



Application for review of a Commissioner's decision

Customs Act 1901 s 269ZZQ

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 June 2021 for a review of a reviewable decision of the Commissioner of the Anti-Dumping Commission.

Section 269ZZO of the *Customs Act 1901* sets out who may make an application to the ADRP for a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time

Applications must be made within 30 days after the applicant was notified of the reviewable decision.

Conferences

The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information

You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 10, 11, 12 and/or 13 of this application form (s269ZZQA(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

Contact

If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

¹ By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: Visy Glama Pty Ltd
Address: Level 11, 2 Southbank Boulevard, Southbank, Victoria 3001
Type of entity (trade union, corporation, government etc.): Company

2. Contact person for applicant

Full name: Dr. Ross Becroft
Position: Principal
Email address: ross@grossbecroft.com.au
Telephone number: +613866 5666

3. Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO

The applicant is the person who made the application for the imposition of dumping duties under Subsection 269TB(2) (refer item 3 of s269ZZO)

4. Is the applicant represented?

Yes No

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

****It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

- Subsection 269TC(1) or (2) – a *negative prima facie decision*
- Subsection 269TDA(1) – a *termination decision*
- Subsection 269TDA(2) – a *termination decision*
- Subsection 269TDA(3) – a *termination decision*
- Subsection 269TDA(7) – a *termination decision*
- Subsection 269TDA(13) – a *termination decision*
- Subsection 269TDA(13A) – a *termination decision*
- Subsection 269TDA(14) – a *termination decision*
- Subsection 269TDA(14A) – a *termination decision*
- Subsection 269X(6)(b) or (c) – a *negative preliminary decision*
- Subsection 269YA(2), (3), or (4) – a *rejection decision*
- Subsection 269ZDBEA(1) or (2) – a *anti-circumvention inquiry termination decision*

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed.**

6. Provide a full description of the goods which were the subject of the reviewable decision:

The goods the subject of the reviewable decision as described in Termination Report No. 548 are:

Kraft paperboard, coated on one side with clay or other inorganic substances, grammage 360-430 grams per square metre ("GSM") wet strength treated.

7. Provide the tariff classifications/statistical codes of the imported goods:

The goods are generally but not exclusively classified to the following tariff subheadings and statistical codes in Schedule 3 to the *Customs Tariff Act 1995*:

- 4810.39.00:83
- 4810.29.90:65

8. If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision:

Anti-Dumping Notice (ADN) number: 2021/86

Date ADN was published: 15 July 2021

9. Provide the date the applicant received notice of the reviewable decision:

15 July 2021
Please refer to Attachment 1 – ADN 2021/86

****Attach a copy of the notice of the reviewable decision to the application****

PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be **highlighted in yellow**, and the document marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so:

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

See Attachment 2 – Submission regarding grounds for this application.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10:

See Attachment 2 – Submission regarding grounds for this application.

12. Set out how the grounds raised in question 10 support the making of the proposed correct or preferable decision:

See Attachment 2 – Submission regarding grounds for this application

13. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision:

Only answer question 13 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act 1901.

See Attachment 2 – Submission regarding grounds for this application.

14. Please list all attachments provided in support of this application:

The attachments provided in support of this application are:

- Attachment 1 – ADN 2021/86;
- Attachment 2- Submission regarding grounds for the application;
- Attachment 3- Visy letter of Authority.

PART D: DECLARATION

The applicant's authorised representative declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:



Name: Dr. Ross Becroft

Position: Principal

Organisation: Gross & Becroft Lawyers Pty Ltd

Date: 13 /08/2021

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: Matthew Stein
Organisation: Visy Glama Pty Ltd
Address: Level 11, 2 Southbank Boulevard, Southbank VIC 3006
Email address: matthew.stein@visy.com.au
Telephone number: (03) 9247 4777

Representative's authority to act

****A separate letter of authority may be attached in lieu of the applicant signing this section****

Please see Attachment 3 – Letter of Authority

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date: / /



Australian Government
Department of Industry, Science,
Energy and Resources

Anti-Dumping
Commission

Customs Act 1901 – Part XV B

ANTI-DUMPING NOTICE NO. 2021/86

Kraft Paperboard

Exported to Australia from the United States of America Termination of Investigation No. 548

Public notice under section 269TDA(15) of the Customs Act 1901 (Cth)

On 30 March 2020, Dale Seymour, the former Commissioner of the Anti-Dumping Commission, initiated an investigation into the alleged dumping of kraft paperboard (the goods) exported to Australia from the United States of America (USA). The investigation followed an application lodged by Visy Glama Pty Ltd (the application) under section 269TB(1) of the *Customs Act 1901* (Cth).¹

A public notice of the decision to not reject the application and to initiate the investigation (the initiation notice) was published on the Anti-Dumping Commission's (Commission) website on 30 March 2020 in Anti-Dumping Notice (ADN) No. 2020/032.²

As a result of the Commission's investigation, I found that like goods were not produced in Australia and exports of the goods from the USA have not caused material injury to an Australian industry producing like goods.³

I am satisfied that the following preconditions for termination of the investigation are met:

- (a) an application was made for a dumping duty notice (section 269TDA(13)(a)); and
- (b) no injury has been caused to an Australian industry producing like goods by exports of the goods from the USA (section 269TDA(13)(b)).

Accordingly, I must terminate this investigation in accordance with section 269TDA(13).

Termination Report No. 548 (TER 548)⁴, sets out reasons why I consider no injury has been caused to an Australian industry producing like goods by exports of the goods from the USA. In summary, I do not consider that locally produced goods (microflute) are like goods to the goods under consideration (kraft paperboard).

¹ All legislative references in this notice are to the *Customs Act 1901* (Cth) unless otherwise stated.

² Available on the electronic public record (EPR) for Investigation No. 548 as item no. 3.

The EPR is available via www.adcommission.gov.au.

³ Pursuant to section 269T, like goods means 'in relation to goods under consideration... goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration'.

⁴ Available on the EPR.

As I consider like goods are not produced in Australia by any manufacturer, there is no Australian industry producing like goods and therefore there can be no injury from dumped goods.

In making the decision to terminate this investigation, I have had regard to:

- the application;⁵
- submissions from interested parties concerning the publication of the initiation notice. I had regard to these submissions for the purpose of formulating *Statement of Essential Facts No. 548* (SEF 548);⁶
- SEF 548;
- submissions in response to SEF 548;
- TER 548; and
- other relevant information.

TER 548, which sets out my reasons for the termination decision, including the material findings of fact or law upon which the decision is based, has been placed on the Commission's public record at: www.adcommission.gov.au.

The applicant may request a review of this decision to terminate part of the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

Enquiries about this notice may be directed to investigations3@adcommission.gov.au.

Dr Bradley Armstrong PSM
Commissioner
Anti-Dumping Commission

15 July 2021

⁵ EPR item no. 1.

⁶ Refer to a list at Non-Confidential Attachment 1 to SEF 548, which is at EPR item no. 37.

ATTACHMENT 2

VISY GLAMA PTY LTD ('Visy')

GROUNDS IN SUPPORT OF AN APPLICATION TO THE ANTI-DUMPING REVIEW
 PANEL (ADRP) FOR REVIEW OF A COMMISSIONER'S DECISION

1. INTRODUCTION

- 1.1. Anti-Dumping Notice (ADN) 2021/86 published on 15 July 2021 announced a decision by the Anti-Dumping Commissioner to terminate dumping investigation 548 concerning Kraft Paperboard exported to Australia from the United States of America on the basis of the matters contained in Termination Report No. 548 ('Decision'). The Decision was stated to be made in accordance with section 269TDA(13) of the Customs Act 1901.
- 1.2. By this Application, Visy respectfully requests a review by the ADRP of the Decision on the grounds set out in this document. Visy contends and demonstrates in this Application that the Decision is not the correct or preferable decision and that the ADRP should direct the Commissioner to resume and continue with dumping investigation no. 548.
- 1.3. Visy's interest in this case is as the applicant that applied to the Anti-Dumping Commission for anti-dumping relief as the Australian Industry suffering material injury.
- 1.4. This application concerns the issue of like goods. In making the Decision, the Commissioner has determined that the imported goods that are the subject of the investigation ('Goods Under Consideration' or 'GUC') and the goods produced in Australia for which injury is claimed, are not like goods ('Like Goods'). This is despite the unequivocal evidence that importations of the GUC have directly resulted in the loss by Visy of some major domestic supply contracts, necessitating the scaling down of Visy's local production.¹ The decision on 'Like Goods' is also despite clear third party evidence that, from an Australian market and end consumer perspective, the GUC and Visy equivalent are seen as completely interchangeable with buying decisions made

¹ [Redacted] [Deleted – confidential]
production data

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'...in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration **or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration**'. (Bold added)

- 1.5. As a consequence of the Commissioner's determination that Visy's products are not Like Goods, the Commissioner made a finding that no injury has been caused to an Australian industry by exports of the goods from the United States of America. The Decision has extremely harsh consequences for Visy in circumstances where the ADC, in the Statement of Essential Facts ('SEF'), made a finding against the major exporter from the United States, Graphic Packaging International LLC of 49.2 percent dumping margin and a finding of a 66.6 percent dumping margin in respect of uncooperative and all other exporters. In order for Visy to be competitive against goods dumped at such levels it would need to sell its equivalent Australian made products at below cost. Where it has declined to do so, it has lost material contracts.
- 1.6. This investigation concerns imported kraft paperboard that is converted in Australia for use as beverage can packaging. The Goods Under Consideration' as defined in Visy's dumping application dated 4 March 2020 are:

KRAFT PAPERBOARD, COATED ON ONE SIDE WITH CLAY OR OTHER INORGANIC SUBSTANCES, GRAMMAGE 360-430 GSM, WET STRENGTH TREATED

- 1.7. In its application, Visy also provided an explanation of the Goods Description in the following terms:

Explanation of the Goods Description

The GUC is formulated to describe by physical characteristics a category of imported goods that have an end use for packaging 12 or more beverage can containers. It is specifically designed to identify a category of imported paperboard and to distinguish it from other paperboard products. This is necessary given the very significant size and diversity of the paperboard market in Australia.

It is important to appreciate that the GUC are an intermediate product that is

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converted into a final product in Australia. The conversion process will generally involve printing, cutting and gluing the imported products to create individual packaging known as beverage can multipacks. The GUC does not include finished ready-for-sale beverage can multipacks.

The dumping of these imported products gives the importers a major cost advantage over the Australian made like products manufactured by Visy as the imported products represent the great majority of the cost to make the beverage can multipacks.

Paperboard (also known as cartonboard) is usually imported in large rolls. It is a paper-based product and is a solid material consisting of 1 or more layers.

The type of paperboard referred to in the GUC is known as kraft, which refers to primarily using virgin softwoods in the initial pulping process (as opposed to any substantive use of recycled material). The reference in the GUC to 'coated on one side with clay or other inorganic substances' is to the application of clay to the top layer of the paperboard which enables high quality printing on the goods.

The reference includes kaolin clay, calcium carbonate or other inorganic substances. This coating is essential given the end use. This expression is also referred to in the customs tariff.

The reference in the GUC to the grammage range of 360-430 gsm is significant due to the need to distinguish imported goods meeting the GUC from other imported goods that may be used for food and beverage packaging (eg packaging designed for light weight or very heavy foods or beverages).

The reference in the GUC to 'wet strength treated' distinguishes the goods from paperboard varieties used for non-beverage packaging. As beverages are frequently stored in refrigerated environments additional moisture resistant properties are required to ensure the packaging holds its shape, and does not tear or collapse. These properties are achieved by adding certain chemicals to the paperboard.

- 1.8. In formulating the Goods Description and providing the accompanying Explanation of the Goods Description (as referenced above) Visy was conscious of not 'overreaching' in its application and therefore the Goods Description was tailored to capture a specific

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sub-set of imported paperboard, and to exclude other paperboard products that do not have such a significant overlap with locally manufactured Visy microflute (as described in more detail in paragraph 1.9 below).

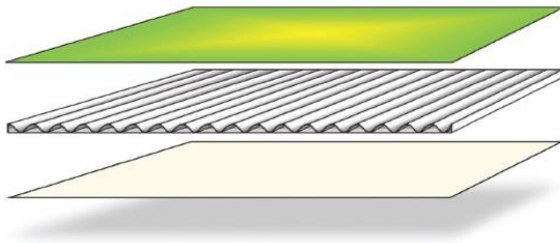
1.9. In its application, Visy described the like goods produced by the Australian Industry as follows:

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

Unlike the imported products within the GUC, Visy's product is wholly manufactured in Australia. All of the production processes referred to below occur in Australia.

Microflute comprises of 3 layers as follows:

- Clay coated top sheet liner (normally printed);
- Corrugated Medium;
- Liner.



The printed externally facing sheet for Microflute is sourced from Visy's **[deleted confidential – name of plant]** plant. That printed sheet is then transported to Visy's **[deleted confidential – name of plant]** plant. Visy's **[deleted confidential – name of plant]** plant manufactures the corrugated fluting and joins this with the internal sheet and the printed external sheet, and then cuts this in the required shape - to make the Microflute products.

Microflute of 1mm or less in thickness is designed for use to package larger multipack beverage can containers holding 12 or more beverage can containers. Visy Glama typically would manufacture microflute packaging to packages between **[deleted confidential text – number]** cans.

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See image below of the finished Microflute goods:



1.10. As can be seen from the abovementioned Goods Description, Explanation and description of Like Goods, Visy has carefully formulated a precise definition of the Goods Under Consideration to capture the category of imported paperboard that directly competes with Visy’s Australian manufactured goods.

1.11. The Commission reviewed Visy’s application and determined that there were reasonable grounds for initiating a dumping investigation. In this regard, in its Consideration Report at section 2.4.1 the Commission states:

The Commission is satisfied that there is an Australian industry producing like goods to the goods the subject of the application on the basis that:

- *Visy Glama produces goods that have characteristics that closely resemble the goods the subject of the application; and*
- *the goods are wholly manufactured in Australia.*

1.12. In assessing the question of like goods, the Commission summarised its position as follows:

FACTOR	THE APPLICANT’S CLAIMS	THE COMMISSION’S ASSESSMENT
Physical likeness	The imported goods and like goods are both forms of fibre packaging used for multipack beverage packaging,	The Commission has examined information in the application and information available on the webpages of the applicant, importers and exporters. The

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	<p>holding 12 or more beverage cans.</p>	<p>Commission considers that the imported goods and the locally produced goods are physically alike. This is on the basis that the imported goods and the locally produced goods look similar and have similar attributes such as fibre content, grammage and coating. Refer to Attachment 2.</p> <p>The Commission's assessment is for the intermediate products. The Commission has not made an assessment as to whether the final products, e.g. multipack beverage packaging are similar.</p>
<p>Commercial likeness</p>	<p>The imported goods and like goods are both sold, upon conversion, to the same market, being beverage companies selling multipack cans to Australian retailers.</p>	<p>The Commission notes that:</p> <ul style="list-style-type: none"> • the imported goods are an intermediate product, which is converted to a final product (multipack beverage packaging) in Australia; and • the locally produced goods are consumed internally by the applicant before conversion to a final product (multipack beverage packaging) in Australia. As such the imported goods and the locally produced goods are not sold into the same market. However, the Commission considers that, once the imported goods and locally produced goods are converted to a final product, they compete directly downstream for the same customers in the multipack beverage packaging market (such as soft drink, beer and alcohol beverage can multipacks). <p>Within this market, there appears to be a competitive process involving the awarding of contracts. There also appears to be substitutability of the products. Therefore, the Commission considers that there is commercial likeness in the way the imported goods and locally produced goods are consumed.</p>

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<p>Functional likeness</p>	<p>The imported goods and like goods have the same end use, being multipack beverage packaging, and are functionally substitutable.</p>	<p>The Commission is satisfied that the locally produced goods are used for the same end use, i.e. beverage can multipacks, and are therefore functionally alike to the imported goods. The Commission was provided with sample beverage can multipacks by the applicant which demonstrated this.</p>
<p>Production likeness</p>	<p>The materials required to construct the like goods and the imported goods are similar, however differentiated by:</p> <ul style="list-style-type: none"> • the locally produced like good is made of three layers comprising of a corrugated centre layer, where the imported good is a solid form of paperboard, with at least one layer, both with a top coating; and • the locally produced good is further produced by printing in a reel to reel flexography rotary process where, in contrast, the imported product is likely printed in a sheet fed lithographic process. 	<p>The Commission recognises that there are some differences in the manufacturing processes of the locally produced goods and the imported goods, e.g. the locally produced goods consist of three layers, whereas the imported goods are a solid form of paperboard.</p> <p>Notwithstanding this, based on the information contained in the application and the Commission's broad understanding of the manufacturing inputs and processes for kraft paperboard, the Commission considers that locally produced goods and imported goods share a production likeness.</p> <p>The Commission does not consider that the different post-production printing methods used to convert the imported goods to a finished product, or other unique customer requirements, substantially alter the production process or primary material inputs for locally produced and imported goods.</p>
<p>COMMISSION'S ASSESSMENT</p>		
<p>THE COMMISSION'S CONSIDERS THAT THE LOCALLY PRODUCED GOODS CLOSELY RESEMBLE THE GOODS THE SUBJECT OF THE APPLICATION AND ARE LIKE GOODS, HAVING REGARD TO THE PHYSICAL, COMMERCIAL FUNCTIONAL AND PRODUCTION SIMILARITIES DESCRIBED ABOVE.</p>		

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1.13. It is noted that the Commission, after having reviewed the application and products and initiating this case has seen fit to reverse its position and to terminate the case after proceeding with the investigation for some 16 months. Visy understands that this is the first time that an investigation of the Commission has been terminated by reason of the Commissioner reaching the view that the imported and locally produced goods are not like goods. It is further noted that the Commission engaged an independent expert, and in reaching this Decision, the Commission has ignored the reasoning and conclusions of its own independent expert. There is no doubt in this case that the finished products manufactured by Visy and the United States producers compete in the same market, are sold to the same customers and are fully substitutable. It is Visy's strident position that the Commissioner has erred in failing to treat the imported and Australian made products as like goods.

1.14. The grounds relied upon by Visy in seeking a review by the ADRP of the Decision are, in summary, that:

- (a) The Commissioner has incorrectly adopted a narrow interpretation of like goods that is inconsistent with the purposes of Part XVB of the Customs Act;
- (b) The Commissioner has erred in concluding that the Goods Under Consideration and the Like Goods (produced in Australia) are not like goods for the purposes of s269T(1) of the Customs Act having regard to the weighing up of the indicia of commercial, functional, physical and production likeness;
- (c) The Commissioner has disregarded and not adopted the conclusions of its own appointed expert in assessing the question of like goods;
- (d) The Commissioner has failed to investigate matters that are directly relevant to the like goods assessment and has based its findings on factually erroneous assumptions; and
- (e) In assessing like goods, the Commissioner has failed to place sufficient weight on the end use of the imported and Australian made goods and properly examine the relationship between the intermediate and finished goods.

Visy contends that, as a result of such errors, the Commissioner has reached an outcome on Visy's original application that is not the correct or preferable decision, and in fact is in direct contradiction to the purpose and intent of the Australian anti-dumping

legislation and the World Trade Organisation (WTO) Anti-Dumping Agreement upon which Australia's anti-dumping laws are based.

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

2.1. In its submission of 4 September 2020, Visy pointed out to the Commission that it is imperative that the Commission interpret the definition of like goods in s269T(1) of the Customs Act in a manner that is consistent with the purposes of the Anti-Dumping provisions contained in Part XVB of the Customs Act. Section 269SM provides that these provisions concern the taking of anti-dumping measures in respect of **goods whose importation into Australia involves a dumping or countervailable subsidisation of those goods that injures, or threatens to injure, Australian industry.** The clear policy objective of the Anti-Dumping regime is to give trade protection to a domestic industry suffering injury resulting from dumped imports. Visy also notes the requirement in s15AA of the Acts Interpretation Act that 'In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.'² This applies to the definition of 'like goods' in s269T(1) of the Customs Act.

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

Additional dumping and countervailing duties become payable in respect of the exportation of those goods to Australia for a period of five years, unless revoked earlier. Those duties are payable by the importer of goods upon the entry of the goods into Australia ... The purpose of those duties is to level the playing field from a price perspective in the Australian market ... In simple terms, the uplift of the price of imported goods through the imposition of an additional duty is meant to provide relief to Australian producers and manufacturers.³

² See Acts Interpretation Act 1901 (Cth).

³ Mr Dale Seymour, former Commissioner, Anti-Dumping Commission, Committee Hansard, Canberra, 27 November 2014, pp. 1-2.

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- 2.3. The legislation, in section 269T(1) defines like goods as ‘goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.’ This definition contemplates that the Commission will examine goods that are not exactly the same but which have a degree of likeness based working criteria such as physical, commercial, functional and production likeness. The key question to consider ultimately is whether the goods are sold into the same market and are substitutable for the Australian-made products.⁴
- 2.4. In the Termination Report (‘TER’), the Commission goes to great lengths to distinguish the characteristics of kraft paperboard and Australian manufactured microflute by focussing on and over emphasising small-scale technical differences between these goods. However, when one examines these two products in an overall sense, they are fundamentally aligned, with both being fibre-based products with a similar grammage/weight and which have an extremely similar appearance, with any differences only really being evident to technical specialists in paper making. These points have been made in Visy’s submission of 18 June 2020 at pages 5-6 where the major areas of likeness have been summarised.⁵ Visy also notes that some of the comparisons of kraft paperboard and microflute made by a major United States exporter attempt to show differences in the physical composition of these goods at a microscopic level.⁶ The Commission has therefore adopted a highly technical and what is verging on a theoretical approach to the question of the relationship between these products in order to over-emphasise their differences. For instance, we note that GPI’s reports from Mr. Klass seek to emphasize the species of pine used as the constituent fibre, the chapter in a textbook in which the products are described, the model of the machine on which the products are manufactured, and also the fact that the constituent plies in GPI’s kraft paperboard only exist ‘momentarily’ in the production process.⁷ But these reports fail to note that, from the perspective of the brand owners and end consumers actually purchasing the resultant packaging products, these nuances are completely irrelevant and typically not even within their knowledge.

⁴ Note that the criteria for determining ‘like goods’ adopted by the Commission is not prescribed by legislation and the working criteria applied by the Commission is not definitive nor exhaustive (refer section 3.1 of this submission).

⁵ Refer public file document no 9.

⁶ Supplementary Report of Charles Klass at page 8 (public file document no.15).

⁷ Supplementary Report of Charles Klass at pages 6 and 11 (public file document no.15) and paragraph 18 GPI submission dated 26 July 2020 (public file document no.16).

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- 2.5. Visy rejects this type of approach and strongly contends that the most important factor in comparing the imported Goods Under Consideration with Like Goods manufactured by an Australian Industry is whether the market identifies, in a practical sense, these products as being substitutable for one another. In particular, if a beverage packaging customer (that is, beverage brand owner) considers that these products are substantially identical in appearance and complete substitutes in terms of functionality and use, and the customer makes purchasing decisions for these products in the marketplace based upon this practical understanding and use of the products, then for the purposes of a dumping investigation the issue of likeness should be satisfied. In making such purchasing decisions the customer will undoubtedly have regard to the Commission's working criteria of physical, commercial, functional (and to some extent) production likeness. The purchasing decision of the customer will also be impacted by whether the end consumer would see any differences between the converted end products derived from kraft paperboard compared with microflute (which the consumer does not).
- 2.6. Visy notes that the Australian Courts have interpreted the expression 'like goods' for the purposes of s269T in a practical and commercial manner. In this regard, we note the comments of Lockhart J, in the Federal Court decision of *Marine Power Australia*, wherein his Honour stated:

'The expression "like goods" defined in s.269T should not be interpreted in a narrow or restrictive manner. It means goods of the same general category.' and *'Words in statutes should be taken to have been used by the legislature in their ordinary sense unless there is something in their context, phrasing or the subject matter with which they deal to lead to the conclusion that they are intended to assume a technical meaning or to be used in a specialised or trade sense.'*⁸

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

*'...the assessment whether there is an "Australian industry producing like goods" (ss269TG(1)(b)(i) and 269TJ(1)(b)(i)) is but one of many factual determinations for the Minister which arises in the course of his consideration whether to exercise the power to issue notices or not.'*⁹

⁸ *Marine Power Australia Pty Ltd and Another v Comptroller General of Customs and others* (1989) FCA, Lockhart, L., 9 June 1989, unreported, paragraph (v) page 562 and page 572.

⁹ *GM Holden Limited v Commissioner of the Anti-Dumping Commission and others* [2014] FCA 708, Mortimer, J., 4 July 2014 VID 555 of 2013, paragraph 117 and 123.

*'This is reinforced by the use of the word "characteristics" in the alternative assessment of the goods themselves, including but not limited to their appearance. Characteristics would include, for example, the composition of the goods, the materials used to manufacture them, their outward appearance and the uses for which they were suitable in a commercial and practical sense. 'The statutory question was a practical one to be answered by a comparison predominantly of the physical characteristics of and uses for the products produced by the Australian industry...'*¹⁰

2.8. These judicial observations were more recently referenced and adopted in ***Anti-Dumping Review Panel Report No. 103 – Steel Pallet Racking exported from the People's Republic of China and Malaysia***.¹¹ In this regard, the ADRP noted in the following passage the practical and not unduly narrow approach that should be taken in investigations:

*'Marine Power suggests that like goods should not be interpreted too narrowly and that words should be taken as their ordinary meaning unless a contrary intention is expressed. GM Holden suggests that a practical approach should be adopted when considering like goods and that the type of framework adopted in that case (same framework as in REP 441) enables a comparison of the characteristics to determine whether the exported goods are like goods to the Australian manufactured goods.'*¹²

2.9. Further, the definition of like goods in s269T(1) mirrors the definition of 'like product' in Article 2.6 of the WTO Anti-Dumping Agreement. The provision has been discussed in various WTO panel decisions such as in *Korea – Pneumatic Valves*¹³ where the panel, in interpreting Article 2.6 of the WTO Anti-Dumping Agreement emphasised a practical and market-based approach in stating:

*Based on this definition, it would be expected that allegedly dumped imports compete with the domestic like product. Indeed, if they did not, it is difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation.*¹⁴

¹⁰ GM Holden Limited v Commissioner of the Anti-Dumping Commission and others [2014] FCA 708, Mortimer, J., 4 July 2014 VID 555 of 2013, paragraph 134.

¹¹ ADRP Report No. 103, 19 October 2019.

¹² Ibid at paragraph 65.

¹³ In *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R, adopted 30 September 2019, para. 7.275.

¹⁴ Ibid.

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This practical and market-based approach to this issue has also been applied in various WTO Panel decisions, such as in *EC – Salmon (Norway)*.¹⁵

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

2.10. As stated above in the introduction to this Application, it would be the first time that Visy is aware of that the Commissioner has made a decision to terminate on the basis of the imported and Australian made goods being found not to be like goods. This finding leaves Visy without the prospect of trade protection in circumstances where there has been a finding of egregious levels of dumping (49.2% for GPI and an all other exporters dumping margin of 66.6%). The consequence of this is likely to be the loss of Australian jobs (particularly in regional areas – where there is higher structural economic disadvantage) and the closure of plants in circumstances where the imported and locally produced goods are completely substitutable. We also note that Visy has carefully formulated the GUC to only deal with imported goods that directly compete with the Australian Industry and which are treated as like by market participants. If a practical and market-based approach is applied in this investigation, then any question as to the likeness and substitutability between the imported Goods Under Consideration and the Like Goods in this instance is easily answered in the affirmative.

2.11. This approach taken by the Commissioner in terminating this investigation is also inconsistent with the approach of the Commission in previous dumping cases, some of which have involved the Commission publishing an Issues Paper to deal with the questions of identifying goods that fall within the scope of the GUC and defining like goods produced in Australia. For example, in the case of *Steel Pallet Racking from China and Malaysia (investigation 441)*, the Commission examined the various claims

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

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of interested parties concerning like goods and was satisfied that the relevant steel pallet racking fell within the scope of the GUC. The Commission noted on page 6 of the Issues Paper that:

One of the mandatory requirements of a notice initiating an investigation is setting out the particulars of the goods the subject of the application. In *GM Holden Limited v Commissioner of the Anti-Dumping Commission* [2014] FCA 708 the Court stated that the use of the term ‘particulars’ implies physical features of the goods. The Commissioner is of the view that ‘particulars’ relate to considerations of material composition, appearance and **uses in a commercial and practical sense.**¹⁶ **(bold added)**

2.12. For the abovementioned reasons, Visy submits that the Commissioner has incorrectly adopted a narrow interpretation of like goods that is inconsistent with the purposes of Part XVB of the Customs Act and, if he had applied an interpretation in a practical and commercial manner that had regard to the objects and purpose of these provisions, he would have found that microflute and imported kraft paperboard (within the GUC) were like goods.

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

3.1. Australian dumping legislation does not set out the criteria that the Commission is to examine in making a like goods assessment. The definition of ‘like goods’ contained in s269T(1) is not instructive. The Commission relies upon working criteria in accordance with the Dumping and Subsidy Manual, but it is important to note that the criteria that it adopts has no legislative force. The Manual represents the current practices of the Commission based upon its own interpretation of Australia’s anti-dumping laws. Accordingly, each assessment of like goods has to be undertaken on a case by case basis having regard to the relevant factors that may determine likeness. Visy submits that the ADRP, in considering what constitutes the correct or preferable decision in this

¹⁶ Case 441 public file document number 103. The ADC also found in section 5.3 that steel pallet racking produced locally by the Australian industry members is like to the imported goods, and possess the same essential characteristics as the imported steel pallet racking.

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case, is not restricted to applying the same criteria as is applied by the Commission nor must it attribute the same level of importance that the Commission has placed upon a particular criterion. With this in mind, the Commission generally assesses like goods according to four criteria, comprising physical, commercial, functional and production likeness. Extracts from the Dumping and Subsidy Manual define these criteria in basic terms as follows:

- Commercial likeness refers to attributes identifiable from market behaviour;
- Functional likeness refers to end use;
- Physical likeness refers to an assessment of which physical characteristics are similar, and the identification of the extent of any differences; and
- Production likeness refers to a comparison of the production process.¹⁷

3.2. It is also noted and acknowledged by the Commission in the Dumping and Subsidy Manual that the factors to be examined are not exhaustive and the Commission should assess 'other considerations', such as how similar is the marketing of the goods.¹⁸ The Commission is required to conduct a 'weighing up' exercise: that is, it must assess the relative likeness of the imported and locally produced goods by examining the relative likeness across these factors. It is Visy's contention that the Commission has erred in carrying out this exercise in failing to place sufficient weight on particular material elements of likeness. In order for the ADPR to determine that the correct or preferable decision is that the imported and Australian made goods are like goods, it is necessary for these abovementioned criteria to be assessed first individually and then as a whole. For this reason, Visy has set forth its position on each of these 'likeness criteria' as sub-grounds to this ground of review (rather than stating each factor as a separate ground of review).

3.3. The Decision in this case is based upon the Commissioner's finding that he is not satisfied that microflute is not a like goods in relation to the Goods Under Consideration on the basis that the physical characteristics of the two goods are not do not closely resemble one another, that they are not commercially alike, not functionally alike and nor is there production likeness. Visy submits that the Commissioner has not correctly assessed any of the abovementioned criteria and when this correct assessment is carried out that the ADPR would arrive at the conclusion that microflute and kraft paperboard within the GUC are like goods.

¹⁷ Refer section 2.3 Dumping and Subsidy Manual.

¹⁸ Refer page 13 of the Dumping and Subsidy Manual which refers to 'Other Considerations'.

3.4. **Sub-ground 2(a) – microflute and the imported goods are COMMERCIALLY ALIKE**

Visy submits that microflute and imported kraft paperboard (within the GUC) are commercially alike. In the SEF, the Commission in fact determined that the goods were commercially alike and noted the following:

Both microflute and kraft paperboard are intermediate products that are converted to end use products. Both products enter the markets for end use products in a similar way.

It is the Commission's preliminary view that the commercial characteristics of microflute closely resemble the commercial characteristics of kraft paperboard.¹⁹

3.5. In reaching this position the Commission noted the following matters:

Commercial interchangeability – Both Visy and one importer of kraft paperboard competed for a long term contract for the supply of packaging of 12 or more beverage can multipacks. Microflute and kraft paperboard can both be used in the production of large format beverage can packaging, however the products aren't substituted outside this scope in Australia, for example, in small format beverage can packaging.²⁰

Price competition and consumption - Visy does not sell microflute which it produces as an intermediary product. Rather, Visy consumes the microflute in the manufacture of various products, including beverage packaging.

Similarly, importers of kraft paperboard convert kraft paperboard to a final end product, typically beverage packaging. Price competition, therefore, occurs at the end-use product level.

Along with price, consumption of the end product may be driven by the beverage manufacturer's requirements. Although, the Commission considers it a

¹⁹ SEF at page 34.

²⁰ SEF at page 28.

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reasonable assertion that the overall consumption levels of beverage packaging are driven by consumer preferences.

Distribution channels - The end use products are sold to manufacturers and wholesalers of products such as food and beverages, who then, fill the packaging with products to distribute to the retail market. There is no difference in the distribution channels for the end use products

- 3.6. This issue of commercial likeness was the subject of a statement by Arthur Mitropoulos²¹, the former head of procurement at Schweppes (now Asahi beverages). This statement is entitled 'Are microflute and kraft paperboard 'Like Goods' when used in beverage can multipacks? A Market Participant's Viewpoint'. Mr Mitropoulos explains how the 12 + multi-can beverage contract moved from GPI (a US exporter) to Visy in about 2004 and how Visy has been supplying Schweppes with this packaging since that time. He concludes that from the point of view of the commercial customer microflute and kraft paperboard are physically, functionally and commercially alike. In terms of commercial likeness he notes that 'they are 'like goods' in terms of consumer preference and do not impact consumer purchasing behaviour.'²² He concludes that 'As Schweppes primarily viewed two products as substitutable in the market, I believed that the two products were interchangeable, and as a consequence, contract renewals were primarily based upon financial considerations.'²³
- 3.7. Contrary to the clear position articulated above, the Commissioner, in the Termination Report has reversed the proposed his findings in the SEF regarding commercial likeness.

The Commissioner, in this regard, states:

'the imported and locally produced goods are not commercially alike as they do not directly compete in any market, noting that some of the imported goods are converted into goods that compete directly with products converted from the locally produced goods.'²⁴

²¹ Public file document no 24.

²² Page 4 Statement of Arthur Mitropoulos dated 20 October 2020, public file document no 24.

²³ Ibid.

²⁴ TER at page 30, section 3.4.9.

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3.8. In reaching this finding, the Commissioner is disregarding the 'real world' evidence of the commercial relationship between these products and instead has opted for a hypothetical and narrow comparison of the goods at a particular point in the manufacturing process, without having regard to the commercial reality that the goods are specifically designed for both manufacture, conversion and sale into the same markets. The finding of the Commissioner as quoted above is also contradictory with the second sentence suggesting an acknowledgement of commercial likeness.²⁵

3.9. This point was addressed by Visy in its submission of 19 April 2021 to the Commission wherein it notes (in response to a submission by GPI)²⁶:

- GPI's statements that kraft paperboard and microflute 'do not directly compete at all'²⁷ and that they 'do not compete in the same market'²⁸ is disingenuous and replete with artifice. It ignores the obvious commercial reality that both goods are manufactured as the raw material for final conversion (via cutting, gluing, folding etc) into goods that directly compete. The ADC's findings on this issue are correct. There are many imported goods (eg aluminium, steel products) that are imported into Australia for further processing or working into final goods in circumstances where the imported products are not sold within Australia prior to conversion. For the same reasons, GPI's claim that there is a lack of price competition between the imported and like goods in this case²⁹ is not a relevant consideration in this matter.
- The GPI contention that the fungibility of the imported kraft paperboard must be assessed by questioning whether an importer of kraft paperboard would swap this product for microflute prior to conversion³⁰ demonstrates the absurdity of GPI's position and ignores the commercial reality of specialised manufacturing conversion machinery required to convert kraft paperboard and microflute as well as the niche nature of the customer market for the sale and purchase of these goods.

3.10. It is Visy's contention that the Commission has correctly determined that the GUC and microflute are commercially alike in the SEF.³¹ Further, Visy asserts that this is an extremely important factor and must be given the greatest weight of all 'likeness'

²⁵ Visy contends that almost all of the imported kraft paperboard (not 'some') is converted to 12 + beverage can multipacks.

²⁶ Public file document no. 41 at pages 5-6.

²⁷ GPI submission dated 25 March 2021 paragraph 21 (public file document no 39).

²⁸ GPI submission dated 25 March 2021 paragraph 22 (public file document no 39).

²⁹ GPI submission dated 25 March 2021 paragraphs 29 and 31 (public file document no 39).

³⁰ GPI submission dated 25 March 2021 paragraph 26 (public file document no 39).

³¹ SEF 27-29, 34.

indicators, given that the purpose of the Anti-Dumping regime is to provide a trade remedy for an Australian Industry that is suffering material injury resulting from dumped imports. In this regard Visy reiterates that the products produced by Visy and importers of the GUC compete in the same markets, they compete for the same brand owner contracts, there is no discernible consumer preference between the two, and so final buying decisions are driven by negotiations with brand owners on price.

3.11. Sub-ground 2(b) – microflute and the imported goods are FUNCTIONALLY ALIKE

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

- These goods have the same end use: they are both used in large format beverage can packaging; and
- These goods perform the same functions: they are both designed for the carrying and storage of beverages.³²

3.12. In the TER, the Commissioner seeks to draw fine distinctions between microflute and imported kraft paperboard (within the GUC) relating to their respective technical properties eg flexibility and performance.³³ These considerations are not relevant to the overall question of whether the goods are functionally alike. What is relevant is whether they may have the same end use or perform the same functions. When one examines this criterion in relation to the commercial considerations discussed under sub-ground 2(a) (ie by looking at the commercial context), there is no doubt that the goods are functionally alike. Brand owners wouldn't be switching back and forth between the two alternatives if they weren't functionally alike.

3.13. Notwithstanding Visy's submission in paragraph 3.12 above, there was no evidence to support a finding by the ADC that there were any differences in the performance of microflute and kraft paperboard (within the GUC) in wet environments (eg refrigerators or bottle shop cold rooms). Both of these goods have been specifically designed to withstand wet or damp environments. Visy refers to and repeats the statements of Mr. Arthur Mitropoulos (referred to in respect of sub-ground 2(a) above) and his comment that 'our business was comfortable that the microflute product would perform as needed in wet environments that our can pack might experience.'³⁴

³² See SEF page 29.

³³ Refer TER page 18.

³⁴ Pages 5-6 Statement of Arthur Mitropoulos dated 20 October 2020, public file document no 24. Refer also Visy submission 25 March 2021 at page 3, document no 38.

3.14. Visy notes that the Commissioner relies to some degree on the unverified assertions about the extent of the overlap between the end use of microflute and imported kraft paperboard (within the GUC). In this regard, the Commission contends as follows:

- 'The commission estimates that approximately one third of packaging (by value) converted from microflute is for applications other than for 12 or more beverage can multipack packaging.'³⁵
- 'Kraft paperboard is almost exclusively used in the conversion to beverage packaging. More than half of the kraft paperboard imported during the investigation was converted to packaging other than for 12 or more beverage can multipacks.'³⁶

3.15. Visy as a major market participant (for over 20 years) in this sector strenuously disagrees with these contentions of the Commission, considers them grossly inaccurate, and notes they are made without adequate verification. Visy has provided evidence to the ADC regarding its production facilities, microflute production and microflute sales that demonstrates that a significantly higher percentage of microflute production in the period of investigation was for the manufacture of 12 or more beverage can multipacks. Rather than two-thirds, Visy has provided evidence as part of the verification process and has stated in various submissions that [REDACTED] **[confidential – figure]** percent of microflute production is used for this type of end product.³⁷

3.16. Visy further strenuously disagrees with the Commission's assessment that approximately half of the imported kraft paperboard (within the GUC) is being used for small format beverage multipacks. As stated by Visy in its submission to the ADC dated 25 March 2021 (following the publishing of the SEF)³⁸ Visy contends that small format beverage packaging is not within the GUC because it has a GSM measurement that is not between 360-430. To evidence this, Visy submitted laboratory testing on a number of samples of small format multipacks exported by GPI and Westrock (the only known US exporters of kraft paperboard to Australia) that showed the GSM to be less than 360. The samples chosen and tested were three of the highest selling small format packs in

³⁵ TER page 18, table 4.

³⁶ Ibid

³⁷ See Visy submission 25 March 2021 (public file document no 38), Visy submission 18 June 2021 (public file document no 9 at page 4). Regarding the claims concerning Opal, refer Visy submission dated 25 March 2021 (public file document no 38) at page 3 and Visy submission dated 19 April 2021 (public file document no 41) at paragraph 12.

³⁸ Public file document no 38 at page 2.

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Australia (being Diet Coke 8 packs, Pepsi Max 6 packs and Kombucha 4 packs).³⁹ This evidence was not addressed in the Termination Report and this must be addressed by the Commission.

3.17. Overall, Visy submits that the Commissioner has erroneously found that the GUC and microflute do not sufficiently align in functionality. Given the market evidence as to the ease with which one can be substituted for the other for large format beverage packaging, Visy submits they simply must align in functionality. Indeed the Commission has acknowledged that in respect of large format beverage packaging the two were functionally similar.⁴⁰ This raises the point that even if the Commission's contention regarding the conversion of some imported kraft paperboard to small format beverage packaging is correct (which is not accepted by Visy), then there is nonetheless a substantial proportion of kraft paperboard that is converted for the same end use as microflute (bearing in mind that all of the imported kraft paperboard (within the GUC) is used for beverage can multipacks). This alone should be sufficient for the Commission to establish that microflute and imported kraft paperboard (within the GUC) are functionally alike.

3.18. **Sub-ground 2(c) – microflute and the imported goods are PHYSICALLY ALIKE**

Visy submits that the Commissioner erred in unnecessarily relying on technical and immaterial differences in the physical characteristics between microflute and imported kraft paperboard (within the GUC) rather than looking at the overall similarity between these goods. In this regard, Visy notes that:

- Both microflute and kraft paperboard are paperboard products (derived from and manufactured with the same/very similar raw materials)⁴¹;
- It requires a high degree of technical acumen to distinguish between these goods;
- The users of these goods (ie the end consumers) would not recognise any differences between these goods.

³⁹ Refer Visy submission dated 25 March 2021, under paragraph 1, pages 1-2 where Visy cites '3 high volume small format beverages'.

⁴⁰ SEF page 35.

⁴¹ See confidential attachments to Visy submission of 18 June 2020 (public file document no 9).

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3.19. In its submission of 25 March 2021, Visy responded to the matters relied upon by the Commissioner in reaching the preliminary findings in the SEF (as found in the Termination Report) that there was no physical likeness.⁴² In this regard, Visy noted the following matters:

- Microflute is stored in flat rectangular sheets whereas the GUC is stored as large jumbo rolls.⁴³ Visy says that this is not a material consideration and is simply a question of storage and shipping convenience - many products are manufactured and shipped in alternating sheet format or roll format.
- Microflute is pre-printed whereas the GUC is not. As Visy has stated above, only one layer (top layer) of microflute is pre-printed. This does not change the physical nature of the goods and the pre-printing is undertaken in readiness for the conversion into end use beverage packs. Kraft paperboard also has a latex (white) coating on one side in its imported state.⁴⁴
- The ADC notes that microflute and the GUC have a similar GSM and a similar thickness. These are very important factors for packaging products and should be given more emphasis in the ADC assessing these packaging materials.
- The GUC is wet strength treated (WST) and microflute is not.⁴⁵ This is not a material difference. WST is an additive to GUC that is not visible (not part of appearance). Both microflute and GUC have very similar wet strength properties but the GUC requires this additive during manufacture.
- The ADC refers to microflute having a visual appearance of parallel indentations.⁴⁶ Visy has disagrees with these findings. No such indentations are obviously visible to the naked eye.⁴⁷
- Regarding the physical composition, the ADC notes the differences in the layers. However, both the GUC and microflute are paperboard products⁴⁸ made using similar raw materials and which undergo very similar early production processes. This was explained by the ADC's expert, Dr Vanderhoek, in his Expert Report.⁴⁹

⁴² Refer SEF page 34 and TER pages 16-17 and 29. Visy has also addressed the question of physical likeness in its submissions of 18 June 2020 (document 9) and 4 September 2020 (document 18).

⁴³ SEF 25.

⁴⁴ Refer SEF 26.

⁴⁵ SEF 26.

⁴⁶ SEF 25.

⁴⁷ Refer Visy submission dated 18 June 2021 at page 8 (public file document no 9).

⁴⁸ Refer SEF 26.

⁴⁹ Refer Expert Report, Dr Nafty Vanderhoek (public file document no. 28), pages 2-12.

- **Ultimately, it takes a trained expert to recognise the physical differences between the GUC and microflute. At the end use stage in the market, the consumer can neither recognise nor does he or she care whether this beverage pack is formulated from microflute or the GUC. So Visy's position is that from a holistic perspective the GUC and microflute are like in physical appearance.**
- **In any event, Visy submits that given the overall purpose of the Anti-Dumping regime, minute physical differences (unrecognisable by end consumers in the market) should be given far less weight than the integral factors of commercial and functional likeness.**

(Bolding added)

3.20. Visy submits that the Commissioner has not taken the above-listed matters into account in reaching his Decision. Further, Visy notes that the Commissioner has not actually undertaken an assessment of the physical likeness in the Termination Report in failing to compare the similarities and differences of the goods. The Commission has rather simply listed technical differences in Table 2 (and not considered similarities) and he has then, in conducting his assessment, merely concluded that 'the physical characteristics of locally produced microflute do not closely resemble the imported goods.'⁵⁰

3.21. Visy also points out for completeness that the Commissioner appears to have relied upon differences in tariff classifications of microflute and imported kraft paperboard. It is asserted that kraft paperboard falls to tariff classifications 4810.29.90 and 4810.39.00 whereas microflute (if imported) would fall to 4808.10.90. Visy says in response that, firstly, that undeniably both microflute and kraft paperboard are paper and paperboard products under chapter 48 of the Customs Tariff. Further, Visy submits that it is highly likely that microflute is in fact classified to the same tariff classification as kraft paperboard because it comprises of a clay coating (as does kraft paperboard) that is not referred to in tariff classification 4808.29.90. The Commission also never requested input from Visy in relation to how microflute would be classified pursuant to the customs tariff if it was an imported product.

⁵⁰ TER page 30.

3.22. Sub-ground 2(d) – microflute and the imported goods have PRODUCTION LIKENESS

Visy submits that there are indeed some differences in the production methods used to produce microflute and kraft paperboard. However, these differences (as acknowledged by the Commission) concern manufacturing processes which involve the manufacturer striving to achieve the same or similar characteristics to enable each product to be used in a specific end use.⁵¹ To achieve the objective, Visy notes that both products are manufactured by bringing together several plies/layers of paper and otherwise involve similar manufacturing processes.⁵²

3.23. Visy also submits that production likeness is not as important as a factor to be taken into account by the Commissioner in weighing up the overall likeness of the imported and Australian made goods. It is rather a subsidiary factor with greater emphasis required to be given to commercial, function and physical likeness. This makes sense in that the most important considerations are the identification of the goods and their function and end use. In its submission of 25 March 2021 in response to the SEF, Visy stated as follows:

We note that the process for making the GUC and microflute is the same up to a certain point, and notably both are constructed from layers of fibrous raw material, but that there are manufacturing differences. However, Visy submits that production likeness is far less important than the other 3 factors considered by the ADC, particularly the key issues of commercial and functional likeness. In the ADC Manual (refer pg 13) the Manual states: *Different production processes may produce identical goods. However, different production processes may be used to create different product characteristics. A comparison of production process will not of itself establish like goods, but may highlight differences or provide support to the assessment of other considerations.*⁵³

⁵¹ Refer TER page 30 section 3.4.8.

⁵² Refer Visy submission of 16 June 2020 – table on page 6 and attachment VG-3 (public file document no 9).

⁵³ Visy Submission 25 March 2021 (public document no 38) paragraph 4, page 6.

3.24. Sub-ground 2(e) – The Commissioner in reaching the Decision has failed to examine other factors in its assessment of like goods

3.25. Visy further submits that the Commission's criteria for examining like goods is not exhaustive. The Australian dumping legislation does not provide prescriptive guidance on the factors that the Commission must consider is deciding the question of likeness.⁵⁴ The Dumping Manual makes reference to 'Other Considerations' such as how the goods are marketed.⁵⁵ In United States dumping cases the authorities examine the following specific factors: 1/ physical characteristics and uses, 2/ interchangeability of the products, 3/ channels of distribution, 4/ common manufacturing facilities, production processes, 5/ customer and producer perceptions, 6/ price.⁵⁶ In Canada, the International Trade Tribunal examines a number of factors, including the physical characteristics of the goods (such as composition and appearance) their market characteristics (such as substitutability, pricing, distribution channels and end uses), and whether the domestic goods fulfil the same customer needs as the subject goods.⁵⁷ These approaches emphasise a market-based/commercial comparison between the imported and locally produced goods rather than one that narrowly focusses on small physical differences or methods of manufacture of the goods.⁵⁸ The Commissioner should have examined these additional matters, many of which demonstrate the commercial relationship as well as the overall likeness between the imported and locally produced goods.

3.26. In conclusion, when the matters raised by Visy in sub-grounds 2(a)-(e) are taken into consideration, Visy submits that the correct or preferable decision that the Commissioner should have reached is that the microflute and imported kraft paperboard (within the GUC) are like goods for the purposes of s269T(1). Visy contends that the goods are commercially, functionally and physically alike (and production differences do

⁵⁴ See definition of 'like goods' in s269T of the Customs Act 1901 (Cth). Note that the criteria for determining 'like goods' adopted by the Commission is not prescribed by legislation and the working criteria applied by the Commission is not definitive nor exhaustive (refer section 3.1 of this submission).

⁵⁵ Dumping and Subsidy Manual at page 13.

⁵⁶ Refer United States Dumping and Subsidy Handbook at page II-34 and decision of *Timken Co. v United States*, 913 F. Supp. 580, 584 (CIT 1996).

⁵⁷ See section 2(1) Special Import Measures Act 1985; see also paragraph 35 of Canada Border Services Agency Preliminary Determination WG 2020 IN at <https://www.cbsa-asfc.gc.ca/simalmsi/i-e/wg2020/wg2020-pd-eng.html#toc6>.

⁵⁸ Both the United States and Canadian dumping legislation is based upon Article 2.6 of the WTO Dumping Agreement (which the Australian definition of 'like goods' in s269T of the Customs Act mirrors).

not impact upon this assessment of likeness). Therefore, Visy strongly asserts that, based upon the criteria that the Commission applies when examining likeness (together with other relevant factors referred to in paragraphs 3.25), the ADRP should now revoke these findings of the Commissioner.

4. GROUND 3: That the Commissioner has disregarded and not adopted the conclusions of its own appointed expert

4.1. Visy submits that the Commissioner has erred in disregarding and not adopting the conclusions of the Commission's own appointed expert, Dr Vanderhoek.

4.2. In formulating their submissions the importers (in particular GPI) no doubt understood the flagrant levels of dumping that was occurring and the harm that this was causing Visy, and saw their only possibility of avoiding the imposition of duties was to construct an argument around the 'like goods' requirement. The Commission then recognised that this was a question on which it needed to be informed by market and industry submissions. The Commission took the view that it would benefit from receiving evidence on this topic from parties that were not local manufacturers (Visy) or importers (GPI) who had inherent interests in the outcome. The Commission therefore took the step of releasing an Issues Paper regarding the 'like goods' question, inviting interested parties to respond.⁵⁹ It is highly instructive that no submissions were filed in response to the Issues Paper by Australian customers or end users of microflute and/or kraft paperboard - these parties would clearly be incentivized to support the position of the US exporters, as the introduction of dumping duty would be contrary to their financial interests. Their silence on the topic was 'deafening'. It was only Visy that elicited a statement from an experienced (and now retired) procurement professional who for decades purchased both Visy microflute and paperboard, and confirmed (with detailed accompanying rationale) that the GUC and Visy's microflute product were in fact seen in the Australian market as like goods.⁶⁰

In the Issues paper the Commission did foreshadow that it was briefing an expert and the ADC obtained an expert report from Dr. Vanderhoek which was made available on 23 December 2020.⁶¹

⁵⁹ Public file document no 19.

⁶⁰ Refer Statement of Arthur Mitropoulos dated 20 October 2020, public file document no 24.

⁶¹ See public file document no 28.

4.3. The ADC briefed Dr. Vanderhoek to answer the following three questions:

1. Is microflute an identical product with kraft paperboard?
2. If you do not consider microflute to be an identical product with kraft paperboard, set out whether or not they have characteristics that closely resemble one another.
3. In addition to microflute, do you consider there to be other products which closely resemble kraft paperboard? If yes, specify these products and to the best of your knowledge outline whether they are manufactured in Australia, and by whom.

4.4. In the Termination Report, the Commissioner notes as to its direction given by the Commission to the Expert:

When answering this question, the Commission asked that Dr Vanderhoek give consideration to physical likeness, commercial likeness, functional likeness, production likeness and any other considerations which are set out in chapter 2.3 of the Dumping and Subsidy Manual (the Manual).⁶²

4.5. Dr Vanderhoek's answers to the three questions posed are set out in section 7.1 of his Report. He concludes:

Finally, taking into account all the factors detailed in this report, in the absence of meaningful specifications for box performance and based on the definition outlined under section 269T (1) of the Customs Act 1901 (Cth), it is my professional opinion in relation to the specific questions listed in paragraph 5.6 that:

- (a) Microflute and kraft paperboard are both similar and different products depending on the measure chosen for comparison;

⁶² Termination Report page 12 section 3.4.3

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(b) Microflute is a “like good” alternative for kraft paperboard for physical, functional, and production factors where these materials are used in 12+ beverage can multipack applications; and

(c) There is no other fibrous product closely resembling kraft paperboard, other than microflute, able to meet the 12+ beverage can multipack performance requirements in their entirety.⁶³

4.6. In the Termination Report the Commissioner states as follows:

The Commissioner has considered the Vanderhoek Report response to question 2. The Commissioner accepts that Dr.Vanderhoek **may be correct from a technical and scientific standpoint** ie that microflute is an alternative to kraft paperboard in certain applications.⁶⁴ (bold added)

4.7. The Commission then went on to distance itself from Dr Vanderhoek’s findings in stating:

‘However, section 269T requires the Commission to conduct a broader comparison between kraft paperboard and microflute based on their characteristics as products, and does not limit this assessment to one particular market in which the products, in a further converted state, may compete.’⁶⁵

4.8. Visy contends that the Commissioner was wrong to disregard the expert’s findings. In this regard, it is clear that the Expert has considered the Commission’s three questions and answered them in providing his expert opinion on the matter. It is noteworthy that Dr Vanderhoek, in the chapeau to his concluding paragraph stipulates that his conclusions **are based upon the definition outlined under section 269T (1) of the Customs Act 1901 (Cth)**. He has also explained earlier in his Report that it is most sensible to compare many of the characteristics of microflute and kraft paperboard ‘at the final product stage; that is, the finished box’.⁶⁶ It is also not correct for the Commissioner to downplay Dr Vanderhoek’s conclusions and claim that they merely relate to one particular end use: this is the significant and indeed overwhelmingly predominant end use of the GUC, and Visy asserts that the Commissioner has grossly

⁶³ Page 18 of Expert Report of Dr. Nafty Vanderhoek

⁶⁴ Termination Report page 12 section 3.4.3

⁶⁵ Termination Report, page 13.

⁶⁶ Expert Report of Dr Vanderhoek at paragraph 6.7.

misunderstood and/or understated the extent of the overlap in the marketplace between microflute and imported kraft paperboard. Finally, it is telling that Dr. Vanderhoek concludes that there are no other substitutable products in the marketplace, wherein he states that there are no other fibrous products closely resembling kraft paperboard other than microflute that can meet the same performance requirements.⁶⁷

- 4.9. Visy raised the abovementioned matters with the Commission in its submission dated 25 March 2021 in response to the SEF⁶⁸, which matters have not been properly taken into account in reaching the Decision and preparing the Termination Report.
- 4.10. As stated in Visy's submissions to the Commission of 15 January 2021 and 25 March 2021, Dr. Vanderhoek was independently appointed and has a detailed knowledge and experience of the pulp, paper and packaging industries in Australia and instead of his views being discarded by the Commission, his findings on this fundamental issue should be adopted and not be distinguished on the basis that he Dr. Vanderhoek has sensibly emphasised in his Report the intended purpose and the customer specifications of the final converted GUC and microflute. The product grade specifications that are issued by the customer are the same whether the product is constructed of kraft paperboard or microflute, and this is then reflected in the ability to meet these specifications through use of either the GUC or microflute.
- 4.11. For the above reasons, Visy submits that Commissioner has erred in disregarding and not adopting the conclusions of the Commission's own appointed expert, Dr Vanderhoek. In the event that the Commissioner had paid proper regard to the findings of the Expert, then he would have concluded that microflute and imported kraft paperboard (within the GUC) were like goods for the purposes of s269T(1) of the Customs Act.

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

- 5.1. The Commissioner has failed to investigate some fundamental matters that are relevant to the like goods determination and the overall consideration of the core criteria that the

⁶⁷ Report, paragraph 7.1(c).

⁶⁸ See Section 10 of Visy's submission dated 25 March 2021 (public file document no 38).

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Commission must determine: that is, whether dumping of goods are causing material injury to an Australian Industry. The Dumping and Subsidy Manual stipulates that 'Establishing the Australian Industry is critical to the examination and existence of Injury'.⁶⁹

5.2. In this regard, the Commissioner has failed to:

- (a) verify total Australian microflute production (production/sales volumes);
- (b) identify Australian microflute producers and quantify their sales and market shares;
- (c) verify the end uses of microflute manufactured and sold within Australia;
- (d) verify the end uses of imported kraft paperboard (within the GUC) noting Visy's claims about small format wet strength treated beverage packaging not being with the scope of the GUC;
- (e) obtain information from commercial customers of the GUC and microflute to examine the claims regarding commercial, functional, physical likeness from the experience of these critical market participants; and
- (f) investigate and place relevant evidence on the public record any information regarding the customer's specifications and the ability of the GUC and microflute to each meet such specifications.⁷⁰ The ADC's appointed Expert, Dr. Vanderhoek, noted in his Report that the omission of the technical specifications for the final products as a 'regrettable omission'.⁷¹

5.3. Specifically, Visy refers to the following factual matters relied upon by the Commissioner in the Termination Report:

ADC finding	Visy Response
Visy has stated that the majority of its packaging, converted from microflute, is used for 12 or more beverage can multipacks. ⁷²	Visy has consistently stated that approximately [deleted confidential – percentage] percent of its Australian microflute production is used in 12+ beverage multipack applications. ⁷³ Microflute production was established

⁶⁹ Dumping and Subsidy Manual at page 11.

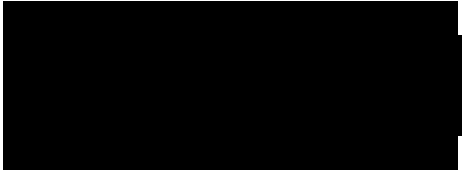
⁷⁰ This point was raised by Visy in its submission dated 25 March 2021 at pages 11-12 (public file document no. 38).

⁷¹ Report at paragraph 6.9.

⁷² Refer TER page 18 Table 4 under characteristic 'end use'.

⁷³ Refer paragraph 3.13 above and references therein.

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	<p>and is maintained for this end use</p>  <p>[deleted – confidential – information re production).</p>
<p>Opal has confirmed it converts the microflute it produces to other forms of packaging.⁷⁴</p>	<p>There is no evidence on the public record about any volumes that Opal may produce or the type of products that Opal produces (ie whether it is microflute). Visy has consistently affirmed that any such production if any (for non-beverage uses) is negligible or immaterial.⁷⁵</p>
<p>The Commission estimates that approx. one third of packaging (by value), converted from microflute, is for applications other than for 12 or more beverage can multipack packaging.⁷⁶</p>	<p>There is no evidence on the public record to support figure (noting it is an estimate only) and this is not consistent with the information provided by Visy during the Australian Industry verification.⁷⁷</p>
<p>Kraft paperboard is almost exclusively used in the conversion to beverage packaging. More than half of the kraft paperboard imported during the investigation period was converted to packaging other than for 12 or more beverage can multipacks.⁶⁶</p>	<p>Visy contends that small format beverage packaging is not within the GUC because it has a GSM measurement that is not between 360-430. Visy has provided laboratory testing confirming this which has not been addressed by the ADC.</p>

5.4. These matters have been raised with the Commission by Visy in its submission dated 25 March 2021.⁷⁸ Such matters are directly relevant to the finding by the Commissioner in the like goods analysis that microflute is used in a wider range of applications than kraft paperboard. Visy contends and has provided evidence to the Commission that almost its entire production of microflute is sold for use in beverage multipacks. The Commission has advised that it contacted Opal and Opal confirmed it was a manufacturer of microflute but no verification was conducted as to Opal’s production

⁷⁴ Ibid

⁷⁵ Refer paragraph 8 on page 9 of Visy’s submission dated 18 June 2021 (public file document no.9), paragraph 7 of Visy submission of 19 February 2021 (public file document no 34), and page 3 of Visy’s submission dated 25 March 2021 (public file document no 38).

⁷⁶ Ibid

⁷⁷ Refer Confidential Upwards Sales Verification Spreadsheet of products sold submitted to the Commission on 9 June 2020.

⁷⁸ Public file document no. 38 at section 7.

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levels, whether in fact its product was microflute⁷⁹ or the end uses of any microflute that it produces.⁸⁰ The Commission suggests that there are a lot of independent uses of microflute and the GUC, but no positive evidence has been relied upon and this issue would not appear to have been investigated. The Commission has therefore not met its own evidentiary standards for verifying critical issues as set out in Evidentiary Standards Attachment 1 to Guidelines for Examination of a Formally Lodged Application which states:

During the consideration of anti-dumping and countervailing matters, we are required to satisfy ourselves about the accuracy of information supplied. *The probative value of information (whether principal, intermediate or assertion) is determined by how reliable it is, or the degree of confidence we can have in it. Due process can change intermediate evidence to principal evidence by establishing more confidence in its accuracy. Information from reliable sources, or which is corroborated or verified imparts higher confidence and reliability.*

The amount of evidence required depends on the seriousness of the consequences.⁸¹ (emphasis added)

- 5.5. In addition, despite Visy having provided the Commission with sufficient information and responding to its various requests, the Commission has not undertaken its obligation to investigate and complete its verification of Visy's claims of material injury that it has suffered and the causal link to the imported dumped GUC. Visy submits that the matters that would normally be investigated in this regard would have a bearing on the like goods analysis in that it would assist the Commissioner to reach an informed decision regarding the relationship between the GUC and microflute within the Australian market.
- 5.6. Visy therefore submits, based upon the matters raised above in sub-paragraphs 5.1 to 5.5 above that the Commissioner has erred in failing to investigate these matters that would have a direct impact upon its like goods assessment and which are also relevant to the question of material injury being suffered by an Australia Industry. Should the Commission have properly verified and taken these matters into account, Visy asserts that it would altered the like goods analysis and the Commissioner would not have terminated this investigation.

⁷⁹ As opposed to other fluted products.

⁸⁰ It is significant that the Commission admits in paragraph 2.2.1 of the TER that it did not verify whether Opal produces microflute and if so in what quantities.

⁸¹ Refer pages 16-19 (Section 6.3) of Evidentiary Standards Attachment 1 to Guidelines for Examination of a Formally Lodged Application.

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

6.1. The record of investigation in this case evidences that the GUC and microflute undergo a similar conversion process and the end products are directly substitutable. Further, commercial customer and consumer perceptions of the end products are the same for converted kraft paperboard and microflute.⁸² Therefore, it is completely appropriate for the Commissioner to have reference to the end use of the GUC and microflute as part of its like goods analysis.⁸³ End use is clearly relevant to the functional likeness of the goods and it is also pertinent to the overall understanding of likeness. This point was made by the Commission's appointed expert, Dr. Vanderhoek, in stating that 'function performance as described above is most sensibly compared at the final product stage; that is, the finished box.'⁸⁴ In this situation the Commissioner has erred in the like goods assessment in not placing sufficient weight on the end use of the goods and in failing to fully and properly examine the relationship between intermediate and finished goods for both the GUC and microflute. It is clear from this investigation that the final (converted) goods are like goods and this is a relevant consideration in determining the likeness of the intermediate goods.

6.2. It is incumbent upon an investigating authority such as the Commission to properly examine these issues to correct complete its analysis of like goods. For instance, in the United States, the International Trade Commission (ITC) has dealt with this issue in previous cases in examining the likeness of intermediate goods. The ITC conducts what is known as a semi-finished product analysis in which it examines the following factors: 1/ whether the upstream article is dedicated to the production of the downstream article or has independent uses 2/ whether there are perceived to be separate markets for the upstream and downstream articles 3/ differences in physical characteristics of the upstream and downstream articles 4/ differences in the cost or value of the vertically differentiated articles and 5/ the significance and extent of the processes used to transform the upstream into downstream articles.⁸⁵

⁸² Statement of Arthur Mitropoulos dated 20 October 2020 (public file document no. 24).

⁸³ Note that the criteria for determining 'like goods' adopted by the Commission is not prescribed by legislation and the working criteria applied by the Commission is not definitive nor exhaustive (refer section 3.1 of this submission).

⁸⁴ Expert Report, Dr Nafty Vanderhoek, para 6.7 (public file document no. 28).

⁸⁵ Refer United States Antidumping and Countervailing Duty Handbook at page II-35.

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- 6.3. The Commission has failed to investigate and make findings on these key issues. Bearing in mind the intent and purpose of the anti-dumping legislation, the relationship between the intermediate goods and the end products cannot simply be determined as irrelevant by the Commissioner because the imported goods are not final goods, especially in circumstances where the intermediate goods are converted by vertically integrated producers, the intermediate goods represent the vast majority of the finished goods by value and there is no market for the sale of the intermediate goods.
- 6.4. For the abovementioned reasons, the Commissioner has erred in his approach to this issue, which has a direct bearing on the like goods analysis, and had the Commissioner has full and proper regard to this issue, he would not have terminated the investigation.

7. CONCLUSION

7.1. Visy submits that the Commissioner has not reach the correct or preferable decision in this investigation upon the grounds as re-stated below:

- (a) The Commissioner has incorrectly adopted a narrow interpretation of like goods that is inconsistent with the purposes of Part XVB of the Customs Act;
- (b) The Commissioner has erred in concluding that the Goods Under Consideration and the Like Goods (produced in Australia) are not like goods for the purposes of s269T(1) of the Customs Act having regard to the weighing up of the indicia of commercial, functional, physical and production likeness;
- (c) The Commissioner has disregarded and not adopted the conclusions of its own appointed expert in assessing the question of like goods;
- (d) The Commissioner has failed to investigate matters that are directly relevant to the like goods assessment and has based its findings on factually erroneous assumptions; and
- (e) In assessing like goods the Commissioner has failed to place sufficient weight on the end use of the imported and Australian made goods and properly examine the relationship between the intermediate and finished goods.

7.2. For the reasons stated in this submission, Visy reiterates that the Commissioner should not have terminated this investigation. The Commissioner should have proceeded to fulfill the Commission's statutory obligation to properly investigate the facts and finalize this investigation. The Commission has already determined that the GUC have been imported into Australia at significantly dumped prices. In addition, Visy has demonstrated that such dumping has directly caused and is continuing to cause material injury to its local operations. Visy has provided evidence to the Commission and stated on multiple occasions that the dumping of kraft paperboard within the GUC has caused [REDACTED] **[confidential- lost revenue figures]** of lost revenue since the beginning of the investigation period. This financial harm will continue to escalate as future beverage packaging supply contracts are renewed by commercial customers, if this extraordinary level of dumping is allowed to continue with impunity.

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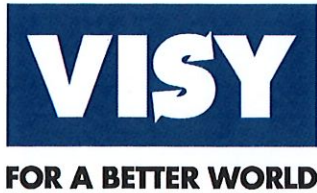
- 7.3. Visy submits that, consistent with the views of the Commission's own independent expert, the overwhelming commercial, functional and physical likeness between the GUC and microflute demonstrates that, in practical terms in the market, they are entirely substitutable and are like goods. Given the heinous level of dumping that has been exposed, and the impact on Visy's Australian business (and so an Australian industry), and with significant numbers of local jobs at stake, Visy's view is that any finding other than one that imposes commensurate duties to address the proven dumping would be one that falls well short of what is intended and expected under the Anti-Dumping regime.
- 7.4. It is highly noteworthy that there have been no submissions filed in response to the Issues Paper by Australian customers or end users of microflute and/or kraft paperboard to the effect that microflute and the kraft paperboard under investigation are not like goods.⁸⁶ These parties would be financially incentivized to support the position of the US exporters, as the introduction of dumping duty would restrict or remove their option to purchase cheap multipacks derived from dumped imports. It can reasonably be assumed that these parties do not hold strong views that align with the Commissioner's findings regarding like goods. Australian customers, in the context of the major commercial decisions they make in choosing between microflute and kraft paperboard in the Australian marketplace, would be expected to have a clear view on whether the two are 'like goods'. The absence of an industry voice to the contrary, and the frequency with which beverage can multi-packs are switched between the two options, seems to leave little room for doubt that the two are seen in the industry as like goods.
- 7.5. When considering the overarching purpose of the anti-dumping legislation, it is clear that the two products in question: kraft paperboard and microflute, are like goods. These products have an unambiguous direct competitive relationship in the Australian packaging marketplace. Visy strongly contends, in accordance with its dumping application, that kraft paperboard is being sold into Australia at dumped prices and that this has caused material injury to Visy. The purpose of the anti-dumping regime is to prevent such commercial behaviour. This conduct has caused Visy to suffer material injury and, absent the imposition of dumping measures, Visy will continue to suffer material injury in the future. This will have a severe impact upon the ongoing economic viability of Visy's microflute manufacturing operations in Australia, putting a great many

⁸⁶ ADC Issues Paper published September 2020 (public file document no 20).

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jobs at risk at a time when Australian manufacturing needs to be supported. This is the very circumstance that the anti-dumping legislation was introduced to guard against.

For the abovementioned reasons, Visy respectfully requests that the ADRP revoke the Decision to ensure an equitable outcome in this case.



Attachment 3

Level 11, 2 Southbank Boulevard
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Visy Glama Pty Ltd
ABN 83 077 517 581

12 August 2021

Secretariat
The Anti-Dumping Review Panel

adrp@industry.gov.au

Dear Sir/Madam,

Re: Application to the Anti-Dumping Review Panel (ADRP) by Visy Glama Pty Ltd for Review of a Commissioner's Decision – termination of dumping investigation No 548 – certain kraft paperboard imported from the USA

I confirm that Visy Glama Pty Ltd (being part of the Visy Group of companies) appoints the following organisation to act on its behalf in relation to the abovementioned matter.

Gross & Becroft Lawyers Pty Ltd
Suite 2, Level 3
182-184 Victoria Parade
East Melbourne, Victoria, 3002
Contact: Dr Ross Becroft

We authorise the ADRP to communicate with Gross & Becroft regarding any aspect of this matter on behalf of our company and its corporate affiliates.

Yours faithfully,

Matthew Stein
General Counsel - Visy Packaging