

24 February 2014

The Director
Operations 1
Australian Anti-Dumping Commission

BY EMAIL ONLY operations1@adcommission.gov.au

Dear Director

**IN THE APPLICATION FOR THE PUBLICATION OF A DUMPING DUTY NOTICE
CONCERNING PREPARED OR PRESERVED TOMATO PRODUCTS
EXPORTED FROM ITALY**

Importer submission in response to Statement of Essential Facts No. 217

Conga Foods Pty Ltd (ABN 96 327 180 764) (Conga Foods) makes this submission in its capacity as an importer of prepared or preserved tomato products exported to Australia from Italy (Goods under Consideration, GUC) during the relevant investigation period (1 July 2012 to 30 June 2013).

Specifically, Conga Foods imported the GUC from the following exporters:

[Exporter names]

Conga Foods makes the following submissions in response to the statement of essential facts (SEF) placed on the public record on 4 February 2014 by the Australian Anti-Dumping Commission (the Commission).

Dumping investigation approach

We note that the Commission has carried out the investigation, and made findings, on the basis of information obtained from an examination of a selected number of exporters pursuant to subsection 269TACAA of the Customs Act 1901 (the Act). Accordingly, the Commission has sought to make an assessment of dumping on the basis of three categories of exporters: "cooperative", "uncooperative" and "residual".

Cooperative exporters

We note the dumping margins found in the case of the "cooperative" exporters, as follows:

- *La Doria* 0.50% (de minimis)
- *Feger* 1.25% (de minimis)
- *De Clemente* 3.25%
- *Conserve Italia* 4.54%

Residual exporters

Subsection 269TACAB(2) of the Act, provides that in the case of "residual" exporters, export prices and normal values are to be determined as follows:

- *the export price of goods for a residual exporter must not be less than the weighted average of export prices for like goods of cooperative exporters from the same country of export; and*

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- the normal value of goods for a residual exporter must not exceed the weighted average of normal values for like goods of cooperative exporters from the same country of export.

We note that in this case the Commission found dumping margins for “residual exporters” of 5.06%. We are at a loss to understand how the residual dumping margin rate may be more than the weighted average dumping margin rates of the “cooperative exporters”. Applied here, the Commission appears to have applied an export price for “residual exporters” that is less than the weighted average export price of the “cooperative exporters”, and a higher normal value than the weighted average normal value of the “cooperative exporters”.

Even if, subsection 269TACAB(3) of the Act is applied, and the export prices and normal values of La Doria and Feger are excluded from the weighted average values, due to their *de minimis* rates of duty, we still fail to understand how a higher dumping margin rate may have been determined for the “residual exporters”, to that found for the two “cooperative exporters” (*De Clemente and Conserve Italia*).

Indeed, the operation of subsection 269TACAB(2) of the Act requires consideration of the weighted average normal value and export prices of “cooperative exporters”, not merely selected exporters, who are later deemed to be “uncooperative”. Therefore, it is not open to the Commission to consider the normal values and export prices of I.M.C.A and Lodato Gennaro & C. S.p.A. when determining the weighted average values for “residual exporters”.

To the extent that subsection 269TACAB(3) of the Act purports to operate to exclude the normal values and export prices of “cooperative exporters” with *de minimis* dumping margin rates, we note that this provision effectively operates to not take fully into account the prices of all comparable export transactions, and as such may be categorised as introducing the criticised practice of “zeroing” into the domestic legislation. To the extent that the practice of “zeroing” is criticised in World Trade Organisation jurisprudence, it prevents a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2 (Appellate Body Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001). Therefore, we submit that in calculating the weighted average dumping margin rates, the weighted average export prices and normal values of La Doria and Feger should be taken into account.

Uncooperative exporters and “all other exporters”

Furthermore, we submit that the Commission has made a significant error in its treatment of so-called “all other exporters” from the subject country, as “uncooperative exporters”. “All other exporters” should properly be treated as “residual exporters” under subsection 269T(1) of the Act, because, as “an exporter of goods that are the subject of the investigation, ... or an exporter of like goods” [emphasis added]:

- their exports were not examined as part of the investigation; and
- they were not an “uncooperative exporter” in relation to the investigation.

By use of the phrase, “or an exporter of like goods”, it is clear that the legislation intended to extend the application of the “residual exporter” definition to exporters who did not export the goods under consideration, during the investigation period, in other words, “all other exporters”.

In order to amount to an “uncooperative exporter”, the “all other exporters”, must satisfy the conditions of subsection 269T(1) of the Act, namely that they are “an exporter of goods that are the subject of the investigation, ... or an exporter of like goods, where:

“(d) the Commissioner was satisfied that the exporter did not give the Commissioner information the Commissioner considered to be relevant to the investigation, ... within a period the Commissioner considered to be reasonable; or

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“(e) the Commissioner was satisfied that the exporter significantly impeded the investigation,...”

We note that at section 7.5 of the SEF, the Commission appears to assert that to be considered a “cooperative or a residual exporter” the exporters had to return the exporter questionnaire to the Commission complete and in the time period stipulated”. However, the definition of “uncooperative exporter” under subsection 269T(1), required the Commissioner to make an actual assessment in relation to the exporter’s cooperation or otherwise, in light of a positive request for information within a reasonable period of time. In other words, “uncooperative exporters” must necessarily be positively identified by the Commissioner, and may not be applied to a generic class of unnamed exporters. To do so would be oppressive to exporters who were not identified by the Commissioner as exporters who “had information the Commissioner considered to be relevant to the investigation”, or identified at all.

Therefore, we submit that the rate for “all other exporters” should be no greater than the rate applicable to “residual exporters”.

Verified cost to make and sell information

Conga Foods repeats its earlier submission (dated 23 October 2013) that the applicant’s cost to make and sell information verified by the Commission, fails to take into account the cost of significant volumes of processed tomato products purchased by SPC Ardmona from:

- Billabong Produce; and
- Kagome Foods Australia Pty Ltd.

We repeat our earlier concerns that unless proper verification of the applicant’s full input costs of production have been taken into account, then we fail to see how the Commission may make any reasonable assessment of the extent of material injury claimed to have been suffered by the applicant, especially in terms of price suppression, and loss of profit and profitability claims.

“Selling arrangements” claims

We are concerned with the statement contained at section 5.2.4 of the SEF in relation to the “evidence provided by SPCA [that] conformed that private label products were located in the preferred [shelving plan] locations whilst its [SPCA] were placed in the unfavourable locations on the shelving plan” (at p. 22, SEF 217).

*This view is completely contradictory to the experience of Conga Foods. Independent surveys commissioned by Conga Foods indicates that SPCA products are treated no less favourably than premium private label brands (refer **NON-CONFIDENTIAL ATTACHMENT A**, August 2013 survey).*

“Other causes of injury” analysis

Un-dumped goods

By the Commission’s own admission, un-dumped goods constituted approximately 44% of the total export volume from Italy (section 8.8.1, p. 51, SEF 217). Of the 56% of total exports allegedly “dumped” we note that the majority of that volume was constituted by “residual exporters” who were deemed to have dumped by an imputed dumping margin rate of 5.06%. Conga Foods does not accept the determination of that rate was properly conducted (refer dumping investigation approach, above) and requires it be reviewed prior to the Commission preparing its final recommendations to the Parliamentary Secretary. If the review of this dumping margin rate determines that the majority of export volume was un-dumped by de minimis margin rates, then, it is submitted that it is not open to the Parliamentary Secretary to publish dumping duty notice at all because

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even if there has been dumping, the injury, if any, to the Australian industry caused by that dumping was negligible.

Floods of 2011 - Capacity constraints

Conga Foods notes the assessment of the Commission in SEF 217 in relation to it finding "no evidence that this [2011 floods] hampered SPCS's ability to source raw tomatoes for the production of [like goods]" (section 8.8.5, p. 53, SEF 217).

We repeat our earlier submission based on evidence submitted to the Australian Productivity Commission Safeguards inquiry, that the Australian industry has experienced a drop in the production of tomatoes for processing in 2011, as the diagram, below, illustrates:

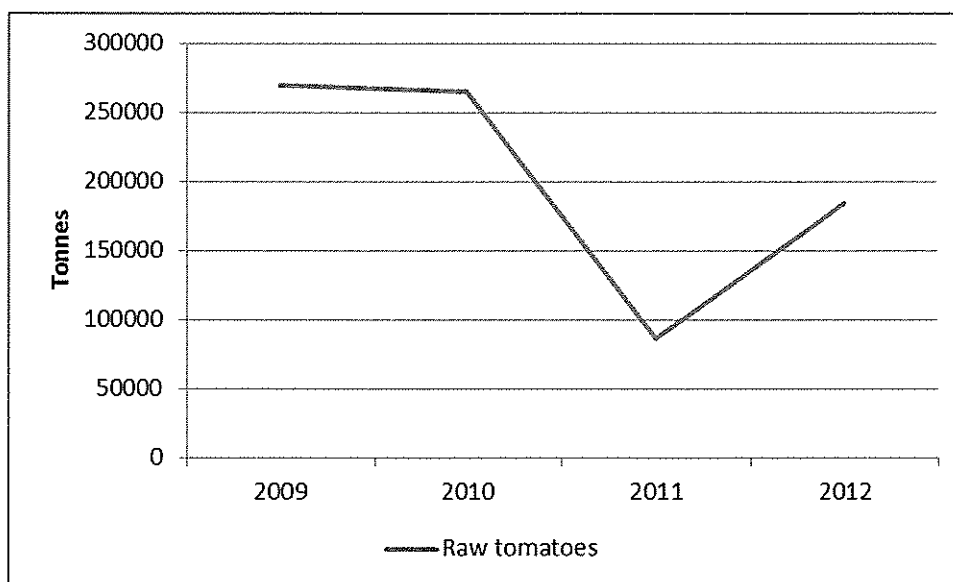


Diagram: Australian raw tomato production for processing (Source: Submission of the European Organisation of Tomato Industries, 17 July 2013, to the Australian Productivity Commission Safeguards inquiry)

This loss of capacity explains the significant increase in import volume reported by the Australian industry. In the course of its inquiries, Conga Foods anticipates that the Commission should have determined, either direct or indirect (indent) imports by SPCA. Conga Foods is aware of at least 11 shipping containers imported by the Australian industry of the GUC from Italy, namely 400 g peeled and diced tomatoes.

We repeat our earlier comments that there has been a lack of examination of capacity factors in the investigation to date. This is critical to explaining import activity with the Australian market, including the import activity of the Australian industry. We note that the Commission has not verified the grower capacity to supply the Australian industry.

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Will the alleged injury continue?

In its earlier submission, Conga Foods asserted that the significant loss of the 2013 Italian tomato crop due to bad weather conditions would cause an increase in export prices for the GUC in 2013/2014.

Conga Foods also maintains that the Commission has seriously underestimated the effects of the appreciation of the Australian dollar of about 40% over the alleged injury analysis period which resulted in a significant decline in the competitiveness of the Australian industry not only in relation to imports but would also have contributed to loss of export business.

The situation has been reversed in recent months with the devaluation of the Australian dollar against the Euro by approximately 22% -24%.

Accordingly, Conga Foods expects a significant return of competitiveness to the Australian industry across the following 12 months.

This reversal is already evident in the Australian market with SPCA's current pricing strategy making them extremely competitive versus imported Italian tomato products.

In conclusion, Conga Foods asserts that in these circumstances, it is not open to the Commission to recommend the Parliamentary Secretary to publish the dumping duty notice the subject of the Australian industry's application.

Yours sincerely,



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