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Feger di Gerardo Ferraioli S.P.A

Investigation concerning prepared or preserved tomato products from Italy

Alleged material injury to the Australian tomato processing industry, and its causation

A	Introduction	1
B	Requirements of a material injury determination.....	2
C	Volume effect of imports of tomato products	6
D	Price effect of imports of tomato products	9
E	Other factors have caused material injury	12
F	Other claimed injuries.....	20
G	Conclusion.....	21

A Introduction

On 10 July 2013, the Anti-Dumping Commission (“ADC”) published Anti-Dumping Notice No 2013/59 (“ADN 2013/59”), which officially initiated a dumping investigation into prepared or preserved tomato products (“tomato products”) exported to Australia from Italy.

ADN 2013/59 explained that the Australian industry, SPC Ardmona Operations Limited, had alleged in its application (“the Application”) that tomato products from Italy had been imported at dumped prices and that this had caused the Australian industry material injury through:

- loss of sales volume;
- reduced market share;
- reduced revenues;
- price depression;

- price suppression;
- reduced profits
- reduced profitability;
- reduced assets for production;
- reduced capital investment; and
- reduced attractiveness for reinvestment in the tomato processing business.

Without detracting from the primary position of our client, Feger di Gerardo Ferraioli S.P.A (“Feger”) - which is that it has not exported tomato products into Australia at dumped prices - this submission is provided in support of the proposition that imports of tomato products have not caused material injury to the Australian industry.

In so doing we start from the premise that competition is present in any market place, and that a finding of dumping does not automatically equate to an inference of material injury. Considerations of cause and degree must be made in a realistic and robust way, which accept the reality of competition as a normal aspect of commerce and which is unaffected by considerations of industry assistance and protection.

Feger maintains that no evidence is available to establish that the Australian tomato processing industry has been materially injured by tomato products exported from Italy.

B Requirements of a material injury determination

Dumping is a form of price differentiation between two markets. It is not prohibited under international agreements. There is nothing illegal about selling low priced goods into the markets of a WTO member. In an economic sense, the supply of low priced inputs is usually of great benefit to the economy of the importing country. Nonetheless, when dumped goods are found to have caused material injury to the domestic industry of an importing country, a WTO Member may impose dumping duties on their future importation.

The requirement that dumping needs to to have caused material injury before measures may be applied is reflected in Article VI of the General Agreement on Tariffs and Trade (“GATT”), as implemented by Australia in Section 269TG of the Customs Act 1901 (“the Act”). That Section requires that, before a dumping notice can be imposed, it must be established that exports of the goods under consideration have been dumped and, because of that:

material injury to an Australian industry producing like goods has been caused, or is being caused or threatened, or the establishment of an Australian industry producing like goods has

been or may be materially hindered

Material injury is a fundamental condition precedent to the imposition of dumping measures on any given product.

The requirements of the injury analysis that an investigating body must fulfil are explained in Article 3 of the WTO's Anti-Dumping Agreement ("the AD Agreement"). Our understanding of that Article must be informed by reports of the Panels and the Appellate Body under the WTO's Dispute Settlement Understanding, which further explain an investigating authority's responsibility in undertaking an investigation into allegations of material injury.

Article 3.1 of the AD Agreement is particularly relevant to injury analysis for two reasons. Firstly, Article 3.1 sets out the fundamental obligations of an investigating authority when undertaking an injury analysis. These fundamental obligations are to base the injury determination on positive evidence, and on an objective analysis of the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like goods, and the consequent impact of those imports on domestic producers of such products.¹ This has two implications on an injury determination:

- the requirement that a determination be based on positive evidence relates to the quality of the evidence that an investigating authority may rely upon in making the determination, and provides that the evidence must be affirmative, objective, verifiable and credible;²
- the term "objective examination" requires that an investigating authority's examination "conform to the dictates of the basic principles of good faith and procedural fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".³

Secondly, Article 3.1 sets out the content required to make a full and proper injury analysis. This involves a consideration of:

(i) the volume of subject imports; (ii) the effect of such imports on the price of like domestic

¹ Report of the Appellate Body United States – Anti-dumping Measures on Certain Hot-Rolled Steel products from Japan (WT/DS184/AB/R) 24 July 2001, paragraph 192.

² Ibid. paragraph 192.

³ Ibid. paragraph 193.

products; and (iii) the consequent impact of such imports on the domestic producer of the like products.⁴

According to the Appellate Body these three components set out the framework for any injury determination, and the other sub-Articles of Article 3 elaborate how these three components are to be assessed. Specifically, the Appellate Body has noted:

[Article] 3.2 ...concern[s] items (i) and (ii) above, and spell[s] out the precise content of an investigating authority's consideration regarding the volume of subject imports and the effect of such imports on domestic prices. [Article] 3.4... together with [Article] 3.5... concern[s] item (iii), that is, the "consequent impact" of the same imports on the domestic industry. More specifically, [Article] 3.4... set[s] out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and [Article] 3.5... require[s] an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.⁵

Therefore, Article 3.1 sets out the basic considerations involved in an injury determination, and the subsequent paragraphs in Article 3 elaborate how these considerations are to be determined.

Following on from this reasoning, the volume of the subject imports and the effect of the subject imports are to be determined in accordance with Article 3.2, which provides:

with regard to the volume of the dumped imports, the investigating authority shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to the production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases which otherwise would have occurred to a significant degree. No one or several of these factors can necessarily give decisive guidance.

The volume of the allegedly dumped imports is a factor for consideration, as well as the existence of price effects which signal that the imports are having an effect on the domestic industry. Once the price impact has been determined, the investigating authority can then proceed to ascertain the impact of this effect on the domestic industry. This determination must be undertaken in accordance with Articles 3.4 and 3.5. Article 3.4 sets out the economic factors that must be evaluated regarding the impact of the dumped imports on the domestic industry, and Article 3.5 requires that an investigating authority show

⁴ Report of the Appellate Body China - Countervailing and Anti-dumping Duties on Grain Oriented Flat Rolled Electrical Steel from the United States (WT/DS414/AB/R) 18 October 2012, paragraph 127.

⁵ Ibid.

that material injury actually is being caused by dumped imports, and not by any other factor.

Article 3 of the AD Agreement sets out a clear and logical process for determining whether any relevant material injury has been suffered by a domestic industry. The Australian implementation of the Article – as set out in Section 269TAE of the Act - is not so well-structured. However, it is evident that the same logical process can and should be undertaken in its application, to be consistent with the AD Agreement which the Section implements.

Section 269TAE(1) essentially requires the Minister to determine whether material injury has occurred on the basis of the effect or likely effect of the importation of those goods. Sections 269TAE(1) set out the factors that should be considered in assessing the effects of the dumped imports.

Importantly, it must also be recalled that the assessment of injury must be done subject to the requirements of Section 269TAE(2A), which provides as follows:

In making a determination in relation to the exportation of goods to Australia for the purposes referred to in subsection (1) or (2), the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:

- (a) the volume and prices of imported like goods that are not dumped; or
- (b) the volume and prices of importations of like goods that are not subsidised; or
- (c) contractions in demand or changes in patterns of consumption; or
- (d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or
- (e) developments in technology; or
- (f) the export performance and productivity of the Australian industry;

and any such injury or hindrance must not be attributed to the exportation of those goods.

We also note the publication of the Ministerial Direction on Material Injury 2012. The Direction itself correctly indicates that it must be read subject to the law. The Direction also provides:

- that “identification of material injury must be based on facts and not on assertions unsupported by facts”;
- the CEO (now ADC) “must have regard to the facts of the individual case”, and “identifying material injury depends upon the circumstances of each case and will differ from industry to

- industry and from time to time”;
- “the injury caused by dumping or subsidisation is material in degree”;
 - that material injury must be “greater than that likely to occur in the normal ebb and flow of business”; and
 - that “dumping and subsidisation need not be the sole cause of injury to the Australian industry” however, “whether dumping... is the sole cause of injury or where there are other contributing factors... the injury caused by dumping... must be material in degree”.

The law and the Ministerial Direction require that “injury caused by other factors must not be attributed to dumping”. Injury caused by other factors cannot be ignored, and the injury caused by any proven dumping must be “material”, being “not immaterial, insubstantial or insignificant”. The injury caused by dumping must be greater than would otherwise have occurred in “the normal ebb and flow of business”. Furthermore, there must be evidence to establish that the injury has been caused by the existence of the dumped goods in the market.

Given that these factors require some degree of prognostication it is clear that the facts relied upon to establish this causation, as well as the materiality of the alleged injury, must be both accurate and adequate for the task.

C Volume effect of imports of tomato products

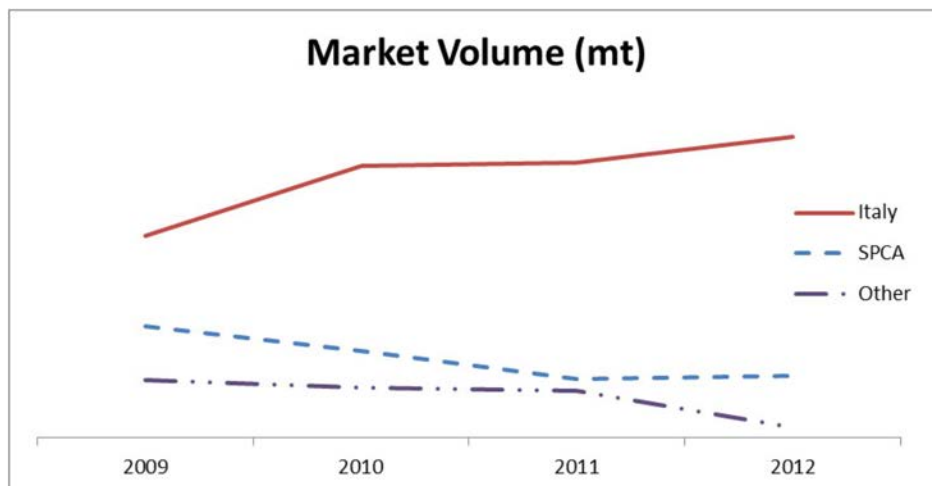
Under Section 269TAE, in determining whether dumping has occurred, the ADC must consider the quantity, and any increase in the quantity, of the subject goods exported to Australia.⁶ In Consideration Report No. 217, it is recorded that the Applicant claims that since 2009 “there has been significant increase in imported prepared or preserved tomato products entering the Australian Market”.⁷ The graph provided by the ADC in its Australian Industry Visit Report – SPC Ardmona Operations Ltd (“the SPCA Visit Report”) (which appears to be the same as that in the Consideration Report) shows that there has been some growth in the market volume of imported prepared or preserved Italian tomatoes over this period. However, the graph also shows a decline in the volume of tomato products from other countries

⁶ Customs Act 1901 s 269TAE(1)(a) and (1)(b)

⁷ Consideration Report No. 217, p 20.

and an increase in SPCA's domestic sales from 2011.

Graph 1: Market Volume



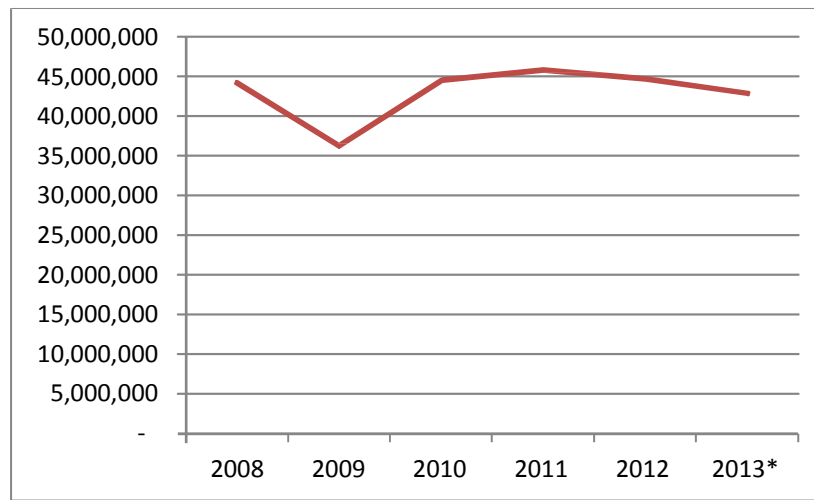
Source: Consideration Report No 217 p 20

Feger notes that this market volume data has not been provided for the period of investigation – 1 July 2012 to 30 June 2013. Thus, no data has been presented in this form for interested party comment for the most critical period of the analysis. However more comprehensive import data is presented in the following table from the Consideration Report:

Table 1 and corresponding chart: Imports from the world, quantity in kg (calendar year data)

2008	2009	2010	2011 ⁸	2012	2013* (Jan-June)
44,213,585	36,334,708	44,572,596	45,792,240	44,702,540	42,929,082

⁸ SPCA is itself an importer of processed tomato products which means that yearly fluctuations in market share were affected by SPCA's own commercial decisions. According to a submission from the South African Fruit and Vegetable Canners' Association in the Productivity Commission's Accelerated Inquiry, SPCA imported processed tomatoes in 2011, a year of very serious flooding in Australia, in order to meet its commitments to customers. This may explain the increase in imports in 2011.



Source: ABS

* 2013 data in Table 1 and the corresponding graph have been “annualised” on the basis of the available data from January 2013 to June 2013.

Feger observes that there has been a decrease in the volume of prepared or preserved tomatoes from other countries. Considering the effects of imports as a whole, the figures show that most recently there has actually been a decrease in the overall volume of tomato products imported into Australia. Further, imports in 2012 are at levels which are the same as the levels in 2008. Levels of imports decreased in 2009, however the levels of the imports shown for 2013 are below 2008 import levels. The decreasing trend in import volumes of tomato products has been confirmed by the Productivity Commission in its report concerning the safeguards inquiry (“the Accelerated Inquiry Report”) into the importation of processed tomato products. The Productivity Commission found that the “total domestic consumption of processed tomato products has been relatively flat over the past five years”⁹ and that although sales of imported products had increased from late 2009 to mid-2012, that they had “flattened off or slightly decreased”¹⁰ from 2012 onwards. Therefore, for injury analysis purposes in this dumping investigation, we find that imports from all sources have actually declined from the levels in the period immediately prior to the period of investigation.

Feger also observes that supermarket sales of imported tomato products have been steady, even decreasing slightly over the period of investigation. Further, SPCA’s supermarket sales appear to have

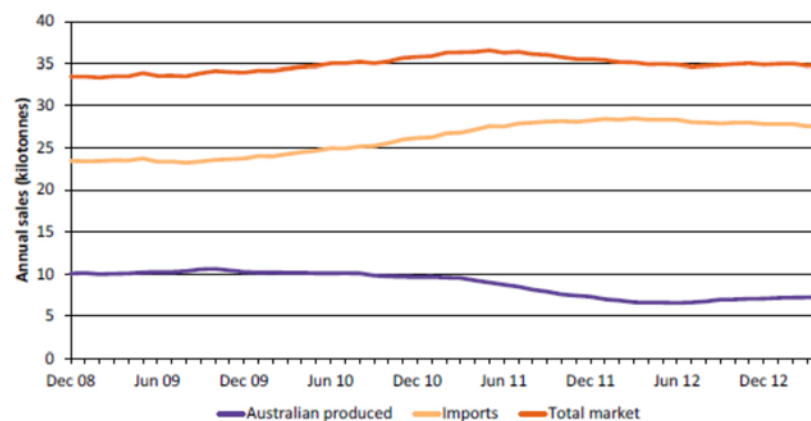
⁹ Ibid, p 30.

¹⁰ Ibid.

increased during the period of investigation. The relatively flat demand for tomato products has also been a contributing factor for minimal growth in volume of SPCA's products. In this regard please refer to Graph 2 below:

Graph 2: Supermarket sales

Figure 2.7 Processed tomato products — supermarket sales
Moving annual totals



Data sources: Aztec Australia (unpublished); Productivity Commission estimates.

In summary, it appears that imports of tomatoes from Italy have replaced other imports, and that total imports have remained steady over most of the injury investigation period before then actually declining when the level in the year prior to the period of investigation is compared with the level in the period of investigation.

D Price effect of imports of tomato products

As well as a consideration of the volume effects of imports, the Act requires a consideration of the price effects of any allegedly dumped imports. Section s 269TAE(1)(d) identifies the export price paid for the subject goods as a relevant consideration. Section 269TAE(1)(e) and (f) go on to identify:

(e) the difference between:

- (i) the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and
- (ii) the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia...

(f) the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind, or like

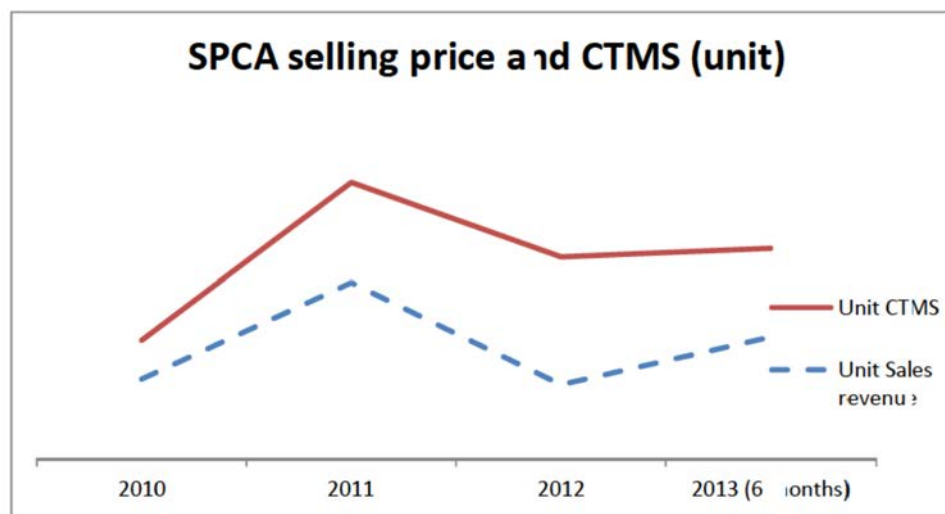
goods, produced or manufactured in the Australian industry and sold in Australia;

Sections 269TAE(1)(d), (e) and (f) establish the second requirement identified by the Appellate Body as we have referred to in A above, namely “the effect of such imports on the price of like domestic products”.¹¹ Although the Sections do not specifically refer to price suppression, depression or restraint, these measurement concepts are used in practice. Clearly, the effect of imports on the price of the products sold by the domestic industry must be determined before any consideration of the economic impacts of the sales of the domestic industry can be considered.

In the Consideration Report, the Applicant has alleged that it has experienced price depression and price suppression. However, an analysis of the information presented in the SPCA Visit Report indicates that neither claim is true.

Price depression is a reduction in prices. However the information in the SPCA Visit Report shows that SPCA’s prices are higher at the end of the injury investigation period than at its commencement, and that its selling prices (referred to as “unit sales revenue”) have increased significantly in the most recent period indicated:

Graph 3: SPCA selling price and CTMS



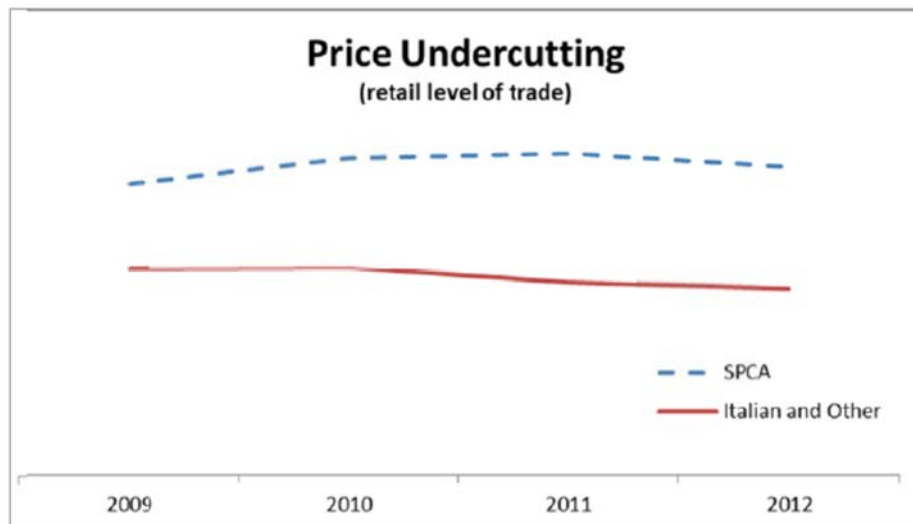
Price suppression is an inability to increase prices by an amount necessary to cover increases in costs.

¹¹ Report of the Appellate Body United States – Anti-dumping Measures on Certain Hot-Rolled Steel products from Japan (WT/DS184/AB/R) 24 July 2001, paragraph 192.

The same graph from the SPCA Visit Report shows that SPCA's loss making has lessened in the dumping investigation period, meaning that even if dumping is established SPCA's prices will be shown to have risen faster than its costs. The fact that its costs are higher than its prices does not make this statement untrue. Evidently, SPCA is a chronic long-term loss making enterprise. An analysis of the change in its performance – at a time when dumping is identified (if that is identified) - will have to conclude that SPCA is doing better than before.

The same reasoning can be applied to the allegation of price undercutting. The latest representation of this condition is as follows:

Graph 4: Price undercutting



Feger's observations are that the price undercutting has been consistent and long term, and that the data does not extend to the dumping investigation period. If it does not cover any part of the period of investigation, it therefore does not say anything about price conditions at the relevant time. In addition, the graph shows SPCA's product compared to "Italian and Other", which involves a comparison against goods which are not covered as part of this dumping investigation. Accordingly, no analysis of change arising by reason of any dumping (if dumping is identified) can be undertaken from the data presented.

Ultimately, therefore, the evidence does not establish price depression (because prices have gone up); does not establish price suppression (because the gap between costs and prices has narrowed); and does not establish a change in price undercutting because of dumping (because the long term trend has not changed).

E Other factors have caused material injury

From the above, we can see:

- that there has not been an increase in imports of processed tomato products;
- that imports of tomato products from Italy appear to have replaced other imports;
- that total domestic consumption of processed tomatoes has been relatively flat over the past five years;
- that sales of imported products have decreased from 2012 onwards;
- that no price depression or suppression is indicated; and
- that no change in price undercutting at a time when dumping is identified (if dumping is identified) can be discerned from the data.

What the information does establish is that SPCA has been continually unprofitable in its production and sale of the tomato products under investigation for many years. In order to arrive at any finding that alleged dumping has caused material injury, the ADC is required to relate its finding of any volume or price effects to dumped imports. Feger submits that even if dumping of tomato products from Italy is identified, the necessary change of circumstances in the dumping investigation period that naturally is also required, and which must be attributable to dumping, does not exist.

Ultimately, SPCA faces the same obstacle against cogently blaming imports or their price for its present situation as it has faced in the Productivity Commission safeguard measures investigation. The carefully considered opinion of the Productivity Commission is instructive:

At page 40 of its Accelerated Inquiry Report, the Productivity Commission concludes:

The Australian market for processed tomatoes has been highly competitive for a long period of time. Processed tomatoes are a globally traded product with limited opportunities for product differentiation, and Australia is a small producer on a global scale. Competition from imports has contributed to ongoing consolidation among growers and recent closures of processors. Operators that have high costs of production or inefficient scale are particularly susceptible to competitive pressures.

Developments in supermarket private label strategies have added to the existing competitive pressure. Supermarkets have changed the way they market their private label products, and consumers may have come to regard some private label products as substitutes for branded products. This has likely reduced the ability of producers of branded products to charge premium prices without losing market share.

In the context of these ongoing competitive pressures, a number of specific developments have combined to cause injury to the domestic processing industry. First, the retail unit value of SPC

Ardmona branded products increased from 2009, which contributed to a loss of market share. This was exacerbated by the floods in 2011, which caused lower production and a loss of market share for domestic private label products supplied by SPC Ardmona. The ready availability of imported products, assisted by the concurrent appreciation of the Australian dollar, made it possible for supermarkets to increase their use of imports for private label brands. At the same time, exports of processed tomato products decreased, probably as a result of the appreciation of the Australia dollar.

The combined effect of these developments has been a reduction in SPC Ardmona's production, revenues and profits. SPC Ardmona's submission, and confidential evidence that it has provided, suggest that it might no longer be producing processed tomato products at an efficient scale. Undoubtedly this classifies as an injury to the industry. However, it appears to be the result of long-term trends, exacerbated by specific recent developments.

And at page 41, it says:

The available evidence suggests that the injury to the domestic industry was caused by the range of factors identified above. One aspect of the injury to the industry has been a reduction in domestic production, which is reflected in the increase in the ratio of imports to domestic production. The increase in imports relative to domestic production is more of a symptom of the injury than the cause.

And again, in the same vein, at page 44:

The Commission then examined causation. The Commission's view at this time is that the damage to the domestic industry was caused by a range of factors. Loss of exports, extreme weather events and persistent high levels of imports, rather than recently surging imports, have been significant, along with private label strategies by supermarkets. Imports and domestic supply enabled certain supermarket pricing strategies to take place, but the price of imports themselves did not vary (when expressed in Euros). Supermarket decisions on pricing strategies and product sourcing were made domestically, rather than being caused by changes in the world market for processed tomato products.

A number of factors have continually prevented SPCA from enjoying improved financial performance. The industry's shortcomings are long term, structural and systemic. Feger maintains that no evidence of a change in circumstances has been presented in any of the information or analysis available on the public record. The Australian industry has been in a loss making state for many years. The causes of this injury - according to the Productivity Commission – are cumulative, and not recent. The situation facing the Australian industry - again, according to the Productivity Commission, and not just Feger – is “that it might no longer be producing processed tomato products at an efficient scale”. The correlation between recently dumped Italian imports (if that is identified) and any change in the industry's performance is not evident. As we have already said, the change in the performance of SPCA in the period of investigation is shown by the evidence to have been positive, and not negative.

In the SPCA Visit Report:

SPCA indicated that no other factors have had a significant impact on its sales apart from dumping.

Feger finds this statement to be unbelievable, as did the Productivity Commission, which went so far as to conclude that imports of processed tomatoes were not a cause of injury to the domestic industry because of other factors. Feger now wishes to address the cumulation of causes of injury to the Australian industry that have brought it to its current financial position.

1 Structural impediments

SPCA itself exposed a broad range of impediments to the development of the Australian food industry in its September 2011 submission in response to the Issues Paper on the National Food Plan. In that submission SPCA expressed its strong concern about the need to address rising local production costs. SPCA submitted that strong government support for the food industry was needed:

- to conduct a value chain assessment of locally produced food as compared to imported food to highlight the gaps that impede Australia from being globally competitive;
- to ensure adequate investment in research and development;
- to examine payroll tax concessions;
- to support and encourage higher education in food technology; and
- to examine regulatory input costs of labelling laws, carbon tax and container deposits to reduce compliance costs and burdens.

Therefore, SPCA's own submission states that the industry is impeded by numerous structural issues impacting the tomato producers industry in Australia.

2 Long term loss-making

SPCA has suffered a number of well documented financial setbacks since its takeover by Coca-Cola Amatil ("CCA") in 2005. Media reports have labelled the takeover as a "financial disaster"¹² for CCA's Group Managing Director Terry Davis. SPCA's Annual Reports have repeatedly highlighted SPCA's

¹² <http://www.theaustralian.com.au/business/opinion/anti-dumping-move-may-prove-fruitful-for-spc/story-e6frg9io-1226677347784>

problematic financial situation.

In its 2010 Annual Report, CCA reported lower revenues in SPCA as the business exited a number of unprofitable activities, in particular, much of its international private label can business. In addition, the Annual Report notes that stronger Australian dollar had materially impacted SPCA's competitiveness against imported brands and private label categories in the domestic market.¹³

In 2011 the Annual Report again blamed the stronger Australian dollar for its impact on SPCA's competitiveness against imported brands and retailer private label categories in Australia. The stronger dollar was also said to have reduced SPCA's earnings from international operations, with export sales declining by over 20%.¹⁴

In its 2012 Annual Report, the ongoing impact of the high Australian dollar on the competitiveness of the SPCA business was again mentioned, as was the significant deflation of fresh fruit prices and the growth of imported grocery private label packaged fruit and vegetables. These factors necessitated a non-cash write-down of goodwill in the business of \$48 million.¹⁵

As evidenced from the Annual Reports, SPCA has made a number of restructuring and financial decisions which have impacted on its financial performance over the past six years. These were well-intentioned strategies, however the restructures have been costly exercises which have ultimately lumped the business with high levels of debt.

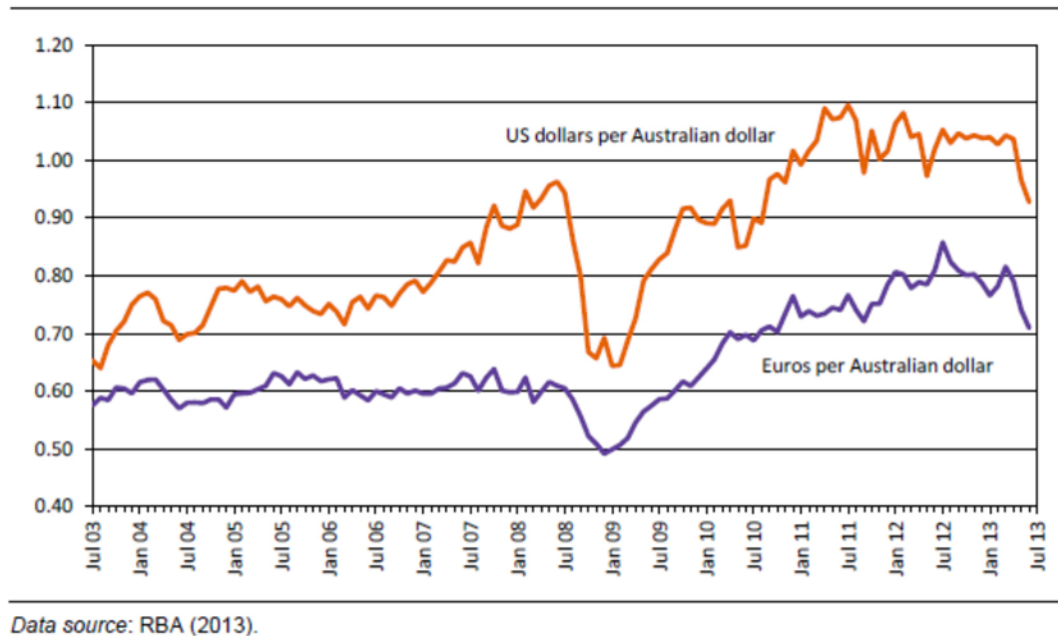
3 Appreciation of the Australian dollar

Over the five years up to and including the period of investigation the Australian dollar appreciated against the Euro (by about 40%) and against the US dollar (by about 38%). Such appreciation reduced the price of imported processed tomatoes relative to domestically produced products, making the domestic products less competitive on the domestic market.

¹³ CCA 2010 Annual Report, p 2.

¹⁴ CCA 2011 Annual Report, p 2.

¹⁵ CCA 2012 Annual Report, p 5.

Graph 5: Australia dollar exchange rate**Figure 2.4 Australian dollar exchange rate**

Source: Safeguards Accelerated Report p 21

Over the same five year period, supermarket unit values of imported product decreased by only 12%.¹⁶ The Australian dollar appreciated at a much higher rate when compared with supermarket price decreases.

4 Decreased exports causing reduced throughput

One of the causes of the injury to SPCA's tomato processing operations has been decreased exports of its products. Australian exports of processed tomato products (including all pack sizes) decreased by 45 per cent between 2008-09 and 2010-11.¹⁷ In addition to making the domestic products less competitive on the domestic market, it is likely that the high exchange rate would have affected SPCA's export sales. The Productivity Commission noted that this "loss of throughput from decreased exports would have contributed to the increased overhead cost per tonne of tomatoes processed by SPC

¹⁶ Please see Graph 6 below. The percentage change has been measured from January 2009 to July 2013 (from approximately \$2.49 to \$2.20).

¹⁷ Safeguards Inquiry into the Import of Processed Tomato Products – Productivity Commission Accelerated Report No. 63, 18 September 2013, p 39.

Ardmona.”¹⁸ This increase in overhead costs impacted SPCA’s revenue as well as profits and profitability.

In addition, the Accelerated Inquiry Report states:

Australian exports of processed tomato products (including all pack sizes) decreased by 45 per cent between 2008-09 and 2010-11... Exports increased in 2011-12, and then decreased again in 2012-13. Over the period 2008-09 to 2012-13, exports decreased from 1885 tonnes to 597 tonnes (approximately 68 per cent). Over the same period, the value of exports (in FOB terms) decreased from \$5.5 million to \$2.6 million (approximately 53 per cent).¹⁹

Feger was concerned to see SPCA referring to this impact on its operations – an impact that the Accelerated Inquiry Report finds to have been of extreme significance, in the terms quoted above – as follows:

Export volume has been a negligible part of tomato operations therefore exchange rate will not have impacted its operations viability.

This seems to miss the point, or even to be a conscious avoidance of the issue. Feger submits that the decrease in production levels caused by reduced exports has been substantial. In other words, the unit cost has increased because SPCA has had lower production levels, and the reason for the reduced production has nothing to do with allegedly dumped imports.

5 Impact of the 2011 floods

In 2011, severe flooding affected the Victorian tomato growing regions. These floods reduced the supply of tomatoes for processing by two thirds, and significantly decreased SPCA’s production of processed tomatoes.²⁰

The impact of the floods on production levels was significant. In 2011, SPCA’s production decreased by 40% when compared to 2010.²¹ Similar to the effect of the Queensland floods on banana prices in 2006 (where bananas increased from about \$1.99 to more than \$15 per kilogram), the smaller crop and scarcity of supply would have led to a higher cost of tomatoes. This in turn would have led to higher

¹⁸ Ibid, p 39.

¹⁹ Ibid.

²⁰ Safeguards Inquiry into the Import of Processed Tomato Products – Productivity Commission Accelerated Report No. 63, 18 September 2013, p 129.

²¹ Ibid, p 126.

costs for tomato products, and limited ability to satisfy orders ad demand.

The reduced tomato supply would have also contributed to the decrease in exports during the period 2010 to 2011 and, as discussed above, would have also impacted SPCA's revenue, profits and profitability.

The floods had an impact on the market share of imported tomato products. Imports of the goods in 2011 were only slightly higher than in 2010 however, the impact of the floods caused a "spike" in the ratio of imports to domestic production. From 2012, SPCA's production recovered and the ratio of imports to domestic production decreased.²²

Submissions to the Productivity Commission in the course of its inquiry show that events such as this have caused tomato growers to exit the industry. For example, the submission of Kagome Australia refers to the position of five growers, who despite initially making a substantial investment in irrigation on land suitable for tomatoes, have now chosen to grow maize or other low value crops as they lack the confidence to remain in the industry.²³ Further, the submission reports that other growers have "lost confidence in expanding production to meet the demand" and that "only 10 independent growers are growing the same tonnage (per Grower) as they did 10 years ago."²⁴

The Australian processing industry's ability to obtain well-priced tomato supplies from Australian growers has been significantly affected by decisions made by growers to exit the industry. The evidence indicates that they have turned to crops which are considered to be less expensive to grow, so as to reduce their exposure to natural disasters and other risks.

6 Private label strategies increasing competition

Supermarket chains have developed private label products to compete with branded products, reducing the ability of domestic producers to charge premium prices for their branded products. Australian supermarkets have a strong incentive to diversify their sources of supply as growers of Australian processing tomatoes are geographically concentrated and are particularly susceptible to periods of low production due to bad weather. (Examples of this include drought in 2006-07 and 2007-

²² Ibid, p 17.

²³ Kagome Australia, Productivity Commission Accelerated Inquiry, Submission No.12, p 13.

²⁴ Ibid, p 10.

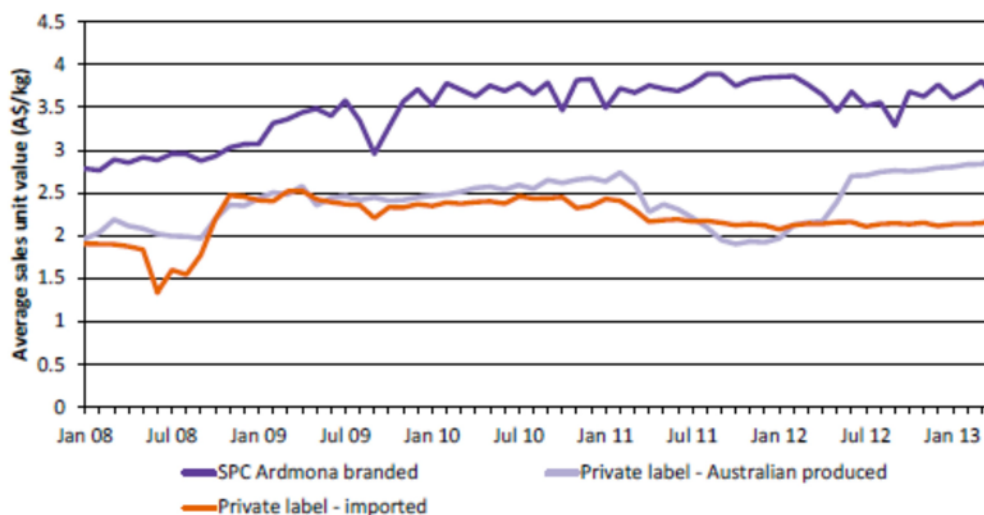
08 as well as the 2011 floods.)²⁵ As SPCA is the only domestic producer of the tomato products, supermarkets will necessarily look to diversify their supplies.

The Productivity Commission stated that it is “important to note that developments in supermarket private label strategies could cause injury to the domestic industry without any increase in imports.”²⁶ This is because supermarkets use a mix of domestically produced and imported products for their private label brands – even SPCA processes tomatoes for its own branded products as well as private labels. Further, the Productivity Commission noted that:

It is likely that any supermarket strategy that leads to consumers switching from SPC Ardmona’s branded products to domestically sourced private label products would reduce SPC Ardmona’s margins and its profitability, driven not by increased imports, but by choices made by supermarkets with their private label brands.²⁷

Graph 6: Supermarket unit values

Figure 2.13 Processed tomato products — supermarket unit values



Data sources: Aztec Australia (unpublished); Productivity Commission estimates.

²⁵ Safeguards Accelerated Inquiry into the Import of Processed Tomato Products – Productivity Commission Accelerated Report No. 63, 18 September 2013, p 36.

²⁶ Ibid, p 37.

²⁷ Ibid.

Graph 6 shows there has been no downward trend in imported supermarket unit value prices during the period of investigation. This data supports Feger's submission that imported products have not had a price effect on SPCA's product.

The retail power of supermarkets in their insistence on private label brands can be seen to be a very significant factor impacting on SPCA's revenue and profitability.

7 Lack of investment in the tomato growing industry

Submissions to the Productivity Commission's Accelerated Inquiry proved that there has been a lack of investment in the required irrigation infrastructure to maintain the long-term production base of the overall industry.²⁸

Further, the Commission noted that:

SPC Ardmona's submission, and confidential evidence that it has provided, suggest that it might no longer be producing processed tomato products at an efficient scale.²⁹

This need for investment was recognized in the lead up to the Australian Federal election with former Minister for Innovation and Industry, Kim Carr, announcing that the federal government would invest \$25 million into the long-term future of SPC, conditional on matched funding from the Victorian government.

The evidence establishes that SPCA does not have adequate facilities or technology to produce tomato products. Viewed in this way, SPCA's claim should be one for industry assistance, and not for dumping measures. SPCA's inefficiencies should not be attributed to injury from imports.

F Other claimed injuries

The Application outlines many forms of material injury that have allegedly been suffered by the Applicant as a result of the subject imports. As well as those addressed above, these include:

- reduced cash flow; and
- reduced attractiveness for reinvestment in the tomato processing in the tomato processing

²⁸ Kagome Australia, Productivity Commission Accelerated Inquiry, Submission No.12, p 13.

²⁹ Safeguards Inquiry into the Import of Processed Tomato Products – Productivity Commission Accelerated Report No. 63, 18 September 2013, p 41.

business.

As discussed above, the Act requires that the complained injury be caused by the dumped goods. This requires some form of causation. Section 269TAE(2A) provides that ADC must also consider whether the claimed injury is attributable to factors other than dumping. If there are any other factors that may have caused injury, the ADC must not attribute that injury to the exportation of those goods. If there is no price depression or suppression caused by any dumping, then the reduction in profits and profitability cannot be linked to the dumping, nor can the reduced return on investment, reduced ability to raise capital and reinvestment, or reduced employment.

G Conclusion

In summary, Feger submits that:

- There has not been an increase of imported tomato products into Australia. Imports in 2013 are at lower levels than the year immediately before the period of investigation. Imports in 2013 are also lower than the levels of imports in 2008.
- Any increase in the volume of Italian tomatoes has been counterbalanced by a decrease in imports from other countries. There has been no change in the volumes of import competition faced by SPCA.
- The injury alleged in the Application is long term, structural and systemic, and cannot be blamed on or attributed to, imported tomato products.
- There are a number of other factors which influenced the domestic industry including:
 - the appreciation of the Australian dollar;
 - SPCA's decreased exports;
 - the effect of the 2011 floods;
 - lack of investment in the tomato growing industry;
 - structural issues in the tomato processing industry;
 - SPCA's poor financial decisions; and
 - private label strategies and supply diversification by supermarkets.

The Productivity Commission has determined that “the increase in imports relative to domestic

production appears to be more of a symptom of the injury than the cause”.³⁰

In light of that statement by an Australian Government instrumentality – effectively, that any proportional increase in imported tomato products is not the cause of injury to the domestic industry - we do not see how the opposite could be said by another Australian Government instrumentality.

Feger requests that the ADC give full consideration to the matters raised in this submission. As a result of that consideration, the ADC should terminate this investigation at the soonest possible opportunity.

Daniel Moulis

Principal

Alistair Bridges

Solicitor

³⁰ Ibid, p 41.