



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. 145: Food service and industrial (FSI) 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 Customs 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 FSI pineapple exported to Australia from the Republic of the Philippines and the Kingdom of Thailand to expire, by declaration under section 269ZHG(1)(b).

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 commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

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 FSI 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 Thailand expired on 17 October 2021. The measures applying to the goods from the Philippines expired on 13 November 2021.
4. The reviewable decision was published on the Commission's website on 6 October 2021, as Anti-Dumping Notice No. 2021/118.³
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. 573 574* (REP 573 574).⁴
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.⁵ 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 573 and 574 (EPR 573 574), document 1.

² EPR 573 574, document 2.

³ EPR 573 574, document 15.

⁴ EPR 573 574, document 14.

⁵ ADRP Review 145 – *Anti-Dumping Review Panel*, Public Notice.

- (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.
- (b) 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.⁶

Ground 1 – In the absence of measures, the Australian industry will likely incur material injury from future exports of FSI pineapple from the Philippines and Thailand.

8. 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].

9. I must be satisfied that the evidence gathered during these inquiries indicates that the expiry of the measures applying to FSI 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.
10. In REP 573 574, I outlined the reasons and evidence for my recommendation to the Minister that the measures be allowed to expire. As recorded in REP 573 574, the key reasons for this finding were as follows:
- (a) Golden Circle achieves a consistently higher sales price on its FSI pineapple, despite imports from the subject countries being at lower prices. The evidence did not establish that the price of imported FSI pineapple impacts on the prices Golden Circle achieves.⁷
 - (b) Since the measures were last continued in 2016, the Australian market has shifted considerably. Imports from Thailand (that are not subject to the measures) and imports from other countries (also not subject to the measures) now hold the vast majority of the Australian market share. These imports compete at a much lower price point. The evidence indicated that the expiry of the measures would lead to these imports continuing to compete at this lower price point, with no impact on Golden Circle's prices.⁸
 - (c) No evidence was identified to indicate that Golden Circle lost sales volumes of FSI pineapple due to imports from the subject countries.⁹

⁶ Ibid page 1.

⁷ REP 573 574, section 7.7.1.

⁸ REP 573 574, sections 7.5 and 7.7.1.

⁹ REP 573 574, section 7.7.2.

11. 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 573 574.
12. Having not reached the level of satisfaction required under section 269ZHF(2), the correct and preferable decision is for these measures applying to FSI pineapple from the subject countries to expire.

Ground 2 – 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

13. 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 2021.¹⁰
14. The commission responded to Golden Circle’s submission in SEF 573 574, which was published on 19 July 2021.¹¹ As well as acknowledging a suite of other considerations raised by Golden Circle, the commission considered Golden Circle’s concerns about future supply problems.
15. In its observations, the commission made the following statement:

Golden Circle claims that the expiration of the measures on both 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 this submission from Golden Circle. 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 dumped imports from the subject countries will limit Golden Circle’s future supply volumes. **The commission also notes that ‘threat of future material injury’ is not part of the legislative test for whether measures should continue or expire.**¹²

16. 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.¹³ Amongst other matters, Golden Circle re-iterated its concerns about the potential for recurrence of material injury if the measures were to be discontinued.
17. The commission’s final report, published on 6 September 2021 maintained the statement about ‘threat of material injury’ without further editorial development or comment.¹⁴

¹⁰ EPR 573 574, document 5.

¹¹ EPR 573 574, document 8.

¹² Ibid, section 7.7.2.

¹³ EPR 573 574, document 13.

¹⁴ EPR 573 574, document 14.

Commission's approach correct at law

18. Section 269ZHF(2) which sets out the primary consideration (referred to in REP 573 574 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.
19. 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.
20. 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 1.
21. 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 573 574.