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PUBLIC RECORD

Investigation 548 (the investigation) – Certain kraft paperboard exported from the United States of America (US)

Submission on behalf of Graphic Packaging International LLC and Graphic Packaging International Australia Converting Ltd (GPI) to the Anti-Dumping Commission (ADC)

Application for publication of dumping duty notice (the application) by Visy Glama Pty Ltd (Visy)

Dear Leisa

GPI refers to the submission by Visy dated 18 June 2020 (Visy submission).

GPI also refers to the expert evidence provided to the ADC in the report by Charles P Klass on 4 June 2020 (Klass Report) and in the supplementary report by Charles P Klass on 26 July 2020 (Supplementary Klass Report).¹

GPI makes the following submissions regarding the Visy submission and generally in respect of the investigation:

1. Microflute² is not a like good to kraft paperboard³ the subject of the investigation (see section 1 below).

¹ The expert evidence provided to the ADC was prepared in accordance with the Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT). This submission refers to these reports together as the Klass Reports.

² The term microflute refers to narrow caliper corrugated cardboard used in packaging. In its first submission of 13 May 2020 GPI drew on independent sources when it referred to microflute as having a thickness of less than 1.5mm (and more than 300 flutes per metre). For purposes of this submission, GPI has made allowance for Visy's shifting position on what constitutes a like good (see section 2) and in this submission when GPI refers to microflute, it refers to microflute that is 1.1mm or less (unless the context requires otherwise).

³ The goods under consideration are kraft paperboard, coated on one side with clay or other inorganic substances, grammage 360-430 gsm, wet strength treated.

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2. Visy must clarify what it regards as the like goods before the investigation proceeds further (see section 2 below).
3. Visy wrongly states the effect of the *Ministerial Direction on Material Injury 2012 (the Ministerial Direction)* (see section 3 below).
4. Visy makes demonstrably wrong statements about microflute and E flute corrugated board (see section 4 below).
5. Microflute is a paper based product but that does not assist Visy (see section 5 below).

On those bases, GPI again submits that the ADC may and should proceed to terminating the investigation at the earliest possible juncture.

In any event, GPI remains ready to assist the ADC in the investigation. In particular, GPI can provide to the ADC any or all of the samples photographed in GPI's submissions for the ADC to verify for itself the matters raised by GPI in its submissions.

Please don't hesitate to contact me if you require anything further.

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1. Microflute is not a like good to kraft paperboard
 1. GPI repeats the submission it made in its submission dated 13 May 2020 (GPI's first submission) that microflute is not a like good to kraft paperboard.
 2. Even allowing for Visy's multifarious positions regarding what constitutes the like goods⁴ and matters raised in the Visy submission, GPI considers it remains clear that microflute is not a like good to kraft paperboard. In particular, excluding E flute from microflute as Visy now seeks makes no substantive difference to the matters set out in GPI's first submission⁵ and (despite Visy's claim) expert evidence in the Klass Reports did not include E flute in its assessment of microflute.⁶
 3. The Klass Reports conclude, despite assertions in the Visy submission, that microflute and kraft paperboard are not like goods (see section 1.a below). Compared at the correct point in the supply chain, the goods under consideration are very large rolls of unprinted material not, as Visy claims, finished beverage multipacks or even cut and printed sheets (see section 1.b below). The paper and packaging industry literature rather regards microflute as an *end use* of paper and the result of a *converting* process (see section 1.c below).
 - a. Expert evidence: "microflute and the goods under consideration are not like goods"
 4. Charles P Klass was retained by GPI to directly answer a key question in the investigation:⁷ is microflute a like good to the goods under consideration? Mr Klass's conclusion was unambiguous, microflute and kraft paperboard are not like goods and indeed, for the reasons stated in his report, "they are very different products".⁸
 5. Mr Klass was retained on condition that he would be familiar with and act in accordance with the current Federal Court of Australia practice note on providing expert evidence.⁹ That practice note required Mr Klass to not act as an advocate for GPI and his paramount duty, overriding any duty to GPI, is to assist in the matter impartially on matters relevant to his area of expertise.¹⁰
 6. Mr Klass has almost 60 years working in the paper industry and for over 20 years has been Adjunct Professor of Paper Engineering, Chemical Engineering and Imaging at

⁴ See section 2, *Visy must clarify what it regards as like goods*, below.

⁵ Notwithstanding that the Visy submission makes demonstrably wrong statements regarding E flute and microflute, see section 4 of this submission.

⁶ See page 3 of the Supplementary Klass Report.

⁷ Klass Report at page 2.

⁸ Klass Report at page 2.

⁹ Klass Report at page 2.

¹⁰ See Annexure A to the practice note at [2].

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the Western Michigan University.¹¹ Mr Klass also teaches internationally. Mr Klass has authored numerous publications in the field of papermaking and packaging and was selected to update several chapters of the latest edition of the *Handbook for Pulp & Paper Technologists*,¹² also known as the Smook Book.¹³ Mr Klass's experience and qualifications are further described in the Klass Report and his curriculum vitae is at Appendix B of the Klass Report.

7. Mr Klass made his assessment of the differences between microflute and kraft paperboard in terms of their physical likeness,¹⁴ commercial likeness,¹⁵ functional likeness¹⁶ and production likeness.¹⁷ Mr Klass found that microflute and kraft paperboard were not alike having regard to any of those considerations and his overall conclusion was that microflute and kraft paperboard are not like goods.¹⁸
8. In particular, Mr Klass found that there were "significant physical differences" between microflute and kraft paperboard. Those differences stemmed from the very different ways in which they are produced.¹⁹ Mr Klass observed that they may appear alike when printed and in end use applications but there were nonetheless "dramatic differences in the two materials".²⁰ Kraft paperboard is a solid product produced completely on a fourdrinier paper making machine whereas corrugated board such as microflute is produced as different layers on a number of machines and then converted on a corrugator.²¹ The complete assessment of the physical differences between microflute and kraft paperboard is contained at pages 5 to 14 of the Klass Report.
9. The Visy submissions on likeness rarely rise above assertion or argumentation. Little in the way of evidence is provided by Visy because apparently it is "*self-evident*" that

¹¹ Klass Report at page 3.

¹² Klass Report at page 3.

¹³ The Technical Association of Pulp and Paper Industry (TAPPI) describes the Smook Book it as "the "Must Have" book for professionals in the Pulp & Paper Industry" and "the preferred and most widely used P&P text by companies, colleges, and universities", <https://www.tappi.org/publications-standards/books/deals/smook-book/>.

¹⁴ Klass Report at page 5 and following.

¹⁵ Klass Report at pages 14 to 15.

¹⁶ Klass Report at pages 15 to 16.

¹⁷ Klass Report at page 16.

¹⁸ Klass Report at page 2.

¹⁹ Klass Report at page 5.

²⁰ Klass Report at page 5.

²¹ Klass Report at pages 5 to 8; the Klass Report also observes that box blanks may be die cut and converted to box blanks "in line" at the end of the corrugator (ie in a continuous process), in which case microflute (as distinct from its end use as packaging) would only exist fleetingly inside the converting machinery.

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microflute is a like good” (emphasis added).²² Similarly Visy asserts that “it is *self-evident* from the commercial background to this case that the products sold by Visy Glama and GPI are completely substitutable and there should be no controversy around this issue” (emphasis added).²³ In effect, Visy asks the ADC to take Visy’s preferred answer to a critical question in the investigation as a given. When Visy does provide evidence of likeness and substitutability (at Attachments VG-4 and VG-5) these are photographs of completed beverage can multipacks; it is apparently lost on Visy that beverage can multipacks are not the goods under consideration and that the comparison at VG-4 and VG-5 does not show that microflute and kraft paperboard are like goods.

10. Visy’s comparison of beverage can multipacks at VG-4 and VG-5 and its insistence at section 3.7 of the Visy submission that the Australian industry is correctly stated at A-3-9 of its application as “Australian manufacturers of finished beverage can multipacks” indicates that GPI and WestRock should also be included in the Australian industry.²⁴ Converting the imported unprinted rolls of kraft paperboard by sheeting, printing, die cutting, folding and gluing to produce beverage packages at its Australian sites clearly comprises a number of substantial processes of manufacture in Australia.²⁵
11. In the Supplementary Klass Report, and having reviewed the Visy submission, Mr Klass remains firmly of the view that microflute and kraft paperboard are not like goods.²⁶ In the Supplementary Klass Report, Mr Klass undertakes further analysis of the physical differences of microflute and kraft paperboard by reference to ISO standard *ISO 534:2011 - Paper and board — Determination of thickness, density and specific volume*. Under ISO 534:2011 the bulk of paper and board is expressed as cubic centimetres per gram. Mr Klass uses the ISO mandated formula to calculate the bulk of Visy’s microflute and GPI’s kraft paperboard and demonstrates that, at a given grams per square metre, microflute has more than 50 per cent greater bulk than kraft paperboard. Mr Klass concludes that this confirms his findings that microflute and kraft paperboard are “significantly different goods physically” and

²² Visy submission at page 5.

²³ Visy submission at page 1.

²⁴ Another producer of beverage can multipacks, Platypus Print Packaging in Brisbane, should also be part of the Australian industry.

²⁵ The test for whether there is an Australian industry in s 269T(4) is concerned with whether there are persons who produce like goods in Australia and the test of whether or not they are produced in Australia, contained at ss 269T(2) and 269T(3), is whether at least one substantial process in the manufacture of the goods was carried out in Australia. This test would be satisfied by GPI for the production of beverage packs.

²⁶ Supplementary Klass Report at pages 2 to 3.

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states that measures of bulk (such as that in ISO 534:2011) “provide a very informative comparison of microflute and kraft paperboard”.²⁷

- b. The goods under consideration are large rolls of unprinted kraft paperboard, not beverage can multipacks or printed sheets
12. GPI submits that the goods under consideration are large rolls of unprinted kraft paperboard. These are clearly not like goods to beverage can multipacks, neither are they like sheets of printed microflute prior to die cutting.
 13. GPI has repeatedly observed that Visy is making the like goods comparison of the *wrong products* by comparing the end use product ie beverage can multipacks. The Visy submission continues to make that wrong comparison in attachments to its submission at Attachments VG-4 and VG-5. Visy also insists that the Australian industry is not Australian producers of microflute²⁸ but rather the Australian industry is Australian manufacturers of finished beverage can multipacks.²⁹
 14. GPI’s first submission observed that the correct like goods comparison was a comparison to GPI’s (or WestRock’s) kraft paperboard as it comes over the Australian docks.³⁰ GPI’s first submission also observed that it was highly inconvenient to Visy’s like goods argument that kraft paperboard, as it crosses the Australian docks, is not printed whereas Visy’s microflute is already printed at the time it comes into existence as a distinct product.³¹ As stated in the application Visy prints the outer layer before the layers are glued together in the corrugator.³²
 15. The photograph in Figure 1 below shows a reel of GPI’s kraft paperboard as it comes over the Australian docks. [REDACTED]
[REDACTED]
[REDACTED] **Confidential information regarding GPI exports**] At risk of stating the obvious, these physical characteristics and Figure 1 below demonstrate that Visy’s completed beverage multipacks are not like goods to kraft paperboard as it enters Australia.

²⁷ Supplementary Klass Report at page 9.

²⁸ As GPI suggested was its better position, see GPI’s first submission at [29] and following.

²⁹ The Visy submission at section 3.7 confirming its statements in the application at A-3-9.

³⁰ GPI’s first submission at footnote 21.

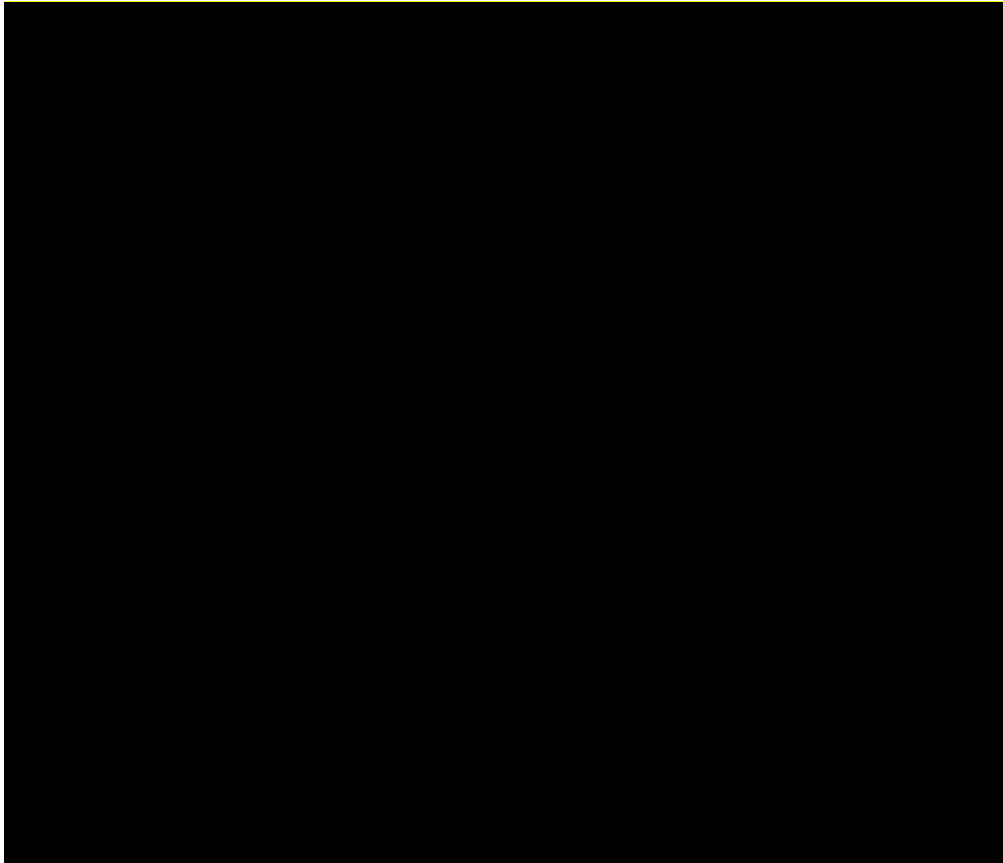
³¹ That microflute comes into existence as a discrete product proceeds on the assumption that die cutting and scoring of the packaging is not done “in line” with the corrugator. If the box blanks are formed in line with the corrugator then microflute may not actually exist as a distinct product except in transitory form during the larger conversion process. GPI refers for the ADC’s consideration Visy’s statements that it has invested heavily, and continues to invest, in capital for its microflute production (Visy submission at pages 3 and 12).

³² The application at page 11.

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16. GPI's first submission proposed a better argument for Visy, namely that the closer comparison would be of microflute prior to its further conversion into end uses.³³ The Visy submission emphatically rejected that proposal³⁴ however, for the sake of completeness and to assist the ADC to make the like good assessment, GPI observes that microflute prior to conversion is not a like good to kraft paperboard as it enters Australia. Microflute prior to conversion is not a like good to kraft paperboard as it enters Australia because microflute is printed³⁵ and GPI understands that Visy's microflute is in the form of separate cut sheets; in contrast, kraft paperboard is unprinted and in large rolls.³⁶ These differences are in addition to the other substantial physical, commercial, functional and production differences set out in GPI's first submission and the Klass Reports.

[Confidential start: image of GPI exports



Confidential end]

³³ GPI's first submission at [29] and following.

³⁴ Visy submission at section 3.7.

³⁵ See the application at page 11.

³⁶ GPI understands that microflute cannot be formed as rolls because of its greater rigidity and so the likelihood of creasing and crushing of the flute layer.

- c. Microflute is an end use of paper and the result of a conversion process
17. GPI submits that microflute is correctly described as an *end use* of paper and the result of a *conversion process*.
18. As the Klass Reports observe, kraft paperboard is produced entirely, and in a single run, on a papermaking machine (known as a fourdrinier machine).³⁷ The *Handbook for Pulp & Paper Technologists* (known as the Smook Book) aptly describes paperboard as “stiff and thick paper”.³⁸ Corrugated board, including N flute, is described in an entirely different chapter of the Smook Book entitled “Introduction to Paper End Uses”.³⁹ In that chapter, the Smook Book describes converting as “all those remanufacturing steps which change the dimensions, shape, surface characteristics or properties of the paper product”.⁴⁰ Converters use “paper or paperboard to make such products as bags, envelopes, writing tablets, boxes and paper towels”.⁴¹ The manufacture of corrugated board,⁴² including N flute,⁴³ is also stated to be a converting process.⁴⁴
19. On that basis, the paper making industry categorises microflute as an *end use* of paper together with other paper based products such as paper bags, envelopes, writing tablets and paper towels. Those end uses are achieved through one or more converting processes; kraft paperboard, in the form that it enters Australia, has had no converting processes.

³⁷ Klass Report at page 5; Supplementary Klass Report at pages 5 to 6.

³⁸ Smook Book, 4th Edition at Chapter 19.

³⁹ Smook Book, 4th Edition at Chapter 23.

⁴⁰ Smook Book, 4th Edition at page 358.

⁴¹ Smook Book, 4th Edition at page 358.

⁴² Smook Book, 4th Edition at page 363.

⁴³ Smook Book, 4th Edition at page 364.

⁴⁴ The manufacture of corrugated board, including N flute comes under section 23.2 of the Smook Book; that section is entitled “Converting”.

2. Visy must clarify what it regards as like goods

20. GPI submits that Visy must clarify what it regards as like goods before the investigation proceeds further.
21. The Visy application makes two materially different claims regarding what the ADC should consider constitute like goods. The Visy submission makes still more, again materially different, claims regarding what the ADC should treat as like goods.
22. GPI considers that Visy has provided a wholly unsatisfactory basis on which the ADC should conduct its investigation. GPI queries whether the ADC may even legally proceed in circumstances where Visy has now so substantially altered the (already unclear) position it put to the ADC in its application. In any event, Visy's equivocations and changing positions on what constitutes like goods has arguably deprived GPI of a fair opportunity to respond to Visy's allegations. It is open to Visy at any time to withdraw its application under s 269TB(3) and reconsider its position; GPI submits that the ADC should urge Visy to do so.

a. Visy's position 1 on like goods – microflute of any thickness

23. Visy's application claimed that microflute was a like good; Visy did not specify a thickness for microflute and neither did Visy state that a narrower specification only such as N flute determined like goods.
24. Rather Visy stated what it considered like goods as: "... a form of fibre packaging for beverage packaging known as Microflute ('**Like Goods**')" (bold definition in original).⁴⁵ That statement defining the like goods was not qualified by reference to any thickness (or specification that would determine a thickness).
25. Visy's application appeared to accept that microflute could be greater than 1mm in thickness when it described the microflute of 1mm or less that was designed for a particular end use, ie an unspecified number of beverage cans:

Microflute of 1mm or less in thickness is designed for use to package larger multipack beverage can containers holding 12 or more beverage can containers. Visy Glama typically would manufacture microflute packaging to packages between [deleted text - number] cans.

26. The term microflute is used elsewhere in the application extensively and without qualification. On that basis GPI was fully justified in referring in its first submission to an independent industry description of microflute as including E flute.⁴⁶ Clearly, for

⁴⁵ The application at page 11.

⁴⁶ Hye Jung Youn, Hyun Seung Kwon and Hak Lae Lee, *Evaluation Methods for Flat Crush Resistance of Corrugated Fiberboard with Microflutes*, in J. of Korea TAPPI 41(5) 2009 at page 8.

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the reasons stated in GPI's first submission, the term microflute, used in an accepted industry meaning, highlighted fatal problems with Visy's submission.

27. GPI submits that microflute of any thickness is not a like good to kraft paperboard and refers to the evidence provided in its submissions and in the expert evidence provided to the ADC in the Klass Report.

b. Visy's position 2 on like goods – finished beverage can multipacks

28. Form B108 at A-3.9 asked Visy to provide details of Australian producers that produced the product that Visy claimed to be a like good. Visy's response to the question was (emphasis added):⁴⁷

Visy Glama is the sole manufacturer of like products. There are no other Australian manufacturers of *finished beverage can multipacks*.

29. Indeed, Visy's overriding fixation with one of the end uses of microflute (ie finished beverage can multipacks) is clear throughout its application; this includes for the important considerations of physical and commercial likeness at A-3.4 in Visy's application.⁴⁸

30. GPI's first submission pointed out that the goods under consideration are not any sort of beverage packaging and so the industry that produced beverage packages are not the industry that produces like goods.⁴⁹ If Visy's response to question A-3-9 of Form B108 is correct then GPI, WestRock and others must also form part of the Australian industry.⁵⁰ GPI's first submission proceeded on the generous basis that Visy had misstated the Australian producers of claimed like goods.⁵¹ However, the Visy submission confirms and stands by Visy's answer to A-3-9;⁵² accordingly it is Visy's confirmed position that the Australian industry producing like goods are Australian manufacturers of finished beverage can multipacks.

31. Visy's position that the comparison should be between finished beverage can multipacks is confirmed by attachment VG-4 to the Visy submission. The Visy submission states that VG-4 is "a photograph providing an *accurate visual comparison between kraft paperboard and microflute*" (emphasis added).⁵³ The photograph at VG-4 shows two finished beverage can multipacks. That is simply wrong, rather an accurate visual image of the goods under consideration is not an

⁴⁷ The application at A-3.9, page 14.

⁴⁸ The application at A-3.4, page 12.

⁴⁹ GPI's first submission at [30].

⁵⁰ GPI's first submission at footnote 30.

⁵¹ GPI's first submission at [31].

⁵² Visy submission at pages 8 and 9.

⁵³ Visy submission at page 8.

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image of a finished beverage can multipack but is large rolls of flat unprinted kraft paperboard as shown at Figure 1.

32. GPI submits, at risk of stating the obvious, that finished beverage can multipacks are not like goods to kraft paperboard. If, as Visy stated in its application and confirmed in its submission, the Australian industry producing like goods are Australian manufacturers of finished beverage can multipacks then GPI and WestRock must form part of that industry. GPI does not export finished beverage can multipacks to Australia.

c. Visy's position 3 on like goods – Visy's niche microflute of 0.7mm

33. Following GPI's critique of Visy's likeness claims in Visy's application, the Visy submission (provided more than 3 months after its application) stated that Visy was rather seeking protection "for its niche microflute business, being a 0.7mm thick premium quality paper based product (also known as 'N' flute)".⁵⁴

34. The most charitable description of Visy's statement is that it is wholly unclear; footnote 10 of the Visy submission indicates that its measurements are of *the fluting layer only*⁵⁵ and caliper measurements by GPI⁵⁶ and in expert evidence provided to the ADC in the Klass Report show that the thickness of Visy's microflute is 0.85mm.⁵⁷ GPI submits that Visy's statement is better described as sophistry intended to narrow the (substantial) difference in thickness between kraft paperboard and Visy's microflute.

35. GPI submits that microflute with a fluting layer of 0.7mm is not a like good to kraft paperboard and refers to the evidence provided in its submissions and in the expert evidence provided to the ADC in the Klass Reports.

d. Visy's position 4 on like goods – microflute excluding E flute

36. The Visy submission takes issue with GPI including E flute in GPI's assessment of Visy's like goods claims in GPI's first submission (notwithstanding that GPI included E flute based on industry sources⁵⁸ and Visy's application stated that microflute, without qualification, was a like good).⁵⁹

⁵⁴ Visy submission at pages 1 to 2.

⁵⁵ Visy submission at footnote 10.

⁵⁶ GPI's first submission at [17].

⁵⁷ Klass Report at page 10.

⁵⁸ See GPI's first submission at footnote 31.

⁵⁹ See this submission above, section 2.a *Visy's position 1 on like goods – microflute of any thickness*.

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37. Excluding E flute from microflute is at least an arguable proposition⁶⁰ although it was not one put by Visy in its application. But there are problems with Visy's position on E flute: firstly, Visy's submission makes demonstrably wrong statements about microflute and E flute for the reasons set out in section 4; secondly, it is clear from expert evidence provided to the ADC in the Class Reports that microflute even *excluding E flute* is not a like good to kraft paperboard.
38. The Visy submission made protestations that expert evidence provided in the Class Report included E flute in microflute when it concluded that microflute and kraft paperboard are not like goods.⁶¹ Those protestations are simply incorrect; as stated in the Supplementary Class Report the expert's view that microflute and kraft paperboard are not like goods did *not* include E flute in the definition of microflute.
39. Accordingly, GPI submits that microflute even *excluding E flute* is not a like good to Kraft paperboard.
- e. Visy's position 5 on like goods – N flute with a flute layer caliper of 0.9mm or less
40. Curiously, even within the same submission Visy vacillates regarding the caliper of microflute that Visy is asking the ADC to accept as like goods. The Visy submission states:⁶²
- Microflute is a class of fluted products generally known as "N flute". It is a narrow caliper product with a thickness of 0.9 mm or less (typically 0.5-0.8mm).
41. Within the course of 3 pages in the Visy submission the like goods have inexplicably expanded over 25 per cent from 0.7mm to 0.9mm. Furthermore, the footnote to this passage of the Visy submission states that this measurement refers *only to the height of the fluting layer*.⁶³ That would indicate that the *actual* thickness of microflute claimed in this part of the Visy submission would be up to 1.1mm in thickness.⁶⁴
42. For the reasons stated in expert evidence provided to the ADC in the Class Reports GPI submits that N flute with a flute layer caliper of 0.9mm is not a like good to kraft paperboard.

⁶⁰ See Supplementary Class Report at page 3.

⁶¹ Visy submission at section 4.

⁶² Visy submission at page 4.

⁶³ Visy submission at footnote 10.

⁶⁴ See Supplementary Class Report at pages 7 to 8 showing that the top and bottom layers in Visy's microflute contribute approximately 20 per cent to the thickness (ie Visy's microflute with thickness 0.85mm has a flute layer of 0.7mm).

3. Visy wrongly states the effect of the Ministerial Direction

43. GPI submits that Visy wrongly states the effect of the Ministerial Direction.

44. The Visy submission opines that the Ministerial Direction merely “provides the Commission with additional guidance”⁶⁵ on the question of injury and that it is only “designed to clarify certain aspects of s269TAE”.⁶⁶ That wrongly states the effect of the Ministerial Direction.

45. The Ministerial Direction takes its operative force from s 269TA(1) of the *Customs Act 1901* (the Act), that provision states (emphasis added):

The Minister may, by legislative instrument, give to the Commissioner such directions in connection with carrying out or giving effect to the Commissioner’s powers and duties under this Part as the Minister thinks fit, and *the Commissioner shall comply with any directions so given.*

46. A direction given under s 269TA is exactly that, a direction; and the ADC must comply with the direction. It is not a suggestion as Visy appears to argue by saying it is merely guidance and clarification.

47. Visy argues that the Ministerial Direction is not designed to supplant the operation of s 269TAE, in particular s 269TAE(1)(g).⁶⁷ However, the matters in s 269TAE(1) (including by reference the economic factors in s 269TAE(3)) are matters to which the ADC “*may ... have regard*” (chapeau of s 269TAE(1)); the term “*may*” denotes a discretion. Those matters are non-mandatory considerations in assessing injury. In contrast the Ministerial Direction is a direction that the ADC “*shall comply with*” (s 269TA(1)); there is no discretion for the ADC to do otherwise.

48. GPI’s first submission observed that the injury claimed by Visy is no greater than that likely to occur in the normal ebb and flow of business.⁶⁸ GPI noted that losing or gaining a contract with a large beverage supplier in Australia is exactly what would be expected in the normal ebb and flow of business in the beverage packaging industry.⁶⁹ Visy appears to agree with that when it states that the “nature of the beverage packaging industry is such that the supply arrangements involve long term

⁶⁵ Visy submission at page 2.

⁶⁶ Visy submission at page 2.

⁶⁷ Visy submission at page 2.

⁶⁸ GPI’s first submission at section 1; GPI also observes that Visy took the same contract from Riverwood International (as GPI was then called) in around 2005, further proof that the customer changing supplier over time is part of the normal ebb and flow of business in the packaging market.

⁶⁹ GPI’s first submission at [4].

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single customer contracts (often at least 5 years) for the supply of very large quantities of packaging”.⁷⁰

49. The Ministerial Direction states that injury claimed by an applicant “must ... be greater than that likely to occur in the normal ebb and flow of business”.⁷¹ The injury claimed by Visy is exactly that which is likely to occur in the normal ebb and flow of business in the beverage packaging industry.
50. The Ministerial Direction also states that “identification of injury must be based on facts and not on assertions unsupported by facts”.⁷² The Visy submission ignores this direction when it asserts, without reference to any supporting facts, that (as well as the single contract it lost) it is “also concerned with the injurious effects of losing future supply opportunities”.⁷³ That “concern” is entirely unsupported by facts.
51. Accordingly, GPI again submits that the investigation should be terminated at the earliest possible juncture because the injury claimed is not greater than that likely to occur in the normal ebb and flow of business.⁷⁴

⁷⁰ Visy submission at page 3, second dot point.

⁷¹ Ministerial Direction at page 1.

⁷² Ministerial Direction at page 1.

⁷³ Visy submission at page 3, fourth bullet point.

⁷⁴ GPI’s first submission at [6].

4. Visy makes demonstrably wrong statements about microflute and E flute

52. GPI submits that Visy makes demonstrably wrong statements about microflute and E flute corrugated board.

53. In particular, as demonstrated in the sections below:

- a. Visy wrongly states that Figure 1 in GPI's first submission is E flute (see section 4.a below);
- b. Visy wrongly states that flutes in its microflute are microscopic and there are no visible undulations (see section 4.b below);
- c. Visy wrongly states that E flute is not used for beverage packaging (see section 4.c below); and
- d. Visy wrongly states that the food trays in Figure 4 in GPI's first submission are both E flute, Hungry Jack's food trays are N flute (see section 4.d below).

a. Visy wrongly states that Figure 1 in GPI's first submission is E flute

54. Visy's statements regarding Figure 1 of GPI's first submission are demonstrably incorrect and raise more questions than they answer.

55. The Visy submission states that the photograph at Figure 1 of GPI's first submission does not show microflute but rather E flute.⁷⁵ E flute is, according to Visy, significantly thicker, typically 1.5-1.8mm.⁷⁶ Visy claims that the Visy product shown in Figure 1 is not used for beverage can multipacks.⁷⁷ The Visy submission claims that the Visy product shown in Figure 1 is produced by a separate Visy company at separate manufacturing facilities; that separate company does not make microflute.⁷⁸ Visy's submission regarding Figure 1 of GPI's first submission states (footnotes omitted):⁷⁹

There are a number of instances in GPI's submission where it has misrepresented the likeness between Visy Glama's microflute product and certain kraft paperboard as defined by the GUC. In this regard, the ADC should be aware of the following matters:

⁷⁵ Visy submission at page 7, paragraph 1.

⁷⁶ Visy submission at page 2.

⁷⁷ Visy submission at pages 7-8.

⁷⁸ Visy submission at page 8.

⁷⁹ Visy submission at pages 7-8.

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1. The photograph on Figure 1 of GPI's submission purports to depict kraft paperboard and microflute. However, the product pictured on the right is in fact of E flute, it is not microflute. Contrary to what GPI says, it is not the product used for beverage can multi-packs. It is evident from the writing on that product that it is manufactured by Visy Board (which is a separate company, and has entirely separate manufacturing facilities and target markets to Visy Glama). Visy Board does not manufacture microflute.

56. These statements are demonstrably incorrect. Figure 1 from GPI's first submission (regarding which Visy makes the claims stated above) is reproduced below in Figure 2 of this submission. GPI's first submission observed that kraft paperboard and Visy microflute were not physically alike for reasons that included the visible corrugated layer in microflute and the fact that Visy microflute used for beverage packaging is 55 per cent thicker than kraft paperboard used for the same packaging.⁸⁰



Figure 2 - reproduction of Figure 1 from GPI's first submission "kraft paperboard and microflute"

57. The photograph below shows that the microflute in Figure 1 (which Visy claims is E flute and not microflute) has a thickness of 0.86mm. According to Visy the material in Figure 1 is E flute and therefore should be 1.5-1.8mm thick.⁸¹ Figure 3 clearly shows that Visy's claim (that the material in Figure 1 is E flute) is wrong.

⁸⁰ GPI's first submission at [17].

⁸¹ Visy submission at page 2.

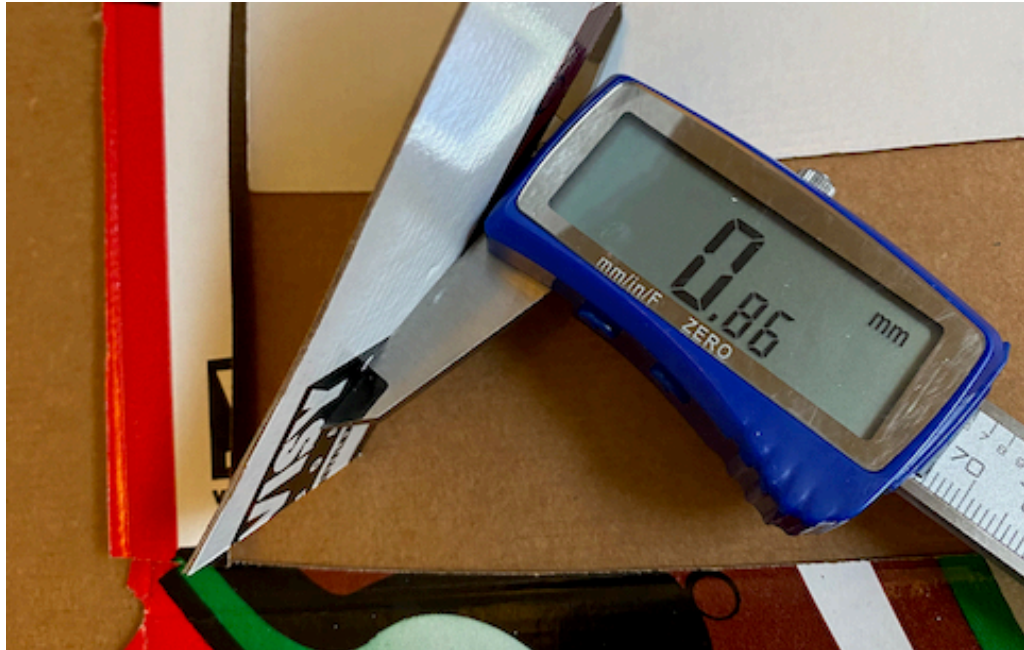


Figure 3 - thickness of microflute material in Figure 1 is 0.86mm

58. The photograph below shows the microflute in Figure 1 (which Visy claims is not microflute and not used for beverage multipacks) with the beverage packaging it was cut from.



Figure 4 – microflute from Figure 1 of GPI's first submission with the beverage packaging it was cut from

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59. According to the Visy submission the product shown in Figure 1 is not used for beverage can multipacks⁸² and is produced by a separate Visy company at separate manufacturing facilities that does not make microflute.⁸³ Figure 4 clearly shows that the material in Figure 1 comes from a beverage can multipack and that Visy is wrong when it states that it does not.
60. Figure 3 and Figure 4 also show that Visy's statement that the separate company, Visy Board, does not make microflute⁸⁴ appears to be wrong; Visy's statements, on which it based its application, that it is the sole manufacturer of like goods in Australia⁸⁵ would also be wrong on that basis. GPI would urge the ADC to: query Visy on the statements it has made regarding the Australian industry; and include manufacturing and sales by Visy Board in any assessment of injury.
- b. Visy wrongly states that flutes in its microflute are microscopic and there are no visible undulations
61. GPI submits that Visy is wrong when it states that the flutes in its microflute are microscopic and that there is no visible "washboard" effect in its microflute.
62. Visy claims that the fluting in its microflute is "microscopic"⁸⁶ and that there are no visible "washboard" undulations on its microflute.⁸⁷
63. Visy's claim that the fluting in Visy's microflute is microscopic is simply incorrect; the photograph of Visy's microflute in Figure 2 was taken with a normal mobile phone camera without the aid of a microscope or other lens.
64. Visy's claim that its microflute has no visible washboard undulations is demonstrably wrong. The photograph below in Figure 5 shows a section of the photograph shown in Figure 4; the horizontal undulations are clearly visible.

⁸² Visy submission at pages 7-8.

⁸³ Visy submission at page 8.

⁸⁴ Visy submission at page 8.

⁸⁵ The application at page 14 responding to question A-3.9.

⁸⁶ Visy submission at pages 6 and 8.

⁸⁷ Visy submission at page 8.



Figure 5 - Visy microflute showing "washboard" undulations

- c. Visy wrongly states that E flute is not used for beverage packaging
65. GPI submits that Visy is wrong in stating that E flute is not used in beverage can multipacks.
 66. The Visy submission claims that GPI seeks to create confusion and conjecture by aggregating Visy's microflute with thicker E flute cardboard.⁸⁸ Visy states that E flute cardboard has a wide variety of uses in food and industrial packaging but that E flute is "not used for beverage multi-pack packaging".⁸⁹ Visy states that "E Flute does not run through the can packing machinery due to its greater thickness and lesser flexibility".⁹⁰ GPI rather considers that any confusion arises from Visy's own flawed statements in its application and its submission; certainly Visy's statement that E flute is rarely if ever used in beverage can multipacks is demonstrably wrong.
 67. The following figure, Figure 6, shows cardboard packaging for 24 cans of beverage. The thickness of the cardboard is 1.77mm, putting it within the range that Visy says is E flute.⁹¹

⁸⁸ Visy submission at page 2.

⁸⁹ Visy submission at page 7; see also Visy submission at page 2 stating that E flute "is rarely, if ever, used in beverage can multipacks".

⁹⁰ Visy submission at page 7.

⁹¹ See Visy submission at page 2.



Figure 6 - Visy E flute beverage can multipack with thickness 1.77mm

68. GPI would make the following observations about the beverage packaging in Figure 6: it is E flute (according to Visy's own definition); it appears to have been produced recently (it shows a best before date of January 2021 and what appears to be a production date stamp of February 2020, "FEB 20"); the packaging is for one of Australia's most popular brands of beer;⁹² the packaging is produced by Visy.
69. On that basis Visy's statement that E flute is "not used for beverage multi-pack packaging"⁹³ is demonstrably wrong. If E flute is used as packaging for one of Australia's bestselling beers it cannot be said that it is not (or not even "rarely, if ever") used for beverage packaging as Visy claims. Furthermore, this fact must surely have been known to Visy as it (or a related company)⁹⁴ produced the packaging shown.
70. (A brief recent survey of a local liquor store by Kinsman Legal suggests that there are quite a number of other beverage brands that are packaged using E flute. Given Visy's substantial involvement in the Australian packaging industry it would be curious if Visy claimed to be unaware of these uses of E flute packaging.)

⁹² According to this website it is in the top ten bestselling brands of beer: <https://galaxytraining.com.au/Pages/10-best-selling-beers-in-australia/>.

⁹³ Visy submission at page 7.

⁹⁴ Visy and its related entities are privately held companies and therefore the relationships between Visy and its related entities are opaque.

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- d. Visy wrongly states that the food trays in Figure 4 in GPI's first submission are both E flute, Hungry Jack's food trays are N flute
71. Visy's statements regarding Figure 4 of GPI's first submission are demonstrably incorrect and raise more questions than they answer. Hungry Jack's food trays are microflute according to Visy's preferred definition.
72. Visy claims that the McDonald's and Hungry Jack's food trays shown in GPI's first submission "are manufactured using E flute and not microflute".⁹⁵ The Visy submission variously states the thickness of E flute as 1.5mm to 1.8mm,⁹⁶ 1.2mm to 1.8mm,⁹⁷ 1.5mm to 1.7mm in Australia⁹⁸ and having thickness no less than 1.6mm.⁹⁹
73. GPI has measured the thickness of the McDonald's and Hungry Jack's food trays shown in GPI's first submission. The figures below show that the McDonald's food tray is 1.5mm thick (Figure 7), that would come within the definition of E flute. But the Hungry Jack's food tray is 1.1mm thick (Figure 8), that comes within Visy's preferred definition of microflute.¹⁰⁰
74. It seems likely that the contract for Hungry Jack's N flute microflute food trays in Australia would be substantial.¹⁰¹ However, what is more troubling for Visy's foundational claims regarding like goods is that there is no clear dividing line between different thicknesses of corrugated cardboard (be they N flute or E flute) and different end uses (be they E flute and N flute food trays as discussed here or E flute and N flute beverage multipacks as discussed in this submission at section 4.c above); E flute and N flute corrugated board are demonstrably substitutable for at least two end uses. That is highly problematic for Visy's like goods claims, which claims are primarily based on end use as beverage can multipacks only.¹⁰² Again, it appears that Visy's injury claims are substantially inflated because Visy conveniently ignores other product groups that use its corrugated boards.

⁹⁵ Visy submission at page 5.

⁹⁶ Visy submission at page 2.

⁹⁷ Visy submission at page 7.

⁹⁸ Visy submission at page 7.

⁹⁹ Visy submission at page 5.

¹⁰⁰ Visy takes a number of different positions on how microflute should be defined (see section 2 of this submission) however the Visy submission at page 4 states that N flute microflute is up to 0.9mm measured at the flute layer. Microflute with a flute layer of 0.9mm would have an overall thickness of 1.1mm, see paragraph 41 of this submission.

¹⁰¹ Footnote 13 and the associated text of the Visy submission is redacted however it seems clear from the context that these are substantial contracts.

¹⁰² See GPI's first submission at section 2.c and the application at sections A-3-4 a), A-3-4 b) and A-3-9.

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Figure 7 - thickness of McDonald's food tray, 1.5mm

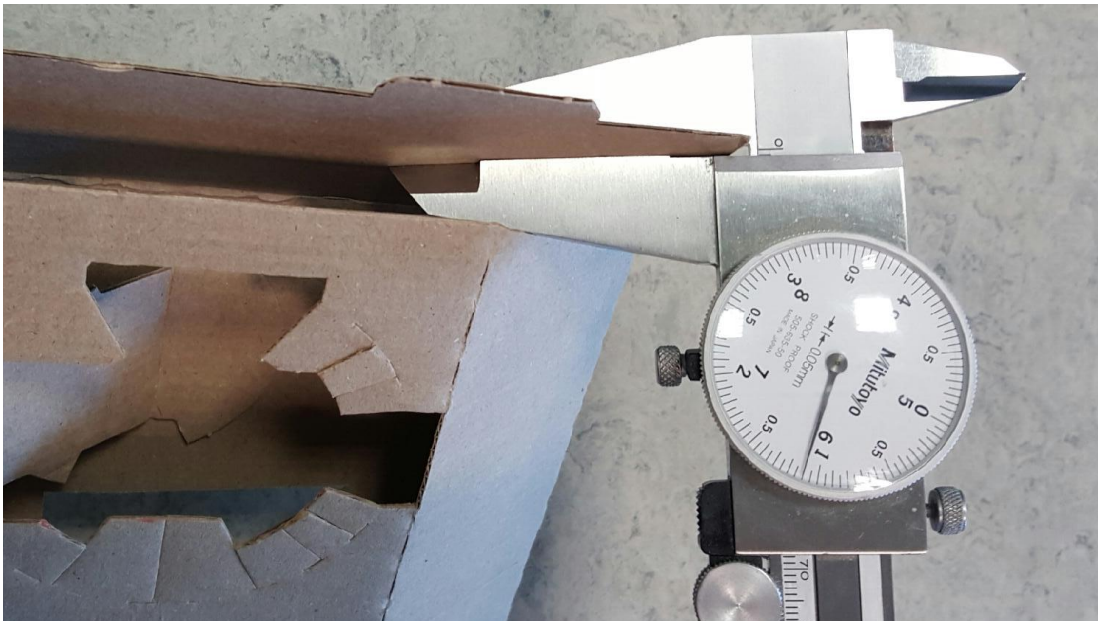


Figure 8 - thickness of Hungry Jack's food tray, 1.1mm

5. Microflute is a paper based product, that does not assist Visy

75. GPI submits that although microflute is a paper based product, that does not assist Visy in its like goods claim.

76. Visy seizes upon the statement in the Klass Report that kraft paperboard and microflute are both paper based products.¹⁰³ However GPI considers that being a paper based product does not make microflute a like good to kraft paperboard.

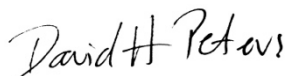
77. GPI notes what would also be called paper based products described in the Smook Book as products of converting processes. These paper based products include paper bags, envelopes, writing tablets and paper towels.¹⁰⁴ It cannot be said that these paper based products are like goods to kraft paperboard.

6. Final remarks

78. GPI repeats its submission that microflute is demonstrably not a like good to kraft paperboard. If the Commissioner is satisfied that the injury caused to an Australian industry is negligible, as he must be if there is no Australian industry producing like goods, then the Commissioner must terminate the investigation under s 269TDA(13). There is no requirement in the legislation for the Commissioner to delay a termination until after the SEF (as is often done);¹⁰⁵ it would be entirely reasonable for the Commissioner to terminate sooner if the facts informing the Commissioner's satisfaction have been established on the balance of probabilities (as GPI submits they have been).

79. GPI is grateful for the opportunity to make this further submission on the investigation. Please let me know if you need any further information or elaboration to the information provided in this submission or in GPI's first submission.

Sincerely



David Peters
Principal Lawyer
Kinsman Legal

¹⁰³ See Visy submission at page 10 referring to a statement at page 2 of the Klass Report. Visy also appears to base one of its varying positions on what constitutes the like goods on this statement – see section 2.c, *Visy's position 3 on like goods – Visy's niche microflute of 0.7mm*.

¹⁰⁴ Smook Book, 4th edition at page 358.

¹⁰⁵ Indeed, unreasonably delaying a termination may be a breach of the duty to decide or act (ADJR Act at s 7, *Judicial Review of Administrative Action and Government Liability*, Aronson et al at [6.320]).