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20 January 2011

Non-confidential

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The Trade Measures Review Officer
Attorney-General's Department
3-5 National Circuit
Barton ACT 2601
Australia

Dear Sir

RE. Application for a review of the decision of the Chief Executive Officer of the Australian Customs and Border Protection Service to terminate the investigation into certain clear float glass exported from the People's Republic of China, Indonesia and Thailand.

Notice of the decision to terminate the above investigation was published in The Australian newspaper on Wednesday December 22, 2010.

1. Contact Details

1.1 Name, street and postal address, and form of business of the applicant

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A copy of the authorisation for Blackburn Croft & Co to act in this matter is attached.

2. Full Description of the Goods

- 2.1 The goods (in the terminated investigation) were clear float glass (CFG) in nominal thicknesses of 3mm-12mm.

The acceptable tolerances to these thicknesses are shown below.

Table 1

Nominal thicknesses (mm)	Acceptable Tolerances (mm)	
	Minimum	Maximum
3	2.80	3.5
4	3.51	4.50
5	4.51	5.50
6	5.51	7.00
8	7.01	9.00
10	9.01	11.00
12	11.01	12.30

- 2.2 The tariff classification is helpful in understanding the description of the goods. Glass imported into Australia that does not fall under tariff classification 7005.29.00 is not the goods. Therefore, the goods must have the following characteristics to be considered as the goods:
- transparent
 - flat; and
 - rectangular or square in shape.

Furthermore, glass with the following characteristics is not the goods:

- coating, colour, tint or opaqueness;
- absorbent, reflective or non-reflective layer;
- wired;
- bent, edge-worked, engraved, drilled, enamelled or otherwise worked;

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- framed or fitted with other materials;
- toughened (tempered) or laminated;
- acid etched; or
- low iron.

3. The Tariff Classification

3.1 The tariff classification of the goods is 7005.29.00, statistical codes 2 through to 6, in Schedule 3 of the *Customs Tariff Act 1995*. Statistical codes are:

- 02 Exceeding 2.5mm but not exceeding 3mm
- 03 Exceeding 3mm but not exceeding 4mm
- 04 Exceeding 4mm but not exceeding 6mm
- 05 Exceeding 6mm but not exceeding 10mm
- 06 Exceeding 10mm

The general rate of duty is 5 percent and the Developing Country Status (DCS) is 4 percent. China and Indonesia are subject to the DCS rate and imports from Thailand are free of duty.

4. A copy of the written advice from the CEO of the decision to terminate the investigation.

4.1 This is attached.

5. A detailed statement setting out the grounds upon which the Review Officer is being asked to review a decision by the CEO to terminate an investigation into whether a dumping duty notice or countervailing duty notice should be published.

5.1 Customs and Border Protection incorrectly assessed sales volumes and did not sufficiently address the decline in volumes in YEM 2010.

5.2 Customs and Border Protection did not adequately examine the relationship between imports and Viridian's sales.

5.3 The conclusion on the market share did not take into account sufficiently the YEM 2010 market for CFG.

5.4 The conclusion on price depression was incorrectly based on an observation of trends since June 2006 and did not observe the recent and verifiable price depression in YEM 2010 both at the total level and that of individual customers.

5.5 The analysis on price suppression did not adequately identify the increasing price suppression in YEM 2010.

5.6 The decline in profits and profitability in YEM 2010 was not adequately assessed.

- 5.7 There was a wrong assumption of a price premium and the price undercutting analysis was influenced by an undumped price comparison.
- 5.8 The use of YEM 2007 and YEM 2008 volumes to analyse the "Materiality of injury caused by dumping" ignores changes to the industry over the injury period and Customs and Border Protection has chosen a method which is unfair and does not produce a meaningful result. The methodology has resulted in wrong calculations of an unsuppressed selling price.
- 5.9 The finding on threatened material injury was based on incorrect findings of negligible injury.
- 5.10 Customs and Border Protection has incorrectly incorporated into its decision to terminate the investigation the predicted impact of the dumping duty. This misplaced speculation has introduced bias and Customs and Border Protection has failed to have proper regard to or draw obvious conclusions from the provided information in examining material injury.
- 5.11 The failure to disclose the analysis in the Termination Report (using volumes achieved in earlier years) at the time of the SEF or subsequent to the SEF within a reasonable time removed Viridian's rights to defend its interests. The late notice of this analysis reflects Viridian's concerns that Customs and Border Protection's resources were not adequately managed during the investigation.

6. Periods used for Analysis

- 6.1 Customs and Border Protection analysis, at times, looked at trends over the four year period. This resulted in some injury analysis insufficiently considering the injury in the last financial year (1 April 2009 – 31 March 2010). The last year of the injury analysis period was also the investigation period for the purposes of establishing dumping.
- 6.2 We note that the WTO Committee on Anti-Dumping Practices (4-5 May 2000) made the following recommendation on the period of data collection:

(c) The period of data collection for injury investigations normally should be at least three years, unless a party from whom data has been gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation;

However the usefulness of data collected over a three year period (in the CFG case four years) should be borne in mind particularly when the domestic industry has undergone significant changes over that period.

- 6.3 In the four years to YEM 2010 the industry producing clear float glass underwent significant changes which included the following:

- The refurbishment of the Dandenong plant in YEM 2009 (May – Nov 2009). At the end of YEM 2008 the Dandenong plant was near the end of its economic life. It is common practice worldwide for clear float glass plants to be refurbished/rebuilt on a 10-15 year cycle.
- During this refurbishment Viridian imported glass in YEM 2008, increased production in YEM 2008 and YEM 2009 to cover production shortfalls during the refurbishment and imported glass in YEM 2009. Viridian's other clear float glass plant at Ingelburn, NSW continued to manufacture clear float glass in Australia during the refurbishment.
- In YEM 2009 standard costs (including fixed costs) were based on YEM 2008 volumes. The under recovery of fixed costs in YEM 2009 reflected lower volumes produced during the refurbishment year.
- As part of the refurbishment Viridian invested in the technology to produce coated glass in Australia. This resulted in an improved range of products available to Viridian's customers.
- The Dandenong refurbishment resulted in reduced fixed costs and other cost savings. The refurbishment allowed wider sheets of glass to be manufactured, resulting in cost efficiencies.
- In the four year period there was a move away from 3mm thick glass to 4mm thick glass following the introduction of a new Australian standard. Lower volumes of 3mm glass were supplied to customers for general use with a greater demand for 3mm glass to be processed into 6.38mm laminated glass.
- This affected the product mix of 3, 4, 5, 6, 8, 10 and 12mm CFG
- Significant improvements in distribution through the use of float liners which reduced the time taken to load the glass and also reduced the offloading costs at customer premises.
- As a result of the refurbishment and investment in the coating facility, Viridian can now provide a wider range of glasses (coated energy efficient glasses) which increases Viridian's position as a one stop shop supplier of all types of glass, including clear float glass.
- Viridian established separate management and reporting structures for Viridian Upstream and Viridian Downstream which came effective in late 2009. Viridian Upstream sells (or using a Customs and Border Protection's terminology: "transfers") clear float glass to Viridian Downstream which is essentially the branch network distributing and processing glass in orders of around █ tonnes or more.
- Viridian Upstream manufactures clear float glass and sells clear float glass to independent distributors who are at the same level of trade as Viridian Downstream. During YEM 2009 Viridian Upstream ceased selling glass to the laminating plant which was then part of Viridian Downstream. Viridian Upstream now transfers at cost clear float glass (mainly 3mm and 5mm thicknesses to produce 6.38mm and 10.38mm laminated glass) to the laminating plant which has had an effect (but not as much as stated by Customs and Border Protection) on the volume of clear float glass sold by Viridian Upstream.
- In YEM 2008 a major customer of Viridian Upstream was acquired (Don Mathieson and Staff Glass Pty Ltd (DMS)). Following this acquisition in Oct 2007,

DMS, which was previously treated as an external customer, became an internal customer.

- There has been a growth in the number of companies capable of processing glass and the required volumes are such that Viridian Upstream can sell directly to those processors. Previously those processors (when they required smaller volumes of CFG) were customers of Viridian Downstream.
 - The refurbishment has resulted in cost savings through production gains, manning reduction, cost reduction and lower energy costs. These savings have offset the higher depreciation costs.
- 6.4 In its consideration of indicators of material injury Customs and Border Protection often appeared to conduct an end point to end point analysis. This was sometimes over the four years or comparisons were made with the first two years and the second two years. However such an analysis is not always appropriate for some indicators (such as price) and an end point to end point analysis must be aware of changes in the industry, particularly when those changes affect comparative periods (such as the refurbishment in YEM 2009).
- 6.5 We note that the period used for injury analysis was considered in the TMRO report on Certain Hollow Steel Sections from Malaysia and the People's Republic of China (13 December 2010).

The TMRO decision included the following comment:

26. Pursuant to section 269AE(1) of the *Customs Act*, a determination of material injury to an Australian industry is to be assessed with regard to various indicators. A number of these indicators (for example, export volume) require an analysis 'during a particular period.' The term 'particular period' is not specifically defined in the legislation. The question thus arises as to whether it was reasonable for Customs and Border Protection, in accordance with its stated policy, to confine its analysis 'during a particular period' to the investigation period.

27. In my view it was not unreasonable for Customs and Border Protection to confine its analysis of material injury suffered over a 'particular period' to the calendar year corresponding with the investigation period. In reaching this conclusion, I note the recommendation adopted by the World Trade Organisation Committee on Anti-Dumping Practices regarding periods of investigation, which was based on normal state practise. This recommendation provides that the period of data collection for dumping investigations should be twelve months, with the period of data analysis for injury at least three years. This appears to have been the approach followed by Customs and Border Protection. Whilst consideration was given to trends in the Australian Industry over 2005 – 2007, findings of injury specifically from dumping were confined to the 12 month period in which a positive finding of dumping had been made. Moreover, in my opinion it would be difficult to attribute injury caused by dumping and/or subsidisation during a period in which a formal legal finding of dumping and/or subsidisation had not been positively established.

- 6.6 We agree with the stated opinion that: "... it would be difficult to attribute injury caused by dumping and/or subsidisation during a period in which a formal legal finding of dumping and/or subsidisation had not been positively established".

6.7 This application contains information that was available to the CEO at the time of the decision to terminate the investigation. The application does not contain new information.

The supporting information in relation to most calculations is derived from the information provided by Customs and Border Protection in emails to Viridian subsequent to the termination. This information and other supporting information is supplied in separate emails to this application.

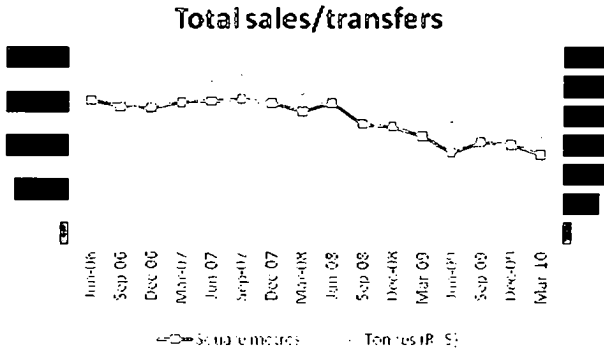
Particulars Concerning the Findings

7. Customs and Border Protection incorrectly assessed sales volumes and did not sufficiently address the decline in volumes in YEM 2010.

7.1 In the Termination Report¹ Customs and Border Protection uses a graph to illustrate that:

Viridian Upstream's total sales and transfer volumes peaked in the September 2007 quarter then trended downwards to the March 2010 quarter, the lowest sales volume in the injury analysis period. (p39)

Graph 1



(Source: Confidential Attachment 07-09)

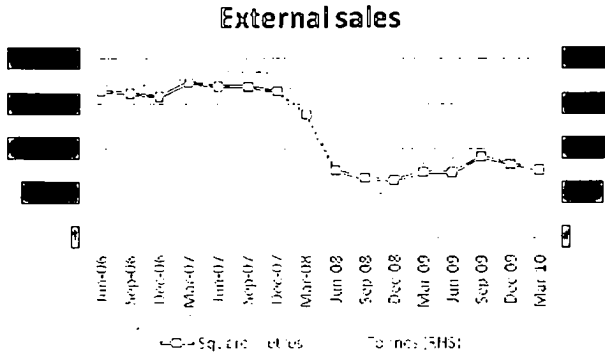
7.2 The Termination Report then examines the reduction in volumes by separately analysing external sales and internal transfers.

7.3 External sales in YEM 2008 and YEM 2009 were influenced by the effect of the October 2007 DMS acquisition (which resulted in sales to DMS previously treated as external sales becoming internal sales). YEM 2009 was the first full 12 months of accounting for the new internal sales.

1. Termination Report No. 1598, available at www.customs.gov.au

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Graph 2



(Source: Confidential Attachment 07-09)

7.4 The Termination Report noted that:

The graph above shows that external sales of CFG were reasonably stable from the June 2006 quarter to the December 2007 quarter. External sales then decreased during the period of the DMS acquisition. For the remainder of the injury analysis period, external sales were relatively stable at the lower level. This coincided with a contracting market (see Section 5.3 above).

Viridian claimed that sales volumes to certain external customers were lost or reduced over the injury analysis period. However, the graph indicates that once the acquisition of DMS was taken into account and despite the loss of sales to specific customers, the quarterly average sales volume was reasonably stable during the injury analysis period. (P.39-40)

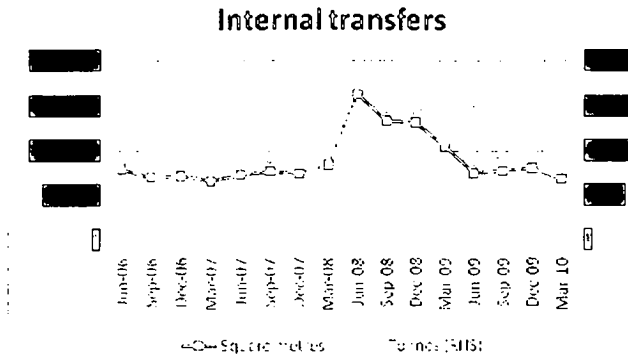
7.5 Viridian demonstrated to Customs and Border Protection that certain sales had been lost to selected customers and that the low prices of dumped imports had prevented Viridian from maintaining volumes to current customers and from making sales to new customers. The application looked at lost sales in YEM 2009 and annualised YEM 2010.

7.6 The end point comparison of the June 2008 quarter with the March 2010 quarter does not take into account the downward trend in YEM 2010.

7.7 The Termination Report then examines internal transfers and used the following graph:

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Graph 3



(Source: Confidential Attachment 07-09)

7.8 The Termination Report made the following comments about the internal transfers graph:

The graph above shows that internal transfers of CFG were reasonably stable from the June 2006 quarter until the DMS acquisition, at which time there was a significant increase in internal transfers. However, after peaking in the June 2008 quarter, internal transfers declined for four successive quarters. In the June 2009 quarter, internal transfer volumes returned to similar levels to that observed prior to the DMS acquisition, and this remained reasonably stable until March 2010.

The decline in internal transfer volume from June 2008 and June 2009 is explained by the progressive transfer of laminating activities from a Viridian Downstream plant (formerly DMS operations) to Viridian Upstream at Clayton. This had the effect of progressively transferring volume out of internal transfers into volume of CFG transferred between Viridian Upstream plants. The latter information category is not captured in the injury analysis. (p40)

7.9 The movement in sales volumes following the DMS acquisition in YEM 2008 and the transfer of CFG at cost directly to the laminating business (previously CFG was treated as a sale to the laminating business but during YEM 2009 this sale became a transfer at cost) was part of Viridian’s strategy to meet the increasing level of competition. As explained to Customs and Border Protection during the verification visit in May 2010 and as was noted in the Visit Report:

Viridian advised that it recognises that some glass processors see Viridian as a competitor rather than a supplier, as Tier 1 customers [volume customers purchasing orders of around 500 tonnes] would compete with Viridian Downstream in selling processed glass to Tier 2 customers [smaller users of CFG who use the glass for window manufacturing etc].

Viridian explained that it is attempting to manage this channel conflict. It advised that it has restructured its business so that Viridian Upstream and Viridian Downstream each report directly to the Chief Executive Officer of CSR Ltd and that from April 2010, the two businesses will have separate accounts. (P. 17, Confidential Attachment A.)

7.10 In examining sales volumes Customs and Border Protection focused on the June quarter in YEM 2009 and did not give sufficient weight to the downward trend in sales in YEM 2010. In YEM 2010 the restructuring of the business was essentially complete and was not affected by the distortions caused by the DMS acquisition. The separation of Viridian Upstream and Viridian Downstream did not fully explain the loss in volume in YEM 2010.

7.11 The effect of the movement of internal transfers in a 12 month period is discussed later in the section.

7.12 Customs and Border Protection concluded in respect of lost sales volume:

Viridian has experienced injury in the form of a loss in total sales and internal transfer volume. It also lost sales to specific customers but did not experience injury in the form of lost sales volume to its overall external sales volume. Viridian's lost volume was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements with Viridian. (Termination Report P. 40)

7.13 The quarterly analysis of external sales from the June 2008 (Confidential Attachment 07-09) quarter shows that there were three successive quarters showing a reduction in volume. There were then three quarters (March 2009 – September 2009) in which external sales increased but then declined in December 2009. In March 2010 external sales for the quarter were about the same level as the volumes recorded in the June 2008 quarter. However, examining external sales volumes in the 12 months of YEM 2009 has shown that in that period external sales reduced significantly reflecting the DMS volumes. In YEM 2010 the 12 month period saw a small increase (around [redacted]) on the previous year volumes.

7.14 The observations made about sales volumes and market share in the Statement of Essential Facts (SEF)² (5 November 2010) and the Termination Report (published 21 December 2010) were the same. Viridian had a meeting with Customs and Border Protection (16 November 2010) and the volume analysis was discussed. In its response to the SEF (23 November 2010, Confidential Attachment B) Viridian did not raise concerns at the differences in the interpretation of the volume analysis as the SEF was overwhelmingly positive in its finding of dumping and material injury. Subsequent to this meeting Customs and Border Protection requested (the reason for this request is shown in paragraph 14.3 of this application) details of the volumes of glass transferred at cost to other Viridian Upstream plants and this was provided on 19 November. (Confidential Attachment, 21) This transfer was because of the operational changes within Viridian. This information was supplied but the internal and external sales did not include details of imports in YEM 2008 and YEM 2009 although total sales and transfer analysis used by Customs includes imports. This explains differences in the data in Confidential Attachment 21 and 07-09.

The following table was used in the application (excluding the external sales and internal transfer lines) and the annualised data used in YEM 2010 in the application

2. SEF 159 available at www.customs.gov.au

was updated during the investigation. Viridian's imports (mainly from Indonesia) in YEM 2008 (), YEM 2009 () and YEM 2010 () have been excluded from the countries under consideration line (CUC-China, Indonesia and Thailand). Viridian imported 3-12mm CFG to ensure adequate stock was available during the refurbishment. Viridian's sales include imports as these volumes would have been domestically produced if the plant was not refurbished.

- 7.15 Because import statistics are only collected by square metres this dictates the use of square metres in some of the analysis.

Table 2

Viridian's Total Sales (including Imports) and CUC Imports
m2 ('000)

YEM	2007	2008	2009	2010
External Sales				
Internal Transfers				
Total Viridian Sales				
CUC Imports				
Other Imports				
TOTAL MARKET				
Change YOY				
External Sales				
Internal Transfers				
Total Viridian Sales				
CUC Imports				
Other Imports				
TOTAL MARKET				
Change YOY (%)				
External Sales				
Internal Transfers				
Total Viridian Sales				
CUC Imports				
Other Imports				
TOTAL MARKET				
Volume Market %				
External Sales				
Internal Transfers				
Total Viridian Sales				
CUC Imports				
Other Imports				
TOTAL MARKET				

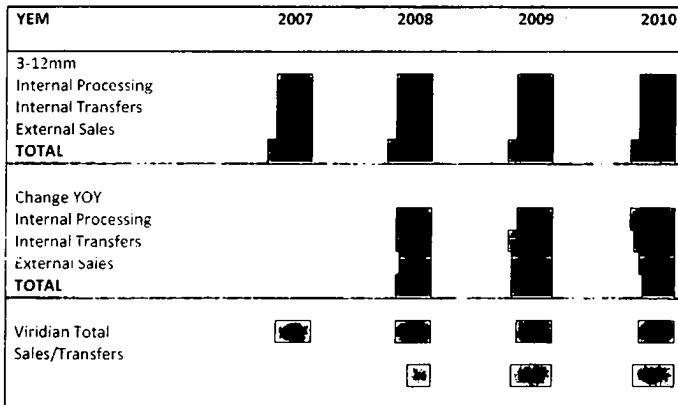
(Source: Confidential Attachments 07-09, ABS (2007-2009 as of March 2010, 2010 as at May 2010))

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- 7.16 The 12 month analysis assists in a better understanding of the relationship between internal and external sales than in the quarterly analysis used in the Termination Report. In YEM 2009 external sales decreased, reflecting the first full 12 months of the DMS acquisition and there was an increase in internal transfers. Total Viridian sales decreased by [redacted] million square metres in YEM 2009 and at the same time imports grew by [redacted] square metres. In this period Viridian's volume market share fell from [redacted] in YEM 2008 to [redacted] in YEM 2009. In a declining market CUC volume market share increased from [redacted] percent in YEM 2008 to [redacted] percent in YEM 2009.
- 7.17 In YEM 2010 despite a small growth in external sales, total Viridian sales decreased as a result of internal transfers declining substantially in YEM 2010. In YEM 2010 volume market share of both Viridian's total sales and CUC imports increased at the expense of the volume market share of other imports.
- 7.18 To check the conclusion in the termination report that: "Viridian's lost volume was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements within Viridian" a comparison of the movement in external sales and internal transfers with the volumes transferred for further processing was undertaken. The first table examines Viridian's total sales and transfers and internal processing volumes in square metres.
- 7.19 The external sales and internal transfers are the same figures used by Customs and Border Protection in its attachment.

Table 3

Viridian's YEM m2('000) (including Imports)



[Source: Confidential Attachments 07-09, 21]

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- 7.20 In YEM 2009 internal processing volumes did not significantly change from YEM 2008. This suggests that “operational changes” in YEM 2009 did not explain Viridian’s overall volume loss of [REDACTED] million square metres. Therefore this analysis shows that Viridian did experience injury in the form of lost sales volume to its overall external sales volume in YEM 2009. Internal transfers reduced in YEM 2010 and of this around [REDACTED] square metres (assuming normal growth of [REDACTED] square metres based on YEM 2009) was possibly attributable to the volume diverted to internal processing. The result was that in taking into account the internal processing transfers there was still evidence of lost sales volume in internal transfers of around [REDACTED] million square metres ([REDACTED] = [REDACTED]).
- 7.21 It can therefore be demonstrated that Viridian experienced a loss of volume in total sales and transfers and this volume loss was over and above the amounts diverted to internal processing.
- 7.22 The total sales and transfers volume lost in YEM 2009 saw Viridian’s volume market share decline by [REDACTED] percentage points in that year while the CUC volume market share increased by [REDACTED] percentage points – this movement in a market that fell by [REDACTED] percent in YEM 2009. Put another way Viridian’s total sales fell [REDACTED] million square metres in YEM 2009 while imports from CUC increased by [REDACTED] square metres.
- In YEM 2010, after taking into account an amount transferred at cost for internal processing ([REDACTED] square metres, see paragraph 7.20), total Viridian sales declined in YEM 2010 by around [REDACTED] million square metres. Therefore while it can be said that “Viridian’s lost volume was primarily related to its internal transfers to Viridian Downstream...” (see paragraph 7.12) it is not correct to conclude “... which in turn can be explained by operational changes to Viridian Downstream”.
- 7.23 Doing the same comparison with the movement between internal processing and internal transfers and external sales using tonnes as a measure of volume depicts a similar result when using square metres. This is shown in Table 4.

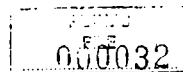


Table 4

Viridian's YEM Tonnes (including Imports)

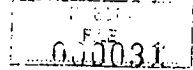
YEM	2007	2008	2009	2010
3-12mm				
Internal Processing				
Internal Transfers				
External Sales				
TOTAL				
Change YOY				
Internal Processing				
Internal Transfers				
External Sales				
TOTAL				
Viridian Total				
Sales/Transfers				

(Source: Confidential Attachments 07-09, 21)

7.24 It has now been established that the fall in internal sales cannot be solely explained by the increase in transfers for further processing. In both YEM 2009 and YEM 2010 Viridian's total sales and transfers have decreased due to the effects of dumped imports. The downward trend of sales in YEM 2010 should also be noted. A recommended investigation should re-examine the conclusion that Viridian's "operational arrangements" explains the decline in internal transfers.

8. Customs and Border Protection did not adequately examine the relationship between imports and Viridian's sales.

8.1 As demonstrated in Table 2 comparing Viridian's total sales with total imports, there appears to be a relationship between Viridian's falling sales and growth in imports in YEM 2009. A quarterly analysis of imports and Viridian's total sales (including imports made during the refurbishment period) is shown below. Viridian's imports have been removed from total CUC imports.



Graph 4



(Source: Confidential Attachment 07-09, Viridian's import analysis does not reconcile with ABS data)

- 8.2 Prior to the publication of the SEF, Customs requested Viridian to comment on the similarity of the external sales volumes (Graph 2) in the first and last quarters of YEM 2010. Customs and Border Protection suggested that there were arguments within Customs and Border Protection that in fact volume related injury had not been demonstrated because the differences in the aforementioned quarters was described by Customs and Border Protection as being "in the normal ebb and flow of business".
- 8.3 Customs and Border Protection had already determined (see above paragraph 7.1)) that the March 2010 quarter had "the lowest sales volume in the injury analysis period". Customs and Border Protection did not comment about the low sales volumes in the March quarter for external sales but did note that for external sales "... the quarterly average sales volume was reasonably stable during the injury analysis period" (see above paragraph 7.4). However, in examining internal transfers Customs and Border Protection noted that internal transfer volumes "... remained reasonably stable until March 2010" (see above paragraph 7.8).

- 8.4 By looking at external sales over the four year injury period it appears that the fall in external sales in YEM 2010 was overlooked. External sales declined over two quarters in YEM 2010.
- 8.5 Viridian’s actual volume sales for the YEM 2010 quarterly periods are shown below.

Table 5

Viridian’s Volume Sales (m ³) YEM 2010				
	Apr - Jun	July - Sept	Oct - Dec	Jan - Mar
External				
Internal				
TOTAL				

(Source: Confidential Attachment 07-09)

- 8.6 At the same time imports over these four quarters are shown below. Imports in the January-March 2010 quarter were the lowest of the four quarters.

Table 6

Viridian’s Volume Sales and Dumped Imports (m ³) YEM 2010				
	Apr - Jun	July - Sept	Oct - Dec	Jan - Mar
Viridian				
CUC (excl Viridian)				
% of Viridian’s Sales				

(Source: Confidential Attachment 07-09)

- 8.7 Dumped imports have continued to have an effect on Viridian’s total sales and transfers. The downward trend in Viridian’s sales in YEM 2010 reflects the impact of dumped imports and should be considered in a recommended investigation.
- 9. **The conclusion on market share did not take into account sufficiently the YEM 2010 market for CFG.**
- 9.1 In the Termination Report Viridian’s volume market share was shown in a graph on Page 41. The market share is the same as the top line on Graph 5 which was not in the Termination Report.
- 9.2 Customs and Border Protection noted:

The Graph showed that Viridian’s overall market share was relatively stable over the first half of the injury analysis period. In the second half of the injury analysis period, Viridian’s overall market share observed a slightly declining trend. The cause of this declining trend was predominantly due to internal transfers as Viridian’s market share of external sales increased.

Summary – Lost Market Share

Viridian has experienced injury in the form of lost market share in relation to the total of its external sales and internal transfers. However, Viridian has not experienced lost market share as far as it

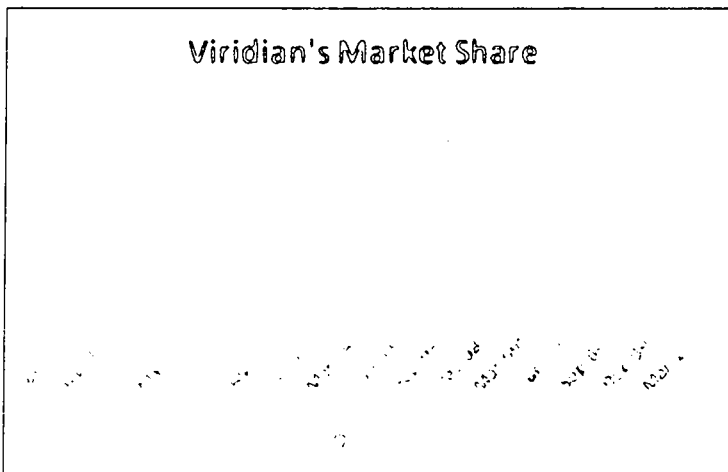
relates to its sales to its external customers. Viridian's lost market share was related to its internal transfers to Viridian downstream. (P. 41)

- 9.3 In the 12 month analysis of Viridian's total sales (Table 2), the volume market share of external sales increased from [REDACTED] in YEM 2009 to [REDACTED] in YEM 2010. In the same period, internal transfers decreased from [REDACTED] to [REDACTED]. Viridian's total sales volume market share increased from [REDACTED] to [REDACTED] and this reflected Viridian's strategy of maintaining volumes by responding to the low prices of dumped imports.

In a contracting market the volume market share of dumped imports increased from [REDACTED] in YEM 2009 to [REDACTED] in YEM 2010.

- 9.4 The slight downward trend in YEM 2010 for Viridian's quarterly market share is relevant when assessing the overall position of the business. In YEM 2010 internal sales market volume share declined as shown in the following graph prepared by Customs but not included in the Termination Report. (Viridian claimed confidentiality of internal and external market share).

Graph 5



(Source: Customs and Border Protection)

- 9.5 Because of the effects of the acquisition and changes within Viridian's business analysing market share in YEM 2008 (the period of the October 2007 DMS acquisition and YEM 2009, the period in which transfers at cost of CFG to other divisions was introduced), the market share analysis should look at YEM 2010. The fall in internal transfer volume market share also reflects import volumes.

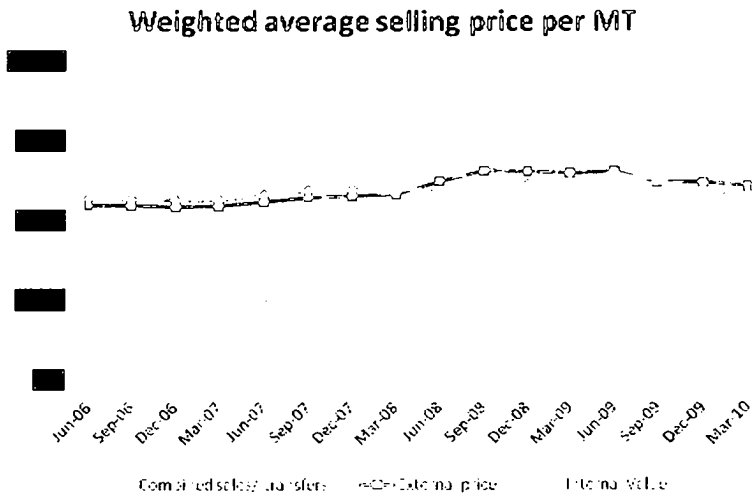
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9.6 Reflecting Viridian's strategy of protecting volume market share by meeting the prices of dumped imports, Viridian's year end volume market share increased in YEM 2010. A recommended investigation should identify the downward trend in quarterly market share.

10. The conclusion on price depression was incorrectly based on an observation of trends since June 2006 and did not observe the recent and verifiable price depression in YEM 2010 both at the total level and that of individual customers.

10.1 The Termination Report used the following graph to examine price depression.

Graph 6



(Source: Confidential Attachment 16-17)

10.2 The Termination Report noted that:

The graph shows that viridian's weighted average unit price for its external sales and combined sales price and transfer value trended slightly upwards in the injury analysis period. However, the unit prices for external sales and internal transfer values trended downwards within the investigation period. Weighted average unit prices for external sales in the investigation period were higher than in the YEM 2007 while weighted average internal transfer value in the investigation period were lower than in the YEM 2007.

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Viridian claimed that selling prices to certain external customers had decreased over the injury analysis period. However, the graph indicates that the quarterly weighted average sales price was reasonably stable during the injury analysis period (p43).

- 10.3 Comparing prices between YEM 2010 and YEM 2007 is not a strong indicator of price depression given the changes in the business, input costs and product mix changes.
- 10.4 The Termination Report as mentioned in the above extract, concluded that the "... weighted average sales price was reasonably stable during the injury analysis period." The relevancy of comparing average selling prices over a four year period is questionable.
- 10.5 However, what is more relevant is the downward trend from June 2009. The values used in constructing graph 6 are shown in the following table.

Table 7

Viridian's Weighted Average Selling Price per MT			
Period	External Price/MT	Internal Value/MT	Combined/MT
June 2009			
September 2009			
December 2009			
March 2010			

(Source: Confidential Attachment 16-17)

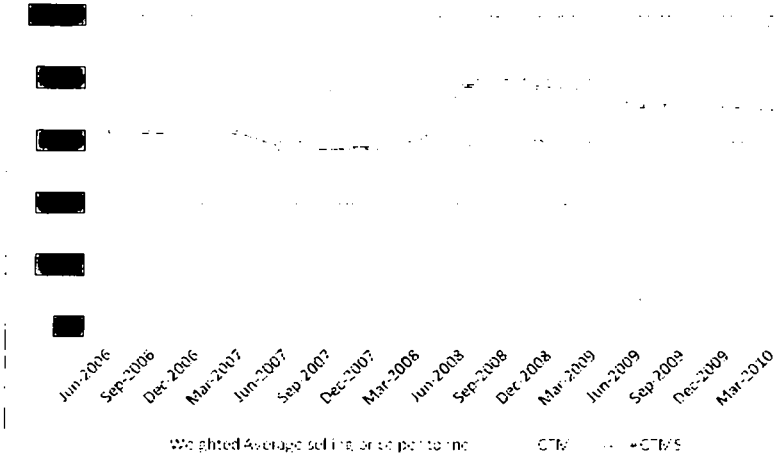
- 10.6 Examining actual weighted average prices over the four quarters in YEM 2010 demonstrates a different picture to that found by Customs and Border Protection.
- 10.7 The Termination Report concluded in Summary - Price depression:

While Viridian may have experienced price depression to specific customers, it has not experienced injury in the form of price depression overall during the injury analysis period, whether measured for external sales prices, internal transfer values, or a combination of external sales and internal transfers (p43).
- 10.8 Viridian notes that relevantly in the investigation period (April 2009 – March 2010) price depression was clear and reflected the price depression evidence provided to Customs and Border Protection. A resumed investigation should examine this price depression.
- 11. The analysis on price suppression did not adequately identify the increasing price suppression in YEM 2010.
 - 11.1 The Termination Report used the following graph to examine the existence of price suppression.

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Graph 7

Total sales and transfers



(Source: Confidential Attachment 11-13)

11.2 The Termination Report noted:

The graph above shows that Viridian’s costs increased during the latter half of the injury analysis period however prices did not increase by the same rate, indicating price suppression.

The increase in costs occurred primarily during the Dandenong Plant refurbishment. Nonetheless, in comparing its fully absorbed CTMS with its prices throughout the injury analysis period, the graph shows that Viridian’s prices have not been able to fully recover its costs except for the period YEM 2008 (p44).

11.3 But what the Termination Report did not apparently give sufficient consideration to was the price suppression per tonne in YEM 2010.

11.4 This is best demonstrated in the following table of the values used in graph 7.

Table 8

Viridian’s Cost to Make and Sell and Selling Price			
Period	CTMS/MT	Selling Price/MT	Difference
June 2009			
September 2009			
December 2009			
March 2010			

(Source: Confidential Attachment 16-17)

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- 11.5 The Termination Report then examined price suppression for external sales and internal transfers and in the Summary–Price suppression it was noted:

Viridian has experienced injury in the form of price suppression in relation to both its sales to its external customers and its internal transfers to Viridian Downstream. (P. 44)

- 11.6 Despite the cost improvements in the business following the Dandenong refurbishment YEM 2010 was a period in which the business was showing significant price suppression, which in part, reflected the substantial undercutting found during the investigation period.

- 11.7 It should be noted that Customs and Border Protection had already observed that the effects of the refurbishment in YEM 2009 meant that the costs related to this period "...must be used with caution" (page 32 Visit Report, Confidential Attachment C).

- 11.8 The recognition of the distorted costs in YEM 2009 points to a more accurate analysis of price suppression concentrating on YEM 2010 and not over the four year injury period.

- 11.9 This finding of actual price suppression in YEM 2010 is important given the analysis by Customs and Border Protection which seeks to override the factual data by calculating an artificial cost to make and sell.

- 11.10 A recommended investigation should examine actual price suppression and such an examination should not be overtaken by incorrect calculations of a theoretical cost to make and sell. (See Section 14).

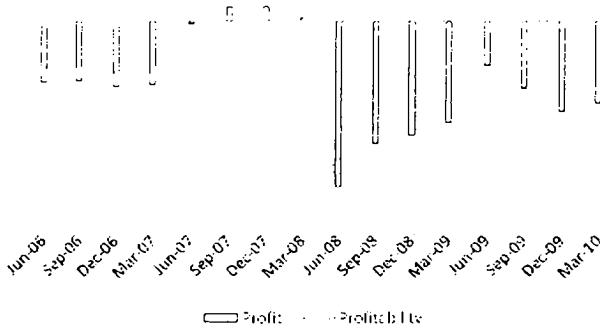
12. The decline in profits and profitability in YEM 2010 was not adequately assessed.

- 12.1 The Termination Report used the following graph to examine profit effects.

000024

Graph 8

Profit and Profitability



(Source: Confidential Attachment 15)

12.2 The Termination Report noted:

The graph above shows that Viridian Upstream incurred losses in the YEM 2007, which improved to profitable results during the following year. In the YEM 2009, which included the Dandenong plant refurbishment, Viridian experienced its largest losses in the injury analysis period. Viridian's losses continued in the investigation period and, although at an improved level when compared with the previous year, the losses remained at levels similar to that of YEM 2007. (P. 44)

12.3 It is correct that in YEM 2009 Viridian experienced its largest losses in the injury analysis period and this reflected the under recovery of fixed costs as a result of the refurbishment of the Dandenong float plant. However, the annual loss in YEM 2010 was [redacted] which was not similar to the YEM 2007 loss of [redacted]. That is the loss in YEM 2010 was more than [redacted] than the annual loss in YEM 2007 or [redacted] worse in YEM 2010.

12.4 There is an error in the spreadsheet used by Customs and Border Protection to analyse profit and profitability. The error is in line six which is the sum of profitability (unit gain or loss divided by unit sales revenue) multiplied by tonnes. Line six should be profitability multiplied by unit revenue multiplied by tonnes. However, the shape of the "profit and profitability" graph does not change. The loss per quarter is shown in Confidential Attachment 15, Tab CTMS.

12.5 The Termination Report examined the lost profit on external sales and internal transfers. The Termination Report noted that profit improved in the first half of the injury analysis period but then:

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It then deteriorated sharply in the June 2008 quarter before recovering, although still making a loss throughout the investigation period. (P. 45)

- 12.6 As identified in the Visit Report it would be expected that profits in the April 2008-March 2009 period would be affected by the Dandenong refurbishment costs. But the loss in YEM 2010 was substantial as is demonstrated in the following table.

Table 9

Viridian's Losses (\$/MT) YEM 2010					
Period	External /MT	Internal/MT	Combined/MT	Total	Correct Total
June 2009					
September 2009					
December 2009					
March 2010					

(Source Confidential Attachment 15, 16-17)

- 12.7 The Termination Report also examined lost profitability for external sales and internal transfers:

The analyses show that Viridian Upstream's profitability for both internal transfers and external sales improved during the first half of the injury analysis period, then fell sharply in the June 2008 quarter before recovering, although still resulting in a negative return (Page 45).

- 12.8 The comparison of profit/profitability in the Termination Report over the four year period is not helpful given the changes in the business. The end point to end point comparison was misleading and the effects of the refurbishment in YEM 2009 were not adequately explained. The significance of the effects of dumping on profit/profitability was demonstrated in YEM 2010.

- 12.9 Profitability for both external sales and internal transfers and total sales (combined) showed a declining trend in YEM 2010. This is demonstrated in the following table:

Table 10

Profitability %			
Period	External	Internal	Combined
June 2009			
September 2009			
December 2009			
March 2010			

(Source Confidential Attachment 15,16-17)

- 12.10 A recommended investigation should take into account the decline in profitability in YEM 2010 as being a strong indicator of material injury.

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13. There was a wrong assumption of a price premium and the price undercutting analysis was influenced by an undumped price comparison.

13.1 The Termination Report reveals that price undercutting analysis was "...conducted at a macro and micro level...":

At the macro level, the comparison of these prices from all three countries with Viridian's prices indicated that the imported goods were consistently undercutting Viridian's price. The levels of price undercutting were significant, although the magnitude of undercutting was greater for exports of CFG from China and Indonesia than for exports from Thailand.

At the micro level, certain Viridian customers were identified as also sourcing CFG from the verified exporters during the investigation period. The price undercutting analysis was conducted by comparing each particular customer's quarterly weighted average purchase price from Viridian and the exporter. This analysis also found that Viridian's prices have been consistently and significantly undercut by CFG exported to Australia at dumped prices. (P. 49)

13.2 The Termination Report then went on to discuss a "price premium":

It is reasonable to expect that Viridian, as the local supplier, would be able to achieve some degree of price premium over the imported CFG prices. Such a premium might be realised in the market for reasons including shorter lead times (just-in-time), delivery options (e.g. Viridian "float-liner"), or after sales service and support. While this notional premium cannot be accurately measured, the magnitude of the price undercutting margins in relation to exports from China and Indonesia are not so small as to be negated by any reasonable measure of the price premium.

In the case of exports from Thailand, the margins of undercutting are significantly diluted after taking into account a reasonable amount for price premium. (p. 42)

13.3 The notion of a price premium was discussed during the verification visit to Viridian. The Australian Industry Visit Report noted:

Viridian advised that it prides itself on its quality, customer service, distribution links, and reputation, and considers that its' products command a 2.5-5% local premium. However, Viridian stated that dumped imports had removed any such perceived premium. (Visit Report P.18, Confidential Attachment D).

13.4 The above extract from the Termination Report in paragraph 13.2 was the same paragraph as in the SEF. Following the publication of the SEF, Viridian met with Customs and Border Protection in Canberra on Tuesday 16 November and referred to the following sentence in the SEF:

However, in the case of exports from Thailand, the margins of undercutting are significantly diluted after taking into account a reasonable amount for price premium (Page 45).

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- 13.5 In its response to the SEF Viridian noted that:

Because of the effects of dumping, Viridian has not been able to achieve a "price premium" for non-price elements such as local supply, float lines, quality, etc.

If the competition in the market was not influenced by dumping then Viridian theoretically could achieve a price premium against some suppliers and not others. For example Viridian's experience suggests that a price premium (if able to be achieved) would be less for CFG sourced from [REDACTED] than with CFG supplied by [REDACTED] exporters. Given this situation the above sentence is not accurate. (Confidential Attachment E)

In the above extract [REDACTED] is an exporter from [REDACTED] and [REDACTED] and [REDACTED] are exporters from [REDACTED].

- 13.6 As explained to Customs and Border Protection, because the quality of glass from [REDACTED] and [REDACTED] was of a high standard a price premium is not commercially realistic.
- 13.7 Despite Viridian's explanation to Customs and Border Protection the Termination Report includes the following paragraph which was not in the SEF:

On the other hand, analysis of the FIS export price of CFG from Indonesia found that the magnitude of the price undercutting is such that if the goods were imported at undumped prices, it (sic) would still undercut Viridian's prices, even after taking into account a reasonable level of premium. This indicates that factors other than dumping are also contributing to the price suppression (sic) experienced by Viridian. (P. 49)

- 13.8 In the context of the later discussion on an unsuppressed selling price, the last sentence in the above extract is significant.
- 13.9 However, the existence of "factors other than dumping" does not necessarily mean there is no material injury and causality because dumping does not have to be the sole cause of material injury.

The observation by Customs and Border Protection (and only made in the Termination Report) suggests that Customs and Border Protection has side stepped the importance of dumping and the resultant price undercutting – even though that dumping does not equal the full extent of the price undercutting. The positive finding in the SEF on price undercutting was reinforced in the Termination Report.

- 13.10 Price undercutting for exports from Thailand was discussed in section 8.7.5 of the Termination Report:

In response to the SEF, Guardian claims that proper consideration was not given to section 269 TDA (13). It states that if a country-by-country analysis was conducted, the investigation so far as it relates to Thailand must be terminated as injury caused by the goods at dumped prices from Thailand is negligible. Guardian argues that this conclusion can be made due to the fact that the dumping margin for Thailand is not much more than 3.8% (3.5% after the revision in section 6.6.1 above) and that exports from Thailand do not substantially undercut Viridian's prices.

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Although the undercutting analysis in section 8.7.2 above found that the price undercutting by CFG from Thailand is not as great as CFG from China and Indonesia, it is not immaterial. The investigation found that the magnitude of the dumping during the investigation period by Guardian was not negligible. Furthermore, as discussed in section 8.3 above, it is reasonable to consider the cumulative effect of dumped imports from China, Indonesia and Thailand. (P. 51)

- 13.11 Customs and Border Protection should have taken into account an alternative view (based on industry experience) that a theoretical premium was not able to be achieved. The price undercutting analysis showed significant undercutting and the comparison with an undumped price does not remove the price undercutting attributable to dumping. A recommended investigation should take into account the verified price undercutting and not diminish the undercutting related to dumping.
14. **The use of YEM 2007 and YEM 2008 volumes to analyse the “Materiality of injury caused by dumping” ignores changes to the industry over the injury period and Customs and Border Protection has chosen a method which is unfair and does not produce a meaningful result. The methodology has resulted in wrong calculations of an unsuppressed selling price.**
- 14.1 In the SEF under the heading of “Materiality of injury caused by dumping” was the following:

As discussed above, injury to Viridian in the form of lost sales volume and lost market share was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements within Viridian.

However, the price pressure from dumped CFG has prevented Viridian from increasing its prices, which otherwise would have occurred in the absence of dumping, resulting in price suppression and consequently lost profit and profitability suffered by Viridian.

Other factors have also caused Viridian to experience price suppression and lost profit and profitability. The global financial crisis and weak market conditions would have affected market prices of CFG. The Dandenong plant refurbishment resulted in higher depreciation and financing costs, although a comparison of Viridian prices with costs adjusted to remove increases in fixed costs still indicates price suppression in the investigation period. The comparative cost advantages of one or more exporters relative to Viridian costs, and the strength of the Australian dollar contributes to the competitiveness of the imported CFG, but does not fully explain the significant levels of price undercutting.

Notwithstanding the likelihood that factors other than dumping have caused injury to Viridian, it is evident that the CFG exported to Australia from China, Indonesia and Thailand at dumped prices have also had an injurious effect on Viridian.

The magnitude of the dumping margins has contributed to the ability of CFG exporters from China, Indonesia and Thailand to significantly undercut Viridian's prices. In order to maintain volumes in a price sensitive and transparent market, Viridian did not increase prices despite increased costs. Therefore the dumping prevented Viridian price increases, which would have occurred, to a significant degree.

As a consequence, Viridian lost profits and profitability. Therefore, exports of CFG to Australia from China, Indonesia and Thailand have caused material injury to the Australian industry producing like goods. (P. 49)

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- 14.2 In the Termination Report the first two paragraphs from the SEF above were repeated and the remaining paragraphs were deleted and replaced by:

Other factors have also caused Viridian to experience price suppression and lost profit and profitability. The global financial crisis and weak market conditions would have affected market prices of CFG. In addition, the comparative cost advantages are of one or more exporters relative to Viridian's costs and the strength of the Australian dollar contributed to the competitiveness of the imported CFG. (P. 55)

- 14.3 The Termination Report then continues with an analysis which was not in the SEF. The paragraph explaining the reason for this analysis is in section 8.9.3 "Higher fixed costs due to lower volumes" which is reproduced below:

8.9.3 Higher fixed costs due to lower volumes

In response to the SEF, JELD-WEN submitted that Viridian did not achieve the anticipated volumes during the investigation period resulting in higher unit fixed costs. It notes that Viridian was able to recover its costs during YEM 2008 when it increased CFG production just prior to the Dandenong plant shutdown.

The lower sales and production volume of CFG during the investigation period has resulted in higher unit fixed costs and SG&A expenses. It is reasonable to suggest that if Viridian's CFG production volume remained at similar levels to the first half of the injury analysis period, Viridian's unit cost during the investigation period would have been lower.

An analysis of Viridian's costs after taking into account the effects of higher unit fixed costs due to lower volumes is discussed in section 8.10 below. (P. 52)

- 14.4 Importantly, Customs and Border Protection appears to accept the observation that production was increased in YEM 2008. This means that production volumes in 2008 are not in the usual course of business which later on in this section Customs and Border Protection has relied upon volumes in this year to calculate adjusted costs.
- 14.5 Information was before Customs and Border Protection which would have allowed it to immediately answer the comments in the second paragraph from the above extract in paragraph 14.3. This information would also have allowed Customs and Border Protection to discuss any concerns it may have had regarding the statement with Viridian well before its volume analysis was presented to Viridian only days before the Final Report was due. Customs and Border Protection would have been able to examine manufacturing variances in YEM 2010 and note that those variances did not reflect volume differences as was the case in YEM 2009 and that YEM 2010 variances indicated that the business was producing at volumes relevant to YEM 2010 expectations. The volume variances are shown in Table 11.

The Industry Producing CFG

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- 14.6 Before examining Custom’s methodology to assess “Materiality of injury” we provide a brief overview of the Australian industry producing CFG.

Table 11

Viridian’s Indicators (\$000)				
YEM	2007	2008	2009	2010
Fixed Costs				
CTM				
SG & A				
Manufacturing Variances				
Local Production (incl imports) (tonnes)				

(Source: Confidential Attachment 11-13, CTMS tab)

- 14.7 The local production includes imports of 3-12mm CFG as imports were part of the stock buildup to continue supplying customers during the refurbishment of the plant in YEM 2009.
- 14.8 As previously mentioned, the business underwent significant changes in the three years prior to YEM 2010 and these were outlined in paragraph 6.3.

The reasons for changes in production volumes are explained in section 7.

- 14.9 The analysis used by Customs and Border Protection to assess the effects of reduced volumes is based on the premise that YEM 2007 and YEM 2008 are “model” years. However, it has been pointed out that the volumes in YEM 2008 were distorted by preparing for the plant refurbishment in YEM 2009, the plant in YEM 2008 was at the end of its life and the effects of the refurbishment in YEM 2009 affected total fixed costs (as identified in the Visit Report). In addition the business had undergone significant changes.
- 14.10 The Termination Report’s reference to: “The Dandenong plant refurbishment resulted in higher depreciation and financing costs...” is not correct as can be seen in the above table where total fixed costs actually reduced. (YEM 2009 fixed costs and manufacturing variances have been affected by the refurbishment and are not included in this comparison.) Late during the investigation when Customs and Border Protection presented Viridian with its volume analysis (received Tuesday 14 December and discussed with Customs and Border Protection on Friday 17 December) it was pointed out that in fact the refurbishment resulted in cost savings to Viridian. This was set out in Viridian’s interim response to Customs’ argument prior to the meeting on Friday 17 December (Confidential Attachment E, Tab 22).
- 14.11 As can be seen from Viridian’s interim assessment, the methodology used in the Termination Report effectively removed around \$2 million annually in costs. This is

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because there is a reduced calculated fixed cost which is at a large variance to the actual fixed cost.

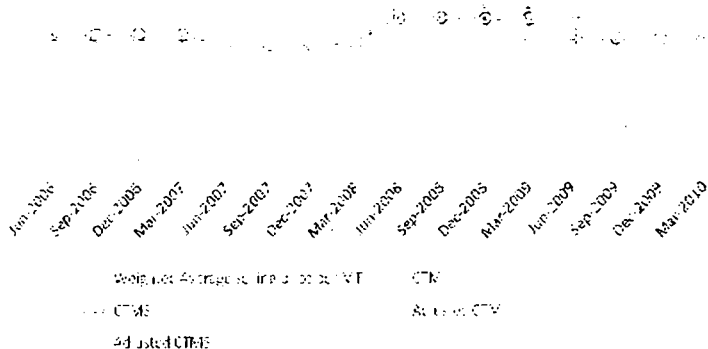
- 14.12 Having incorrectly chosen YEM 2007 and YEM 2008 as "model" years (for an industry that has changed significantly over the four year injury analysis period) Customs and Border Protection then calculates unit costs based on volumes relating to YEM 2007 and YEM 2008. The approach in the Termination Report is outlined in the following paragraphs.
- 14.13 The periods for which adjustments have been made are YEM 2009 and YEM 2010. The earlier years (YEM 2007 and YEM 2008) have not been adjusted.
- 14.14 The lines in the three graphs for YEM 2009 and YEM 2010 are surprisingly similar, reflecting the poor assumptions used in constructing the methods.
- 14.15 The following comments relate to the methods described in the Termination Report.

Method 1.

This uses the actual fixed manufacturing cost for YEM 2009 or YEM 2010 and adjusts it by the average CFG volumes in YEM 2007 and YEM 2008.

Graph 9

Based on YEM 2007 & 2008 volume of CFG



(Source: Confidential Attachment 23a)

000016

- 14.16 In discussing the effects of the refurbishments in YEM 2009 Customs and Border Protection noted in the Visit Report that:

Upon analysing the manufacturing variances over the injury analysis period, we note that these spiked in YEM 2009, inflating unit costs. Viridian explained that the manufacturing variances for YEM 2009 were abnormal due to the refurbishment of the Dandenong float plant. Therefore, we note that the cost to make and sell for YEM 2009 must be used with caution. (Confidential Attachment C, P. 32).

We have verified the cost to make and sell data provided by Viridian and are satisfied that it is a complete, relevant and accurate reflection of the cost to manufacture and sell CFG. However, we note that the cost to make and sell data for YEM 2009 must be used with caution. (Confidential Attachment G, P. 35).

- 14.17 And in the SEF Customs and Border Protection noted:

It is acknowledged that the Dandenong plant refurbishment had an impact on Viridian's costs in YEM 2009 and this was addressed in Section 7.5 above (Page 47).

- 14.18 The large variances in YEM 2009 were not taken into account in Custom's methods. These variances primarily relate to under recovery of fixed costs (as do most variances within other periods). The under recovery of fixed costs in YEM 2009 was directly related to lower volumes.

- 14.19 The formula used in the Method 1 spreadsheet for calculating fixed costs took the sum of all fixed costs (excluding variances) in the four quarters in YEM 2009 (or YEM 2010) multiplied this by two and divided by the total of the eight quarters in YEM 2007 and YEM 2008. This results in the adjusted fixed manufacturing costs being the same for each quarter in YEM 2009 (or YEM 2010).

- 14.20 An alternative and more accurate calculation would have been to calculate the fixed costs in the relevant quarter (e.g. June 2006 and June 2007) and divide this sum by the volumes sold in those two quarters. This would then have given a different adjusted fixed manufacturing cost for each quarter in YEM 2009 and YEM 2010. Actual fixed costs vary by quarter. A similar formula applied to the Selling, General and Administration (SG & A) cost calculation.

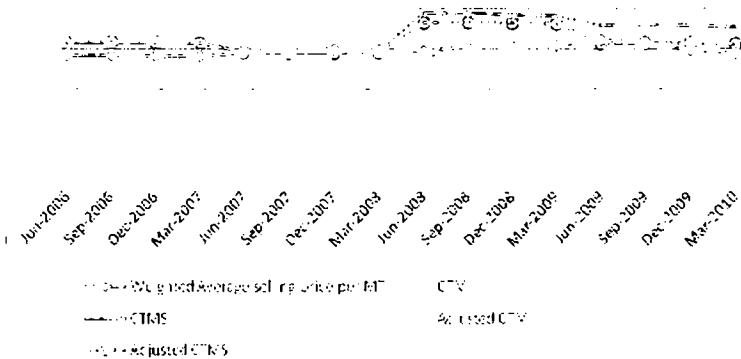
- 14.21 However making these changes to Customs and Border Protection's calculations does not materially change the shape of the graphs.

Method 2

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Graph 10

Based on YEM 2007 & 2008 volume of all float



(Source: Confidential Attachment 23a)

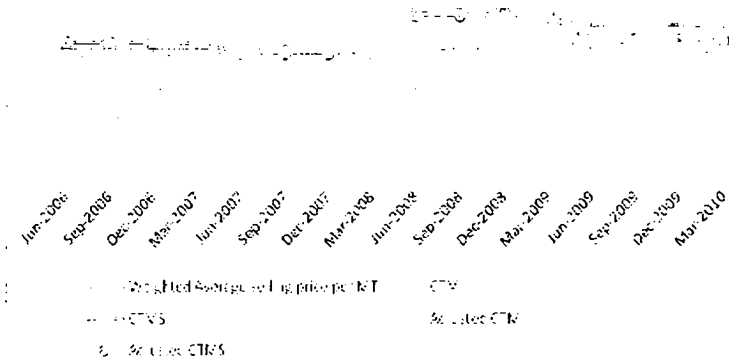
- 14.22 This calculates adjusted unit fixed manufacturing costs by taking the actual unit fixed manufacturing cost for the four quarters in YEM 2009 (or YEM 2010) and multiplies this figure by the total float volume to get a theoretical total fixed cost. This is then divided by average float volumes (CFG and other float products and imported products) in YEM 2007 and YEM 2008.
- 14.23 This results in a fixed cost value which is the same for each quarter in YEM 2009 and YEM 2010.
- 14.24 Our comments about calculating actual quarter fixed costs as a method also apply here as do the comments on the calculation of the SG & A figure.
- 14.25 This method takes total float volumes from one of Viridian’s Management Reports (██████████). The total float volume in this Report includes all float volumes sold whether or not the float glass was manufactured in Australia or not. This means that in all four periods a significant number of imported tonnes are used to allocate a total fixed cost value. Import volumes do not incur a fixed cost value but have been allocated that cost through Customs and Border Protection’s methodology.

Method 3

000014

Graph 11

Based on YEM 2007 & 2008 unit costs



(Source: Confidential Attachment 23b)

14.26 This calculates a fixed manufacturing cost based on the total unit fixed manufacturing cost in YEM 2007 and YEM 2008. This value is then applied as a fixed manufacturing cost for YEM 2009 and YEM 2010. The same fixed manufacturing cost value is used for YEM 2009 and YEM 2010 although actual fixed manufacturing costs vary by quarter. Customs and Border Protection's adjusted fixed manufacturing cost could have been calculated by quarter to give different values per quarter in YEM 2009 and YEM 2010.

The same comments apply to the SG & A calculation.

Analysis of the Graphs

14.27 The Termination Report notes that:

The graphs above highlight the difference between the actual costs and the adjusted costs during the investigation period. This difference can be attributed to factors other than dumping, namely higher unit fixed costs caused by lower sales and transfer volumes for Viridian during the investigation period.

The magnitude of the difference can depend on the method on which the calculation is based. The first method, which bases the adjusted costs on YEM 2007 and 2008 CFG volumes, shows that Viridian would have broken even during the investigation period. However, the other two methods show that Viridian would have still operated at a loss. In all three cases, the cost-price relationship in YEM 2010 has improved in relation to YEM 2007, a year unaffected by dumping. (P. 58)

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14.28 It is to be expected that there would be a difference between actual costs and adjusted costs in YEM 2010. This is because lower fixed costs were allocated over much higher volumes. For example, Method 2, which was used to calculate an unsuppressed selling price calculated a total fixed cost figure based on the actual unit fixed costs in YEM 2010 multiplied by the total float volumes in YEM 2010 (all float products, not just 3-12mm float products, including all imports) and divided by the average total float volumes in YEM 2007 and YEM 2008. Customs and Border Protection did not acknowledge the reduced market for total float in YEM 2010. The movement in total float volumes is shown in Confidential Attachment 23a and shown in the following table:

Table 12.

Viridian's Sales of Total Float Volumes			
	MT	YOY Change	% Change
YEM 2007			
YEM 2008			
YEM 2009			
YEM 2010			

(Source: Confidential Attachment 23a)

14.29 The calculation of adjusted fixed costs is wrong. It makes no sense to adjust fixed costs as has been done in any of the three methods.

Tables 2 and 3 have shown that the observation by Customs and Border Protection that: "Viridian's lost volume was primarily related to its internal transfers to Viridian Downstream, which in turn can be explained by changes in operational arrangements within Viridian" (p40) – was not entirely correct. Certainly Table 3 shows a gain in external sales in YEM 2010 and a fall in internal transfer volumes. But only an estimated [redacted] square metres (linked to operational arrangements) is attributable to the overall volume loss of [redacted] million square metres. The remaining internal transfer volume loss of [redacted] million square metres has resulted from the overall decline in the market for CFG and the presence of dumped imports.

14.30 Having concluded that the reduced volumes in YEM 2010 were the result of Viridian transferring volumes of CFG out of the 3-12mm CFG business (which Table 3 shows to be only partially correct), Customs and Border Protection then embarked on an analysis which sought to view the 3-12mm CFG business based on volumes in YEM 2007 and YEM 2008.

After this analysis one conclusion was: "In all three cases, the cost-price relationship in YEM 2010 has improved in relation to YEM 2007, a year unaffected by dumping" (Termination Report p58).

The cost-price ratio is summarized in the following table:

000012

Table 13

Cost/Price Ratio per MT

CTMS compared with weighted average selling price

Quarter	Method 1			Method 2		Method 3	
	Actual	Adjusted	%Difference	Adjusted	%Difference	Adjusted	%Difference
Jun-2006	█						
Sep-2006							
Dec-2006							
Mar-2007							
Jun-2007							
Sep-2007							
Dec-2007							
Mar-2008							
Jun-2008	█	█	█	█	█	█	█
Sep-2008							
Dec-2008							
Mar-2009							
Jun-2009							
Sep-2009							
Dec-2009							
Mar-2010							

(Source: Confidential Attachments 23a-23b)

14.31 The percentage difference column shows the percentage by which the actual cost is higher than the adjusted cost. But in using this ratio to analyse the business, Customs and Border Protection should have seen that in the June quarter 2009 (YEM 2010) the cost-price ratio (█) was the same as in the June quarter 2006 (YEM 2007, the year stated to be unaffected by dumping). This comparison suggests that the volume effects analysis need have gone no further. In the first three months of YEM 2010 there was no indication that the volume effects Customs and Border Protection were erroneously pursuing existed. The increase in the cost-price relationship for the remainder of YEM 2010 can be explained by the presence of dumped imports and the price depression shown in Table 7.

As explained in paragraph 14.5 the changes in manufacturing variances should also have raised questions about the need to pursue the volume analysis.

14.32 We recall in the volume analysis in section 7 of this application that "lower sales and transfer volumes" had been incorrectly assessed by Customs and Border Protection. In addition, there is a fundamental problem with the assumptions used by Customs and Border Protection which are further analysed in the next section. Having obtained a theoretical cost to make and sell this figure is then used to calculate an unsuppressed price.

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The Methodology Used to Calculate an Unsuppressed Selling Price

- 14.33 The Termination Report shows that an unsuppressed selling price was calculated using the adjusted cost to make and sell using Method 2. The weighted average unit price in YEM 2007 (a year considered by Customs and Border Protection to be unaffected by dumping) was indexed up by the percentage difference between:

...the weighted average CTMS in YEM 2007; and
...the adjusted CTMS based on Method 2 over the investigation period for each thickness.

Method 2 was considered the most appropriate as it included Viridian's actual total fixed cost and SG & A amount for YEM 2009 and 2010 and it was adjusted to Viridian's total float production, not just CFG.

This price was then compared to Viridian's actual weighted average unit price achieved for each thickness in YEM 2010. This analysis found that for all thicknesses, Viridian's YEM 2010 prices were actually higher by between 3% and 9% than the corresponding unsuppressed selling price. Aggregating all thicknesses Viridian's YEM 2010 weighted average selling price was 9% higher than the corresponding unsuppressed selling price.

In other words, the unsuppressed selling price calculated above is a price unaffected by dumping, with the factors causing injury to Viridian other than dumping removed. However, Viridian's YEM 2010 weighted average selling price achieved was above the unsuppressed selling price, indicating that dumping has caused negligible price suppression to Viridian. (P. 59)

- 14.34 Viridian does not believe that obtaining a fixed manufacturing value using total float volumes in YEM 2010 with YEM 2010 unit costs and dividing by average total float volumes in YEM 2007 and YEM 2008 is an objective evaluation of the domestic industry based on positive evidence. (Viridian's comments on Method 2 are also, in general, applicable to Method 1 and Method 3).
- 14.35 The assumption that the industry will forever and a day be producing volumes achieved in YEM 2007 and YEM 2008 underscores the fragility of Customs and Border Protection's approach. Industries change through acquisitions and reorganizations and the fact that these events occurred during the injury period should not be considered as "self injury". Of course there are also years, such as YEM 2010, when markets contract (Termination Report p39). If Customs and Border Protection had not used its methodology then dumping, material injury and causality would have been found as was strongly indicated in the SEF. Absurdly, Customs and Border Protection is suggesting that an industry should operate in denial of commercial opportunities if it was ever to consider addressing the impact of dumped imports.

This would mean that Viridian is being told to ignore the use of trade remedies until the end of YEM 2012 (this would give a three year injury period) as this would remove the distortions caused, particularly in YEM 2009, of the refurbishment and reorganization. Viridian would also have to be mindful of the next scheduled refurbishment at Dandenong which would probably occur from 2019 onwards.

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- 14.36 An objective analysis should not have a predetermined outcome. In the Termination Report this predetermined outcome was clearly signalled when Customs was looking at calculating unit costs on a reduced level of fixed costs (particularly in YEM 2010) and applying unrelated and higher volumes which resulted in lower unit costs.

Using such a blunt tool to isolate "other factors" is not analytically sound or commercially realistic and cannot be relied upon to achieve its purpose.

- 14.37 Had Viridian not refurbished the float line (which was well beyond its end use date) extended its production to include coated CFG, invested in distribution (through which significant gains had been made) and restructured its business (to clearly define operational and financing objectives) then the industry producing CFG in Australia would be in a worse position.

There seems to be an extraordinary jump from establishing significant price undercutting to declaring the industry's costs are artificially inflated.

- 14.38 Customs and Border Protection was prompted to look at unit costs by interested parties who, given the "cross pollination" within the industry, had a surprisingly poor understanding (or poor recollection) of Viridian's business. It is not uncommon in dumping investigations to have interested parties argue against causal link by criticising the domestic industry and the industry's business strategy (as guessed at).
- 14.39 This business strategy argument was raised recently in a WTO Panel Report (US-Tires). The following extract is not completely relevant to the current application but does demonstrate that such arguments need to be carefully examined:

7.320 The Panel was confronted with the fact that the majority of the USITC and the dissenting commissioners drew precisely the opposite conclusions on the issue of business strategy. The majority took the view that the strategy to reduce U.S. production and locate production in China was itself a response to increased imports and thus it was not an alternative cause that prevented the increasing imports from China to be a significant cause.

The dissenting commissioners took the view that the business strategy of relocating production to China was an independent business strategy that began before imports were increasing.

Yet both considered precisely the same evidence. There was no evidence considered by the dissenting commissioners that was not also considered by the majority. And, no further evidence that might have been considered by the majority but was not was (sic) adduced in this case.

7.321 In these circumstances, it would be inappropriate for the Panel simply to make a choice between the views of the majority and the dissenting commissioners. In fact, our own assessment of the record indicates that it is difficult to separate out the business strategy from the increasing imports. It may well be, as the dissenting commissioners say, that the strategy of relocating to China began before 2004 and before the substantial increases in subject imports. But it is also true that plant closures occurred after the increase in imports and may well have been linked to the competition from imports. Indeed, the decision to locate production in China might have been the result on an independent business strategy, but the decisions to close plants might well have been a response to imports.

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7.322 In the light of these considerations, the Panel can see no basis for determining that the USITC's analysis of the alternative business strategy was in error. It was for China to establish a prima facie case of such error and it failed to do so. (United States – Measures affecting imports of certain passenger vehicle and light truck tires from China WT/DS399/R, 13 December 2010).

- 14.40 The mathematical certainty of obtaining lower costs by using out of period volumes demonstrates an inherent unfairness in the investigation. The concept of objective examination was analysed in US-Hot Rolled Steel and the Appellate Body noted:

The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. (United States – Anti-Dumping Measures on certain hot-rolled steel products from Japan, WT/DS184/AB/R, 24 July 2001, para 145).

- 14.41 The predetermined outcome of the methodology used by Customs and Border Protection falls well below the standards expected of a factual determination. The methodology used is not a well reasoned and meaningful analysis of the industry producing CFG in Australia. A resumed investigation should reject this methodology.

15. The finding on threatened material injury was based on incorrect findings of negligible injury.

- 15.1 In the SEF under the heading "Will Dumping and Material Injury Continue?" Customs and Border Protection made the following assessment:

It was established that CFG has been exported to Australia from China, Indonesia and Thailand at dumped prices during the investigation period, except for CFG exported to Australia from China by Xinyi. The dumping margins ranged from 3.3% to 37.2% (Xinyi's margin was -2.8%).

In view of the degree of price sensitivity in the Australian market for CFG, the demand for imported CFG, and the breadth of well established supply arrangements for the imported goods, it is likely that dumping will continue and anti-dumping measures are not imposed.

Price pressures from CFG sold in to the Australian market at dumped prices are likely to continue to suppress Viridian's process and result in further losses of profit and profitability. (P. 50)

- 15.2 In the Termination Report the heading in the SEF ("Will dumping and material injury continue?") was replaced by a heading "Has Dumping Threatened Material Injury to the Australian Industry?" Under the sub heading "Assessment" Customs and Border Protection reached the following conclusion in the Termination Report:

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Viridian provided evidence that export prices of CFG from China have reduced since the initiation of the investigation (see Viridian's submission in response to the SEF). Even so, as of 1 November 2010, Viridian has increased its prices of CFG by up to 5%, which corresponds to a period where the Australian dollar is still broadly regarded as being relatively strong. Viridian states that this price increase was primarily driven by the need to recover increased costs, particularly energy costs. This indicates that Viridian appears to have the ability to increase prices of CFG into the Australian market in the absence of anti-dumping measures.

There is no evidence to suggest that there is a threat of material injury to the Australian industry that is foreseeable and imminent unless dumping measures were imposed.

- 15.3 Prior to the SEF being published (5 November 2010), Viridian, after several months of negotiating with customers, put in place a price increase to cover increased costs. This was the first price increase put in place by Viridian following a series of price reductions which were dictated by the presence of dumped imports. Evidence of these price reductions in YEM 2009 and YEM 2010 was provided to Customs as part of the verification visit in May 2010 and in subsequent submissions. (Confidential Attachment F)
- 15.4 Customs and Border Protection has made a significant comment based on a price increase which occurred outside of the injury analysis period which ended in YEM 2010. Customs and Border Protection has not considered the price reductions in YEM 2009 and YEM 2010 and has not examined other injury factors at the time of the price increase in November 2010.
- 15.5 It is therefore incorrect for Customs and Border Protection to reach a general conclusion that "...Viridian appears to have the ability to increase prices of CFG into the Australian market in the absence of anti-dumping measures." If this was correct Viridian would have increased prices in YEM 2009 and YEM 2010 and not decreased prices.
- 15.6 In its discussion on threatened material injury, Customs and Border Protection had already been convinced of its own analysis that there was negligible injury. Nevertheless in considering "likelihood of substantially increased importation" Viridian refers to the growth and imports in the first six months of YEM 2011 (the latest import statistics available at the time of this application.)
- 15.7 Imports from China, Indonesia and Thailand have increased significantly in the first two quarters of the year beginning 1 April 2010.

Table 14

	CFG imports into Australia (m ³ ,000)			
	April - June		July - Sept	
	2009	2010	2009	2010
Change by Qtr				
Change by %				

(Source: Confidential Attachment G, Viridian's import analysis does not reconcile with ABS data)

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15.8 Customs and Border Protection did not adequately address the factors that should have been examined in assessing the threat of material injury.

16. Customs and Border Protection has incorrectly incorporated into its decision to terminate the investigation the predicted impact of a dumping duty. This misplaced speculation has introduced bias and Customs and Border Protection has failed to have proper regard to or draw obvious conclusions from the provided information in examining material injury.

16.1 In the SEF Customs and Border Protection made the following preliminary conclusions:

10.6 Assessment

As outlined in section 10.3, the preferred approach to establishing the USP is using the Australian industry's selling process at a time unaffected by dumping. As discussed in section 7.3.4 above, year-ending-March 2007 has been identified as a year unaffected by dumping. Accordingly, the USP has been calculated using Viridian's weighted average selling process per thickness over the year-ending-March 2007 and indexed to its weighted average CTM over the period to reflect contemporaneous prices.

As Viridian's actual selling prices and CTM for each thickness have been used, the result would be identical regardless of whether the calculation was based in square metres or metric tonnes.

It is noted that this USP is higher than the USP calculated by Viridian.

10.7 Non-injurious price

The NIP has been calculated by deducting from the USP verified weighted average importation costs, ocean freight costs, and importer's SG&A costs over the investigation period.

10.8 Comparison of the NIP to the export prices

The NIP was compared with the weighted average export prices of CFG exported from China, Indonesia and Thailand during the investigation period.

The analysis found that the NIP was higher than the weighted average export prices of all CFG exporters over the investigation period. This is consistent with the assessment that the CFG exported to Australia from China, Indonesia and Thailand at dumped prices have caused material injury to the Australian industry. (P. 52)

16.2 In the Termination Report, Customs and Border Protection replaced its preliminary finding with a conclusion that was based on an incorrect methodology. The Termination Report compared Viridian's actual selling prices with undumped prices:

Undumped Prices

An undumped CFG price has also been calculated to assist in determining whether dumping has materially suppressed Viridian's prices. Specifically, a weighted average FOB export price has been increased by the relevant dumping margin, before adding an amount for ocean freight, marine insurance, importation costs, and inland freight. This brings imported CFG to an undumped FIS price. This price, plus a reasonable premium, was then compared to Viridian's weighted average selling price.

This analysis found that Viridian's weighed (sic) average selling price is higher than the undumped FIS import price with any reasonable premium (Confidential Attachment 25).

In other words, if CFG exported to Australia was being sold at undumped prices, Viridian's prices would still be undercut even after adjusting for any reasonable amount of premium. This analysis indicates that even if CFG exports from each of the countries were undumped, the resulting prices in Australia would have remained competitive. In these circumstances, it is unlikely that Viridian would have experienced similar levels of price suppression that could not be attributed to dumping.

Conclusion on material injury

All of the analyses above indicate that the degree of price suppression and consequently lost profit and profitability, if any, to Viridian that has been caused by dumping is negligible. (P. 59)

- 16.3 For the reasons set out earlier in this application, Viridian does not agree with the imposition of a premium.
- 16.4 Whether or not Viridian's weighted average selling price is undercut by an "undumped" price is not determinative in assessing if injury is material and not negligible. This does not necessarily affect causality.
- 16.5 A dumping duty is not always imposed to the level of price undercutting. Customs and Border Protection is wrong to conclude that because there is still price undercutting this is a reason not to find material injury. A dumping duty is designed to remove the injurious elements of dumping. If there is still an element of price undercutting that is not due to dumping, then it is not for Customs to speculate on the outcome of imposing an anti-dumping duty. In a situation where the dumping margin exceeds the level of material injury, then the "lesser duty rule" applies. But, when the dumping margin is less, than the level of material injury this does not mean that a dumping duty should not be applied.
- 16.6 It is not for Customs and Border Protection to speculate on the outcome of a trade remedy. In past investigations, Customs and Border Protection has made the following description of anti-dumping measures:
- "Anti-dumping measures often cause exporters to modify their behavior and are designed to discourage dumping or remedy material injury caused by dumping. (Customs and Border Protection Report 134, Section 7.2)
- 16.7 The Termination Report revisits the analysis in the SEF of a non-injurious price (NIP) as outlined above in paragraph 16.1. In the Termination Report it is shown that the NIP was calculated from the unsuppressed selling price. As explained the unsuppressed selling price was based on a methodology which Viridian believes is incorrect:

The NIP was compared with the weighted average export prices of CFG exported from China, Indonesia and Thailand for each thickness during the investigation period.

The analysis found that the NIP was higher than the weighted average export prices of all CFG exporters over the investigation period except for one thickness from one exporter. This indicates that CFG exported to Australia from China, Indonesia and Thailand is causing injury to Viridian, however, as found in Section 8.10 above, the injury caused by dumping in (sic) negligible. (P. 63)

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- 16.8 The Termination Report's analysis has incorrectly introduced irrelevant matters (being the presence of price undercutting even if a measure was imposed) and the basis for a NIP is flawed. These matters should be reviewed in a recommended investigation.
- 16.9 The NIP based on the adjusted cost USP (using Method 2) is above the relevant weighted average export prices and this was the same finding in the SEF in which a USP based on actual costs was used.

The adjusted cost NIP is not a reliable value and conclusions using an adjusted cost NIP must be treated as unreliable.

- 16.10 The Termination Report states (see above section 16.2) that the "... degree of price suppression and consequently lost profit and profitability, if any, to Viridian that has been caused by dumping is negligible".
- 16.11 This material injury conclusion does not consider any other injury factors in the Termination Report, particularly price undercutting. It would appear that Customs and Border Protection has erroneously decided that the verified price undercutting and other indicators of material injury has been overtaken by its flawed method to calculate a cost to make and sell.

Notwithstanding its flawed methodology, Customs and Border Protection has erred in not considering other injury factors in this conclusion. This Review Application has also identified errors in the findings of material injury in the Termination Report such that the decision to terminate should be rescinded.

17. **The failure to disclose the analysis in the Termination Report (using volumes achieved in earlier years) at the time of the SEF or subsequent to the SEF within a reasonable time removed Viridian's rights to defend its interests. The late notice of this analysis reflects Viridian's concerns that Customs and Border Protection's resources were not adequately managed during the investigation.**
- 17.1 Prior to the publication of the SEF, Viridian was advised by Customs and Border Protection (in a meeting with Customs on 29 October), that there did not appear to be a convincing case for a positive preliminary determination.
- 17.2 This position was similar to the view expressed by Customs and Border Protection when looking at the analysis of external sales and internal sales as outlined in section 7.
- 17.3 The SEF when published on 5 November 2010 did not suggest that there were any areas (apart from the volume analysis) that mitigated the strong positive preliminary determination.

- 17.4 The delegate of the Chief Executive Officer responsible for the CFG investigation was on annual leave from 9 September to 19 October 2010 and the officer in charge of the investigation was absent from Customs from 24 September to 12 October 2010. These dates are significant as Customs and Border Protection determined that the last day for submissions prior to the SEF being published on 5 November was 12 October 2010.
- 17.5 At a late stage prior to the SEF, there were significant misunderstandings on the part of Customs and Border Protection as to the evidence put forward by Viridian and these misunderstandings were addressed immediately upon the return of the delegate to the office. Subsequent to the release of the SEF of 5 November, Viridian met with Customs and Border Protection on 16 November 2010. There was no discussion in this meeting (based on Viridian's record of the meeting) that indicated an analysis using YEM 2007 and YEM 2008 volumes would be used to assess other factors. There was a discussion in that meeting of Customs and Border Protection's view that a dumping measure may not remove price undercutting.
- 17.6 At that meeting Customs and Border Protection raised Viridian's earlier request for a preliminary affirmative determination. There was a clear indication by Customs and Border Protection that it could consider a preliminary affirmative determination. A PAD submission was consequently lodged with Customs and Border Protection (Confidential Attachment H).
- 17.7 It was not until Customs provided its methodology on calculating an unsuppressed selling price on Tuesday 14 December that Viridian was aware of this significant change in Custom's approach to material injury. Viridian responded to the information provided by Customs on Wednesday 15 December. At a meeting at Viridian's premises on Friday 17 December, Customs and Border Protection outlined its methodology.
- 17.8 It is not acceptable for Customs and Border Protection to undertake such an analysis at such a late stage of the investigation, given that the final Report was to go to the Minister on Monday 20 December 2010.
- 17.9 It is recognized that a preliminary finding such as published in the SEF is subject to further submissions by interested parties and further analysis by Customs and Border Protection. However, a significant change to a preliminary finding which is based on assumptions surrounding the applicant's business should be conveyed to the applicant so that the applicant can protect its interests prior to any decision being made by the investigating authority, in this case, Customs and Border Protection.

18. Conclusion Relating to the Particulars Concerning the Findings

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18.1 This application for review of a decision by the CEO has clearly and comprehensively set out the grounds on which a review is sought. Overall the grounds set out in this application indicate that a reinvestigation of the grounds is likely to lead to a change to the decision to terminate the investigation.

Yours faithfully

J J Croft