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Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal Branch

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By EMAIL

Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Dear Commissioner,

ADRP Review No. 144 – Consumer Pineapple exported from the Republic of the Philippines and the Kingdom of Thailand

The Anti-Dumping Review Panel (Review Panel) is currently conducting a review of the decision of the then Acting Minister for Industry, Science and Technology (Minister) made under section 269ZH(1) of the *Customs Act 1901* (the Act) in respect of consumer pineapple exported from the Republic of the Philippines (Philippines) and the Kingdom of Thailand (Thailand).

The Review Panel accepted an application for review from Golden Circle Limited (Golden Circle).

As you are aware, I am conducting the review.

Pursuant to s.269ZZL of the Act, I require the following finding in Report 571 & 572 (the Report), relating to Golden Circle's grounds of review, be reinvestigated, namely that 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.

I provide below a summary of my reasons for making the request under s.269ZZL of the Act.

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The relevant grounds

1. Three of the four grounds of the application for review by Golden Circle which were accepted by the Review Panel were:
 - a. The Anti-Dumping Commission (Commission) erroneously found that Golden Circle's Australian product operated in its own segment of the consumer pineapple market in Australia.
 - b. The available evidence confirmed that, in the absence of measures, the Australian industry will likely incur material injury from future exports of consumer pineapple from the Philippines and Thailand.
 - c. The Commission erred 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's finding

2. The grounds all relate to the principal question which the Commission must address in a continuation inquiry under Division 6A of Part XVB of the Act. This question is posed by s.269ZHF(2) which is relevantly 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, or be 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.”
3. In the Report prepared by the Commission, it was stated that “the Commissioner is not... satisfied that there was sufficient evidence to support a finding that material injury is *likely* to be caused by future imports at dumped prices upon the expiration of the measures”.¹ The Commissioner recommended to the Minister that the Minister declare pursuant to s.269ZH(1)(a) that he had decided not to secure the continuation of the anti-dumping measures.² The Minister accepted that recommendation and on 6 October 2021 made a declaration in those terms.³
4. The basis for the Commissioner's finding for the purpose of s.269ZHF(2) was stated to be the specific findings that:
 - Golden Circle had been able to achieve a consistently higher sales price on its consumer pineapple, despite imports from the subject countries and other countries being at lower prices.

¹ REP 571 & 572, section 7.8 at page 59.

² As above, section 8 at page 61.

³ Anti-Dumping Notice 2021/117.

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- There was no evidence before the Commission indicating that imports from the subject countries impact the prices Golden Circle achieves.
- The available evidence indicates that Golden Circle's sales of consumer pineapple are within a segment of the Australian consumer pineapple market – a segment in which imported consumer pineapple does not compete.
- There is no evidence that Golden Circle has lost sales volumes to imported products or would lose sales volumes if the measures expire, with the data indicating that Golden Circle was able to process all of the raw pineapple it acquires.
- The key factor limiting Golden Circle's ability to increase sales volume is the availability of raw pineapple and there is no evidence to find that imports from the subject countries impact on raw pineapple availability.⁴

Golden Circle's contentions

Market Segmentation

5. Golden Circle takes issue with the finding by the Commission that it operates in its own segment of the consumer pineapple market in Australia. It points to the findings in previous investigations to the effect that locally produced consumer pineapple and imported pineapple are directly substitutable with each other and that despite perceived quality differences, price was an important determinant in consumers' pricing decisions. Golden Circle notes that the Commissioner afforded no consideration to its earlier findings.
6. In its application, Golden Circle contends that not only is the consumer market in Australia not segmented but that Golden Circle is affected by the lower prices of directly substitutable imported pineapple. It argues that it is incorrect to find that, on the basis of weighted average selling prices, Golden Circle operates in its own segment of the market.
7. According to Golden Circle, the finding should have been that there is only one market of processed pineapple in Australia comprising consumer pineapple in which Golden Circle sells locally manufactured processed pineapple that sells at a premium to imported consumer pineapple (due to quality and local supply loyalty) which is wholly substitutable with imported pineapple. Such imported pineapple undercuts Golden Circle's selling prices due to the lower prices of the imported pineapple from the Philippines and Thailand which, Golden Circle points out, the Commission found was dumped during the investigation period and would continue to be dumped should the anti-dumping measures be allowed to expire.

Likelihood of Future injury

⁴ As above, section 7.8 at pages 59-60.

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8. In its application Golden Circle notes that the issue of future dumping from the Philippines and Thailand is not in dispute. Golden Circle also notes that the Commission found that all imports of the subject goods undercut the Australian industry's selling prices during the inquiry period and this included imports from the Philippines and Thailand. Despite this, as Golden Circle points out, the Commission found that it had not identified evidence that imports of consumer pineapple had impacted on the prices Golden Circle had been able to achieve.
9. According to Golden Circle, the basis for this latter finding was its alleged inability to demonstrate that, in pricing negotiations with the supermarkets, imports from the subject countries were the cause of it not being able to secure high prices to recover increased costs. Golden Circle considers that it was an absence of examples of pricing offers from retailers of alternative offers to Golden Circle's prices that appears to have been a key consideration in the Commission's findings and the Commission's non-satisfaction that future material injury from dumping was likely.
10. Golden Circle relies on the Dumping and Subsidy Manual which states that there are a range of factors for consideration and not one factor can provide decisive guidance. The following facts are relied upon by Golden Circle to establish that the Minister's decision was not the correct or preferable decision and that, in the absence of the measures, the Australian industry will likely incur material injury from future exports of consumer pineapple from the Philippines and Thailand, namely:
 - dumping from the Philippines and Thailand will continue;
 - the Philippines and Thailand are the two largest exporters of processed pineapple globally;
 - the co-operative exporters in the Philippines and Thailand have excess capacity with which to supply the Australian market of between 13 and 57 per cent;
 - all import prices from the Philippines and Thailand undercut the Australian industry's selling prices;
 - the Australian market for consumer pineapple is price sensitive;
 - whilst Golden Circle's Australian pineapple sells at a premium to imported pineapple the two products are substitutable;
 - the Australian industry is susceptible to increased imports at dumped prices as it embarks on a recovery from a drought-affected period where volumes were constrained; and
 - that, in the absence of measures, it is likely that the exporters in the Philippines and Thailand will increase exports to Australia to retard Golden Circle's ability to re-grow displaced volumes over the period 2022-2027 as planned.

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Error of Law

11. A further difficulty with the analysis by the Commission is, according to Golden Circle, that it erred in law. The basis for this contention is the comment in the Report that the “threat of future material injury” is not part of the test for the continuation of measures. Golden Circle relies on a quote from the decision of the Full Court of the Federal Court in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd*⁵ as authority for the contention that the phrase “material injury” when used in s.269ZHF(2) bears the same meaning as it does in Division 1 of Part XVB of the Act (particularly s.269TAE) and those matters set out in s.269TAE(2A) (for the purpose of s.269TAE(1)) at the very least may bear upon the formation by the Commissioner of the state of satisfaction in s.269ZHF(2).
12. Golden Circle notes that s.269TAE, in turn, relevantly speaks of material injury to an Australian industry being “threatened” and refers to s.269TAE(1),(2),(2A) and (2B).

Review Panel’s Consideration

The relevant legislation

13. I think it useful to start with the issue of the construction of the test in s.269ZHF(2) and whether the Commission has possibly misunderstood this test. The Commission notes in the Report 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 Report refers to a previous Review Panel report as 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.⁶
14. The Report also refers to the Manual to note that a number of factors will be relevant in assessing the likelihood that dumping and material injury will continue or recur and that no one factor can necessarily provide decisive guidance. The latter is a point relied upon by Golden Circle.
15. Given the above, I am not sure what to make of the comment in the Report that the Commission notes that the threat of future material injury is not part of the test for the continuation of measures. It is possibly simply making a point that the language of s.269ZHF(2) does not refer to the “threat” of material injury in such terms. However, 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). The threat would of course have to be of material injury that is likely to occur should the measures not be continued.

⁵ [2010] FCAFC 86.

⁶ REP 571&572, section 7.2 at page 47.

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16. The concern caused by the comment in the Report regarding the threat of material injury is heightened by the submission made by the Commissioner pursuant to s.269ZZJ on this point. In that submission the following comment is made:

There is no legal basis on which future possible conditions or hypothetical injury are relevant to an assessment of material injury in a continuation inquiry.⁷

A continuation inquiry does include a consideration of hypothetical injury. It is quite possible that the measures in place during the inquiry period are preventing material injury to the Australian industry. After all, that is what is intended by applying the measures and it is contemplated by s.269ZHF(2) in the reference to a recurrence of the material injury.

17. If there is a threat of material injury recurring if the measures are allowed to expire, then such a threat must be considered when conducting an inquiry into whether measures should be continued. I note that in a submission on behalf of Dole Asia Holdings, Minter Ellison contends that considering whether there is a threat of material injury may involve an assessment limited to whether there is a 'possibility' of such injury.⁸ If the level of threat was only a possibility of injury then, I agree, it would not pass the test in s.269ZHF(2). In order to pass the test set by s.269ZHF(2), the material injury threatened would have to be more likely to occur if the measures expired or it was more probable than not that the threat would eventuate.
18. There is also judicial authority that a threat of material injury within the meaning of s.269TG(1) and (2) and s.269TAE(2B) may, in some circumstances, come within the type of material injury referenced in s.269ZHF(2). Subsections 269TG(1) and (2) refer to material injury which is threatened because of dumping and can be the basis for taking measures. Subsection 269TAE(2B) requires that in determining whether or not material injury is threatened to an Australian industry the Minister take into account only such changes in circumstances as would make that injury foreseeable and imminent unless measures were imposed.
19. In the first instance decision of Justice Rares in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs [No 2]*⁹, his Honour stated “ a review under Div 6A of Pt XVB is not intended as a complete replication of the process under Div 3 involved in the initial imposition of anti-dumping measures. But, the continuation review under Div 6A is still directed to the purpose of preventing material injury or the threat of such an injury caused by dumping.”¹⁰ While his Honour’s decision was overturned on appeal, I do not read the judgment of the Full Court as disagreeing with this approach. Indeed, the passages relied upon by Golden Circle in the Full Court decision would appear consistent with this approach.

⁷ Attachment A to the Submission by the Commissioner of the Anti-Dumping Commission dated 15 December 2021 at paragraph 32.

⁸ Letter from MinterEllison to the Review Panel dated 15 December at page 4.

⁹ [2009] FCA 838.

¹⁰ As above at [41].

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20. In any event, a consistent legislative intention can be inferred from the language of s.269ZHF(2), as well as that of s.269TG(1) and (2), that the Australian industry does not have to have already suffered or be suffering material injury from dumping for the measures to be applied or continued. It can be readily inferred that the legislative objective is to prevent such injury occurring or recurring.
21. Accordingly, I am concerned that the Commission, in its approach to the task to be undertaken in a continuation inquiry, may have misunderstood what is required. It is not sufficient simply to consider what has occurred during the inquiry period but based on the material and evidence obtained during the inquiry to consider what is likely to occur if the measures in place are not continued. This includes a consideration of what hypothetically may happen, including any material injury which may occur if the measures are not continued.

Market Segmentation

22. The finding by the Commission that Golden Circle operates in its own market segment appears to be key to its analysis of the likelihood of material injury due to dumping continuing or recurring if the measures are not continued. This is because it is the basis for the conclusion that imported consumer pineapple does not compete in that market. Hence, the price undercutting by dumped imports does not affect the prices which Golden Circle can obtain for its locally produced product.
23. I have a number of concerns with the analysis relied upon by the Commission to reach this conclusion. The first is that it is, as Golden Circle points out, inconsistent with previous findings by the Commission. The Commission is not bound to follow its previous findings if circumstances have changed in the relevant market since those findings were made. However, if this is the case, I would have expected to find an explanation of what was different in the market during the inquiry period to the market in the earlier inquiries. There is no explanation in the Report for the different conclusion reached as to the effect of the price undercutting by dumped imported consumer pineapple.
24. My other concern is that the conclusion reached by the Commission in this respect appears to be inconsistent with a finding in the Report itself. In the consideration of whether the locally produced consumer pineapple products are like goods to the goods under consideration (namely imports from the Philippines and Thailand), the Commission relevantly found that the "imported and locally produced goods are commercially alike as they are sold to the same customers and/or compete in the same markets".¹¹
25. I note that in a submission made pursuant to s.269ZZJ of the Act, PAVÉ Limited provided certain data in an attachment to its submission. It is submitted that this data supports the Commission's analysis as to market segmentation. It was not clear to me that this data was relevant information within the meaning of s.269ZZK of the Act and therefore information to which the Review Panel could have regard.

¹¹ REP 571 & 572, section 3.5 at page 16.

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Likelihood of injury continuing or recurring

26. It is accepted that Golden Circle does achieve higher prices for its product based on perceived quality differences and loyalty for a local product. This was also the conclusion in earlier inquiries. To reach a conclusion that price undercutting has not caused material injury during the inquiry period, the Commission relies on no correlation between the higher price Golden Circle's product obtains and the price fluctuations of imported consumer pineapple and to the examples of price negotiation between Golden Circle and key retailers.
27. The latter conclusion relies on Golden Circle correspondence with major supermarket customers in which Golden Circle sought to increase selling prices, justifying the request on, among other things, increasing costs of raw pineapple, tin can and labour costs. In the correspondence, the customers reference their own data and analysis of raw pineapple costs in Australia, ultimately negotiating a lower price than Golden Circle had originally sought.
28. The Commission notes that in both examples of price negotiation, there was no reference to selling prices of imported consumer pineapple, nor any perceived pricing pressure due to imports from the subject countries. It is also noted that the Commission has not identified evidence in the application, in submissions from interested parties or raised at the industry verification visit to indicate cheaper imports from the subject countries have placed pricing pressure on the Australian industry.
29. It seems to me that significant weight is placed on the lack of a reference to the prices of imported product in the examples of negotiations with the supermarkets. I am not sure that the correspondence is evidence supporting the conclusion reached by the Commission. The parties to the correspondence are the Australian industry (Golden Circle) and major customers. Both sides would be aware of the presence in the market of imported product and the significant price undercutting of such imports. The conclusion reached does not take into account that price negotiations take place in that context. It would not need to be spelt out in the correspondence for it to have an effect.
30. The other concern I have with the analysis is that it finds no evidence that the cheaper imports have placed pricing pressure on the Australian industry and yet the Commission also found that Golden Circle suffered injury in the form of price suppression¹² and reduced profit and profitability across the injury analysis period.¹³ If Golden Circle operated in its own segment of the market without competition, then it would be expected to achieve prices which prevented such injury. No explanation is found in the Report to explain why such injury is being suffered if there is no effect on Golden Circle's prices from competition from imported product.
31. It is possible that there is partly an explanation in the market power of the supermarkets, but I am not convinced by the information in the Report that this accounts for the injury, or at least all of it. Further, the market power of the

¹² As above section 5.3.2 at page 29.

¹³ As above section 5.4.1 at page 29.

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supermarkets could also be increased by the presence of significantly cheaper imports. I also note that injury suffered from dumping does not have to be the only cause of the injury suffered by the Australian industry for measures to be taken.

32. I also find it difficult to accept that there is no cross-elasticity of demand between the locally produced consumer pineapple and the imported product. This would mean that no matter how more expensive the local product became, there were no consumers who would switch to the imported product. I note that previous inquiries found that price was important to consumers.¹⁴
33. Finally, as the view was taken in the Report that there was no material injury suffered by Golden Circle due to dumping during the inquiry period, it was not surprising that it was also found that it was unlikely that the expiration of the measures would lead to a continuation of material injury. For the reasons given, I have a number of concerns regarding the finding that no material injury was suffered by the Australian industry during the inquiry period. As discussed above s.269ZHF(2) requires the Commissioner to consider what might occur hypothetically if the measures are allowed to expire. If there was material injury suffered by the Australian industry during the inquiry period, then, given the finding that dumping was likely to continue, I would expect that such material injury would continue.
34. Even if material injury was not suffered by the Australian industry during the inquiry period, I am not convinced that the Report adequately addresses the statutory test in s.269ZHF(2). The Report found that dumping was likely to continue. In such circumstances, I would have expected to see an analysis of whether dumped exports were likely to increase given the evidence of excess capacity for some exporters and that exporters have maintained distribution links to the Australian market.¹⁵ An increase in dumped exports could cause both price and volume injury.
35. The analysis in the Report with respect to the likely effect on volumes dismissed the threat that dumping would limit Golden Circle's future volumes. This analysis may however have been affected by the approach taken that a threat of future injury was not part of the test in s.269ZHF(2).
36. The analysis in the Report does not allow me to form a view on whether or not the Commissioner should have been satisfied that it was likely that material injury would be suffered by the Australian industry if the measures were allowed to expire. For this reason, and because of the concerns expressed above, I am requiring a reinvestigation.

If you have any issues in relation to the reinvestigation or if you consider that a conference under s 269ZZHA of the Act would assist in obtaining the further information the subject of the reinvestigation, please contact the Secretariat.

¹⁴ REP 333 section 5.6.2 at page 25.

¹⁵ REP 571 & 572 section 7.5.4 at page 50.


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Please could you report the result of the reinvestigation within 90 days, that is, by **Tuesday, 12 April 2022**.

If you require more time, including time to allow interested parties the opportunity to comment on an aspect of the reinvestigation, please contact the Secretariat.

Thank you for your assistance.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Joan Fitzhenry', written in a cursive style.

Joan Fitzhenry
Senior Member
Anti-Dumping Review Panel
12 January 2022