MinterEllison

4 February 2022

BY EMAIL

The Director
Investigations 2 – investigations2@adcommission.gov.au
GPO Box 2013
Canberra ACT 2601

Dear Director

Reinvestigation - Continuation Inquiry 571 & 572– Consumer Pineapple exported to Australia from the Philippines and Thailand (Goods)

We act for Dole Philippines Inc (**DPI**), Dole Thailand Limited (**DTL**) and Dole Asia Holdings Pte. Ltd. (**DAH**) (collectively **Dole**) in relation to the above matter. We refer to the File Note published on the Electronic Record by the Commission on 20 January 2022 inviting interested parties to provide submissions relating to the above reinvestigation required by the Anti-Dumping Review Panel (**Panel**) on 12 January 2022 (**Request**). We also draw the Commission's attention to our earlier submissions to both the Commission and the Panel relating to REP 571/572 and Inquiry 2021/144 respectively.

The Panel described the Commission's finding to be reinvestigated in the following terms:

> …there was not sufficient evidence to support a finding that material injury was likely to be caused by future imports at dumped prices upon the expiration of the anti-dumping measures then applying to imports of consumer pineapple.

The Panel identified three grounds advanced by Golden Circle Limited (**Golden Circle**) in support of its claim that the Commissioner's finding was not the correct or preferable decision. We deal in the first instance with the assertion that the Commission erred in law in its application of s.269ZHF(2) of the Act.

Error of Law

Subsection ZHF(2) is relevantly expressed in the following terms:

> *The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, orbe likely to lead, to a continuation of, or a recurrence of, the dumping…and the material injury that the anti-dumping measure is intended to prevent.*

The Commission's application of the test set out in the subsection has been challenged by both Golden Circle and the Panel. The former asserts that the Commission erred in law by stating that the threat of future material injury is not part of the test for the continuation of measures. The Panel appears to agree with this assertion when it states in the Request that … *it is difficult to understand how a threat of material injury from dumping in the event of the measures not*

being continued is not part of what is contemplated by s.269ZHF(2)[1] and opines that the Commission possibly misunderstood the test[2].

In our view there is no misunderstanding by the Commission or error of law in its application of the test and there is no difficulty in understanding why a threat (or the likelihood of a threat) of future material injury is neither a legitimate incorporation into the ordinary meaning of the words of the subsection nor a warranted additional or substitute test criterion.

If Parliament had intended to expand or modify the test in that manner it could have done so. It did not. Similarly, it could have extended the application of the threat concept in s269TAE beyond s269TG and s269TJ to Division 6A of the Act. It did not.

Golden Circle cites judicial authority allegedly supporting the addition of threat of injury as a test criterion but the Court in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86 observed at [105] that it is not self-evident that s269TAE(2B) is part of the s269ZHF(2) test and at [108] avoided expressing any concluded view on the issue. Significantly however, the Court at [107] did isolate consideration of the matters listed in s269TAE(2A) as being potentially relevant in the application of s269ZHF(2) in particular cases while not extending the same observation to s269TAE(2B). The distinction is that while consideration of the other injury factors listed in s269TAE(2A) may illuminate the causation requirement embedded in s269ZHF(2), the terms of that subsection clearly require the establishment of the likelihood of actual future injury, not merely the likelihood of the future threat of injury.

The significant level of satisfaction that the statutory test requires of the Commissioner would be seriously eroded by the substitution of a threat test that could be enlivened by a mere apprehension that an unwanted or undesirable likelihood may arise in the future. The potential for conflicting standards could obviously arise in a quite feasible hypothetical situation where the Commissioner is satisfied that due to expiry of anti-dumping measures a threat of future material injury is likely but actual future material injury is less than likely.

Furthermore the approach by Golden Circle assumes that a legitimate application of s269ZHF(2) would be for the Commissioner to consider whether the expiration of measures would lead, or would be likely to lead, to a continuation or recurrence of the threat of material injury that the anti-dumping measure is intended to prevent. The relevant dumping duty notices applying to consumer pineapple from the Philippines and Thailand imposed dumping duties based on actual material injury, not a threat of such injury. Consequently, on this ground also, the issue of threat of injury is not a relevant consideration in the current review as the anti-dumping measures were not intended to prevent a threat of injury.

We submit there is no lawful basis when applying the continuation test to introduce or substitute a requirement that the Commissioner be satisfied that the threat, rather than the actuality, of material injury is a likely consequence of the expiry of measures. As stated above If Parliament had intended to expand or modify the test in that manner it could have done so. It did not.

We also take this opportunity to comment on the Panel's concern with the observations of the Commissioner at paragraph 32 of his submission to the Panel that on the one hand his assessment of the likelihood of recurrence of material injury …*included consideration of the potential for future injury if the dumping duties were allowed to expire* …and on the other that …

1[1]Request: para 15
2[2] Ibid; para 13

[t]here is no legal basis on which future possible conditions or hypothetical injury are relevant to an assessment of material injury in a continuation inquiry. While the reference to *hypothetical injury* may be justified if it is characterising a threat of injury*, future possible conditions* are of course an intrinsic element in the formation of the satisfaction concerning likelihood required by the statutory test. Apart from this paragraph, the view expressed by the Panel and the WTO Appellate Body that the question of continuation of measures requires a forward looking test is consistently shared by the Commission and the Commissioner in the Customs Manual and numerous reports including REP 571/572 where it is stated at page 47 that .

> The commission notes that its assessment of the likelihood of certain events occurring and their anticipated effect, as is required in a continuation inquiry, necessarily requires an assessment of a hypothetical situation. The Anti-Dumping Review Panel has supported this view, noting that the commission must consider what will happen in the future should a certain event, being the expiry of the measures, occur. However, the Commissioner's conclusions and recommendation must nevertheless be based on facts.

While the Commission gave extensive consideration to past and current market conditions and pricing factors this statement by the Commission makes it clear that, as a matter of policy, it adopted a forward looking perspective when applying the statutory test for continuation.

Market Segmentation

The Panel characterises the Commission's finding that Golden Circle operates in its own market segment as the key to its analysis of the likelihood of recurring material injury. While identifying later in this submission other factors that could be considered supportive of the Commission's finding, segmentation is undoubtedly an important consideration. Apart from referring to findings by the Commission in earlier inquiries, Golden Circle's response to the very extensive and compelling evidence produced by the Commission on the topic has been to simply assert unsupported denials and to claim that its inability to produce evidence of price competition is due to confidentiality issues even though the Commission and interested parties have not been impeded in accessing detailed market information.

In contrast to these denials Golden Circle has paradoxically acknowledged, or not disputed, that

- there are three market segments for consumer pineapple;
- it supplies a premium product;
- it obtains substantial price premiums in the market;
- it has increased its prices steadily since 2016;
- it enjoys brand loyalty as the producer of an Australian made product;
- it has elected to sell only to the premium segment due to raw material constraints;
- it has elected to import consumer pineapple to counter raw material shortages;
- it has not been able or willing to furnish the Commission with competitive pricing information.

On the subject of alleged inconsistent segmentation findings, Golden Circle has simply assumed the correctness of earlier findings dating back over 15 to 20 years and has ignored the significance of changes in the market over that period. In particular the decision by Golden Circle to exit the private label level due to the limited supply of raw pineapple at prices that have increased by 30% since 2016[3] has accentuated the market divide between its premium priced products and imported products from the Philippines, Thailand and other countries.

The Commission's evidence on, and analysis of, the subject of market segmentation has been corroborated in a submission to the Panel by Pavé Limited, an importer and reseller of the

[3] REP 571/572: p.21-22

goods. The submission concludes that its attached pricing data clearly demonstrates that there is no evidence that Pavé's prices for consumer pineapple from the Philippines to two of Australia's major retailers have any influence on prices achieved by GC in the premium segment of the market. Whatever the status of historical findings on market segmentation, the market in 2022 is very different to that applying prior to 2017.

We note that the Panel has queried whether the data produced by Pavé is "relevant information" within the meaning of s269ZZK of the Act. Pavé completed and submitted an importer questionnaire response to Inquiry 571[4] that contained the pricing data suitable for inclusion in any analysis of market segmentation by the Commissioner. We submit that the evidence provided by Pavé is relevant information for the purpose of the Panel's inquiry and the reinvestigation being conducted by the Commission.

The Panel also directs attention to the finding by the Commission that Golden Circle's products and the subject imports are "like goods". The 'finding' is located in a section of REP 571/572 that is superfluous to the requirements of a continuation investigation. The original determinations made by the Minister under s269TG(1) and (2) apply to 'like goods' for the purpose of imposing and collecting duties under section 8 of the Dumping Duty Act. The finding is clearly not germane to the application of the continuation test and is the result of a misguided copy/paste exercise from other types of reports of the Commission that need to consider the issue of like goods. The superfluous finding is obviously inconsistent with the extensive consideration and definitive finding elsewhere in the Commission's report that the locally produced and imported products do not compete in the same market.

The Continuation Test

An integral element of the continuation test is the issue of causation – whether a continuation or recurrence of dumping is likely to lead to a recurrence of material injury. Both Golden Circle and the Panel query how the Commission can conclude that there is no evidence of pricing pressure caused by cheaper imports after acknowledging the presence of price undercutting, price suppression and reduced profit and profitability and challenge the Commission's well supported finding[5] that there was no material injury caused by dumping in the investigation period.

The submissions of Golden Circle focussing on price effects and the queries raised by the Panel do not distinguish between imports not subject to measures and the goods the subject of the relevant notices. They also fail to deal with a number of other factors impacting the economic performance of the Australian industry. We urge the Commission to take the opportunity of this reinvestigation to identify those factors and their influence on the causation issue.

To lend further weight to the Commission's comprehensive finding that Golden Circle did not suffer injurious dumping during the investigation period, we draw attention to the dumping duty calculation method that applied during that period. Referred to in section 5 of the Customs Tariff (Anti-Dumping) Regulation 2013 as …*Combination of fixed and variable duty method* …it involves the addition of a variable amount expressed as the difference between the ascertained export price and determined normal value (the dumping margin last determined by the Minister) and the fixed amount, if any, by which the actual export price is less than the ascertained export price (the floor price). The application of this method results in the introduction of the subject goods into Australia at a cost, measured at the fob level, equal to or greater than an undumped price. Effectively the duty method totally offsets any dumping and consequently any injury

[4] Ibid. p.10
[5] REP 571/572: section 7.7

suffered by Golden Circle during that period must be attributable to factors other than dumping or to exports that are not subject to anti-dumping measures.

In the previous continuation inquiry into exports of consumer pineapple from the Philippines and Thailand, the Commission found that the non- injurious price was higher than the normal values for all exports from the Philippines and Thailand[6]. That finding remains in place today. This confirms that Golden Circle is not competitive with undumped exports and that factors other than price undercutting, price suppression and impaired profitability are contributing to any material injury being suffered by the Australian industry.

In addition to market segmentation, examples of other factors impacting on the likelihood of future material injury in the current matter include:

- Golden Circle's lack of competitiveness;
- volumes and prices of undumped like goods.
- contractions in demand;
- fresh pineapple availability constraints;
- increased cost of fresh pineapple;
- market power of the supermarkets;
- imports of like goods by Golden Circle; and
- increases in shipping rates from Asia to Australia of at least 50%.

We submit that the cumulation of these other factors make it likely that even if Golden Circle does suffer future injury following the expiry of measures it is most unlikely that a material degree of such injury can be attributed to any dumping of the subject goods.

Conclusion

We request that the Commission report the following results of its reinvestigation to the Panel:

- the Commission did not err in law in its application of s.269ZHF(2) of the Act in stating that the threat of future material injury is not part of the test for the continuation of the measures.
- the Commission correctly found that Golden Circle's Australian product operated in its own segment of the consumer pineapple market in Australia.
- there was not sufficient evidence to support a finding that material injury was likely to be caused by future imports at dumped prices upon the expiration of the anti-dumping measures then applying to imports of consumer pineapple from the Philippines and Thailand.

Yours faithfully
MinterEllison

John Cosgrave
Director, Trade Measures
Contact: John Cosgrave T: +61 2 6225 3781
john.cosgrave@minterellison.com
Partner: Michael Brennan T: +61 2 6225 3043
OUR REF: MRB/JPC 1122743

[6] REP 333: p.48