

PUBLIC



Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal Branch

Department of Industry, Science, Energy and Resources
10 Binara Street
Canberra City, ACT 2601

02 6276 1781

Email: ADRP@industry.gov.au

Web: www.adreviewpanel.gov.au

By EMAIL

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

Dear Commissioner,

ADRP Review No. 145 – Food Service and Industrial 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 Food Service and Industrial (FSI) 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 section 269ZZL of the Act, I require the following finding in Report numbered 573 & 574, relating to Golden Circle's ground of review, be reinvestigated, namely that, the Commissioner was not satisfied that the expiration of the anti-dumping measures applicable to FSI pineapple exported to Australia from the Philippines and Thailand would lead, or would be likely to lead, to a continuation or recurrence of, the dumping and the material injury the anti-dumping measures are intended to prevent.

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

PUBLIC

The grounds of review

1. The grounds of the application for review by Golden Circle which were accepted by the Review Panel were:
 - a. The available evidence confirmed that, in the absence of measures, the Australian industry will likely incur material injury from future exports of FSI pineapple from the Philippines and Thailand as the Australian growers of pineapple and Golden Circle embark on an increase in production strategy.
 - b. The Anti-Dumping Commission (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 above grounds relate to the principal question which the Commissioner 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 is 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 in accordance with s.269ZHG(1)(a) that he had decided not to secure the continuation of the anti-dumping measures concerned.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 FSI pineapple, despite imports from the subject countries and other countries being at lower prices.
 - Future imports from Thailand and the Philippines are likely to compete on price with each other and with imports from other countries (not subject to the measures). This competition is at a much lower price point than Golden

¹ REP 573 & 574, section 7.8 at page 49.

² As above, section 8 at page 51.

³ Anti-Dumping Notice 2021/118.

PUBLIC

Circle's sales price. There is insufficient evidence before the Commission indicating that the price of imported goods impacts the prices Golden Circle achieves.

- Due to limited supply of raw pineapple (not attributable to imports from the subject countries), Golden Circle has focused on the consumer pineapple market rather than the FSI pineapple market, a factor which has led to its declining sales volume for FSI pineapple.
- 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 is able to process all of the raw pineapple it acquires.⁴

Golden Circle's Contentions

Likelihood of future injury

5. With respect to the Commission's first two points above, Golden Circle notes the evidence before the Commission that Golden Circle's selling prices and the prices for imported pineapple from the Philippines the subject of measures were at similar levels from 2018-2019. Given this evidence, Golden Circle submits it is not clear how the Commission considered that selling prices from the Philippines will compete at the lower prices.
6. On the issue of whether or not the prices Golden Circle achieves for its product are affected by the lower priced imports, Golden Circle contends that locally produced and imported FSI pineapple are substitutable for each other. Golden Circle also contends that there is intensive price competition in the FSI segment of the market. There is no cross-reference by Golden Circle however to material before the Commission that supports this.
7. Golden Circle submits that the fact that as a local manufacturer it is able to achieve a premium to imported product does not mean that its prices are not influenced by lower-priced substitutable goods. It contends that there exists a cross-elasticity of pricing between locally produced and imported selling prices for FSI pineapple as the goods are wholly interchangeable with each other. Therefore, Golden Circle contends, it cannot be assumed, that because Golden Circle achieves a price premium, it is unaffected by lower dumped prices of imported goods.
8. Finally, on the issue of its prices being affected by imports of dumped product, Golden Circle notes it was unable to obtain any information from its customers but points to the available evidence confirming that selling prices of the imported goods from the Philippines have undercut the locally produced pineapple selling prices. This, it contends, is confirmation that, in the absence of measure, price-effect injury will continue.

⁴ REP 573 & 574 section 7.8 at page 49.

PUBLIC

9. On the issue of sales volumes and the last two findings by the Commission, Golden Circle notes that the Commission was unable to confirm that processors in the Philippines and Thailand had increased production capacity since the measures were introduced in 2016. In response to material that Dole Philippines had increased its production capacity in 2016, Golden Circle notes that the Commission concluded that an increase in production activity did not necessarily indicate an intention to increase export volumes to Australia, particularly given a pattern of behavior over an extended period suggesting that the Australian market was not a key focus of exporters in the Philippines.
10. Golden Circle points to the fact that there were no co-operative exporters from the Philippines and that the Government of the Philippines had made representations to the Commissioner not to continue the measures. The latter, it is suggested by Golden Circle indicates that the Philippines canned pineapple industry was and is interested to increase supply to the Australian market. Golden circle also points to material from the continuation inquiry into consumer pineapple (REP 571 & 572) that cooperative producers had excess capacity.
11. The Commission had, Golden Circle contends, erred in its assessment of the available excess capacity and failed to recognise that, should the measures expire, exporters in the Philippines and Thailand would increase export volumes to Australia.
12. Golden Circle also refers to its representations to the Commission that it was recovering from prolonged drought conditions and seeking to rebuild pineapple volumes from suppliers and had in place a strategy that would deliver incremental increases from 2022 to 2027. It contends that the industry at the present time is susceptible to injury from dumping as increased volumes of dumped imports would jeopardise the growth strategy that Golden Circle and growers of Australian pineapple had embarked on.
13. Finally, Golden Circle refers to the Dumping and Subsidy Manual and the factors identified for consideration as to the likelihood of a recurrence of material injury. It notes the guidance that there are a range of factors for consideration and no one factor can provide decisive guidance. Golden Circle relies on a list of facts which, it contends, establish that the Australian injury will likely incur material injury from future exports of FSI pineapple as the Australian growers embark on an increase in production strategy. This list is as follows:
 - dumping from the Philippines and Thailand will continue;
 - the Philippines and Thailand are the two largest exporters of processed pineapple globally;
 - the exporters in the Philippines and Thailand have excess capacity with which to supply the Australian market;
 - all import prices from the Philippines and Thailand undercut the Australian industry's selling prices;

PUBLIC

- the Australian market for food service and industrial 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.

Error of Law

14. 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).
15. 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

16. 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

⁵ [2010] FCAFC 86.

⁶ REP 573 & 574, section 7.2 at page 38.

PUBLIC

17. 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.
18. The above approach to the test in s.269ZHF(2) seems at odds with 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.⁷ It is possible that the Commission is 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.
19. 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.*⁸

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.

20. 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, MinterEllison 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.⁹ 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.
21. 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

⁷ As above section 7.7 at page 49

⁸ Attachment A to the Submission by the Commissioner of the Anti-Dumping Commission dated 15 December 2021 at paragraph 20.

⁹ Letter from MinterEllison to the Review Panel dated 15 December at page 4.

PUBLIC

account only such changes in circumstances as would make that injury foreseeable and imminent unless measures were imposed.

22. In the first instance decision of Justice Rares in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs [No 2]*¹⁰, 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.”¹¹ 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.
23. 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.
24. 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 not be occurring during the inquiry period and the threat of such injury.

Likelihood of injury continuing or recurring

25. In the submission made by the Commissioner to the Review Panel, the Commissioner again outlines his reasons and evidence for his recommendation to the Minister that the measures be allowed to expire. The point is again made that Golden Circle achieves a consistently higher sales price on its FSI pineapple, despite imports from the subject countries being at a lower price. Further the evidence did not establish that the price of imported FSI pineapple impacts on the prices Golden Circle achieves.
26. The Commissioner’s submission cross references the relevant section of the Report for the evidence in support of the above. This evidence is set out in a graph showing the export prices of imports compared to the prices of Golden Circle’s product.¹² However, I agree with the submission made by Golden Circle that the evidence does not, on the face of it, appear to support the conclusion made by the Commission.
27. First, the evidence does not necessarily support the statement regarding Golden Circle consistently achieving a higher sales price than imports from subject countries.

¹⁰ [2009] FCA 838.

¹¹ As above at [41].

¹² REP 573 & 574 section 7.7.1 Figure 20 at page 46.

PUBLIC

Certainly, this does not apply to imports from the Philippines. I also do not understand what evidence there is which supports the conclusion that the price of imported FSI pineapple does not impact Golden Circles prices. The conclusion appears to be based on the fact that (except for the imports from the Philippines) Golden Circle was able to achieve higher prices.

28. The fact that a locally made product may be able to achieve a higher price than imported product does not, of itself, mean that those lower prices are not affecting the price the local product is able to achieve. The presence of imported product which undercuts the local product may prevent the local product from being able to increase its prices further. I note that the Commission found that Golden Circle suffered price suppression and low overall profit and profitability during the 2019-2020 period.
29. The conclusion reached by the Commission does seem to allow for any price elasticity. It would mean that no matter how much the margin grew between the imported product and Golden Circle's product, there would be no switch by customers to the lower priced product. I note that the Commission found that Golden Circle's FSI pineapple is sold to the same customers and/or competes in the same markets as the imported FSI pineapple and has the same end uses and/or are substitutable.¹³ I agree with Golden Circle's submission that it cannot be assumed that because the imported FSI pineapple has a lower price point, it does not have any impact on the prices Golden Circle achieves for its product.
30. With respect to the issue of future injury in the form of loss of sales volume which Golden Circle is likely to suffer if the measures are not continued, I note that the Commission found that imports from Thailand and the Philippines are likely to continue upon the expiration of the measures and that they will continue to be at dumped prices. However, the Commission found that there was no evidence Golden Circle would lose sales volumes if the measures expired as it was able to process all of the raw pineapple it acquired.¹⁴
31. The Commission dismissed Golden Circle's claims that the expiration of the measures would impact Golden Circle's pineapple processing plans or it rebuilding its supply of pineapples. However, at least part of the Commission's reasoning in rejecting Golden Circle's claim was the view taken that the threat of material injury is not part of the legislative test for whether or not the measures should continue. For the reasons given above, I am concerned that with this comment, the Commission may have misunderstood the test in s.269ZHF(2).
32. Given the concerns I have expressed above regarding the specific findings made by the Commission in the Report, I am not convinced that there was an adequate basis outlined in the Report for the Commissioner not being satisfied that it was likely that material injury would be suffered by the Australian industry if the measures were allowed to expire. However, the analysis and material referenced in the Report is not

¹³ As above section 3.5 at page 15.

¹⁴ REP 573 & 574 section 7.8 at page 50.

PUBLIC

sufficient to allow me to come to a view as to whether or not the Commissioner should have been satisfied. For this reason, I have requested the 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.

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