



CUSTOMS ACT 1901 - PART XVB

FINAL REPORT

REPORT NO. 250

**ACCELERATED REVIEW
OF A DUMPING DUTY NOTICE APPLYING TO**

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

CALISPA S.P.A. INDUSTRIA CONSERVE ALIMENTARI

AUGUST 2014



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ABBREVIATIONS

Abbreviation	Full title
ADN	Anti-Dumping Notice
CON 250	Consideration Report No. 250
CTMS	Cost to make and sell
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
FOB	Free-on-board
NIP	Non-Injurious Price
review period	1 April 2013 to 31 March 2014
SPCA	SPC Ardmona Operations Limited
the Act	<i>Customs Act 1901</i>
the Commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
the goods	the kind of goods to which the anti-dumping measures apply
the Minister	the Minister for Industry
the Parliamentary Secretary	the Parliamentary Secretary to the Minister for Industry

1 SUMMARY AND RECOMMENDATIONS

This *Accelerated Review No. 250* is in response to an application¹ from Calispa S.p.A. Industria Conserve Alimentari (Calispa) seeking an accelerated review of the dumping duty notice applying to prepared or preserved tomatoes exported to Australia from Italy, in so far as it affects Calispa.

1.1 Recommendation

The Commissioner of the Anti-Dumping Commission (the Commissioner) recommends that the dumping duty notice, the subject of the application, be altered so as to apply to the applicant as if different variable factors had been fixed relevant to the determination of duty payable by Calispa.²

If the Parliamentary Secretary to the Minister for Industry (Parliamentary Secretary) accepts this recommendation, to give effect to the decision, the Parliamentary Secretary must declare (by signing the notice at **Attachment 1**) that, for the purposes of the *Customs Act 1901* (the Act)³ and the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act), the original dumping duty notice had applied to the applicant but the Minister had specified different variable factors relevant to the determination of duty payable by Calispa, and such notice must be published in the Gazette.⁴

In terms of the method for working out interim dumping duty payable in relation to any exports of prepared or preserved tomatoes by Calispa, the interim dumping duty amount will be worked out in accordance with the combination of fixed and variable duty method pursuant to subregulation 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013*. This is consistent with the method used in the original dumping duty notice applying to prepared or preserved tomatoes exported to Australia from Italy.

1.2 Application of law to facts

Division 6 of Part XVB of the Act enables eligible parties to apply for an accelerated review of anti-dumping measures. The Division, among other matters:

- sets out the procedures to be followed and the matters to be considered by the Commissioner in conducting accelerated reviews in respect of the exporter and the goods covered by the application for the purpose of making a report to the Minister; and
- empowers the Minister, after consideration of such reports, to leave the measures unaltered or to modify them as appropriate.

¹ This application was lodged in accordance with section 269ZF.

² Subsection 269ZG(1)(b)(ii).

³ 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.

⁴ Subsection 269ZG(1)(b)(ii).

In December 2013, the Minister for Industry (the Minister) delegated responsibility for decision making on operational matters under Parts XVB and XVC of the Act and other anti-dumping legislation to the Parliamentary Secretary.

1.3 Findings and conclusions

Based on all relevant and available information the Anti-Dumping Commission (the Commission) has, in relation to the variable factors for Calispa's exports of prepared or preserved tomatoes to Australia, found that:

- the export price should be determined having regard to all relevant information⁵ (refer to Section 3 of this report);
- the normal value should be established using the price paid or payable for like goods sold by Calispa in the ordinary course of trade for home consumption in Italy in sales that are arms length transactions⁶ (refer to Section 4 of this report); and
- the non-injurious price⁷ (NIP) should be based on an unsuppressed selling price that is the full cost to make and sell (CTMS) of the Australian manufacturer, SPC Ardmona Operations Limited (SPCA), adjusted to reflect export price at free-on-board (FOB) (refer to section 5 of this report).

Based on these findings and conclusions, the Commissioner recommends that the Parliamentary Secretary declare that the original dumping duty notice had applied to the applicant but the Minister had specified different variable factors relevant to the determination of duty payable by Calispa.⁸

The effect is that prepared or preserved tomatoes exported to Australia from Italy by Calispa will be subject to interim dumping duty. The dumping duty payable comprises a fixed component that is zero, and a variable component that will be payable if the actual export price of Calispa is below a specified (confidential) amount per kilogram.

⁵ Subsection 269TAB(3)

⁶ Subsection 269TAC(1).

⁷ Subsection 269TACA

⁸ Subsection 269ZG(3)

2 BACKGROUND

2.1 Accelerated review process

If anti-dumping measures have been taken in respect of certain goods, a new exporter, as defined in section 269T of the Act, may request an accelerated review of those measures as they affect that particular exporter, if they consider the measures are not appropriate to that exporter.

If an application for an accelerated review of anti-dumping measures is received and not rejected, the Commission has up to 100 days to conduct its review and report to the Parliamentary Secretary.

In making recommendations in its final report to the Parliamentary Secretary, the Commissioner must consider the application for an accelerated review and make such inquiries as considered appropriate.

In respect of a dumping duty notice, the Commissioner must recommend to the Parliamentary Secretary that the dumping duty notice:

- remain unaltered; or
- be altered:
 - so as not to apply to the particular exporter; or
 - to have effect in relation to the particular exporter as if different variable factors had been fixed.

Following the Parliamentary Secretary's decision, a notice is published in the Commonwealth Gazette advising interested parties of the decision.

2.2 Existing measures

On 16 April 2014 the Parliamentary Secretary signed a dumping duty notice that imposed dumping duties on certain prepared or preserved tomatoes exported to Australia from Italy except for the goods exported by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A.

The current anti-dumping measures on prepared or preserved tomatoes imported from Italy expire on 15 April 2019.

The dumping duty imposed in relation to prepared or preserved tomatoes from Italy is an amount worked out in accordance with the combination of fixed and variable duty method, as detailed in the table below.

Exporter / Italy	Dumping Margin	Effective rate interim dumping duty	Duty Method
De Clemente Conserve S.p.A.	3.25%	3.25%	<i>combination of fixed and variable duty method</i>
Attianese S.p.A.	4.24%	4.24%	
Fiamma Vesuviana Srl	4.24%	4.24%	
Greci Industria Alimentare S.p.A.	4.24%	4.24%	
Menu Srl	4.24%	4.24%	
Mutti S.p.A.	4.24%	4.24%	
Nolana Conserve Srl	4.24%	4.24%	
Princes Industrie Alimentari SRL	4.24%	4.24%	
Rispoli Luigi & C (S.R.L.)	4.24%	4.24%	
Steriltom Srl	4.24%	4.24%	
Conserve Italia Soc. Coop Agr	4.54%	4.54%	
I.M.C.A. S.p.A.	26.35%	26.35%	
Lodato Gennaro & C. S.p.A.	26.35%	26.35%	
Uncooperative exporters (All other)	26.35%	26.35%	

Pending the outcome of this accelerated review, if Calispa exports prepared or preserved tomatoes to Australia, the imported goods will be subject to the “*All other*” rate of 26.35%, 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.

2.3 The current review

On 12 May 2014, Calispa lodged an application for an accelerated review.

The Commission examined the application and considered at that time:

- Calispa was a new exporter;⁹
- there were no grounds to reject the application;¹⁰ and
- the requirements of an application for accelerated review were satisfied.¹¹

⁹ As defined by section 269T

¹⁰ Subsection 269ZE(2)

¹¹ Section 269ZF

As the circumstances in which an accelerated review can be sought were satisfied, the Commissioner did not reject the application and commenced the accelerated review. Consideration Report No. 250 (CON 250) provides further details in relation to the Commission's consideration of the application and the decision of the Commissioner. The report is available on the Commission's website at www.adcommission.gov.au.

The commencement of the accelerated review was publicly notified in Anti-Dumping Notice (ADN) No. 2014/43, which was published on 29 May 2014. It also advised that the Commissioner's recommendation to the Parliamentary Secretary will be made in a report on or before 20 August 2014. The ADN is available on the Commission's website at www.adcommission.gov.au.

For the purposes of the accelerated review the period examined is 1 April 2013 to 31 March 2014 (referred to as the review period).

2.4 Public record

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

2.5 The goods

2.5.1 Goods under review

The goods subject to anti-dumping measures, in the form of a dumping duty notice, 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.*¹²

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

2.5.2 Tariff classification

The goods are classified to subheading 2002.10.00 (statistical code 60) in Schedule 3 of the *Customs Tariff Act 1995*.

¹² Anti-Dumping Commission Report No. 217

3 EXPORT PRICE

3.1 Findings

Calispa did not export prepared or preserved tomatoes to Australia during the review period. As such, sufficient information is not available to determine the export price of the goods using:

- the price paid or payable by the importer;¹³
- the price in Australia less prescribed deductions (deductive export price);¹⁴ or
- the price having regard to all the circumstances of the exportation.¹⁵

The Commission therefore considers it appropriate to determine export price, for the purposes of the accelerated review, having regard to all relevant information.¹⁶ Specifically, the Commission considers it appropriate to determine the export price to be the same amount as that determined to be the normal value for the purposes of this accelerated review (refer to the next section of this report).

¹³ Subsection 269TAB(1)(a)

¹⁴ Subsection 269TAB(1)(b)

¹⁵ Subsection 269TAB(1)(c)

¹⁶ Subsection 269TAB(3)

4 NORMAL VALUE

4.1 Findings

The Commission considers that the information provided by Calispa in its response to the exporter questionnaire is suitable for normal value purposes. In particular, the Commission verified cost and price data for prepared and preserved tomatoes sold domestically in Italy by Calispa in the review period.

The Commission considers that normal value should be established using the price paid or payable for all sales of like goods sold by Calispa in the ordinary course of trade for home consumption in Italy in sales that are arms length transactions.¹⁷ The Commission has made certain adjustments¹⁸ to normal value to express the amount at terms equivalent to an export price at ex-works delivery terms and specified (confidential) credit terms. Normal value is expressed as a weighted average per kilogram.

4.2 The Commission's assessment - normal value

4.2.1 Verification

The CTMS data submitted in Calispa's original response to the exporter questionnaire was initially rejected by the Commission because the cost calculations did not provide for meaningful amounts per unit. However, Calispa revised and resubmitted that data in a reasonably timely manner.

The Commission benchmarked the revised Calispa costs against verified CTMS data obtained in the original investigation, and found nothing to indicate the Calispa costs were unreasonable.

The Commission decided to not seek on-site verification of the Calispa data primarily for the reason it was able to benchmark the Calispa data with verified data from the original investigation. However, the Commission sought certain management and financial reporting documents from Calispa, and a range of source documents for verification purposes. After considering the Calispa cost and price data in the context of the further evidence provided by Calispa, the Commission found the Calispa cost and price data to be reasonably complete, relevant and accurate, but for a few exceptions where it sought further evidence.

The exceptions related to certain (confidential) data elements contained within the detailed Calispa sales spreadsheet that were not well supported by the source documents supplied. The Commission therefore sought further evidence to substantiate these items. In response, Calispa provided additional source documents and explanations with respect to the data elements in question. The Commission was ultimately satisfied that the sales data

¹⁷ Subsection 269TAC(1)

¹⁸ Subsection 269TAC(8)

elements in question were supported by relevant and reliable evidence and it has taken account of those matters in calculation of the normal value.

It is important to note that the Commission removed from the Calispa sales data for certain product types where it considered those sales were not (for confidential reasons) likely to be relevant domestic sales for the purposes of establishing normal value. The Commission also removed certain sales that it considered were not in the ordinary course of trade. Calispa acknowledged the Commission approach in this regard and considered these to be proper determinations.¹⁹

After reaching a reasonable level of satisfaction with the completeness, relevance and accuracy of the sales and cost data provided by Calispa in relation to its costs and prices for domestic sales for the review period, the Commission used that data to assess normal value.

4.2.2 The Commission's preliminary approach to normal value

In a preliminary assessment notified to Calispa on 7 August 2014, the Commission proposed a normal value that was based on domestic sales for one product type/model, rather than a normal value based on all domestic sales of like goods in the review period. The Commission chose the product type/model with the highest weighted average normal value in the review period. The Commission explained that this normal value was established in terms of subsection 269TAC(1) of the Act.

The Commission chose the product type/model with the highest weighted average normal value because Calispa had not exported the goods in the review period, and its likely future export product mix and volumes for Australia could not be established. In these circumstances, the highest weighted average normal value represented a price per unit that minimised the possibility of Calispa exporting the goods to Australia without incurring dumping duty. To the extent any lower price per unit is selected it becomes possible for Calispa to export certain product types/models of the goods at dumped prices without incurring dumping duty.

4.2.3 Submissions on normal value

Calispa submitted its view that the approach proposed by the Commission is inconsistent with international and domestic legal jurisprudence. It has also submitted that the approach leads to an unreasonable outcome for Calispa.

The Commission interprets Calispa's view to be that there is no choice in this accelerated review but to establish normal value on the basis of all like goods sold by Calispa in the review period that were sold in the ordinary course of trade in sales that are arm's length transactions. The Commission disagrees with this view, given the circumstances of this case, where Calispa had not exported the goods in the review period, and there is no reasonable means to

¹⁹ Calispa submission received 11 August 2014, p. 3

anticipate the product mix and volume of goods that will be exported to Australia by Calispa.

The Calispa view is one that stems from the rules applying to dumping margin calculations, but that view does not accurately reflect an approach to assessing ‘corresponding normal values’ that must be applied in all cases.

Calispa’s focus on dumping margin assessments, as distinct from normal value assessments, is evident in the following statements:

*“In fact his Honour went to great lengths to highlight the correct reasoning for determining a ‘product’ **dumping margin...**”²⁰ (emphasis added); and*

*“It is important to note that the Appellate Body concluded that **dumping** has “the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings...” (emphasis added)²¹*

The facts of this case are that Calispa did not export the goods in the review period, so an assessment of dumping cannot be determined. The focus of the Commission is on establishing the appropriate normal value as the key variable factor relevant to the determination of duty payable.

It is not entirely correct to say that normal values established under subsection 269TAC(1) of the Act use all domestic sales of like goods in all circumstances, even when calculating a product dumping margin. It is quite common for only the normal values for models that are considered most comparable to the exported models to be used. This is because the aim is to establish normal value of any goods exported to Australia.²² Normal values determined for any other model/types, albeit like goods, can be set aside when establishing normal values used in calculating product dumping margins.

It is also important to recognise that any single weighted average normal value that underpins an overall product dumping margin must take into account a weighting based on export volumes. This will of course be affected by the specific exporter’s volume and product mix of goods exported – which cannot be determined in the case of Calispa because it made no exports in the review period.

Therefore, the Commission considers that there is no mandatory requirement for normal value for Calispa to be based on a weighted average of all like goods sold by Calispa in the review period that were sold in the ordinary course of trade in sales that are arm’s length transactions.

The Commission also notes the submission from the European Commission where it expressed its view that, in the absence of exports, there are only two

²⁰ Calispa submission received 11 August 2014, p. 3

²¹ Calispa submission received 11 August 2014, p. 6

²² Subsection 269TAC(1)

possibilities for calculating normal value. It described the first as a weighted average normal value based on all 'eligible' domestic sales. It described the second as different normal values by type/model.

The Commission is of the view that, while the second approach is logical and reflects past practices of the Commission, it is no longer open to the Commission given a recent decision by the Federal Court of Australia.²³ The Commission considers, for the reasons outlined above, that it is not a mandatory requirement, in the absence of exports, to determine the normal value on the basis of domestic sales for all 'eligible' domestic sales.

4.2.4 The Commission's final assessment of normal value

The Commission has had regard to relevant information and submissions made in this review and accepts that its preliminary assessment of normal value may have caused dumping duties to be payable in relation to a significant proportion of Calispa's exports to Australia. This would be the case, for example, where Calispa's exports were of a product mix similar to its domestic sales of like goods in the review period. However, no dumping duty would be incurred so long as the export price was at or above the normal value. It is not possible for the Commission, in the absence of exports or perhaps an irrevocable contract for supply, to reasonably anticipate the product mix that might be exported to Australia.

The Commission is seeking to make its recommendation in accordance with the requirements of the legislation and in a manner that is consistent with the Commission's policy and practice on these matters. In considering the range of alternative approaches, the Commission considers that the outcome should ensure that the effectiveness of the remedy for injurious dumping is upheld, but any outcome should, where possible, also avoid unintended or unnecessary consequences. The Commission accepts that the preliminary assessment of normal value may, in certain circumstances, lead to an unintended outcome in regards to duties applied to prepared or preserved tomatoes exported by Calispa. While the Commission considers the preliminary assessment is legally open to it, the Commission has reconsidered its approach.

The Commission examined the manner in which the variable factors were established for prepared and preserved tomatoes exported from Italy for the purposes of determining the duty payable after the original investigation. It has also had regard to the relativities of those variable factors when compared to the range of Calispa normal values by type/model, and to the overall weighted average normal value for Calispa in the review period. Having regard to these matters, the Commission has concluded that the overall weighted average normal value for Calispa represents a reasonable approach to establishing

²³ *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870

normal value for the purposes of the accelerated review, and preserves the effectiveness of the existing anti-dumping measures.

Accordingly, the Commission considers it is appropriate to recommend to the Parliamentary Secretary that the normal value for Calispa for the purposes of this accelerated review should be set at the weighted average normal value based on all like goods sold by Calispa in the review period that were sold in the ordinary course of trade in sales that are arm's length transactions.

A summary of Calispa normal value calculations is at **Confidential Appendix 1**.

4.3 Dumping margin

Measurement of a dumping margin is not required for the purposes of an accelerated review where the exporter did not export the goods in the review period.

5 NON INJURIOUS PRICE

The calculation of the NIP provides the mechanism whereby the 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.²⁴

In REP 217, the Commission based its calculation of NIP on SPCA's CTMS, and it stated:

*"...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"*²⁵

The Commission considers it is appropriate to maintain the same approach to calculating NIP for the purposes of the accelerated review. The Commission requested, and SPCA provided, additional CTMS data up to 31 March 2014 for the purposes of this accelerated review. Using the CTMS data as an unsuppressed selling price, the Commission then deducted the same amounts as those deducted from the unsuppressed selling price in the original investigation to calculate the NIP expressed at FOB delivery terms.

As was the case in the original investigation, the Commission noted the NIP for the accelerated review period exceeded the normal value calculated for Calispa for the review period.

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

²⁴ Section 269TACA of the Act.

²⁵ Anti-Dumping Commission REP 217, p. 71

6 EFFECT OF THE REVIEW

The existing dumping duties take the form of a fixed amount of duty per kilogram (calculated as a percentage of the 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.

The method of calculating duty payable in relation to Calispa's exports of prepared or preserved tomatoes will not vary as a result of this accelerated review. However, the fixed component of dumping duty applying to the goods exported by Calispa will be zero. This is because the ascertained export price is set at the same level of the weighted average normal value for Calispa.

Dumping duty will only be incurred in relation to Calispa exports of prepared or preserved tomatoes where the actual export price is below the ascertained export price.

7 RECOMMENDATION

The Commissioner recommends that the Parliamentary Secretary considers this report, and if agreed, sign the attached notice (Confidential Attachment 1) to declare, under subsection 269ZG(3)(b)(ii), that the Act and the Dumping Duty Act have effect as if the original dumping duty notice had applied to Calispa but the Minister had fixed specified different variable factors relevant to the determination of duty payable.

8 ATTACHMENTS

Attachments	
Attachment 1	Section 269ZG(3) public notice
Appendices	
Confidential Appendix 1	Normal value calculations
Confidential Appendix 2	NIP calculations