



**Australian Government**  
**Department of Industry,  
Innovation and Science**

**Anti-Dumping  
Commission**

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*CUSTOMS ACT 1901 - PART XVB*

**STATEMENT OF ESSENTIAL FACTS  
NO. 455**

**REVIEW OF ANTI-DUMPING MEASURES APPLYING TO  
CONSUMER PINEAPPLE  
EXPORTED TO AUSTRALIA FROM THE KINGDOM OF  
THAILAND BY  
KUIBURI FRUIT CANNING COMPANY LIMITED  
AND  
KUIBURI FRUIT CUP COMPANY LIMITED**

June 2018

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**ABBREVIATIONS**

ABF	Australian Border Force
the Act	<i>Customs Act 1901</i>
ADN	Anti-Dumping Notice
the Applicant	Kuiburi Fruit Canning Co.,Ltd. and Kuiburi Fruit Cup Co.,Ltd as a joint exporter and joint applicant
the Assistant Minister	the Assistant Minister for Science, Jobs and Innovation
the Commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
consumer pineapple	Pineapple fruit - Consumer
CTMS	cost to make and sell
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
EPR	electronic public record
FSI pineapple	Pineapple fruit – Food services and industrial
GCL	Golden Circle Limited
the goods	the goods the subject of the application (also referred to as the goods under consideration or GUC)
IDD	interim dumping duty
KFC	Kuiburi Fruit Canning Company Limited
KFCup	Kuiburi Fruit Cup Company Limited
NIP	non-injurious price
OCOT	ordinary course of trade
the then Parliamentary Secretary	the then Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science
the Regulation	<i>Customs (International Obligations) Regulation 2015</i>
REP 333	<i>Anti-Dumping Commission Report No. 333</i>
REP 397	<i>Anti-Dumping Commission Report No. 397</i>
REQ	exporter questionnaire response
review period	1 October 2016 to 30 September 2017
SEF	statement of essential facts
SG&A	selling, general and administrative
Thailand	the Kingdom of Thailand
US	the United States of America
TPC	Thai Pineapple Canning Industry Corp Ltd

# 1 SUMMARY

## 1.1 Introduction

This statement of essential facts (SEF) sets out the facts on which the Commissioner of the Anti-Dumping Commission (the Commissioner) proposes to base his recommendations to the Assistant Minister for Science, Jobs and Innovation (the Assistant Minister)<sup>1</sup> in relation to a review of the anti-dumping measures (in the form of a dumping duty notice) applying to certain pineapple fruit - consumer (also referred to in this report as consumer pineapple or the goods) exported to Australia from the Kingdom of Thailand (Thailand) by Kuiburi Fruit Canning Company Limited (KFC) and Kuiburi Fruit Cup Company Limited (KFCup) as a joint exporter.

This review was initiated on 24 November 2017 after a joint application was lodged by KFC and KFCup.

KFC and KFCup considered it appropriate to review the anti-dumping measures because one or more of the variable factors relevant to the taking of the anti-dumping measures had changed. The variable factors that have allegedly changed are the export price and normal value.

KFC and KFCup are currently subject to the 'All other exporters' rate of dumping duties applicable to Thailand. This rate applies to all exporters of consumer pineapple from Thailand except Thai Pineapple Canning Industry Corp Ltd (TPC).<sup>2</sup>

## 1.2 Legislative background

Division 5 of Part XVB of the *Customs Act 1901* (the Act)<sup>3</sup> sets out, among other things, the procedures to be followed by the Commissioner when undertaking a review of anti-dumping measures.

Division 5 empowers the Commissioner to reject or not reject an application for review of anti-dumping measures. If the Commissioner does not reject the application, he is required to publish a notice indicating that it is proposed to review the anti-dumping measures covered by the application.<sup>4</sup>

The Commissioner must, within 110 days after the publication of the notice (or such longer period as is allowed)<sup>5</sup>, place on the public record a SEF on which the Commissioner proposes to base his recommendation to the Assistant Minister in relation to the review of anti-dumping measures.<sup>6</sup>

<sup>1</sup> For the purposes of this review, the Minister is the Assistant Minister for Science, Jobs and Innovation.

<sup>2</sup> TPC's exports of consumer pineapple to Australia are exempt from dumping duties.

<sup>3</sup> All legislative references in this report are to the *Customs Act 1901*, unless otherwise specified.

<sup>4</sup> Subsection 269ZC(4).

<sup>5</sup> Subsection 269ZDA(1). It is noted that, on 14 January 2017, the then Parliamentary Secretary for Industry, Innovation and Science as the relevant Minister at the time delegated the powers and functions of the Minister under section 269ZHI to the Commissioner. Refer to Anti-Dumping Notice (ADN) No. 2017/10 for further information.

<sup>6</sup> Subsection 269ZD(1).

### **1.3 Proposed recommendation**

The Commissioner proposes to recommend to the Assistant Minister that the dumping duty notice relating to the goods exported to Australia from Thailand by KFC and KFCup as a joint exporter be varied.

### **1.4 Final report**

The Commissioner's final report and recommendations must be provided to the Assistant Minister by **30 July 2018** or within such longer period as may be allowed.

## 2 BACKGROUND

### 2.1 Initiation

Following consideration of the application, the Commissioner decided not to reject the application and on 24 November 2017, initiated a review of the anti-dumping measures applying to the goods exported to Australia from Thailand by KFC and KFCup.

Notification of the initiation of the review was made in ADN No. 2017/171, which was published on the Anti-Dumping Commission (the Commission) website<sup>7</sup> on 24 November 2017.

*Consideration Report No. 453 and 455*<sup>8</sup> was also published on the Commission's website detailing the Commissioner's reasons for not rejecting the application.

For the purposes of assessing KFC and KFCup's variable factors in this review, a period of 1 October 2016 to 30 September 2017 (the review period) was examined.

### 2.2 The current anti-dumping measures

The anti-dumping measures applying to consumer pineapple were last ascertained in relation to KFC and KFC Cup in October 2016 following Continuation Inquiry No. 333. The findings of this inquiry were detailed in *Anti-Dumping Commission Report No. 333* (REP 333).

Neither KFC nor KFCup participated in Continuation Inquiry No. 333 and are therefore subject to the dumping duties applicable to 'All other exporters' from Thailand. This includes a fixed (confidential) amount per kilogram and a variable component of duty where the actual export price is below the ascertained export price.

### 2.3 History of the anti-dumping measures

Since 2001, the Commission has conducted numerous investigations, reviews and inquiries relating to consumer pineapple. Full details can be found on the EPR on the Commission's website. The matters most relevant to this review are outlined below:

#### 2.3.1 Original investigation

On 8 January 2001, Golden Circle Limited (GCL) lodged an application requesting that the then Minister for Justice and Customs publish dumping duty notices in respect of certain pineapple products exported to Australia from Thailand. The then Minister accepted the recommendations in *Trade Measures Report No. 41* and published dumping duty notices for consumer pineapple and pineapple fruit - food service and

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<sup>7</sup> [www.adcommission.gov.au](http://www.adcommission.gov.au) – refer to item 003 on the electronic public record (EPR) for Review No. 455.

<sup>8</sup> This Review No. 455 was initiated concurrently with Review No. 453 – a review of measures applying to exports of certain consumer pineapple exported to Australia from Thailand by Prime Products Industry Co.,Ltd. From an administrative aspect, various aspects of the two cases were handled in tandem until the SEF stage where this Review No. 455 was granted an extension, and the two cases were handled separately.

industrial (FSI pineapple) exported to Australia from Thailand with the exception of FSI pineapple exported by Malee Sampran Public Co.

### **2.3.2 First continuation inquiry**

On 26 February 2006, following consideration of applications by GCL, continuation inquiries and reviews of measures were initiated in relation to the anti-dumping measures imposed on consumer and FSI pineapple. On 28 September 2006, the then Minister for Justice and Customs accepted the recommendations contained in *Trade Measures Branch Report Nos 110 and 111* to continue the anti-dumping measures applying to both consumer and FSI pineapple for a further five years and fix different variable factors in relation to the anti-dumping measures.

On 4 April 2008, the Federal Court set aside the then Minister for Justice and Customs' decision to continue measures in relation to exports of consumer pineapple from TPC.

### **2.3.3 Second continuation inquiry**

On 15 April 2011, following consideration of an application for the continuation of measures by GCL, continuation inquiries and reviews of measures were initiated in relation to the anti-dumping measures imposed on consumer and FSI pineapple. The then Minister for Home Affairs, accepted the recommendations contained in *Trade Measures Branch Report Nos 171c and 171d*, to continue the anti-dumping measures for a further five years from 18 October 2011.

### **2.3.4 Accelerated review no. 191**

On 8 June 2012, KFC lodged an application for an accelerated review of the measures applicable to consumer pineapple exported from Thailand. The outcome of the accelerated review was published in Australian Customs Dumping Notice (ACDN) No. 2012/49 and the Commonwealth Gazette on 10 October 2012. The reasons of the findings of the accelerated review are contained in *International Trade Remedies Report No. 191 (REP 191)*.

As a result of this accelerated review no interim dumping duty (IDD) was to be payable unless KFC's export price was below the relevant normal value (this is referred to as a floor price).

### **2.3.5 Review no. 195**

On 19 December 2012, following an application by Siam Agro-Food Industry Public Company Ltd, a review of measures was initiated in relation to consumer pineapple from Thailand. On 29 January 2013 the review was extended to all exporters from Thailand. KFC participated in the review and the findings were published in *International Trade Remedies Branch Report No 195A (REP 195A)* on 26 July 2013. As a result of this review KFC remained subject to a floor price only.

### **2.3.6 Third continuation inquiry**

On 9 March 2016, following consideration of an application by GCL, a continuation inquiry was initiated in relation to the anti-dumping measures imposed on consumer and FSI

pineapple. The then Parliamentary Secretary accepted the recommendations contained in REP 333, to continue the anti-dumping measures for a further five years from 17 October 2016 (with the exception of consumer pineapple exported by TPC) and alter the variable factors in relation to exporters generally.

### **2.3.7 Accelerated review no. 397**

On 16 February 2017, KFCup lodged an application for an accelerated review of the dumping measures applying to consumer pineapple exported to Australia from Thailand. The outcome of the review was published in ADN No. 2017/69 on 29 May 2017.

The Commissioner found that KFCup was not eligible to apply for an accelerated review because the circumstances in which an accelerated review could be sought under subsection 269ZE(1) had not been satisfied.

In particular, the Commission found that a declaration that applied to KFCup had already been made under subsection 269ZG(3)(b) because the Commission determined that KFCup and KFC are joint exporters of the goods and a declaration has already been made under subsection 269ZG(3)(b) in respect of KFC. The reasons for the findings of the accelerated review are contained in *Final Report No. 397* (REP 397).

As a result of this accelerated review KFCup remained subject to the “All other exporters” rate in relation to Thailand; and the Commission established that KFC and KFCup are to be regarded as a joint exporter.

## **2.4 Review process**

If anti-dumping measures have been taken in respect of certain goods, an affected party may consider it appropriate to review those measures as they affect a particular exporter or exporters generally. Accordingly, the affected party may apply for,<sup>9</sup> or the Assistant Minister may request that the Commissioner conduct,<sup>10</sup> a review of those measures if one or more of the variable factors has changed.

The Assistant Minister may initiate a review at any time. However, a review application must not be lodged earlier than 12 months after publication of the dumping duty notice or countervailing duty notice or the notice(s) declaring the outcome of the last review of the dumping or countervailing duty notice.<sup>11</sup>

If an application for a review of anti-dumping measures is received and not rejected, the Commissioner has up to 155 days, or such longer time as is allowed, to conduct a review and report to the Assistant Minister on the review of the anti-dumping measures.<sup>12</sup>

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<sup>9</sup> Subsection 269ZA(1).

<sup>10</sup> Subsection 269ZA(3).

<sup>11</sup> Subsection 269ZA(2)(a).

<sup>12</sup> Subsection 269ZDA(1).

On 5 March 2018, the Commissioner approved an extension of 60 days to the SEF and final report for this review.<sup>13</sup> A second extension to the SEF and final report, of an additional 30 days was granted by the Commissioner on 7 May 2018.<sup>14</sup>

The final report and recommendations must now be provided to the Assistant Minister on or before **30 July 2018** or within such longer period as may be allowed.

## **2.5 Submissions received in relation to the initiation of the review**

No submissions were received as part of this review.

## **2.6 Responding to this SEF**

This SEF sets out the essential facts on which the Commissioner proposes to base his final recommendations to the Assistant Minister.

The SEF represents an important stage in the review as it informs interested parties of the facts established and allows them to make submissions in response to the SEF.

It is important to note that the SEF may not represent the final views of the Commissioner. The final report will recommend whether or not the dumping duty notice should be varied, and the extent of any IDD's that are, or should be, payable.

Interested parties are invited to make submissions to the Commissioner in response to the SEF within 20 days of the SEF being placed on the public record. The due date to lodge written submissions in response to this SEF therefore is **3 July 2018**. The Commissioner is not obliged to have regard to any submission made in response to the SEF received after this date if to do so would, in the opinion of the Commissioner, prevent the timely preparation of the report to the Assistant Minister.<sup>15</sup>

Submissions should preferably be emailed to [investigations3@adcommission.gov.au](mailto:investigations3@adcommission.gov.au). Alternatively, they may be sent to fax number +61 3 8539 2499, or posted to:

Director Investigations 3  
Anti-Dumping Commission  
GPO 2013  
CANBERRA ACT 2601  
AUSTRALIA

Confidential submissions must be clearly marked accordingly and a non-confidential version of any submission is required for inclusion on the public record.

A guide for making submissions is available at the Commission's website at [www.adcommission.gov.au](http://www.adcommission.gov.au).

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<sup>13</sup> ADN No. 2018/37 refers.

<sup>14</sup> ADN No. 2018/72 refers.

<sup>15</sup> Subsection 269ZDA(4).

## PUBLIC RECORD

The public record contains non-confidential submissions by interested parties and other publicly available documents. It is available by request in hard copy in Melbourne (phone (03) 8539 2478 to make an appointment), or online at [www.adcommission.gov.au](http://www.adcommission.gov.au)

Documents on the public record should be read in conjunction with this SEF.

### 3 THE GOODS AND LIKE GOODS

#### 3.1 The goods subject to the anti-dumping measures

The goods the subject to the anti-dumping measures in relation to Thailand are:

*Pineapple prepared or preserved in containers not exceeding one litre.*

Glace and/or dehydrated pineapple are excluded from the measures.

#### 3.2 Tariff classification

The goods are generally, but not exclusively, classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

Tariff	Statistical code	Description
2008.20.00	26	Pineapples – Canned, in containers not exceeding one litre
2008.20.00	28	Pineapples – Other

#### 3.3 Like goods

Subsection 269T(1) defines like goods as:

*“...goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration”.*

The definition of like goods is relevant in the context of this review in determining the variable factors. The Commission’s framework for assessing like goods is outlined in Chapter 2 of the Commission’s *Dumping and Subsidies Manual*.<sup>16</sup>

<sup>16</sup> Available at [www.adcommission.gov.au](http://www.adcommission.gov.au)

## 4 VARIABLE FACTORS

### 4.1 Finding

The Commissioner finds that the variable factors (being the export price and the normal value) relevant to the determination of dumping duty payable under the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) have changed.

The Commissioner proposes to recommend to the Assistant Minister that the dumping duty notice have effect as if different variable factors (being the export price and normal value) had been ascertained.

### 4.2 Cooperation with this review

Upon initiation of this review, the Commission provided KFC and KFCup with an exporter questionnaire to complete. KFC and KFCup provided detailed information and data in their response to the exporter questionnaire (REQ), including data relating to selected third country sales and details of the cost to make and sell (CTMS). Each applicant provided additional information when requested by the Commission.

The Commission conducted an on-site verification of the information provided in KFC and KFCup's REQ. The verification team verified the data of KFC and KFCup concurrently as the two entities are co-located. A report of the verification visit is available on the EPR.<sup>17</sup>

### 4.3 The exporter

#### 4.3.1 Definition

The term 'exporter' is not defined in the Act, however the Commission will generally identify the exporter as:

- a principal in the transaction located in the country of export from where the goods were shipped and who knowingly placed the goods in the hands of a carrier, courier, forwarding company, or their own vehicle for delivery to Australia; or
- a principal will be a person in the country of export who owns, or who has previously owned, the goods but need not be the owner at the time the goods were shipped.

#### 4.3.2 Company structure of KFC and KFCup

KFC was founded in 1992, as a private company limited by shares. The company manufactures and exports fruit products in cans, mainly pineapple. Joint-products of the production include juice and dehydrated fruit, and by-products include scrap which is sold as animal feed. In 2010 KFC invested in a production line for plastic cups. KFC set up a subsidiary for the plastic cup division being KFCup. KFCup is wholly controlled by KFC.

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<sup>17</sup> Item number 008 for Review No. 455.

KFCup has few staff. Most of its business functions, including fruit processing and sales, are managed through shared services with KFC.

#### 4.3.3 The Commission's assessment

The Commission considers that KFC and KFCup are jointly the manufacturer and exporter of the goods.<sup>18</sup> Consequently, the Commission has calculated variable factors jointly for KFC and KFCup, and recommends that KFC and KFCup's exports be subject to the same anti-dumping measures.

#### 4.4 Export price

Verification of KFC and KFCup's sales records confirmed that neither KFC nor KFCup exported the goods to Australia during the review period.

The Commission considers that the application of subsection 269TAB(1) for determining the export price would require KFC and KFCup to have exported the goods to Australia. As the Commission has found that KFC and KFCup did not export consumer pineapple to Australia during the review period, the Commission considers that there is insufficient information available to ascertain the export price of the goods using:

- the price paid or payable by the importer;<sup>19</sup>
- the price at which the goods were sold by the importer in Australia less prescribed deductions;<sup>20</sup> or
- the price having regard to all the circumstances of the exportation.<sup>21</sup>

The Commission has considered whether the requirements of subsection 269TAB(2A) have been met, and therefore whether KFC and KFCup's export price should be determined under subsection 269TAB(2B).

Subsection 269TAB(2A) specifies that the export price of the goods exported to Australia<sup>22</sup> may be determined by the Assistant Minister in accordance with subsection 269TAB(2B) if:

- (a) the price is being ascertained in relation to an exporter of those goods (whether the review is of the measures as they affect a particular exporter of those goods, or as they affect exporters of those goods generally); and
- (b) the Assistant Minister determines that there is insufficient or unreliable information to ascertain the price due to an absence or low volume of exports of those goods to Australia by that exporter having regard to the following:
  - (i) previous volumes of exports of those goods to Australia by that exporter;

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<sup>18</sup> Consistent with the findings in REP 397 and the verification visit report for KFC and KFCup for this review.

<sup>19</sup> Subsection 269TAB(1)(a).

<sup>20</sup> Subsection 269TAB(1)(b).

<sup>21</sup> Subsection 269TAB(1)(c).

<sup>22</sup> As KFC and KFCup did not export the goods to Australia during the review period, and as provided by subsection 269TAB(2C), the Commission has deemed such exports to have occurred for the purposes of applying subsections 269TAB(2A) and (2B).

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- (ii) patterns of trade for like goods;
- (iii) factors affecting patterns of trade for like goods that are not within the control of the exporter.

The Commission notes that this is a review whereby the price is being ascertained in relation to a particular exporter, therefore subsection 269TAB(2A)(a) is satisfied. The Commission's assessment of the factors outlined in subsection 269TAB(2A)(b) are set out in detail below.

### Previous volumes of exports by KFC and KFCup - subsection 269TAB(2A)(b)(i)

The Commission requested export volumes of the goods to Australia by KFC and KFCup for each of the four years prior to the review period as part of the REQ.

The REQ indicated that:

- KFC exported the goods to Australia in relatively large quantities in the 2013 and 2014 with no exports in 2015, 2016 and 2017; and
- KFCup has never exported to Australia.

The REQ was consistent with data the Commission obtained from the Australian Border Force (ABF) import database.

### Patterns of trade for like goods - subsection 269TAB(2A)(b)(ii)

ABF import data confirms that, in 2012, 2013 and 2014, Thailand was the largest source of imports of consumer pineapple to Australia, accounting for between 35 per cent and 48 per cent of total imports. In 2015, exports from Thailand dropped to 29 per cent of total imports. In 2016 and 2017, this proportion further decreased to 25 and 20 per cent respectively. Since 2015, the Philippines has been the largest source of imports of consumer pineapple, followed by Thailand. The Commission notes, that although imports of consumer pineapple from Thailand have decreased in both absolute and relative terms, the imports from Thailand and other countries remain substantial.

The Commission considers that KFC and KFCup's lack of exports to Australia during the review period is not because of a decline in the pattern of exports of like goods to Australia generally.

The Commission's analysis of import data for consumer pineapple is contained at **Confidential Attachment 1**.

### Factors affecting patterns of trade - subsection 269TAB(2A)(b)(iii)

The Commission notes that the explanatory memorandum for the *Customs Amendment (Anti-Dumping Measures) Bill 2017* identifies factors that may affect patterns of trade for like goods that are not within the control of the exporter. Such factors may include supply disruptions or natural events (such as flood, drought or fire) that affect production levels.

The Commission has found that KFC and KFCup have manufactured and sold consumer pineapple to third countries during the review period. KFC and KFCup have not claimed

that their ability to export like goods to Australia was affected by events outside of their control.

The Commission considers that there have been no factors affecting the pattern of trade for KFC and KFCup to Australia.

The Commission's consideration - subsection 269TAB(2A)

Having regard to the above, the Commission considers KFC and KFCup to be a 'low volume' exporter. The Commission considers that there is insufficient or unreliable information to ascertain the export price due to an absence or low volume of exports.

The Commission considers it appropriate to ascertain the export price in relation to KFC and KFCup under subsection 269TAB(2B). In accordance with this subsection, the Commission can determine the export price of the goods having regard to any of the following:

- a. the export price for the goods exported to Australia by KFC and KFCup established in accordance with subsection 269TAB(1) for a decision of a kind mentioned in subsection 269TAB(2D)<sup>23</sup>;
- b. the price paid or payable for like goods sold by KFC and KFCup in arms length transactions for exportation from Thailand to a third country determined to be an appropriate third country;
- c. the export price for like goods exported to Australia from Thailand by another exporter or exporters established in accordance with subsection 269TAB(1) for a decision mentioned in subsection 269TAB(2D).

Previous export price - subsection 269TAB(2B)(a)

The Commission has never established an export price for the goods exported to Australia by KFCup. Following an accelerated review, the then Trade Measures Branch established an export price for KFC for REP 191 in October 2012. In July 2013 the then Trade Measures Branch established an export price for KFC, following KFC's participation in a review. However, on both these occasions the export price was determined under subsection 269TAB(3). The current export price for the goods, was established in REP 333, also in accordance with subsection 269TAB(3).

Therefore, the Commission cannot determine the export price of the goods exported by KFC and KFCup in accordance with subsection 269TAB(2B)(a).

Export price to third countries - subsection 269TAB(2B)(b)

<sup>23</sup> For the purposes of paragraphs (2B)(a) and (c), the decisions are the following:

- (a) deciding to publish a notice under any of the following provisions:
  - (i) subsection 269TG(1) or (2) (dumping duties);
  - (ii) subsection 269TJ(1) or (2) (countervailing duties);
  - (iii) subsection 269ZDB(1) (reviews of anti-dumping measures);
  - (iv) subsection 269ZDBH(1) (anti-circumvention inquiries);
  - (v) subsection 269ZG(3) (accelerated review);
  - (vi) subsection 269ZHG(1) (continuation of anti-dumping measures);
- (b) any other decision under this Act of a kind prescribed by the regulations.

The Commission found that, during the review period, KFC sold like goods to 40 countries. KFCup sold like goods to the US only.

Export price from another exporter or exporters - subsection 269TAB(2B)(c)

The Commission has not determined any export prices in accordance with subsection 269TAB(1) for exports of consumer pineapple from Thailand within the time limitation prescribed in subsection 269TAB(2E).<sup>24</sup>

Therefore, the Commission cannot determine the export price of the goods exported to Australia by KFC and KFCup in accordance with subsection 269TAB(2B)(c) using the export price for like goods exported by another exporter or exporters.

The Commission's consideration - subsection 269TAB(2B)

For the reasons set out above, the Commission considers that it cannot determine the export price of the goods exported to Australia by KFC and KFCup under subsections 269TAB(2B)(a) and 269TAB(2B)(c).

The Commission has found that KFC and KFCup have sold like goods to third countries during the review period. Therefore, the Commission considers that it can determine the export price of the goods exported by KFC and KFCup to the US, in accordance with subsection 269TAB(2B). The export price was calculated at free on board terms.

The Commission's consideration of the US as an appropriate third country is outlined in **Non-Confidential Appendix A**.

The Commission found that the resulting ascertained export price for KFC and KFCup as a joint exporter in respect of consumer pineapple has changed since last ascertained as part of Continuation Inquiry No. 333. The export price calculation is at **Confidential Attachment 2**.

## 4.5 Normal value

Under subsection 269TAC(1) the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade (OCOT) for home consumption in the country of export in sales that are arms length transactions.

Subsection 269TAC(2)(a)(i) provides that the normal value of goods exported to Australia cannot be ascertained under subsection 269TAC(1) where there is an absence, or low volume, of sales of like goods in the market of the country of export. Low volume is defined by subsection 269TAC(14) as the domestic sales of like goods being less than five per cent of the total volume of exports of the goods by the exporter.

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<sup>24</sup> For the purposes of paragraph (2B)(c), the decision must be a decision made during the period:  
(a) beginning 2 years before the day the Commissioner published notice of the review under subsection 269ZC(4), (5) or (6); and  
(b) ending on the day notice of the review is published under subsection 269ZDB(1).

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Subsection 269TAC(2)(c) provides that, where the normal value cannot be ascertained under subsection 269TAC(1), the normal value of the goods is to be calculated as:

- the cost of production or manufacture of the goods in the country of export; and
- on the assumption that the goods had been sold for home consumption in the OCOT in the country of export, the administrative, selling and general (SG&A) costs associated with such a sale and the profit on that sale.

The Commission found that in relation to domestic sales by KFC and KFCup, there were insufficient quantities of domestic sales of like goods sold in the OCOT.

Therefore, the Commission constructed the normal value under subsection 269TAC(2)(c).

The Commission calculated constructed normal values of the goods exported by KFC and KFCup as:

- the cost of production of the goods exported to the US;
- SG&A costs on the assumption that the goods have been sold for home consumption in the OCOT under subsection 44(2) of the *Customs (International Obligations) Regulation 2015* (the Regulation); and
- an amount for profit, pursuant to subsection 45(3)(c) of the Regulation, based on the net profit realised by KFC and KFCup respectively during the review period.

In accordance with subsection 45(4) of the Regulation, if an amount of profit is calculated under subsection 45(3)(c) of the Regulation, this amount must not exceed the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export. To satisfy this requirement, the profit calculated for KFC and KFCup under subsection 45(3)(c) of the Regulation was compared to profits achieved by other exporters during the most recently completed reviews and inquiries, where exporters from Thailand cooperated. It is noted that no exporters cooperated in Continuation Inquiry No. 333, therefore the most contemporaneous information available is from Review No. 195. Relying on information from this review, the Commission is satisfied that the profit calculated under subsection 45(3)(c) of the Regulation for KFC and KFCup does not exceed the profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export.

In order to ensure the normal value is properly comparable with the export price of the goods, the Commission made the following upwards adjustments to the normal value under subsection 269TAC(9):

- export inland transport;
- export handling charges;
- export Commissions; and
- export packaging.

The normal value calculation is located at **Confidential Attachment 3**.

#### 4.6 Non-injurious price

Although KFC and KFCup did not allege that there has been a change in the non-injurious price (NIP) as part of their application, subsection 269T(4E) defines that, in relation to a review of a dumping duty notice, the variable factors are export price, normal value and NIP.

Under subsection 8(5B) of the Dumping Duty Act, if the NIP is less than the normal value, the Assistant Minister must have regard to the desirability of specifying a method such that the sum of the export price and the IDD payable does not exceed the NIP (the “lesser duty rule”). Subsection 269TACA(a) identifies the NIP of the goods exported to Australia as the minimum price necessary to remove the injury caused by the dumping.

In REP 333 (which examined the period of 1 January 2015 to 31 December 2015) the Commission found that the NIP was higher than the normal value for all exporters of the goods from Thailand and therefore the lesser duty rule did not apply. The data examined in REP 333 is considered to be the most contemporaneous data available.

The Commission has reviewed the evidence available for this review and is satisfied that NIP determined in REP 333 remains relevant .

The Commission therefore recommends that the NIP applicable to exports by KFC and KFCup be set equal to the current NIP applicable to all exporters of the goods from Thailand, as last ascertained for the purposes of REP 333. The NIP is higher than KFC and KFCup’s normal value. Therefore, the lesser duty rule has no application.

#### 4.7 Dumping margin

The Commission has calculated a dumping margin based on the revised variable factors. For this review the dumping margin for the review period has been calculated by comparing the weighted average export price of the goods during the review period, with the weighted average of corresponding normal values in accordance with subsection 269TACB(2)(a).

The dumping margin for KFC and KFCup is **negative 9.7%**.

The dumping margin calculation is located at at **Confidential Attachment 4**.

## **5 FINDINGS AND PROPOSED RECOMMENDATIONS**

### **5.1 Findings**

The Commissioner finds that, in relation to exports of consumer pineapple to Australia from Thailand for KFC and KFCup during the review period:

- the ascertained export price has changed; and
- the ascertained normal value has changed.

### **5.2 Proposed recommendations**

The Commissioner proposes to recommend to the Assistant Minister that the dumping duty notice in respect of exports of consumer pineapple from Thailand have effect as if different variable factors had been ascertained insofar as they relate to KFC and KFCup.

### **5.3 Proposed form of duty**

The current anti-dumping measures are in the form of a combination duty, i.e. a combination of fixed and variable duty. As KFC and KFCup's export price is higher than its normal value (i.e. the goods are not dumped), the Commissioner recommends that duties be calculated, in respect of any IDD that may become payable, using the floor price duty method.<sup>25</sup> This is consistent with prior practice of the Commission.

IDD will be payable on exports by KFC and KFCup, if the actual export price is below the ascertained normal value, which is a specified (confidential) amount per kilogram.

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<sup>25</sup> Pursuant to subsection 5(4) of the *Customs Tariff (Anti-Dumping) Regulation 2013*.

**APPENDICES AND ATTACHMENTS**

<b>Confidential Attachment 1</b>	Analysis of pineapple imports to Australia
<b>Confidential Attachment 2</b>	Calculation of export price
<b>Confidential Attachment 3</b>	Calculation of constructed normal value
<b>Confidential Attachment 4</b>	Calculation of dumping margin
<b>Non-confidential Appendix A</b>	Consideration of appropriate third country
<b>Confidential Attachment 5</b>	KFC's third country sales listing
<b>Confidential Attachment 6</b>	Volume of exports of preserved pineapple from Thailand in 2016

## APPENDIX A - CONSIDERATION OF APPROPRIATE THIRD COUNTRY

### Consideration of appropriate third country

#### Summary

For the reasons set out below, the Commission considers that the US is an appropriate third country for the purpose of determining an export price under subsection 269TAB(2B)(b).

#### Legislation

In determining whether a third country is an appropriate third country (in accordance with subsection 269TAB(2F)), the Commission may have regard to the following matters:

- (a) whether the volume of trade from Thailand to the third country is similar to the volume of trade from Thailand to Australia;<sup>26</sup>
- (b) whether the nature of the trade in goods concerned between Thailand and the third country is similar to the nature of trade between Thailand and Australia.<sup>27</sup>

Subsection 269TAB(2F) does not limit the matters that may be taken into account in determining whether a third country is an appropriate third country. Therefore, the Commission also had regard to other matters, being:

- consumer purchasing power,
- domestic production of like goods,
- similarities of products sold to third countries and products that may be sold to Australia; and
- import tariffs and anti-dumping measures.

The Commission also sought KFC and KFCup's opinion of which countries they considered would be the most suitable. KFC and KFCup recommended the US and Germany.<sup>28</sup>

#### Selection methodology

The Commission followed a two-step process to select an appropriate third country.

After reviewing KFC and KFCup's application<sup>29</sup> the Commission found that KFC sold like goods to 40 countries during the review period and that KFCup sold like goods to one country, being the US. The sales data for third country sales was however provided at an aggregate level of total sales volumes and amounts for each third country. The delivery

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<sup>26</sup> Subsection 269TAB(2F)(a).

<sup>27</sup> Subsection 269TAB(2F)(b).

<sup>28</sup> Email dated 23 November 2017.

<sup>29</sup> KFC and KFCup provided EQR spreadsheets in their application.

and payment terms for each country were denoted as 'various'. KFC's third party listing is located at **Confidential attachment 5**.

As the first step the Commission selected three countries, and requested KFC to provide total sales listings for each of these countries for the review period. As the second step in the process, the Commission analysed the new data provided to determine, out of the three countries, the most appropriate third country.

## **Step 1**

### **Volume of trade**

Under subsection 269TAB(2F)(a), the Commission may have regard to the volume of trade from Thailand to the third country, and Thailand to Australia. Subsection 269TAB(2F)(a) is not limited to a consideration of like goods, and since the Commission did not have reliable information concerning the volume of trade of consumer pineapple only, the Commission has based its analysis of all preserved pineapple products that fall under tariff code 20082000. This tariff code also includes FSI pineapple and goods that are exempt from dumping duties in Australia, such as glace and dehydrated pineapple.

The Commission compared the value of exports of preserved pineapple from Thailand to Australia and the countries listed at KFC's third party listing.<sup>30</sup> The Commission found that a number of KFC's export destinations (for the goods) had similar volume of trade as Australia at a macro level.

### **Consumer purchasing power**

The Commission consider that consumer purchasing power should be a factor in determining the appropriate third country because it is a determinant of how much consumers are prepared to pay for the goods. The Commission therefore matched Australia and the countries of similar level of trade as Australia to the Worldbank consumer purchasing power data 'Household final consumption expenditure per capital.

The Commission found that a number of the countries on KFC's third party listing had similar volume of trade and similar consumer purchasing power as Australia.

### **Domestic production of like goods in the third country**

In Investigation No. 41, and in each of the following continuation inquiries and reviews, the Commission found that consumer pineapple produced by the Australian industry directly competes with imports in the Australian market. The Commission considers that competition between domestically produced goods and imported goods is relevant to determining whether the export price in a third country is a suitable proxy for the export price of goods exported to Australia. Therefore, the Commission considered whether there are any domestic manufacturers that produce and sell like goods in the third country domestic market.

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<sup>30</sup> International Trade Centre (ITC) calculations based on The Customs department of the Kingdom of Thailand sourced from ITC Trade Map website accessed at [www.trademap.org](http://www.trademap.org)

The Commission found that of the countries of similar consumer purchasing power as Australia the US was the only country that grows pineapple domestically.

### **Step 1 summary**

The Commission decided to seek detailed listings from KFC of KFC's sales to US, Canada and France during the review period. It was found that France and Canada both had similar volume of trade and similar consumer purchasing power as Australia.

The Commission notes that, while the US has similar consumer purchasing power as Australia, the volume of total Thai exports of the goods to the US is much larger than the corresponding volume to Australia. However, the Commission included the US on the basis that the US is a pineapple growing country.

### **Step 2**

#### **Nature of trade**

In accordance with subsection 269TAB(2F)(b), the Commission has considered whether the nature of the trade in goods concerned between Thailand and the three selected third countries is similar to the nature of the trade between Thailand and Australia.

In comparing the nature of the trade, the Commission has considered the terms of trade, such as commercial trade terms including delivery and credit terms, and the level of trade.

The Commission has compared the terms of trade of KFC's transactions to the US, France and Canada during the review period to the terms of trade of KFC's sales of FSI pineapple to Australia during Continuation No. 334.<sup>31</sup> The Commission found that KFC sold pineapple to these markets at various level of trade and that the terms of trade differed by individual customer, rather than by country.

The Commission also found that the level of trade of KFC's customers in Canada and the US is similar to the level of trade of the final customers in Australia during Continuation Inquiry No. 334. The Commission found that KFC had one customer only in France. This customer was not at the same level of trade as KFC's customers in Australia during Continuation Inquiry No. 334.

The Commission has no other information to indicate that the nature of the trade in goods between Thailand and the US and Canada respectively, and between Thailand and Australia, differs.

Therefore, the Commission considers that the nature of the trade in the goods exported from Thailand by KFC to the US and Canada respectively is similar to the nature of the trade from Thailand to Australia. The Commission considers that the nature of the trade in the goods exported from Thailand by KFC to France is not similar to the nature of the trade from Thailand to Australia.

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<sup>31</sup> Subsection 269TAB(2F) is not limited to consideration of the goods.

### Other matters taken into account

In considering whether the US or Canada is the most appropriate third country for the purposes of determining an export price of the goods exported by KFC and KFCup, the Commission also had regard to the following matters:

- domestic production of like goods in the third country;
- similarities of products sold to third countries and products that may be sold to Australia;
- import tariffs and anti-dumping measures.

In having regard to each of the matters listed above, the Commission considered whether the relevant factors were sufficiently similar to conclude that the market conditions in the US and Canada are reasonably similar to the market conditions in Australia, and therefore, whether the export price of like goods sold by KFC and KFCup to the US or Canada would be a suitable proxy for the export price of the goods had KFC and KFCup exported the goods to Australia.

#### *Domestic production of like goods*

There are no growers or processors of pineapple in Canada due to unfavourable growing conditions. Pineapples grow in tropical and sub-tropical climates.

Until 20 years ago, Hawaii, in the US, supplied a large proportion of the world's canned pineapple. However, due to increasing labour costs and competition from Asian canneries the Hawaiian canneries later closed production. The large producers Dole and Del Monte, that formerly operated canneries in Hawaii, now own canneries in the Philippines that produce consumer pineapple. The pineapple plantations in Hawaii now supply fresh pineapple to the American market.<sup>32</sup> Canned pineapple is still processed in Puerto Rico, a territory of the US.

The Commission considers that the market structure for consumer pineapple in Canada is different to Australia, since Canada has no domestic industry for pineapple, fresh or processed.

The Commission further considers that the market structure for consumer pineapple in the US is similar to Australia in part, since pineapple is grown in the US and fresh American pineapple is sold in the US. However, the Commission notes that consumer pineapple canned in the US would make up but a small segment of the total US market for consumer pineapple.

#### *Similarity of products sold*

The Commission has found that KFC's exports of consumer pineapple to the US and Canada have similar product characteristics and specifications to the consumer pineapple that KFC and KFCup may sell to Australia in the future.

The Commission notes that KFCup did not sell to Canada during the review period. The Commission also notes that KFCup unsuccessfully applied for an accelerated review

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<sup>32</sup> Bartholomew et al: Hawaii Pineapple: The Rise and Fall of an Industry, HortScience October 2012

related to their exports of consumer pineapple in plastic cups in 2015, which indicates that KFCup intends to export consumer pineapple in plastic cups to Australia in the future.

Given the similarity of the characteristics and specifications of the consumer pineapple sold by KFC and KFCup to the US and Canada and the consumer pineapple that they may sell in the Australian market, and given that product characteristics and specifications are one determinant of price, the Commission considers that the export price of like goods sold by KFC and KFCup to the US would be a more suitable proxy for the export price of the goods had KFC and KFCup exported the goods to Australia.

#### *Import tariffs and anti-dumping measures*

Preserved pineapple products<sup>33</sup> exported to Canada from Thailand are subject to a zero per cent rate of duty. Canada does not impose anti-dumping measures on pineapple products.

Preserved pineapple products exported to the US from Thailand are subject to a rate of duty of 0.35 US cent per kg. The US does not impose anti-dumping measures on pineapple products.

Preserved pineapple products exported to Australia from Thailand are subject to a zero per cent rate of duty. Certain pineapple products, including the goods, are however subject to anti-dumping measures.

The Commission considers that neither the US nor Canada has a similar tariff rate to Australia.

#### **Step 2 summary**

In having regard to each of the matters listed above, the Commission considers that the US is an appropriate third country for the purpose of determining an export price under subsection 269TAB(2B)(b) because:

- the US has a domestic market for pineapple;
- the US purchased consumer pineapple from both KFC and KFCup during the review period; and
- KFC and KFCup considers the US to be an appropriate third country.

Accordingly, KFC and KFCup's sales to the US are a suitable country in determining the export price of the goods under subsection 269TAB(2B)(b).

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<sup>33</sup> Goods classified to tariff subheading 2008.20.00