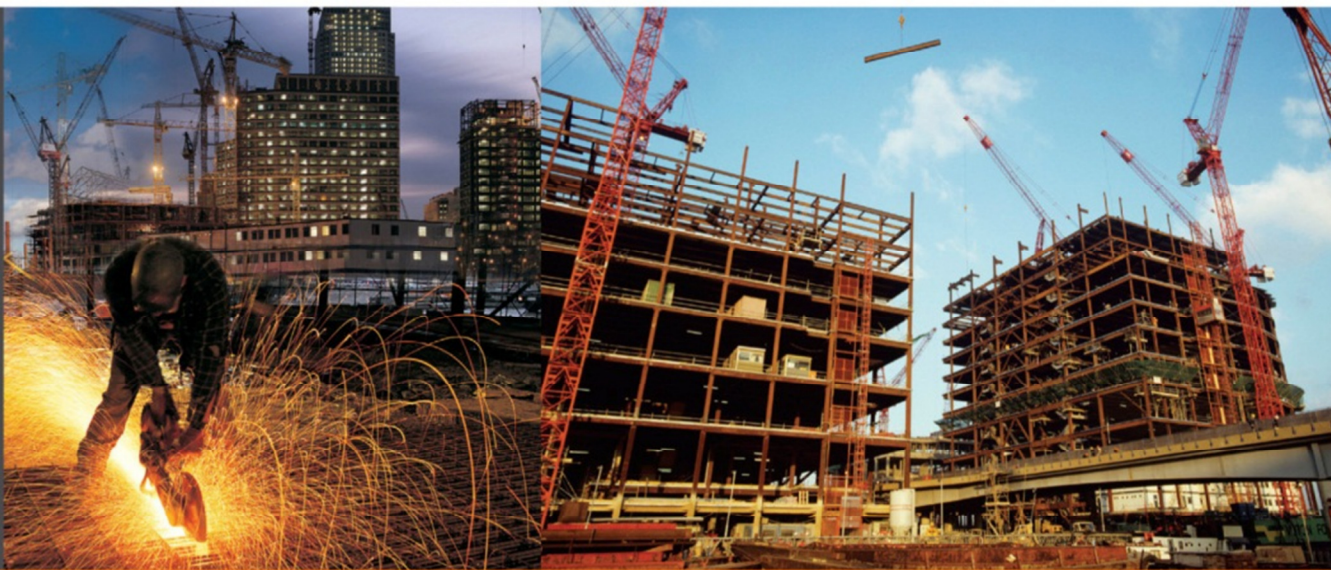




Australian Government
Anti-Dumping Review Panel



DECISION OF THE ANTI-DUMPING REVIEW PANEL



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**APPLICATION FOR REVIEW OF A MINISTERIAL DECISION TO
APPLY ANTI DUMPING MEASURES TO FOOD SERVICE AND
INDUSTRIAL PINEAPPLE PRODUCED IN THAILAND AND
EXPORTED TO AUSTRALIA BY TIPCO FOODS PUBLIC
COMPANY LIMITED**

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INTRODUCTION

1 Tipco Foods Public Company Limited (the applicant) is one of a number of Thai companies which manufacture Food and Service Industry pineapple (FSI pineapple) and exports it to Australia. FSI pineapple exported from Thailand to Australia is subject to anti-dumping measures. The applicant is seeking review of a decision by the then Minister for Home Affairs (the Minister) of the variable factors of the anti-dumping measures applying to FSI pineapple exported to Australia from Thailand.

BACKGROUND

2 FSI pineapple consists of pineapple (including pieces, thins, slices, crushed and pizza cuts) prepared or preserved in containers exceeding one litre. FSI pineapple is sold into the wholesale market where price is the dominant factor. It is distinguished from consumer pineapple which consists of pineapple prepared or preserved in containers of less than one litre. Consumer pineapple is sold directly into the retail market and quality is the dominant factor.

3 'Variable factors' refer to the following terms which are defined in the Customs Act [1901](the Act)-export price (s269TAB), normal value (s289TAC) and non-injurious price (s 269TACA). This review is limited to considering whether applying one the methodology comprehensive figure for each variable factor is the correct or preferable decision.

4. A free trade agreement has existed between Australia and Thailand since 1 January 2005. However since 2001 anti-dumping measures have been in place for FSI pineapple exported from Thailand to Australia, with the exception of one company not relevant to this proceeding. The measures expire at the expiration of five years unless

renewed. The measures were renewed in 2006 and again in 2011.

5 The sole Australian producer of FSI (and consumer) pineapple is Golden Circle Limited (Golden Circle).

6 S269ZA (1)(i) of the Act permits an affected party to apply for the review of one or more of the variable factors relevant to the anti-dumping measures. S 269ZA(2) provides that an application cannot be made earlier than twelve months after the measures were last put in place. An 'affected party' is defined in s269T(1) to include an exporter who is directly concerned with the exportation to Australia of goods to which measures relate. The applicant is an affected party and made the application for the review on 10 December 2012. The application sought a revocation of the measures as well as a review of the variable factors.

7 The Chief Executive Officer of Customs accepted the application for variable factors review but not the revocation review application. This proceeding is concerned only with the variable factors review. A public notice, as required by s269ZC(4) of the Act notifying the review was published on 19 December 2012. The notice advised a review period of 1 October 2011 to 30 September 2012.

8 Following a request from the Minister made under s 269ZC(5) of the Act Customs published notification on 29 January 2013 that the variable factors review had been extended to all Thai exporters of FSI pineapple to Australia. As is required by s269ZD a Statement of Essential Facts (SEF 196) was published on 8 May 2013. A Statement of Essential Facts sets out Customs' preliminary view of the recommendation it proposes making to Minister. Parties had until 29 May 2013 to respond to SEF196 following which a report (REP196) was made to Minister for his decision. Customs verified information provided by the exporters before compiling REP196.

9 The Minister accepted the recommendations and a notice was published revising the variable factors. The applicant then applied, under s269ZZC of the Act to the

Review Panel for a review of the Minister's decision. The Senior Member of the Review panel, pursuant to s269ZYA, appointed me to undertake the review. A public notification of the review, as required by s269ZZI was published.

10 In Rep 196 Customs determined the export price of FSI pineapple under s269TAB(1) (a) of the Act by reference to arms length sales made to the applicant's Australian customers. As appears from the applicant's submission to this review the calculation was based on one type of FSI product. That product is described by the applicant as being a specialty product consisting of 'choice grade chunk in light syrup'. The applicant maintained that the only export of FSI pineapple it made to Australia during the investigation period consisted of three containers of the premium product. It also claimed that there were unlikely to be any further such sales. The specialty product had what, on behalf of the applicant, was described as a 'highly inflated ascertained export price' of A\$ [REDACTED]/kg.

11 The applicant maintained that it anticipated future exports of FSI pineapple to Australia would be standard pieces, standard slices and tidbits each in light syrup. These three products had a weighted average normal value of A\$ [REDACTED]/kg. The applicant claimed that a dumping duty which, on the figures presented, was 23% higher than the normal value of the future FSI products it anticipated exporting to Australia would result in not being able to continue exporting its standard products to Australia.

12 On behalf of the applicant attention was drawn to the fact that the normal values attributed to other Thai exporters which did not export during the investigation period would be A\$ [REDACTED] for future exports. This it claimed exacerbated the unfairness to the applicant.

13 The applicant submits that the variable duty applied to the FSI pineapple it exports to Australia should be divided into two tranches- between the choice grade chunks-where duty would be based on an AEP of A\$ [REDACTED] /kg and other types-based on an AEP of A\$ [REDACTED]

CONSIDERATION

14 There are in my view several reasons why the applicant is unable to succeed. The first is that variable factors are to be determined within the set time frame of the investigation period. Customs can only calculate the variable factors in that time frame. Since the applicant did not export any of the three standard FSI products in respect of which it submits the variable factors should be considered these cannot be considered.

15 Customs is unable to take account of what future exports may be made when considering the variable factor calculations. It is impermissible, in circumstances where exports have been made, for Customs to undertake variable factor calculations on the basis that at some time in the future there may be a change in the product exported.

16 Finally there is now judicial authority expressly endorsing the imposition of single figure, usually expressed as a percentage, for each variable factor. In *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA870 Nickolas J considered the imposition of anti-dumping measures on aluminium extrusions with different finishes which had different costs and pricings depending on the finish used. The Court held that the Minister may only specify a single normal value, a single export price and a single non injurious price for a particular exporters goods (-at paragraph 139). Different values were to be calculated for different types of the same product but then an average figure applied as a single value for the variable factor concerned.

17. The approach endorsed by the Court was clearly that anti-dumping measures were to be imposed, as His Honour described it, on a 'consolidated as opposed to a differentiated basis' (paragraph 120). In light of the Court decision delivered on 30 August 2013 the submission made on behalf of the applicant that variable factors should be applied to different types of the same product cannot be upheld.

18 For the reasons stated I recommend pursuant to s269ZZK(1) of the Act that the Minister affirm the reviewable decision.

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

Reviewer: Graham McDonald
Anti-Dumping Review Panel Member
Date: 28 October 2013