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PUBLIC FILE

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

BY EMAIL

Attention: Director Operations, International Trade Measures Branch

Dear Joanne Reid

RE: STATEMENT OF ESSENTIAL FACTS 159C

1. This SEF was made available on Tuesday 9 August 2011 at around 4.48pm (est). SEF159C follows the resumed investigation in April 2011.

2. Termination Report No.159B (TER159B) reversed the strong preliminary determination in SEF159. Customs and Border Protection Service recalculated costs for YEM2010 using volumes in YEM2007 and YEM2008. Customs concluded that the difference between its actual and adjusted costs during the investigation period related to factors other than dumping: "... namely higher unit fixed costs caused by lower sales and transfer volumes for Viridian during the investigation period".

3. Customs then observed that "in all three cases, the cost-price relationship in YEM2010 has improved in relation to YEM2007, a year unaffected by dumping". But what Customs did not recognise was that the cost-price relationship, which it used to justify its adjusted cost approach, was similar for actual costs in the first two quarters of YEM2010 as with YEM2007 (1 July Submission).

4. TER159 then calculated an unsuppressed selling price on the basis of adjusted costs and found that Viridian's actual prices in YEM2010 were higher than the unsuppressed selling price obtained by the adjusted cost method.

5. Had the adjusted cost method not been used in TER159 then there was a strong indication that there would have been a positive final finding.

6. In Viridian's application to the TMRO and in its 1 July Submission, it revealed that Customs' assumption in TER159, that lower sales were caused by a contraction in the market in YEM2010 and that transfer volumes (internal processing) did not fully explain the reduction in volumes.

7. In considering internal processing volumes Customs notes in SEF159C:

> Viridian diverted volume from external sales to internal transfers and from internal transfers to internal processing during the injury analysis period.

8. To put this in context, Viridian over the injury analysis period transferred CFG directly to internal processing. This has always occurred and did not just commence in YEM2007. This is distinct from the DMS effects and reorganisation of the laminating operation.

9. SEF159C notes: "A high proportion of clear float glass produced by Viridian was diverted to internal processing during the investigation period".

10. To put this in context, the July 1 Submission takes into account the organic growth in internal processing volumes such that it is inaccurate to suggest without qualification that a "high proportion" of CFG was diverted in YEM2010 when in fact historically there had been a steady level of CFG supplied to the requirements of internal processing.

11. Viridian disagrees with Customs' assessment in the resumed investigation that: "... internal transfer values... have lower probative value..." Extensive analysis in the original investigation indicates that this is not the case.

12. Viridian does not agree with the decision by Customs to include internal processing volumes in the market volume. The TMRO indicated that a re-examination of the impact of increased transfers to internal processing should be undertaken but did not suggest that internal processing volumes should form part of the industry producing like goods. The TMRO's concern at the impact of internal processing transfers is answered by reference to the tables in the July 1 Submission (under paragraph 12).

13. TER159B concluded:

> Internal transfers from within Viridian upstream manufacturing operations are regarded as transfers of CFG, as an intermediate product with a dedicated purpose of manufacturing further processed product. Data pertaining to these transfers is not considered a relevant measure of the economic performance of the Australian industry producing CFG.

14. Viridian believes that this is the correct approach and notes that having determined that internal processing transfers did not fully account for the volume reduction as suggested in TER159B that Customs does not have to pursue this matter further.

15. However, in SEF159C Customs has incorporated these previously excluded internal transfer volumes into the definition of the industry producing like goods. But Customs has not requested the updated financials for the industry producing like goods (such as in the A6 format). This means that Customs cannot examine these increased volumes without incorporating the increased volumes in the accounts of the industry producing like goods.

16. This problem can be overcome by simply declaring that the transfers to internal processing have not been significant as set out in the July 1 Submission.

17. The definition of like goods in TER159 specifically excludes coated glass. Viridian does not agree with Customs' including volumes of coated glass in the like goods.

18. Customs should reconsider its analysis of volume and market share as this volume cannot be properly considered in the absence of like goods accounts showing the same volumes.

19. We refer to our email of 11 and 16 August and Customs' response of 12 and 17 August with respect to the differences in the growth of imports. We record our concern that Customs has not advised us sooner that there were discrepancies or reasons for these discrepancies. Although Customs has informed us that its imports are obtained from its own "confidential database" the main source of the statistics is still the Australian Bureau of Statistics. Viridian's analysis of statistics from the ABS reveals significant differences.

20. SEF159C notes:

> Unit costs for the different thicknesses did not return to pre-refurbishment levels in YEM2009 and YEM2010. This was due to reduced volumes in YEM2009 and YEM2010.

21. In the original investigation, evidence was provided of increased costs, particularly energy costs.

22. As mentioned earlier in this Submission, Customs has not requested that the like goods accounts be adjusted to reflect the increased volume designated by Customs to be now the industry producing like goods. This will affect unit costs and total revenue.

23. With respect to loss of volume, SEF159C notes:

> Based on these observations Customs and Border Protection concludes that Viridian's loss of volume during the investigation period was due to the overall decline in the total Australian market, and not due to dumping.

24. There is no evidence for Customs to make such a definite statement about volume loss. Intuitively, if imports had a significant market share in YEM2009, then that market share (although according to Customs it declined in YEM2010) would still have volume effects in YEM2010. There is no evidence available to Customs to indicate that there has not been some volume loss, although this is a qualitative/subjective assessment. Viridian was competing with dumped imports in YEM2010 and could only regain volume by decreasing its prices. This behaviour suggests that if Viridian decreased its prices even further then the volume loss to dumped imports would be lessened. That is, there is an indication of volume loss attributable to dumped imports.

25. TER159B concluded that Viridian:

> ... also lost sales to specific customers but did not experience injury in the form of lost sales volume to its overall external sales volume. (page 40)

26. This comment reflects the evidence provided to Customs during the original investigation which showed that despite strong pricing efforts, Viridian lost sales to some of its top customers.

27. To conclude that Viridian did not lose any sales in the investigation period to imports from the dumped countries ignores also the following observation in TER159B:

> In this context, the price for CFG in the Australian market is sensitive and transparent. Accordingly, it is reasonable to expect that competitive price offers may have an effect on the volumes and/or prices of competitors. (page 49)

28. SEF159C notes:

> The price suppression observed from a comparison between Viridian's margins in YEM2010 to YEM2007 (a year unaffected by dumping) is at least partly caused by an increase in costs following the Dandenong refurbishment. While overall the refurbishment may have resulted in savings, unit costs in the investigation period increased due to lower volumes. It has earlier been found that the reduced volume was not caused by dumping.

29. The first sentence appears to contradict the second sentence. There were cost savings following the Dandenong refurbishment. The cost savings were outlined in the spreadsheet which formed part of the attachments to TER159B.

30. The Dumping and Subsidy Manual (the Manual) suggests that the resumed investigation could have followed this approach:

> In either case, the price suppression analysis is based on a counter-factual conclusion, ie assessing what trend in, or level of, prices the Australian industry is likely to have achieved in the absence of dumping. (page 13)

31. Under Other Causes, SEF159C notes:

> Shift in demand to more energy efficient glass such as coated and tinted glass.

32. Apart from anecdotal comments, Viridian is not aware of any analysis done by Customs which would confirm these generalised observations. Customs knows Viridian's production of coated and tinted glass has not been at the expense of CFG production.

33. SEF159C notes that full production resumed in March 2009 following the Dandenong refurbishment. Full production resumed in November 2008.

34. SEF159C discussed the value of the Australian dollar. This is an important area because Customs ascribes the Australian dollar as being a reason to discount the injury arising from price depression.

35. In TER159B it was noted:

> Several interested parties have submitted that as CFG is traded globally in US dollars, the appreciating Australian currency during 2009 made imported CFG more competitive. CSR Limited's full results announcement for YEM2010 acknowledges that "the continuing high Australian dollar for much of the year... makes imported float glass more price competitive".
>
> Viridian argues that an appreciating Australian dollar "does not remove the effect of differential pricing attributable to the margin of dumping" and "exacerbates the effects of the dumping margin".
>
> It is noted that a significant proportion of CFG exported to Australia from China, Indonesia and Thailand is sold in Australian dollars.

36. The last sentence indicates that the exchange rate effects are vastly overstated in the anecdotal comments made to Customs in the resumed investigation. When an exporter pays in AUD, the USD rate is not directly relevant. Exporters often take an element of exchange rate risk as shown in the application's confidential attachments beginning at B2.1.3.

37. In SEF159C the anecdotal comments appear to have made a mark on Customs:

> Customs and Border Protection noted in the resumed investigation that the Australian dollar appreciated against the US dollar by 33 percent during the investigation period.

38. As submitted to Customs prior to SEF159C (26 July 2011) the average AUD/USD exchange rate in YEM2010 was 0.8519 and when compared with the average exchange rate in YEM2009 of 0.7934 this gives an annual increase of +7.4%. Viridian can only get to the "33 percent" figure quoted in SEF159C by taking the exchange rate on 31 March 2010 (0.9159) and comparing it to the exchange rate on 1 April 2009 (0.6883) which gives a difference of 33 percent. (These calculations are based on the Reserve Bank of Australia average daily exchange rate.)

39. SEF159C then refers to an extract from the first half results of CSR Limited for the period ending 30 September 2010. These comments are not dissimilar to the comments in the above extract from TER159B relating to CSR Limited's full year

results for YEM2010. Obviously the first half results for the period ended 30 September 2010 are outside of the investigation period which ended 31 March 2010.

40. The formula used in SEF159C to examine the effect of the exchange rate on price undercutting is flawed because the exchange rate on the day of importation is not relevant. As the exporter visit reports reveal, orders for CFG are normally paid some months prior to landing in Australia.

41. In discussing the shift in demand to more energy efficient glass, SEF159C notes:

> Viridian also claimed during the resumed investigation that independent glass processors have also invested in new plant and equipment in the expectation of the shift in the market [to coated glass]. As a result, Viridian upstream has picked up these processors as new external customers at the expense of Viridian downstream

42. Viridian's comments did not relate to very expensive coated glass equipment but related to the much less expensive plant and equipment used for the general processing of glass.

43. In discussing profits and profitability on external sales of 3-6mm clear float glass, the SEF159C notes:

> Customs and Border Protection noted that Viridian's performance in relation to 3mm float glass was affected by the pricing arrangements Viridian has with its largest customer of 3mm clear float glass.

44. Customs is reminded of Viridian's comments that the pricing arrangements to major customers reflect the desire to obtain volumes and a contribution to the recovery of fixed costs in a high fixed costs business. Major customers have access to highly competitive prices of imported glass and if Viridian did not compete with those prices to obtain the relevant volumes then the overall profitability of each thickness would be detrimentally affected.

45. In the section on undumped price analysis SEF159C notes:

> Customs and Border Protection considers that this tends to support the view that even if imports were at undumped prices, the Australian industry might not have been able to raise its prices given the margin between its selling prices and imports. As illustrated in the earlier price analysis, Viridian attempted to increase its price in YEM2009, however reduced prices in the following year.

46. Customs should avoid speculating on the outcome of the imposition of a dumping duty. Such speculation cannot predict market behaviour (as shown below) and is not an objective examination of the industry.

47 As mentioned below Viridian, after a lot of explaining to its customers, did achieve a price increase in November 2010 (after the investigation period ended on 31 March 2010). Customs seems to be expecting that if a dumping margin does not result in a price that is the same as the price offered by Viridian, then there is no point in addressing the injury identified by dumping. This of course is a nonsense. Customs

will be aware that the reasons for imposing a remedy are not dependent on a simple equation of price undercutting equalling the margin of dumping.

48. Similarly, under Price Premium SEF159C notes:

> This analysis tends to support a conclusion that Viridian might not have been able to raise its prices in the absence of dumping given the differences shown above.

49. Again, this speculation by Customs is misplaced and outside of the provisions of the Customs Act. Subsequent to the investigation period ending, Viridian increased its prices by 5 percent in November 2010 to cover increased energy costs. This shows that Customs can't predict changes in the market and that Viridian can obtain a price increase even in the presence of dumped imports. Here it must be pointed out that the reasons for that price increase do not detract from the reasons to impose a remedy against dumping.Viridian still needs to look after its business and not incur "self injury" and recover some of its increased costs as identified to its customers in November 2010.

50. As explained to Customs on 1 September, the undercutting that still exists after an undumped/price premium adjustment is to be expected given the observations about different exporter competitive advantages in TER159B.

The analysis following Table 11 (in SEF159C) concludes because Viridian's external sales price was greater than the undumped FIS export prices, the Australian industry might not have been able to raise its prices given the margins between its selling prices and imports in YEM2010.

Table 12 then adds in a nominal premium of 6%. Presumably the calculation of this premium needs to be considered with some caution as it depends on the customers used to calculate the premium-some customers have different views on the premium acceptable, if at all. The premium used in SEF159C was calculated as described on page 41.

SEF159C notes that:

> Table 12 shows that the undumped FIS export prices adjusted for a price premium are below Viridian's actual weighted average external sales prices for 3, 4, 5 and 6mm clear float glass from China and Indonesia and for 5 and 6mm thickness from Thailand.
>
> This analysis tends to support a conclusion that Viridian might not have been able to raise its prices in the absence of dumping given the differences shown above"

51. It should be pointed out that 3mm and 4mm CFG from Thailand were above Viridian's price.

The analysis following Tables 11 and 12 does not however pick up on the significant improvement in the level of price undercutting established in Table 8 when compared with the amount by which Viridian's price is greater than an undumped price and an undumped with a premium price.

52. The relevant tables (8, 11 and 12) are summarised below:

China	3mm	4mm	5mm	6mm
P/undercuttting	4%	13-17%	14-19%	18-20%
Undumped difference	n/a	6%	9%	12%
Undumped&Premium	n/a	1%	3%	6%

Indonesia	3mm	4mm	5mm	6mm
P/Undercuting	11-22%	13-25%	15-24%	19-28%
Undumped difference	6%	13-22%	15-22%	13-23%
Undumped &Premium	1%	8-17%	10-18%	7-9%

Thailand	3mm	4mm	5mm	6mm
P/Undercutting	4%	8%	9%	9%
Undumped difference	1%	5%	8%	9%
Undumped&Premium	-5%	-1%	2%	4%

53. With all dumped countries there has been a significant improvement in the average level of price undercutting after taking into account an undumped price and an undumped plus premium price for China and Thailand and an improvement in the undumped 3mm and 6mm thicknesses for Indonesia and all thicknesses from Indonesia with an undumped plus premium.

54. As explained to Customs the conclusion in SEF159C that Viridian could not raise its price because of the various percentage differences suggests that Viridian has to have a price the same or similar to imports. Taking this proposition further suggests that Viridian shouldn't be able to sell any glass at any time as imports are cheaper. Viridian explained that a remedy to remove the dumping would lessen the price undercutting by raising the "floor" price to an undumped level. This undumped pricing would likely increase the market value for both imports and the Australian industry.

55. The reduction in the level of price undercutting (as demonstrated in the above tables) should allow Customs to determine that the injury being addressed is related to dumping and that the injury caused by other factors (such as the competitive advantage of exporters) has not been affected by the remedy. The improvement in the level of undercutting measured against an undumped plus premium price should assist Customs in understanding Viridian's view that the fact that Viridian's prices are more expensive does not preclude a price movement following the imposition of a remedy.

56. The operation of the premium has been explained to Customs and it was noted that the premium achieved in YEM2010 (the investigation period) was exceeded by the premium achieved in later financial periods. The increase in the premium after the investigation period should allow Customs some comfort in understanding that Viridian does have a perceived value for some customers over alternative suppliers of CFG. Had a remedy been imposed in December 2010 then the premium would have been applied on an uplifted "floor price" which would have resulted in an improvement in Viridian's revenue and profitability.

57. In the section on "Estimate of Materiality of Revenue Loss" Customs notes:

> When expressed as a percentage of Viridian's total revenue for like goods over the investigation period, the amount of lost potential revenue was around 5 percent. This represents the maximum lost potential revenue if all price depression was entirely attributable to dumping. As discussed above, the strengthening of the Australian dollar and the global financial crisis also impacted on Viridian's external sales price during the investigation period. This supports the finding that any part of the price depression caused by dumping was less than 5 percent.

58. This statement reveals a lack of understanding of how a manufacturing business works and is similar to the comments made about one of Viridian's major customers. Customs will recall that it expressed surprise at why one of Viridian's major customers was being sold product at "below cost". It was subsequently explained to Customs, both at the time the comment was made and in a subsequent meeting with Customs, that it is the contribution at the gross margin level which is relevant. Major customers benefit from a particular price and the benefit to Viridian is the contribution that such a large volume of business makes to Viridian's fixed costs.

59. A 5 percent increase in revenue is substantial in a commodity based business – or any business for that matter. We have already discussed the inappropriate analysis surrounding the strengthening of the Australian dollar (noting that a comparison of the Australian dollar on 1 April 2009 with 31 March 2010 is not a robust analysis). The weakening in demand for clear float glass does not remove the competition that Viridian has to face from dumped imports in order to maintain its volumes. It is a simplistic generalisation to say that the presence and adverse effects of dumped imports is over-ridden because of demand falling in the market. Intuitively this is not correct. Customs' attention is drawn to the Manual's reference to the greater impact of injury during periods of economic downturn.

60. The impact of a 5 percent increase in revenue is significant. Viridian's gross margin (excluding internal processing volumes) increases by [redacted] percent as does the favourable movement in the reduction in the loss in YEM2010.

AUD YEM2010	Actual	Price Depression Adjustment	Change	%
Revenue	[redacted]	[redacted]	[redacted]	+5.2
Cost of Sales	[redacted]	[redacted]	-	-
Gross Margin	[redacted]	[redacted]	[redacted]	[redacted]
%	[redacted]	[redacted]		[redacted]
SG&A	[redacted]	[redacted]	-	-
Net Gain or Loss	[redacted]	[redacted]	[redacted]	[redacted]

Source: Confidential Attachment B108, Customs CA10 spreadsheet

61. The above table summarises the increased revenue by thickness in Customs' spreadsheet CA10: "Measure of Materiality of Price Depression" and applied against the relevant tab in the B108 spreadsheet (as used by Customs in the original investigation). The CA10 spreadsheet also contains the following subjective assessment of other factors causing injury

If all caused by dumping	:	[redacted]
If [redacted] caused by dumping	:	
If [redacted] caused by dumping	:	
If [redacted] caused by dumping	:	

62. The above table shows that in YEM2010 if the price depression element of material injury was removed then Viridian's gross margin would have increased by [redacted] up from [redacted] to [redacted]. This is a significant improvement indicator for Viridian. Although Customs seems to be fixated on the usefulness of a dumping remedy being limited if it does not restore like for like price competition (if such a situation ever existed), this removal of the injurious element of dumping allows Viridian to build on the other improvements already made in the business and future improvements that have to be made in order to retain its customers. Note that, contrary to Customs' observations, Viridian has retained customers despite the finding in TER159B:

> ... that Viridian's prices have been consistently and significantly undercut by CFG exported to Australia at dumped prices. (page 49)

63. Under the section "Preliminary Findings on Whether Dumping has Caused Injury" SEF159C notes:

> The TMRO has directed Customs and Border Protection to consider, in a qualitative way, whether any part of the injury to the Australian industry was caused by dumping given the other factors at play. If so, Customs and Border Protection should consider whether that part of the injury caused by dumping is material. The direction of the TMRO to make a qualitative assessment recognises the difficulty in apportioning injury to dumping when there are other contributors to injury.

64. A qualitative (meaning related to or concerned with quality, Chambers English Dictionary) assessment is just that and is a subjective consideration mainly aimed at whether or not there is a matter that may qualify the factual examination of evidence. Customs should be aware that the TMRO was not directing them to over-ride a commonsense approach to interpreting the Act.

65. Viridian is not convinced that Customs has provided the Australian industry with a competent level of analysis. In particular,

- examining volumes of glass which are not in the like goods financial accounts;
- this means that the industry producing like goods is not being examined properly;
- the lack of understanding of the contribution made by large customers;
- the misleading comparison of exchange rates which has resulted in an unnecessary examination of exchange rates, particularly as the effect of exchange rates is minor because trade is done in Australian dollars;

- the counter-intuitive assessment of the impact of dumped imports in the market when the overall market has declined;
- a lack of understanding of the gross margin and EBIT level improvement of increased revenue;
- the decision in SEF159C to ignore the Manual in examining vertically integrated industries;
- not recognising the material injury indication in the Manual of the impact on profits in a declining market.

66. The findings in SEF159C are not significantly different from the findings in the original investigation in SEF159. Despite a strong positive finding in SEF159 it was overturned in the Termination Report (TER159B). Given that there is no indication in the resumed investigation that the findings in SEF159 have been contradicted, it is surprising to see the emergence of reasons for termination in SEF159C. This observation suggests that there is an element of bias in Customs seeking to support the decision to terminate in TER159B, albeit through a slightly different path.

67. The reasoning in SEF159C brings to mind the criticisms levelled at Customs in the Federal Court Decisions relating to Siam Polyethylene and Thai Pineapple. The assumptions and methodology used by Customs as revealed in those Federal Court Decisions points to a "bulletproof" approach in Customs. Ironically it is this approach/mentality that drove the recent amendments to the administration of Trade Remedies.

68. For these reasons Viridian is not making any comments on a non-injurious price and has not addressed all of the issues that it believes deserve attention in SEF159C.

Yours sincerely

J J Croft