



David Peters
Kinsman Legal
54 Bunbury Street
Footscray, VIC 3011

24 February 2021

Anti-Dumping Commission
Level 6, 215 Spring Street
MELBOURNE VIC 3000

By email: Leisa.Baynham@adcommission.gov.au, Investigations3@adcommission.gov.au

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 made by Visy dated 19 February 2021 (the Visy submission).

GPI also refers to the report prepared for the ADC by Dr Nafty Vanderhoek of Expertsdirect (the Vanderhoek report) and the expert evidence provided to the ADC in the report by Charles P Klass on 4 June 2020, in the supplementary report by Mr Klass on 26 July 2020 and in the response by Mr Klass to the Vanderhoek report on 3 February 2021.¹

GPI makes the following submissions:

1. Visy failed to recognise the relevance of WTO jurisprudence regarding like goods (see section 1 below).
2. Visy is inviting the ADC to overlook a required statutory element of the test for actionable dumping (see section 2 below).
3. Visy now appears to accept or admit that microflute only has transient existence in an inline conversion from rolls of paper to beverage packaging (see section 3 below).
4. Klass observes that the Vanderhoek report “did not answer the question posed by

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 respectively as the Klass Report, the Supplementary Klass Report and the Responding Klass Report and together as the Klass Reports.



PUBLIC RECORD

Submission on behalf of Graphic Packaging International

the Australian Anti-Dumping Commission" (section 4 below).

5. Other matters in the Visy submission are addressed in section 5 below.



PUBLIC RECORD

Submission on behalf of Graphic Packaging International

Contents

1. Visy failed to recognise the relevance of WTO jurisprudence regarding like goods ...	4
2. Visy is inviting the ADC to overlook a required statutory element of the test for actionable dumping	6
3. Visy now appears to accept or admit that microflute only has transient existence in an inline conversion from rolls of paper to beverage packaging	7
4. Klass observes that the Vanderhoek report “did not answer the question posed by the Australian Anti- Dumping Commission”	8
5. Other matters.....	10

1. Visy failed to recognise the relevance of WTO jurisprudence regarding like goods

1. GPI submits that Visy has failed to recognise the relevance of WTO jurisprudence regarding like goods.
2. Visy argues that the WTO like goods case of *United States-Definition of Industry Concerning Wine and Grape Products* (US wine and grape case) is “hardly relevant or analogous”.²

This case is hardly relevant or analogous and does not aid the ADC in this investigation. The comparison between grapes to wine is hardly an apt comparison to microflute and kraft paperboard.

3. GPI considers that Visy entirely misses the relevance of this important case. The relevance is that the US had sought in an anti-dumping context to equate upstream and downstream products, ie grapes and wine, in a similar way to which Visy seeks to conflate the goods, kraft paperboard, with a specific downstream product, ie beverage packaging of a certain size and usage.
4. The US wine and grape case is international authority for the proposition that conflation of upstream and downstream goods is not permissible, and that the governing consideration is the difference in physical characteristics between goods. In the US wine and grape case, wine and grapes could not be lumped together when making a like goods assessment. Similarly, in the current investigation, the specific end use of beverage packaging is rather beside the point, the physical differences between the goods as they cross the docks and (to put Visy’s best foot forward)³ microflute govern the assessment.
5. Visy also objects to the use of the US wine and grape case because it predates the current WTO agreements.⁴ Apparently, it has escaped Visy’s attention that well decided cases remain relevant. The US wine and grape case is cited in the well-regarded *Journal of World Trade* some 70 years after the offending US legislation as a leading international authority for a like goods definition in anti-dumping cases that is “too broad”.⁵ That overly broad like goods definition sought to conflate upstream

² Visy submission at [4].

³ GPI has observed that Visy’s strongest case is that kraft paperboard as it crosses the docks and microflute are like goods (see for example GPI’s submission of 21 September 2020 at paragraph 53). Visy has strenuously refuted this approach, arguing instead for an assessment that includes a specific end use, ie beverage packaging of a specific size (see Visy’s first submission at section 3.7).

⁴ Visy submission at [4].

⁵ GPI submission of 2 February 2021 at paragraph 14 citing Marco Bronkers and Natalie McNelis, *Journal of World Trade* 33(3) 73-91, 1999, “Rethinking the ‘Like Product’ Definition in WTO Antidumping Law” at page 79.



PUBLIC RECORD

Submission on behalf of Graphic Packaging International

and downstream products in a manner analogous to Visy's attempt in its application and submissions to conflate kraft paperboard with a downstream product, namely beverage packaging of a certain size.

6. It may serve Visy's purposes for the ADC to ignore Australia's international obligations regarding how it assesses like goods however GPI submits that the better view is that the ADC should have regard to the US wine and grape case. On that basis the relevant comparison is between kraft paperboard as it crosses the Australian docks and microflute.

2. Visy is inviting the ADC to overlook a required statutory element of the test for actionable dumping
7. GPI submits that Visy is inviting the ADC to overlook a required statutory element of the test for actionable dumping.
8. Visy argues that GPI's statements and evidence regarding like goods "diverts attention away from the key issues", "distracts from [...] fundamental issues" and is "overly esoteric and technical".⁶ In doing so Visy invites the ADC to overlook inconvenient facts that point to the absence of an Australian industry producing like goods.
9. Visy's argument ignores the legal reality that there is no actionable dumping if there is not an Australian industry producing like goods. The existence of an Australian industry producing like goods is a required element of the legal test for actionable dumping and, despite all of Visy's urgings, the ADC is not at liberty to overlook that element of the legal test.
10. The legal test is contained at s 269TG of the Act and requires *inter alia* that "material injury to an Australian industry producing like goods has been or is being caused". Case law states that whether there is material injury to an Australian industry producing like goods is a "core aspect of the statutory task".⁷ The Minister must be positively satisfied of the matters in s 269TG, including that there is a Australian industry producing like goods; if the ADC has insufficient basis on which to recommend under s 269TEA that the Minister should be so satisfied then no such recommendation may be made (s 269TE(2)).
11. The evidence now before the ADC is more than ample to satisfy the Commissioner that there is no injury to an Australian industry that produces like goods; on that basis, s 269TDA (13) provides that the Commissioner must terminate the investigation.

⁶ Visy submission at paragraphs 2 and 3.

⁷ *GM Holden Ltd v Commr of the Anti-Dumping Commission* [2014] FCA 708 at paragraph 120.

Submission on behalf of Graphic Packaging International

3. Visy now appears to accept or admit that microflute only has transient existence in an inline conversion from rolls of paper to beverage packaging
12. GPI submits that Visy now appears to accept or admit that microflute only has transient existence in an inline conversion from rolls of paper to beverage packaging.
13. The Visy submission observed that GPI did not accept the conclusions of Dr Vanderhoek “except in very selective instances where GPI gleans that the reasoning or conclusions of Dr Vanderhoek support GPI's position regarding like goods”.⁸
14. Indeed, there was only *one* instance where GPI observed that Dr Vanderhoek supported GPI's position. In its submission of 2 February 2021 GPI observed that, if anything, Dr Vanderhoek supported observations by Charles Klass that Visy may produce microflute and packaging in line.⁹ On that basis, there were now two expert reports indicating that Visy's microflute and beverage packaging may be produced in line.¹⁰ GPI also observed that Visy has invested heavily in its beverage packaging.¹¹ All of that evidence tends to support the proposition that microflute does not exist as a distinct, separately identifiable product but that it only exists transiently within Visy's production line.
15. The Visy submission does not deny the proposition but only makes the carefully curated statement that GPI “gleans” that the Vanderhoek report supports GPI's position. Visy only refers to GPI's observation that Visy's production of microflute appears to be in line as an “overly technical” observation.¹² In the face of mounting evidence that Visy's microflute and beverage packaging are produced in line, Visy's statements of what GPI has “gleaned” and that observations regarding in line production are “overly technical” are tantamount to acceptance or admission of the fact.
16. GPI submits that, if there is no distinct or separately identifiable microflute product (other than something that exists transiently inside machinery), then Visy's already problematic like goods argument falls away in its entirety. In that case, there is arguably not even an Australian producing microflute (or at least not one that includes Visy).

⁸ Visy submission at paragraph 3.

⁹ GPI submission of 2 February 2021 at paragraph 47.

¹⁰ GPI submission of 2 February 2021 at paragraph 47.

¹¹ GPI submission of 2 February 2021 at paragraph 45.

¹² Visy submission at paragraph 9 referring to GPI's submission of 2 February 2021 at paragraph 47, which observe that the expert evidence before the ADC points to in line microflute production.

4. Klass observes that the Vanderhoek report “did not answer the question posed by the Australian Anti-Dumping Commission”
17. GPI notes Mr Klass’s observation that the Vanderhoek report “did not answer the question posed by the Australian Anti- Dumping Commission”.¹³
18. Visy appears to take heart that Mr Klass did not “raise [...] additional matters” in the Responding Klass Report.¹⁴
19. In reality, Mr Klass correctly declined to be drawn into matters addressed by conclusions in the Vanderhoek report that are, at best, peripheral to the key issue in this investigation. Indeed, Mr Klass’s comments, couched as they are in the most respectful of terms, are fatal to the approach taken by Vanderhoek. Of Vanderhoek’s conclusion stated in terms of 12+ can beverage pack, Mr Klass observed that that “is not my understanding of the issue at stake in this case”. At page 7 of the Responding Klass Report (emphasis added):

In summary, Dr. Vanderhoek did not answer the question posed by the Australian Anti- Dumping Commission as to whether kraft paperboard imported to Australia and Microflute are “like goods.”

The conclusion he provides is a much narrower conclusion about a particular end use of kraft paperboard and Microflute, i.e. 12+ can beverage carrier multipacks. *That is not my understanding of the issue at stake in this case.* If he did want to answer the question in terms of end use, he should have considered other end uses of kraft paperboard and Microflute.

I confirm and stand by my previous opinion that microflute and coated kraft paperboard are not like goods.

20. Crucially, after a fulsome and respectful consideration of the matters addressed in the Vanderhoek report,¹⁵ Mr Klass stood by his previous opinion that “microflute and coated kraft paperboard are not like goods”.¹⁶
21. Mr Klass also pointed out a fatal inconsistency in the Vanderhoek report even on its own terms, namely that if Dr Vanderhoek “did want to answer the question in terms of end use, he should have considered other end uses of kraft paperboard and

¹³ Responding Klass Report at page 7.

¹⁴ Visy submission at paragraph 10.

¹⁵ See the Responding Klass Report at pages 3 to 7.

¹⁶ Responding Klass Report at page 7.

Submission on behalf of Graphic Packaging International

Microflute”.¹⁷ As GPI has observed, the approach taken by Vanderhoek (to consider only a common end use) presupposes the outcome in favour of finding like goods.¹⁸

22. Visy takes issue with the fact that Mr Klass is US based.¹⁹ However, Mr Klass residing outside Australia, far from being an issue, provides additional confidence to the ADC of his independence;²⁰ in any event, Mr Klass’s experience and teaching has substantial international breadth.²¹
23. GPI would also observe that, drawing on his extensive and international knowledge of packaging, and having *physically examined* Visy microflute and kraft paperboard, Mr Klass concluded that microflute and kraft paperboard were not like goods and, for the reasons stated in his report, are indeed “very different products”.²² GPI submits that the physical characteristics of microflute and kraft paperboard are not affected by Mr Klass’s place of residence. For its part, Visy takes issue with Mr Klass’s examination and assessment of the most basic physical characteristics of kraft and microflute (ie weight and thickness) as “overly technical”.²³

¹⁷ Responding Klass Report at page 7.

¹⁸ GPI submission of 2 February 2021 at paragraphs 18 and 22.

¹⁹ Visy submission at paragraph 10.

²⁰ GPI submission of 2 February 2021 at section 4.a.

²¹ GPI submission of 2 February 2021 at section 4.a.

²² Klass Report at pages 5 to 14.

²³ Visy submission at paragraph 9 referring to GPI’s submission of 2 February 2021 at paragraph 42, which described Mr Klass’s assessment of differences in bulk for microflute and kraft paperboard according to *ISO 534:2011 Paper and board – Determination of thickness, density and specific volume*.

5. Other matters

24. **Most kraft paperboard imported to Australia is not used for 12+ beverage can multipacks:** Visy does not accept what it calls “bald assertions” that most kraft paperboard imported to Australia is not used for 12+ beverage can multipacks. Far from being bald assertions, these are facts with a luxuriant growth of evidence (verified or verifiable) that is highly inconvenient to Visy’s like good argument.²⁴ Visy’s claim that GPI’s statement in this respect is not limited to the goods under consideration is incorrect.²⁵
25. **Including material used in beverage packaging that is not microflute would further undermine Visy’s claims of what comprises the Australian industry:** Visy claims that GPI’s estimates of microflute production in Australia likely include products that are not microflute.²⁶ Visy’s claim is incorrect (notwithstanding Visy’s inability to state what comprises microflute).²⁷ But if Visy wants like goods to be based on an end use of beverage can packaging (notwithstanding “overly technical” physical differences in the material used for such packaging) then the Australian industry must include products other than microflute that are used for beverage can multipacks.²⁸ That would further undermine Visy’s claims of what comprises the Australian industry (and concomitantly the extent of any injury). Visy cannot have it both ways.
26. **Vanderhoek and Visy propose a radical change to the ADC’s conventional like goods assessment:** Visy argues that the end use like goods approach proposed by Dr Vanderhoek is not radical because that approach concurs with that advocated by Visy and Mr Mitropoulos.²⁹ With all respect, poor advice is not the better for being repeated. Visy calls in support of its radical position a citation in a previous ADC issues paper of *GM Holden Ltd v Commr of the Anti-Dumping Commission* [2014] FCA 708.³⁰ Far from supporting Visy, the decision of the Court in *GM Holden* is authority for the proposition that the focus in a like goods assessment is on “a comparison of

²⁴ GPI considers that these facts can be confirmed by verified or verifiable data held by the ADC, see GPI submission of 2 February 2021 at paragraph 30.

²⁵ Throughout all of GPI’s submissions a reference to kraft paperboard is a reference to the goods under consideration. Any reference to kraft paperboard that does not come within the goods description has been expressly stated as such by GPI in its submissions.

²⁶ Visy submission at paragraph 7.

²⁷ See GPI’s submission of 26 July 2020 at section 2.

²⁸ See for example the beverage can packaging shown and referred to in GPI’s submission of 26 July 2020 at section 4.c. It seems highly likely that there are substantial quantities of such non-microflute beverage packaging produced in Australia.

²⁹ Visy submission at paragraph 3.

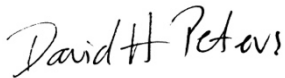
³⁰ Visy submission at paragraph 5.

Submission on behalf of Graphic Packaging International

the *physical* characteristics” (emphasis added) of the goods and claimed like goods;³¹ that was the approach taken by Mr Klass in the Klass Reports. GPI again submits that the ADC would be better advised to assess the wider implications of the approach advocated by Visy before deploying it in a live investigation.³²

27. 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.
28. 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
Principal Lawyer
Kinsman Legal

³¹ See *GM Holden Ltd v Commr of the Anti-Dumping Commission* [2014] FCA 708 at paragraph 124.

³² GPI submission of 2 February 2021 at section 2.