

PUBLIC



**Australian Government**  
**Anti-Dumping Review Panel**

# ADRP Decision No. 139

Kraft paperboard exported from the United States of America

October 2021

<https://www.adreviewpanel.gov.au>

# Contents

Contents .....	2
Abbreviations.....	3
Overview .....	5
Background .....	6
Conduct of the review .....	7
The grounds of review .....	8
Consideration of Grounds.....	9
Ground 1: The Commissioner has incorrectly adopted a narrow interpretation of like goods that is inconsistent with the purposes of Part XVB of the Customs Act. ....	9
Ground 2: The Commissioner has erred in concluding that the Goods Under Consideration and the Like Goods (produced in Australia) are not like goods for the purposes of s269T(1) of the Customs Act having regard to the weighing up of the indicia of commercial, functional, physical and production likeness.....	24
Ground 3: The Commissioner has disregarded and not adopted the conclusions of its own appointed expert in assessing the question of like goods .....	41
Ground 4: The Commissioner has failed to investigate matters that are directly relevant to the like goods assessment and has based its findings on factually erroneous assumptions.....	45
Ground 5: In assessing like goods, the Commissioner has failed to place sufficient weight on the end use of the imported and Australian made goods and properly examine the relationship between the intermediate and finished good.....	47
Conclusion as to 'like goods' .....	49
Decision .....	49

## Abbreviations

Term	Meaning
12+ beverage packages	Packaging for 12 or more beverages
12- beverage packages	Packaging for less than 12 beverages
Act	<i>Customs Act 1901</i>
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Appellate Body	Appellate Body of the World Trade Organisation
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
GUC	Goods under consideration being Kraft paperboard, coated on one side with clay or other inorganic substances, grammage 360 – 430 GSM, wet strength treated.
GPI	Graphic Packaging International LLC
GPIAC	Graphic Packaging International Australia Converting Pty Ltd
Interpretation Act	<i>Acts Interpretation Act 1901</i>
Investigation period	1 January 2018 to 31 December 2019
Manual	Dumping and Subsidy Manual November 2018
Review Application	Visy's application for review of the Reviewable Decision made on 13 August 2021

Reviewable Decision	The decision of the Commissioner made on 15 July 2021 terminating Investigation 548
Panel	Anti-Dumping Review Panel
SEF 548	Statement of Essential Facts published on 5 March 2021.
TER 548	The termination report published by the ADC on 15 July 2021
Visy	Visy Glama Pty Ltd
Visy microflute	Narrow calliper corrugated cardboard produced by Visy
WTO	The World Trade Organization

## Overview

1. This review arises out of an investigation into the alleged dumping of certain kraft paperboard (GUC) exported to Australia from the United States of America (Investigation 548).
2. The Commissioner considered that the goods produced by the applicant for review, Visy Glama Pty Ltd (Visy), were not 'like goods' compared to the GUC so there was no Australian industry producing 'like goods'. Consequently, he considered there can be no injury by exports of the GUC to such an industry. The Commissioner terminated Investigation 548 pursuant to s 269TDA(13)(b) of the *Customs Act 1901* (the Act) on 15 July 2021 (Reviewable Decision).<sup>1</sup>
3. Visy, which had applied for the imposition of dumping duty on the GUC, contended that the Reviewable Decision was not the correct or preferable decision. It contended that the narrow calliper corrugated cardboard which it produced (Visy microflute), was in fact a 'like good' compared to the GUC, so that there was an Australian industry producing goods like the GUC capable of suffering material injury. It applied for review of the Reviewable Decision pursuant to s 269ZZO.
4. The issue in this Review is whether the GUC and the Visy microflute were 'like goods' within the definition of that term in s 269T(1).
5. I consider that:
  - (a) the goods produced by Visy were *not* like the goods exported to Australia, so that there was no 'Australian industry producing like goods'; and
  - (b) the Reviewable Decision was the correct or preferable decision and that the Reviewable Decision must be affirmed.

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<sup>1</sup> ADN 2021/86.

# Background

6. On 5 March 2020, Visy lodged an application pursuant to s 269TB of the Act seeking the imposition of dumping duties on certain goods imported from the United States of America (USA).
7. In its application, Visy described the GUC as follows:

Kraft paperboard, coated on one side with clay or other inorganic substances, grammage 360 – 430 GSM, wet strength treated.<sup>2</sup>
8. On 30 March 2020, Investigation 548 was initiated by the Commissioner. The description of the GUC in the Notice of Initiation was that in Visy's application. The investigation period was 1 January 2018 to 31 December 2019.
9. Visy contended that the Visy microflute was 'like' the GUC.<sup>3</sup>
10. Both the GUC and the Visy microflute were used to make folded and glued, flat beverage packages that could contain 12 or more beverage cans (12+ beverage packages). The 12+ beverage packages are sold to beverage manufacturers who 'erect' the flat packages, fill them with beverage cans and seal the ends. However, the Consideration Report contains further information which explicitly states that the GUC does not include 'finished ready for sale beverage can multipacks'.<sup>4</sup>
11. Two exporters of the GUC from the USA were identified for the purposes of Investigation 548: Graphic Packaging International LLC (GPI) and WestRock MWV, LLC.
12. Graphic Packaging International Australia Converting Pty Ltd (GPIAC) was identified as the importer of goods exported by GPI. It is a wholly owned subsidiary of GPI. They made joint submissions to Investigation 548. GPI/GPIAC took an active role in Investigation 548 and provided numerous submissions to the ADC. The arguments raised by Visy in this Review substantially rehearsed positions

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<sup>2</sup> EPR 548, document #1, Visy Application, p9. 'GSM' means grams per square metre.

<sup>3</sup> EPR 548, document #1, p11.

<sup>4</sup> EPR 548, document #2 at p6.

which had been advanced during Investigation 548. Those arguments were disputed by GPI/GPIAC during Investigation 548.

13. The ADC published a Statement of Essential Facts on 5 March 2021 (SEF 548). In the case of the GUC exported by GPI, SEF 548 indicated a dumping margin of 49.2%.<sup>5</sup>
14. Investigation 548 was terminated in respect of 'WestRock Australia' pursuant to s 269TDA(1) on the basis that there was no evidence of dumping.<sup>6</sup>
15. The Termination Report (TER 548) was published on 15 July 2021. It did not make final findings in relation to the dumping margin.
16. On 13 August 2021, Visy applied for review of the Reviewable Decision pursuant to s 269ZZN(a) of the Act (Review Application).

## Conduct of the review

17. The Senior Member directed in writing that I should constitute the Anti-Dumping Review Panel (Panel) for the purposes of the Review.
18. I accepted each of Visy's grounds of review for the purposes of s 269ZZQA(5)(c).
19. I initiated the review by notice dated 20 August 2021. It was published on that date.
20. In undertaking the review, s 269ZZT(4) of the Act requires the Panel to only take into account information that was before the Commissioner when the Commissioner made the reviewable decision, subject to certain exceptions.<sup>7</sup>
21. If a conference is held under s 269ZZRA of the Act, then the Panel may have regard to further information obtained at the conference to the extent that it relates to the information that was before the Commissioner, and to conclusions based on that information.<sup>8</sup>

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<sup>5</sup> EPR 548, document #37, p6.

<sup>6</sup> ADN 2021/60.

<sup>7</sup> See ss.269ZZRA(2) and ZZR(2).

<sup>8</sup> Section 269ZZRB(2).

22. A conference was held on 14 October 2021 for the purpose of enabling me to have regard to samples of beverage packages supplied to me by Visy and to enable aspects of the production of microflute to be clarified. The samples were in substitution for samples previously provided by Visy to the ADC. The conference was attended by representatives of the ADC, Dr Becroft of Gross & Becroft for Visy and Mr Stein, General Counsel of Visy, and Mr Peters of Kinsman Legal on behalf of GPI/GPIAC. A summary of the proceedings at the conference was published on the Panel's website on 26 October 2021.
23. On 19 October 2021, the Minister extended the time for completing this Review till 29 October 2021.
24. I am required by s 269ZZT of the Act to decide whether to affirm or revoke the reviewable decision. I must revoke the reviewable decision if I consider it is not the correct or preferable decision.

## The grounds of review

25. Visy identified 5 grounds of review, each leading to the conclusion that the Visy microflute was 'like' the GUC, with the consequences that there was an 'Australian industry producing like goods' and that the Reviewable Decision was wrong.

26. The grounds were:

- Ground 1: The Commissioner has incorrectly adopted a narrow interpretation of like goods that is inconsistent with the purposes of Part XVB of the Customs Act.
- Ground 2: The Commissioner has erred in concluding that the Goods Under Consideration and the Like Goods (produced in Australia) are not like goods for the purposes of s269T(1) of the Customs Act having regard to the weighing up of the indicia of commercial, functional, physical and production likeness.
- Ground 3: The Commissioner has disregarded and not adopted the conclusions of its own appointed expert in assessing the question of like goods.



Ground 4: The Commissioner has failed to investigate matters that are directly relevant to the like goods assessment and has based its findings on factually erroneous assumptions.

Ground 5: In assessing like goods, the Commissioner has failed to place sufficient weight on the end use of the imported and Australian made goods and properly examine the relationship between the intermediate and finished good.

There was overlap between arguments advanced in support of the grounds.

27. I will consider Visy's grounds of review in turn.

28. The grounds of review were directed primarily to whether the Commissioner made an error in arriving at the Reviewable Decision. Whether the Commissioner erred in making his decision does not determine the outcome of this Review. The Commissioner may have arrived at the correct or preferable result, even if aspects of his reasoning were wrong. Accordingly, after considering the grounds of review, I will briefly articulate my own reason for concluding that the GUC and the Visy microflute are not 'like goods'.

## Consideration of Grounds

**Ground 1: The Commissioner has incorrectly adopted a narrow interpretation of like goods that is inconsistent with the purposes of Part XVB of the Customs Act.**

### Introduction

29. Section 269TDA(13) of the Act provides:

(13) Subject to subsection (13A), if:

(a) application is made for a dumping duty notice; and

- (b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the Commissioner is satisfied that the injury, if any, to an Australian industry or an industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;

the Commissioner must terminate the investigation so far as it relates to that country.

If there is no Australian industry producing 'like goods', there can be no material injury to an Australian industry, and s 269TDA(13) is activated.

30. Sub-section 269T(4) provides that for the purposes of Part XVB of the Act there should be taken to be an Australian industry in respect of goods of a particular kind if there is a person who produces 'like goods' in Australia or there are two or more such persons.
31. The expression 'like goods' is defined in s 269T(1):

Like goods', in relation to goods under consideration, means 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.

32. The Commissioner terminated the investigation because he concluded the Visy microflute was not a 'like good', compared to the GUC. Visy did not suggest that there were 'like goods' produced in Australia other than its own product. Consequently, if Visy did not produce 'like goods' there was no Australian industry producing 'like goods' that could suffer injury from dumping of the GUC.<sup>9</sup>
33. The Commissioner conducted a detailed comparison of the characteristics of the GUC and the microflute manufactured by Visy. The framework of the

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<sup>9</sup> ADN 2021/86, p 2.

Commissioner's comparison is set out in Dumping and Subsidy Manual (Manual).<sup>10</sup>

It says:

*Where two goods are not alike in all respects, the Commission will assess whether they have characteristics closely resembling each other against the considerations below.*

Physical likeness

- *Assess which physical characteristics are similar, and identify the extent of differences. Characteristics to consider include:*

<i>Size</i>	<i>Shape</i>	<i>Content</i>
<i>Weight</i>	<i>Appearance</i>	<i>Taste</i>
<i>Grade</i>	<i>Standards</i>	<i>Age</i>
<i>Strength</i>	<i>Purity</i>	<i>Chemical composition</i>

- *Are the goods classified to a matching tariff classification?*

*Goods which are classed to the same tariff classification will often be physically like goods. However, in some instances the classification covers a very broad range of goods and other indicators of likeness are necessary to identify like goods. It may also be the case that like goods are classified by multiple tariff classifications.*

Commercial likeness

*Commercial likeness refers to attributes identifiable from market behaviour.*

- *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?*

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<sup>10</sup> [https://www.industry.gov.au/sites/default/files/2019-05/adc\\_dumping\\_and\\_subsidy\\_manual.pdf](https://www.industry.gov.au/sites/default/files/2019-05/adc_dumping_and_subsidy_manual.pdf), page 11 and following.

- *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?*

#### Functional likeness

*Functional likeness refers to end-use. End-use will not of itself establish like goods, but may provide support to the assessment of physical and commercial likeness.*

- *Do the goods have the same end use? To what extent are the two products functionally substitutable? e.g. both a shovel and an earthmoving machine can move earth.*
- *To what extent are the goods capable of performing the same or similar functions? e.g. an earthmoving machine is capable of moving earth more rapidly than a shovel.*
- *Do the goods have differential quality? Quality claims can be subjective. Objective evidence has higher probative value e.g. by standards, or the extent consumers are willing to use the goods to perform the required functions.*
- *Is consumer preference likely to change in the future? Consider consumer behaviour in other markets/ countries.*

### Production likeness

*Different production processes may produce identical goods. However, different production processes may be used to create different product characteristics. A comparison of production process will not of itself establish like goods, but may highlight differences or provide support to the assessment of other considerations.*

- *To what extent are the goods constructed of the same or similar materials?*
- *Have the goods undergone a similar manufacturing process? If different, what is the impact of those differences?*
- *Are the costs of manufacture similar? A similarity in the cost of manufacture may be an indicator of likeness but is not determinative.*
- *Are there any patented processes or inputs involved?*

### Other considerations

*How similar is the marketing of the goods?*

*In conducting its like goods analysis in terms of the factors set out above, the Commission will consider:*

- *matters raised by interested parties*
- *matters that the Commission identifies during the course of the investigation.*

## Visy's contentions

34. Visy contended that the Commissioner's approach was wrong and was based on an overly narrow interpretation of the expression 'like goods'.

35. Visy contended that a detailed comparison of the physical and technical characteristics of the GUC and its microflute was inappropriate.<sup>11</sup> It said:

*... 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.*

36. Visy asserted:

*The key question to consider ultimately is whether the goods are sold into the same market and are substitutable for the Australian-made products.*<sup>12</sup>

37. At 2.09 of the Review Application:

*The fundamental issue for the Commissioner to satisfy himself of in any like good analysis is whether the goods under consideration are sold into the same market and are substitutable for the Australian-made products. There is no doubt in this case that the GUC and microflute are such like competing goods.*

38. Visy also said that 12+ beverage packages made from kraft paperboard and 12+ beverage packages made from microflute were not distinguished by brand managers, who decide what type of beverage packaging that will be purchased by beverage producers. It contended that members of the public who buy packages of beverages in shops would not distinguish them either.

39. Visy argued that its construction reflected the application of s 15AA of the *Acts Interpretation Act 1901* (Interpretation Act). Section 15AA provides:

*In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.*

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<sup>11</sup> Review Application, at [2.4].

<sup>12</sup> Review Application, at [2.3].

40. Visy referred to s 269SM which gives an overview of Part XVB of the Act. Section 269SM(1) says:

- (1) This Part deals with 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.

41. Visy pointed out that SEF 548 showed a substantial dumping margin for goods exported by GPI. It also said that it had suffered material injury through the loss of a beverage packaging supply contract to a supplier of kraft paperboard packaging. Visy argued that the Act should be interpreted to protect Australian producers of goods who had suffered material injury as a result of established dumping.

## The issues

42. Three issues arise in respect of this ground of review:

- (a) the importance of the substitutability of the goods under consideration and the local goods;
- (b) the application of s 15AA of the Interpretation Act; and
- (c) the stage of production at which the 'like goods' comparison of intermediate goods should be made.

It is convenient to deal with the third issue as part of ground 2.

## Discussion

### Substitutability

43. Visy quoted from two Australian court decisions in support of its approach to 'like goods':<sup>13</sup> *Marine Power Australia v Comptroller General of Customs*<sup>14</sup> (*Marine Power*) and *GM Holden Ltd v Commissioner of the Anti-Dumping Commission and Other (GM Holden)*.<sup>15</sup>

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<sup>13</sup> Review Application at [2.6] and [2.7].

<sup>14</sup> (1989) 89 ALR 561; [1989] FCA 210.

<sup>15</sup> (2014) 225 FCR 222; [2014] FCA 708.

44. *Marine Power* concerned outboard motors for boats. The applicants were associated with 52 kinds of outboard motors branded 'Mercury' and a further 49 kinds of outboard motors bearing the 'Mariner' brand.<sup>16</sup> The applicant's outboard motors ranged from 2hp to 225hp.<sup>17</sup> The second respondent was associated with the 'Johnson' and 'Evinrude' ranges. It appears that the second respondent had a range of outboards going from 1.2hp to 225hp.
45. The Comptroller General found that the Marine Power outboards and the outboards associated with the second respondent, 'Outboard Marine', were like goods. Marine Power challenged this conclusion.
46. The principal issue in *Marine Power* was whether the outboards of the second respondent could properly be considered goods produced in Australia. Those outboards were not wholly made in Australia. It appears that it was an issue whether there had been a substantial manufacturing process in Australia, and this depended on the costs incurred in Australia. This in turn depended on the meaning of the expression 'factory overheads'. Marine Power also raised the ground that the Comptroller should have considered the question of likeness on a model-by-model basis.<sup>18</sup>
47. The applicant contended that the expression 'factory overheads' should have been applied in the sense used by accountants, and lead evidence on the point. It was in this context that Lockhart J said:

*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.*<sup>19</sup>

Visy quoted this passage in support of this ground of review.

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<sup>16</sup> FCA at [18].

<sup>17</sup> FCA at [27].

<sup>18</sup> FCA at [38].

<sup>19</sup> FCA at [52].



48. Lockhart J held that the expression 'factory overheads' had not acquired a technical meaning.<sup>20</sup> This was the focus of his decision.

49. He also set out the definition of 'like goods' in s 269T(1). He said:

*This expression should not be interpreted in a narrow or restricted fashion and is not limited to the "same" goods: see Beseler and Williams, Anti-Dumping and Anti-Subsidy Law (1986) at para. 4.4.1. It means "goods of the same general category".*<sup>21</sup>

50. Visy quoted this passage as well.

51. Lockhart J said that the Comptroller's 'approach to the task, in considering the application under s 269T(1), was one reasonably open to him'.<sup>22</sup>

52. The expression 'the same general category' was used in paragraph [60] of *Marine Power* in the context that the Commissioner considered the likeness of the two ranges of outboard motors and the argument that the Commissioner should have compared individual models. It appears that were differentiated by power output. The Court did not give detailed consideration to the meaning of 'like goods'.

53. The other Australian authority dealing with the meaning of 'like goods' is *GM Holden*.<sup>23</sup>

54. *GM Holden* concerned aluminium road wheels or 'ARWs'. The second respondent was an Australian manufacturer of ARWs. The applicant, GM Holden Ltd, imported ARWs manufactured in China, which were installed on the vehicles which Holden made in Australia. The second respondent was part of the Australian industry.

55. The market for ARWs could be divided into two segments: 'original equipment manufacture' or 'OEM' (ie wheels which come with the car) and the 'aftermarket' or 'AM' (ie wheels sold separately). The second respondent had 95% of aftermarket sales. The 'aftermarket' was 70% of all sales of ARWs.

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<sup>20</sup> FCA at [56] and [58].

<sup>21</sup> FCA at [60].

<sup>22</sup> FCA at [61].

<sup>23</sup> (2014) 225 FCR 222; [2014] FCA 708.

56. The CEO of Customs determined that the goods imported from China and the ARW made in Australia were 'like goods'. GM Holden challenged this conclusion. One of the grounds of review raised the issue of market differentiation:

(b) *Further or alternatively, in making the said decisions, the Minister adopted and applied an erroneous construction of the term "like goods" in s 269T of the Customs Act by construing "characteristics" as being limited to physical characteristics and as not including market considerations such as cost structures, price, route to market, market segmentation, and other market considerations.*<sup>24</sup>

57. Visy relied on a number of passages from the judgment. It quoted the following passage from [124]:

*This is reinforced by the use of the word "characteristics" in the alternative assessment, which implies a comparison of the physical characteristics 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.*

58. However, the beginning of paragraph [124] reads:

*The definition in s 269T allows for two alternative assessments. The first is goods which are "identical in all respects". The second is goods which "although not alike in all respects" have "characteristics closely resembling" the goods which are the subject of the application. It is clear that the statute uses "identical" and "alike" in the same way in this definition. Both nouns focus on a visual or physical comparison.*

59. Visy also relied on part of paragraph [134]:

*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.*

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<sup>24</sup> At [110].

60. The beginning of paragraph [134] is as follows:

*In my opinion, what occurred here was that Holden erected identified factual differences between OEM and AM markets and distributions and then sought to import those differences into the scheme of ss 269TG and 269TJ, when the scheme did not require the decision-maker to evaluate those differences for the purposes of forming a view whether there was an “Australian industry producing like goods”.*

61. Paragraphs [124] and [134] of the judgment of Mortimer J, considered as a whole, do not support Visy's contention about the importance of market substitutability of products. The comparison contemplated is a comparison of physical and visual characteristics and of uses, rather than one focused on competition in the market between the goods under consideration and the local goods (or between goods made from the goods under consideration and the local goods). The 'like goods' comparison does not refer to the market impact of the exported goods.

62. At paragraph [24] of *GM Holden*, Mortimer J considered the publication of notices under s 269TG in relation to third country dumping duties, based on material injury to an industry in that country. She said:

*Those provisions are not presently relevant, although they turn even more centrally on the concept of “like goods”, because it is only the “like goods” which are being imported into Australia. The comparative term in these third-country provisions is “any goods produced or manufactured in a particular country”. There is nothing in the text or context of these provisions which suggests the term “like goods” is used any differently there than in the provisions with which this case is concerned, especially since the term is defined in s 269T. The proposition that the “respects” or characteristics to which the definition in s 269T refers are physical or use-based, rather than extending to matters such as market, is reinforced by the comparative term’s focus on production and manufacture. The comparison is, in my opinion, to be one capable of practical judgment.*

63. Paragraphs [138] and [139] of *GM Holden* do not support Visy's approach either. At paragraph [138], Mortimer J set out the CEO's comparison of the goods under

consideration and the like goods. It largely reflects the approach described in the Manual. At [139], Mortimer J said:

*In its argument, Holden did not challenge the four categories of “likeness” identified in Report 181, but rather sought to identify factual differences between the markets for OEM and AM wheels. This, I have found, sought to move away from the statutory task.*

64. In this case, Visy also seeks to apply a ‘market based’ approach. Visy argues that the similarities between kraft paperboard 12+ beverage packages and microflute 12+ beverage packages and the economic impacts on Visy of the Kraft paper packaging have the consequence that the imported kraft paper and Visy’s microflute are ‘like goods’. This is, again, to move away from the statutory task of comparing the goods under consideration and the putative like goods.
65. Visy relied on the remarks of a Panel of the World Trade Organisation (WTO) in *Korea – Pneumatic Valves* at 7.275:<sup>25</sup>

*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.*

However, in the same paragraph, the Panel said:

*In considering the price effects of dumped imports, nothing in the Anti-Dumping Agreement stipulates how an investigating authority should proceed. Certainly there is nothing that would explicitly require an investigating authority to consider the degree or nature of competition between the dumped imports and the domestic like product.*

The Panel was considering material injury, rather than making a ‘like goods’ comparison.

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<sup>25</sup> *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R, adopted 30 September 2019.

66. Visy referred to the Panel Decision in *European Communities – Anti-dumping Measures on Farmed Salmon from Norway*.<sup>26</sup> This decision was considered by Mortimer J in *GM Holden* at [125] – [127]:

*The definition in s 269T closely follows the terms of Art 2.6 of the Anti-Dumping Agreement, which provides:*

*Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.*

*The use of the term “product” in the Anti-Dumping Agreement, together with the other phrases in Art 2.6, emphasises that the comparison required is a visual or physical one. Adopting the approach to which I have referred at [12] above, a construction of s 269T which focuses on the matters to which I have referred in [124] above is consistent with the terms of the Anti-Dumping Agreement. The WTO decisions to which the Court was referred, and in particular the WTO Panel report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WTO Doc WT/DS337/R, adopted 15 January 2008, at [7.16]- [7.75], appear to adopt a similar approach.*<sup>27</sup>

The ‘visual or physical’ comparison contemplated by Art. 2.6 of the Anti-Dumping Agreement, is not reflected Visy’s market based ‘like goods’ comparison or its emphasis on injury.

67. Visy referred to the decision of the Review Panel in Review 103 – *Steel Pallet Racking Exported from the People’s Republic of China and Malaysia*.<sup>28</sup> The passage says that a ‘practical approach’ should be adopted to considering whether goods are like goods. I agree. However, adopting a ‘practical approach’ does not enable the Panel to focus on the substitutability of the GUC and the Australian

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<sup>26</sup> WS/DS337/R, adopted 15 January 2008.

<sup>27</sup> [125] – [127].

<sup>28</sup> At [65].

goods, rather than approaching the comparison visual or physical characteristics or uses in a practical way.

### **Section 15AA of the Interpretation Act**

68. Visy argued that the purpose of the anti-dumping regime in Part XVB of the Act is to give protection to a domestic Australian industry suffering injury from dumped imports and that an interpretation of 'like goods' should be adopted which furthered this purpose. Visy referred to s 269SM of the Act.
69. However, it is not clear that the purpose of Part XVB is purely and simply to protect Australian manufacturers. A purpose of the legislation is to implement Australia's WTO obligations. The Preambles to the *Marrakesh Agreement Establishing the World Trade Organization* recognize that there are advantages in eliminating tariff barriers to trade. The imposition of anti-dumping measures is a precisely circumscribed exception to this general principle. Visy's approach to the purpose of the Part elides the 'like goods' comparison. The fact of material injury would be sufficient for measures to be imposed. The Act and the Agreement on Implementation of Article VI of the *General Agreement on Tariffs and Trade 1994* require both material injury *and* likeness of goods before measures are warranted.
70. Section 269SM is a description of the operation of Part XVB, rather than a statement of intention or purpose. Although it refers to injury to an Australian industry, it should be read in conjunction with the provisions of the Part, having regard to the definitions of expressions in that Part. Section 269T(4) contains a definition of the circumstances in which there may be said to be an Australian industry. The definition operates by reference to the production of 'like goods' as defined in s 269T(1).
71. Section 269T(2) of the Act is also relevant:

*For the purposes of this Part, goods, other than unmanufactured raw products, are not to be taken to have been produced in Australia unless the goods were wholly or partly manufactured in Australia.*

It appears that the beverage packaging made from kraft paperboard is partly manufactured in Australia. The substitutability on which Visy focusses appears to be substitutability of two goods wholly or partly manufactured in Australia.

72. Section 15AA of the Interpretation Act requires the precise formulation of an alternative interpretation of the relevant provision.<sup>29</sup> Visy did not formulate an alternative construction of the definition of 'like goods' that would have been more in keeping with its view of the purpose of the Part XVB. It did not identify any words in the definition which might give rise to an alternative construction. In addition, Visy's argument was that the market impact of the goods under consideration should be prioritised over other characteristics of the goods. This argument does not appear based on construction of the definition.
73. In any event, it is not clear that Visy's emphasis on market considerations would necessarily favour Australian manufacturers. A 'market based' approach to the definition of 'like goods' may have prevented the Australian industry manufacturing ARWs in *GM Holden* obtaining relief against dumped imported ARWs.

## Conclusion

74. The approach to determining whether goods are 'like goods' has been established by *Marine Power* and *GM Holden*. *GM Holden* is inconsistent with the proposition that the 'most important factor' or the 'fundamental issue' in a like goods comparison is the market substitutability of the goods under consideration and the local goods. Goods that compete in the market may have quite disparate characteristics.
75. This is not to say that the substitutability of the goods under consideration and the local goods is irrelevant. It is unlikely that goods that are not substitutable or are not treated by the market as substitutable would be as 'like goods'. However, substitutability is not a sufficient condition for two goods to be regarded as 'like goods'.
76. The Commissioner was not required to approach the 'like goods' comparison in the way proposed by Visy. He did not err in failing to do so.
77. Ground 1 must be rejected.

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<sup>29</sup> *Mills v Meeking* (1989 – 1990) 169 CLR 214 at 235 (Dawson J).

Ground 2: The Commissioner has erred in concluding that the Goods Under Consideration and the Like Goods (produced in Australia) are not like goods for the purposes of s269T(1) of the Customs Act having regard to the weighing up of the indicia of commercial, functional, physical and production likeness.

## Introduction

78. In this ground of review, Visy contended that, even applying the rubric for comparison in the ADC Manual, the Commissioner's 'like good' analysis was wrong and, in fact, the Visy microflute was 'like' the GUC.
79. Visy contended that the GUC and its microflute were 'commercially alike' (ground 2(a), 'functionally alike' (ground 2(b), 'physically alike' (ground 2(c) and had 'production likenesses' (ground 2(d). Visy also contended that the Commissioner failed to take 'other matters' into account (ground 2(e)), specifically matters identified by the International Trade Tribunal when considering the likeness of goods.
80. It is convenient to deal first with sub-ground 2(c).

## Sub-ground 2(c) – physical likeness

81. Visy contended that the GUC and the Visy microflute are physically alike. Visy said:

*- It requires a high degree of technical acumen to distinguish between these goods;*

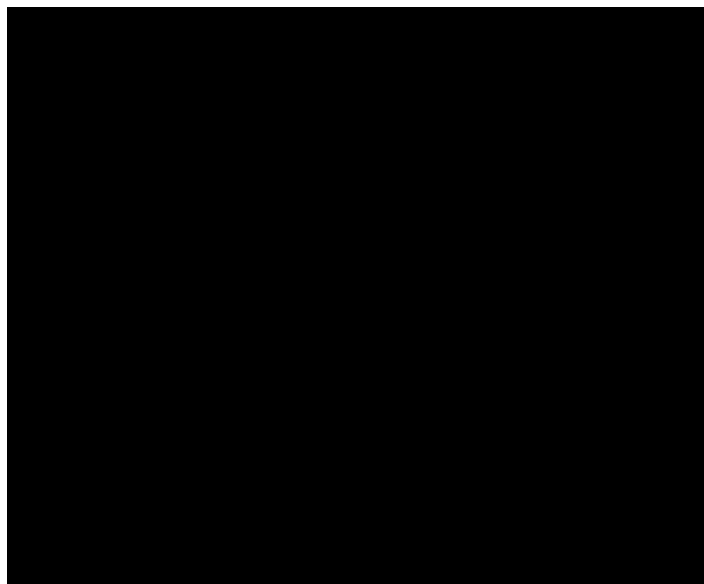
*- The users of these goods (ie the end consumers) would not recognise any differences between these goods.<sup>30</sup>*

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<sup>30</sup> Review application.



82. These contentions involve a comparison of 12+ packaging containers made from the GUC and the Visy microflute, rather than a comparison on the GUC and the Visy microflute. This raises the third issue identified in respect of ground 1 – the stage at which the like goods comparison is to be made.
83. As a general proposition, I consider that the ‘like goods’ comparison involves a focus on the goods under consideration at the time at which those goods enter Australia, rather than those goods at some later stage in the production process. This follows from the focus on the physical and visual characteristic contemplated by *GM Holden*. It also reflects the identification of the goods under consideration in applications under s 269TBA by reference to particular consignments of goods.
84. The appropriateness of this approach is illustrated by the present case.
85. Although the description of the GUC was broad enough to include kraft paper board exported in different formats, such as cut sheets, there was no suggestion that this occurred. It appears that ‘jumbo’ rolls are the standard product of the kraft paper manufacturing process.<sup>31</sup> The ADC was provided with a photograph of a ‘jumbo’ roll of kraft paperboard in the condition in which it arrived in Australia.<sup>32</sup>

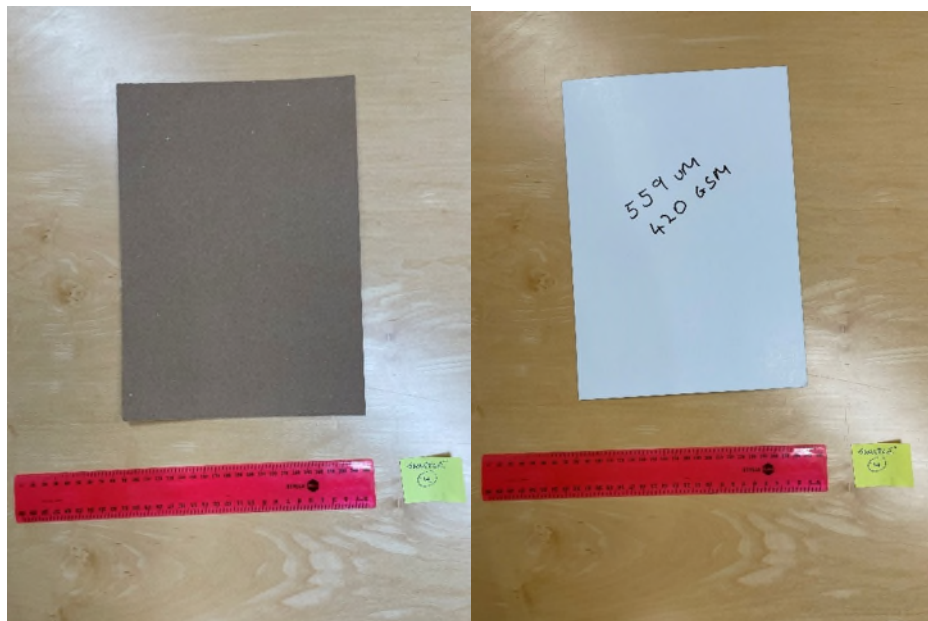


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<sup>31</sup> EPR 548, document #28.

<sup>32</sup> EPR 548, document #16, p8, Fig.1.

86. This photograph and the precise dimensions of the rolls were confidential.<sup>33</sup> The roll is on its side, with the axis vertical. [REDACTED] Assuming that the kraft paperboard was 400GSM, [REDACTED] a roll might weigh [REDACTED]. There was no suggestion that kraft paperboard was exported from the USA in any other form.
87. In addition to the photograph of a 'jumbo roll' of kraft paperboard, GPI/GPIAC provided samples to the ADC kraft paperboard taken from a jumbo roll. The following are photographs of the 420 GSM sample.



The kraft paperboard is unprinted. The photograph to the right shows side covered with the layer of 'clay or other inorganic substance', ready for printing.

88. After the GUC arrives in Australia, the jumbo rolls of kraft paper are transformed into beverage packaging of [REDACTED] in area which weigh [REDACTED].<sup>34</sup> The beverage packages are printed with the branding of the purchaser. Although the ends are not sealed and glued together when the blanks are sold, the blanks are cut into a flat carton structure that can be readily erected and filled with cans by the brand owner. GPI/GPIAC did not provide a sample of a kraft paperboard 12+

<sup>33</sup> The length of the rolls and the dimensions of the kraft paper varied.

<sup>34</sup> These estimates are rough, and based on my inspection of the samples and information provided by the parties. The dimensions of a beverage packages vary depending on the number of cans the package is designed to hold.

beverage package, but Visy provided a photograph comparing a kraft paperboard 12+ beverage package with a microflute 12+ beverage package.<sup>35</sup> The part showing the kraft paperboard 12+ beverage package is:



89. A person who ordered a quantity of finished 12+ kraft paperboard beverage packages and who received, instead, a [REDACTED] roll of unprinted kraft paperboard, would be entitled to say, 'I ordered something else'. Kraft paperboard and kraft paperboard 12+ beverage packages are different goods.
90. It is inappropriate to carry out a comparison of the physical characteristics of the goods under consideration and the putative like goods after the physical characteristics of goods under consideration have substantially changed.
91. A similar point may be made about the Visy microflute. The Visy microflute also undergoes a process of transformation before a 'blank' beverage package is made.

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<sup>35</sup> EPR 548, document #9, Attachment VG5.

92. Visy provided a summary of the production processes associated with the production of blank beverage containers.<sup>36</sup>

### **Production stages at Visy**

Stage 1: Microflute Production Line (includes corrugation and lamination processes)

The material is comprised three paper layers:

- Top sheet (printed)
- Medium (fluted)
- Back liner (inside)

These are all supplied in reel form. The width of the of the reels (deckle) is either [REDACTED] or [REDACTED]. [REDACTED] Approximate length of each reel is [REDACTED].

All three reels are placed into the machine.

- In the corrugating process, the medium (fluted layer) passes through a corrugated roller to form the flutes. This is joined to the back liner (inside) lined using starch.
- The top sheet (printed layer) is then laminated to the top of the fluted medium.
- At this stage the product is still in one continuous strip.
- After the three layers are laminated together, they are sheeted into individual sheet form at the end of the line and palletised.
- The width of the sheets is either [REDACTED] or [REDACTED], and the length of sheets is [REDACTED] (varies depending on the end product)

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<sup>36</sup> In conjunction with the conference on 14 October 2021.

- The microflute is then moved to another line at the Visy plant.

#### Stage 2: Conversion – Die cutting and Stripping Line

- On a new line the microflute sheets are put through a sheet fed die cutter (which cuts and creases the pack design).
- Sheets being loaded into the die cutter feeder can be seen at the 58 second mark of the Visy video.
- After the die cutting station, the sheets go through the stripping station - where any waste is stripped off.
- Each microflute sheet will have several carton blanks – for example [REDACTED] or [REDACTED] carton blanks per sheet (number dependant on blank and machine size).
- The sheets then go through the bundle breaker to separate them into individual blanks.
- Individual blanks are then palletised
- This conversion process is not microflute specific. Imported kraft paperboard can (and does at times) undertake the same conversion process on Visy machines

#### Stage 3: Conversion – Folding and Gluing Line

- On a new line the individual blanks are then pre folded and glued
- The handle is part of the design, it has been cut at the die cut stage and is formed during this folding and gluing stage. After die cutting, the handle element is held to the main body of the carton via 'nicks'. During folding and gluing the strip is folded 180 degrees and glued down. The two top halves then overlap and form the handle hole.

#### Stage 4: Preparation for Shipping

- The individual blanks are then counted and placed in a shipping box
- The shippers are placed on pallets, covered in stretch wrap and delivered to customer

#### Customer site production line

- The customer site will have packing machines that 'erect' the flat glued blanks, insert the required number of beverage cans into the pack, and close and glue the end flaps.

93. There was some controversy about the stage in the production process at which 'microflute' comes into existence.<sup>37</sup> Visy maintained that Stages 2, 3 and 4 above do not form part of the manufacture of microflute. Visy supported this contention by pointing out that stages 2, 3 and 4 could be carried out at facilities separate from the facility used to laminate the microflute. Even where the same facility is used, stages 2, 3 and 4 occur in separate production lines. I accept Visy's contentions on this point. The final stage in the production of microflute is, therefore, 'sheeting', that is cutting the continuous microflute from the lamination phase into a stack of rectangular sheets of microflute.
94. At the end of Stage 1, the sheets of microflute bear the image and design for [REDACTED] beverage containers depending on the size of the containers and the size of the sheet of microflute. The precise dimensions of the sheets of microflute were confidential but the area is about [REDACTED].
95. Again, a purchaser of microflute 12+ beverage packages would be entitled to refuse delivery of sheets of microflute that had not gone through stages 2, 3 and 4 above.
96. The legislation does not provide that any specific stage in the process of producing a putative like good must be identified as the 'comparison stage' by an applicant. An applicant is entitled to identify, and the Commissioner is obliged to consider, any stage in the production of the putative like good when that it might be 'like' the good

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<sup>37</sup> See for example, EPR 40 at p 3, para. 2 and 3.

under consideration. However, it is not permissible to say that a good at one intermediate stage in production of the local goods is similar to the goods under consideration in one way, *and* that a later stage in the production of the local goods is also physically similar to the goods under consideration in another way. The comparison must be made at particular points in the overall production of the putative like good.

97. Visy did not assert that microflute beverage packages blanks wrapped for shipping at the end of stage 4 of the production process were like the GUC or the blanks into which the GUC had been transformed. The 'like goods' comparison in this case was between sheets of microflute and the GUC. A person in an aisle in a supermarket who finds it difficult to tell a Visy microflute 12+ beverage package from a kraft paperboard 12+ beverage package is not making a comparison between the GUC and the Visy microflute.
98. This approach applies to other aspects of the 'like goods' comparison. By definition, the production process of the goods under consideration and the putative like goods is confined to the production history up to the point of comparison. The 'like goods' comparison is, in general, concerned with the uses of the GUC and the uses of the local goods at the time of the comparison. The like goods comparison does not involve comparing the uses of kraft paperboard with the uses of microflute 12+ beverage packages and vice versa.
99. This is not to say that aspects of the product journey before and after the point of like goods comparison are irrelevant. The Manual recognizes that the production journey of a good may inform the 'like goods' comparison by highlighting differences between the goods under consideration and the putative like goods. The uses to which goods may be put are a consequence of and illuminate the physical characteristics of the goods at the time of the comparison. Where goods are intermediate goods, the variety of goods into to which those intermediate goods may be put after further manufacturing or processing, is an aspect of the 'uses' of the intermediate good.
100. Some qualities of goods at the time of comparison might most readily be evaluated having regard to events later in the product life. For example, the resistance of the GUC and the Visy microflute to wetness could be ascertained either by testing the

goods themselves in a laboratory situation or by seeing how the end products perform as beverage packages. However, these inquiries are directed to the characteristics of the goods in the state at which they are to be compared.

101. It might be said of two intermediate goods the subject of a like goods comparison that, if the processes of manufacture subsequently to the two intermediate goods are the same and the end products of those processes are the same, then that is evidence that the intermediate goods were the same. There is some force to this argument, but it depends on the circumstances. In this case, Visy contended that the microflute 12+ beverage packages and the kraft paperboard 12+ beverage packages were very similar and that both microflute and kraft paperboard could be cut and folded using the same cutting and folding equipment (after some fine tuning). However, Visy's cutting and folding equipment appears to operate using pre-cut sheets of microflute, not the continuous roll in which kraft paperboard is delivered. More importantly, the sheets of microflute at the end of stage 1 are printed on one side. The kraft paperboard is not. Putting the GUC through Visy's cutting and folding equipment would not result in 12+ beverage containers bearing the client's branding. This demonstrates significant differences between the GUC and the Visy microflute.

102. It might also be said that the physical features of intermediate goods, particularly their visual appearance, are transient qualities, so that the visual appearance of goods should be given little weight. While visual appearance may be transient in a particular case, that does not warrant making the visual comparison after the visual appearance of the goods has changed. In the present case, the difference between the visual appearance of the GUC and the Visy microflute means that different processing is required before those goods can be used as beverage packages.

103. Visy also contended that the fact that the GUC is in large rolls and the Visy microflute is in sheets is merely a matter of convenience. It said that there are many goods which can be stored as sheets or rolls.<sup>38</sup> There was no suggestion the kraft paperboard is delivered to Australia as cut sheets. Conversely, the Commissioner identified that microflute cannot be formed into a roll because of its inflexibility.<sup>39</sup>

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<sup>38</sup> Review application at 3.19.

<sup>39</sup> TER 548 at p18.



104. In the present case, these physical differences between the GUC and the Visy microflute are not fine differences that require technical expertise to discern. They are gross physical differences.
105. Even after the GUC and the Visy microflute are made into beverage packages, microflute can be identified without technical expertise. Inspecting the samples of the Visy microflute provided to me, I could detect very slight corrugations in the surface of some but not all the microflute beverage packages provided by Visy. I could see the fluting in the cut cross sections of the packaging and, more obviously, if I tore the microflute. 'N' fluting, such as the Visy microflute, has fluting 0.5mm wide. I accept, however, that a reasonable person in a supermarket aisle would not bother. The focus of a consumer would be on the beverage.
106. TER 548 also identified other less obvious physical differences between the two goods. Kraft paperboard is comprised of a single layer derived from virgin pulp. The kraft paperboard's strength derives from the length of the cellulose fibres making it up<sup>40</sup> and the process used to make it, the 'kraft' process.<sup>41</sup> In addition, the strength of the kraft paperboard in wet environments is preserved through the use of chemical additives. The Commissioner noted that kraft paperboard is slightly thinner than microflute.
107. Visy microflute, on the other hand, is a type of corrugated board.<sup>42</sup> It is a laminate, made up of three layers: top and bottom liners together and a middle layer of corrugations or fluting, which is glued to the linings. Corrugated boards are classified by their width, which depends on the size of the fluting. Visy categorised its product as 'N' flute, with a width of 0.7mm. Dr Vanderhoek, an independent expert engaged by the ADC, refers to the height of the flutings themselves, with "N" flute having 0.5mm corrugations. The strength of microflute derives from its composite structure, as well as the strength of its materials.<sup>43</sup>

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<sup>40</sup> EPR 548, document #28, at [5.11].

<sup>41</sup> EPR 548, document #28 at [5.24].

<sup>42</sup> EPR 548, document #28 at p12.

<sup>43</sup> EPR 548, document #28, at 5.96.

108. Brand managers are aware of these differences between the two product and the impact of the differences on their production, even if they used or were prepared to use either product.<sup>44</sup>

109. The Commissioner considered that the GUC and Visy microflute should be assigned to different tariff classifications.<sup>45</sup> He considered that the GUC should be assigned to either one of the following classifications:

4810.29.90 – 64: Paper and paperboard of a kind used for writing, printing or other graphic purposes, of which more than 10% by weight of the total fibre content consists of fibres obtained by a mechanical or chemi-mechanical process:

o other, containing less than 55% mechanical pulp; and

4810.39.00 – 83: Kraft paper and paperboard, other than that of a kind used for writing, printing or other graphic purposes:

o other

110. He considered microflute falls under the following classification:

4808.10.90 – 51: Paper and paperboard, corrugated (with or without glued flat surface sheets), creped, crinkled, embossed or perforated, in rolls or sheets, other than paper of the kind described in 4803:

o other.

111. Visy contended that the GUC and Visy microflute should be classified to the 4808.10.90 because the GUC has a clay coating, which is not referred to in classification 4809.29.90. I disagree with Visy on this point. Classification 4809.29.90 is neutral as to the presence of a clay coating. Classification 4810.39.00 – 83 specifically refers to kraft paperboard. On the other hand, classification 4808.10.90 – 51 specifically refers to a corrugated product including a corrugated product with surface sheets, like the Visy microflute.

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<sup>44</sup> EPR 548, document #24. This is also reflected in the confidential letter from a brand manager provided by GPI/GPIAC dated 23 October 2020.

<sup>45</sup> TER 548 at p 16.

112. I consider that the GUC and the Visy microflute are not physically alike.

### Sub-ground 2(a) - Commercial likeness

113. The Commissioner concluded that the GUC and the Visy microflute were not commercially alike. He said:

*the imported and locally produced goods are not commercially alike as they do not directly compete in any market, noting that some of the imported goods are converted into goods that compete directly with products converted from the locally produced goods.*<sup>46</sup>

114. Visy contended:

*the Commissioner is disregarding the 'real world' evidence of the commercial relationship between these products and instead has opted for a hypothetical and narrow comparison of the goods at a particular point in the manufacturing process, without having regard to the commercial reality that the goods are specifically designed for both manufacture, conversion and sale into the same markets. The finding of the Commissioner as quoted above is also contradictory with the second sentence suggesting an acknowledgement of commercial likeness.*

115. I do not agree with Visy's criticisms.

116. The Commissioner did not disregard the fact that the GUC and the Visy microflute are converted into competing goods. He specifically adverted to it. I accept that it is relevant. Definitive market differentiation can be problematic.

117. For the reasons given above, the evaluation of the commercial likeness between the GUC and the Visy microflute is a comparison between the GUC and the Visy microflute at the stage before both those goods have been substantially changed. Consideration of market competition involves considering the market for the GUC and the Visy microflute, rather than the market for 12+ beverage packages made from those goods.

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<sup>46</sup> TER 548 at p28.

118. It is accurate for the Commissioner to say that the GUC and the Visy microflute do not compete in the market. Visy does not sell its microflute. There is no market for Visy microflute as such. Although Visy indicated that it would consider suitable offers for microflute before it went through stages 2, 3 and 4 of the production process, it does not appear that it has received such offers. It does not appear to have solicited such offers. GPI/GPIAC do not appear to sell kraft paperboard to third parties. If there was a market for Visy microflute, it is unlikely that a potential purchaser would choose kraft paperboard instead of microflute. The kraft paperboard has not been cut into sheets. It is not printed. There is no reason to think a purchaser of microflute could or would want to sheet and print kraft paperboard.
119. Visy and GPI/GPIAC do compete in the market for 12+ beverage containers. I accept that kraft paperboard 12+ beverage packages and 12+ microflute beverage packages are substitutable. The former brand manager of Schweppes, Mr Mitropolous, provided a statement about an occasion on which the Schweppes contract from 12+ beverage containers had moved from kraft paperboard to microflute. This happened in 2004.<sup>47</sup> Visy also indicated that it had recently lost a contract for the supply of microflute 12+ beverage packages to kraft paperboard. However, it appears that there are commercial risks and practical difficulties associated with moving from one type of beverage packages to another which makes brand owners reluctant to change. They have done so, but not often.
120. The Commissioner concluded that more than half the kraft paperboard imported during the investigation period was used for products other than 12+ beverage packages,<sup>48</sup> specifically beverage packages for less than 12 beverages (12- beverage packages). Both GCI and Westrock provided evidence of the use of their product within the description of the GUC on 12- beverage packages.<sup>49</sup> Visy accepted that 12- beverage packages were made from kraft paperboard but contended that the kraft paperboard was outside the 360GSM lower limit of the description of the GUC. It provided results from an independent testing laboratory of

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<sup>47</sup> EPR 548, document #24.

<sup>48</sup> TER 548 at p 16 and 18.

<sup>49</sup> EPR 548, document #8 at pp 2 and 3, and Attachments 2. EPR 32 at p 10 – 12. This information was provided confidentially. The data is analysed in Confidential Appendix 2 to TER 548.

12- beverage packages with grammages less than 360 GSM.<sup>50</sup> However, the grammage, particularly of the GPI products, is not much below the lower boundary specified in the description of the GUC. Dr Vanderhoek indicated that the results of testing paperboard was substantially affected by the circumstances in which the products were tested. Dr Vanderhoek refers to testing being carried out on reels of kraft paper.<sup>51</sup> He also said that kraft paperboard rolls retain between 6% and 8% moisture on a dry mass basis. Visy's testing was carried out on assembled beverage containers, rather than on reels of kraft paper. It is not clear that moisture would be retained after kraft paperboard is converted to beverage packages so that the grammage might not be maintained in assembled goods. I am not persuaded by the tests provided by Visy. I adopt the Commissioner's conclusion that kraft paperboard is used for 12- beverage packages.

121. On the basis that, during the investigation period, a [REDACTED]<sup>52</sup> of Visy's microflute was used for 12+ beverage containers, kraft paperboard packaging is sold into markets in which Visy's microflute does not participate.

122. I do not consider that a 'yes/no' answer is required for each individual component of likeness. The analysis given by the Commissioner is appropriate.

## Ground 2(b) – functional likeness

123. The Commissioner concluded that the GUC and the microflute were not functionally alike. He said:

*the imported and locally produced goods are not functionally alike as they are not substitutable. Noting that some end use products made from imported goods can be substituted with end use products made from locally produced goods, for more than half of the products made from imported goods, the locally produced goods are unable to perform the same function.*

124. Visy contended that microflute and imported kraft paperboard (within the GUC) are functionally alike because:

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<sup>50</sup> EPR 548, document #38.

<sup>51</sup> EPR 548, document #28 at [5.78] and [5.81].

<sup>52</sup> [REDACTED]

- These goods have the same end use: they are both used in large format beverage can packaging; and
- These goods perform the same functions: they are both designed for the carrying and storage of beverages.

125. In this context, it is helpful to recall the discussion of 'Functional likeness' in the Manual:

*Functional likeness refers to end use. End-use will not of itself establish like goods, but may provide support to the assessment of physical and commercial likeness.*

126. To analyse the 'end use' of a good is to answer the question, 'what can people do with this thing?'

127. In case of microflute, the answer to this question is that Visy 12+ beverage packages with its microflute. In the case of kraft paperboard, the answer is that GPI/GPIAC makes 12+ beverage packages with it. Microflute and kraft paperboard have end uses which are the same. There was debate between Visy and GPI/GPIAC about which product performed better as a 12+beverage package, but it was inconclusive. Further, differences in performance were not so significant as to deter brand managers using either good for 12+ beverage packages.

128. I note that the Manual uses the expression 'end use'. The judges in *Marine Power* and *GM Holden* did not use the expression 'end use'. There is not much difference in the present case because the microflute and the GUC do not appear to have uses apart from conversion into packaging.

129. The lack of 'substitutability' between the GUC and the microflute does not mean that they do not have the same use. I disagree with the Commissioner on this point. Substitutability, in the present context is about whether a purchaser or user of microflute would switch from buying or using microflute to using kraft paperboard, and vice versa. It does not appear likely that will occur because the main users of kraft paperboard are GPI/GPIAC and Westrock the main user of Visy microflute is Visy. However, both the Visy microflute and the kraft paperboard are used to make 12+ beverage packages.

130. Visy contends that microflute has no other significant end use<sup>53</sup> while the Commissioner considered kraft paperboard has other end uses in addition to use as 12+ beverage packages, specifically packaging for less than 12 beverage packages. For the reasons given above at paragraph [120] I accept that this was the case.

### Summary

131. In the present case, I consider that there is functional likeness between microflute and kraft paperboard. A primary use of both products is the same. However, the end uses of kraft paperboard are broader, extending to 12- beverage packages.

### Ground 2(d) – production likenesses

132. In relation to production likenesses Visy accepted that there were ‘some differences’ in the production methods used to product microflute and kraft paperboard. It contended that the differences concern ‘manufacturing processes which involve the manufacturer striving to achieve the same or similar characteristics to enable each product to be used in a specific end use’. It said that ‘both products are manufactured by bringing together several plies or layers of paper and otherwise involve similar manufacturing processes’.

133. Visy also contended that ‘production likeness’ is ‘a subsidiary factor with greater emphasis required to be given to commercial, function and physical likeness. This makes sense in that the most important considerations are the identification of the goods and their function and end use.’<sup>54</sup>

134. The production differences between the microflute and the GUC are substantial. Microflute is manufactured by laminating three separate layers, shortly before it is cut into sheets. The fluting component is made from recycled materials. One of the layers is pre-printed. Although microflute is, in a general sense, a paper product, it is also the result of conversion processes applied to previously existing paper products. Indeed, kraft paper is used for the top and bottom and bottom liners. Dr

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<sup>53</sup> It asserted that [REDACTED] of microflute is used for this purpose.

<sup>54</sup> Review Application, p 24.

Vanderhoek refers to the process of creating corrugated products as a 'converting process'.<sup>55</sup>

135. Kraft paperboard, on the other hand, is formed from wood pulp slurry. A water strengthening agent is added to the slurry which is then formed into a sheet on a Fourdrinier paper machine. A white pigment is applied to the kraft paperboard. This process is not 'lamination'. The product is then calendared, so that it can be printed.<sup>56</sup>

136. I do not consider that 'production likeness' is an aspect of the like goods comparison which should be subordinated to the commercial and functional aspects of the 'like goods' comparison. However, the same good may be produced by different processes (eg steel). Production differences are not conclusive.

## Ground 2: Summary

137. My views in relation to ground 2 may be summarised as follows.

138. The 'like goods' comparison should be undertaken before the goods under consideration have been substantially transformed by subsequent manufacturing or processing. The same is true of the putative like goods. However, events which occur after or before the point of comparison may be relevant.

139. The GUC and Visy microflute are significantly physically different, both at the 'macro level' and in terms of the inherent make-up of the two goods. These differences affect the uses to which the two goods can be put and limit their substitutability.

140. The production processes of the GUC and Visy microflute are different and lead to the physical differences between the goods.

141. The GUC and the microflute products are not commercially substitutable because of the physical differences between them and because there is no commercial market for the GUC and the Visy microflute before those goods are converted into beverage packages. After the GUC and the Visy microflute have undergone substantial manufacturing processes, 12+ beverage packages are made from the GUC

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<sup>55</sup> EPR 548, document #28 at 5.63.

<sup>56</sup> EPR 548, document #7, at p6, document #28.



and the Visy microflute are substitutable. The GUC participate in the 12- beverage package market, so there are commercial differences between the GUC and the Visy microflute.

142. I do not agree with the Commissioner's analysis of the functional likeness, or end use, of the two goods. The limited substitutability of the goods does not prevent them having the same end use, that is the production of 12+ beverage packages. The GUC and Visy microflute have a substantial end use which is the same. However, the GUC has broader uses than the Visy microflute.

### Ground 3: The Commissioner has disregarded and not adopted the conclusions of its own appointed expert in assessing the question of like goods

143. The ADC commissioned a report from an independent expert, Dr Nafty Vanderhoek. Dr Vanderhoek sets out the questions he was asked:

- (a) Is Microflute an identical product with kraft paperboard?
- (b) If not, set out whether or not Microflute and kraft paperboard have characteristics closely resembling one another by giving consideration to physical likeness, commercial likeness, functional likeness, production likeness or any other consideration as set out within Chapter 2.3, Anti-Dumping Commission's Dumping and Subsidy Manual (November 2018).
- (c) In addition to Microflute, do any other products closely resemble kraft paperboard and, if yes, are they manufactured in Australia and by whom?<sup>57</sup>

144. Dr Vanderhoek's conclusion was:

- 7.1 *Finally, taking into account all the factors detailed in this report, in the absence of meaningful specifications for box performance and based*

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<sup>57</sup> EPR 28, at [5.6].

*on the definition outlined under section 269T (1) of the Customs Act 1901 (Cth), it is my professional opinion in relation to the specific questions listed in paragraph 5.6 that:*

- (a) Microflute and kraft paperboard are both similar and different products depending on the measure chosen for comparison;*
- (b) Microflute is a “like good” alternative for kraft paperboard for physical, functional, and production factors where these materials are used in 12+ beverage can multipack applications; and*
- (c) There is no other fibrous product closely resembling kraft paperboard, other than microflute, able to meet the 12+ beverage can multipack performance requirements in their entirety.*

145. The Commissioner commented:

*The Vanderhoek Report does not substantially compare the similarities and differences of the following characteristics between locally produced microflute and the goods under consideration:*

- physical;*
- commercial;*
- functional; and*
- production.*

*...*

*The Commissioner considers that Dr Vanderhoek’s opinion that microflute is a “like good alternative” for use in a particular application is not the same as it being a like good for a dumping investigation.*

146. Visy argued that the Commissioner was wrong to not conclude, on the basis of Dr Vanderhoek's opinion, that the GUC and the microflute were 'like goods'.<sup>58</sup> I disagree with Visy and agree with the Commissioner's stance for the following reasons.

147. Although, as Visy points out, Dr Vanderhoek specifically referred to the 'definition outlined in section 269T in [7.1]. Dr Vanderhoek did not address the criteria of physical, commercial, functional and production likeness in his reasoning. He did not refer to the discussion of 'like goods' in the Manual and does not appear to have had regard to the relevant portion of the Manual. His report may be contrasted with the report of Mr Klass, which was provided by GPI/GPIAC and went through the relevant criteria. The lack of overt reasoning lessens the weight which can be given to the report.

148. Dr Vanderhoek's disregard for the considerations articulated in the Manual is also apparent from paragraph 6.6 of his Report:

*Microflute is not an identical product with kraft paperboard; however in the context of the matter under consideration and in my opinion, the critical question from a scientific viewpoint is not whether kraft paperboard and Microflute are identical products (they are both similar and different depending on the measure chosen for comparison or if one takes a narrow or broader perspective), but whether each can be converted into 12+ beverage can multipacks (the intended purpose) and perform according to agreed specifications (standard scientific practice) or to the complete satisfaction of the customer in the instance where there are no agreed specifications (non-scientific assessment).*

149. The answers set out in paragraphs 7.1(a), (b) and (c) were given in the absence of such specifications. He said:

6.9 *From a reading of the documents provided in the Electronic Public Register, the question of final product specifications, as mentioned in paragraph 6.8, is barely addressed by either party in any meaningful*

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<sup>58</sup> Review Application at [4.8].

*way. From a technical viewpoint, I consider this as an unfortunate and a regrettable omission.*

To require specifications is to misunderstand the task. The question is not whether both of the UC and the Visy microflute are both 'like' or satisfy a standard or specification. The question is whether they are 'like' each other. The standard against which the GUC is to be judged is the Visy microflute, and vice versa.

150. Visy pointed out that Dr Vanderhoek said in his report that 'it is most sensible to compare many of the characteristics of microflute and kraft paperboard 'at the final stage; that is the finished box'. The broader context in which that remark occurs is:

6.7 For packaging, customer expectations encompass the basic functions of protection, containment, convenience, information, and promotion. Technology allows these expectations to be met in multiple ways through a combination of fibre selection, processing methods, equipment choice, construction preferences, and print options as described in the body of this report. As a consequence, function performance as described above is most sensibly compared at the final product stage; that is, the finished box.

6.8 The functions listed in paragraph 6.7 are qualitative descriptors and accepted scientific practice is to replace these, whenever and wherever possible, with quantitative measures that are reflected in product grade specifications. Failure to do so means performance is judged subjectively and what may be acceptable to one party may be unacceptable to another.

151. The issue is not one of customer satisfaction. It is one of objective likeness. Dr Vanderhoek's narrow focus on the ability of each of the GUC and the Visy microflute to function as 12+ beverage containers was misguided. Two different goods can perform to the same function. Matches and cigarette lighters are an obvious example. Further, the goods to be compared are not beverage containers but kraft paperboard and microflute.

## Ground 4: The Commissioner has failed to investigate matters that are directly relevant to the like goods assessment and has based its findings on factually erroneous assumptions.

152. Visy contended that the Commissioner failed to investigate the following relevant matters:

- (a) verify total Australian microflute production (production/sales volumes);
- (b) identify Australian microflute producers and quantify their sales and market shares;
- (c) verify the end uses of microflute manufactured and sold within Australia;
- (d) verify the end uses of imported kraft paperboard (within the GUC) noting Visy's claims about small format wet strength treated beverage packaging not being within the scope of the GUC;
- (e) obtain information from commercial customers of the GUC and microflute to examine the claims regarding commercial, functional, physical likeness from the experience of these critical market participants; and
- (f) investigate and place relevant evidence on the public record any information regarding the customer's specifications and the ability of the GUC and microflute to each meet such specifications. The ADC's appointed Expert, Dr. Vanderhoek, noted in his Report that the omission of the technical specifications for the final products as a 'regrettable omission'.

153. Dealing with these matters in turn:

- (a), (b) & (c) it is not apparent how total microflute production is relevant. The GUC and the Visy microflute do not become more or less alike depending on the amount of microflute produced in Australia or who produces it. Visy asserted that it was the sole manufacturer of microflute in Australia;

- (d) the Commissioner made inquiries, received information about, and was satisfied about the end uses of imported kraft paperboard. He was aware of Visy's claims about small format wet strength treated beverage packaging not being within the scope of the GUC. He disagreed with Visy's claims; and
- (e) it is not apparent that there are customers of 'the GUC and microflute'. Visy indicated that it does not sell 'microflute'. It provided no material to suggest that it has received any offers to purchase 'microflute'. If paragraph (e) is intended to refer to purchasers of 12+ beverage containers made from kraft paperboard and microflute respectively:
  - (i) 12+ beverage containers are not the GUC or the putative like goods; and
  - (ii) it was not in substantial dispute that brand managers were prepared to buy 12+ kraft paperboard beverage containers in place of 12+ microflute beverage containers. Visy and GPI/GPIAC provided material from brand managers setting out their opinions about the respective beverage containers which showed that switching between the GUC and Visy microflute occurred; and
- (f) As a supplier of 12+ microflute beverage packaging, Visy was aware of the product specifications of those entities to whom it supplied or formerly supplied its product. It did not provide specifications to the Commissioner, even after Dr Vanderhoek's comments. It is not able to complain that the Commissioner did not obtain that information. I do not agree with Dr Vanderhoek's comments about the need for specifications in order for a comparison to be made between the GUC and the Visy microflute.

154. Visy also raised the following matters:

- (a) it complained that the Commissioner said that 'the majority of its packaging is used for 12+ beverage containers' when, in fact, [REDACTED] was used for that purpose. This complaint does not advance Visy's position. Both statements are true. The Commissioner was constrained by his obligation of confidentiality to not specify the actual figure.

- (b) it complained about that the Commissioner found that Opal converted its product to other forms of packaging. Visy did not explain how this question was germane to the present issue. If the GUC and the Visy microflute were found to be 'like goods', it would become necessary to determine the extent of the Australian industry and the extent of material injury.
- (c) the Commissioner wrongly concluded that there was substantial use of the GUC for applications other than 12+ beverage packs. I have dealt with this contention at paragraph [120] above.

155. In addition:

- (a) the issue for determination is whether the Reviewable Decision was or was not the correct or preferable decision. The fact that the Commissioner failed to investigate certain matters, does not mean that the decision was not the correct or preferable decision; and
- (b) the ADC need not go through a formal verification process of matters relevant to material injury when the application fails at the earlier, 'like goods', hurdle. For the reason given earlier, the fact that Visy has suffered material injury as a result of the importation of the GUC does not establish that the GUC and the local goods are 'like goods'.

156. I do not accept this ground of review.

**Ground 5: In assessing like goods, the Commissioner has failed to place sufficient weight on the end use of the imported and Australian made goods and properly examine the relationship between the intermediate and finished good.**

157. Visy contended that the Commissioner erred in his like goods analysis because he failed to place sufficient weight on the end use of the goods and failed to fully and properly examine the relationship between intermediate and finished goods for both

the GUC and the microflute.<sup>59</sup> Visy contended that ‘the final (converted) goods are like goods and this is a relevant consideration in determining the likeness of the intermediate goods’. This ground effectively restates the propositions advanced in support of grounds 1 and 2. For the reasons given in those grounds, I consider that focussing on the likeness of the beverage packages, rather than the GUC and the Visy microflute, is not consistent with *Marine Power* and *GM Holden* or the definition of ‘like goods’. To the extent that the approach of the ITC goes beyond that contemplated by *Marine Power* and *GM Holden*, it does not, in my opinion, reflect the approach to be followed under the Act.

158. Visy said that the Commissioner should have carried out what the United States International Trade Commission calls a ‘semi-finished product analysis’. Visy said that the ‘semi finished goods analysis’ involves examination of the following factors:<sup>60</sup>

1. whether the upstream article is dedicated to the production of the downstream article or has independent uses;
2. whether there are perceived to be separate markets for the upstream and downstream articles;
3. differences in physical characteristics of the upstream and downstream articles;
4. differences in the cost or value of the vertically differentiated articles; and
5. the significance and extent of the processes used to transform the upstream into downstream articles.

159. Visy did not explain how the ITC factors were applied by the Commission. Visy did not explain how these matters would assist it in this case, apart from the general propositions discussed above. It does not appear that each of those factors would be relevant in each case where an intermediate good was involved. Apart from the cost or value of the vertically differentiated articles I have adverted to matters in this Report.<sup>61</sup> Although Visy contended at the conference that Stages 2, 3 and 4 of the

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<sup>59</sup> Review Application at [6.1].

<sup>60</sup> Review Application at [6.2].

<sup>61</sup> At [128], [119], [127], [88] to [95].



creation of 12+ beverage packages was only a very small part of the total cost of producing 12+ beverage packages, it did not point to detailed information on this matter. I accept that it is also likely that a substantial part of the costs of microflute 12+ beverage containers is attributable to the raw materials and Stage 1 of the process. This impact of this fact is contestable. It might be thought to reinforce the significance of the physical differences between the GUC and the Visy microflute before conversion into beverage packages.

160. This ground does not assist Visy.

## Conclusion as to 'like goods'

161. The like goods comparison contemplated by *Marine Power* and *GM Holden* focusses on the visual and physical characteristics of the goods under consideration and the putative like goods and their uses. The substitutability of the goods is not the primary consideration. Economic injury to an Australian manufacturer of goods is not sufficient to establish that exported goods are like locally produced goods.

162. The like goods comparison involves the goods under consideration as defined and imported, rather the goods after they have undergone a substantial manufacturing process in Australia. In the present case, the GUC underwent a substantial manufacturing process to become beverage packages. The 'like good' comparison in the present case was between the GUC and the Visy microflute, rather than between beverage packages made from GUC or Visy microflute.

163. My views about the individual components of the like good comparison are summarised at paragraphs [137] to [142] above.

164. While there are some similarities between the GUC and the Visy microflute, particularly in relation to the end use of the two goods, the physical differences are substantial and significant. I consider that, on balance, the GUC and the Visy microflute are not 'like goods'.

## Decision

165. The Reviewable Decision was the correct or preferable decision and must be affirmed.

166. Interested parties may be eligible to seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decision (Judicial Review) Act 1977*, within 28 days of receiving notice.

A handwritten signature in blue ink, appearing to read 'DS Ellis', with a small comma at the end.

DS Ellis  
Panel Member  
Anti-Dumping Review Panel  
29 October 2021