



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

**Anti-Dumping
Commission**

CUSTOMS ACT 1901 - PART XVB

REPORT
NO. 398

**ACCELERATED REVIEW OF
A DUMPING DUTY NOTICE APPLYING TO
CERTAIN PREPARED OR PRESERVED TOMATOES
EXPORTED FROM ITALY BY
BRUNELLA FOOD INDUSTRY S.R.L.**

5 June 2017

PUBLIC RECORD

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ABBREVIATIONS

| | |
|-----------------------------|--|
| the Act | <i>Customs Act 1901</i> |
| ADN | Anti-Dumping Notice |
| ARIA | AR Industrie Alimentari S.p.A |
| Brunella | Brunella Food Industry S.r.l, the applicant |
| COGS | cost of goods sold |
| the Commission | the Anti-Dumping Commission |
| the Commissioner | the Commissioner of the Anti-Dumping Commission |
| CON 398 | <i>Anti-Dumping Commission Consideration Report No. 398</i> |
| the goods | the goods the subject of the application, prepared or preserved tomatoes |
| Feger | Feger di Gerardo Ferraioli S.p.A. |
| La Doria | La Doria S.p.A. |
| OCOT | ordinary course of trade |
| the Parliamentary Secretary | the Assistant Minister for Industry, Innovation and Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science |
| REP 217 | <i>Anti-Dumping Commission Report No. 217</i> |
| REP 349 and 354 | <i>Anti-Dumping Commission Report Nos. 349 and 354</i> |
| REQ | response to the exporter questionnaire |
| the review period | 1 January 2016 to 31 December 2016 |
| SG&A | selling, general and administrative |
| SPCA | SPC Ardmona Operations Ltd |

1 SUMMARY AND RECOMMENDATIONS

1.1 Introduction

This final report has been prepared in response to an application under section 269ZF of the *Customs Act 1901*¹ (the Act) from Brunella Food Industry S.r.l (Brunella, the applicant) seeking an accelerated review of the dumping duty notice applying to prepared or preserved tomatoes (the goods) exported to Australia from Italy, in so far as it affects Brunella.

This report sets out the facts on which the Commissioner of the Anti-Dumping Commission (the Commissioner) is basing his recommendations to the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (Parliamentary Secretary).²

1.2 Application of law to facts

Division 6 of Part XVB provides for eligible parties to apply for an accelerated review. This Division, among other matters:

- sets out the procedures to be followed and the matters to be considered by the Commissioner in conducting accelerated reviews for the purpose of making a report to the Parliamentary Secretary; and
- empowers the Parliamentary Secretary, after consideration of such reports, to leave the dumping duty notice unchanged, or to declare that the notice have effect with regard to the applicant as if different variable factors had been specified.

Subsection 269ZE(1) sets out that a new exporter may apply for an accelerated review. A new exporter is defined in subsection 269T(1) as an exporter who did not export such goods to Australia at any time during the period after the start of the investigation period in relation to the application.

1.3 Findings

After considering the application and making further inquiries, the Commissioner is not satisfied there is sufficient and reliable information to calculate exporter specific variable factors (and therefore an individual dumping duty rate) for the goods exported to Australia by Brunella.

¹ Unless otherwise specified all legislative references in this report are to the *Customs Act 1901*.

² On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science. For the purposes of this accelerated review, the Minister is the Parliamentary Secretary.

1.4 Recommendation

Based on the above finding, the Commissioner recommends that the dumping duty notice, the subject of the application, remain unaltered.³

As a result, Brunella will remain subject to the “uncooperative and all other exporters” interim dumping duty rate, which is the fixed component of duty. An additional amount of variable duty may be incurred if the export price per unit is below the (confidential) ascertained export price per unit.⁴

If the Parliamentary Secretary accepts this recommendation, in order to give effect to the decision the Parliamentary Secretary must declare, by notice published on the Anti-Dumping Commission (the Commission) website, that for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975*, the dumping duty notice is to remain unchanged.

³ Subsection 269ZG(1)(a).

⁴ The existing measures have been established in the recently completed review of measures; section 2.3.2 refers.

2 BACKGROUND

2.1 The goods

2.1.2 Description

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

Tomatoes (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.

2.1.3 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 per cent for the goods imported from Italy.

2.2 The accelerated review process

If a dumping duty notice or a countervailing duty notice has been published in respect of certain goods, a new exporter, as defined in subsection 269T(1), may request an accelerated review of those measures in so far as they affect that exporter.

If an application for an accelerated review of anti-dumping measures is received and not rejected, the Commissioner has up to 100 days after the application is lodged to conduct his review and complete a report for the Parliamentary Secretary.⁵

Under subsection 269ZG(1), the Commissioner must, after considering the application and making such inquiries as the Commissioner thinks appropriate, recommend to the Parliamentary Secretary that the notice the subject of the application:

- remain unaltered; or
- be altered so as to apply to the applicant as if different variable factors had been fixed.

Following the Parliamentary Secretary's decision, a notice is published on the Commission website advising of the decision.

⁵ Subsection 269ZG(2) refers.

2.3 Existing measures

2.3.1 The original investigation

On 10 July 2013, an investigation into the alleged dumping of certain prepared or preserved tomatoes exported to Australia from Italy was initiated following an application lodged by SPC Ardmona Operations Ltd (SPCA). In that investigation, as outlined in *Anti-Dumping Commission Report No. 217* (REP 217), it was found that:

- in the case of two exporters, Feger di Gerardo Ferraioli S.p.A. (Feger) and La Doria S.p.A. (La Doria), the goods were exported to Australia from Italy at dumped prices, but the dumping margins were negligible (less than 2 per cent);
- for all other exporters, the goods were exported to Australia from Italy at dumped prices, with dumping margins ranging from 3.25 to 26.35 per cent;
- 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 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 which the investigation was terminated. The recommendation was accepted and, on 16 April 2014, public notice of the decision was published in the *Commonwealth of Australia Gazette*⁶ and *The Australian* newspaper (Anti-Dumping Notice (ADN) No. 2014/32 refers).

2.3.2 Reviews of measures

On 1 April 2016, AR Industrie Alimentari S.p.A (ARIA) lodged an application requesting a review of the anti-dumping measures as they apply to its exports of the goods to Australia from Italy. ARIA claimed that certain variable factors relevant to the taking of the anti-dumping measures have changed since they were established in REP 217.

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 also claimed that certain variable factors relevant to the taking of the anti-dumping measures have changed since they were established in REP 217.

The Commissioner initiated both reviews of measures regarding:

- the goods exported by ARIA, on 21 April 2016 (ADN No. 2016/41 refers); and
- the goods exported by all exporters other than Feger, La Doria and ARIA, on 25 May 2016 (ADN No. 2016/55 refers).

The reviews examined the same period of time and were therefore combined for administrative convenience.

⁶ Available on <https://www.legislation.gov.au/Details/C2014G00626>.

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The *Statement of Essential Facts 349 and 354* was published on 20 February 2017. On 5 May 2017, notice of the Parliamentary Secretary's decision to alter the relevant dumping duty notice as if different variable factors had been ascertained was published on the Commission website. The Commissioner's findings and recommendations are set out in *Anti-Dumping Commission Report Nos. 349 and 354* (REP 349 and 354).⁷

2.4 The current review

On 24 February 2017, Brunella lodged an application for an accelerated review of the dumping duty notice applying to prepared or preserved tomatoes exported to Australia from Italy in so far as the notice affects Brunella.

The Commission examined the application and considered that:

- the application was taken to have been lodged in accordance with subsection 269ZF(2);
- the circumstances in which an accelerated review can be sought under subsection 269ZE(1) have been satisfied;
- the conditions for rejection under subsection 269ZE(2) were not satisfied; and
- the application was in writing and contained a description of the kind of goods to which the notice relates and a statement of the basis on which Brunella considers that the notice is inappropriate in so far as it is concerned (subsection 269ZF(1)).

Accordingly, the Commissioner did not reject the application and commenced the accelerated review. The *Anti-Dumping Commission Consideration Report No. 398* (CON 398) provides further details in relation to the Commission's consideration of the application and the Commissioner's decision. CON 398 should be read in conjunction with this report and is available on the public record.

The commencement of the accelerated review was publicly notified in ADN No. 2017/32, which was published on 24 March 2017. The review period is 1 January 2016 to 31 December 2016 (review period).

2.5 Response to the exporter questionnaire

Following receipt of the application, the Commission sent an exporter questionnaire to Brunella for completion, with a due date of 7 April 2017. Brunella provided a response to the exporter questionnaire (REQ) on 6 April 2016. A non-confidential version of the REQ is available on the public record.⁸

⁷ [Anti-Dumping Commission Report No. 349 and 354](#) and [ADN No. 2017/47](#) refer.

⁸ Document No. 4 on the electronic public record

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Brunella's REQ contained information and data in relation to:

- company structure and organisational charts;
- ownership and related entities;
- product brochure;
- turnover, unaudited financial statements and income tax records;
- domestic sales;
- list of raw material purchases;
- domestic production and selling costs; and
- production processes and production volumes.

The Commission reviewed the REQ and determined that it was deficient. The Commission subsequently notified Brunella of the deficiencies of the REQ on 18 April 2017, and requested that the deficiencies be addressed in a further response by no later than 25 April 2017.

Brunella provided its further response on 24 April 2017. The Commission considered that the deficiencies were substantially rectified.

2.6 Public record

There is no legislative requirement under Division 6 for the Commissioner to maintain a public record for accelerated reviews. However, in the interests of ensuring the process is conducted in an open and transparent manner, a public record for this accelerated review has been maintained and is accessible on the Commission website at www.adcommission.gov.au.

3 ASSESSMENT OF VARIABLE FACTORS

3.1 Findings

On the basis of Brunella's REQ and the verification of transactions, the Commissioner is satisfied that Brunella is a manufacturer of like goods.

However, due to the circumstances of its production of the like goods and having considered Brunella's data and other relevant information, the Commissioner is not satisfied there is sufficient and reliable information to calculate exporter specific variable factors (and therefore an individual dumping duty rate) for the goods exported to Australia by Brunella.

3.2 Circumstances of Brunella's production and sale of like goods

The Commission has examined the circumstances of Brunella's production and sale of prepared or preserved tomatoes.

3.2.1 Status as a manufacturer

Brunella provided evidence of its production volumes, sales data, and details of cost to make and sell in its REQ. The Commission sought additional documentary evidence of Brunella's sales and related payment information and certain of its production records. Based on the information that Brunella has subsequently provided, the Commission is satisfied that Brunella is a manufacturer of like goods.

3.2.2 Like goods

Subsection 269T(1) defines like goods as:

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

Brunella has not exported the goods to Australia during the review period. In these circumstances, the Commission has compared the goods produced by Brunella for sale on its domestic market to the goods that it would produce for export to Australia to assess whether the goods ought to properly be considered "like".

The goods sold domestically by Brunella were unlabelled (also known as "bright") cans of the goods. Brunella's domestic sales are in similar product sizes as those typically exported to Australia by other producers, contain the same prepared or preserved tomato types, are sold to the same types of customers (expected to be wholesalers and retailers) and have the same end uses.

In the Commission's view, the product sold on the domestic market (albeit unlabelled) has characteristics that closely resemble the goods that Brunella would be expected to export to Australia. Accordingly, the Commission is satisfied that the goods produced by Brunella for sale on its domestic market are considered to be "like goods".

3.3 Normal value

Subsection 269TAC(1) 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 by the exporter or, if the goods are not sold by the exporter, by other sellers of the like goods.

3.3.1 Home consumption

The information contained in Brunella's REQ indicates that Brunella sold like goods (in the form of bright cans) in its domestic market during the review period. However, the Commission notes that the ultimate destination of those goods was unknown to Brunella at the time of sale; the bright cans may have been subsequently exported. The circumstances of those sales do not provide the Commission with sufficient evidence to conclude that those goods were destined for home consumption in Italy.

3.3.2 Arms length

The Commission has previously established in CON 398 that Brunella is an associate of an exporter that was already subject to the dumping duty notice, but which had not been examined as it was a residual exporter.⁹ Based on the REQ, the Commission has found that all of Brunella's domestic sales of like goods were made to that same associated exporter during the review period.

The Commission is unable to conduct further testing of the prices paid to assess whether they were nevertheless in arms length transactions. There were no sales to third party customers during the review period, and, as REP 349 and 354 examined a different period, with only a single quarter of data (being January to March 2016) in common. However, the Commission observes that Brunella's sales in this quarter were at prices which were substantially less than the prices being obtained by the examined exporters in REP 349 and 354. Based on the data before it and the close nature of the relationship between Brunella and its related customer, the Commission has determined that the prices paid in Brunella's domestic sales appear to be influenced by a commercial or other relationship between the parties. The Commission is therefore not treating these sales as arms length transactions.¹⁰

3.3.3 Calculation of normal value

Noting the Commission's findings that Brunella's sales may not have been sold for home consumption in Italy and were not sold in arms length transactions, the Commission is unable to assess whether the like goods were sold in the ordinary course of trade (OCOT) and is unable to calculate a normal value by reference to Brunella's sales under subsection 269TAC(1).

⁹ In terms of subsection 269TAA(4); [CON 398](#), page 10, refers.

¹⁰ Subsection 269TAA(1)(b) refers.

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As noted previously, there is only a single quarter in common between the review period and the period examined in REP 349 and 354. Whilst subsection 269TAC(1) provides that a normal value can be established having regard to the prices obtained by other sellers of the like goods, the Commission's experience is that the costs and prices of prepared or preserved tomatoes fluctuate from year to year. In part, this is because the product includes a substantial component of seasonal produce (i.e. raw tomatoes). The Commission's experience is that there is no benchmark to which the Commission can have regard in order to adjust the prices of the other sellers to better reflect prices during the review period (as per subsection 269TAC(8)).

In the truncated timeframe of an accelerated review, the Commission further considers that it is not practical to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purposes of determining a price under subsection 269TAC(1).¹¹ As the Commission is unable to make adjustments of this kind, the single quarter of relevant data (January to March 2016) is insufficient to reliably calculate a normal value under subsection 269TAC(1), having regard to other sellers of like goods.

Constructed normal value

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

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

As required by subsections 269TAC(5A) and 269TAC(5B), the costs of production or manufacture, the SG&A costs and profit are established in accordance with sections 43, 44 and 45 of the *Customs (International Obligations) Regulation 2015*, respectively.

Brunella's REQ, whilst complete, did not include sufficient information and evidence to enable the Commission to calculate a cost of production and SG&A costs of prepared or preserved tomatoes as if they had been sold for home consumption in the OCOT. For the same reasons as were outlined above, the Commission is unable to adjust these costs by reference to the costs incurred by other sellers of these goods in REP 349 and 354, or other sellers generally, in order to reliably establish a constructed normal value for Brunella in the review period.

¹¹ Subsection 269TAC(2)(b) refers. See also *Dumping and Subsidy Manual (April 2017)*, Chapter 8.

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Further, as the cost of producing the goods and the associated SG&A costs are unable to be reliably ascertained, the Commission is unable to calculate an amount for profit otherwise than by reference to all relevant information.¹² Such an amount must not exceed the amount of profit normally realised by other exporters of the goods in the same general category in the domestic Italian market.¹³ Noting that the costs incurred and prices obtained by other exporters varies from year to year, the Commission does not consider that it can reliably calculate an amount of profit normally realised by other exporters of the goods.

For the reasons set out above, the Commission is unable to ascertain normal value under subsection 269TAC(2)(c).

Third country sales

In accordance with subsection 269TAC(2)(d), in certain circumstances, the normal value can be based on comparable third country sales. However, as outlined in Chapter 10 of the *Dumping and Subsidy Manual*, in determining whether it is appropriate to do so, regard will be had to:

- whether the trade between the country of export and the third country is at arms length and in the OCOT;
- the volume of trade from the country of export to the selected third country is similar to the volume of trade from the country of export to Australia; and
- the nature of the trade in like goods between the country of export and the selected third country is similar to the nature of trade between the country of export and Australia (in considering “nature of trade” such things as the level of trade in a third country may be relevant).

As Brunella did not export the goods under consideration to Australia during the review period, the Commission is unable to identify a country where similar volumes of like goods were being exported during the period. Further, Brunella’s REQ indicates that its third country sales occurred only via its related customer. As a result, and noting the earlier finding that the Commission was unable to establish whether Brunella’s related party sales were in the OCOT, the Commission is also unable to establish whether the third country sales occurred in the OCOT. Accordingly, the normal value cannot be established under subsection 269TAC(2)(d).

¹² The Commission has found that sales did not occur in the OCOT, there are no relevant domestic sales in the same general category of goods, and there is no reliable, contemporaneous data relevant to calculating the weighted average profit achieved by other exporters for the reasons already outlined; subsections 45(2) and 45(3) of the *Customs (International Obligations) Regulation 2015* refer.

¹³ Subsection 45(4)(b) of the *Customs (International Obligations) Regulation 2015* refers.

Normal value based on all relevant information

Subsection 269TAC(6) provides that where sufficient information has not been furnished or is not available to enable the calculation of normal value under the preceding subsections, the normal value may be determined having regard to all relevant information. Chapter 13 of the *Dumping and Subsidy Manual* lists examples of relevant information such as information from independent sources, information from other countries and earlier dumping investigations.

Aside from the data provided by the exporter, the only relevant information available to the Commission in the present circumstances is the information relating to other exporters that was collected in REP 349 and 354. For the reasons outlined above, the Commission does not consider this information to be suitable to reliably calculate a normal value which is relevant to the review period and appropriate to Brunella's circumstances.

3.3.4 Conclusion

The Commission has concluded it has insufficient reliable information to be able to calculate a normal value for Brunella that is relevant to the review period.

3.4 Export price

A search of the Australian Border Force import database confirmed that Brunella has not exported the goods to Australia during the review period. As a result, the Commission considers that sufficient information is not available to determine the export price of the goods pursuant to subsection 269TAB(1).

Accordingly, the Commissioner has determined the export price under subsection 269TAB(3), having regard to all relevant information. In past accelerated reviews where there have been no exports during the review period, the Commission's usual practice has been to determine the export price as being equal to the exporter's normal value. However, for the reasons set out in the preceding sections, the Commission has been unable to establish a normal value. Therefore, in the absence of reliable information, the Commission has not calculated an export price specific to Brunella.

3.5 Conclusion

The Commissioner notes the findings of the Commission with respect to the absence of reliable information and therefore its inability to calculate the variable factors relevant to the taking of the anti-dumping measures in so far as they affect Brunella.

In these circumstances, the Commissioner therefore recommends that the Parliamentary Secretary declare that, for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975*, that the dumping duty notice remain unchanged.

The Commission notes that the lesser duty rule does not currently apply to prepared or preserved tomatoes exported from Italy. Noting its findings concerning normal value and export price, the Commission has not calculated a non-injurious price for the purpose of this review. The relevant notice (for the reasons outlined in REP 349 and 354) established that dumping duty would be calculated by reference to the combination of fixed and variable duty method, and therefore this will be unchanged.

4 EFFECT OF THE REVIEW

If the Parliamentary Secretary accepts the recommendations in this report, in respect of prepared or preserved tomatoes exported by Brunella to Australia from Italy:

- in accordance with subsection 269ZG(3)(a), the notice will remain unchanged; and
- Brunella will remain subject to the measures applying to “uncooperative and all other exporters”.

The Commissioner notes that if the recommendations in this report are accepted by the Parliamentary Secretary, Brunella may apply again for an accelerated review in accordance with subsection 269ZE(1).

5 RECOMMENDATIONS

The Commissioner recommends that the Parliamentary Secretary considers this report and, if in agreement, sign the attached notice at Attachment 1 **to declare**:

- in accordance with subsection 269ZG(3)(a), for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975* the notice remains unchanged.

The Commissioner recommends the Parliamentary Secretary **be of the opinion that**:

- in accordance with subsection 269TAB(4), information provided by Brunella as set out in chapter 3 is unreliable and therefore disregard that information; and
- in accordance with subsection 269TAC(7), information provided by Brunella as set out in chapter 3 is unreliable and therefore disregard that information.

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6 ATTACHMENTS

Attachment 1

Public Notice