



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

**Anti-Dumping
Commission**

CUSTOMS ACT 1901 - PART XVB

CONSIDERATION REPORT NO. 354

**CONSIDERATION OF AN APPLICATION FOR REVIEW OF
ANTI-DUMPING MEASURES**

**CERTAIN PREPARED OR PRESERVED TOMATOES
EXPORTED FROM ITALY**

**(EXCEPT BY FEGER DI GERARDO FERRAIOLI S.P.A.
LA DORIA S.P.A., AND AR INDUSTRIE ALIMENTARI S.P.A)**

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ABBREVIATIONS

| Abbreviation | Full title |
|-------------------------------|---|
| ADN | Anti-Dumping Notice |
| the applicant | SPC Ardmona Operations Limited (SPCA) |
| ARIA | AR Industrie Alimentari S.p.A. |
| the Commission | the Anti-Dumping Commission |
| the Commissioner | the Commissioner of the Anti-Dumping Commission |
| Feger | Feger di Gerardo Ferraioli S.p.A. |
| the goods | the goods to which the anti-dumping measures apply (defined in Chapter 2.3) |
| La Doria | La Doria S.p.A. |
| REP 217 | Report No. 217 |
| REP 276 | Report No. 276 |
| original investigation period | 1 July 2012 to 30 June 2013 |
| the Parliamentary Secretary | the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science |

1 SUMMARY AND RECOMMENDATIONS

This report outlines the Anti-Dumping Commission's (the Commission's) consideration of an application lodged by SPC Ardmona Operations Limited (referred to as SPCA or the applicant in this report) for a review of the anti-dumping measures applying to certain prepared or preserved tomatoes (the goods) exported to Australia from Italy for all exporters subject to measures as a result of the decision to publish a dumping duty notice on 16 April 2014, following the consideration of Report No. 217 (REP 217).

The application, at **Confidential Attachment 1**, is based on a change in the variable factors.¹ The variable factors relevant to the taking of the measures, relevant to the application, are the normal value and export price in respect of the goods.

1.1 Recommendation

The Commission recommends that the Commissioner of the Anti-Dumping Commission (the Commissioner) not reject the application, and recommends that he initiate a review into the anti-dumping measures as they relate to REP 217.

The Commission notes that Feger di Gerardo Ferraioli S.p.A. (Feger) and La Doria S.p.A. (La Doria) will be excluded from the review because they are not subject to the same anti-dumping measures. In addition, AR Industrie Alimentari S.p.A. (ARIA) will be excluded from the review because a review of measures in relation to its exports has already been initiated (*Consideration Report 349* refers).

1.2 Legislative background

Division 5 of Part XVB of the *Customs Act 1901*² sets out, among other things, the procedures to be followed by the Commissioner in dealing with an application for review of anti-dumping measures.

Division 5 empowers the Commissioner to reject or not reject an application for a review of anti-dumping measures.

If the Commissioner does not reject the application, he is required to publish a notice indicating that it is proposed to review the measures covered by the application.

1.3 Findings and conclusions

SPCA's application for review of the anti-dumping measures applying to certain prepared or preserved tomatoes exported to Australia from Italy has been examined and the Commission is satisfied that:

¹ A public version of the application is at **Non-Confidential Attachment 1**.

² A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

PUBLIC RECORD

- the application complies with section 269ZB; and
- having regard to the applicant's claims and other relevant information, there appear to be reasonable grounds for asserting that one or more of the variable factors relevant to the taking of the anti-dumping measures have changed.

2 BACKGROUND

2.1 The goods subject to the anti-dumping measures

The goods subject to the anti-dumping measures (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.

2.2 Tariff classification

The goods are currently classified to subheading 2002.10.00 (statistical code 60) to Schedule 3 of the *Customs Tariff Act 1995*. The general rate of Customs duty is currently 5% for the goods imported from Italy.

2.3 Existing measures

2.3.1 The original investigation

On 10 July 2013, the Commissioner initiated a dumping investigation into certain prepared or preserved tomatoes exported to Australia from Italy following an application by SPCA. In that investigation, and as outlined in REP 217, it was found that:

- in the case of two exporters, Feger and La Doria, the goods were exported to Australia from Italy at dumped prices, but the dumping margins were negligible (less than 2%);
- in the case of all other exporters, the goods were exported to Australia from Italy at dumped prices, at dumping margins ranging from 3.25% to 26.35%;
- the dumped goods caused material injury to the Australian industry producing like goods; and
- continued dumping may cause further material injury to the Australian industry.

Accordingly, the Commissioner recommended that the then decision-maker, the Parliamentary Secretary to the Minister for Industry, impose anti-dumping measures on the goods exported from Italy, with the exception of two exporters, Feger and La Doria, against whom the investigation was terminated. The Parliamentary Secretary to the Minister for Industry accepted that recommendation and, on 16 April 2014, notice of their decision was published in the Commonwealth Gazette³ and *The*

³ Available on the legislation.gov.au website at <https://www.legislation.gov.au/Details/C2014G00626>.

Australian newspaper. Anti-Dumping Notice (ADN) No. 2014/32 refers. The measures are in place until 15 April 2019.

2.3.2 Subsequent investigation

On 19 January 2015, the Commissioner initiated a dumping investigation into certain prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria following an application by SPCA. In that investigation, and as outlined in Report No. 276 (REP 276), it was found that:

- the goods were exported from Italy by Feger and La Doria at dumped prices (8.4% and 4.5%, respectively);
- the dumped goods caused material injury to the Australian industry producing like goods; and
- continued dumping may cause further material injury to the Australian industry.

Accordingly, the Commissioner recommended that the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary)⁴ impose anti-dumping measures on the goods exported from Italy by Feger and La Doria. The Parliamentary Secretary accepted that recommendation and, on 10 February 2016, notice of the Parliamentary Secretary's decision was published in ADN No. 2016/13.

2.4 The current review application

On 5 May 2016, SPCA lodged an application requesting a review of the anti-dumping measures as they apply to all exports of prepared or preserved tomatoes to Australia from Italy except by Feger and La Doria. SPCA claims that certain variable factors established in REP 217 have changed and should be reviewed.

SPCA is an Australian manufacturer of the goods for sale in domestic and international markets. The Commission considers that SPCA falls within the definition of an "affected party" in subsection 269T(1) as SPCA represents the Australian industry. Accordingly, SPCA is eligible to lodge an application for a review of measures under subsection 269ZA(1).

The application is not precluded by subsection 269ZA(2)(a). This requires that an application for review must not be lodged earlier than 12 months after the publication of the dumping duty notice or countervailing duty notice, or the publication of a notice declaring the outcome of the last review of the dumping duty or countervailing duty notice. No such notice was published within the 12 months preceding SPCA's application.

⁴ The Minister for Industry, Innovation and Science has delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary, and accordingly, the Parliamentary Secretary is the relevant decision maker.

Pursuant to subsection 269ZC(1), the Commissioner must examine the application and, within 20 days after the lodgement date, decide whether to reject the application. The decision must be made no later than 25 May 2016.

If the Commissioner is not satisfied, having regard to the application and to any other relevant information, of one or more matters referred to in subsection 269ZC(2), the Commissioner must reject the application.

2.5 Concurrent applications

On 1 April 2016, ARIA lodged an application requesting a review of the anti-dumping measures as they apply to its exports of prepared or preserved tomatoes to Australia from Italy. The application by ARIA also relates to the anti-dumping measures imposed following REP 217. The Commissioner's consideration of the application and reasons for initiating a review of the measures applying to ARIA is set out in *Consideration Report 349*, which is available on the electronic public record.⁵

If initiated, the Commission will utilise a combined electronic public record for both the present review and the review of measures which is currently underway, and submissions relating to either review can be considered concurrently.⁶ The investigation period for this case and case 349 are the same.

2.6 Relevance of other investigations

The findings of other investigations including REP 276 and any other investigations, reports or reviews the Commissioner deems relevant will be considered during this review.

⁵ Available on www.adcommission.gov.au.

⁶ The Commission also notes that an accelerated review relevant to the goods is currently underway, concerning exports by La Specialità Italiane S.r.L. (*Consideration Report 351* refers).

3 CONSIDERATION OF THE APPLICATION

3.1 Finding

Having regard to the applicant's claims, the Commission is satisfied that the application complies with section 269ZB and that there appear to be reasonable grounds for asserting that one or more of the variable factors relevant to the taking of anti-dumping measures have changed.

3.2 Legislative framework

Subsection 269ZB(1) requires that the application be in writing, be in an approved form for the purposes of section 269ZB, contain such information as the form requires, be signed in the manner indicated by the form, and be lodged in the manner approved under section 269SMS.

Subsection 269ZB(2) states that the application must include:

- (a) *a description of the kind of goods to which the measures the subject of the application relate; and*
- (b) *a description of the measures the subject of the application; and*
- (c) *if the application is based on a change in variable factors—a statement of the opinion of the applicant concerning:*
 - (i) *the variable factors relevant to the taking of the measures that have changed; and*
 - (ii) *the amount by which each such factor has changed; and*
 - (iii) *the information that establishes that amount;*

Subsection 269ZC(2) specifies the matters which the Commissioner must consider in making a decision whether to reject the application. These matters are:

- (a) *that the application complies with section 269ZB; and*
- (b) *that there appear to be reasonable grounds for asserting either, or both, of the following:*
 - (i) *that the variable factors relevant to the taking of anti-dumping measures have changed;*
 - (ii) *that the anti-dumping measures are no longer warranted.*

3.3 Variable factors

To comply with subsection 269ZB(2)(c), the application must include a statement of the applicant's opinion concerning the relevant variable factors that have changed, the amount by which those variable factors have changed, and information that establishes the amount of change. The applicant is not required to demonstrate that all the variable factors have changed.

3.3.1 Normal value

SPCA states that more than three and a half years have passed since the beginning of the investigation period in REP 217 (1 July 2012 to 30 June 2013). Over this time, SPCA claims there have been significant increases in the cost of production for raw tomatoes in Italy.

SPCA additionally highlighted the Commissioner's findings in REP 276, which referred to payments made to tomato growers under the European Union *Common Agricultural Policy* which affected the exporters' normal values. SPCA claims that a new payment has been provided to tomato growers beyond that identified in REP 276, being €11.2 million in specific support for growers of tomatoes. To support this claim, SPCA provided calculations of anticipated payments, and estimated the impact of these payments on the cost of a tonne of raw tomatoes (**Confidential Attachment 2** refers).

SPCA claims that the incentives and payments for tomato producers may result in a higher normal value than was previously calculated in REP 217. SPCA claims that, as such, there appears to be reasonable grounds for asserting that the normal value relevant to the taking of anti-dumping measures has changed.

3.3.2 Export price

SPCA claims that export prices may no longer reflect arms-length transactions and accordingly should be reviewed. SPCA's concerns are illustrated by one particular exporter, which SPCA notes should be subject to the highest dumping duty rate identified in REP 217. SPCA has undertaken a detailed weekly analysis of retail prices for the product, as well as its own margin calculations (**Confidential Attachment 4** refers). SPCA claims that the analysis indicates that retail prices of the goods allegedly supplied by that exporter have declined.

SPCA alleges that, over the past 24 months, the retail price of the goods more generally has not risen despite the imposition of the measures. SPCA has provided quarterly retail price data for the goods (**Confidential Attachment 3** refers) to support this observation. Accordingly, SPCA considers that export prices for the goods have declined since the relevant period examined in REP 217.

3.3.3 Non-injurious price

SPCA did not make any claims in its application in relation to whether the non-injurious price had changed.

3.4 The Commission's assessment

The Commissioner found in REP 276 that direct income support payments were being made to tomato growers under the *Common Agricultural Policy* which significantly affected the prevailing market prices in Italy for raw tomatoes, and therefore the Commissioner found that the costs recorded by Feger and La Doria for raw tomatoes in their records did not reasonably reflect competitive market costs.⁷ This affected the normal value for Feger and La Doria, as the normal value was modified to account for this payment. It is likely that this payment affects the normal value of all producers of prepared and preserved tomatoes in Italy, and therefore will result in a change in this variable factor. The Commission considers it reasonable to investigate this claim.

The Commission notes that *Consideration Report 349* accepted ARIA's evidence of its domestic sales values as being reasonable evidence that normal values for the goods have declined. SPCA, however, is arguing that normal values have increased because of changes in the cost of raw tomato production and in accordance with the approach taken in REP 276. The Commission considers it reasonable to obtain relevant evidence of actual sales prices and to examine the cost of production of the goods as part of the review process to resolve these competing claims.

The Commission has noted SPCA's claims in relation to export price and compared it with information from the Department of Immigration and Border Protection import database from 2013 to 2016. The data shows average export prices rising in Australian dollars since the imposition of measures under REP 217, and more recently REP 276, however the movement in exchange rates may make this misleading as contracts for sale may be in a variety of currencies and other factors may influence the purchase price.

The increased export price combined with alleged lower retail prices does raise the prospect that the transactions may no longer be arms-length. As is its usual practise, the Commission will examine whether the relevant transactions have been at arms-length in conducting the review of measures. In addition, noting the various tests required for the calculation of normal values which are set out in section 269TAC, the Commission observes that REP 276 found that there was no particular market situation relevant to the goods as recently as February 2016. No claims have been made by the applicant in this regard, but any relevant submissions will be considered.

Given the above considerations, the Commission concludes that there appear to be reasonable grounds for asserting that the variable factors relevant to the taking of anti-dumping measures have changed.

⁷ Regulation 43(2) of the *Customs (International Obligations) Regulation 2015* refers.

4 CONCLUSION AND RECOMMENDATIONS

The Commission has considered the application made by SPCA in accordance with sections 269ZB and 269ZC.

The Commission concludes, on the basis of the information provided in the application and other relevant information, that:

- the application complies with section 269ZB; and
- there appear to be reasonable grounds for asserting that one or more of the variable factors relevant to the taking of the anti-dumping measures have changed.

Accordingly, the Commission recommends that the Commissioner not reject the application for review of the anti-dumping measures applying to certain prepared or preserved tomatoes exported to Australia from Italy except for Feger, La Doria and ARIA.

Should the Commissioner decide not to reject this application for a review, the Commission recommends that the review period be from 1 April 2015 to 31 March 2016.

5 ATTACHMENTS

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| Confidential Attachment 1 | Application |
| Confidential Attachment 2 | Calculations of adjustment to normal value |
| Confidential Attachment 3 | Quarterly retail data |
| Confidential Attachment 4 | Detailed weekly retail data |
| Non-Confidential Attachment 1 | Public record version of the application |