

Dr. Ross S. Becroft B.A., LL.B., M.Comm.Law. PhD

Suite 2, Level 3
182-184 Victoria Parade
East Melbourne, Victoria, 3002
Australia
Telephone: (61 3) 9866 5666
Facsimile: (61 3) 9866 5644

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Your Ref:

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The Director, Investigations 3
GPO Box 2013
CANBERRA ACT 2601

By email: investigations3@adcommission.gov.au

Dear Sir/Madam,

Re: Dumping Investigation No. 548 – Certain Kraft Paperboard Exported to Australia from the United States of America.
Second Submission by the Applicant – Visy Glama Pty Ltd (“Visy Glama”)

We refer to the submissions of Graphic Packaging International LLC and Graphic Packaging International Australia Converting Ltd (collectively referred to as “GPI”) dated 26 and 28 July 2020 and the supplementary report of C. Klass dated July 2020.

In these submissions, GPI raises a range of arguments as to why imported kraft paperboard and microflute are not like goods for the purposes of this anti-dumping investigation. Visy rejects such arguments.

Visy wishes to raise the following considerations:

1. THE OVERARCHING PURPOSE OF AUSTRALIA’S ANTI-DUMPING SYSTEM

It is important to consider the overarching purpose of Australia’s anti-dumping laws prescribed in Part XVB of the Customs Act 1901 (Cth). Section 269SM provides that these provisions concern the taking of anti-dumping measures in respect of goods whose importation into

Australia involves a dumping or countervailable subsidisation of those goods that injures, or threatens to injure, Australian industry. Section 269TB empowers the responsible Minister to impose dumping duties where there is a finding of dumping and this has caused material injury to an Australian industry producing like goods. The clear purpose of this system is to protect Australian industry from the effects of dumping of products into the Australian market.

The Anti-Dumping Commissioner has expressed the overarching purpose of the system in the following terms:

Additional dumping and countervailing duties become payable in respect of the exportation of those goods to Australia for a period of five years, unless revoked earlier. Those duties are payable by the importer of goods upon the entry of the goods into Australia ... The purpose of those duties is to level the playing field from a price perspective in the Australian market ... In simple terms, the uplift of the price of imported goods through the imposition of an additional duty is meant to provide relief to Australian producers and manufacturers.¹

The legislation, in section 269T defines like goods as 'goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.'² This definition contemplates that the Commission will examine goods that are not exactly the same but which have a degree of likeness based working criteria such as physical, commercial, functional and production likeness. The key question to consider ultimately is whether the goods are sold into the same market and are substitutable for the Australian-made products.

In its submissions, GPI goes to great lengths to distinguish the production processes and the physical characteristics of kraft paperboard and microflute. GPI is focussing on small-scale technical differences between these products in attempt to convince the Commission that these products are completely different. However, when one examines these two products in an overall sense, there are fundamental similarities, with both being fibre-based products with a similar grammage/weight and which have an extremely similar appearance, with any differences only really being evident to technical specialists in paper making. These points have been made in Visy's previous submission of 18 June 2020 at pages 5-6 where the major areas of likeness have been summarised. We also note that on page 8 in the latest report of Mr. Klass there are cross-sectional comparisons of kraft paperboard and microflute with the images showing differences at a microscopic level.

GPI are taking a very technical and what is verging on a theoretical approach to the question of the relationship between these products in order to over-emphasise their differences, and endeavour to convince the Commission that they are not like goods. For instance, we note that GPI's reports from Mr. Klass seek to emphasize the species of pine used as the constituent fibre, the chapter in a text book in which the products are described, the model of

¹ Mr Dale Seymour, Commissioner, Anti-Dumping Commission, Committee Hansard, Canberra, 27 November 2014, pp. 1-2.

² This language mirrors that of Article 2.6 of the WTO Anti-Dumping Agreement.

the machine on which the products are manufactured, and also the fact that the constituent plies in GPI's kraft paperboard only exist 'momentarily' in the production process. Visy rejects this type of approach and strongly contends that the most important factor in comparing the imported Goods Under Consideration with Like Goods manufactured by an Australian Industry is whether the market identifies, in a practical sense, these products as being substitutable for one another. In particular, if a beverage packaging customer (that is, beverage brand owner) considers that these products are substantially identical or complete substitutes, and the customer makes purchasing decisions for these products in the marketplace based upon this practical understanding and use of the products, then for the purposes of a dumping investigation the issue of likeness is self-evidently satisfied. In making such purchasing decisions the customer will undoubtedly have regard to the Commission's working criteria of physical, commercial, functional (and to some extent) production likeness. The purchasing decision of the customer will also be impacted by whether the end consumer would see any differences between the converted end products derived from kraft paperboard compared with microflute (which the consumer would not). (The major differentiating factor for the end consumer would likely be that the microflute product is recyclable, usually identifiable with the recyclable symbol on the packaging, whilst the kraft paperboard product is, in practice, not. However if a brand owner decides to prioritise the financial savings of a dumped kraft paperboard product over marketing the sustainability credentials of a microflute based product, then this advantage for microflute is lost).

Visy notes that the Australian Courts have interpreted the expression 'like goods' for the purposes of s269T in a practical and commercial manner. In this regard, we note the comments of Lockhart J, in the Federal Court decision of *Marine Power Australia*, wherein his Honour stated:

'The expression "like goods" defined in s.269T should not be interpreted in a narrow or restrictive manner. It means goods of the same general category.' and *'Words in statutes should be taken to have been used by the legislature in their ordinary sense unless there is something in their context, phrasing or the subject matter with which they deal to lead to the conclusion that they are intended to assume a technical meaning or to be used in a specialised or trade sense.'*³

In a later Federal Court decision of *GM Holden*, Mortimer, J., considered, amongst other matters, the proper construction and application of the term 'like goods'. She stated that:

*'...the assessment whether there is an "Australian industry producing like goods" (ss269TG(1)(b)(i) and 269TJ(1)(b)(i)) is but one of many factual determinations for the Minister which arises in the course of his consideration whether to exercise the power to issue notices or not.'*⁴

³ *Marine Power Australia Pty Ltd and Another v Comptroller General of Customs and others* (1989) FCA, Lockhart, L., 9 June 1989, unreported, paragraph (v) page 562 and page 572.

⁴ *GM Holden Limited v Commissioner of the Anti-Dumping Commission and others* [2014] FCA 708, Mortimer, J., 4 July 2014 VID 555 of 2013, paragraph 117 and 123.

'This is reinforced by the use of the word "characteristics" in the alternative assessment of the goods themselves, including but not limited to their appearance. Characteristics would include, for example, the composition of the goods, the materials used to manufacture them, their outward appearance and the uses for which they were suitable in a commercial and practical sense. 'The statutory question was a practical one to be answered by a comparison predominantly of the physical characteristics of and uses for the products produced by the Australian industry...'⁵

These judicial observations were more recently referenced and adopted in Anti-Dumping Review Panel Report No. 103 – *Steel Pallet Racking exported from the People's Republic of China and Malaysia*.⁶ In this regard, the ADRP noted in the following passage the practical and not unduly narrow approach that should be taken in investigations:

*'Marine Power suggests that like goods should not be interpreted too narrowly and that words should be taken as their ordinary meaning unless a contrary intention is expressed. GM Holden suggests that a practical approach should be adopted when considering like goods and that the type of framework adopted in that case (same framework as in REP 441) enables a comparison of the characteristics to determine whether the exported goods are like goods to the Australian manufactured goods.'*⁷

This practical and market-based approach to this issue has also been applied in various WTO Panel decisions, such as in *EC – Salmon (Norway)*⁸ and in *Korea – Pneumatic Valves*.⁹

⁵ GM Holden Limited v Commissioner of the Anti-Dumping Commission and others [2014] FCA 708, Mortimer, J., 4 July 2014 VID 555 of 2013, paragraph 134.

⁶ See Anti-Dumping Review Panel Report No. 103 – *Steel Pallet Racking exported from the People's Republic of China and Malaysia* (August 2019) at paragraph 65.

⁷ Ibid.

⁸ The Panel in *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, rejected Norway's argument that in defining "like product", Article 2.6 required an assessment of "likeness" in respect of the product under consideration "as a whole" and that this required a comparison of all product categories considered as potentially "like product": Panel Report, *EC – Salmon (Norway)*, para. 7.52. The Panel noted: "In the context of Article 2.6, this logic could be understood to mean that where the product under consideration consists of different sub-categories, the investigating authority, in assessing the question of like product, must take into account each and every sub-category, and may not ignore any. It cannot, however, be stretched to require that an investigating authority assess whether each category or group of goods **within** the product under consideration is 'like' each other category or group of goods." Panel Report, *EC – Salmon (Norway)*, para. 7.55.

⁹ In *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R, adopted 30 September 2019, the Panel notes: "We recall that Article 2.6 of the Anti-Dumping Agreement defines the like product as a product which is either 'alike in all respects' to, or has 'characteristics closely resembling' those of the imported products subject to the investigation. Based on this definition, it would be expected that allegedly dumped imports compete with the domestic like product. Indeed, if they did not, it is difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation." Panel Report, *Korea – Pneumatic Valves*, para. 7.275.

If a practical and market-based approach is applied in this investigation, then any question as to the likeness and substitutability between the imported Goods Under Consideration and the Like Goods in this instance is easily answered.

2. VISY HAS CORRECTLY COMPARED KRAFT PAPERBOARD IMPORTS WITH AUSTRALIAN MANUFACTURED MICROFLUTE

Visy does not agree with GPI's contention that it is using a downstream (end) use of microflute as a point of comparison for assessing imported kraft paperboard. This is an inference that GPI has chosen to draw from Visy's dumping application and from Visy's earlier submission dated 18 June 2020. Visy concurs that the point of comparison in the supply chain for the purposes of this investigation must be the rolls of kraft paperboard that are imported into Australia (prior to conversion into a final product) as against Visy's microflute continuous sheeting that is produced at its manufacturing facilities (prior to conversion to a final product).

It is, however, noted that beyond this point of comparison (other than the timing of the outer-face printing) both kraft paperboard and microflute are subjected to a near identical conversion process to produce the final packaging product. The reason why Visy has focussed, to some degree, on the final packaging product is that this best illustrates why the imported kraft paperboard and microflute sheeting are like products. The two products follow a very similar conversion process before being sold into the same market, with the market, as discussed in section 1 above, being the true objective umpire and ultimate arbiter of whether these are like goods.

3. VISY HAS NOT ALTERED THE DESCRIPTION OF LIKE GOODS IN THIS INVESTIGATION

Visy does not agree with GPI's assertion that it has altered the description of like goods covered by this dumping application. Again, this has been implied by GPI in order to obfuscate matters but at no stage has Visy varied the nature or categories of microflute products in question. Visy stated at section A-3.3 of the Application that:

Visy Glama manufactures a form of fibre packaging for beverage packaging known as Microflute ('Like Goods'). Microflute is a narrow caliper corrugated cardboard suitable for applications where strength and durability is required with the ability to offer a high quality printed result. It is often used in place of solid fibre or carton board to obtain the extra strength some products require in refrigerated conditions.

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 for packages between 12 and 36 cans.

This like goods description sufficiently captures the goods in question that are affected by dumping of imported goods.

Visy further submits that the Goods Under Consideration definition (to which Visy's like goods are compared) has been carefully composed to accurately capture and delineate the relevant product categories. GPI's submissions are aimed at widening and otherwise changing this comparison between the GUC and Visy's microflute by, for example, referring to other fluted packaging which are different in character and which have other industrial applications, such as beauty product or food packaging.

4. SPECIFIC RESPONSES TO GPI'S SUBMISSIONS

Visy also wishes to make the following specific observations in response to GPI's latest submissions:

- The Hungry Jacks fluted products discussed at paragraphs 72-74 and figures 7 and 8 of GPI's submission of 26 July 2020 are not, as asserted by GPI, an N flute product. They are in fact a classic E flute product imported into Australia that, when manufactured, would be in the order of 1.5mm in width. As a result of supply chain factors (in particular their packing and lengthy time spent in sea freight and storage) they are compressed over time. These products are supplied to Hungry Jacks by [REDACTED]. **[confidential information: name of supplier and location of plants]**. These products are not part of the Australian manufacturing environment.
- The Opal products that are referred to in paragraphs 7-9 and figures 1 and 2 of GPI's submission of 28 July 2020 are manufactured in Australia. However, consistent with what Visy has previously asserted, Opal does not manufacture can multipacks for sale to the beverage industry and this production is for a completely different purpose (namely confectionary packaging). Further, Visy's intelligence indicates that these are [REDACTED] **[confidential information: manufacturing and sales information]** (which is immaterial compared with the scale of production and monetary value of Visy's microflute production in Australia).
- Visy does not accept the unsubstantiated and completely misguided statement in paragraph 4 of GPI's supplementary submission of 28 July 2020 that 'GPI estimated that, with Opal's microflute production and Visy's non-beverage microflute production, around three-quarters of Australian microflute is used in end uses other than beverage packing' or the assertion in paragraph 10 of that submission of 'the fact that a substantial portion of Australian microflute is used in end uses other than beverage packaging.' Visy can confirm that its own production of microflute is almost exclusively for the high volume beverage multipack end use and, other than small scale Opal production existing as noted in the previous bullet point, these statements by GPI are false.

- The beer 'slab' packaging pictured as figure 6 and discussed at paragraphs 66-70 of GPI's submission dated 26 July 2020 is not a Visy Glama product (but rather produced by Visy Board). It is not E flute packaging (as claimed by GPI) but a product known as R flute, which is a much thicker type of packaging used for different purposes. GPI say they measured their sample at 1.77mm but that is either an error or the product has significantly flattened during handling and storage – the actual thickness of R flute is at least 2.5 mm. As such it is around triple the thickness of microflute, and is a quite different style of packaging. R-flute is not designed for wet strength environments, it does not enable high-end graphic capability, is not produced with a handle and is not used for beverage 'carry packs'. R-flute is a much thicker product that is not within the same product category as microflute and kraft paperboard.
- Visy notes the statement on page 3 of the supplementary report of Mr Klass (repeating a statement in his original report) that he agrees that 'Microflute is used for lighter weight and lower caliper constructions' and that his original report 'does not categorise E flute as microflute'. This confirms Visy's clear position that there is a categorical distinction between microflute and other fluted products. Further, Visy vehemently disagrees with GPI's contention that excluding E flute from the Commission's like goods analysis makes no difference to the analysis. Rather, it serves to focus this case, as is intended, squarely on the two relevant competing products being microflute and kraft paperboard.
- Visy notes Mr Klass's clarification that GPI's imported kraft paperboard product is constructed of a solid layer rather than multiple layers (utilising Wikipedia rather than GPI sourced schematic diagrams as a reference). However he does also refer to the product being manufactured from plies existing 'momentarily'. But either way, the GUC does not distinguish between the kraft paperboard with one solid layer or multiple layers so long as the criteria set out in the Goods Under Consideration description are met.
- In response to the various other technical issues that GPI raises in its further submissions, including its focus on matters such as asserted differences in the visual appearance, printability, wet strength capability and cracking, Visy vehemently disputes the GPI position and further notes that the fact that Visy has supplied microflute to the Australian market for in excess of 15 years from specialised manufacturing facilities in Australia points strongly to the immateriality of these contended product differences.
- It is clear that, fundamentally, GPI is seeking to de-emphasise the overall likeness between these competing products and places undue reliance on highly technical distinctions and, at the same time, is seeking to focus on peripheral issues rather than the fundamental ones, namely does the market see the products in question here as substitutable and then by extension, is dumping occurring and is that dumping causing material injury to Australian manufacturing.

5. THE MINISTERIAL DIRECTION ON MATERIAL INJURY

Visy does not agree that it has wrongly stated the effect of the Ministerial Direction on Material Injury as alleged by GPI in paragraphs 43 to 51 of its supplementary submission of 26 July 2020 and does not wish to engage on questions of whether the Ministerial Direction is a direction or providing guidance on how the Commission should assess material injury. The Ministerial Direction clearly states that identifying material injury will depend upon the circumstances of each case. In this regard, Visy takes issue with GPI's contention in paragraph 49 therein that 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. The loss of major long term supply contracts in a marketplace where there is a small concentration of commercial actors is plainly not a normal 'ebb and flow' of business but rather it can have devastating economic consequences for businesses that have capital intensive operations and which employ many workers in such operations. The further loss of current supply volumes to the Australian market as well as the risk of losing future supply opportunities are very real and such claims have been, and will be, supported by objective evidence being considered by the Commission in this investigation.

CONCLUSION

In conclusion, when considering the overarching purpose of the anti-dumping legislation, it is clear that the two products in question: kraft paperboard and microflute, are like goods. These products have an unambiguous direct competitive relationship in the Australian packaging marketplace.

Visy strongly contends, in accordance with its dumping application, that kraft paperboard is being sold into Australia at dumped prices and that this has caused material injury to Visy. The purpose of the anti-dumping regime is to prevent such commercial behaviour. This conduct has caused Visy to suffer material injury and, absent the imposition of dumping measures, Visy will continue to suffer material injury in the future. This will have a severe impact upon the ongoing economic viability of Visy's microflute manufacturing operations in Australia, putting a great many jobs at risk at a time when Australian manufacturing needs to be supported. Hence, the focus of the investigation must remain on the issue of establishing the level of dumping that is occurring in respect of exports of kraft paperboard from the United States.

Do not hesitate to contact the writer should the Commission require any further information or wish to discuss the matter generally.

Yours faithfully

GROSS & BECROFT



Dr. Ross Becroft
Principal