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Anti-Dumping Commission
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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 27 October 2020 (Visy's third submission) and the Statement of Arthur Mitropoulos accompanying Visy's third submission (Mitropoulos statement). GPI also refers to the **[confidential end use information responding to Visy's claims of like goods** [REDACTED]

GPI also refers to the expert evidence provided to the ADC in the report by Charles P Klass on 4 June 2020 and in the supplementary report by Charles P Klass on 26 July 2020.¹

GPI makes the following submissions regarding Visy's submission, the Mitropoulos statement and generally in respect of the investigation:

1. Visy's submission on the issues paper is over a month late and does not address the questions posed by the ADC in the issues paper (see section 1 below).
2. The Mitropoulos statement is not expert evidence for the like goods issue (see section 2 below).
3. The Mitropoulos statement is outdated and unreliable evidence for the matters it

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.



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addresses (see section 3 below).

4. The Mitropoulos statement asks (and answers) the wrong question (see section 4 below).
5. If anything, the Mitropoulos statement supports GPI's position on like goods (see section 5 below).
6. **[confidential end use information responding to Visy's claims of like goods**

[REDACTED]

] (see section 6 below).



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Submission on behalf of Graphic Packaging International

1. Visy's third submission is over a month late and does not address the questions posed by the ADC in the issues paper
 1. GPI observes that Visy's third submission was provided more than a month after the date by which the ADC had requested submissions to its issues paper. In addition, Visy's submission does not address the questions to which the ADC sought answers.
 2. In its submission of 23 October 2020 GPI reasoned that Visy's failure to respond to the ADC's issues paper more than a month after submissions were due showed that Visy had, in substance, abandoned its position on the like goods issue.
 3. The ADC called for submissions by 21 September 2020 and Visy only provided its third submission on 27 October 2020.
 4. The ADC rightly considered that Visy had a case to answer on the like goods issue and published its issues paper accordingly.² The ADC's issues paper set out a number of questions that it sought answers to; those questions formed the basis of the case that Visy had to answer regarding the like goods issue. GPI's submission dated 21 September 2020 was careful to expressly address the questions asked by the ADC's issues paper.³
 5. Visy's third submission refers to the ADC's issues paper and criticises the responses of other interested parties to the ADC's issues paper but Visy's third submission *does not address the questions raised by the ADC in its issues paper*.
 6. GPI submits that Visy's conduct in responding to the ADC on this crucial issue (its extreme tardiness and its failure to address the matters raised by the ADC), shows nothing less than contempt for the ADC and its processes. GPI submits that it would bring the ADC into disrepute if the ADC were to overlook Visy's contemptuous conduct in the investigation. In addition, it would be highly unfair to interested parties, such as GPI, who respect the task that the ADC is bound to undertake and who work hard to provide the ADC with the information it requires to complete that task in a timely manner.

² GPI submission of 23 October 2020 at [3].

³ GPI submission of 21 September 2020 at section 7.

2. The Mitropoulos statement is not expert evidence for the like goods issue
7. GPI submits that the Mitropoulos statement is not expert evidence for the like goods issue.

A brief primer on expert evidence

8. The ADC is not bound by formal rules of evidence. However, the formal rules of evidence in Australian courts have accreted over time to best reveal the truth of a matter; accordingly, the ADC would be well advised to base its findings and decisions on the sensible principles behind those formal rules. Relevant to the current investigation is the so-called "opinion rule" of formal evidence. The opinion rule provides that an opinion generally cannot be used to prove a fact that the opinion attests to (*Evidence Act 1995, s76*). That is also a sensible approach for the ADC to take, generally the ADC should base its decisions on factual evidence rather than on someone's opinion.
9. Opinion can be distinguished from evidence of a "fact". Where a person simply states something that he or she observed, that will not be opinion evidence (see the following cases for example: *Bodney v Bennell* (2008) 167 FCR 84; *Australian Securities and Investments Commission v Vines* [2003] NSWSC 1095; *Hodgson v Amcor Ltd* [2011] VSC 272).
10. There is a sensible exception to the opinion rule. Opinion evidence is permitted if it is wholly or substantially based on "specialised knowledge" that the person making the statement has obtained from "training, study or experience" (*Evidence Act 1995, s79*). Such opinions are commonly referred to as "expert evidence". Again, it would be a sensible approach for the ADC to accept opinion evidence of a matter only where the person providing the statement has demonstrated that he or she has specialised knowledge of the matter that he or she has obtained from training, study or experience.
11. The Australian courts also recognise that someone hired by a party as an expert can become an *advocate* for that party. The ADC should also recognise that an expert can slip into the role of advocate. The Australian Federal court requires those who give expert evidence to read and comply with the *Harmonised Expert Witness Code of Conduct* (Expert Witness Code) in the *Federal Court's Expert Evidence Practice Note*. A key requirement is that the expert witness must not be an advocate for a party and has "a paramount duty", overriding any duty to a person retaining the expert witness, to assist "*impartially* on matters relevant to the area of expertise of the witness" (Expert Witness Code at [2], emphasis added).

The Mitropoulos statement is not expert evidence for the like goods issue

12. It is clear from the Mitropoulos statement that Mr Mitropoulos is not an expert for the like goods issue because he does not have specialised knowledge of paperboard, cardboard and packaging that would allow him to provide a reliable opinion on whether microflute is a like good to kraft paperboard.
13. Mr Mitropoulos states his experience at the start of his statement and in Appendix A of his statement. With respect, it appears on that basis that Mr Mitropoulos may know something about supply chains, procurement, fast moving consumer goods and business management. Clearly however he does not have specialised knowledge of paperboard, cardboard and packaging such that he could reliably address the question of whether microflute and kraft paperboard are like goods in terms of physical likeness, commercial likeness, functional likeness or production likeness.
14. In addition, at no point in his statement does Mr Mitropoulos state that he has read and that his statement complies with, the Expert Witness Code (or any comparable statement of commitment to impartiality). On that basis it not at all clear how Mr Mitropoulos sees his role, whether as advocate for Visy or by impartially assisting on matters relevant to his expertise; the answer to that cannot simply be assumed (just as it is not assumed in the Australian courts). In all fairness to Mr Mitropoulos, it seems likely that he was simply not retained by Visy on the basis that he should sign up to the Expert Witness Code (or similar statement of impartiality).
15. On that basis, to the extent that the Mitropoulos statement expresses any opinion on whether microflute and kraft paperboard are like goods, that opinion is opinion only and cannot be regarded as expert evidence.⁴

⁴ The same cannot be said of the evidence given by Charles Klass in this investigation. Mr Klass has very substantial specialised knowledge in the relevant areas of paperboard, cardboard and packaging and was expressly retained on the basis that he read and comply with the Expert Witness Code (see section 2 of GPI's submission of 21 September 2020 and the first Klass report at pages 2-3).

3. The Mitropoulos statement is outdated and unreliable evidence for the matters it addresses
16. GPI submits that the Mitropoulos statement is outdated and unreliable evidence for the matters it addresses.
17. Much of the Mitropoulos statement concerns Mr Mitropoulos's recollection of Schweppes' switch from using GPI kraft to Visy microflute in 2004 and the work at Schweppes in the "12 months or so" before the switch.⁵ It appears that Mr Mitropoulos was employed by Schweppes in 2004⁶ and that he is not currently employed by Schweppes.⁷
18. With all respect to Mr Mitropoulos, the primary matters to which his statement refers took place more than 16 years ago. There is an inherent unreliability in recollections of factual matters recalled after that period, but the problems are apparent even on the face of the Mitropoulos statement. For example, the Mitropoulos statement states at page 2 (emphasis added):

I *believe* that the initial switch from GPI paperboard to Visy microflute occurred in 2004, but the internal work on this switch *would have been undertaken* for 12 months or so beforehand, to confirm product suitability and ensure success of the transition once the decision was made to switch.
19. Mr Mitropoulos makes similar statements about other factual matters.⁸ These statements are made on the basis of Mr Mitropoulos's *belief* rather than his knowledge; apparently Mr Mitropoulos does not recall those key factual matters.⁹ It must also be the case that Mr Mitropoulos does not have access to any

⁵ Mitropoulos statement under the headings "Schweppes initial switch from GPI kraft paperboard to Visy microflute" at page 2 and "Production process and constitutional differences" at page 3. That the Mitropoulos statement is primarily concerned with recollections of factual matters only confirms that the evidence is not by nature expert opinion evidence, see paragraph 9 of this submission for a brief description of the distinction between factual and opinion evidence.

⁶ Mitropoulos statement at page 1.

⁷ Mitropoulos statement at Appendix A.

⁸ See for example page 4 of the Mitropoulos statement, "I believe that there were no other material changes required to the rest of the beverage production line, to switch between the two options".

⁹ Putting aside other reasons why Mr Mitropoulos would rely on belief rather than on his own knowledge.

contemporaneous Schweppes materials to aid his memory as he is no longer employed by Schweppes.¹⁰

20. Even assuming, despite clear indications to the contrary in his statement, that Mr Mitropoulos has perfect recall of the matters at Schweppes in and before 2004, no allowance is given for the possibility that those matters would still pertain for Schweppes in 2020 or would pertain at any time with an end user of kraft paperboard other than Schweppes. On that basis, there would be few, if any, broader learnings that can be reliably drawn from the Mitropoulos statement and applied in the current investigation. More relevant and more current evidence is **[confidential end use information responding to Visy's claims of like goods**

[REDACTED]

¹⁰ Mr Mitropoulos expressly qualifies his recollections in places as being “from memory”, see for example page 1 of the Mitropoulos statement.

The redacted parts of the Mitropoulos statement on pages 1 and 2 raise another question: to whom is confidentiality in the redacted parts owed? On its face it appears that Mr Mitropoulos, no longer an employee of Schweppes, is disclosing Schweppes’ confidential information to the ADC and to Visy. Perhaps this is ultimately a matter for Mr Mitropoulos, Schweppes, Visy and the ADC however it would seem prudent for the ADC to assess whether it is in receipt of an unauthorised disclosure of Schweppes’ confidential information. Alternatively, if confidential information has been provided by Visy to Mr Mitropoulos then the ADC (and interested parties) should know what material Visy has provided to Mr Mitropoulos and the extent to which he has relied on that material in making his statement.

4. The Mitropoulos statement asks (and answers) the wrong question
 21. GPI submits that the Mitropoulos statement asks (and answers) the wrong question.
 22. The Mitropoulos statement does not expressly state the question on which Mr Mitropoulos was asked to opine.¹¹ However the title of the Mitropoulos statement poses a question “Are Microflute and Kraft Paperboard ‘Like Goods’ *when used in beverage can multi packs?*” (emphasis added). Similarly, the Mitropoulos statement states on its last page: “I believe that microflute and paperboard products are ‘like’ goods *for beverage can multi packs (12 can packs and above)*” (emphasis added).¹²
 23. Even putting aside for the moment the other issues with the Mitropoulos statement, the Mitropoulos statement discloses that Mr Mitropoulos was asked and answered the wrong question. The question of likeness does not concern likeness at the stage when goods are transformed into final products (in this case as beverage can multi packs of particular sizes). Rather the question of likeness concerns the goods as they cross the Australian docks – are the goods claimed to be like goods and manufactured by the claimed Australian industry alike to the goods at the time that they cross the Australian docks?
 24. This is the same error that is apparent in the application and in Visy’s subsequent submissions is apparent in the Mitropoulos statement. Visy has refused to recognise the goods as kraft paperboard as it crosses the Australian docks and address the like goods issue on that basis. The goods are large rolls of unprinted kraft paperboard, not beverage can multipacks as Visy insists on arguing – GPI has addressed this issue repeatedly in its submissions and in particular in section 4 of its 21 September 2020 submission.
 25. With all respect to Mr Mitropoulos, it appears that Visy put the wrong question to him. As a result, the Mitropoulos statement proceeded on that wrong basis.

¹¹ That lack of transparency is not a feature of the first Klass report which expressly sets out the question that Mr Klass was asked and that he answered (see the first Klass report at Appendix A).

¹² Mr Mitropoulos’ conclusion specifically regarding 12 can packs and above is a *non sequitur* in the sense that his conclusion does not logically follow from the reasoning in the body of the statement. Nothing is stated in the Mitropoulos statement that would lead to such a conclusion. If kraft paperboard and microflute are alike and substitutable as concluded by Mr Mitropoulos, it is not clear from the Mitropoulos statement why Schweppes did not choose to switch to microflute for its other beverage packs, such as 6 packs.

5. If anything, the Mitropoulos statement supports GPI's position on like goods
 26. GPI submits that, if anything, the Mitropoulos statement supports GPI's position on like goods.
 27. Putting aside the clear problems that the ADC has in relying on the Mitropoulos statement (set out in sections 2, 3 and 4 above) and taking the Mitropoulos statement at face value, it seems that Schweppes considered it necessary to undertake 12 months of internal work prior to switching from kraft paperboard to microflute. The Mitropoulos statement states that the 12 months of internal work at Schweppes was required prior to the switch "to confirm product suitability and ensure success of the transition".¹³ The review of the switch to microflute was evidently substantial, requiring senior management (Mr Mitropoulos in his role as Operations Director) "signing off at key stages of the [Strategic Sourcing Process]".¹⁴
 28. GPI would agree with this aspect of the Mitropoulos statement, that switching from kraft paperboard to microflute would have been a substantial operational matter for Schweppes. That fact contradicts Visy's claims that microflute is a like good to kraft paperboard. Switching to a like good, ie to a good with characteristics closely resembling those of kraft paperboard, would not have been a substantial operational matter for Schweppes. Mr Mitropoulos does not reconcile the fact that a large company such as Schweppes would undertake 12 months' work to assess changing suppliers when there was "no material difference between the two offerings" (as the Mitropoulos statement purports at page 3).
 29. Accordingly, if anything, the Mitropoulos statement supports GPI's position on like goods.

¹³ Mitropoulos statement at page 2.

¹⁴ Mitropoulos statement at page 2.

6. Confidential end use information responding to Visy's claims of like goods

Confidential information starts

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Submission on behalf of Graphic Packaging International

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

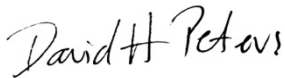
Confidential information ends

7. Final remarks

36. GPI once again repeats its submission that microflute is demonstrably not a like good to kraft paperboard. The reasons for and evidence supporting that submission can be found in this and in previous submissions provided by GPI.

37. 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 or GPI's other submissions.

Sincerely



David Peters
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