that information from the "merchant" part of the industry should also be analysed to ensure there is an objective examination. While there may be a "satisfactory explanation" for only looking at the one customer, this has not been provided.

We are not of the view that Customs cannot request this information as it appears the performance of Viridian downstream's sales has been put before Customs.

We recall that Customs has requested information relating to one of Viridian upstream's customers, Viridian downstream. At the time of writing this letter, Viridian has yet to respond to the detail first requested in Customs' email of 14 October of:

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- Viridian upstream sales data of coated glass and other processed glass during the investigation period.

- Viridian downstream sales data of CFG and processed glass during the investigation period.

Customs' explanation in the same email for requesting this additional information was that:

> ... The focus has now shifted to internal transfers, the performance of Viridian downstream and evidence that dumping of CFG is causing injury to Viridian through its internal transfers.

We believe that our submission on internal v external sales (12 October) and our comments on the Jeld-Wen submission in our letter of 19 October should assist Customs in identifying the causal nexus of dumped imports to internal and external sales.

We are aware that similar information on downstream sales was requested by Customs in the Aluminium Extrusions Investigation. Page 6 of the Capral Ltd industry Visit Report noted that Customs "... Considered it important to understand Capral's distribution business, and that such information may be relevant to our considerations".

The Capral Visit Report notes that this information was received on 30 October 2009 having, presumably, been requested at the time of the visit to Capral on 8 September 2009 (the second visit to Capral).

The extended Aluminium Extrusions SEF publication date (originally 12 October 2009) was advised in ACDN 2009/34 (9 October 2009) as 1 March 2010. We mention these dates in the event there is a delay in supplying the substantial information requested in Customs' email of 14 October 2010.

This date being subsequent to the 12 October 2010 submission date in the CFG investigation and just twenty-two days before the SEF is due on 5 November 2010.

At the time of writing we do not know the availability of the information requested on 14 October 2010.

We would expect that the complexity of the Viridian downstream information would not be too dissimilar to the following description by Capral.

In the Statement of Essential Facts for the Aluminium Extrusions case (1 March 2010) it was noted:

> Capral stated that sales by its distribution business comprise a multitude of variables that would make them very complex to categorise, assess, or compare, such variables include levels of trade, credit terms, order sizes and service levels (p 44).

Customs then went on to conclude:

> The performance observed in relation to Capral's distribution business is not sufficiently different from Capral's manufacturing business as to alter conclusions that can be drawn from trends observed of the manufacturing business (page 44, SEF 1 March 2010).

We are not suggesting that the same conclusion will be reached in any analysis of the information requested on 14 October 2010.

However, we are concerned that the wide-ranging information requested by Customs on 14 October 2010 may not be available for analysis and/or inclusion in the SEF to be published 5 November. The analysis of other Viridian upstream customers should also be considered.

Yours sincerely

J J Croft