



Australian Government
Department of Industry,
Innovation and Science

Anti-Dumping
Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Senior Member Joan Fitzhenry
Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Senior Member Fitzhenry,

ADRP Review No. 144: Consumer pineapple exported from the Republic of the Philippines and the Kingdom of Thailand

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the Act) published on 15 November 2021. This notice advised of your intention to review the decision of the Acting Minister for Industry, Science and Technology (the Minister) which allowed the anti-dumping measures applying to consumer pineapple exported to Australia from the Republic of the Philippines and the Kingdom of Thailand to expire, by declaration under section 269ZHG(1)(b) (the reviewable decision).

I have considered the application submitted by Golden Circle Limited (Golden Circle) for a review of the reviewable decision and make submissions, pursuant to section 269ZZJ(aa) of the Customs Act, at **Attachment A** (public version).

The Anti-Dumping Commission remains at your disposal to assist you in this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bradley Armstrong'.

Dr Bradley Armstrong PSM
Commissioner, Anti-Dumping Commission

15 December 2021

Attachment A

COMMISSIONER, ANTI-DUMPING COMMISSION SUBMISSION

Background

1. On 4 January 2021, the Anti-Dumping Commission (commission) received an application from Golden Circle Limited (Golden Circle). This application sought to continue the anti-dumping measures on consumer pineapple (the goods) exported from the Republic of the Philippines (the Philippines) and the Kingdom of Thailand (Thailand) (collectively, the subject countries).¹
2. The then Commissioner, Mr Dale Seymour, considered the application and decided to not reject the application. Notice of the decision and the intention to inquire whether the continuation of the measures was justified was published on the commission's website on 25 January 2021, pursuant to section 269ZHD(4).²
3. On 6 October 2021, the Acting Minister for Industry, Science and Technology, the Hon Angus Taylor MP (the Acting Minister), declared that he had decided not to secure the continuation of the anti-dumping measures, pursuant to section 269ZHG(1)(a) (the reviewable decision). The measures applying to the goods from the Philippines expired on 10 October 2021. The measures applying to the goods from Thailand expired on 17 October 2021.³
4. The reviewable decision was published on the Commission's website on 6 October 2021, as Anti-Dumping Notice No. 2021/117.⁴
5. In the reviewable decision, the Acting Minister stated he had considered and accepted the recommendations and reasons for recommendations, including all the material findings of facts or law, set out in *Anti-Dumping Commission Report No. 571 572* (REP 571 572).⁵
6. Golden Circle Limited (Golden Circle) applied to the Anti-Dumping Review Panel ('ADRP') for review of the reviewable decision.
7. Following receipt of the application for review, the ADRP published notice of the intention to conduct a review.⁶ In that notice, the ADRP proposed to conduct a review of the reviewable decision in relation to the following grounds:

¹ Pursuant to section 269ZHB of the *Customs Act 1901* (Cth) (the Act). All legislative references in this submission are to the Act unless otherwise indicated. Golden Circle's application can be found on the Electronic Public Record for continuation inquiries 571 and 572 (EPR 571 572), document 1.

² EPR 571 572, document 2.

³ EPR 571 572, document 24.

⁴ Ibid.

⁵ EPR 571 572, document 25.

⁶ ADRP Review 144 – *Anti-Dumping Review Panel*, Public Notice.

- (a) Exports of the goods from Siam Food Products Public Company Limited (Siam Food) to Australia were at dumped prices.
- (b) The commission incorrectly found that Golden Circle's consumer pineapple operated in its own segment of the consumer pineapple market in Australia.
- (c) 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.
- (d) The commission erred in law in its application of section 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.⁷

Ground 1 – Exports of the goods from Siam Food were at dumped prices

- 8. Upon the initiation of continuation inquiries 571 and 572, the commission invited exporters of the goods from the subject countries to cooperate with the inquiry through the provision of a response to the exporter questionnaire (REQ). Siam Food provided a REQ within the time permitted. This REQ was complete with no material deficiencies.
- 9. The commission undertook verification of the information contained in Siam Food's REQ. The commission was satisfied that the information contained in Siam Food's REQ was complete and accurate. This information was used to determine whether Siam Food's exports of the goods during the inquiry period were at dumped prices.
- 10. In the Statement of Essential Facts (SEF) for inquiries 571 and 572, the commission published a preliminary dumping margin for Siam Food of 6.4%.⁸ The normal value for Siam Food was ascertained under section 269TAC(2)(c). Golden Circle did not raise concerns with this approach in its submission in response to SEF 571 572.
- 11. As part of the determination of the normal value, the commission included an upwards adjustment to the normal value for export packaging costs, amongst other adjustments. These adjustments are made pursuant to section 269TAC(9) to ensure that the normal value so ascertained is properly comparable with the export price of the goods.
- 12. As part of its standard practice to ensure the accuracy of dumping margin calculations, the commission provided Siam Food with the calculations. The purpose of providing the calculations to Siam Food is so that the exporter can identify any errors or omissions with the use of the data. The commission sent the calculations to Siam Food on 23 July 2021. This occurred after the date on which the SEF was placed on the public record, being 19 July 2021.

⁷ Ibid page 1.

⁸ EPR 571 572, document 14. Refer to chapter 6.

13. Upon review of the calculations, Siam Food alerted the commission to an error in the calculation of the normal value. As outlined in **Confidential Attachment 1**, Siam Food identified that export packaging costs had been inadvertently included twice, thereby incorrectly uplifting the normal value. Specifically, Siam Food referred to the cost to make (CTM) data used in the constructed normal value under section 269TAC(2)(c). Siam Foods identified the specific components that represented the export packaging costs. As these costs were included in the CTM, when subsequently making an upwards adjustment for these costs, the commission had incorrectly double-counted these expenses.
14. The commission, therefore, removed the upwards adjustment for export packaging costs. The result of this change was to reduce Siam Food's dumping margin from 6.4% (as outlined in the SEF) to negative 5.3% (as outlined in REP 571 572).
15. The reference to the upwards adjustment for export packaging costs at Table 10 of REP 571 572 is an error – no upwards adjustment was required for these expenses.
16. The dumping margin established for Siam Food in REP 571 572, of negative 5.3%, is correct and accurate.

Ground 2 – Golden Circle's consumer pineapple operates in its own segment of the Australian market

17. In REP 571 572, the commission outlined the relevant findings as to the structure of the Australian market for consumer pineapple.⁹ As outlined in chapter 4 of REP 571 572, the commission established that:
 - (a) Golden Circle's goods processed in Australia, branded as 'Australian' pineapple, attract the highest retail prices.
 - (b) There is a clear price difference between the Golden Circle 'Australian' consumer pineapple and consumer pineapple imported from Thailand and the Philippines.
 - (c) This price difference was confirmed through two forms of analysis:
 - i. Comparing Golden Circle's selling prices for consumer pineapple with the prices of imported consumer pineapple (from the Australian Border Force import database), inclusive of all import costs and duties, where applicable.
 - ii. Comparing the selling prices achieved by a leading supermarket for Golden Circle's 'Australian' consumer pineapple and imported consumer pineapple from Thailand and the Philippines.

⁹ EPR 571 572, document 23. Refer to chapter 4.

(d) Both forms of analysis support the finding that Golden Circle's prices for 'Australian' consumer pineapple are unaffected by the price of the imported consumer pineapple from Thailand or the Philippines.¹⁰

18. The analysis outlined in paragraph 17 (above) is based on the information and evidence gathered during continuation inquiries 571 and 572. This includes the data from the Australian industry and other interested parties. The evidence relating to the inquiry period for these cases is the key evidence that informs the recommendations and findings that the Minister accepted.
19. For that reason, I maintain the finding regarding market segmentation is correct. The price behaviours that inform this analysis are also discussed in ground 3 below.

Ground 3 – In the absence of measures, the Australian industry will likely incur material injury from future exports of consumer pineapple from the Philippines and Thailand.

20. Section 269ZHF(2) of the Act outlines that:

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 **would be likely to lead**, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent [Commission emphasis added].

21. I must be satisfied that the evidence gathered during these inquiries indicates that the expiry of the measures applying to consumer pineapple would lead, or would be likely to lead, to a continuation or recurrence of the material injury that the measures are intended to prevent.
22. In REP 571 572, I outlined the reasons and evidence for my recommendation to the Minister that the measures be allowed to expire. As recorded in REP 571 572, the key reasons for this finding were as follows:

- (a) Golden Circle maintains a consistently higher selling price for its consumer pineapple. This price does not fluctuate in response to movement in the prices of imported consumer pineapple. This is despite the importer consumer pineapple being at a lower price point.¹¹
- (b) No evidence was identified to indicate Golden Circle experienced pricing pressure from dumped imports from the subject countries. There was no evidence that the expiry of the measures, and a reduction in the price of the imported consumer pineapple, would impact Golden Circle's prices.¹²

¹⁰ Ibid.

¹¹ REP 571 572, section 7.7.1.

¹² Ibid.

- (c) No evidence was identified to suggest that Golden Circle has lost sales volumes due to imports from the subject countries.¹³
23. Golden Circle has made a series of other claims regarding evidence to indicate that material injury will recur upon the expiry of the measures. These have been addressed in detail in REP 571 572.
24. Having not reached the level of satisfaction required under section 269ZHF(2), the correct and preferable decision is for the measures applying to consumer pineapple from the subject countries to expire.

Ground 4 – The commission erred in law in its application of section 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

Background

25. Golden Circle first raised concerns about imports that “pose a very real and immediate threat of material injury” in a submission made to the commission on 8 June 2021.¹⁴
26. The commission responded to Golden Circle’s submission in SEF 571 572, which was published on 19 July 2021.¹⁵ As well as acknowledging a suite of other considerations raised by Golden Circle, the commission considered Golden Circle’s concerns about future supply problems.
27. In its observations, the commission made the following statement:

Golden Circle claims that the expiration of the measures on consumer and FSI pineapple exported from the Philippines and Thailand pose a ‘very real and immediate threat of future material injury to the prospects of the pineapple processing industry that is only recently recovering from enduring drought conditions’. The commission has considered Golden Circle’s submission in the conduct of these inquiries. The commission considers that there is insufficient evidence before it to find that the expiration of the measures would impact Golden Circle’s pineapple processing plans as claimed. While Golden Circle states that the expiration of measures will prevent it re-building supply of pineapples for canning, there is insufficient evidence before the commission to indicate that the dumping of imports from the subject exporters of this inquiry will limit Golden Circle’s future volumes. **The commission also notes that ‘threat of future material injury’ is not part of the test for the continuation of measures.**¹⁶

28. Golden Circle subsequently made a further submission to the SEF on 8 August 2021, which did not address or respond to the statement made by the commission.¹⁷ Amongst other matters, Golden Circle re-iterated its concerns

¹³ Ibid, section 7.7.2.

¹⁴ EPR 571 572, document 10.

¹⁵ EPR 571 572, document 14.

¹⁶ Ibid. Refer to section 7.7.2.

¹⁷ EPR 571 572, document 20.

about the potential for recurrence of material injury if the measures were allowed to expire.

29. REP 571 572, published on 6 September 2021 maintained the statement about 'threat of material injury' without further editorial development or comment.¹⁸

Commission's approach correct at law

30. Section 269ZHF(2) which sets out the primary consideration (referred to in REP 571 572 as the 'test') provides that:

(2) 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 would be likely to lead, **to a continuation of, or a recurrence of**, the dumping or subsidisation and the material injury that the anti dumping measure is intended to prevent.

31. Relevantly, section 269ZHF(3) sets out various other matters that I also considered:

3) Subject to subsection (4), in deciding on the recommendations to be made to the Minister in the Commissioner's report, the Commissioner:

(a) must have regard to:

- (i) the application for continuation of the anti-dumping measures; and
- (ii) any submission relating generally to the continuation of the measures to which the Commissioner has had regard for the purpose of formulating the statement of essential facts in relation to the continuation of those measures; and
- (iii) that statement of essential facts; and
- (iv) any submission made in response to that statement that is received by the Commissioner within 20 days after the placing of that statement on the public record; and

(b) may have regard to any other matter that the Commissioner considers to be relevant to the inquiry.

32. The commission undertook an assessment of the likelihood of the recurrence of material injury. This assessment included consideration of the potential for future injury if the dumping duties were allowed to expire. This assessment was, however, limited to consideration of the evidence available regarding the present conditions of competition, including Golden Circle's current commercial activities, volumes and pricing. 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. This is wholly consistent with my position set out earlier in this submission in respect of ground 3.

¹⁸ EPR 571 572, document 23.

PUBLIC RECORD

33. To the extent that the likelihood of recurrence of future material injury is a relevant consideration, I have considered it. These considerations are all set out in chapter 7 of REP 571 572.