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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 statement of essential facts published in the investigation on 5 March 2021 (SEF).

GPI also refers to 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 a report by Dr Vanderhoek on 3 February 2021.¹

GPI makes the following submissions:

1. The termination decision presaged by the SEF is the correct decision and the only decision open to the Commissioner on the evidence (see section 1 below).
2. Mr Klass made no submissions during the investigation (see section 2 below).
3. Microflute and kraft paperboard are not commercially alike (see section 3 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 respectively as the Klass Report, the Supplementary Klass Report and the Responding Klass Report and together as the Klass Reports.



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1. The termination decision presaged by the SEF is the correct decision and the only decision open to the Commissioner on the evidence
 1. GPI submits that the termination decision presaged by the SEF is the correct decision and the only decision open to the Commissioner on the evidence. GPI considers that that evidence, detailed in GPI's submissions and expert evidence given to the ADC in the Klass Reports,² shows that microflute is not a like good to kraft paperboard. That evidence includes evidence showing that:
 - a. Kraft paperboard crosses the Australian docks as very *large rolls of unprinted, unconverted paperboard* whereas microflute (if it exists other than transiently in inline machinery)³ is *printed sheets* that result from conversion on a corrugator.⁴
 - b. Microflute has a distinctive visual surface appearance of parallel indentations with a "washboard" effect due to its corrugated middle layer.⁵ Kraft paperboard does not have the "washboard" effect (and no corrugated middle layer). Visy argued (against all evidence) that there was no such appearance⁶ however photographs,⁷ samples⁸ and the evidence of Mr Klass confirm the "washboard" effect.⁹ As Mr Klass observed, the "very different physical and other characteristics come from the very substantial production differences".¹⁰

² Section 2 of this submission makes submissions regarding how the ADC should treat the expert evidence provided in the Klass Reports.

³ SEF at page 25; GPI submission of 24 February 2021, section entitled *Visy now appears to accept or admit that microflute only has transient existence in an inline conversion from rolls of paper to beverage packaging*.

⁴ SEF at pages 11, 25; Klass Report at page 6 and following; *The Handbook for Pulp and Paper Technologists* 3ed (the Smook Book) at chapters 19 (paperboard) and 23 (paper end uses including converting) respectively; GPI submission of 21 September 2020, section entitled *The goods are large rolls of unprinted kraft paperboard, not beverage can multipacks as Visy argues, neither are they printed sheets of corrugated cardboard*.

⁵ SEF at pages 25 to 26.

⁶ Visy's submission of 18 June 2020 stated at page 8, "GPI asserts that the surface of microflute has distinctive parallel "washboard" undulations because of the underlying corrugate inner layers. This is incorrect. Microflute has no "washboard" undulations that are visible on the surface of the product."

⁷ See GPI submission of 13 May 2020 at Figure 1; photo at page 11 of the Klass Report.

⁸ Samples provided to the ADC on 14 August 2020; SEF at footnote 45.

⁹ Klass Report at page 10.

¹⁰ Klass Report at page 2, Mr Klass elaborated on this conclusion in the following terms (also on page 2): "Kraft paperboard is made on a paper machine. Microflute is not a product

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2. GPI observes that the SEF also found that kraft paperboard and microflute come under different tariff classifications.¹¹ That is strong and independent confirmation of what has been GPI's contention throughout the investigation, based on the World Customs Organization's internationally agreed "Harmonized System" of classifying goods. It provides a solid underpinning of the SEF's finding that microflute and kraft paperboard are not like goods.
3. From the start of the investigation GPI has been nothing if not long-suffering in contending and providing substantial evidence (including photographs, samples and expert opinion) showing that microflute is not a like good in terms of physical likeness, commercial likeness,¹² functional likeness or production likeness.¹³ This has been in the face of vacillating and demonstrably wrong assertions by Visy about the characteristics of microflute and other products in the market¹⁴ and its entrenched position that the Australian industry is one that produces beverage packaging of a certain size (rather than microflute).¹⁵
4. The SEF now confirms that there is simply "no evidence" that there is an Australian industry producing like goods.¹⁶ That finding is damning of Visy's application and its approach to the investigation more generally as well as vindication of GPI's early and ongoing calls for the investigation to be terminated.¹⁷ GPI again urges the ADC to promptly proceed to terminating the investigation and to drawing a firm line under the costly and distracting exercise that Visy has imposed on other parties (not to

made on a paper machine. Microflute is a converted product made by combining three layers of paperboard on a corrugator."

¹¹ SEF at pages 26 to 27.

¹² GPI observes that the SEF reached the provisional view that microflute and kraft paperboard are commercially alike. For the reasons set out in section 3, GPI submits that the ADC should revisit its provisional view of commercial likeness in the SEF.

¹³ GPI submission of 13 May 2020 at section 2.

¹⁴ See GPI submission of 21 September 2020 at section 6.

¹⁵ See GPI submission of 21 September 2020 at paragraph 50 referencing Visy's first submission at section 3.7; Visy's insistence that the Australian industry is one that produces beverage packaging rather than microflute has taken on greater significance in light of the emerging likelihood that microflute exists only transiently in Visy's inline beverage package production machinery, SEF at page 25 (in this respect see also GPI submission of 24 February 2021 at section entitled *Visy now appears to accept or admit that microflute only has transient existence in an inline conversion from rolls of paper to beverage packaging*).

¹⁶ SEF at pages 5, 35 and 37.

¹⁷ GPI submissions of: 13 May 2020 at paragraph 44; 26 July 2020 at page 2 and paragraph 78; 21 September 2020 at paragraph 110; 23 October 2020 at paragraphs 7 and 12; 2 February 2021 at paragraph 63; 24 February at paragraph 11.

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mention that the investigation will also have diverted scarce ADC resources away from cases with genuine merit).

5. As the ADC knows, the legal test that must be satisfied before imposing dumping duties (in s 269TG of the *Customs Act 1901* (Act)) 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”.¹⁸ In spite of arguments to the contrary by Visy,¹⁹ 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)). The SEF now confirms that there is no such basis on which to make such a recommendation.
6. The SEF also confirms that the evidence 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, as the SEF correctly observes,²⁰ s 269TDA (13) provides that “the Commissioner *must* terminate the investigation” (emphasis added). There is no discretion.

¹⁸ *GM Holden Ltd v Commr of the Anti-Dumping Commission* [2014] FCA 708 at paragraph 120.

¹⁹ GPI’s insistence that the statutory element of like goods must be satisfied is, in Visy’s view, “overtly [sic] esoteric and technical” (Visy submission of 19 February 2021 at paragraph 4 and following); Visy’s approach, where statutory requirements can in effect be overlooked or set aside “in light of [a] ... high dumping margin” (Visy submission of 19 February 2021 at paragraph 4), would lead the ADC into legal error.

²⁰ SEF at section 6.

2. Mr Klass made no submissions during the investigation
 7. GPI submits that Mr Klass made no submissions during the investigation.
 8. It seems clear that the ADC found the Klass Reports useful in reaching the views set out in the SEF however in some places the SEF refers to one or other of the Klass Reports as “submission”.²¹
 9. GPI strongly refutes that Mr Klass’s evidence is or could be construed as “submission”. Mr Klass was expressly and purposefully 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.²² That practice note required Mr Klass to not act as an advocate for GPI and his paramount duty, overriding any duty to GPI, was to assist in the matter impartially on matters relevant to his area of expertise.²³ Mr Klass was not asked to provide a submission and had no interest in doing so.
 10. No party suggested that Mr Klass did otherwise than as he was instructed and there is no finding in the SEF to that effect. Indeed, it’s clear from the tenor and content of his reports that Mr Klass undertook his task as instructed. For example, Mr Klass addressed the report prepared by Dr Vanderhoek (who was retained by the ADC on substantially similar terms) in measured, respectful terms and identifying areas where Mr Klass agreed and where he disagreed with Dr Vanderhoek.²⁴ Having examined Dr Vanderhoek’s report in a thorough and fairhanded manner, Mr Klass found nothing there to dissuade him of his opinion that microflute and kraft paperboard are not like goods.²⁵
 11. The ADC does itself a substantial disservice in describing as “submission” the contribution of an expert of Mr Klass’s demonstrable standing.²⁶ This is particularly so in circumstances where Mr Klass was instructed to proceed (and evidently did proceed) as an expert witness on the same terms as if he was providing evidence to

²¹ SEF at pages 14 and 15.

²² Klass Report at page 2.

²³ See Annexure A to the practice note at paragraph 2.

²⁴ See generally the Responding Klass Report.

²⁵ See the Responding Klass Report at pages 2 and 7.

²⁶ Mr Klass has almost 60 years working and teaching in the paper industry, for over 20 years has been Adjunct Professor of Paper Engineering, Chemical Engineering and Imaging at the Western Michigan University, 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* (the Smook Book). 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.

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the Federal Court of Australia. The Federal Court would not describe or treat the Klass Reports as “submission” and it is not clear on what basis the ADC might purport to do so.

12. GPI observes that Dr Vanderhoek was provided with an ADC document (undated) entitled “Guideline – Persons Giving Independent Expert Opinion” (ADC Expert Guideline). The ADC Expert Guideline appears to annex the same Federal Court’s Expert Evidence Practice Note (GPN-EXPT) that Mr Klass was instructed to (and did) adhere to.²⁷
13. The ADC Expert Guideline (which does not appear to have been previously published) broadly reflects what is contained in the GPN-EXPT and is stated to apply to “any independent expert opinion given to the Commission that has been obtained from a person because they have special knowledge or experience in a subject area”.²⁸ On its own terms, the ADC Expert Guideline would appear to apply to the Klass Reports (being independent expert opinion given to the Commission by GPI that was obtained from Mr Klass because he has special knowledge and experience in the subject area of paper and packaging). Compliance with the ADC Expert Guideline “may be relevant to determining the weight that will be given to opinion”.²⁹
14. In adhering to the GPN-EXPT, Mr Klass has in considerable substance complied with the ADC Expert Guideline.³⁰ On that basis there is nothing of substance in the ADC Expert Guideline that should relegate the Klass Reports to some lesser status (eg “submission”). (It would be a different matter if the ADC intended or considered that the effect of the ADC Expert Guideline was somehow to automatically impart greater weight to experts retained by the ADC than to experts retained by interested parties on substantially the same basis.)³¹

²⁷ The ADC Expert Guideline does not expressly refer to the Federal Court practice note.

²⁸ ADC Expert Guideline at paragraph 1.3.

²⁹ ADC Expert Guideline at paragraph 1.4.

³⁰ Noting that the ADC Expert Guideline does not appear to have been publicly available to parties prior to the ADC publishing Dr Vanderhoek’s report.

³¹ GPI submits that such an approach may be ruled unreasonable or irrational by the courts. The ADC Expert Guideline observes at paragraph 1.2 that the ADC is not bound by the rules of evidence, however the ADC must nonetheless proceed on the basis of evidence that is “rationally probative”, see Aronson et al, *Judicial Review of Administrative Action and Government Liability* 6ed at [8.360]. An approach to expert evidence that automatically relegates some (and not other) expert evidence to be something other than evidence would be an arbitrary prejudgment of its probative value and would effectively exclude certain evidence being put on by interested parties; that cuts across the very rationale for freeing decision makers from the rules of evidence in the first place, again see Aronson et al at [8.360]. GPI submits that the better approach would be for the ADC to eschew creating its

15. The Klass Reports would be accepted by the Australian Federal Court as expert evidence. It is not clear on what basis the ADC might treat them otherwise. The ADC's termination report is an opportunity for the ADC to correct the record in this regard.

own arbitrary rules of evidence and to rather give "proper, genuine and realistic consideration to the merits of the case" before it (see Aronson et al at section [5.150] citing *Khan v Minister for Immigration* (1987) 14 ALD 291 at 292), including to the merits of any properly prepared expert evidence provided by parties that bears on issues in the case.

3. Microflute and kraft paperboard are not commercially alike

16. GPI submits that microflute and kraft paperboard are not commercially alike.
17. The SEF's preliminary finding on the issue of commercial likeness is that the goods and claimed like goods are commercially alike.³² With respect, GPI submits that the SEF's assessment of commercial likeness has been drawn down the erroneous path urged on it by Visy in focussing on a single end use of the goods following printing and conversion.
18. GPI submits that as for the other considerations in assessing like goods (physical, functional and production likeness), the assessment of commercial likeness must rather be undertaken on the goods *as they cross the Australian docks* and not on some downstream product. There is nothing in the Act or elsewhere that provides for an assessment of likeness, including commercial likeness, on a product other than on the goods themselves as against goods claimed to be commercially alike.
19. The Manual sets out the ADC's published indicia for assessing whether goods are commercially alike:³³
- Are the goods directly competitive in the market? e.g. do the goods compete in the same market sector? Within a market sector, are the goods similarly positioned?
 - To what extent are participants in the supply chain willing to switch between sources of the goods and like goods? e.g. willingness of participants to switch between sources may suggest commercial interchangeability.
 - How does price competition influence consumption? e.g. close price competition may indicate product differentiation is not recognised by the market.
 - Are the distribution channels the same?
 - How similar is the packaging used? Does different packaging reveal significant differences in the goods, or highlight different market sectors?
20. The indicia for commercial likeness from the Manual are assessed in turn below, comparing the commercial aspects of kraft paperboard (as it crosses the Australian

³² SEF at page 34.

³³ Manual at section 2.3. The SEF frames the commercial likeness assessment in somewhat different terms, however as GPI has urged the ADC in previous submissions, the ADC should rather follow its publicly stated policy in the Manual; case law states that a decision maker who does not follow their own publicly stated policies may be subject to review on the basis of unreasonableness (see *Taveli v Minister for Immigration* [1989] FCA 175; 86 ALR 435 at paragraph 62) or irrationality (section [5.200] of *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves, Weeks).

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docks) with those of microflute. On that basis, the goods and claimed like goods are not commercially alike.

The goods are not directly competitive in any market

Relevant commercial likeness indicia:³⁴ *Are the goods directly competitive in the market? e.g. do the goods compete in the same market sector? Within a market sector, are the goods similarly positioned?*

21. As the SEF points out, kraft paperboard and microflute do not directly compete at all.³⁵ Rather, it is only (some) downstream products produced using kraft paperboard and microflute that compete. This simply cannot be described as direct competition.
22. Similarly, kraft paperboard and microflute do not compete in the same market sector. Some *downstream products produced using kraft paperboard and microflute* compete in the same market sector, but those products *are not the goods*. For the same reason, kraft paperboard and microflute are not similarly positioned within any market sector.
23. Even if downstream products are considered (remembering that these are *not the goods*) the SEF observes that “Australian converters of kraft paperboard, used in the production of small format beverage can packaging *do not compete in the same market with Visy*”.³⁶ As GPI has previously observed (and provided verifiable evidence in support of), the significant majority of kraft paperboard imported to Australia is not used for large format packaging³⁷ so, even looking at downstream products (which are not the goods), only a small proportion of those products compete with products produced from microflute.

Participants in the supply chain that use kraft paperboard and microflute would be unwilling (and unable) to switch between these

Relevant commercial likeness indicia:³⁸ *To what extent are participants in the supply chain willing to switch between sources of the goods and like goods? e.g. willingness*

³⁴ Manual at section 2.3.

³⁵ SEF at page 27 and following.

³⁶ SEF at page 28.

³⁷ See for example GPI’s submission of 21 September 2020 at section 1.b and GPI’s submission of 2 February 2021 at section 3.a.

³⁸ Manual at section 2.3.

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of participants to switch between sources may suggest commercial interchangeability.

24. Again, GPI submits that the proper analysis of commercial likeness is an assessment of commercial likeness as the goods cross the Australian docks. Any relevant potential switching is between the goods and claimed like goods, not between some downstream products.
25. Visy and GPI (and WestRock) are vertically integrated producers of packaging (*not* the goods nor the claimed like goods) and the intermediate products used to produce the packaging (the goods and claimed like goods). For Visy, the intermediate product is microflute (claimed like goods) and for GPI the intermediate product is kraft paperboard (the goods). Viewed in terms of the supply chain, both Visy and GPI self-supply the intermediate products to themselves for subsequent production of packaging ie they both participate at *two stages of the supply chain*.³⁹
26. The relevant questions then are 1) whether a user of kraft paperboard (not some other downstream product) would be willing to switch to microflute or 2) whether a user of microflute would be willing to switch to kraft paperboard.
 - a. The users of kraft paperboard in Australia are GPI and WestRock. At risk of stating the obvious, it is objectively extremely unlikely that either of these would switch from using kraft paperboard to microflute. This is because their business models are to produce kraft paperboard and downstream packaging. In any event it seems likely that WestRock or GPI would in any event be *unable* switch to microflute as Visy does not supply microflute as a separate product.
 - b. The user of microflute in Australia is Visy. Again, it is objectively extremely unlikely that Visy would switch from using microflute to kraft paperboard. Even if Visy wished to do so, it would be unable to switch to kraft paperboard because GPI and WestRock do not supply kraft paperboard as a separate product in Australia.
27. Again, even if downstream products are considered (remembering again that these are *not the goods*) then, as GPI has previously observed (and provided verifiable evidence in support of), the significant majority of kraft paperboard imported to

³⁹ Visy's primary error during the investigation into the like goods issue was, in essence, to ignore the distinction between production *of* the goods and production *with* the goods ie between the 2 different levels of the supply chain. For Visy, where production of microflute and packaging appears to be inline, that distinction may be blurred however that does not allow for a comparison against anything other than the goods as they cross the Australian docks.

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Australia is not used for large format packaging and is instead used for smaller format packaging.⁴⁰ Microflute is not suitable for smaller format packaging and so, for the significant majority of applications in downstream products, end users would be unwilling to switch between packaging produced using kraft paperboard and packaging produced using microflute. Commercial interchangeability is highly limited in end use.

There is no price competition between microflute and kraft paperboard

Relevant commercial likeness indicia:⁴¹ *How does price competition influence consumption? e.g. close price competition may indicate product differentiation is not recognised by the market.*

28. Again, GPI submits that the proper analysis of commercial likeness is an assessment of commercial likeness as the goods cross the Australian docks. Relevant price competition in a commercial likeness assessment is between the goods and claimed like goods, not between downstream products.
29. Suppliers of microflute and kraft paperboard are vertically integrated to produce downstream products, namely packaging (not the goods or the claimed like goods). None of these suppliers sell microflute or kraft paperboard other than as converted into those downstream products, so there is no price competition (or any other sort of competition) at the relevant point in the supply chain ie between microflute and kraft paperboard.
30. Again, even if downstream products are considered (noting that these are *not the goods*) then, as GPI has previously observed (and provided verifiable evidence in support of), the significant majority of kraft paperboard imported to Australia is used for smaller format packaging⁴² for which microflute is not suitable. So, for the significant majority of applications in downstream products, there would be no price competition between downstream products produced using microflute and products produced using kraft paperboard.
31. To the extent that price competition influences consumption at all, it can only be in a small segment of downstream use.⁴³ The differences between products made from microflute and products made from kraft paperboard go far beyond any product

⁴⁰ See for example GPI's submission of 21 September 2020 at section 1.b and GPI's submission of 2 February 2021 at section 3.a.

⁴¹ Manual at section 2.3.

⁴² See for example GPI's submission of 21 September 2020 at section 1.b and GPI's submission of 2 February 2021 at section 3.a.

⁴³ GPI has provided evidence showing that factors other than price have a substantial impact on competition.

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differentiation – microflute is simply unsuitable for use in the significant majority of products where kraft paperboard is used; that is clearly recognised by the market.

The distribution channels of microflute and kraft paperboard are not the same

Relevant commercial likeness indicia:⁴⁴ *Are the distribution channels the same?*

32. The relevant distribution channels are the distribution channels for microflute and kraft paperboard (not packaging). Each of the suppliers of kraft paperboard and the supplier of microflute *self-supply those products as vertically integrated operations*. Accordingly, the distribution channels for those products are wholly proprietary to each supplier and distinct from each other. There is no point in those proprietary distribution channels where there is any common warehousing, transport, storage, wholesaler or other distributor.
33. For microflute, which is produced and consumed inline or soon after production, none of those elements of a distribution channel exist. This is not the case for kraft paperboard, which requires warehousing, transport, storage and distribution to converting facilities (within proprietary distribution channels).

The packaging used for kraft paperboard is highly distinctive to the goods and microflute cannot be (and is not) packaged in the same way

Relevant commercial likeness indicia:⁴⁵ *How similar is the packaging used? Does different packaging reveal significant differences in the goods, or highlight different market sectors?*

34. The SEF found that kraft paperboard is transported and stored in large “jumbo” rolls.⁴⁶ This form of packaging for kraft paperboard is highly distinctive to the goods. Microflute is not and indeed *cannot* be packaged in this way.⁴⁷ Indeed, it appears that microflute uses no packaging at all as it is consumed inline or simply stored flat following production.⁴⁸
35. The SEF found that these differences in packaging revealed significant differences in the goods and claimed like goods in its assessment of physical likeness.⁴⁹ Those significant differences also bear on the question of commercial likeness.

⁴⁴ Manual at section 2.3.

⁴⁵ Manual at section 2.3.

⁴⁶ SEF at pages 11 and 25.

⁴⁷ WestRock submission of 22 September 2020 as cited in the SEF at page 20.

⁴⁸ SEF at page 25.

⁴⁹ SEF at page 25.



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4. Other matters

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

Sincerely

A handwritten signature in cursive script that reads "David H. Peters".

David Peters
Principal Lawyer
Kinsman Legal