

## For Publication

The Director  
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Dear Sir/Madam

### **Continuation Inquiry: Clear Float Glass exported to Australia from the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand - Case No. 575**

We act for Guardian Industries Corp Ltd (Thailand) (**Guardian**) and refer to the Anti-Dumping Commission (**ADC**) continuation inquiry into certain clear float glass (**CFG**) products exported from, relevantly, the Kingdom of Thailand (**Thailand**) following an application lodged by Oceania Glass Pty Ltd (**Applicant**).

This letter is a preliminary submission in relation to the above-captioned continuation inquiry. The purpose of the submission is to respond to the Application lodged by the Applicant and to demonstrate that the Commissioner of the ADC (**Commissioner**) should recommend to the Minister under s 269ZHF of the *Customs Act 1901* (Cth) (**Act**) that anti-dumping measures cease in respect of CFG. Guardian reserves the right to supplement its response in answer to the Application more generally and when appropriate.

#### 1. **Executive summary**

1.1 Guardian submits that the Commissioner cannot be satisfied that:

- (a) the expiration of the current anti-dumping measures would lead, or would be likely to lead, to a continuation of or recurrence of dumping; and
- (b) if dumping is likely to continue or recur, it is likely to cause material injury to the Applicant.

1.2 Accordingly, the Commissioner ought recommend that the anti-dumping measures be allowed to expire. Alternatively, the Commissioner should recommend that the notice cease to apply to Guardian pursuant to s 269ZHF(1)(a)(ii) of the Act.

#### 2. **Requirements of s 269ZHF(2) of the Act**

2.1 The Act prohibits the Commissioner from recommending to the Minister that anti-dumping measures be continued unless "*the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent*": s 269ZHF(2) of the Act. As a matter of Australian law, the meaning of the word "likely" in s 269ZHF(2) is "more than a 50 percent chance" or "more probable than not".<sup>1</sup> Moreover, the WTO appellate body has held that "likely" in this context means nothing less

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<sup>1</sup> See *Australian Securities Commission v Nomura International PLC* (1998) 89 FCR 301 at 396.

than “probable”.<sup>2</sup> That ruling should be afforded “substantial weight” in anti-dumping law.<sup>3</sup> It follows that the Commissioner cannot be satisfied under s 269ZHF(2) if there is only a *chance* or *possibility* that dumping will continue or recur.

- 2.2 Insofar as the Application relates to CFG exports from Thailand, it is apparent that the Applicant’s concern is with whether dumping will “recur” rather than “continue”. The Applicant has calculated that over the 2019/2020 twelve-month period, relevant CFG products were either not exported from Thailand, or were exported at a negative dumping margin.<sup>4</sup> That is one aspect of the Application with which Guardian agrees, and may be a matter which the Commission considers does not warrant further attention vis-a-vis examination of the variable factors.
- 2.3 The Applicant’s attempt to satisfy the Commissioner that, if current anti-dumping measures expire, Guardian will likely seek to export CFG from Thailand to Australia, and do so at dumped prices, relies on three planks, namely:
- (a) the premise that Guardian “*could adjust its production portfolio*” to shift production and supply of CFG to Thailand from other parts of its global business “*if it was considered commercially advantageous to do so*”;<sup>5</sup>
  - (b) the claim that Guardian has maintained distribution links from Thailand into the Australian market (without reference to actual or specific products supplied);<sup>6</sup> and
  - (c) the premise that the findings of previous Investigation 479 somehow “demonstrate” a current desire for Guardian to supply the Australian market from its Thailand operation (again, without specification of product).<sup>7</sup>
- 2.4 The suggestion that these factors make it “probable” that Guardian would seek to export CFG from Thailand to Australia, and do so at dumped prices, is based on speculation rather than evidence. As a matter of law and logic, the Applicant’s arguments in relation to Guardian are incapable of satisfying the test in s 269ZHF(2) of the Act. Accordingly, at least in respect of Guardian, the Commissioner ought not recommend that measures continue on the basis of the material currently before him.
3. **Dumping is not likely to recur**
- 3.1 The Applicant’s contention that expiry of the current anti-dumping measures would have the result that Guardian “*would be incentivized to shift supply from its present United Arab Emirates production facility back to its facility in Thailand to supply the Australian market – most likely at a lower cost to it overall*”<sup>8</sup> is entirely misconceived.
- 3.2 Whether or not anti-dumping measures are continued, Guardian does not intend to supply CFG from its Thailand facility.

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<sup>2</sup> United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (AB2004-4) at [75]–[77].

<sup>3</sup> Siam Polyethylene Co Ltd v Minister of State for Home Affairs [2009] FCA 837 at [66].

<sup>4</sup> Application Attachment A page 5.

<sup>5</sup> Application Attachment A page 5.

<sup>6</sup> Application Attachment A page 4.

<sup>7</sup> Application Attachment A page 5.

<sup>8</sup> Application, Attachment A page 6.

- 3.3 Exporting CFG from Thailand into the Australian market is not aligned with Guardian's strategic objectives. Exports from Thailand are focused on value-added products, including mirror, picture frame glass and laminated products. The capacity of the float production from Thailand, with respect to the Australian market, is limited to the manufacture of these value-added products.
- 3.4 The CFG market segment will continue to be of no strategic interest to Guardian due to the increasing demands of such value added products which best utilise Guardian's production capacity. This demand is expected to increase significantly over the next years driven by changes in regulations in favour of energy efficient and sustainable glass products, as well as Guardian's intensified efforts and resource deployment to promote value-added products.
4. **Recurrence of material injury**
- 4.1 As to the issue of 'recurrence of material injury', the Applicant submits that its continued deterioration in profit and profitability from about 2017/2018 to 2019/2020 "*demonstrates a deterioration in the industry's economic performance and is indicative of the susceptibility of the industry to changes in events including the expiration of anti-dumping measures against exporters that have maintained distribution links to the Australian market*".<sup>9</sup>
- 4.2 Respectfully, that reasoning is blinkered and omits key relevant factors. It is well-known that the Applicant and its predecessor entity (Viridian Glass Australia) have struggled for years with profitability, due to economic circumstances that affect it directly. In 2018, for example, its parent company (CSR Limited) identified "operational issues" at Viridian's factory and "increasing energy costs" as the cause of its decline in EBIT.<sup>10</sup> The previous year, the parent company pointed to "impacts from WA and NZ operations" as the source of Viridian's decline in EBIT.<sup>11</sup> In January 2019, CSR Limited sold the Viridian business (for reasons including that Viridian is exposed to high energy intensity) in a bid for Viridian "to align its footprint and cost structure to operate more effectively".<sup>12</sup>
- 4.3 Further to this point, the Applicant has a limited primary production capacity at its sole Dandenong float line, and is unable to single-handedly meet the demands of the Australian market. It is Guardian's understanding that the Applicant has relied upon imports from Xinyi Glass (which in 2015 established a float glass plant in Malacca, Malaysia, and is one of the largest global producers of CFG) to supplement its local production capacity. Guardian urges the Commission to investigate and consider:
- (a) whether and to what extent the Applicant purchases CFG from Xinyi (or a local distributor tied to Xinyi); and
  - (b) whether the Applicant has an alliance or arrangement with Xinyi.
- 4.4 Guardian also urges the Commission to investigate and consider the impact of Xinyi's export of CFG from Malaysia to Australia generally.

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<sup>9</sup> Application, Attachment A page 7.

<sup>10</sup> CSR Limited Annual Report 2018 p 3.

<sup>11</sup> CSR Limited Annual Report 2017 p 2.

<sup>12</sup> CSR Limited Annual Report 2019 p 4.

5. **Section 269ZHF(1)(a)(ii) of the Act**

- 5.1 If the Commissioner considers that materially injurious dumping from exporters other than Guardian will continue or recur, he should recommend pursuant to s 269ZHF(1)(a)(ii) of the Act that the notice cease to apply to our client. Guardian is not and will not be responsible for dumping or consequent material injury to the Applicant, even if other exporters may be so responsible.

Yours sincerely



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