



**CUSTOMS ACT 1901 - PART XVB**

**FINAL REPORT**  
**NO. 217**

**ALLEGED DUMPING OF PREPARED OR PRESERVED  
TOMATOES**

**EXPORTED FROM ITALY**

**21 March 2014**

**Final report 217 Prepared or preserved tomatoes - Italy**

**CONTENTS**

<b>CONTENTS</b> .....	<b>2</b>
<b>ABBREVIATIONS</b> .....	<b>4</b>
<b>1 SUMMARY AND RECOMMENDATIONS</b> .....	<b>5</b>
1.1 RECOMMENDATION .....	5
1.2 APPLICATION OF LAW TO FACTS .....	5
1.3 APPLICATION .....	5
1.4 INITIATION.....	5
1.5 PRELIMINARY AFFIRMATIVE DETERMINATION .....	6
1.6 STATEMENT OF ESSENTIAL FACTS.....	6
1.7 TERMINATIONS.....	7
1.8 REPORT 217.....	7
1.9 FINDINGS AND CONCLUSIONS .....	7
<b>2 BACKGROUND</b> .....	<b>10</b>
2.1 INITIATION.....	10
2.2 PREVIOUS INVESTIGATIONS .....	10
2.3 RESPONSES TO SEF 217 .....	11
2.4 SAFEGUARDS INQUIRY.....	11
<b>3 THE GOODS AND LIKE GOODS</b> .....	<b>14</b>
3.1 FINDING.....	14
3.2 LEGISLATIVE FRAMEWORK.....	14
3.3 THE GOODS .....	14
3.4 TARIFF CLASSIFICATION .....	15
3.5 VIEWS OF INTERESTED PARTIES .....	15
3.6 RESPONSES TO SEF 217 .....	15
3.7 EXEMPTION OF CERTAIN GOODS FROM MEASURES.....	16
3.8 CLOSE PROCESSED AGRICULTURAL GOODS.....	17
<b>4 THE AUSTRALIAN INDUSTRY</b> .....	<b>18</b>
4.1 FINDING.....	18
4.2 LEGISLATIVE FRAMEWORK.....	18
4.3 PRODUCTION PROCESS.....	18
4.4 THE COMMISSION'S ASSESSMENT .....	19
<b>5 AUSTRALIAN MARKET</b> .....	<b>20</b>
5.1 FINDINGS .....	20
5.2 MARKET SUPPLY AND STRUCTURE.....	20
5.3 MARKET SIZE.....	24
5.4 IMPORTERS.....	25
<b>6 MARKET SITUATION</b> .....	<b>26</b>
6.1 FINDING.....	26
6.2 BACKGROUND .....	26
6.3 MARKET SITUATION.....	27
6.4 ENQUIRY FRAMEWORK.....	29
6.5 RESPONSES.....	30
6.6 THE COMMISSION'S VIEW.....	30
6.7 RESPONSES TO SEF 217 .....	32
6.8 THE COMMISSION'S ASSESSMENT .....	33
<b>7 DUMPING INVESTIGATION</b> .....	<b>35</b>

## PUBLIC RECORD

7.1	FINDINGS .....	35
7.2	INTRODUCTION.....	35
7.3	SELECTED EXPORTERS .....	36
7.4	RESPONSES TO SEF 217 .....	37
7.5	APPROACH TO CALCULATION OF PRODUCT DUMPING MARGINS .....	37
7.6	DE CLEMENTE .....	44
7.7	CONSERVE ITALIA.....	45
7.8	COREX S.P.A.....	46
7.9	I.M.C.A. ....	47
7.10	LODATO .....	48
7.11	RESIDUAL EXPORTERS .....	48
7.12	UNCOOPERATIVE EXPORTERS.....	49
7.13	VOLUME OF DUMPED EXPORTS .....	50
<b>8</b>	<b>ECONOMIC CONDITION OF THE INDUSTRY AND HAS DUMPING CAUSED MATERIAL INJURY? .....</b>	<b>51</b>
8.1	FINDING.....	51
8.2	INTRODUCTION.....	51
8.3	APPROACH TO ASSESSING MATERIAL INJURY .....	51
8.4	RESPONSES TO SEF 217 .....	51
8.5	PRICE EFFECTS .....	56
8.6	VOLUME EFFECTS.....	59
8.7	OTHER ECONOMIC FACTORS.....	62
8.8	OTHER CAUSES OF INJURY .....	63
8.9	MATERIALITY .....	66
8.10	THE COMMISSION'S ASSESSMENT .....	67
<b>9</b>	<b>WILL DUMPING AND MATERIAL INJURY CONTINUE? .....</b>	<b>68</b>
9.1	FINDINGS .....	68
9.2	THE COMMISSION'S ASSESSMENT .....	68
<b>10</b>	<b>NON-INJURIOUS PRICE.....</b>	<b>70</b>
10.1	ASSESSMENT OF NIP .....	70
10.2	INTRODUCTION.....	70
10.3	SPCA'S CLAIMS .....	70
10.4	THE COMMISSION'S ASSESSMENT .....	70
<b>11</b>	<b>ANTI-DUMPING MEASURES .....</b>	<b>72</b>
11.1	UNDERTAKING.....	72
11.2	INTERIM DUMPING DUTIES.....	72
<b>12</b>	<b>RECOMMENDATIONS.....</b>	<b>74</b>
<b>13</b>	<b>APPENDICES AND ATTACHMENTS.....</b>	<b>77</b>

## PUBLIC RECORD

### ABBREVIATIONS

ACBPS	Australian Customs and Border Protection Service
ADA	Anti-Dumping Authority
ADN	Anti-Dumping Notice
AUD	Australian dollars
CFR	Cost and freight
CTM	Cost to make
CTMS	Cost to make & sell
CTS	Cost to sell
DDP	Duty Delivered Paid
EUR	Euro
Feger	Feger di Gerardo Ferraioli S.p.A.
FIS	Free into store
FOB	Free On Board
GAAP	Generally accepted accounting principles
La Doria	La Doria S.p.A.
NIP	Non-injurious Price
PAD	Preliminary Affirmative Determination
Parliamentary Secretary	Parliamentary Secretary to the Minister for Industry
RBA	Reserve Bank of Australia
SEF	Statement of Essential Facts
SPCA	SPC Ardmona Operations Ltd
The Act	<i>Customs Act 1901</i>
The applicant	SPC Ardmona Operations Ltd
The Commission	The Anti-Dumping Commission
The Commissioner	The Commissioner of the Anti-Dumping Commission
the goods	the goods the subject of the application (also referred to as the goods under consideration or GUC)
the Minister	the Minister for Industry
USP	Unsuppressed Selling Price
WTO	World Trade Organisation
WTO ADA	World Trade Organisation Anti-Dumping Agreement

## 1 SUMMARY AND RECOMMENDATIONS

This investigation is in response to an application by SPC Ardmona Operations Limited (SPCA) in relation to the allegation that dumped prepared or preserved tomatoes exported to Australia from Italy caused material injury to the Australian industry producing like goods.

This report (REP 217) sets out the Commissioner of the Anti-Dumping Commission's (the Commissioner) recommendation to the Parliamentary Secretary to the Minister for the Department of Industry (the Parliamentary Secretary) in relation to the investigation.

### 1.1 Recommendation

The Commissioner recommends to the Parliamentary Secretary that dumping duty notices be published in respect of prepared or preserved tomatoes exported to Australia from Italy for all exporters other than:

- La Doria S.p.A (La Doria); and
- Feger di Gerardo Ferraioli S.p.A (Feger).

If the Parliamentary Secretary accepts this recommendation, to give effect to the decision, the Parliamentary Secretary must sign the relevant notices and schedules, under s.269TG(1) and s.269TG(2) of the *Customs Act 1901* (the Act)<sup>1</sup>, and s.8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act).

### 1.2 Application of law to facts

#### 1.2.1 Authority to make decision

Division 2 of Part XVB of the Act sets out, among other matters, the procedures to be followed and the matters to be considered by the Commissioner in conducting investigations in relation to the goods covered by an application.

### 1.3 Application

On 17 June 2013, SPCA lodged an application requesting that the Minister publish a dumping duty notice in respect of prepared or preserved tomatoes exported to Australia from Italy.

The delegate of the Commissioner was satisfied that the application was made in the prescribed manner by a person entitled to make the application.

### 1.4 Initiation

After examining the application, the delegate of the Commissioner was satisfied that:

- there was an Australian industry in respect of like goods; and

---

<sup>1</sup> A reference to a part or section is a reference to a part or section of the *Customs Act 1901*.

## PUBLIC RECORD

- there appeared to be reasonable grounds for the publication of a dumping duty notice in respect of goods the subject of the application.

On 10 July 2013, the delegate of the Commissioner decided not to reject the application and published a notice in *The Australian* newspaper of the initiation of this investigation.

In respect of this investigation:

- the investigation period<sup>2</sup> for the purpose of assessing dumping is 1 July 2012 to 30 June 2013; and
- the injury analysis period for the purpose of determining whether material injury has been caused to the Australian industry is from 1 January 2009.

### 1.5 Preliminary Affirmative Determination

The Commissioner, after having regard to the application and submissions, was satisfied that there were sufficient grounds for the publication of a dumping duty notice in respect of prepared or preserved tomatoes exported to Australia by certain exporters from Italy, and made a preliminary affirmative determination (PAD)<sup>3</sup> to that effect on 1 November 2013. PAD 217 contains details of the decision and is available on the public record at <http://www.adcommission.gov.au/cases/EPR217.asp>.

To prevent material injury to the Australian industry occurring while the investigation continued, the Commissioner decided to require and take securities<sup>4</sup> in respect of any interim dumping duty that may become payable in respect of the goods from Italy that were entered into home consumption on or after 1 November 2013.

### 1.6 Statement of essential facts

The Commissioner must, within 110 days after the initiation of an investigation, or such longer period as the Minister allows, place on the public record a statement of the facts on which the Commissioner proposes to base a recommendation in relation to the application.

In formulating the Statement of Essential Facts (SEF) the Commissioner must have regard to the application concerned, any submissions concerning publication of the notice that are received by the Commission within 40 days after the date of initiation of the investigation, and any other matters considered relevant.

The initiation notice advised that the SEF for the investigation would be placed on the public record by 28 October 2013. However, the Commissioner was of the view that the prescribed 110 days to place the SEF on the public record for the investigation was likely to be insufficient and requested that the Minister extend the publication timeframes on two occasions.

---

<sup>2</sup> As defined by section. 269T(1)

<sup>3</sup> Under section 269TD.

<sup>4</sup> Under section 42

## **PUBLIC RECORD**

The Minister under s. 269ZHI of the Act extended the deadline for the publication of the SEF for the investigation to 4 February 2014. Anti-Dumping Notice (ADN) Nos 2013/84 and 2013/103 were issued on 25 October 2013 and 12 December 2013 respectively notifying the Minister's decision.

Interested parties were invited to make submissions to the Anti-Dumping Commission (the Commission) in response to the SEF within 20 days of the SEF being placed on the public record.

### **1.7 Terminations**

On 20 March 2014 the Commissioner terminated the dumping investigation so far as it relates to prepared or preserved tomatoes exported by:

- La Doria and;
- Feger.

Termination Report No. 217 (TER217) sets out the reasons for these terminations and is available on the public record.

### **1.8 Report 217**

In formulating the final report the Commissioner must have regard to the application concerned, any submissions concerning the publication of the notice to which the Commissioner has had regard to for the purpose of formulating SEF217, any submission in response to SEF217 received by the Commission within 20 days of the publication of the SEF, and any other matters considered relevant<sup>5</sup>.

### **1.9 Findings and conclusions**

The Commission has made the following findings and conclusions based on available information.

#### **1.9.1 The goods and like goods (Chapter 3 of this report)**

Locally produced prepared or preserved tomatoes are like to the goods the subject of the application.

#### **1.9.2 Australian industry (Chapter 4 of this report)**

There is an Australian industry producing like goods of prepared or preserved tomatoes, being SPCA.

#### **1.9.3 Market (Chapter 5 of this report)**

The Australian market for prepared or preserved tomatoes is predominately supplied to the retail sector by the local Australian producer and imports from Italy.

---

<sup>5</sup> Section 269TEA(3)

## PUBLIC RECORD

### 1.9.4 Market situation (Chapter 6 of this report)

The evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade).

### 1.9.5 Dumping (Chapter 7 of this report)

The Commission has assessed that prepared or preserved tomatoes exported to Australia from Italy during the investigation period were dumped (except by La Doria and Feger which were found to be negligible margins). The dumping margins determined for the other exporters are set out below.

Manufacturer/Exporter	Visited	Dumping margin
<b>Selected exporters</b>		
De Clemente Conserve S.p.A (De Clemente)	Yes	3.25%
Conserve Italia Soc. Coop Agr (Conserve Italia)	Yes	4.54%
I.M.C.A. S.p.A (IMCA)	No	26.35%
Lodato Gennaro & C. S.p.A.(Lodato)	No	26.35%
<b>Residual exporters</b>		
Attianese S.p.A.	No	4.24%
Fiamma Vesuviana Srl	No	4.24%
Greci Industria Alimentare S.p.A.	No	4.24%
Menu Srl	No	4.24%
Mutti S.p.A.	No	4.24%
Nolana Conserve Srl	No	4.24%
Princes Industrie Alimentari SRL	No	4.24%
Rispoli Luigi & C (S.R.L.)	No	4.24%
Steriltom Srl	No	4.24%
<b>Uncooperative exporters (All other)</b>	No	26.35%

### 1.9.6 Injury Assessment (Chapter 8 of this report)

The Commission is satisfied that the Australian industry producing like goods has experienced material injury in the form of;

- price depression;
- price suppression;
- reduced profits;
- reduced profitability;
- reduced revenues;
- reduced return on income; and
- loss of employment.



## **PUBLIC RECORD**

### **1.9.7 Has dumping caused material injury (Chapter 8 of this report)**

The Commission is satisfied that the material injury experienced by the Australian industry is as a result of dumped imports from Italy.

### **1.9.8 Will dumping and material injury continue? (Chapter 9 of this report)**

The Commission is satisfied that dumping and material injury will continue if measures are not imposed.

### **1.9.9 Non-injurious price (Chapter 10 of this report)**

The Commission considers that the non-injurious price (NIP) can be established by reference to a constructed minimum selling price that the Australian industry could be expected to achieve in a market unaffected by dumping.

### **1.9.10 Proposed measures (Chapter 11 of this report)**

The Commission has determined that the NIP exceeds normal values. This means that the recommended rates of interim dumping duty equals the corresponding dumping margins. The Commission recommends that the measures be in the form of a combined fixed and variable duty with the fixed component to be calculated as a percentage of the Free On Board (FOB) export price or the ascertained export price whichever is the greater.

## 2 BACKGROUND

### 2.1 Initiation

On 17 June 2013, an application was lodged by SPCA requesting that the Minister responsible for anti-dumping publish a dumping duty notice in respect of prepared or preserved tomatoes exported to Australia from Italy.

SPCA alleges the Australian industry has suffered material injury caused by prepared or preserved tomatoes exported to Australia from Italy at dumped prices.

The applicant claimed that injury occurred in the form of:

- loss of sales volume;
- reduced market share;
- reduced revenues;
- price depression;
- price suppression;
- reduced profits;
- reduced profitability;
- reduced cash flow; and
- reduced attractiveness for reinvestment in the tomato processing business.

The delegate of the Commissioner was satisfied that the application was made in the prescribed manner by a person entitled to make the application.

Public notification of initiation of the investigation was made on 10 July 2013 in *The Australian* newspaper and ADN No. 2013/59.

### 2.2 Previous investigations

In April 1992, the then Minister for Customs accepted the recommendations of the Anti-Dumping Authority (ADA) report (No. 68 of April 1992) and imposed countervailing duties on canned tomatoes from Italy, Spain and Thailand and dumping duties on the same goods from Italy and China.

Following a Federal Court challenge by an Italian exporter, the countervailing and dumping duties on canned tomatoes from Italy were removed in June 1993. Pursuant to a subsequent appeal to the Full Bench of that Court by the ADA, the Minister reinstated the duties. In February 1994, as a result of the Court decision, importers were advised that dumping and countervailing duties would be payable on future imports but that the amount of duty was to be reassessed. This was addressed in ADA report No. 124 of May 1994.

In 1997 the ADA (Report No. 169) concluded a continuation inquiry whereby countervailing and dumping duties on canned tomatoes from Italy were continued for a further five years.

In 2001, an application to continue the countervailing duty measures was submitted with the Trade Measures Branch of the Australian Customs and Border Protection Service

## **PUBLIC RECORD**

(ACBPS). Following an inquiry the ACBPS concluded that the measures should continue for a further five years (Trade Measures Report No. 52 refers). The Minister took steps to continue those measures for a further five years. The measures lapsed on 27 April 2007.

### **2.2.1 Current measures**

There are currently no dumping or countervailing duties applying to the goods exported to Australia.

## **2.3 Responses to SEF 217**

In formulating this report to the Parliamentary Secretary, the Commissioner has had regard to:

- the application concerned;
- any submissions concerning publication of the notice to which the Commissioner has had regard for the purpose of formulating SEF 217;
- SEF 217;
- any submission in response to SEF 217 received by the Commission within 20 days after the day that statement was placed on the Public Record; and
- any other matters considered relevant.

The Commission received the following submissions in response to SEF 217 and which were taken into account in preparing REP 217:

- Associazione Nazionale Industriali Conserve Alimenrari Vegerali (ANICAV)
- Attianese S.p.A.
- Conga Foods Pty Ltd
- Conserve Italia Soc. Coop. Agr
- De Clemente Conserve S.p.A.
- European Commission
- Feger di Gerado Ferraioli S.p.A.
- Food & Beverage Importers Association
- I.M.C.A. S.p.A.
- Italian Government
- Leo's Imports and Distributors Pty Ltd
- Lodato Gennaro & C. S.p.A.
- Mutti S.p.A.
- Princess Industrie Alimentari S.r.L
- SPC Ardmona Operations Ltd
- Woolworths Ltd.

## **2.4 Safeguards inquiry**

On 26 September 2013 the Productivity Commission released its accelerated report titled *Safeguards Inquiry into the Import of Processed Tomato Products, Productivity Commission Accelerated Report*. The final report was released on 12 December 2013.

Whilst many submissions were made by interested parties citing the accelerated report and claiming that the report supports the claims that exported Italian prepared or

## **Final report 217 Prepared or preserved tomatoes - Italy**

## PUBLIC RECORD

preserved tomatoes are not the cause of injury to the Australian industry, the safeguard inquiry uses different tests and has stated that the term *serious* injury used in the safeguards inquiry and *material* injury used in the anti-dumping context have different thresholds.

Furthermore the accelerated report also examined in addition to the Article 2.1 of the World Trade Organisation (WTO) Agreement on Safeguards, if provisional safeguard measures should apply using the test contained in Article 6 of the WTO Agreement on Safeguards, which states inter alia, *in critical circumstances where delay would cause damage (to the domestic industry) which it would be difficult to repair*. The Productivity Commission found no evidence to satisfy this test.

In the December 2013 report the Productivity Commission succinctly described the main differences of the Safeguards and anti-dumping investigations:

*Anti-dumping measures are distinct from safeguard measures, and different tests are applied for the two types of trade remedies. A key point of difference is that anti-dumping duties are intended to remedy injury caused when the price of imports is below their 'normal value'. By contrast, safeguard measures are intended to remedy injury caused by a recent surge in the quantity of imports. Dumping could be a factor causing a surge in imports if dumping was a recent occurrence. It does not follow that the imposition of dumping duties means safeguards are also warranted. Dumping may have been occurring over a long period of time, and is not a necessary or sufficient condition for a finding that safeguards are warranted.*

*A second point of difference relates to the level of injury that the domestic industry must have suffered for the measures to be applied. Anti-dumping duties can be applied if 'dumped' imports are causing or threatening to cause material injury to the domestic industry. Safeguard measures can be applied if increased imports are causing or threatening to cause serious injury to the domestic industry. Although the WTO Agreement on Safeguards provides no clear guidance on what constitutes serious injury, it is consistently interpreted as being a more demanding test than the material injury test applying in anti-dumping.*

*Because the two systems are intended to deal with different circumstances, and apply different tests to determine whether measures are warranted, there should be no expectation that a finding that measures are warranted under one system would lead to a similar finding under the other. Conversely, a finding that measures are not warranted under one system would not automatically lead to the same finding under the other<sup>6</sup>.*

The Productivity Commission found the evidence pursuant to Article 2.1 of the WTO Agreement on Safeguards to apply safeguard action did not exist namely:

*"Finding 2.1*

---

<sup>6</sup> Productivity Commission, Safeguards Inquiry into the Import of Processed Tomato Products Report, 12 December 2013, p 20.

## PUBLIC RECORD

*There has not been a sufficient increase in import volumes of the products under reference to satisfy the requirement under Article 2.1 of the WTO Agreement on Safeguards. However, there is evidence that imports have increased relative to domestic production, sufficient to meet the WTO standard. This change was largely driven by changes in domestic production.*

### *Finding 2.2*

*Increased imports of the processed tomato products under reference have not caused serious injury to the domestic industry producing like or directly competitive products. Instead, the injury has resulted from a combination of factors, including:*

- *sustained competitive pressure from imports*
- *supermarket private label strategies, facilitated by the appreciation of the Australian dollar*
- *extreme weather events.*

*Therefore, safeguard action under the WTO Agreement on Safeguards is not warranted”.*<sup>7</sup>

The Commission supports this view.

---

<sup>7</sup> Ibid p15

## 3 THE GOODS AND LIKE GOODS

### 3.1 Finding

The Commission considers that locally produced prepared or preserved tomatoes are like to the goods the subject of the application (the goods).

### 3.2 Legislative framework

Subsection 269TC(1) of the Act requires that the Commissioner must reject an application for a dumping duty notice if, inter alia, the Commissioner is not satisfied that there is, or is likely to be established, an Australian industry in respect of like goods.

In making this assessment, the Commissioner must firstly determine that the goods produced by the Australian industry are “like” to the imported 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”.*

An Australian industry can apply for relief from injury caused by dumped or subsidised imports even if the goods it produces are not identical to those imported. The industry must however, produce goods that are “like” to the imported goods.

Where the locally produced goods and the imported goods are not alike in all respects, the Commission assesses whether they have characteristics closely resembling each other against the following considerations:

- i. physical likeness;
- ii. commercial likeness;
- iii. functional likeness; and
- iv. production likeness.

### 3.3 The goods

The goods the subject of the application (the goods) are:

Tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

The goods excluded from this definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

### 3.4 Tariff classification

The goods are currently classified to subheading 2002.10.00 (statistical code 60) to Schedule 3 of the *Customs Tariff Act 1995*. For Italian prepared or preserved tomatoes a Customs duty rate of 5% applies.

### 3.5 Views of interested parties

The majority of interested parties were in agreement that the Australian industry produced like goods to those exported from Italy. However the Commission was informed that there may be another producer of like goods apart from SPCA.

The Commission's inquiries into whether there are other members of the Australian industry producing like goods reveals that there are other manufacturers of preserved tomatoes goods in containers exceeding 1.14 litres. Given that these goods were primarily destined for the food, service and industrial sector and did not compete against imports in the retail sector, the Commission considers that these other manufacturers do not produce like goods and are therefore not considered part of the Australian industry.

Some interested parties submitted that a significant factor to consider when defining like goods is the significant commercial differences that occur between a private label and a proprietary label sold into the retail sector. Suppliers of proprietary label products incur significant promotional expenditure to market their products with retailers. In contrast, suppliers of private label products do not incur such expenses as promotional activity for these products are the responsibility of the retailers.

It was suggested that for proprietary labels, a sales force, significant or otherwise, is required to gather orders and provide merchandising support. This is in addition to the promotional support required to maintain a presence on the market shelf.

A further claim was made by importers that the Australian made goods are not like to the goods exported from Italy due to a claim that tomato paste was used by SPCA in producing some of their goods, which was not present in the Italian imported goods.

### 3.6 Responses to SEF 217

In response to SEF 217, Associazione Nazionale Industriali Conserve Alimentarie Vegetali (ANICAV) indicated that the Italian peeled tomato products and the San Marzano tomatoes were not like goods. It indicated that peeled tomatoes were a different variety to those grown in Australia and the San Marzano tomatoes are *Protected Denomination of Origin* certified. The San Marzano tomatoes are a thicker flesh and fewer seeds and cannot be grown or certified in Australia. The peeled tomatoes are a *long tomato* and are not grown or used by the Australian industry. Furthermore ANICAV indicated that SPCA uses tomato paste in some of its products for which is not included in the Italian peeled tomatoes.

Based on information gathered from SPCA, importers and exporters during the investigation the Commission considers that the Australian industry produces like goods on the following grounds:

- *physical likeness* - the primary physical characteristics of imported and locally produced goods are similar. Whilst recipes differed slightly amongst the numerous

## PUBLIC RECORD

producers, the key ingredient in the imported and locally produced goods are raw tomatoes and tomato juice. SPCA's products were also sold in the same packaging as the imported goods, being available in 400 gram (g) net weighted and 800g size cans. Whilst SPCA may use tomato paste to thicken the juice surrounding the tomatoes in the can in some of its products, many Italian exporters used a tomato juice concentrate for similar purposes.

- *commercial likeness* - the imported and locally produced goods are commercially alike, directly competitive and are sold to common customers. Whilst differences exist in terms of the promotional activities associated with sales of proprietary and private label products, the Commission does not consider this diminishes the view that prepared or preserved tomatoes are commercially alike. This issue is further addressed at section 5.2.1 of this report;
- *functional likeness* - the imported and locally produced goods are functionally alike as they have the same end-uses; and
- *production likeness* – based on visits to SPCA and exporters of prepared or preserved tomatoes, the Commission has confirmed that the imported and locally produced goods are manufactured in a similar manner.

For the reasons outlined above, the Commission is satisfied that SPCA produces goods that have characteristics closely resembling the goods exported to Australia, including Italian prepared or preserved tomatoes using peeled tomatoes, San Marzano variety or organic tomatoes.

Consequently the Commission considers that the goods manufactured by SPCA are like goods to the goods under consideration.

### 3.7 Exemption of certain goods from measures

In response to SEF 217, Woolworths Ltd indicated that the organic range of tomato products should be excluded from the examination as the Australian industry does not make such goods. Furthermore it indicated that its customers specifically seek the certified organic tomatoes and will pay the premium that already exists. Woolworths considers a dumping duty is not appropriate to products not made in Australia and for those that don't compete with the domestically made goods.

In the event that measures are imposed on prepared or preserved tomatoes exported from Italy, all types that conform to the goods description will be subject to the dumping duty notice unless the Parliamentary Secretary exempts particular goods. For goods to be exempt from measures, the Parliamentary Secretary must be satisfied:

- that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade; or
- that a Tariff Concession Order is in place in respect of those goods; or
- that the goods, being articles of merchandise, are for use as samples for the sale of similar goods.

Woolworths has requested that the organic range of import products be exempt from the measures on the basis that like or directly competitive goods are not offered for sale in



## **PUBLIC RECORD**

Australia. The Commission will conduct separate inquiries following the imposition of measures into whether the nominated goods should be exempt from measures.

### **3.8 Close processed agricultural goods**

In its application SPCA indicated that the prepared or preserved tomato products are not close processed agricultural products. SPCA stated the fresh tomatoes used in the production of the prepared or preserved tomato products are not substantially devoted to the production of prepared or preserved tomato products.

The Commission was advised that the vast majority of tomatoes grown for processing in Australia are used in the production of tomato paste, passata and other tomato based products with a small portion being used in the production of the prepared or preserved tomatoes.

The Commission found that the tomatoes sourced by SPCA were purchased from a single supplier. The Commission was informed that this single source was a grower and processor of tomatoes and also acted as a trader for other tomato growers.

The Commission considers that the goods are not close processed agricultural goods.

## 4 THE AUSTRALIAN INDUSTRY

### 4.1 Finding

The Commission has found that:

- the like goods were wholly manufactured in Australia; and
- there is an Australian industry consisting of SPCA that produce like goods in Australia.

### 4.2 Legislative framework

The Commission must be satisfied that “like” goods are produced in Australia. Subsections 269T(2) and 269T(3) of the Act specify that for goods to be regarded as being produced in Australia, they must be wholly or partly manufactured in Australia. In order for the goods to be considered as partly manufactured in Australia, at least one substantial process in the manufacture of the goods must be carried out in Australia.

### 4.3 Production process

SPCA advised the production process in relation to prepared or preserved tomatoes is standardised for all products with marginal differences made at various production stages depending on specific product variables (such as cut profile and value adding).

SPCA submitted it undertakes a substantial process of manufacture in the production of like goods. The Commission was able to confirm during its verification visit the following production activities performed by SPCA:

#### 1. Raw material delivery

Fresh tomatoes are delivered to SPCA’s production facility directly from local tomato growers. SPCA requires tomatoes to be delivered on the same day they are harvested from the vine.

#### 2. Washing, grading and peeling

SPCA aims to process tomatoes from delivery to an intermediate finished product (unlabelled can) within 24 hours.

Accordingly, fresh tomatoes are moved from the point of delivery to the processing line and are washed and graded into tiers of quality:

- Higher quality tomatoes are graded for processing as canned prepared or preserved tomato products; and
- Lower quality tomatoes are graded for use in the production of juice which is either used as filling in the canning process or evaporated and used to produce concentrates and paste products.

Tomatoes bound for processing are then peeled using a steam-peeling process.

### 3. Second grading

Peeled tomatoes are then graded for a second time according to peeled quality. Higher quality peeled tomatoes are selected for processing for whole tomato products, lower quality tomatoes are graded for dice, chop or crushed cut profiles in descending order depending on specific quality profiles.

### 4. Filling and liquid adding

Once sorted and processed according to cut profile, all products are moved for canning. Each can is filled with standardised ratios of processed tomatoes to liquid filling stage (juice derived from stage 2). Products are then sorted by can size and cut profile.

At this stage, depending on specific product requirements, certain cans are produced with additional ingredients such as herbs, spices and other flavouring. These products are internally delineated by can size, cut profile and additional ingredients and are summarily referred to as 'value added' products.

### 5. Pasteurisation, cooling and labelling

Once filled to product specifications, cans are sealed and pasteurised (cooked) to preserve the product and then moved to cool to ambient temperature.

Once cooled, all unlabelled cans (referred to as the 'bright can' stage) are moved to storage according to product grouping.

Cans are labelled depending on specific order requirements and customer demands on an as-needed basis prior to shipping.

#### **4.3.1 Other producers**

The Commission became aware of other manufacturers of prepared or preserved tomatoes. The Commission wrote to other prospective manufacturers of the goods and was informed that they do not produce prepared or preserved tomatoes in containers not exceeding 1.14 litres.

### **4.4 The Commission's assessment**

The Commission has found that:

- there is an Australian industry<sup>8</sup> consisting of SPCA producing like goods; and
- the like goods were wholly manufactured in Australia.

The Commission considers SPCA to be the only manufacturer of the goods in Australia with container sizes not exceeding 1.14 litres.

---

<sup>8</sup> For the remainder of the report the term, Australian industry and SPCA are used interchangeably.

## **5 AUSTRALIAN MARKET**

### **5.1 Findings**

The Commission estimates that in the 2013 financial year the size of the prepared or preserved tomatoes market was approximately 54,000 tonnes. The Commission has established that the Australian market is predominantly supplied by importers and SPCA with the goods being sold into the retail sector.

### **5.2 Market supply and structure**

The Commission found the goods, apart from a small quantity of sales to the food service industry sector, are sold to retail consumers via supermarkets and grocery stores and the smaller independent food outlets. Retailer supply chains for the goods are via importations on behalf of the retail outlet, direct importations by the retail outlet and, or direct purchases from the Australian industry.

The Commission notes that whilst there are a large number of importers of prepared or preserved tomatoes from Italy, the vast bulk of the imported goods are either purchased directly by the major supermarkets or on their behalf via a smaller subset of importers.

SPCA sells directly to the major supermarkets and other retail outlets. The Commission did not find other Australian manufacturers of like goods selling into the Australian market.

Despite the numerous outlets available to the retail consumer, the Commission estimated that approximately 82% of all prepared or preserved tomato sales occur via the major supermarkets comprising Coles, Woolworths, Aldi and the Metcash network of supermarkets (IGA etc).

#### **5.2.1 Products**

The Commission found the goods can be separated into two groups being private labels and proprietary labels. The distinction between the two labels is that private labels are brands created and owned by the supermarkets with the goods being made under toll type arrangements. Examples of private label goods include Coles Brand, Coles Smart Buy, Woolworths Home Brand, Woolworths Select, etc.

A proprietary label is generally created and owned by the manufacturer or distributor such as Annalisa, Ardmona, Edgell, Val Verde, etc.

Within the two types of label categories the Commission also found that there were five general sub-categories. These were diced/chopped, crushed, whole peeled, value added and miscellaneous. Value added were prepared or preserved tomatoes with the addition of other ingredients such as herbs and vegetables and in some instances tomato paste. The miscellaneous category included prepared or preserved baby tomatoes, cherry tomatoes and organic.

### **5.2.2 Quality**

The Commission examined the prepared or preserved tomatoes pricing and was informed by interested parties, that the consumer price points for the various goods was a function of the label appearance, type of can (lacquered with easy opening lid (ring pull top or standard can) and on opening, sight, smell and taste. In terms of production costs, premium priced products typically were more expensive to produce due to the container type being an internally lacquered can with a ring pull top. Standard cans with standard lids were typically cheaper due to the raw material costs of these cans.

Interested parties indicated that content quality also had an impact on producer's costs. A higher brix (measure of sugar content) resulted in a thicker and a more flavoursome product due to, primarily, the inclusion of a tomato juice concentrate.

### **5.2.3 Buying arrangements**

An important element in the market structure of the goods is the manner in which the major supermarkets procure the goods.

The Commission found that private labels are usually purchased under tender. Before being included in the tender offer, the producer must be certified with the major retailer. Once certified they are invited to tender in accordance with product specifications and volumes required. The tender documents are forwarded to producers before the commencement of the harvest season.

Once parties agree on price, it is fixed for the term of the contract which is usually twelve months with shipment of the goods occurring as required up to the level of the contracted volume.

Retailers advised that price was not the only consideration in the awarding of contracts. Other considerations include the business relationship, quality, and ability to supply the contracted volume.

For proprietary labels, major retailers are often approached by suppliers or distributors. The purchase price is negotiated however the invoice price is not the final price. For proprietary label purchases, major retailers seek a promotional plan. In this plan vendors indicate when and by how much they will spend on promoting their products. For items on special to the retail customer, the vendor typically funds the discount to the shelf price.

For proprietary labelled products, in addition to the promotional expenditure, vendors were also required to provide trading terms. The Commission found that these varied between retailers and varied by function. The trading terms were again an adjustment to the invoiced selling prices for various activities undertaken by the retailer.

### **5.2.4 Selling arrangements**

The Commission found that the label had relevance to the sale and marketing of the goods.

Private labels were marketed by the supermarkets and any promotion or discounts were funded by the supermarket. In contrast, proprietary label goods were sold with a

## **PUBLIC RECORD**

promotion schedule which included inter alia, price reductions and other promotion strategies. The Commission found that pricing promotions or price discounting was funded in the main by the vendor of the goods.

Supermarkets maintain a shelving plan that shows the locations of particular products on the supermarket shelves. Typically product categories are grouped together, for example prepared or preserved tomatoes. Within the plan are preferred positions, such as eye height shelving which is generally reserved for products with the highest sales volume. The top shelf and bottom shelves are reserved for products that are low volume sellers and, or are soon to be deleted from the product range.

From the evidence provided by SPCA the Commission confirmed that private label products were located in the preferred locations whilst its products were placed in the unfavourable locations on the shelving plan.

The Commission considered the distinction between private and proprietary labels important when examining the vendors' selling documents and the purchasers purchasing documents as the invoice price was not always an accurate determination of the net sales revenue for the vendor or the purchase price for the buyer.

Accordingly, when the Commission examined wholesale prices it eliminated all selling terms and promotions to achieve net selling prices.

### **5.2.5 Pricing tiers**

Interested parties indicated the goods were broken into either three or four tiers of pricing when sold to the retail customer. The Commission examined this and found that prices could generally be grouped into the following four label categories from highest to lowest priced:

- Local proprietary labels;
- Italian proprietary labels;
- Premium private labels; and
- Generic or value private labels.

Figure 1 below shows the high and low range of 400g chopped/diced retail shelf prices over the investigation period for the four categories. Similar pricing patterns were evident in 800g cans.

## PUBLIC RECORD

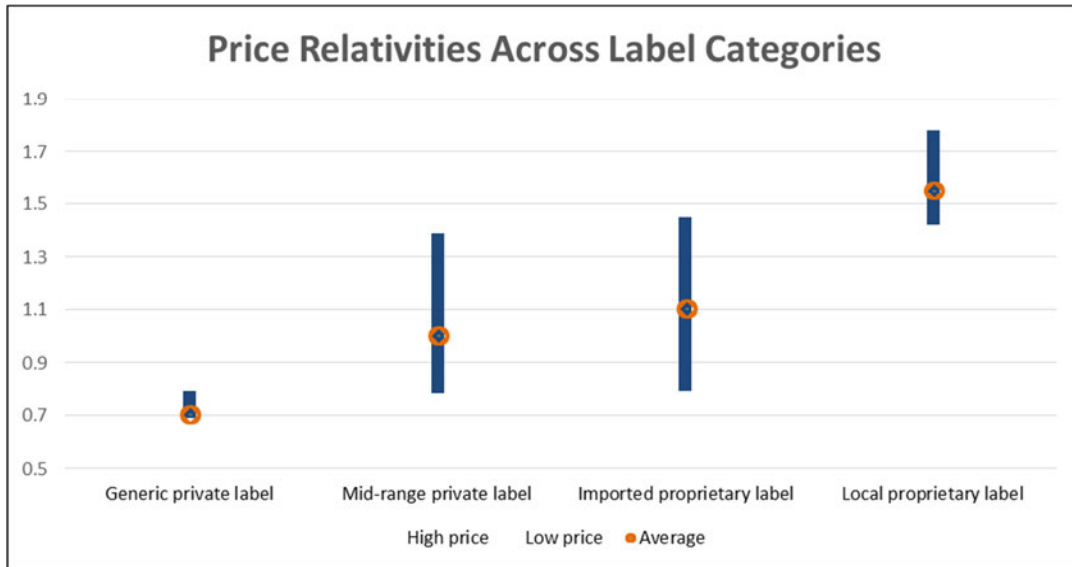


Figure 1 – Retail shelf prices by label categories

Within each of the label categories, further price differentiation was evident which largely reflected differences in the recipes or quality of tomatoes. Whole, chopped or diced cans were generally evenly priced on a per kilo basis, followed by organic and value added goods.

To examine these prices the Commission requested point of sale selling prices from the retailers. The Commission also received AZTEC point of sale data via SPCA. This included sales from the major retailers except Aldi Partnership. The available data confirmed the tiers of pricing discussed above.

The Commission found that for the goods under investigation, in particular SPCA's goods, proprietary Italian labels and the premium private labels, sales volumes notably increased in response to price discounting. The Commission examined the impacts of price discounting and volume impacts from the information supplied by retailers and found a strong correlation between price reductions and increase sales volumes.

Figure 2 indicates the impact on volume for premium private or proprietary labelled goods when price discounting occurs at the retail level. It shows the sales volumes are highly responsive to price decreases.

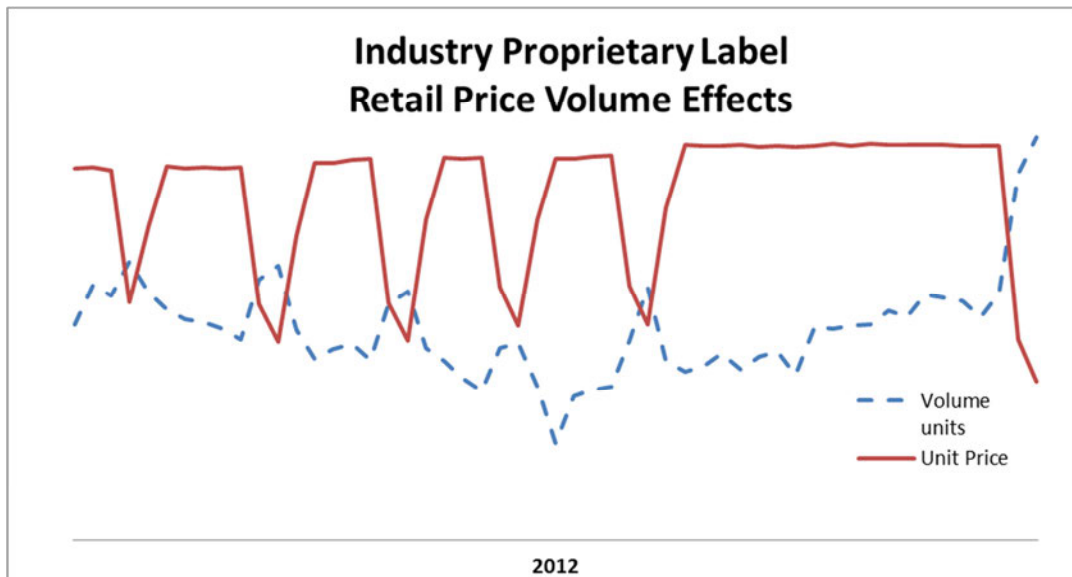


Figure 2 – Relationship between prices and volumes of proprietary label

The Commission also examined the generic or value end of prepared or preserved tomatoes with regard to price elasticity of demand and found that pricing was static in this category and the volume sold moved more in line with seasonal trends—a slight tapering of sales volumes in the warmer months.

In April 2011, Coles extended the ‘*down down*’ promotional strategy to its premium private label reducing a 400g (net) can from \$1.19 to \$0.80 (retail price). This dramatically changed the retail pricing of Italian prepared or preserved tomatoes. The relevance of the ‘*down down*’ program is that Coles indicated that price will remain low.

### 5.3 Market size

The Commission used information gathered from SPCA, exporters, importers and the ACBPS import database to examine the Australian market size for prepared or preserved tomatoes.

Figure 3 depicts the Commission’s estimate of the Australian market size for prepared or preserved tomatoes. It is estimated that the Australian market for prepared or preserved tomatoes was approximately 54,000 tonnes in the 2013 financial year. The Commission found the market size has decreased approximately 8.9% when compared to the 2010 financial year.



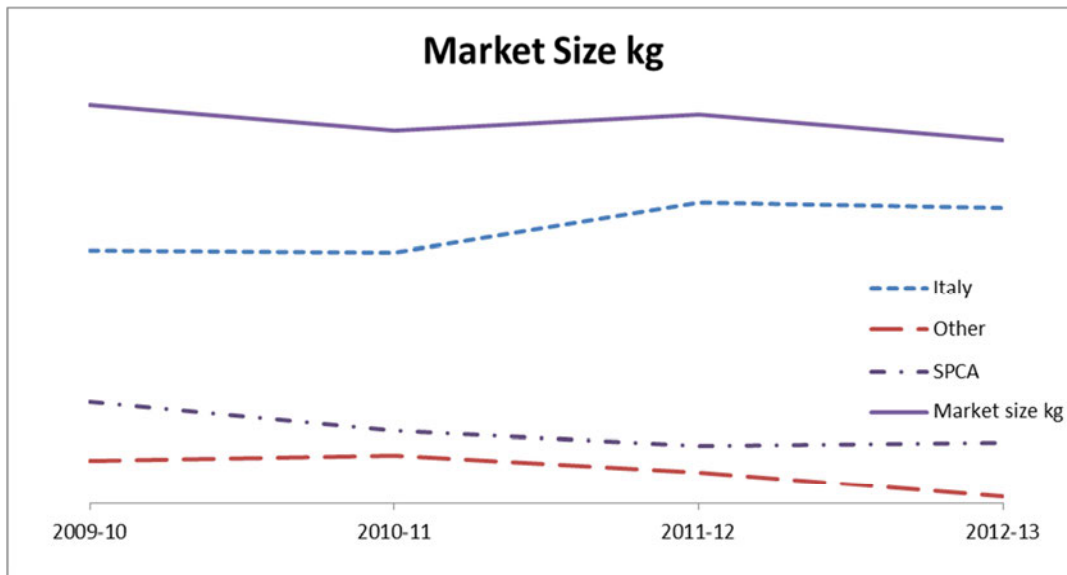


Figure 3 – Australian market size using ACBPS data base and SPCA sales data

When examined in totality the volume of the goods exported from Italy increased 16.4% since June 2010, whilst SPCA and other countries' volumes decreased by 39.7% and 84.9% respectively.

## 5.4 Importers

The Commission performed a search of the ACBPS import database and identified importers of prepared or preserved tomatoes. Relevant information was requested from the following importers with a view to undertaking verification of information provided:

- Woolworths Ltd
- Grocery Holdings Pty Ltd
- Metcash Trading Ltd
- Aldi Partnership
- Conga Foods
- Orange and Green Pty Ltd
- P&T Basile Pty Ltd
- Leo's Imports

Aldi Partnership and Leo's Imports declined to provide requested information and did not cooperate with the investigation. Verification was undertaken with the remaining importers which accounted for approximately 60% to 70% of prepared or preserved tomato volume exported from Italy during the investigation period.

Visit reports for the above importers can be found on the electronic public record available on the Commission website at <http://www.adcommission.gov.au/>.

The Commission found the importers generally operated in one of three ways – as an indent importer selling the goods on the water before arrival into Australia, importing the goods and acting as a distributor to smaller retailers or importers purchasing the goods either from the exporter or via an intermediary, and then selling the goods in their store to retail customers.

## 6 MARKET SITUATION

### 6.1 Finding

The Commission considers that there is no situation in the market in Italy such that sales in Italy are not suitable for use in determining a price under subsection 269TAC (1) of the Act.

### 6.2 Background

Section 269TAC(1) of the Act provides that the normal value of any goods exported to Australia is the price paid or payable for like goods sold domestically in the ordinary course of trade in arm's length transactions. However, s.269TAC(2)(a)(ii) provides that the normal value of the goods exported to Australia cannot be determined under subsection (1) where the Minister is satisfied that:

*'...because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1)'.*

One such situation may be where domestic selling prices in the country of export have been materially affected by government influence rendering those prices unsuitable for use in establishing normal values.

Where such a market situation exists, normal value cannot be established on the basis of domestic sales. Instead, the normal value may be determined on the basis of a cost construction or third country sales. Therefore, a determination as to whether there is a market situation has potential consequences for the assessment of normal value and dumping margins.

In its application SPCA did not claim that a 'market situation' exists in Italy and domestic sales of prepared or preserved tomatoes are not suitable for determining normal values. During previous investigations into the alleged dumping and/or subsidisation of goods exported from member countries within the European Union (EU), processed dried currants being the most recent example, the Commission has become aware of certain agricultural development and support policies that are administered by EU member states (in cooperation with the European Committee (EC) and other bodies).

These policies provide for various forms of support and development assistance to be delivered to agricultural sectors including, but not limited to, the cultivation of products for processing.

Preliminary research into publically available information highlighted a number of common policies established under formal EU regulations which may apply to the cultivation of tomatoes for processing, and the production of like goods sold into the Italian domestic market.

The primary agricultural policy applicable throughout the EU (and administered by the European Commission) is referred to as the Common Agricultural Policy (CAP). The European Commission states that the main aims of the CAP are: "[T]o improve

## PUBLIC RECORD

agricultural productivity, so that consumers have a stable supply of affordable food. To ensure that EU farmers can make a reasonable living.”<sup>9</sup>

The Commission understands that the CAP has undergone a number of reforms. In 2003 reforms were initiated shifting support towards direct aids to farmers, and away from price support (commonly referred to generally as ‘de-coupling’ reforms). This has significantly changed the mechanisms through which support mechanisms and benefits are administered to achieve its key policy objectives.

Available information also indicated to the Commission that the CAP is still operational within the EU and is administered, including within Italy.

At the time of initiation, the Commission considered that there was sufficient information to warrant inquiring into whether the EU’s agricultural policies created a market situation that led to a distortion of competitive market conditions to such an extent that domestic sales were no longer suitable for establishing normal values.

### 6.3 Market situation

The Act does not provide any definition of particular circumstances or factors which would satisfy the Minister that a ‘market situation’ exists in a domestic market. The WTO Anti-Dumping Agreement is similarly silent in relation to the definition of the concept of a ‘particular market situation’ referred to within Article 2.2.

The Commission considers that the nature of the consideration at the heart of the market situation analysis involves consideration of all relevant market variables in relation to the subject good in totality and, as such, the term ‘a situation’ for the purposes of the subsection defies precise definition. To this end, the Commission is of the view that ‘a situation’ refers to the presence of a factor or composite factors which collectively operate to cause a degree of distortion in the market that renders arm’s-length transactions in the ordinary course of trade in that market unsuitable for use in determining normal values.

More specifically, the Commission considers that a market situation assessment involves an examination of factors which may affect the interaction of supply and demand in a sector, industry or particular market, to a considerable extent that prices and costs in that market can no longer be viewed as being established under those market principles. To that end, the Commission considers that governments can directly influence domestic prices through the imposition of restrictions on how prices are charged for a product. This can be in the form of direct price regulation (floor or ceiling pricing mechanisms) or indirect influence through policies that impact on the supply of the subject goods or the supply or price of inputs used in the production of the subjects goods.

The influence of government does not, in itself, mean that a ‘market situation’ exists. The Commission needs to examine the effect such influence has on the market and the extent to which domestic prices are distorted and unsuitable for proper comparison with corresponding export prices.

---

<sup>9</sup> *European Commission, The Common Agricultural Policy: A partnership between Europe and Farmers, p.3, available at: [http://ec.europa.eu/agriculture/cap-overview/2012\\_en.pdf](http://ec.europa.eu/agriculture/cap-overview/2012_en.pdf).*

## **PUBLIC RECORD**

The Commission considers that, in the context of this analysis, evidence of Government policies and programs, including but not limited to the CAP, that confer benefits which specifically or indirectly flow to the relevant market under consideration, may have an effect on the domestic commerce with respect to the goods. The Commission holds that this information is relevant to analysis of whether factors exist which can be characterised as a 'market situation' for the purposes of s.269TAC(2)(a)(ii).

### **6.3.1 Evidentiary threshold**

The Commission notes that the Act does not provide any guidance, implicit or explicit, to the evidentiary standard required to warrant a finding being made that a situation exists in the market for the purposes of s. 269TAC (2)(a)(ii). Ultimately, the Minister must be satisfied that because of the situation in the domestic market, domestic prices are not suitable for determining normal values under s.269TAC(1).

The Commission considers that the issues as to whether or not a 'market situation' exists in the domestic market of an exporting country, is a matter for the Minister to consider. In doing so the Minister ought to be satisfied on the basis of consideration of the totality of all relevant available evidence that a 'market situation' exists for the purposes of s. 269TAC(2)(a)(ii) in so far as the evidence provides a reliable understanding of the prevailing characteristics of the market for the goods in that country.

The Commission does not consider the fact that conclusive evidence cannot be reasonably acquired requires the Minister to find in the market that a 'market situation' does not exist. Similarly, it does not consider it reasonable to suggest that the absence of conclusive information or evidence of quantifiable market distortion precludes the ability of the Minister to be satisfied that a 'market situation' does exist.

### 6.2.2 Submissions on the Commission's basis for examining market situation

The Commission notes that the EC and Italian Government made specific submissions questioning the validity of the Commission's enquiries regarding the operation of mechanisms and programmes administered by the EC and Italian Government through which benefits may have been provided to growers and processors of the goods in Italy.

The submissions provided by the EC and the Italian Government contend that the questionnaire provided by the Commission, which seeks specific information regarding the operation of such programmes, improperly introduces into an anti-dumping investigation, inquiries into subsidies that may only be investigated within a countervailing investigation.

As is discussed in detail above, consideration as to whether a situation exists in the market for the purposes of s.269TAC(2)(a)(ii) necessarily involves the analysis of all relevant factors and variables associated with the domestic market of the subject goods.

The Commission believes that the criticisms submitted by the EC and Italian Government reflect a collective misunderstanding of the differences between:

- a) analysis of Government policies which are appropriately characterised as subsidy programs for the purposes of determining countervailable subsidies and the calculation of applicable countervailing duties under s.269TJ; and
- b) consideration of subsidy programs for the purposes of market situation analysis for the purposes of s. 269TAC(2)(a)(ii).

## PUBLIC RECORD

The Commission emphasises that consideration of the existence and operative effect of government administered benefits upon a domestic market is distinctly different to specific investigation of subsidy programs under s. 269TJ.

Consideration of whether a situation exists in the relevant market is concerned with the operation of policies and regulations (whether overt or implied) and their potential impact on the suitability of domestic selling prices for normal value purposes. Accordingly, the question to be answered is whether the relevant policies operate in a manner which:

- a) leads to a distortion of competitive market conditions in relation to the subject goods such that domestic sales are unsuitable for the purposes of determining normal value; and
- b) affects the conditions of commerce related to the production or manufacture of like goods such that the records of exporters of prepared or preserved tomatoes cannot be relied upon to reasonably reflect competitive market costs associated with production in accordance with the provisions of Regulation 180(2) of the Customs *Regulations 1926*.

The Commission notes previous anti-dumping investigations<sup>10</sup> administered by the EC where it undertook an examination of factors which may potentially be actionable under the countervailing framework. Those inquiries examined whether:

- a) prices of raw material inputs were artificially low; and
- b) had regard to evidence of the operation of government support programs which apply to the relevant domestic industry for the production of subject goods.

The assessments were relevant to the EC's consideration of whether costs reasonably reflected the costs of production in relation to the goods. A process apparently very similar in nature to that undertaken by the Commission in this inquiry.

### 6.4 Enquiry framework

The Commission was satisfied that, at the time of initiation of the investigation, that there was relevant publicly available information to indicate that the EU may affect the interaction of supply and demand in the market for processed tomato products. The impact of the EU's policies was believed sufficient to consider that prices and costs in that market can no longer be viewed as being established under those market principles and allowing normal values to be established pursuant to s.269TAC(1).

The Commission considered that there was sufficient information and reasonable bases for the inclusion of specific enquiries with the EC and Italian governments which seek to identify the agricultural policies and specific programmes currently administered in

---

<sup>10</sup> Cotton yarn from Brazil, Egypt, India, Thailand and Turkey, OJ L 271, 1991, p. 17, rec. 13; Silicon from Russia, OJ L 339, 2003 p. 3, rec 27; Potassium chloride from Belarus, Russia and Ukraine, OJ L 302, 2005, p. 14, rec. 31; Aluminium foil from Russia, OJ L 26, 2006, p.1, rec. 13; Welded tubes and pipes of iron or non-alloy steel from Belarus, Bosnia and Herzegovina, China and Russia, OJ L 343, 2007, p. 1, rec. 111; Ammonium nitrate from Ukraine, OJ L 75, 2008, p. 8, rec. 26.

## PUBLIC RECORD

Italy. The Commission's assessment was set out in *Issues Paper – Suitability of domestic Sales* dated 10 July 2013.

The Commission submitted specific questionnaires with the EC and Italian governments which sought to identify the agricultural policies and specific programmes currently administered in Italy. Specific enquiries were also included within questionnaires submitted to Italian exporters for the purposes of acquiring an understanding of the form and substance of any benefits received by exporters of the goods pursuant to policies administered by the EC and/or Italian Government.

The information gathered in relation to agricultural support programs in Italy was requested by the Commission for two purposes:

- a) to investigate whether, by virtue of policy programs applying to the cultivation of tomatoes in Italy, there is a situation in the Italian domestic market for prepared or preserved tomato products that renders domestic sales unsuitable for determining normal values in accordance with s. 269TAC(2)(a)(ii); and
- b) to assess whether the records of exporters of prepared or preserved tomatoes reasonably reflect competitive market costs associated with the production or manufacture of like goods in accordance with the provisions of Regulation 180(2) of the *Customs Regulations 1926*.

### 6.5 Responses

The EC provided a formal response to the Commission by letter on 5 and 7 August 2013.

The first letter articulated the EC's views regarding the Commission's issues paper regarding a 'market situation', and the 'market situation' questionnaire provided to the EC and the Italian Government by the Commission. The correspondence of 7 August 2013 provided further comment with respect to these issues and also provided specific submissions regarding the corresponding enquiries included in questionnaires submitted by the Commission to exporters.

The Italian Government provided formal submissions in relation to these issues dated 7 and 13 August 2013.

All but one exporter who provided completed questionnaire responses to the Commission indicated that the section relating to 'market situation' ("Section H" of the questionnaire) was not applicable as they did not receive any benefits. One exporter indicated that they did receive a small benefit and provided other relevant facts.

Notwithstanding the above, the Commission holds the view that enquiries into the situation of the domestic market in Italy to be relevant and reasonable within the framework of determining normal values and, specifically, costs are representative of market conditions and normal values can be determined in accordance with the Act.

### 6.6 The Commission's view

Consideration as to whether a 'market situation' exists for the purposes of s.269TAC(2)(a)(ii) involves the analysis of all relevant facts to determine whether competitive conditions have been materially distorted and price can no longer be viewed as being established under market principles.

## **PUBLIC RECORD**

To that end, the Commission considers that governments can directly influence domestic prices in a number of ways.

This can occur directly in the form of price regulation (floor or ceiling pricing mechanisms) or the dominance of government-owned or controlled enterprises to such an extent that those enterprises are price-leaders in the domestic market.

Governments can also indirectly influence domestic prices through instruments that indirectly impact on the supply of the subject goods or the supply or price of inputs used in the production of the subjects goods. For example:

- governments can control import and export levels through licensing, quotas, duties or taxes to maintain domestic prices at certain levels;
- governments can subsidise producers by providing direct financial subsidies or low-price inputs in order to maintain selling prices of a product at certain levels;
- governments can purchase goods in sufficient quantities to raise the domestic price of goods or sell stockpiled goods to put downward pressure on prices;
- through taxation or other policies, governments can regulate the level of profits that a company can achieve which will affect selling prices; and
- the government can regulate or control production levels or the number of producers or sellers permitted in the market in order to affect domestic prices.

### **6.6.1 Consideration of exporter material**

During the course of the exporter verification program, the Commission investigated whether any benefits, payments or forms of support had been received from the Italian government, the EC or, any other affiliated agency or group by the selected exporters visited by the Commission. The Commission examined the requested information which directly or indirectly related to the sale or production of prepared or preserved tomatoes for calendar years 2011, 2012 and year-to-date (YTD) June 2013.

### **6.6.2 Payments received by selected exporters**

#### Direct CAP payments

From the advice provided by selected exporters the Commission understands that prior to 2001, tomato processors in Italy were eligible for direct financial support from the Italian government under the auspices of the CAP. Between 2000 and 2001 the support policies applied under the CAP were amended and direct payments were provided to the growers of tomatoes rather than the processors.

The Commission understands that support payments under the CAP had undergone further amendments after 2001 to the effect that payments are no longer paid in relation to the cultivation of tomato crops specifically, and are instead (subject to relevant eligibility criteria) available to agricultural land holdings irrespective of the commodity cultivated upon the land.

The Commission investigated whether each exporter visited owned, operated or was affiliated with any agricultural land holdings associated with the cultivation of tomatoes or other crops, which may be eligible for payments under the CAP.

## PUBLIC RECORD

During the course of verification, the Commission found only one small instance where a selected exporter had received, or was eligible to receive, any payments under the auspices of the CAP related to agricultural land holdings. The Commission verified the payments to this exporter and was satisfied that the quantum of payment was not material.

### Other government payments

Notwithstanding the above, the Commission notes that it identified a number of miscellaneous payments received by a number of selected exporters during the period of investigation that were provided pursuant to initiatives and programs administered by the Italian government. The value of such payment was not considered material.

In summary, payments were provided to manufacturers under the auspices of support initiatives and incentives associated with regional development agendas related to, inter alia, employment, technological development and innovation. The Commission notes that it found no evidence to suggest that such government initiatives relate specifically to the production of processed tomatoes.

### **6.7 Responses to SEF 217**

On 7 March 2014, SPCA lodged a submission responding to the market situation findings outlined in SEF 217. The submission references a 2011 Global Agricultural Information Network Report (*GAIN Report*) published by the USDA Foreign Agriculture Service. SPCA submits that the report contains sufficient information to consider that the single payment scheme operating within the EU has distorted the domestic market for prepared or preserved tomatoes.

On 17 March 2014, SPCA lodged a further submission relating to the Commission's market situation findings.

SPCA considers that the information submitted raises doubts about evidence gathered during the investigation and the findings set out in SEF217. In both submissions, SPCA requests the Commission to seek a further extension from the Parliamentary Secretary in order to properly consider the new information submitted.

The Commission notes that SPCA made no submissions to the investigation on the issue of market situation prior to the publication of the SEF. It did not respond to the issues paper published by the Commission soon after initiation, nor did it make any submissions in response to the exporter questionnaires or normal value visit reports which outlined that exporters had not received payments under the single payment scheme. In its primary submission of 24 February 2014, SPCA made no comment on the Commission's market situation finding.

These most recent submissions from SPCA, received after the due date for general submissions, contends that new information provides grounds for the Commissioner to request an extension to the due date for the Final Report.

In deciding firstly whether to have regard to this submission, the Commission notes that the Commissioner is not obliged to have regard to any submission made in response to the statement of essential facts:

- that is received after the end of the 20 days after the placing of the statement of essential facts on the public record, and

### **Final report 217 Prepared or preserved tomatoes - Italy**



## PUBLIC RECORD

- if to do so would, in the Commissioner's opinion, prevent the timely preparation of the report to the Parliamentary Secretary.

The Commission has reviewed the *GAIN Report* attached to the submission of 7 March 2014 and whilst it contains relevant statistics relating to the level of production, consumption and trade of both fresh and prepared tomatoes, the information is not referenced to any source.

The report does include a section dealing with 'Policy' where it outlines that:

- negotiated price for fresh tomatoes 'was set significantly higher than the previous year',
- the estimated €183 million in EU aid will only benefit approximately 1000 of the possible 6000 Italian companies;
- 75% of the support will be received by 15% of the farmers;
- 75% of total tomato volume is sourced from large companies;
- raw tomato prices are increasing; and
- land under tomato cultivation decreased by 14.6%.

The report lacks sources to support the statistics and contains no new information that would alter or diminish the Commission's finding in relation to the existence of a market situation that would render domestic sales unsuitable for determining normal values.

As outlined in SEF 217, the Commission has already established that a large number of tomato growers exist in Italy and there was evidence that payments were made to growers on the basis of land under cultivation under the EU's single payment scheme. However, there is no evidence to be satisfied that these payments to growers ultimately resulted in a distortion of the price for fresh tomatoes purchased by processors or distorted competitive market conditions for processed tomatoes.

Therefore the Commission has had regard to the information submitted by SPCA on 7 March 2014 and does not consider that this information or any inferences that can be drawn from it would alter the Commission's finding that domestic sales of prepared or preserved tomatoes in Italy are suitable for determining normal values.

In respect of SPCA's submission of 17 March 2014, the Commission notes that the new information presented to the investigation includes reference to a number of detailed reports that provide commentary on the operation of the EU's common agricultural policies. Given the lateness of the submission, the Commission considers that there is insufficient time to properly have regard to this new information. To do so, would in the opinion of the Commissioner, prevent the timely preparation of the termination report and final report to the Parliamentary Secretary.

In accordance with s.269TEA(4), the Commissioner has not had regard to SPCA's submission of 17 March 2014.

### **6.8 The Commission's assessment**

The Commission must consider the impact of the relevant policies and whether these policies distort competitive market conditions in relation the subject goods such that domestic sales are unsuitable for the purposes of determining normal value pursuant to s.269TAC (1).

On the basis of the available evidence, the Commission was satisfied that there is evidence that manufacturers of processed tomato products were eligible for, and did

### **Final report 217 Prepared or preserved tomatoes - Italy**

## **PUBLIC RECORD**

receive, financial benefits from the Italian Government paid under the auspices of the CAP until 2001.

However, the Commission is also satisfied that, following reform of the operation of the CAP (and the benefit payment mechanisms prescribed therein) no direct CAP payments were received by any selected exporter during the investigation period.

Notwithstanding the above, the Commission notes that there is evidence that the majority of selected exporters received some form of government payment during the investigation period. The available evidence suggests that government payments received by one exporter during the period were administered under general support programs which do not specifically relate to the production of tomatoes but was paid in relation to the agricultural land on which crops (including, but not limited to tomatoes) are grown.

The Commission considered the distortion, if any, that was likely to occur via the purchase prices of the raw tomatoes. From evidence gathered during the verification visits, the Commission found that there were many suppliers of tomatoes and that the prices did vary from region to region before such adjustments of brix levels and quality. Furthermore the Commission found that the price negotiations for the canned tomato products were not influenced by these payments to farmers. The Commission found this price was set via negotiations that considered numerous factors including harvest yield, business relationships and volumes ordered.

The Commission analysed the weighted average price of tomatoes purchased by the Australian industry from local suppliers as a notional price of fresh tomato paid by processors in a market unaffected by any support programs, payments or benefits which may distort the price of fresh tomatoes in the market.

The Commission then compared this notional benchmark against the verified raw material purchase price paid by selected exporters from tomato suppliers in Italy to assess whether there is any indication that payments paid to tomato growers have flowed through to distorted selling prices paid by the tomato processors in the form of lower prices.

In all instances, the Commission found that the price of fresh tomato paid by Italian processors was either similar or higher than the benchmark price of fresh tomato available in Australia.

On this basis, in the absence of positive evidence to the contrary, the evidence indicates that any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processors in the form of lower prices.

The Commission is satisfied that, whilst the evidence indicates that producers of processed tomatoes in Italy receive support from the Italian government under various domestic industry support programs, the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade).

## **7 DUMPING INVESTIGATION**

### **7.1 Findings**

Dumping margins for the investigation period were calculated by comparing weighted average export prices with the corresponding weighted average normal values. Dumping margins are summarised in the following table:

Manufacturer/Exporter	Visited	Dumping margin
<b>Selected exporters</b>		
De Clemente Conserve S.p.A	Yes	3.25%
Conserve Italia Soc. Coop Agr	Yes	4.54%
I.M.C.A. S.p.A.*	No	26.35%
Lodato Gennaro & C. S.p.A.*	No	26.35%
<b>Residual exporters</b>		
Attianese S.p.A.	No	4.24%
Fiamma Vesuviana Srl	No	4.24%
Greci Industria Alimentare S.p.A.	No	4.24%
Menu Srl	No	4.24%
Mutti S.p.A.	No	4.24%
Nolana Conserve Srl	No	4.24%
Princes Industrie Alimentari SRL	No	4.24%
Rispoli Luigi & C (S.R.L.)	No	4.24%
Steriltom Srl	No	4.24%
<b>Uncooperative exporters<sup>11</sup> (All other)</b>	No	26.35%

\*The Commission determines these exporters to be uncooperative exporters.

### **7.2 Introduction**

Dumping occurs when a product from one country is exported to another country at a price less than its normal value. The export price and normal value of goods are determined under sections 269TAB and 269TAC of the Act respectively.

This chapter explains the results of investigations by the Commission into whether prepared or preserved tomatoes were exported from Italy at dumped prices during the investigation period.

---

<sup>11</sup> S.269T of the Act refers to a definition of an uncooperative exporter.

### **7.3 Selected Exporters<sup>12</sup>**

At the commencement of the investigation, a large number of potential exporters of prepared or preserved tomatoes from Italy were identified. Questionnaires were forwarded to all known exporters from Italy.

Following initial feedback, and completed responses to Part 1 of the Exporter Questionnaire, the Commission considered that the number of exporters that provided information was too large to determine individual dumping margins for each of them. As a result, the Commission undertook a sampling exercise where it identified 7 selected exporters which accounted for approximately 70% of the export volume to Australia.

Pursuant to s.269TACAA of the Act, the Commission selected the following exporters:

- Conserve Italia
- COREX S.p.A.
- De Clemente
- Feger
- I.M.C.A.
- La Doria
- Lodato Gennaro & C. S.p.A.

The Commission received questionnaire responses that were assessed by the Commission as being substantially complete from:

- Conserve Italia
- COREX S.p.A.
- De Clemente
- Feger
- La Doria.

The verification visit reports for each of the cooperating exporters are available at the Commission's website <http://www.adcommission.gov.au/> and provide additional detail to what is discussed below.

On 20 March 2014, the Commissioner was satisfied that the product dumping margins for La Doria and Feger were negligible and terminated the investigation in so far as it relates to those exporters. Termination Report 217 is available on the Commissions website <http://www.adcommission.gov.au/>.

#### **7.3.1 Insufficient exporter questionnaire responses**

Exporter questionnaire responses were also submitted by:

- Lodato Gennaro & C. S.p.A.;
- I.M.C.A.

---

<sup>12</sup> S.269T of the Act refers – an exporter whose exportations were investigated for the purposes of deciding whether or not to publish that notice.

## **PUBLIC RECORD**

Questionnaire responses submitted by these parties provided limited information required by the exporter questionnaire. The Commission considered the information provided in these questionnaire responses was not suitable for verification and the making of a reasonable assessment of dumping. Each party was contacted by the Commission and informed of the deficiencies in its respective questionnaire responses, and the Commission's finding that the response was not suitable for verification and therefore considered the exporters uncooperative.

### **7.4 Responses to SEF 217**

#### **7.4.1 Approach to calculation of product dumping margins**

### **7.5 Approach to calculation of product dumping margins**

In response to SEF 217, SPCA submitted that like goods sold on the domestic market in Italy should include prepared or preserved tomatoes in all variants and packaging formats, and that the ordinary course of trade test should be applied to all sales of the domestic like goods.

It argued that only after the 5% sufficiency test had been applied to the qualifying domestic sales, the normal value (with adjustments) be compared to the corresponding export sales.

Section 269TAC(1) of the Act provides that 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 for home consumption in the country of export in sales that are arms length transactions by the exporter, or if like goods are not so sold by the exporter, by other sellers of like goods.

Like goods are defined in s.269T as:

*...in relation to goods under consideration, means 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*

At the outset of the investigation, the Commission requested Italian exporters provide domestic sales information covering all types of prepared or preserved tomatoes that conformed to the broad description of the goods under investigation. This included sales of products in all variants and packaging formats.

In instances where there are numerous and various types of export sales to Australia, the Commission will seek to establish model categories. These model categories will then be used to identify whether relevant domestic sales of comparable like goods exist and to identify a subset of corresponding normal values to ensure that like is being compared with like. These are commonly referred to as model export prices and model normal values.

This is a critical step in the determination of dumping as the Commission's practice is to apply the ordinary course of trade tests and sufficiency of sales tests to each model

## **PUBLIC RECORD**

category. Hence, it is important to identify whether different types or models of goods have been exported before assessing whether domestic sales were sold in the ordinary course of trade and in sufficient quantities.

A model normal value is only warranted insofar as there are export sales of the particular model. For example, if an exporter has domestic sales of models A, B and C but only exported models A and C during the investigation period, the Commission would not require a normal value for model B to be determined.

For each cooperating exporter of prepared or preserved tomatoes, the Commission identified the principal physical characteristics of the goods exported in order to classify each export transaction into a particular model category. The characteristics generally included:

1. Type of tomato – whole, chopped, organic, etc
2. Recipe – standard, value-added
3. Can size – 500g, 800g, etc
4. Container – tin easy-open, lacquered, non-lacquered, etc
5. Drained weight – 60%, 70%

After identifying the export model categories, the next step was to identify relevant domestic sales for comparison with the exported goods by classifying each individual domestic transaction into a corresponding normal value model category. Following that, the Commission is able to assess for each of the exported models whether comparable domestic sales exist.

The Commission then performs the ordinary course of trade test on all domestic sales of like goods (including both comparable like goods and like goods with no equivalent export model) to calculate whether each individual transaction is profitable or recoverable. The arranging of both export and domestic sales into model categories is important here as a weighted average cost to make and sell over the investigation period will be calculated for each model to determine whether unprofitable sales are ultimately recoverable.

Where the volume of unprofitable domestic sales exceeds 20% of the total volume for each corresponding model, sales that were found to not be recoverable over the investigation period are discarded from normal value calculations. After disregarding sales not in the ordinary course of trade, the remaining volume of domestic sales for each model are compared to the volume of export sales of the corresponding model to assess whether there is a sufficient volume exceeding 5%.

To illustrate this further, the table below provides an example of the model matching process undertaken by the Commission after performing the ordinary course of trade and sufficiency tests and shows that for models A and C that were exported to Australia, domestic sales of comparable like goods exist. Therefore, normal values for these exported goods can be determined under s.269TAC(1) using suitable domestic sales.

## PUBLIC RECORD

Model	Export model	Domestic model	Like goods
A	YES	YES	YES
B		YES	
C	YES	YES	YES
D	YES		NO
E		YES	

In the case of export model D, where there are no such comparable like goods sold on the domestic market, the Commission considered that domestic sales of other like good models were not appropriate for the purposes of establishing normal values under s.269TAC(1).

As a result, the Commission considered it appropriate to construct normal values using:

- the cost of production of the exported goods, plus
- an amount for selling, general and administrative expenses incurred on domestic sales, plus
- an amount for profit on the assumption that the goods had been sold on the domestic market.

Regulation 181A sets out the manner in which the Minister must determine an amount of profit to be included in a constructed normal value. Pursuant to reg. 181A(2), “the Minister must, if reasonably possible, work out the amount [for profit] by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade”.

As each of the cooperating exporters of prepared or preserved tomatoes had domestic sales of like goods in the ordinary course of trade, the Commission was able to use this verified data to determine a profit pursuant to reg. 181A(2). The Commission considers that the correct or preferable interpretation of reg. 181A(2) is that the actual profit achieved on all domestic sales of like goods sold in the ordinary course of trade be used.

Referring again to the earlier example, a profit margin would have been derived from all like goods sold in the ordinary course of trade being domestic models A, B, C and E. It is important to note that sales of domestic models B and C are included as they meet the definition of like goods, even though the exporter did not export these particular models to Australia.

As submitted by SPCA, it is open to the Commission to have regard to other like models sold on the domestic market and make necessary adjustments for differences between the goods being compared. For example, using domestic sales of model C to compare with export sales of model D and adjusting for physical differences between them.

However, this is unlikely to result in a significantly different outcome to the approach preferred by the Commission. That is because the constructed normal value is based on the cost of production of the exported model and includes a profit component that is

## PUBLIC RECORD

based on domestic sales of all like goods sold domestically in the ordinary course of trade.

The weighted average product dumping margin is then calculated by multiplying the weighted average unit normal value for each comparable like model by the export volume of the corresponding export model. This result would be a weighted average normal value for the goods exported during the investigation period, which is then compared to the corresponding weighted average export price for the goods exported during the investigation period, to provide a product dumping margin over the investigation period.

SPCA further submits that the ordinary course of trade test should be applied against all sales of like goods as defined before any domestic/export model analysis proceeds. As noted earlier, it is the Commission's practice to categorise sales into model groupings and then test whether each individual domestic sale was sold in the ordinary course of trade.

SPCA refers to the following WTO Appellate Body finding<sup>13</sup> to support its view that the Commission's practice of using export model groupings to determine the comparable normal value groupings was in contradiction of the Anti-Dumping Agreement:

*Having defined the product at issue and the 'like product' on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.*

The Commission is not persuaded by this argument. The relevant issue being considered by the Appellate Body in that matter was whether the European Communities then-practice of "zeroing" was consistent with the Anti-Dumping Agreement. The quote from the Appellate Body Report relied on by SPCA was in response to the European Communities defending its practice of zeroing on the grounds:

*"...that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various model or types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics."*

The Appellate Body ultimately concluded that the European Communities practice of zeroing was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement and that all exported transactions falling within the product scope must be used when establishing the existence of the margin of dumping. The Commission has not practiced zeroing in its

---

<sup>13</sup> European Communities – Anti-dumping duties on imports of cotton-type bed linen from India (WT/DS141/AB/R). para. 58.



## PUBLIC RECORD

dumping margin determination and all export transactions are used to determine the “product” dumping margin.

SPCA further contends that the Commission’s approach to determining comparable export and normal value model groupings, renders the due allowance provisions redundant. In support, it makes reference to a WTO Panel finding<sup>14</sup> in its submission.

The relevance of the particular paragraph from the Panel’s Report referred to in SPCA’s submission is unclear to the Commission. However, the Commission notes the Panel’s finding that:

*Article 2.4 requires investigating authorities to ensure a fair comparison between the normal value and the export price, and provides explicit guidance on how this is to be done: where there are “differences” affecting price comparability between the export price and normal value, “[d]ue allowance shall be made” for those differences. These allowances can only be made after normal value and the export price have been established. [emphasis added]*

After establishing the relevant and suitable domestic sales for comparison with corresponding export sales, the Commission considered and made due allowance for numerous factors that affected their proper comparison.

SPCA pointed to another Panel Report<sup>15</sup> which they claim supports their argument that all domestic sales of like goods must be used to determine normal value and not just those comparable like goods to the exported goods. In that case, the Panel stated:

*We believe that the strict rules in Article 2 regarding the determination of normal value require that, in the usual case, normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade.*

It would appear that the Panel members in that dispute took a particular interpretation of Article 2.4.2 of the Anti-Dumping Agreement. However as outlined below, other WTO Panels have taken a different interpretation to that presented in the poultry dispute. Ultimately, the Appellate Body is the final arbiter and authority on legal interpretation of the WTO Agreements. The Commission considers that the Appellate Body has given clear and unambiguous guidance that model matching for the purposes of determining dumping margins is a reasonable approach that is open to an investigating authority.

The Commission notes that the determination of model categories for the purposes of comparing domestic and export sales is an accepted practice of most investigating authorities and has been accepted as being consistent with the Anti-Dumping Agreement.

In DS179<sup>16</sup>, United States submitted that:

---

<sup>14</sup> European Union – Anti-Dumping measures on certain footwear from China (WT/DS405/R). para. 7.264

<sup>15</sup> Argentina – Definitive Anti-Dumping duties on poultry from Brazil. (WT/DS241/R). para. 7.274

<sup>16</sup> United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (WT/DS179/R). paras. 6.107 and 6.111

## PUBLIC RECORD

*...while Article 2.4.2 provides that margins of dumping be based upon a comparison of an average of normal value prices with an average of the prices for export transactions, the transactions included in these averages must be "comparable". The reason for this limitation is that the inclusion in the averages to be compared of sales that are not comparable could result in a dumping margin based upon factors not related to dumping. The United States notes that Article 2.4.2 is subject to the provisions of Article 2.4, which requires that normal value and export price be compared "at the same level of trade . . . in respect of sales made at as nearly as possible the same time" and that allowance be made for, inter alia, differences in physical characteristics. Thus, a Member may create multiple averages in order to ensure that comparisons are not distorted by averaging of non-comparable transactions, such as transactions involving different models or at different levels of trade.*

In considering this issue, the Panel found:

*...that we do not consider that Article 2.4.2 prohibits the use of multiple averaging per se, as Korea's first submission could be taken to suggest. To the contrary, Article 2.4.2 provides that the existence of dumping shall normally be established "on the basis of a comparison of a weighted average normal value with a weighted average of all comparable export transactions" (emphasis added). The inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value.*

In DS397<sup>17</sup>, the Panel made the following observation:

*There is no methodological guidance in Article 2.4 as to how due allowance for differences affecting price comparability is to be made. We understand that, in order to comply with the requirement of Article 2.4 to make due allowance for differences affecting price comparability between sales of the imported product and sales of the like product in the country of exports, most investigating authorities either make comparisons of transaction prices for groups of goods within the like product that share common characteristics, or by making an adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared. It is clear to us that investigating authorities may find the first method more practical in certain cases, since it may minimize, or even eliminate, the need to make adjustments for each difference that affect price comparability, which may be a difficult task.*

---

<sup>17</sup> European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/R). para. 7.297

## PUBLIC RECORD

*However, the authorities are free to follow the second approach and make adjustments for each difference in physical characteristics that affects price comparability.*

On appeal, the Appellate Body in DS397<sup>18</sup> commented:

*In our view, as a starting point for the dialogue between the investigating authority and the interested parties to ensure a fair comparison, the authority must, at a minimum, inform the parties of the product groups with regard to which it will conduct the price comparisons. For example, the authority may choose to make comparisons of transaction prices for a number of groups of goods within the like product that share common characteristics, thus minimizing the need for adjustments, or it may choose to make adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared. [emphasis added]*

The Appellate Body went on to add:

*Indeed, by using the PCNs (Product Control Numbers) as the organizing principle when gathering product information from the interested parties, the Commission's approach created a reasonable expectation that price comparisons would be conducted on a very particular basis. Moreover, in the light of the very precise nature of the physical characteristics listed under the PCNs, it was also reasonable to assume that few adjustments would be necessary, as prices of narrowly defined products by the Chinese producers would have been compared to prices of equally narrowly defined products in the analogue country, India.*

Therefore, the Commission considers that its practice of identifying exported models and comparable like goods in determining normal value is reasonable.

Notwithstanding the Commission's preference for identifying comparable domestic like models for establishing normal values, it is worth noting that the final dumping margin will not differ greatly if all domestic sales were used to establish the normal value. This is because the construct normal values for export models where suitable domestic sales did not exist, was based on the cost of the goods exported plus a calculated profit margin derived from all like goods sold in the ordinary course of trade.

The approach being proposed by SPCA would involve using the domestic selling prices of all like goods sold in the ordinary course of trade and adjusting those prices to account for differences between them and the export model. In effect, it would result in a s.269TAC(1) normal value that is equal to the s.269(TAC)(2)(c) constructed normal value determined by the Commission.

---

<sup>18</sup> European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/AB/R). paras. 490 and 496

## **7.6 De Clemente**

### **7.6.1 Submissions to SEF 217**

SPCA questioned the decision to exclude certain products sold domestically by De Clemente due to significant differences with the exported goods. As noted earlier, the Commission's practice is to determine normal values for the exported goods after identifying whether comparable like goods exist. The Commission did not use products considered not to be comparable like goods or for which there were no corresponding export sales to Australia, for the purposes of determining normal values under s.269TAC(1).

SPCA noted the statement in the De Clemente report in reference to *inventory hold variables* that 'price of goods sold will be influenced by the current inventory levels of stock held in storage by De Clemente'. It queried how such price variance had been analysed.

Whilst the visit report did not articulate how the price variances would operate, it did indicate that prices were set by supply and demand considerations, inter alia, set with reference to the volume of stock that De Clement had on hand.

SPCA also claimed that deductions from De Clemente's cost to make and sell for delivery and certain other selling expenses were incorrect and would have affected the ordinary course of trade analysis.

The Commission can clarify that the deductions stemmed from De Clemente incorrectly allocating export related expenses to domestic sales. In such circumstances it is appropriate to remove these costs before performing the ordinary course of trade test as that test is performed on domestic sales of like goods.

Finally, SPCA seeks to confirm whether De Clemente's own proprietary label and other private labels were used to determine normal values where comparable like goods were found to have been made in the ordinary course of trade.

The Commission is able to confirm that all domestic sales of comparable like goods were used in determining normal values, irrespective of the type of label.

### **7.6.2 Export price**

The Commission found that De Clemente does not sell the goods directly to the importer. Goods are sold via a buying agent that sells to the importer.

Therefore export prices were established pursuant s.269TAB(1)(c) having regard to all the circumstances of exportation. The Commission had regard to the arms' length FOB invoice prices paid by the buying agent to De Clemente.

### **7.6.3 Normal value**

Normal values were established pursuant s. 269TAC(1) based on domestic sales of comparable like goods that were sold in the ordinary course of trade.

## **PUBLIC RECORD**

To ensure the comparability of normal values to export prices, the Commission considered adjustments were required pursuant to s.269TAC(8) and adjusted for:

- inland freight and FOB costs (positive adjustment);
- domestic credit terms (positive adjustment);
- discounts and rebates (negative adjustment); and
- packing costs (positive adjustment).

The dumping margin was established in accordance with s.269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

The dumping margin for De Clemente is 3.25%.

### **7.7 Conserve Italia**

#### **7.7.1 Submissions to SEF 217**

SPCA noted that a downward adjustment had been made to normal values for advertising expenses incurred on domestic sales and claimed that the adjustment should not include advertising incurred as part of the general cost of doing business.

The Commission considers that the adjustment was considered warranted after sufficient evidence was provided demonstrating that the advertising expenses related to the sale of domestic prepared or preserved tomatoes.

#### **7.7.2 Export price**

Export prices were established pursuant to s.269TAB(1) where the goods were sold from the exporter to the importer using the arm's length FOB invoice price paid by the importer. The Commission also found that Conserve Italia sold goods via a buying agent that subsequently sold the goods to the importer. In these instances export prices were established pursuant to s.269TAB(1)(c) having regard to all the circumstances of exportation. The Commission had regard to the arms' length FOB invoice prices paid by the buying agent to Conserve Italia.

#### **7.7.3 Normal value**

Normal values were established pursuant s.269TAC(1) based on domestic sales of comparable like goods that were sold in the ordinary course of trade.

Where like goods were not sold on the domestic market in sufficient volumes in the ordinary course of trade, the Commission established normal values pursuant to s.269TAC(2)(c) by using Conserve Italia's cost of production of the exported goods plus appropriate amounts for selling, general and administration expenses<sup>19</sup> as if the goods

---

<sup>19</sup> *Customs Regulation 1926* Reg 180 Determination of cost of production and *Customs Regulation 1926* Reg 181 Determination of administrative, selling and general costs.

## PUBLIC RECORD

were sold on the domestic market and an amount for profit<sup>20</sup> based on all domestic sales of like goods sold in the ordinary course of trade.

The Commission made adjustments to ensure the comparability of normal values to export prices pursuant to s.269TAC(8) or s.269TAC(9), as relevant, for:

- export inland freight handling, loading and ancillary costs (positive adjustment);
- domestic commission (positive adjustment);
- domestic advertising (positive adjustment);
- domestic inland freight (positive adjustment); and
- domestic CONAI tax.

By submission Conserve Italia requested that the Commission make an adjustment for sales of the goods via the intermediary. Although unproven, Conserve Italia considers the amount paid by the importer to the intermediary to be more than the just the invoice price paid by the intermediary to Conserve Italia.

The Commission found that the intermediary was acting as a buying agent for the importer with payment to the intermediary for these services being made by the importer. The Commission knows that the buying agent provides other services for which it is only reasonable to be remunerated.

The Commission examined all the circumstances surrounding the sale of goods in these transactions and despite the intermediary being the buyer of the goods, the price paid to Conserve Italia was a price negotiated by the intermediary on behalf of the importer.

The dumping margin was established in accordance with s.269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

The dumping margin for Conserve Italia is 4.54%.

### **7.8 Corex S.p.A.**

In its exporter questionnaire response, Corex outlined the extent of its involvement in export transactions to Australia and claimed that it undertook sufficient activities to be considered the exporter of the goods during the investigation period.

Following inquiries with all relevant parties involved in the production and sale of the goods, the Commission considered there to be sufficient evidence that Corex S.p.A was not the exporter of the goods but a trading intermediary.

The Commission was informed of the necessary requirements stipulated by Corex S.p.A's customers that gave suitable confidence to the Commission that the manufacturer was aware of the final destination of the goods. Given these requirements, the Commission

---

<sup>20</sup> *Customs Regulation 1926 Reg 181A Determination of profit.*

## PUBLIC RECORD

considers that there is a sufficient nexus between the manufacturer and Corex S.p.A's customers to determine these sales as if the manufacturer was the exporter.

Consequently, the Commission considers Corex S.p.A not to be an exporter of prepared or preserved tomatoes under investigation.

### 7.9 I.M.C.A.

#### 7.9.1 Submissions to SEF 217

I.M.C.A. submitted that they should have been found to have cooperated with the investigation as they considered that they had submitted a substantially completed exporter questionnaire response and were willing for the Commission to undertake a verification visit at their premises. To remedy this outcome, it submits that the Commission should consider I.M.C.A to be a cooperative residual exporter and determine a dumping margin based on the residual exporter rate.

I.M.C.A. further submits that it faced difficulties in completing the questionnaire in a full and timely manner as it is a small enterprise with limited resources and it had difficulty with the English language. They consider they complied with the Commission's requests and as such the Commission was not respectful of Article 6.13 of the WTO ADA in that *authorities shall take due account of any difficulties experienced by interested parties*.

The Commission considers that it has fulfilled its obligations under Article 6.13 of the WTO ADA. The Commission wrote to I.M.C.A. soon after initiation and informed the company of the information requirements to be considered a cooperative exporter. The Commission granted an extension to the questionnaire response deadline following a formal request from I.M.C.A.

Following identification of critical deficiencies in the I.M.C.A. response, the Commission provided the exporter with additional time to remedy those deficiencies. The Commission considers that exporters are not provided an indefinite number of opportunities to rectify critical deficiencies in their exporter questionnaire responses and within reason are required to comply with the Commissions' requirements pertaining to information and visit timeframes.

The Commission considers I.M.C.A. to be an uncooperative exporter and has established export prices pursuant to s.269TAB(3) of the Act having regard to all relevant information by reference to export prices determined from verified information of cooperating exporters<sup>21</sup> over the investigation period. The Commission used the lowest export price from exporters found to have a dumping margin greater than 2%.

Normal values were established pursuant to s.269TAC(6) of the Act having regard to all relevant information. The Commission used the highest normal value from cooperative exporters found to have a dumping margin greater than 2%.

The dumping margin for I.M.C.A is 26.35%.

---

<sup>21</sup> S.269T of the Act refers to a definition of a cooperative exporter

## **7.10 Lodato**

### **7.10.1 Submissions to SEF 217**

Lodato submitted that they should have been found to have cooperated with the investigation as they considered that they had submitted a substantially completed exporter questionnaire response and were willing for the Commission to undertake a verification visit at their premises. To remedy this outcome, it submits that the Commission should consider Lodato to be a cooperative residual exporter and determine a dumping margin based on the residual exporter rate.

Lodato further submits that it faced difficulties in completing the questionnaire in a full and timely manner as it is a small enterprise with limited resources and it had difficulty with the English language. They consider they complied with the Commission's requests and as such the Commission was not respectful of Article 6.13 of the WTO ADA in that *authorities shall take due account of any difficulties experienced by interested parties.*

The Commission considers that it has fulfilled its obligations under Article 6.13 of the Anti-Dumping Agreement. The Commission wrote to Lodato soon after initiation and informed the company of the information requirements to be considered a cooperative exporter. The Commission granted an extension to the questionnaire response deadline following a formal request from Lodato.

Following identification of critical deficiencies in the Lodato response, the Commission provided the exporter with additional time to remedy those deficiencies. The Commission considers that exporters are not provided an indefinite number of opportunities to rectify critical deficiencies in their exporter questionnaire responses and within reason are required to comply with the Commissions' requirements pertaining to information and visit timeframes.

The Commissioner considers Lodato to be an uncooperative exporter and established export prices pursuant to s.269TAB(3) of the Act having regard to all relevant information by reference to export prices determined from verified information of cooperating exporters over the investigation period. The Commission used the lowest export price from exporters found to have a dumping margin greater than 2%.

Normal values were established pursuant to s.269TAC (6) of the Act having regard to all relevant information. The Commission used the highest normal value from exporters found to have a dumping margin greater than 2%.

The dumping margin for Lodato is 26.35%.

## **7.11 Residual Exporters<sup>22</sup>**

Following initial feedback, and assessment of completed responses to Part 1 of the Exporter Questionnaire, the Commission considered it necessary to identify certain

---

<sup>22</sup> S.269T of the Act refers – an exporter whose exports were not examined, however the exporter was not considered uncooperative.



## **PUBLIC RECORD**

exporters as residual exporters based on export volume to Australia. On 8 August 2013, the Commission released its Sampling Report.

The Commission considered that those exporters that provided Part 1 of the Exporter Questionnaire and were not selected exporters were deemed to be residual exporters. These entities were:

- Attianese S.p.A.
- Fiamma Vesuviana SRL
- Greci Industria Alimentare S.p.A.
- Menu' SRL
- Mutti S.p.A.
- Nolana Conserve SRL
- Princes Industrie Alimentari SRL
- Rispoli Luigi & C (S.R.L.)
- Steriltom Srl.

In accordance with s.269TACAB(2) the Commission established export prices for residual exporters pursuant to s.269TAB(3) having regard to all relevant information.

The Commission used the weighted average export prices of cooperative selected exporters whose dumping margin was greater than 2%.

Normal values were established pursuant to s.269TAC(6) of the Act having regard to all relevant information. The Commission used the weighted average normal values from cooperative selected exporters found to have a dumping margin greater than 2%.

The dumping margin for all residual exporters is 4.24%.

### **7.12 Uncooperative exporters**

Following initiation of the investigation, the Commission wrote to all known exporters, Italian industry associations and the Government of Italy informing them of the investigation and seeking cooperation and provided the exporter questionnaire for their convenience.

To be considered cooperative or a residual exporter the exporters had to return the exporter questionnaire to the Commission complete and in the time period stipulated. The Commission considers that all exporters that did not respond to Part 1 of the exporter questionnaire are considered a non-cooperating selected exporter.

Pursuant to s.269T(1) of the Act, the Commissioner was satisfied that the exporters did not give information the Commissioner considered to be relevant to the inquiry were considered uncooperative exporters.

For uncooperative exporters, the Commission established export prices pursuant to s.269TAB(3) of the Act having regard to all relevant information by reference to export prices determined with verified information of cooperating exporters over the investigation period. The Commission used the lowest export price from cooperative selected exporters found to have a dumping margin greater than 2%.

## **PUBLIC RECORD**

Normal values were established pursuant to s.269TAC(6) of the Act having regard to all relevant information. The Commission used the highest normal value from cooperative selected exporters found to have a dumping margin greater than 2%.

The dumping margin for uncooperative exporters is 26.35%.

### **7.13 Volume of dumped exports**

Pursuant to s.269TDA(3) of the Act, the Commissioner must terminate the investigation if satisfied that the total volume of goods that are dumped is a negligible volume.

Subsection.269TDA(4) defines a negligible volume as 3% of the total volume of goods imported into Australia over the investigation period.

The Commission calculated that the volume of dumped goods represents approximately 56% of all goods exported from Italy. The Commission considers the volume of dumped goods not a negligible volume.

## **8 ECONOMIC CONDITION OF THE INDUSTRY AND HAS DUMPING CAUSED MATERIAL INJURY?**

### **8.1 Finding**

SPCA has suffered material injury and there is a causal link between the material injury experienced by the Australian industry and dumped imports from Italy. Due to these dumped imports, SPCA has suffered injury in the form of:

- reduced revenues;
- price depression;
- price suppression;
- reduced profits;
- reduced profitability, and
- reduced return on income.

### **8.2 Introduction**

This section examines whether dumped imports of prepared or preserved tomatoes from Italy have caused material injury to the Australian industry.

The Minister may publish a dumping duty notice and impose anti-dumping measures on exports of like goods, where the Minister is satisfied that:

- the amount of the export price of the goods is less than the amount of the normal value of those goods; and
- the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods;
- because of that, material injury to the Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered.<sup>23</sup>

### **8.3 Approach to assessing material injury**

In assessing whether dumped goods have caused material injury, the Commission has relied on purchasing and retail shelf pricing information submitted by Coles and Woolworths, which represent approximately 60% of the total imported volume and 73% of goods sourced from selected exporters and AZTEC point of sales data.

### **8.4 Responses to SEF 217**

#### **8.4.1 Determination of the volume of dumped imports in assessing material injury**

Numerous submissions were received from interested parties questioning the validity of the material injury assessment outlined in SEF 217.

---

<sup>23</sup> Section 269TG

## PUBLIC RECORD

A common view was that the Commission's assessment of material injury was flawed as it incorrectly attributed injury from import volumes from residual exporters as dumped imports. Interested parties referred to the finding of the WTO Appellate Body in DS141 to support its view that the Commission cannot have regard to the dumping margins determined for residual exporters when examining the impact of dumped imports for the purposes of assessing causation.

In examining this issue, it is important to first note that Australia's legislation<sup>24</sup> specifically provides for the Minister to have regard to the size of the dumping margin as a relevant factor in assessing whether dumping caused material injury. In this case, the Commission considers that the dumping margin determined for residual exporters is relevant to the material injury assessment being undertaken.

The Commission also notes that the key issue before the Appellate Body in DS141<sup>25</sup> was whether the European Communities' determination of the volume of dumped imports attributable to non-examined producers was based on an "objective examination" of positive evidence. Importantly, the Appellate Body commented that:

In other anti-dumping investigations, there may be different and additional types of evidence that properly could be considered as "positive evidence" and relied upon when determining, on the basis of an "objective examination", the volume of dumped imports. That, however is not the case before us<sup>26</sup>.

Also of relevance is the footnote from that paragraph of the report. It states:

In response to questioning at the oral hearing, the United States referred, for example, to evidence such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports. In the circumstances of a specific investigation, such categories of evidence may qualify as affirmative, objective, and verifiable, and thus form part of the "positive evidence" that an investigation authority may properly take into account when determining, on the basis of an "objective examination", whether or not imports from non-examined producers are being dumped<sup>27</sup>.

Whilst it would not appear necessary under Australia's legislation to separately establish that the volume of imports from residual exporters were dumped for the purposes of assessing material injury, the Commission has nonetheless had regard to other sources of information in making this determination.

---

<sup>24</sup> s.269TAE(1)(aa)

<sup>25</sup> European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India (WT/DS141/AB/RW)

<sup>26</sup> Ibid, para. 129

<sup>27</sup> Ibid Footnote 162

## **PUBLIC RECORD**

The Commission has examined and had regard to statistical data of declared import values for goods exported by each individual residual exporter during the investigation period. The information reveals that imports from all of the residual exporters were dumped by margins exceeding 2%. The average dumping margin for the residual exporters was approximately 14% when compared to the verified weighted average normal value for all cooperating exporters.

Therefore, the Commission considers it reasonable to determine import volumes from residual exporters to be dumped volumes for the purposes of assessing material injury.

### **8.4.2 Effect of dumped imports on price analysis**

Another common view from interested parties was that the Commission erred in assessing the effects of dumped imports on prices. The specific concerns identified include:

- the inclusion of undumped imports in the undercutting analysis which compared retail shelf prices of goods sold by Coles and Woolworths; and
- the material injury assessment was carried out on the basis of an unproven assumption that a correlation exists between wholesale prices and retail shelf prices.

In addressing the first issue that undumped imports had been incorrectly included in the undercutting analysis, the Commission notes that Figure 1 of SEF 217 clearly shows that retail shelf prices for all Italian imports undercut corresponding prices of Australian industry's products, irrespective of whether imports were dumped or undumped. A further examination and comparison of import prices shows that dumped prices from selected exporters undercut the lowest undumped prices by up to 18%.

The Commission also compared the declared export prices of residual exporters derived from the commercial import database to undumped prices and found that these prices were approximately 10% below the lowest undumped prices.

In response to the second issue, the Commission is satisfied that a strong correlation exists between free-into-store wholesale prices and retail shelf prices after examining verified information gathered during the investigation. Figure 4 below shows that from 2010 retail prices decreased at similar rates to wholesale prices through to 2012.

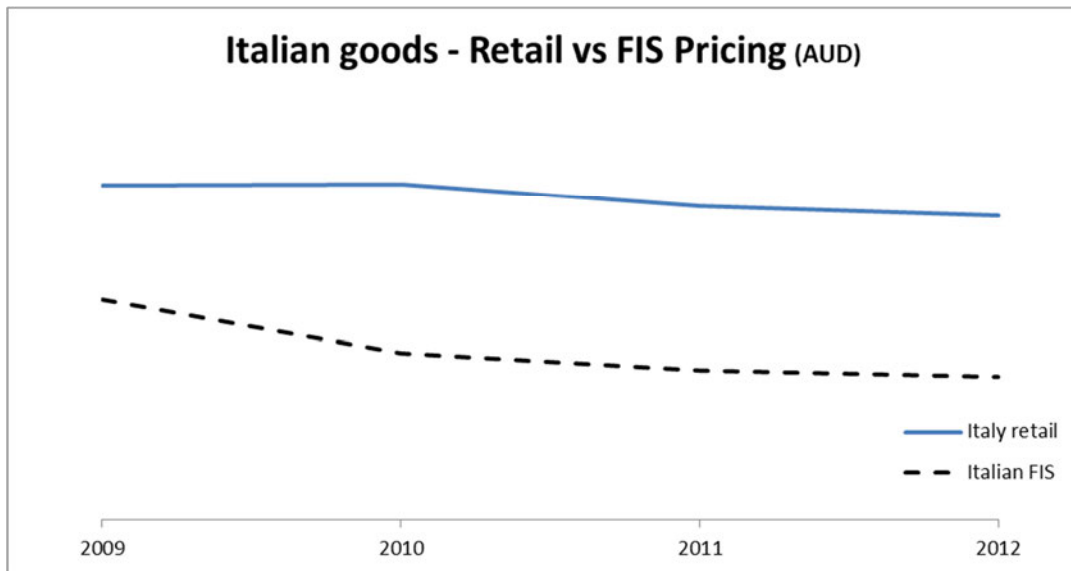


Figure 4: Relationship between Italian FOB price and Italian goods retail prices

### 8.4.3 Contradictions with the Productivity Commission’s Safeguard findings

A number of interested parties highlighted the apparent inconsistencies between the Commission’s preliminary findings in SEF 217 and the Productivity Commission’s Safeguards Inquiry into Imported Processed Tomato Products. It is submitted that as the Productivity Commission found in its inquiry that other factors were the sole cause of the serious injury being experienced by the Australian industry, the Commission should have outlined its reasons for departing from the conclusions reached by the Productivity Commission. In departing from the Productivity Commission’s findings the Commission considers that the different inquiries support the conclusions reached.

The defining circumstances between the two outcomes is that the Productivity Commission was examining whether a surge of imports was the cause of serious injury to the Australian industry. In contrast the dumping investigation is tasked with assessing whether dumped imports were causing ‘material’ injury to the Australian industry.

Therefore, the Commission does not agree with the views expressed by interested parties that its findings are inconsistent with and contradict the views of the Productivity Commission. Firstly it is important to note that in examining whether safeguard action was warranted, the Productivity Commission was not tasked with examining whether imports had been exported to Australia at dumped prices.

The Productivity Commission itself notes that:

*The Anti-Dumping Commission’s investigation is still underway and is not required to be completed until 30 January 2014. In any event, the anti-dumping and safeguard systems are intended to deal with different circumstances — a finding that measures are warranted under one system would not automatically lead to the same finding under the other system.*

Ultimately the Productivity Commission found that:

## Final report 217 Prepared or preserved tomatoes - Italy

## PUBLIC RECORD

*Increased imports of the processed tomato products under reference have not caused serious injury to the domestic industry producing like or directly competitive products. Instead, the injury has resulted from a combination of factors, including:*

- *sustained competitive pressure from imports*
- *supermarket private label strategies, facilitated by the appreciation of the Australian dollar*
- *extreme weather events.*

The Commission considers that these findings are generally consistent with the findings outlined in SEF 217. The Commission has determined that factors other than dumping, including the appreciation of the Australian dollar and the retail strategies of the major supermarkets have played a contributing role to the injury experienced by SPCA during the investigation period.

In terms of the Productivity Commission's finding that sustained competitive pressures from imports contributed to SPCA's injury, the Commission considers that dumped and undumped prices are relevant indicators of the competitive pressures identified by the Productivity Commission.

However, after isolating the effects of the identified other factors from dumped imports to ensure they are not incorrectly attributed to injury caused by dumping, the Commission has determined that dumped imports of themselves caused material injury. In effect, whilst not the sole cause of injury, the injury attributable to dumping was in itself material.

### **8.4.4 Injury attributable to other injury factors**

In response to the SEF, a number of interested parties expressed concern that the preliminary findings did not adequately address the impact of other factors on SPCA's economic performance. In particular, parties referenced the WTO ADA which states that authorities must '*examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*'.<sup>28</sup>

A number of interested parties have suggested that the other identified factors have caused the vast majority [emphasis added] of the injury suffered by the Australian industry. Firstly, the Commission considers that this incorrectly suggests that investigating authorities are required and able to precisely quantify the effects of the various factors at play in a market. Disentangling the effects that a range of factors have had on an industry is a very challenging task and the Commission is unaware of any investigating authority that undertakes to measure the amounts of injury attributable to dumped imports and other known factors.

Secondly, interested parties appear to suggest that where other known factors are causing the "vast majority" of the injury to the domestic industry, the remaining injury caused and attributable to dumping is unable to be considered material. It is important to

---

<sup>28</sup> Article 3.5 of the World Trade Organisation Anti-dumping Agreement

## PUBLIC RECORD

bear in mind that dumped imports need not be the sole or even the principal cause of injury. What must be established is that the injury that can be attributed to dumping is material. It is also worth highlighting that volume and price injury effects need not both exist before causation is established.

Nevertheless, the Commission agrees that other known factors need to be isolated from the dumped imports to ensure that injury caused by these other factors aren't attributed to the dumped imports. However, the Appellate Body did emphasize that 'the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effect of the other known causal factors are not prescribed by the Anti-Dumping Agreement.'

To that extent, the Commission's usual practice is to firstly examine whether the volume and prices of dumped imports could have resulted in the injury experienced by the Australian industry. Following this, the examination is broadened to include the other known factors that are affecting the economic condition of the industry to arrive at an overall conclusion on causation.

### **8.5 Price effects**

#### **8.5.1 Retail selling strategies**

Information gathered during the investigation shows that the major supermarket retailers account for approximately 82% of the Australian market for prepared or preserved tomatoes. The Commission found that Coles and Woolworths and to a lesser degree Aldi Partnership hold significant buying power due to the size of their purchases and sales volumes in the retail sector. The concentration of large volume contracts amongst a few large retailers has resulted in strong and aggressive competition between suppliers to secure these supply contracts.

The volumes and mix of private label products required for sale in the respective stores of Coles and Woolworths are offered to tender annually. The tender price submitted by suppliers will often be the starting point for further price negotiations. Interested parties informed the Commission that the nature of these negotiations were intended to extract the best possible price on behalf of the retailer.

As noted earlier in this report and highlighted in figure 5, shelf prices for generic private label products were predominantly static during the investigation period with a reduction evident in June 2013. This confirms the strategy of the retailers to ensure that private label products at the value end of the pricing spectrum are to be maintained at low levels.

This strategy has also been extended to premium private label products with Coles extending its '*down down*' promotion which saw the reduction of a 400g (net) can from \$1.19 to \$0.80 in April 2011. As evident in the graph below, those prices have continued through the investigation period. SPCA indicated the significance of this promotion was that Coles indicated that the reduced prices would continue to remain low.



## PUBLIC RECORD

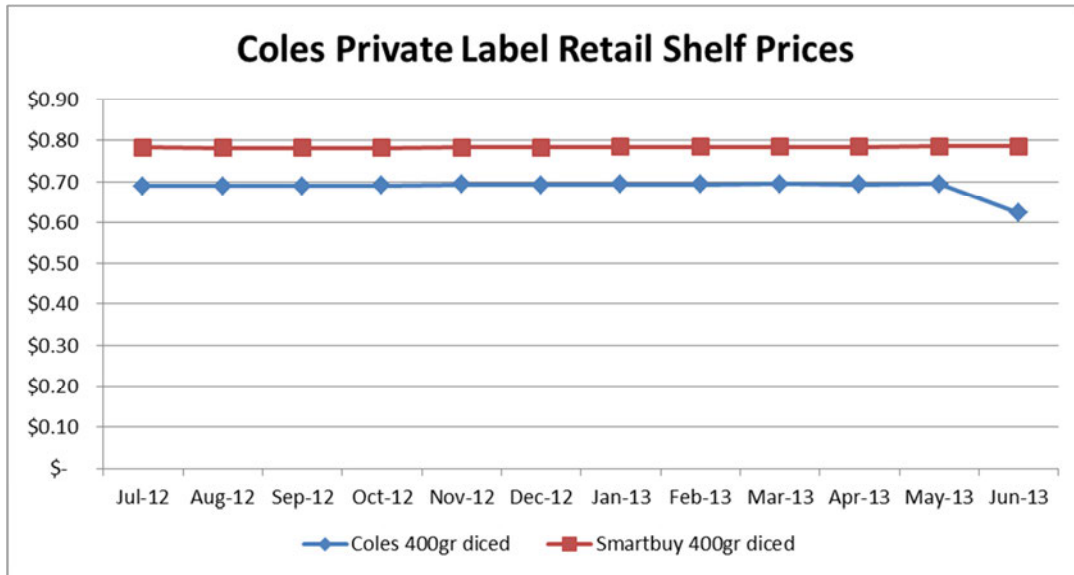


Figure 5- Generic private label retail shelf prices using Coles and Woolworths pricing data

For suppliers of proprietary label products, a promotional plan is required to be submitted to the retailer in advance of sales being made. This plan sets out the marketing and promotional strategies being put forward by the supplier. A promotional plan may translate into price discounting off the standard shelf price which is funded by the vendor. The Commission was informed that because of the high price elasticity of the goods, higher promotional spending results in greater sales volumes.

This is supported by figure 2 (section 5) that shows that sales volumes significantly improve with price discounting. The Commission considers it is evident that a relationship exists between the reduction in prices and corresponding spike in volumes.

SPCA indicated that maintaining sales volume in the major supermarkets is important. Products that continue to underperform will at some point be replaced with alternative products. Consequently SPCA has to promote its goods to maintain sales volumes, however, SPCA supplied the shelf layout plans for Coles and Woolworths and the shelf space being offered for their prepared or preserved tomatoes shows that this space has been declining.

### 8.5.2 Price injury

SPCA submitted that retail shelf prices for Italian imports are a reflection of, and correlate strongly with, the purchase prices paid by the retailers. To support this view SPCA compared prices at the wholesale and retail levels using retail scanned data and deducting estimated costs to calculate selling prices to the retailers.

An examination of available information gathered during the investigation also supports this view with retail prices following a similar decline to Free-Into-Store (FIS) prices since 2010.

To examine the effects of price undercutting the Commission considers it appropriate to assess price undercutting at both the retail level and at the wholesale levels of trade. Figure 1 (section 5) shows the range of shelf prices during the investigation period across

## PUBLIC RECORD

the four types of label categories. It is clear that shelf prices of SPCA's products were undercut by Italian dumped imported products.

The Commission also calculated the weighted average FOB unit price of the Italian goods and converted those prices to an FIS level that is equivalent to the terms of trade that SPCA has with the retail sector. Figure 6 below shows price undercutting of all Italian exporters.



Figure 6 – Wholesale price undercutting analysis

On a product specific basis, a comparison of weighted average selling prices over the investigation period shows that Italian prepared or preserved tomato retail prices for chopped, diced and whole peeled tomatoes were between 16% and 55% below SPCA's prices. For value added products, the Italian retail prices were below SPCA's prices by approximately 30% to 35%.

Evidence provided by SPCA indicated that as soon as the 'down down' program commenced the volume of the Coles brand Italian 400g diced tomatoes rose dramatically and was sustained.

This decrease coupled with the demand elasticity of the goods meant SPCA needed to react to these retail price demands. SPCA considered that the 'down down' program made other retailers change their pricing policies.

Coles stated that the Australian industry's products do not compete head to head with Italian imports as there is specific demand for the Italian goods. However Coles did indicate that customers will readily switch between labels depending on price and other promotions. Coles submitted that the tendency for customers to switch was less likely at the value end of the pricing tiers.

The Commission examined the price sensitivity of the goods and considers that the goods priced in the upper three tiers of the supermarket pricing strategy are very price sensitive. The Commission considers that purchases of Italian imports at dumped prices have allowed retailers to maintain their reduced shelf prices for generic private label products

## PUBLIC RECORD

and provide for a margin of undercutting that is greater than what it otherwise would have been in the absence of dumping.

The retailer pricing strategies, the degree of undercutting evident at both the wholesale and retail level and the consumers' propensity to change brands depending on price, has placed SPCA under pressure to react with a promotional and marketing campaigns aimed at discounting its prices in an attempt to maintain sales volume and market share.

SPCA's promotional activities during the investigation period have directly impacted on its net unit revenue which is highlighted in figure 7. It shows SPCA's unit revenue and unit costs, in respect of prepared or preserved tomatoes from 2009-10 period to 2012-13 period. Of particular note, is the decrease in SPCA's unit cost to make and sell (CTMS) which stems from a reduction in the number of employees and other efficiency gains implemented in its operations.

Notwithstanding the fall in its costs, SPCA's net unit revenue fell at a greater rate in the investigation period as the company attempted to minimise falling sales volumes from aggressive price competition from dumped imports on retail shelves. This ultimately resulted in SPCA incurring greater unit losses in the investigation period than at any other time during the injury analysis period.

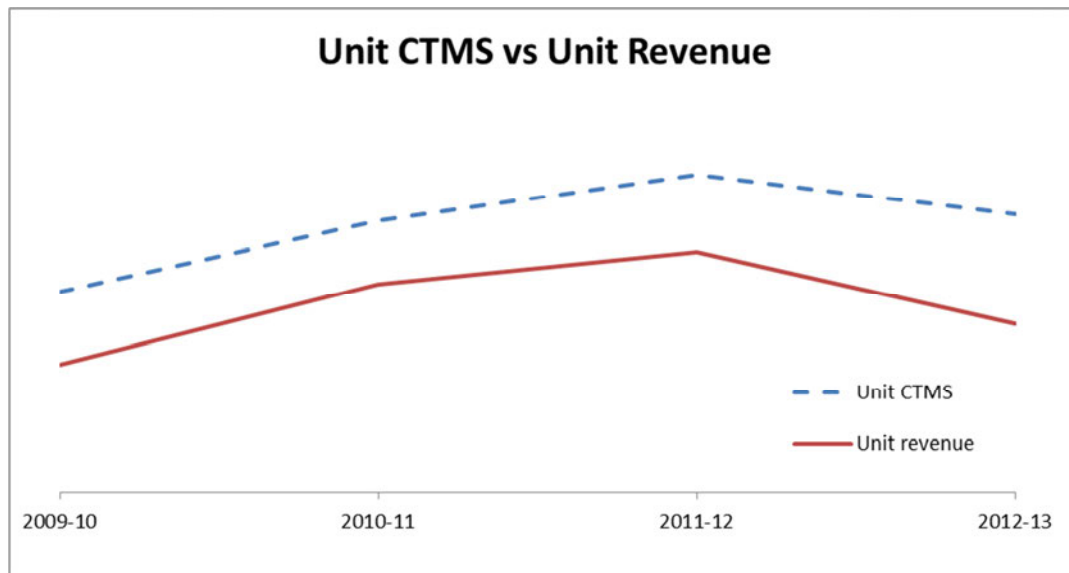


Figure 7 - Price suppression analysis using SPCA's revenue and costs

The Commission has found that dumped imports of prepared or preserved tomatoes from Italy have been a factor to the Australian industry suffering injury in the form of price depression and price suppression.

### 8.6 Volume effects

#### 8.6.1 Sales volume

##### Lost sales

As noted in the previous section, the investigation has found that a strong correlation exists between the discounting of SPCA's proprietary products and corresponding increase in sales volumes. Analysis of competing brands such as Annalisa, Val Verde

## PUBLIC RECORD

and Capriccio shows a similar relationship between price reductions and growth in sales volume.

In terms of premium private label products, a similar association between prices and volumes was evident with Woolworths Select range. However, in the case of Coles' product range, the evidence did not show this relationship existed as prices had remained unchanged throughout the investigation period.

An assessment of SPCA's domestic sales volumes of prepared or preserved tomatoes shows a steady decline from 2009 to 2012, after which SPCA experienced a slight improvement. Overall SPCA's sales volume to June 2013 has decreased by approximately 39% when compared to June 2010 period.

The Commission considers that suppliers of imported proprietary products to the retail sector were able to discount the price of their products during the investigation period to levels lower than they would have otherwise in the absence of dumping. These promotional campaigns appeared to occur on a regular basis and resulted in increased sales during those periods. In part therefore, it is reasonable to consider that the dumped imports contributed to SPCA losing sales at the retail level as consumers switched between the various brands on offer.

It is important to note however that several other factors were present in the Australian market which also contributed to SPCA's fall in volume. Firstly, the major supermarkets determine the shelf placement of all products within a range of goods. In doing so, retailers tend to provide the prime locations to the highest volume selling goods, often being their own private labels. Consequently SPCA's products have been moved to unfavourable locations on shelves within the prepared or preserved tomato range of goods which can exacerbate the lower sales performance.

The Commission considers that the strategy of shelf placement by the retailers is not related to their purchase of dumped imports from Italy. As a result, lost sales due to the unfavourable placement of SPCA's products on the retail shelf cannot be attributed to dumped imports. However the Commission considers the dumped goods are displacing SPCA's products in the retailers' shelf space.

Secondly, a significant volume of imported prepared or preserved tomatoes from Italy were found to not have been dumped in Australia. These were supplied by La Doria and Feger during the investigation period. Lost sales to La Doria and Feger cannot be attributed to dumped imports.

Lastly, interested parties have expressed the view that a significant proportion of consumers seek to specifically purchase Italian canned tomatoes irrespective of any price differential or brand association. Some parties have attributed this to consumer perceptions of quality differences between the imported and domestically produced goods. The Commission considers that consumer preferences for region specific products that contribute to SPCA's decline in sales cannot be attributed to dumped imports.

### Market share

Figure 8 below shows the market share in the Australian market for prepared or preserved tomatoes from June 2010 to June 2013. It highlights that SPCA's market share

## PUBLIC RECORD

decreased from June 2010 until June 2012 before improving slightly in the investigation period reflecting SPCA's sales volumes trend.

Since June 2010 to June 2013 SPCA's market share has decreased approximately 34 percentage points. In contrast, the market share of Italian prepared or preserved tomatoes increased by approximately 27 percentage points whilst the market share for countries other than Italy decreased by approximately 83 percentage points. Of note, the market share for the Italian goods has been increasing in a declining market putting greater pressure on the Australian industry to maintain sales volumes and market share.

The volume for the Italian goods has increased during the injury analysis period by 16% to June 2013 whilst SPCA's volume has fallen by 39% in the same corresponding period.

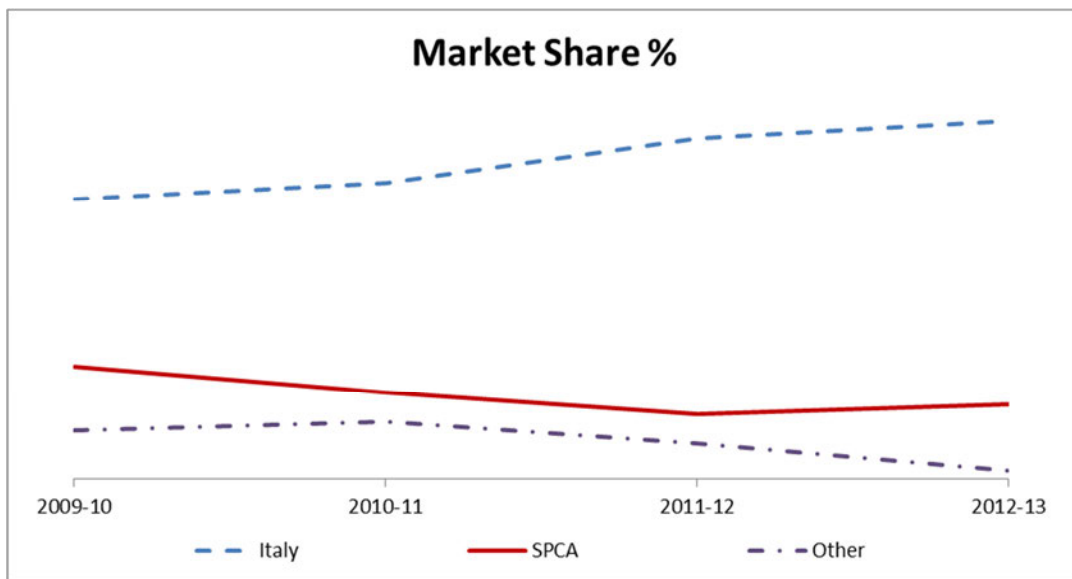


Figure 8 – Market share analysis using SPCA data, ACBPS data and exporter data.

To assess the impact of dumped imports, the Commission estimated the volume of Italian dumped goods to be approximately 56% of the total Italian goods exported to Australia during the investigation period.

The Commission has found that dumped imports of prepared or preserved tomatoes from Italy have been a contributing factor to the Australian industry suffering injury in the form of lost sales and reduced market share during the investigation period.

### 8.6.2 Profits and profitability

Figure 9 shows movements in SPCA's profitability in respect of prepared or preserved tomatoes from June 2010 to June 2013. The graph demonstrates a declining trend in profitability over the injury analysis period and specifically from June 2011 to the end of the 2013 financial year. A similar trend was evident for actual profits achieved by SPCA over the injury analysis period.

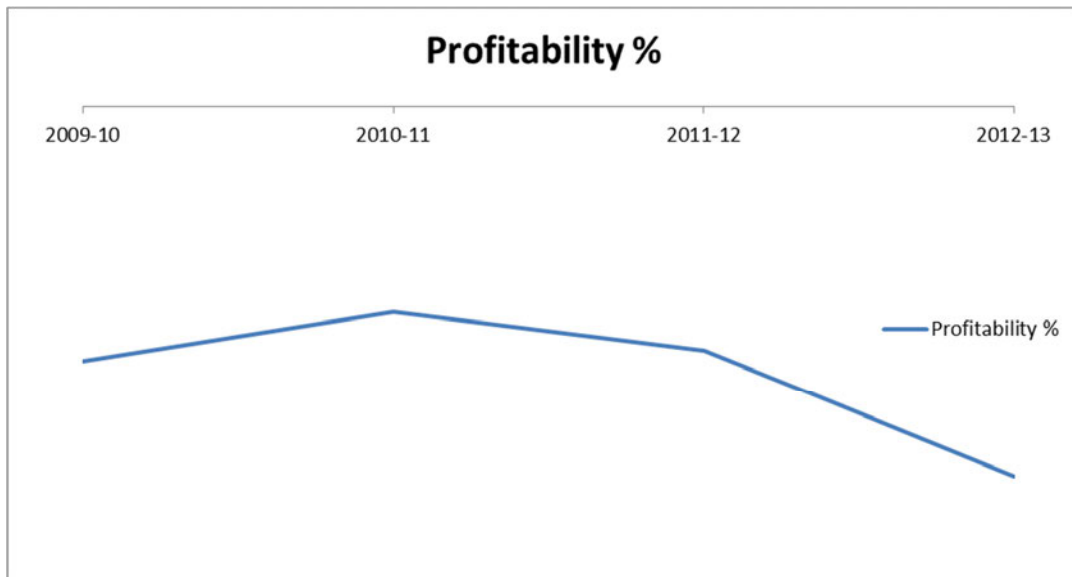


Figure 9 - SPCA profitability using SPCA's revenue and costs

It highlights the impact of SPCA's decisions to promote its products through heavy discounting of the retail price in direct competition with both imported private and proprietary labels. In effect, the price discounting had a significant impact on SPCA's financial performance, eliminating the effect of achieved operational efficiencies.

The Commission has found that the Australian industry has suffered injury in the form of lost profits and profitability that can be attributed to dumped imports.

## **8.7 Other economic factors**

The Commission has verified information presented by SPCA at Appendix A7 of its application and makes the following findings.

### **8.7.1 Assets**

SPCA indicated the value of assets in the production of prepared or preserved tomatoes decreased during the financial years 2009-2012.

The value of the assets presented in the Appendix A7 represents the whole company. Whilst the Commission can see a reduction of assets from a company-wide perspective, SPCA could not separate the specific assets for the production of the goods. Accordingly, the Commission cannot confirm if injury caused by dumping has occurred in the form of reduced assets.

### **8.7.2 Capital investment**

SPCA indicated the value of capital investment in the production of prepared or preserved tomatoes decreased during the financial years 2009-2012.

The value of the capital investment presented in the Appendix A7 represents the whole company. Whilst the Commission can see a reduction in capital investment from a company-wide perspective, SPCA did not separate the specific components for the

production of the goods. Accordingly the Commission cannot confirm if injury caused by dumping has occurred in the form of reduced capital investment.

### **8.7.3 Capacity**

Capacity in relation to prepared or preserved tomatoes has remained static since 2010.

### **8.7.4 Capacity utilisation**

Capacity utilisation has declined each year since 2010 to 2012, almost halving since 2010.

### **8.7.5 Employment numbers**

Employment has decreased from FY2010 to FY2012. Over this period SPCA identified the number of staff related to the goods at the Shepparton canning facility and other support staff involved in the logistics, administration and sales of the goods that have lost their jobs.

### **8.7.6 Stocks**

SPCA identified decreasing closing stock values since 2010.

## **8.8 Other causes of injury**

During the investigation the Commission either found or was informed by interested parties of the following other possible causes of injury:

- Un-dumped goods;
- Other country pricing;
- The appreciation of the Australian dollar;
- SPCA's decreased exports;
- The effect of the 2011 floods;
- Capacity constraints;
- Lack of investment in the tomato growing industry;
- Structural issues in the tomato processing industry;
- SPCA's poor financial decisions;
- Long term loss making; and
- Private label strategies and supply diversification by supermarkets.

### **8.8.1 Un-dumped goods**

The Commission considered un-dumped goods were also a cause of injury to the Australian industry and estimated the volume of un-dumped goods to be approximately 44% of the total export volume from Italy. However, it is reasonable to expect that dumped prices offered to importers/retailers during contract negotiations would have influenced and impacted on prices being tendered by exporters of un-dumped product. In a market unaffected by dumped prices of prepared or preserved tomatoes from Italy, the Commission considers that prices of un-dumped goods would be higher.

### **8.8.2 Effect of imports from other countries**

The Commission examined the volume and value of exportations from countries other than Italy. The main exporting countries of prepared or preserved tomatoes during the injury analysis period apart from Italy were, Argentina, China, New Zealand, and the United States of America (USA). Information from the ACBPS database shows that FOB export prices of these other countries apart from the USA and Argentina were above the FOB prices from Italy. Although the FOB prices from USA and Argentina were below the Italian FOB prices, during the course of the injury analysis period Argentina stopped exporting the goods altogether and the volume exported by the USA significantly decreased. During the injury analysis period the volume from other countries decreased from 20.9% to 1.4% of the total market.

Further, there has been no evidence presented or gathered by the Commission to indicate that imports from these other countries were making their way into the critical segment of the retail market, being the four key retailers.

The Commission considers that goods exported from countries other than Italy have not materially contributed to SPCA's injury.

### **8.8.3 Exchange rates**

Since 2007 the AUD / EUR exchange rate has appreciated significantly. Information available from the Reserve Bank of Australia shows currency fluctuations and in particular the appreciation of the AUD against key foreign currencies. It reveals that the AUD appreciated 37% between 2009 and 2013 and at its peak in 2012 the AUD had appreciated in excess of 42% over the EUR.

Given the majority of prepared or preserved tomatoes exported from Italy were sold in euros, the Commission examined the impact of the appreciation on FOB prices. It shows that unit FOB prices in Australian dollar terms decreased by up to 45% since 2009.

However it is important to note that when export prices are examined in EUR, unit prices have also fallen by 11.9% between June 2010 and June 2013. This suggests that decreases in export prices were not solely driven by the appreciation of the Australian dollar. These observations are contrary to the views expressed by many exporters and importers that attributed the entire injury to exchange rate fluctuations rather than any reduction in the EUR FOB price.

So whilst the appreciation of the Australian dollar was a significant contributor to the low import prices evident in the Australian market during the investigation period, the Commission notes that un-dumped prices or corresponding normal values in equivalent Australian dollar terms were materially higher than corresponding export prices.

The Commission considers the appreciation of the AUD is a significant contributing factor to the injury suffered by the Australian industry by reducing the FOB value in Australian dollar terms thereby improving the competitiveness of the imported goods.



#### **8.8.4 Decreased export sales**

Submissions have been received from interested parties indicating that SPCA's injury or part thereof is caused from its reduced export sales. The Commission examined this factor and concludes that in absolute terms SPCA has had a significant decline in its export sales performance. However, in relative terms, the volume sold since 2009, has been negligible relative to the volume SPCA sold in Australia.

The Commission considers the impact of declining export sales by SPCA has not materially contributed to the injury indicators found during the investigation period.

#### **8.8.5 Floods of 2011**

Interested parties submitted that the Australian industry suffered as a result of floods that occurred during 2011 that destroyed a significant proportion of raw tomatoes that are supplied to SPCA.

The Commission found no evidence that this hampered SPCA's ability to source raw tomatoes for the production of prepared or preserved tomatoes during the investigation period.

#### **8.8.6 Private label strategies and supply diversification by supermarkets**

Interested parties have argued that one of the causes for decreasing prices in the Australian market is the private label strategy of the major supermarkets. The private label pricing strategy places these goods in direct competition to the proprietary labels.

Interest parties argued that this strategy has been the main cause for declining prices more generally. In one submission, it was argued that that the major retailers have sought to obtain the cheapest prices from reliable sources by encouraging multiple suppliers to promote both price competition and ensure continuity of supply. Consequently the interested party concludes the reduction of shelf prices has led to an increase of supply of Italian sourced goods.

The Commission has also been advised that one particular supplier ceased price negotiations for the supply of a fixed volume contract as prices had fallen below the cost of production.

The Commission agrees with the view that the private label strategy of the supermarkets has contributed to the competitive environment in the Australian market. This in turn has contributed to suppliers of Italian imports seeking to secure the fixed volume contracts at prices less than the normal value.

Therefore whilst the strategy of retailers to promote their own private labels has contributed to SPCA suffering injury, the Commission has identified that the consequences that flow from these strategies is to ultimately encourage, and lead to, increased price competition amongst exporters. The retailers seek tenders for large volumes over twelve month periods. The consequential effect of this competitive process results in exporters selling at dumped prices which aids to replace SPCA's goods with imported goods.

## 8.9 Materiality

### 8.9.1 Submissions to SEF 217

With regard to materiality, responses to SEF217 indicated that prices from undumped exporters would not increase in the absence of dumping and a price increase of 9% was mere assertion and not based on relevant facts.

The submission received from Conserve Italia indicated that the impact of dumping on prices in the Australian retail sector was approximately 1%. Conserve Italia interprets s.269TAE(1)(aa) of the Act as not allowing the Commission to take into account the product dumping margin of 26.35% determined for uncooperative exporters. Consequently, it argues that a 1% dumping margin cannot be the cause of material injury.

The Commission disagrees with the view submitted by Conserve Italia. As noted earlier in this report, Section 269TAE(1)(aa) allows for the size of the dumping margins to be a relevant factor in assessing material injury and makes no mention of particular dumping margins.

Conserve Italia further argues that the “but-for” test used to assess the materiality of the injury caused by dumping is based on mere conjecture. The Commission respectfully disagrees. In deciding whether the injury caused by dumping was material, the Commission considered the likely impact of undumped import prices in the market during the investigation period. As noted in section 8.4.4, the Commission does not consider it necessary or a requirement to quantify the injurious effects of dumping.

The Commission considers that the market dynamics need to be considered together with the volume of dumping to fully comprehend the materiality of the dumping.

Depending on the economic condition of an industry, injury caused by dumping at one point in time may not be material, and at another point in time the same magnitude of dumping will be material. In the Productivity Commission report it indicated that the broader Australian industry for processed tomatoes (which includes SPCA) has experienced injury over the last two decades. *It is likely the accumulation of the long term competitive pressures has culminated in the difficult commercial situation SPCA Ardmona currently faces*<sup>29</sup>. Given the Australian industry performance has been eroded over a number of years for various reasons, and it is such, that any adverse market condition that causes injury could be considered to be material.

To assess the materiality of the injurious effects of dumped imports from Italy, the Commission has adjusted retail shelf prices upwards to account for the weighted average margin of dumping for all dumped goods exported to Australia. In effect, this will reflect a market where retail selling prices are unaffected by dumping. This approach also ensures that factors other than dumping that may have contributed to the injury being experienced by SPCA are isolated from the effects of dumping.

The Commission considers that the higher import prices would have translated into higher retail shelf prices given the strong correlation between the wholesale prices and retail prices. The magnitude of the price increases based on actual dumping margins

---

<sup>29</sup> Productivity Commission, Safeguards Inquiry into the Import of Processed Tomato Products Report, 12 December 2013, p 55

## **PUBLIC RECORD**

determined for selected exporters and a weighted average dumping margin using declared import values, is approximately 9%.

Therefore, the Commission is satisfied that the dumped imports caused material injury to the Australian industry producing like goods.

### **8.10 The Commission's Assessment**

The Commission has found that dumped prepared or preserved tomatoes exported from Italy have caused material injury to the Australian industry producing like goods. The injurious effects of the dumped goods were in the form of:

- reduced revenues;
- price depression;
- price suppression;
- reduced profits;
- reduced profitability, and
- reduced return on income.

In reaching this conclusion, the Commission has identified and isolated the impact of other factors evident in the Australian market that may have contributed to the injurious effects experienced by SPCA. Factors other than dumping that have been identified include:

- undumped imports from Italy;
- imports from countries not the subject of the investigation;
- the appreciation of the Australian dollar; and,
- a decrease in SPCA'S export sales.

In doing so, the Commission has ensured that the impact of these other factors have not been attributed to the dumped exports.

## **9 WILL DUMPING AND MATERIAL INJURY CONTINUE?**

### **9.1 Findings**

The Commission makes a finding that exports of prepared or preserved tomatoes from Italy in the future may be at dumped prices, and that continued dumping may cause further material injury to the Australian industry.

#### **9.1.1 Submissions to SEF 217**

Conga Foods submits that dumping will not continue. It submits that the Commission dramatically underestimated the price directions citing that the AUD has recently devalued by approximately 22% to 24% and the significant loss of the Italian tomato crop will cause an increase in the export price in financial year 2013/14.

### **9.2 The Commission's Assessment**

#### **9.2.1 Will dumping continue?**

The Commission's dumping analysis found dumping margins between 3.25% and 26.34% of prepared or preserved tomatoes exported from Italy during the investigation period.

The Commission considers that due to the significant portion of goods sold via a small number of retailer organisations that exert significant buying power over the suppliers of those goods, Italian producers will continue to compete aggressively for large volume contracts offered by retailers.

From verification visits it has been calculated that approximately 56% of the goods exported from Italy were at dumped prices. Given the extent of the dumping and the buying strategies of the major supermarkets, the Commission considers that exporters, in the absence of dumping duties, would continue to sell their goods to Australia at prices below normal values. Given the price elasticity of demand for the goods, in particular the imported proprietary and private labelled goods, retailers will continue to strive for lower prices creating a circumstance of continued lower prices which the Australian industry cannot compete with.

The Commission considers that dumping will continue if dumping duties are not imposed.

#### **9.2.2 Will material injury continue?**

The Commission has reviewed the Australian industry's performance over the injury analysis period and has made a finding that prepared or preserved tomatoes exported from Italy at dumped prices have caused material injury to the Australian industry.

The Commission considers that the material injury will continue in the absence of dumping duties. This view is formed by the dynamics of the procurement strategies of the major supermarkets, the willingness of the exporters to secure the sales contracts and the propensity of consumers to continue to switch between proprietary and premium private labels based on price.

## **PUBLIC RECORD**

The Commission considers that in the absence of anti-dumping measures the impact may be particularly evident in:

- reduced revenues;
- price depression;
- price suppression;
- reduced profits; and
- reduced profitability.

Based on the available evidence, the Commission makes a finding that exports of prepared or preserved tomatoes (other than by exporters found to be not dumping or dumping to a negligible degree) in the future may be at dumped prices and that continued dumping may cause further material injury to the Australian industry.

## 10 NON-INJURIOUS PRICE

### 10.1 Assessment of NIP

The Commission has preliminarily assessed that the NIP can be determined using SPCA's cost to make and sell to determine a minimum price that the Australian industry could be expected to achieve in a market unaffected by dumping.

### 10.2 Introduction

Dumping duties may be applied where it is established that dumped imports have caused or threaten to cause injury to the Australian industry producing like goods. The level of dumping duty cannot exceed the margin of dumping, but a lesser duty may be applied if it is sufficient to remove the injury.

The calculation of the NIP provides the mechanism whereby this lesser duty provision is given effect. The NIP is the minimum price necessary to prevent the injury, or a recurrence of the injury, caused to the Australian industry by the dumping and subsidisation<sup>30</sup>.

Anti-dumping measures are based on FOB prices in the country of export. Therefore a NIP is calculated in FOB terms to compare to the country of export.

### 10.3 SPCA's claims

On 29 August 2013, SPCA lodged a submission regarding the USP calculation. In their submission SPCA considered it was inappropriate to establish a USP using selling prices unaffected by dumping. This was based on its view that the Australian market has been affected by dumped imports for numerous years prior to the investigation period.

SPCA submitted that the USP be constructed from its 2012 CTMS information provided to the Commission plus an appropriate rate of profit reflecting the expected rate of return for this category of product.

### 10.4 The Commission's assessment

In considering whether lesser duties are sufficient to remove the injurious effects of dumping, the Commission has considered what might be the minimum price for prepared or preserved tomatoes that SPCA could be expected to achieve in a market unaffected by exports at dumped prices.

The Commission agrees that SPCA's historical domestic selling prices are not appropriate given the influence of Italian imports at dumped prices. In these circumstances the Commission considers it appropriate to construct a notional minimum price using SPCA's cost to make and sell for like goods sold during the investigation period.

---

<sup>30</sup> The non-injurious price is defined in section 269TACA

## **PUBLIC RECORD**

For the purposes of assessing whether a lesser amount of duty is warranted to remedy the injury caused by dumping, the Commission has adjusted the minimum price to reflect a free-on-board price to be compared with normal values. The comparison shows that the minimum NIP exceeded established normal values. Accordingly, the Commission intends recommending that the full margins of dumping be the basis for imposing interim dumping duties.

NIP calculations are at **Confidential Appendix 2**.

## 11 ANTI-DUMPING MEASURES

### 11.1 Undertaking

Pursuant to s.269TG(4) of the Act, the Parliamentary Secretary may accept, if offered from an exporter, an undertaking that the exporter will conduct future trade to Australia so as to avoid causing material injury, or materially hinder the establishment of an Australian industry.

On 11 March 2014, Conserve Italia offered a formal request for an undertaking to be considered by the Parliamentary Secretary.

In considering whether to recommend to the Parliamentary Secretary that the terms of the undertaking are acceptable, the Commission notes that:

- the undertaking price is based on a normal value and corresponding domestic sales that occurred during the investigation period of July 2012 to June 2013;
- those domestic sales stem from annual contract negotiations with domestic customers that take place from June 2012;
- the contract price for the fresh tomatoes was negotiated between February 2012 to April 2012, and
- as a result, the price undertaking offered is already significantly outdated.

Therefore the price undertaking offered by Conserve Italia is a price based on a period that does not correspond with current export price contracts. Although the price undertaking is reviewable each twelve months, the subsequent contract periods will continue to be out of alignment with subsequent price undertakings offered by exporters.

The Commission recommends the Parliamentary Secretary not accept any price undertakings that may be offered by exporters of the goods from Italy.

### 11.2 Interim dumping duties

The Commission recommends that the Parliamentary Secretary publish a dumping duty notice in respect of prepared or preserved tomatoes exported to Australia by:

- all exporters from Italy except La Doria and Feger.

The lesser duty rule can only reduce the amount of interim dumping duty where the NIP is lower than the ascertained normal value (the export price plus the dumping margin).

For all goods the NIP has been set at the level of the normal values for respective exporters. This means that the lesser duty rule does not come into effect and the proposed measures are linked to the full margin of dumping.

The Commission recommends to the Parliamentary Secretary that the dumping duties take the form of a fixed amount of duty per kilogram (calculated as a percentage of the FOB export price or the ascertained export price whichever is higher) plus a variable amount of duty if the actual export price is below the ascertained export price.



## PUBLIC RECORD

Manufacturer/Exporter	Visited	Effective rate of duty
<b>Selected exporters</b>		
De Clemente Conserve S.p.A	Yes	3.25%
Conserve Italia Soc. Coop Agr	Yes	4.54%
I.M.C.A. S.p.A.	No	26.35%
Lodato Gennaro & C. S.p.A.*	No	26.35%
<b>Residual exporters</b>		
Attianese S.p.A.	No	4.24%
Fiamma Vesuviana Srl	No	4.24%
Greci Industria Alimentare S.p.A.	No	4.24%
Menu Srl	No	4.24%
Mutti S.p.A.	No	4.24%
Nolana Conserve Srl	No	4.24%
Princes Industrie Alimentari SRL	No	4.24%
Rispoli Luigi & C (S.R.L.)	No	4.24%
Steriltom Srl	No	4.24%
<b>Uncooperative exporters (All other)</b>	No	26.35%

## **12 Recommendations**

The Commissioner is satisfied that:

- the dumping of prepared or preserved tomatoes exported to Australia from Italy has caused material injury to the Australian industry producing like goods; and
- the dumping of prepared or preserved tomatoes exported to Australia from Italy has caused material injury to the Australian industry producing like goods.

**The Commissioner recommends that the Parliamentary Secretary impose:**

- anti-dumping measures on prepared or preserved tomatoes exported to Australia from Italy (except for La Doria and Feger).

**The Commissioner recommends the Parliamentary Secretary be satisfied:**

- in accordance with s.269TAAD(1), that like goods sold in the country of export in arms' length transactions in substantial quantities during an extended period for home consumption or export to a third country:
  - at a price that is less than the cost of such goods and;
  - it is unlikely that the seller of the goods will be able to recover the cost of those goods within a reasonable period;

the price paid for those goods is taken to not have been paid in the ordinary course of trade;

- in accordance with s.269TAB(3), that sufficient information has not been furnished, or is not available, to enable the export price of prepared or preserved tomatoes exported to Australia from Italy by the category of 'uncooperative exporters' be determined under s.269TAB(1)(a), (b), or (c);
- in accordance with s.269TAC(6), sufficient information has not been furnished or is not available to enable the normal value of prepared or preserved tomatoes exported to Australia from Italy to be ascertained under s.269TAC(1), (2), (5C) or (5D) for the category 'uncooperative exporters';
- in accordance with s.269TG(1) the amount of the export price of prepared or preserved tomatoes exported to Australia from Italy is less than the amount of the normal value of those goods and because of that, material injury to the Australian industry producing like goods has been, or is being caused;
- in accordance with s.269TG(2) the amount of the export price of prepared or preserved tomatoes exported to Australia from Italy is less than the amount of the normal value of those goods and the export price of the goods that may be exported to Australia from Italy in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been, or is being caused;

**Final report 217 Prepared or preserved tomatoes - Italy**

## **PUBLIC RECORD**

### **The Commissioner recommends the Parliamentary Secretary determine:**

- in accordance with s.269TAAD(4), the amounts for the cost of production or manufacture of prepared or preserved tomatoes in the country of export and the administrative, selling and general costs associated with the sale of those goods;
- in accordance with s.269TAB(1)(c) the export prices for certain exports, De Clemente Conserve S.p.A., and Conserve Italia Soc. Coop Agr be calculated having regard to all the circumstances of the exportation;
- in accordance with s.269TAB(3), the export prices for the categories of 'uncooperative exporters' of prepared or preserved tomatoes exported to Australia from Italy be determined having regard to all relevant information;
- in accordance with s.269TAC(2)(c), the cost of production or manufacture of prepared or preserved tomatoes exported in the country of export, and the administrative, selling and general costs associated with the sale and the profit on that sale;
- in accordance with s.269TAC(6), normal values for the categories of 'uncooperative exporters' of prepared or preserved tomatoes having regard to all relevant information;
- in accordance with s.269TACB(1), by comparison of the weighted average of export prices during the investigation period and the weighted average of normal values during that period, that exports of prepared or preserved tomatoes exported from Italy were dumped;

### **The Commissioner recommends the Parliamentary Secretary direct:**

- in accordance with s.269TAC(8), the price paid or payable for like goods sold by:
  - De Clemente Conserve S.p.A., and
  - Conserve Italia Soc. Coop Agr La Doria S.p.A.

be taken to be such a price adjusted for differences between domestic and export sales to ensure a fair comparison.

### **The Commissioner recommends the Parliamentary Secretary compare:**

- in accordance with s.269TACB(2)(a), the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

### **The Commissioner recommends the Parliamentary Secretary declare:**

- in accordance with s.269TG(1), by public notice, that section 8 of the Dumping Duty Act applies to:

## **PUBLIC RECORD**

- preserved tomatoes exported all exporters from Italy (except La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A), to the extent permitted by s.269TN; and
- like goods that were exported to Australia by all exporters from Italy (except La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A), after the CEO made a PAD under s.269TD on 1 November 2013 but before publication of the notice, to the extent permitted by s.269TN; and
- in accordance with s.269TG(2), by public notice, that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia by all exporters from Italy (except La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A) after the date of publication of the notice.

**13 APPENDICES AND ATTACHMENTS**

<b>Confidential Appendix 1</b>	Assessment of the economic condition on the Australian industry
<b>Confidential Appendix 2</b>	Non-Injurious Price
<b>Confidential Appendix 3</b>	Ascertained export prices and normal values