



# Application for review of a Ministerial decision

## *Customs Act 1901 s 269ZZE*

This is the approved<sup>1</sup> form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party<sup>2</sup> may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

### **Time**

Applications must be made within 30 days after public notice of the reviewable decision is first published.

### **Conferences**

You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

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<sup>1</sup> By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

<sup>2</sup> As defined in section 269ZX *Customs Act 1901*.

**Further application information**

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

**Withdrawal**

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email [adrp@industry.gov.au](mailto:adrp@industry.gov.au).

**PART A: APPLICANT INFORMATION**

**1. Applicant's details**

Applicant's name:

Dole Philippines Incorporated

Address:

5th Floor, 6750 Tower,

Ayala Avenue 1200,

Philippines

Type of entity (trade union, corporation, government etc.):

Corporation

**2. Contact person for applicant**

Full name: Ruby Ann L Relampagos

Position: Regional Business Support Manager

Email address: Ruby.Ann.Relampagos@doleintl.com

Telephone number: +63 2 771 2146

**3. Set out the basis on which the applicant considers it is an interested party**

The Applicant is directly concerned with the exportation into Australia of the goods the subject of the reviewable decision and has been directly concerned with the exportation into Australia of like goods to the goods the subject of the reviewable decision.

**4. Is the applicant represented?**

Yes      ~~No~~

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

***\*It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.\****

**PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES**

**5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:**

Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

Subsection 269TL(1) – decision of the Minister not to publish duty notice

Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

**6. Provide a full description of the goods which were the subject of the reviewable decision**

Pineapple prepared or preserved in containers not exceeding one litre (consumer pineapple) exported from the Republic of the Philippines

**7. Provide the tariff classifications/statistical codes of the imported goods**

2008.20.00/26 – Canned in containers not exceeding one litre

2008.20.00/28 - Other

**8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision**

*If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.*

ADN No. 2016/81

**9. Provide the date the notice of the reviewable decision was published**

13 September 2016

***\*Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application\****



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## **ANTI-DUMPING NOTICE NO. 2016/81**

*Customs Act 1901 – Part XVB*

### **Consumer Pineapple Exported from the Republic of the Philippines Findings of the Continuation Inquiry into Anti-Dumping Measures**

*Notice under subsection 269ZHG(1)(b) of the Customs Act 1901*

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry, which commenced on 9 March 2016, into whether the continuation of the anti-dumping measures in the form of a dumping duty notice applying to consumer pineapple exported to Australia from the Republic of the Philippines (the Philippines) is justified.

The goods subject to measures (the goods) are:

*Pineapple prepared or preserved in containers not exceeding one litre (consumer pineapple).*

Recommendations, reasons for the recommendations, and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 333* (REP 333).

I, CRAIG LAUNDY, the Assistant Minister for Industry, Innovation and Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science,<sup>1</sup> have considered REP 333 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts and law therein and have decided that the anti-dumping measures applying to consumer pineapple exported to Australia from the Philippines should continue from 10 October 2016.

Under subsection 269ZHG(1)(b) of the *Customs Act 1901* (the Act), I declare that I have decided to secure the continuation of the anti-dumping measures currently applying to consumer pineapple exported to Australia from the Philippines.

Pursuant to subsection 269ZHG(4)(a)(iii) of the Act, I determine that the dumping duty notice in relation to the goods from the Philippines continues in force after 10 October 2016, but that after this day, the notice has effect as if different specified variable factors had been fixed in relation to all exporters generally.

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<sup>1</sup> On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science.

In accordance with subsection 8(5BB) of the *Customs Tariff (Anti-Dumping) Act 1975*, and the *Customs Tariff (Anti-Dumping) Regulation 2013* (the Regulation), the duty that has been determined will continue to be an amount worked out in accordance with the combination of fixed and variable duty method pursuant to subsections 5(2) and 5(3) of the Regulation, as detailed in the table below.

Particulars of the dumping margins established for each of the exporters, and the interim dumping duty rates are also set out in the following table.

Country	Exporter/country	Dumping margin and interim dumping duty rate	Duty Method
The Philippines	Dole Philippines Inc.	5.9%	combination of fixed and variable duty method
	All other exporters	22.9%	

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel ([www.adreviewpanel.gov.au](http://www.adreviewpanel.gov.au)), in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

REP 333 has been placed on the public record, which may be examined at the Anti-Dumping Commission Office by contacting the case manager on the details provided below. Alternatively, the public record is available at [www.adcommission.gov.au](http://www.adcommission.gov.au).

The interim dumping duty liability is to be calculated as follows:

- an amount equal to the interim dumping duty rate per kilogram; plus
- the amount, if any, by which the actual export price is lower than the ascertained export price.

The interim dumping duty rates per kilogram and the ascertained export prices are confidential. Genuine importers who wish to know the variable factors relevant to the determination of interim dumping duties, should contact the Anti-Dumping Commission team by email at [clientsupport@adcommission.gov.au](mailto:clientsupport@adcommission.gov.au).

Other enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2415, fax number +61 3 8539 2499 or email at [operations3@adcommission.gov.au](mailto:operations3@adcommission.gov.au).

Dated this 12<sup>th</sup> day of September 2016.

CRAIG LAUNDY

Assistant Minister for Industry, Innovation and Science

Parliamentary Secretary to the Minister for Industry, Innovation and Science

## **PART C: GROUNDS FOR THE APPLICATION**

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so:

### **10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

Please see **Attachment A -Normal Value Adjustments (Confidential)**

#### **Attachment B Normal Value Adjustments (Non-confidential)**

### **11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

The correct or preferable decision ought to be that the Assistant Minister declare that he has decided not to secure the continuation of the anti-dumping measures in so far as they relate to the exportation of consumer pineapple from the Philippines by the Applicant.

Alternatively, the correct or preferable decision ought to be that the Assistant Minister declare that he has decided to secure the continuation of the anti-dumping measures after the specified expiry day but that, after that day, the notice has effect, in relation to the applicant, as if the Minister had fixed a different normal value that was ascertained by providing for adjustments, additional to those included in the reviewable decision, in respect of selling , marketing and trade promotion costs under s.269TAC (8) and (9) of the Customs Act 1901.

### **12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

The first proposed decision set out in the response to question 11, being a proposed decision not to secure the continuation of anti-dumping measures, is manifestly materially different from the reviewable decision to secure the continuation of such measures.

The alternative proposed decision set out in response to question 11 differs materially from the reviewable decision in that, if adopted, it would result in an interim dumping duty of 0.0% applying to exports by the applicant rather than the currently proposed rate of 5.9%

*Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.*

**PART D: DECLARATION**

The applicant/~~the applicant's~~ authorised representative [*delete inapplicable*] declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.



Signature:.....

Name: John Patrick Cosgrave

Position: Director, Trade Measures

Organisation: Minter Ellison

Date: 13 / 10 / 2016



**PART E: AUTHORISED REPRESENTATIVE**

*This section must only be completed if you answered yes to question 4.*

**Provide details of the applicant's authorised representative**

Full name of representative: John Patrick Cosgrave

Organisation: Minter Ellison

Address: Level 3, 25 National Circuit

Forrest ACT 2603, Australia

Email address: john.cosgrave@minterellison.com

Telephone number: 61 2 6225 3781

**Representative's authority to act**

***\*A separate letter of authority may be attached in lieu of the applicant signing this section\****




October 11, 2016

To Whom it May Concern

**Application to the ADRP for Review of a Decision to declare the continuation of anti-dumping measures applying to exports of consumer pineapple from the Philippines – Normal Value Adjustments**

Dole Philippines Incorporated appoints Minter Ellison (contact John Cosgrave) to act on its behalf in relation to above application to the Anti-Dumping Review Panel

Yours sincerely,

  
Ruby Ann L. Relampagos  
Regional Business Support Manager  
Dole Asia Holdings – Packaged Foods Division

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....

(Applicant's authorised officer)

Name:

Position:

Organisation

Date: — / — /

## ATTACHMENT B

### NON-CONFIDENTIAL

#### **Dole Philippines Incorporated (DPI) - Consumer Pineapple from the Philippines - Grounds on which the Reviewable Decision is not the correct or preferable decision.**

#### **Introduction**

The reviewable decision set out in Anti-Dumping Notice No 2016/81(**ADN**) that secures the continuation of anti-dumping measures adopts the material findings of fact and law in *Anti-Dumping Commission Report 333 (REP333)*. Section 8.3.1 of REP333 deals with a range of adjustments under s.269TAC(8) and (9) of the *Customs Act 1901 (Act)* to the applicant's normal value. The area of contention is the Commission's refusal to make any adjustments to normal value on account of differences in selling, marketing and trade promotion expenses applying to domestic and export sales. Adjustments for these differences were specifically claimed by DPI at the time of the verification visit and were the subject of confidential correspondence that forms part of the relevant information relating to this case.

The quantum of those expenses is not in question. At section 4.4 of the Exporter Visit Report the Commission states that

Having verified Dole Philippines' CTMS data for consumer pineapple to financial statements and to source documents, the verification team is satisfied (after taking account of the revisions to the CTMS data) that Dole Philippines CTMS data is complete, relevant and accurate.

That complete, accurate and relevant data reveals that the domestic expenses incurred by DPI in the three categories referred to above exceed the company's export expenses in the same category by a factor of about ●.

If adjustments were made to normal value on account of one or more of the expense categories the resulting dumping margin attributable to DPI would be less than zero. The potential consequences of such a change in a material finding of fact would be either a decision by the Assistant Minister not to secure the continuation of the anti-dumping measures applying to DPI or, alternatively, to secure such measures but on the basis of fixing a different normal value ascertained by providing for adjustments, additional to those included in the reviewable decision, in respect of selling , marketing and trade promotion costs [selling costs].

#### **Issues**

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There are a number of anomalies attaching to the rejection by the Commission of an adjustment to normal value on account of differences in selling costs. In the 2011 continuation inquiry concerning consumer pineapple from the Philippines the then administering authority made the following material findings of fact in respect of selling cost adjustments<sup>1</sup>.

### 7.3.3 Selling expenses

DPI explained that selling expenses are the costs it incurs for **[Confidential]** We have verified the amount and are satisfied that DPI does not incur this expense in respect of export sales to Australia. We recommend a downward adjustment to domestic selling expenses for this amount.

### 7.3.4 Domestic administration expenses

DPI maintains a marketing team **[Confidential]** for sales in the Philippines. Major expenses are salaries, transportation and travel and office rental. The marketing team works with distributors throughout the Philippines. As DPI's sales in the Philippines **[Confidential]**, its sales effort is greater than DPFA's effort in export markets such as Australia **[Confidential]**

We have verified the amount **[Confidential]** and are satisfied that DPI does not incur this expense in respect of export sales to Australia. We recommend a downward adjustment to domestic selling prices for this amount.

### 7.3.5 Domestic merchandising and promotion expenses

DPI incurs merchandising expenses on the domestic market that are not incurred in respect of exports to Australia. As with administration expenses, this is a reflection that the majority of domestic sales are **[Confidential]** while exports to Australia are **[Confidential - Numbers]**

Examples of merchandising and promotion expenses are television ads and value packs.

We have verified the amount for merchandising and promotion expenses **[Confidential]** and are satisfied that DPI does not incur these expenses in respect of export sales to Australia. We recommend a downward adjustment to domestic selling prices for this amount.

Since that time there have been no changes in relevant laws or the published policies and practices of the administering authorities. However the Commission in the current matter, while accepting the accuracy and integrity of the data provided by DPI, has ignored the earlier findings and reasons for those findings without providing any cogent explanation for this neglect or its contrary finding.

A further anomaly is the fact that in the parallel dumping inquiry just conducted into FSI pineapple exported from Thailand, the Commission has, without debate, made an adjustment to normal value on account of differences in selling costs applying to domestic and export sales undertaken by Dole Thailand Limited.

At page 43 of REP 333 the Commission's rejection of adjustments claimed by DPI is expressed in the following terms:

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<sup>1</sup> EPR 171 – item 014, p.25

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Selling expenses – the Commission considers that selling costs are general sales and administration expenses that relate more to the general cost of doing business. As detailed in the Manual, the Commission considers that general expenses of this nature are not within the scope of the term ‘differences in conditions and terms of sale’. As a result, the Commission has not made an adjustment for Dole Philippines’ selling expenses.

Admin and other marketing expenses, trade promotions and merchandising – as outlined in the Manual, the Commission does not make adjustments for marketing costs unless such costs can be directly linked to the transactions the company is seeking an adjustment for. The Commission is not satisfied that this requirement has been met and has not made an adjustment for such expenses.

In relation to selling expenses reference to the *Dumping & Subsidy Manual* indicates a resistance on the part of the Commission to adjusting for expenses that ...*relate more to the general cost of doing business* ... (whatever that may mean) and ... *are spread across all sales of the company*. However, the selling expenses in the present matter set out in the accepted and verified domestic and export cost to make and sell (CTMS) worksheets are the expenses found by the Commission to be properly attributable to sales by DPI of consumer pineapple. The existence of the difference between the selling expenses incurred on domestic and export sales in itself clearly rebuts any claim that the expenses are spread across all sales of the company and the quantum of the difference destroys any assertion that that there are no differences in the conditions of the domestic and export sales.

The Commission's rejection of an adjustment for marketing costs is based on the claim that they cannot be directly linked to the domestic and export sales of consumer pineapple. Of course in the previous inquiry a contrary conclusion was reached and again in relation to marketing costs these are clearly identified in the CTMS worksheets, and accepted by the Commission, as expenses directly linked to the relevant sales.

We submit that there is no lawful ground on which a claim for adjustment to normal value on account of the expenses under consideration can be rejected and that the correct decision is to adjust DPI's normal value downwards by the amount of the differences between the domestic and export expense categories.

### **Contention – Discontinue the Anti-Dumping Measures**

Adoption of a material finding of fact that a downward adjustment to normal value on account of selling and marketing expenses was required would result in a finding that DPI was not exporting consumer pineapple to Australia at dumped prices during the investigation period. Such a finding obviously has the potential to bring into question the sustainability of a number of the recommendations set out in REP 333 and relied on by the Assistant Minister.

Section 269ZHF(2) of the Act provides 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.

The provision requires that in the changed circumstances of DPI's dumping status a review be undertaken of the Commissioner's recommendations concerning the likelihood of a continuation of dumping, a recurrence of dumping and the likelihood of a continuation or recurrence of the material injury caused by such dumping.

We submit that in the light of revised dumping findings concerning DPI for the 2015 investigation period there is no evidence that could support a reasonable satisfaction that dumping by DPI will continue.

Similarly there is no evidence of a likelihood of a recurrence of such dumping. There is no evidence of any dumping, calculated according to law, by DPI since calendar year 2010 and at that time the margin was close to *de minimis* (2.6%). The following five years involved the imposition of an ad valorem dumping duty of that amount and the introduction of a floor price equal to the Company's ascertained export price in 2010. The fob export price of exports by DPI of consumer pineapple in each year since 2010 has been greater than the sum of the floor price plus the dumping duty. Bearing in mind that DPI accounts for the major proportion of consumer pineapple exports from the Philippines, the absence of any dumping is confirmed by trade statistics that show that from 2011-2015 the fob price for exports of consumer pineapple from the Philippines increased by over 60%<sup>2</sup>.

In the absence of any dumping by DPI over the past five years, there are no reasonable grounds on which the Commissioner could be satisfied that, if the dumping duty notice ceased to apply to DPI, there would be a recurrence of dumping by the company. In fact the evidence is all to the contrary. Over a five year period of supplying undumped exports to Australia, DPI has increased market share primarily at the expense of imports from Thailand and countries not subject to the anti-dumping notice<sup>3</sup>. Put simply, in maintaining its market position in Australia, DPI has no need to reduce export prices below properly comparable normal values in the Philippines.

Turning to the issue of the likelihood of a recurrence of material injury we note that in Report 172b<sup>4</sup> the ACBPS accepted DPI's argument that its dumped exports in 2010 did not cause material injury to GCL. The authority also observed that an undumped price tendered by DPI would have been lower than a GCL tendered price<sup>5</sup>. A few weeks earlier in SEF 172b the ACBPS had observed that an undumped tender price from DPI was significantly below the Australian industry's cost of production.

The magnitude of GCL's lack of competitiveness is further revealed by the Commission's findings in the current inquiry that *...the NIP is higher than the normal values for all exports of*

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<sup>2</sup> REP 333 – Figure 10, p.31

<sup>3</sup> REP 333: p.23

<sup>4</sup> *ibid.* p.23.

<sup>5</sup> *id.*

*the goods from the Philippines*<sup>6</sup> ... and the dumping margin for 'other exporters' is 22.9%<sup>7</sup>. Clearly, DPI's undumped prices remain significantly below GCL's production costs.

The Commission's confused approach to this issue is revealed in the statement that:

*It is acknowledged that the Australian industry's CTMS is higher than the CTMS in the Philippines and Thailand, however Colden Circle's consumer pineapple business is competitive...*<sup>8</sup>

In addition to concealing the magnitude of the competitive disadvantage, the two assertions in the statement are obviously incompatible and fail to acknowledge, in the words of the Commission, the degree to which this disadvantage completely outweighs any future injury which may be caused by the removal of measures.

We submit that there is no evidence to support a lawful recommendation from the Commissioner to the Assistant Minister that he take steps to secure the continuation of anti-dumping measures applying to exports of consumer pineapple by DPI and consequently we request that the Panel recommend that the Assistant Minister revoke the reviewable decision and recommend that he declare that he has decided not to secure the continuation of the anti-dumping measures concerned..

#### **Alternative Contention – Different Variable Factors**

Alternatively, if the Minister maintains his declaration to secure the continuation of anti-dumping measures, the correct or preferable decision ought then be that the Assistant Minister declare that after the specified expiry day of those measures the notice has effect, in relation to the applicant, as if the Minister had fixed a different normal value that was ascertained by providing for adjustments, additional to those included in the reviewable decision, in respect of selling , marketing and trade promotion costs under s.269TAC (8) and (9) of the Customs Act 1901.

**MinterEllison**



John Cosgrave  
Director, Trade Measures

13 October 2016

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<sup>6</sup>REP 333, p. 48

<sup>7</sup> ibid. p. 41

<sup>8</sup> ibid. p. 40