



**CUSTOMS ACT 1901 - PART XVB**

**FINAL REPORT NO. 276**

**DUMPING OF**  
**PREPARED OR PRESERVED TOMATOES**  
**EXPORTED FROM ITALY**  
**BY FEGER DI GERARDO FERRAIOLI S.P.A.**  
**AND LA DORIA S.P.A.**

**18 January 2016**

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## ABBREVIATIONS

the Act	<i>Customs Act 1901</i>
ACBPS	Australian Customs and Border Protection Service
ADA	WTO Anti-Dumping Agreement
ADN	Anti-Dumping Notice
AOA	WTO Agreement on Agriculture
the applicant	SPC Ardmona Operations Limited, also referred to as SPCA
CAP	European Union Common Agricultural Policy
CCA	Coca-Cola Amatil Limited
CTM	cost to make
CTMS	cost to make and sell
the Commission	Anti-Dumping Commission
the Commissioner	Commissioner of the Anti-Dumping Commission
CON 276	Consideration Report 276
EC	European Commission
EPR	Electronic Public Record
EU	European Union
Feger	Feger di Gerardo Ferraioli S.p.A.
GAAP	generally accepted accounting principles
the goods	the goods the subject of the application (also referred to as the goods under consideration)
the investigation period	1 January 2014 to 31 December 2014
La Doria	La Doria S.p.A.
the Minister	the Minister for Industry, Innovation and Science
NIP	non-injurious price
the Parliamentary Secretary	the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science
PAD	Preliminary Affirmative Determination
PO	Producer Organisations
REP 217	Anti-Dumping Commission Report Number 217
SEF	Statement of Essential Facts
SPCA	SPC Ardmona Operations Limited
WTO	World Trade Organization

# 1 SUMMARY AND RECOMMENDATIONS

## 1.1 Introduction

This final report relates to the investigation by the Anti-Dumping Commission (the Commission) into allegations made by SPC Ardmona Operations Limited (SPCA) that prepared or preserved tomatoes (the goods) exported to Australia from Italy by Feger di Gerardo Ferraioli S.p.A. (Feger) and La Doria S.p.A. (La Doria) at dumped prices has caused material injury to the Australian industry producing like goods.

This final report sets out the findings on which the Commissioner of the Anti-Dumping Commission (the Commissioner) has based his recommendation to the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science (Parliamentary Secretary) <sup>1</sup> in relation to SPCA's application.

## 1.2 Recommendation to the Parliamentary Secretary

Based on the findings in this final report, the Commissioner recommends to the Parliamentary Secretary that a dumping duty notice be published in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

## 1.3 Application of law to facts

### 1.3.1 Authority to make decision

Division 2 of Part XVB of the *Customs Act 1901* (the Act)<sup>2</sup> sets out, among other matters, the procedures to be followed and the matters to be considered by the Commissioner in conducting investigations in relation to the goods covered by an application.

### 1.3.2 Application

On 24 November 2014, SPCA lodged an application requesting that the then Parliamentary Secretary publish a dumping duty notice in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

### 1.3.3 Initiation of investigation

After examining the application, the Commissioner was satisfied that:

- the application complied with subsection 269TB(4);
- there was an Australian industry in respect of like goods; and

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<sup>1</sup> On 23 December 2014, the then Minister for Industry and Science delegated his powers and functions under Part XVB of the *Customs Act 1901* to the Parliamentary Secretary to the Minister for Industry and Science. On 20 September 2015, the Department of Industry and Science became the Department of Industry, Innovation and Science. The titles of the Minister and Parliamentary Secretary also changed to the Minister for Industry, Innovation and Science, and the Parliamentary Secretary to the Minister for Industry, Innovation and Science. On 20 September 2015, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Science.

<sup>2</sup> 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.

- there appeared to be reasonable grounds for the publication of a dumping duty notice in respect of goods the subject of the application (the goods).<sup>3</sup>

The Commissioner decided not to reject the application, and notice of the initiation of this investigation was published in *The Australian* newspaper on 19 January 2015.<sup>4</sup>

#### **1.3.4 Statement of essential facts**

The Commissioner must, within 110 days after the initiation of an investigation, or such longer period as the Parliamentary Secretary allows under subsection 269ZHI(3), place on the public record a statement of the essential facts on which the Commissioner proposes to base his recommendation to the Parliamentary Secretary.<sup>5</sup>

In formulating the Statement of Essential Facts (SEF) the Commissioner must have regard to the application concerned, and any submissions concerning publication of the notice that are received within 40 days after the date of initiation of the investigation,<sup>6</sup> and may have regard to any other matters that he considers to be relevant.<sup>7</sup>

The Commissioner published the SEF on 4 September 2015.

### **1.4 Findings and conclusions**

The Commissioner has made the following findings and conclusions based on all available evidence.

#### **1.4.1 The goods and like goods (Chapter 3 of this report)**

Locally produced prepared or preserved tomatoes are like to the goods under consideration.

#### **1.4.2 Australian industry (Chapter 4 of this report)**

There is an Australian industry producing like goods, comprising of one Australian producer of prepared or preserved tomatoes, being SPCA.

#### **1.4.3 Australian market (Chapter 5 of this report)**

The Australian market for prepared or preserved tomatoes is supplied by the Australian industry and by imports, predominantly from Italy.

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<sup>3</sup> Subsection 269TC(1).

<sup>4</sup> Subsection 269TC(4).

<sup>5</sup> Subsection 269TDAA(1).

<sup>6</sup> Subsection 269TDAA(2)(a).

<sup>7</sup> Subsection 269TDAA(2)(b).

#### 1.4.4 Dumping investigation (Chapter 6 of this report)

The dumping margins for prepared or preserved tomatoes exported from Italy by Feger and La Doria are outlined below.

Exporter / Manufacturer	Dumping Margin
Feger di Gerardo Ferraioli S.p.A.	8.4%
La Doria S.p.A.	4.5%

Table 1- Dumping margins

#### 1.4.5 Economic condition of the Australian industry (Chapter 7 of this report)

During the investigation period, the Australian industry producing like goods has experienced:

- price suppression;
- reduced profits; and
- reduced profitability.

#### 1.4.6 Has dumping caused material injury? (Chapter 8 of this report)

Prepared or preserved tomatoes have been exported to Australia from Italy by Feger and La Doria at dumped prices and the dumping has caused material injury to the Australian industry producing like goods.

#### 1.4.7 Will dumping and material injury continue? (Chapter 9 of this report)

The Commissioner is satisfied that dumping and material injury will continue if dumping duties are not imposed on prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

#### 1.4.8 Non-injurious price (Chapter 10 of this report)

The non-injurious price (NIP) should be based on SPCA's cost to make and sell (CTMS), and because the NIP is higher than the normal values for Feger and La Doria it is appropriate to recommend that dumping duties should be based on the full margins of dumping.

#### 1.4.9 Recommended measures (Chapter 11 of this report)

The Commissioner recommends to the Parliamentary Secretary that a dumping duty notice be published in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

The Commissioner recommends that the method of working out the interim dumping duty payable be in accordance with the combination of fixed and variable duty method.

## **1.5 Public Record**

The public record contains non-confidential submissions by interested parties, the non-confidential versions of the Commission's verification visit reports and other publically available documents. It is available by request in hard copy in Canberra or Melbourne (phone 03 8539 2443 to make an appointment), or online at <http://www.adcommission.gov.au/cases/Pages/CurrentCases/EPR276.aspx>.

This final report should be read in conjunction with the documents on the public record.



## 2 BACKGROUND

### 2.1 Initiation

On 24 November 2014, SPCA lodged an application for the publication of a dumping duty notice in respect of prepared or preserved tomatoes (the goods) exported to Australia from Italy by Feger and La Doria.

Following consideration of the application, the Commissioner decided not to reject the application and initiated the investigation. Public notification of the initiation of the investigation was made on 19 January 2015 in *The Australian* newspaper and in ADN No. 2015/05.

In respect of the investigation, the Commission established an:

- investigation period of 1 January 2014 to 31 December 2014 for the purpose of assessing dumping; and
- injury analysis period beginning from 1 January 2010 for the purpose of determining whether material injury has been caused to the Australian industry.

### 2.2 Previous investigation and existing measures

In *Consideration Report 276* (CON 276), the Commission noted that a previous investigation into the alleged dumping of prepared or preserved tomatoes exported to Australia from Italy had been initiated on 10 July 2013.<sup>8</sup> As a result of the Commission's investigation, and the Commissioner's recommendation, the then Parliamentary Secretary to the Minister for Industry decided to impose dumping duties on prepared or preserved tomatoes exported from Italy except by Feger and La Doria.<sup>9</sup>

During the previous investigation it was found that goods exported by Feger and La Doria had been dumped during the relevant investigation period (1 July 2012 to 30 June 2013), but that the dumping margins were less than 2%. Accordingly, on 20 March 2014, the Commissioner decided to terminate the investigation in so far as it related to Feger and La Doria in accordance with subsection 269TDA(1)(b)(ii).<sup>10</sup>

After accepting a request by certain parties to review the then Parliamentary Secretary to Minister for Industry's decision, the Anti-Dumping Review Panel (ADRP) recommended that the then Parliamentary Secretary to the Minister for Industry affirm his decision. The then Parliamentary Secretary to the Minister for Industry decided on 21 October 2014 to affirm his decision to impose dumping duties on prepared or preserved tomatoes exported to Australia from Italy (except by Feger and La Doria). These measures are currently due to expire on 15 April 2019.

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<sup>8</sup> Investigation No. 217 refers: <http://www.adcommission.gov.au/cases/ADC217.asp>.

<sup>9</sup> ADN No. 2014/32.

<sup>10</sup> ADN No. 2014/22.

## 2.3 Nature and scope of the investigation

### 2.3.1 Legality of the investigation

Feger and La Doria in their joint submission of 20 February 2015 stated that initiation of the investigation by the Commission violates “World Trade Organization (WTO) law” by:

- limiting the investigation to two exporters and not the whole of Italy; and
- being a disguised review of the exporters’ dumping margin within 12 months from the completion of investigation 217 (Inv 217).<sup>11</sup>

However, the exporters note in their submission that Article 5 of the WTO Anti-Dumping Agreement (ADA) does not explicitly state that anti-dumping investigations must be conducted or initiated with respect to all exporters from an exporting country.<sup>12</sup> Rather, Article 5 of the ADA which provides for the initiation and subsequent investigation of an anti-dumping application provides that an investigation shall be initiated upon a written application by or on behalf of domestic industry (Article 5.1) and lists the information that an applicant shall provide an investigating authority in support of its application (Article 5.2). Article 5 further provides directives to the investigating authority regarding how the information provided by an applicant should be assessed for the purposes of initiating an anti-dumping investigation.

Section 269TB of the Act provides for the applicant the process by which they may lodge an application for a dumping duty notice. A consideration for the applicant is to first establish whether “a consignment of goods” has been, is likely to be or may be imported into Australia.

In requesting the Parliamentary Secretary to publish a dumping duty notice, the expression “a consignment of goods” is not specific to a particular exporter from a particular country or multiple consignments of goods from one or more specific exporters.

Further, subsection 269TC(1), which lists the matters upon which the Commissioner must be satisfied in considering an application received under subsection 269TB(1), does not provide that the Commissioner needs to have regard to the timing of an application in relation to the completion of a previous anti-dumping investigation of the same goods from the same country within the preceding 12 months.

Therefore, the Commissioner is satisfied that the initiation of this investigation on 19 January 2015 is a new investigation not contrary to subsection 269TC(1).

### 2.3.2 Investigating Market Situation

In their submission of 27 February 2015, Feger and La Doria submit that the Commission’s investigation of a particular market situation being present in Italy for prepared or preserved tomatoes can only be addressed within a countervailing investigation. Accordingly, Feger and La Doria argue that the Commission’s examination of a market situation is outside the framework of an anti-dumping investigation in violation

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<sup>11</sup> EPR013 Exporter submission.

<sup>12</sup> *ibid*, p 5.

of WTO law.<sup>13</sup> The exporters also submit that addressing questions concerning subsidies in an anti-dumping investigation would be in breach of WTO rules.

Paragraph 269TAC(2)(a)(ii) of the Act sets out an exception to determining normal value under subsection 269TAC(1) where the Parliamentary Secretary is satisfied that, because the situation in the market in the country of export is such that sales in that market are not suitable for use in determining a price under subsection 269TAC(1), the normal value of the goods exported to Australia cannot be ascertained under subsection 269TAC(1).

The Commission's *Dumping and Subsidy Manual*<sup>14</sup> states:

*In considering whether sales are not suitable for use in determining a normal value under subsection 269TAC(1) because of the situation in the market of the country of export, the Commission may have regard to factors such as:*

- *whether the prices are artificially low; or*
- *whether there is significant barter trade; or*
- *whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under subsection 269TAC(1) of the Act.*

*Government influence on prices or costs could be one cause of "artificially low pricing". Government influence means influence from any level of government.*

*In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.*

In examining the effect of support schemes administered under the European Union's Common Agricultural Policy (CAP) in this investigation (along with certain other factors), the Commission has undertaken a practical assessment as to whether the payments made to Italian growers of raw tomatoes under the CAP distorted the prevailing market prices in Italy for prepared or preserved tomatoes. This was done for the purpose of determining normal value in the context of considering whether to recommend the publication of a dumping duty notice under section 269TG of the Act. These considerations are distinctly different to investigations of subsidy programs for the purpose of recommending a countervailing duty notice under section 269TJ.

The Commission is of the view that it is not limited in terms of the factors it may examine when assessing whether there is a situation in the Italian market such that sales of prepared or preserved tomatoes in that market are unsuitable for use in determining normal values under subsection 269TAC(1).

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<sup>13</sup> EPR 012, 029 – Exporter submission. See also EPR 014 – European Union submission, EPR 015 – Italian Government submission.

<sup>14</sup> Available online at [http://adcommission.authprod.ind/accessadsystem/Documents/DumpingandSubsidyManual-December2013\\_001.pdf](http://adcommission.authprod.ind/accessadsystem/Documents/DumpingandSubsidyManual-December2013_001.pdf)

### 2.3.3 Initiation of new investigation within 12 months of previous investigation

Feger and La Doria in their joint submission of 20 February 2015 stated that initiation of the investigation by the Commission violates the Doha Ministerial Decision committed to by WTO Members.

Paragraph 7.1 of the Doha Ministerial Decision states that:

*investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.*<sup>15</sup>

In making his decision to initiate the investigation, the Commissioner considered the SPCA application which, in comparison to the information that informed Anti-Dumping Commission Report Number 217 (REP 217) of the previous investigation, contained a considerable amount of new factual information provided by SPCA regarding allegations of a particular market situation. The allegations of a particular market situation made by SPCA in the previous investigation were not had regard to, as to do so would have prevented the timely preparation of the report to the then Parliamentary Secretary to the Minister for Industry and Science. However, as SPCA's application contains allegations of a particular market situation, that information must be taken into account for the purposes of providing this report to the Parliamentary Secretary.

The new factual information related to allegedly trade distorting measures such as the Single Payment Scheme (SPS) that forms part of the CAP, regulations on imports of raw tomatoes and measures and support offered through Italian Producer Organisations (PO).

Further, the SPCA application presented:

- export price, normal value and dumping margin estimates based on a different period to the one used as the investigation period (1 July 2012 to 30 June 2013) in the previous investigation; and
- claims of dumping and injury caused by dumping in a manner that was reasonably confined to exports of the goods by Feger and La Doria.

In considering the application, the Commission established that the volume of prepared or preserved tomatoes exported to Australia by Feger and La Doria (in aggregate) had increased since the investigation period used for the purpose of Inv 217. Similarly, the share of the Australian market for prepared or preserved tomatoes held by goods exported by Feger and La Doria had significantly increased. The Commission considers these findings demonstrate that circumstances had changed and were particularly relevant in the context of an application that was alleging that Feger and La Doria were dumping and that the dumping by those two exporters caused material injury.

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<sup>15</sup> EPR013 Exporter submission.

The new factual information raised by SPCA in its application, including its new claims of dumping, injury and causation, was examined with special care by the Commission in the context of the changed circumstances outlined above. The examination was undertaken with special care in line with the Doha Ministerial decision. Based on information contained in the application and other information the Commissioner considered relevant, the Commissioner decided not to reject the application.

## 2.4 Statement of Essential Facts

The public notice of the initiation advised that the SEF for the investigation would be placed on the public record by 9 May 2015.

The Parliamentary Secretary granted an extension of 90 days to the date for the publication of the SEF. That extension required the SEF to be published by 7 August 2015, and the final report and recommendations to be provided to the Parliamentary Secretary by 21 September 2015. ADN No. 2015/56 provides further details and is available on the Commission's website at <http://www.adcommission.gov.au>.

On 7 August 2015, the Parliamentary Secretary granted a further extension of 28 days for the publication of the SEF. That extension required the SEF to be published by 4 September 2015, and the final report and recommendations to be provided to the Parliamentary Secretary by 19 October 2015.

The SEF was published on 4 September 2015.

On 4 September 2015 the Commissioner made a Preliminary Affirmative Determination (PAD) in relation to prepared or preserved tomatoes. Securities were imposed as of 11 September 2015 against all exports of prepared or preserved tomatoes from Italy by Feger and La Doria. If the Parliamentary Secretary accepts the Commissioner's recommendation to impose anti-dumping measures on exports of prepared or preserved tomatoes from Italy by Feger and La Doria, any securities taken will then be converted in respect of interim duty that may be payable on the goods under the *Customs Tariff (Anti-Dumping) Act 1975*.

On 19 October 2015, the Parliamentary Secretary granted an extension of 90 days for the preparation of the Final Report. The Final Report is due by 16 January 2016. ADN No. 2015/124 provides further details and is available on the Commission's website at <http://www.adcommission.gov.au>.

## 2.5 Submissions received from interested parties

The Commission has received numerous submissions from interested parties during the course of the investigation. Each submission that was received within 20 days of publishing the SEF (that is, received by 24 September 2015) has been considered by the Commissioner in reaching the recommendations contained in this Final Report.

## Public Record

The Commission also received submissions after 24 September 2015 from all interested parties. These additional submissions have either re-stated the parties' position on relevant issues or provided clarification on those issues raised throughout the investigation and in response to the SEF. The Commissioner has considered the submissions received after 24 September 2015 in formulating his recommendations to the Parliamentary Secretary because the Commissioner is of the opinion that their consideration has not prevented the timely preparation of this report.<sup>16</sup>

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<sup>16</sup> Subsection 269TEA(4).

### 3 THE GOODS AND LIKE GOODS

#### 3.1 Finding

The Commissioner considers that locally produced prepared or preserved tomatoes are like to the goods the subject of the application (the goods).

#### 3.2 Legislative framework

In making his assessment of like goods, the Commissioner must firstly determine that the goods produced by the Australian industry are “like” to the imported 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.”*

An Australian industry can apply for relief from injury caused by dumped or subsidised imports even if the goods it produces are not identical to those imported. The industry must however, produce goods that are “like” to the imported goods.

Where the locally produced goods and the imported goods are not alike in all respects, the Commissioner assesses whether they have characteristics closely resembling each other against the following considerations:

- i. Physical likeness;
- ii. Commercial likeness;
- iii. Functional likeness; and
- iv. Production likeness.

#### 3.3 The goods

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 (prepared or preserved tomatoes), exported from Italy by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. The following tomato products do not form part of this application: pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.*

The application contains the following further information in relation to the goods the subject of the application:

*The common container sizes of the imported prepared or preserved tomatoes the subject of this application are 300grams to 850grams, but the application covers all container sizes up to and including 1.14L.*



*The imported goods could be packaged in different containers such as cans, glass jars, pouches or Tetra packs.<sup>17</sup>*

*Products sold in multi-unit packs, for example 3x400gram cans, are to be considered as three single packs.*

*The imported prepared or preserved tomatoes can be labelled with a generic, a house brand / private label for retailer or a proprietary label. The imported goods the subject of this application covers all imported prepared or preserved tomatoes regardless of how labelled.*

### **3.3.1 Tariff classification**

The goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

- 2002.10.00 (statistical code 60).

The general rate of duty is currently 5% for goods imported from Italy.

### **3.3.2 Tariff Concession Orders**

There are no Tariff Concession Orders in place for the goods.

## **3.4 The Commission's like goods assessment**

From the available information as well as information collected during Inv 217, the Commission has not identified any Australian producers of like goods apart from SPCA. Based on information gathered from SPCA, exporters and importers the Commission is satisfied that the Australian industry produces like goods on the following grounds.

### **3.4.1 Physical likeness**

The locally produced goods and the imported goods are physically alike. Product recipes differ however the major ingredient of the locally produced goods and the imported goods is raw tomatoes. The locally produced goods and the imported goods are available in similar packaging sizes of 400 gram and 800 gram net weighted cans. SPCA may use tomato paste as a thickening agent while the exporters subject to the investigation use tomato juice concentrate for similar purposes.

### **3.4.2 Commercial likeness**

The locally produced goods and the imported goods are sold to the same customers in the retail sector and directly compete with each other. Therefore the locally produced goods and the imported goods are commercially alike.

### **3.4.3 Functional likeness**

Both the locally produced goods and the imported goods are functionally alike because they have the same end use.

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<sup>17</sup> Tetra packs are proprietary packaging mediums produced, under copyright, by the Tetra Pack Company.



#### **3.4.4 Production likeness**

Based on visiting SPCA's production facility and visits to the exporters, the Commission has confirmed that the locally produced goods and the imported goods are manufactured in a similar way.

The Commission notes that the previous investigation revealed that there are other Australian manufacturers of prepared and preserved tomatoes in containers exceeding 1.14 litres. In line with the previous investigation findings that these goods are primarily destined for the food, service and industrial sector and do not compete against imports in the retail sector, the Commission considers that these other manufacturers do not produce like goods and are therefore not considered part of the Australian industry.

Therefore, based on the above, the Commissioner considers that locally produced prepared or preserved tomatoes are like to the goods the subject of the application.

## 4 THE AUSTRALIAN INDUSTRY

### 4.1 Finding

The Commissioner has found that there is an Australian industry consisting of SPCA that produces like goods in Australia and those like goods were wholly manufactured in Australia.

### 4.2 Legislative framework

The Commissioner must be satisfied that the “like” goods are produced in Australia. Subsection 269T(2) specifies that goods are not to be taken to have been produced in Australia unless the goods were wholly or partly manufactured in Australia. Subsection 269T(3) further specifies that the goods shall not be taken to have been partly manufactured in Australia unless at least one substantial process in the manufacture of the goods was carried out in Australia.

### 4.3 Australian industry

#### 4.3.1 Corporate, organisational and ownership structure

SPCA commenced commercial trading as SPCA in 2002 following the merger of two previously unaffiliated commercial entities – Shepparton Preserving Company (SPC) and Ardmona Fruit Products Co-Op (Ardmona). SPCA is currently a wholly owned subsidiary of SPC Ardmona Ltd which is wholly owned by Coca-Cola Amatil Limited (CCA) following completion of the commercial acquisition of SPCA by CCA in 2005. SPCA’s head office is located at Hawthorn East in Melbourne, Victoria.

The SPCA financial year operates from January to December. Being part of CCA, SPCA provided CCA’s audited financial statements and annual reports.

#### 4.3.2 Applicant’s manufacturing operations and production process

SPCA operates manufacturing facilities in Shepparton and Mooroopna, located in regional Victoria. SPCA is the sole Australian manufacturer of like goods.

The manufacture of the goods occurs, subject to weather, between February and April each year at its Mooroopna facility near Shepparton, Victoria. The Commission was informed this is the only manufacturing facility in Australia for like goods. On 13 February 2015 the Commission visited the manufacturing facilities of SPCA and observed the production of prepared or preserved tomatoes to gain an understanding of the production process.<sup>18</sup>

SPCA advised the production process in relation to prepared or preserved tomatoes is standardised for all products with marginal differences made at various production stages depending on specific product variables (such as cut profile and value adding).

The Commission observed the following production activities at SPCA Mooroopna manufacturing facility:

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<sup>18</sup> EPR No. 276/9 refers.

- The raw tomatoes are delivered to SPCA's Mooroopna facility directly by the local tomato growers on the same day that they are harvested from the vine.
- The delivered raw tomatoes are moved immediately to the processing line, so as to be washed and graded.
- The higher quality raw tomatoes are then steam-peeled, whilst the lower quality tomatoes are graded for use in the production of juice which is either used as filling in the canning process or evaporated and used to produce concentrates and paste products.
- The peeled raw tomatoes are graded a second time, so as to be sorted for processing as either whole tomato products if they are higher quality or if they are lower quality raw tomatoes, these are graded a third time for dice, chop or crush cut profiles.
- Once sorted and processed according to cut profile, all raw tomatoes are put into cans. Each can is filled with standardised ratios of raw tomatoes to liquid filling stage (juice that is derived from step 3 above). Products are then sorted by can size and cut profile. At this stage, depending on specific product requirements, certain cans are produced with additional ingredients such as herbs, spices and other flavouring (referred to as 'value added' products).
- Once filled to product specifications, cans are sealed and pasteurised (cooked) to preserve the product and moved to cool to ambient temperature.

Once cooled, all unlabelled cans (referred to as the 'bright can' stage) are moved to storage according to product grouping. The Commission observed that the finished goods follow two main processes; canning of the goods, followed by labelling and packing. SPCA advised that the goods are manufactured up to the bright can stage, i.e. no labels, and stored ready for sale. Cans are then taken out of storage and labelled on an as-needed basis prior to shipping, depending on specific order requirements and customer demands.

When tomatoes are not being processed, the Mooroopna tomato processing lines are left idle.

#### **4.3.3 Other producers**

As discussed at Section 3.3.4 of this report, the Commission is aware of other manufacturers of prepared or preserved tomatoes however, as the goods produced are in containers exceeding 1.14 litres and do not compete against imports in the retail sector, these products are not considered to be like goods.

#### **4.3.4 Product range**

The applicant makes a range of goods for sale in Australia under its own labels and for private and generic labels. The broad categories are:

- Whole peeled;
- Diced, chopped and crushed; and
- Value added.

The value added range includes minor amounts of herbs and spices and/or tomato paste and other vegetables.

There are two typical can sizes. During the investigation period, the majority of SPCA's prepared or preserved tomatoes were manufactured in two container sizes, being the 400g or 800g pack groups.

#### **4.3.5 Close processed agricultural goods**

In its application, SPCA indicated that prepared or preserved tomato products are not close processed agricultural goods.<sup>19</sup> SPCA explained that the fresh tomatoes used in the production of prepared or preserved tomato products are not substantially devoted to the production of those goods. SPCA noted they are also used for consumption in the fresh form and they are used to manufacture other products such as paste, puree and sauces.

At its visit to SPCA's manufacturing plant, the Commission was advised that SPCA sourced its raw tomatoes from local suppliers who are also tomato growers.<sup>20</sup>

The Commission considers that the goods are not close processed agricultural goods. Therefore, the Commission considers that the Australian industry for prepared or preserved tomatoes does not include the person or persons producing the raw agricultural goods from which the processed goods are derived.<sup>21</sup>

#### **4.4 Conclusion**

Accordingly, based on the above findings, the Commissioner is satisfied that:

- there is an Australian industry producing like goods in Australia, consisting of SPCA;
- the prepared or preserved tomatoes produced by SPCA are like to the imported goods; and
- the like goods are wholly manufactured in Australia.

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<sup>19</sup> Within the meaning of subsection 269T(4B).

<sup>20</sup> See EPR 009 for a full description of the site visit conducted by the Commission of SPCA's production process.

<sup>21</sup> Within the meaning of subsection 269T(4A).

## 5 AUSTRALIAN MARKET

### 5.1 Finding

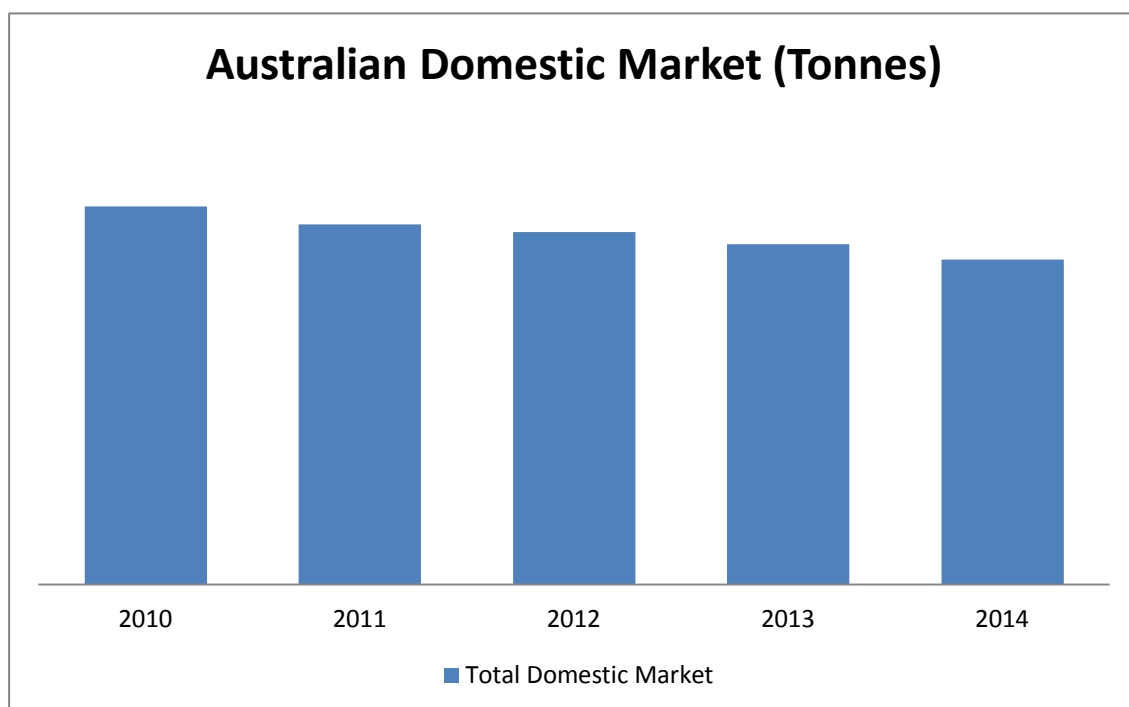
The Commissioner found that there is an Australian market for prepared or preserved tomatoes which the Commission estimates comprised sales of approximately 49,500 tonnes during the investigation period. The Australian market is supplied by SPCA and by imports, almost exclusively from Italy, with the goods and like goods sold in the retail sector.

### 5.2 Market structure

#### 5.2.1 Market size

In its application SPCA submitted its estimates of the Australian market size and share of prepared or preserved tomatoes for each calendar year during the period 2010-2013 and for the first half of the 2014 calendar year. Following the initiation of the investigation, the Commission obtained SPCA's updated sales volumes and net sales values for the second half of the 2014 calendar year.

Using SPCA's sales data and the then Australian Customs and Border Protection Service (ACBPS) import database, the Commission has presented the size of the Australian market for prepared or preserved tomatoes in the following graph. The graph shows the changes in the Australian domestic market size for prepared or preserved tomatoes across the calendar years from 2010 through to 2014.



**Graph 1: The Australian domestic market size for prepared or preserved tomatoes**

Graph 1 demonstrates that the size of the Australian domestic market for prepared or preserved tomatoes has decreased each year since 2010.

The Commission estimates that in 2014, the size of the Australian market for prepared or preserved tomatoes was approximately 49,500 tonnes. The Commission observes that the market size has decreased by approximately 13% when compared to the 2010 calendar year.

Details of the Australian prepared or preserved tomatoes market share and size are at **Confidential Attachment 1**.

### 5.2.2 Market supply

SPCA is the only manufacturer of the like goods in Australia. All other prepared or preserved tomatoes supplied to the market are imported, primarily from Italy.

Whilst there are a large number of importers of prepared or preserved tomatoes from Italy, the vast bulk of the imported goods are either purchased directly by the major supermarkets or on their behalf via a smaller subset of importers.

SPCA explained that it sells directly to the major supermarkets and other retail outlets that generally purchase a combination of imported and locally-produced prepared or preserved tomatoes.

## 5.3 Importers

At the commencement of the investigation, the Commission identified a number of importers of the goods from the then ACBPS import database. The Commission noted that there were six importers that, in aggregate, accounted for approximately 95% of the import volume of the goods to Australia in the investigation period.

On 23 January 2015, the Commission contacted these six importers and invited them to cooperate with the investigation by completing an importer questionnaire, which requested information relevant to the investigation. The due date for responses to the importer questionnaire was set as 16 February 2015.

The Commission received responses from all but one of the importers of the goods. Responses received included:

- company information for the importer;
- overseas supplier information;
- details of imported goods (including cost to import and sell);
- details of selling expenses for the goods;
- details of Australian sales of the goods;
- details of forward orders of the goods;
- contracts for supply of the goods; and
- supporting documentation for selected importations of the goods identified by the Commission.

The Commission considers that for the purpose of this investigation, it is not necessary to undertake on-site visits to verify the importers information and data.<sup>22</sup> Instead, the Commission:

- verified certain importers' costs and sales data to the source documentation provided; and
- considers that the composition of the updated importers' costs and sales data is closely aligned to previously complete, accurate and relevant verified data.<sup>23</sup>

Accordingly, the Commission considers that the data is suitable for use for the purpose of this investigation as follows:

- corroborating evidence of arms length transactions in relation to export price;
- determining selling prices in Australia for goods exported from Italy by Feger and La Doria; and
- assessing the post-exportation costs incurred in relation to goods exported by Feger and La Doria.

The Commission found the importers generally operated in one of two ways:

- importing the goods and acting as a distributor to retailers; or
- importers purchasing the goods either directly from the exporter or via an intermediary and then selling the goods in their store to retail customers.

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<sup>22</sup> EPR No. 276/38 refers.

<sup>23</sup> Inv 217.

## 6 DUMPING INVESTIGATION

### 6.1 Finding

The Commissioner has found the following dumping margins:

Exporter / Manufacturer	Dumping Margin
Feger di Gerardo Ferraioli S.p.A.	8.4%
La Doria S.p.A.	4.5%

### 6.2 Legislative framework

Dumping occurs when a product from one country is exported to another country at a price less than its normal value. Under the Act, the export price and normal value of goods are determined under section 269TAB and section 269TAC respectively.

Generally, the normal value reflects the price paid for like goods in the domestic market of the country of export. However, there may be instances where the goods are not sold in that market, or the price paid for like goods in that market cannot, for some reason, be used. Section 269TAC provides for several methods in which normal values may be calculated.

Subsection 269TAC(1) provides that, subject to certain conditions, the normal value is the price paid or payable for like goods sold in the ordinary course of trade (OCOT) for home consumption in the country of export in sales that are arms length transactions. Section 269TAAD sets out the tests to determine if a transaction is in the OCOT.

In instances where normal value cannot be established under subsection 269TAC(1), subsection 269TAC(2)(c) provides for the normal value to be constructed by reference to the cost of production, administrative, selling and general costs and an amount for profit. Alternatively, subsection 269TAC(2)(d) provides for the normal value to be based on the price of exports from the country of export to a third country.

Dumping margins are determined under section 269TACB.



## 6.3 Matters relevant to the calculation of dumping margins

The applicant, the exporters and other interested parties have raised a range of issues relevant to the Commission's calculation of the dumping margins for Feger and La Doria. This chapter will deal with each key issue, outlining the position taken at the time of the SEF, the submissions made from all interested parties in response and the Commission's assessment and conclusions. These conclusions are relied upon by the Commission in calculating the dumping margins referred to in section 6.1.

### 6.3.1 Allegation of market situation

SPCA submitted in its application that domestic prices of prepared or preserved tomatoes in Italy are not suitable for the determination of normal values under subsection 269TAC(1) of the Act, alleging that a particular market situation in relation to those goods in Italy renders those domestic selling prices unsuitable.<sup>24</sup>

### 6.3.2 The Act

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 OCOT for home consumption in the country of export in sales that are arm's length transactions by the exporter. However, subsection 269TAC(2)(a)(ii) provides that the normal value of the goods exported to Australia cannot be determined under subsection (1) where the Parliamentary Secretary is satisfied that:

*the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1).*

Where such a market situation exists, normal value cannot be established on the basis of domestic sales. Instead, the normal value may be determined on the basis of a cost construction (subsection 269TAC(2)(c)) or third country sales (subsection 269TAC(2)(d)).

### 6.3.3 The Commission's assessment

Prior to the publication of the SEF the Commission engaged Law and Economics Consulting Associates (LECA) to analyse the [CAP](#)<sup>25</sup> and SPS.

A full evaluation of the Commission's investigation of market situation and its consideration of all available relevant evidence and information can be found in the **Appendix** of this report.

At the time of publishing the SEF, and after review and consideration of all available evidence and information, the Commission was not satisfied that there is a situation in the market in Italy for prepared or preserved tomatoes that makes sales of prepared or preserved tomatoes in that market unsuitable for use in determining a price under subsection 269TAC(1).

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<sup>24</sup> Subsection 269TAC(2)(a)(ii).

<sup>25</sup> See Appendix for a full description of the CAP and the payments available to growers of raw tomatoes in Italy.

SPCA submitted in response to the SEF that the Commission should reconsider its negative finding regarding a market situation. Their submission sought to clarify its allegations and provide the Commission with further comment on other interested parties' interpretation of the operation of the CAP.

Based on its original assessment contained in the SEF and the absence of new or better information, the Commission remains satisfied that there is not a situation in the market in Italy for prepared or preserved tomatoes such that sales in that market are unsuitable for use in determining a price under subsection 269TAC(1).

## **6.4 Determining normal value**

### **6.4.1 Ordinary course of trade**

As there is no finding of a particular market situation relevant to the goods, the Commission is required to consider subsection 269TAC(1) to determine the normal value of the goods exported to Australia. This requires a consideration of whether domestic sales have been made in the OCOT and are in arms length transactions. The results of the OCOT testing may provide exceptions, such as the absence or low volume of sales, for determining normal value under subsection 269TAC(1).

As noted in the Feger and La Doria visit reports, the Commission considers that all sales of like goods made by the exporters in the domestic market during the investigation period were at arms length.

As per subsections 269TAAD(1)(a) and (b), in order for a sale in the country of export to be considered to be in the OCOT, the total volume of loss making sales must not be greater than 20% of the total volume of sales.<sup>26</sup> However, if the loss making sales are greater than 20% of the total volume of sales, but the loss relating to those sales is recoverable within a reasonable period of time, then those sales are also to be considered in the OCOT.<sup>27</sup>

The Commission therefore sought to establish the costs relating to Feger and La Doria's production or manufacture of prepared or preserved tomatoes in Italy in accordance with the Act.<sup>28</sup>

The Commission notes that the production of prepared or preserved tomato products occurs only once per season (i.e. once a year). It was not possible to break Feger and La Doria's costs down into shorter periods to obtain, for example, quarterly CTMS data. Therefore, the Commission used the annualised CTMS data to test whether sales of goods were at a price less than the cost of such goods in terms of subsection 269TAAD(2). Accordingly, all of those transactions found to be at a price below the cost of such goods are also considered to be unrecoverable within the meaning of subsection 269TAAD(3). As a result the Commission has used subsections 269TAC(1) and 269TAC(2) depending on the results of the OCOT tests.

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<sup>26</sup> Subsection 269TAAD(2).

<sup>27</sup> Subsection 269TAAD(3).

<sup>28</sup> Subsection 269TAAD (4)(a) and (5) set out how to work out the cost of goods and require the Commission to have regard to the Regulation.

#### 6.4.2 Competitive market costs

The cost of production or manufacture of like goods sold by an exporter is worked out in such manner, and taking into account of such factors, as the *Customs (International Obligations) Regulation 2015* (the Regulation) provides.

Subsection 43(2) of the Regulation requires that if an exporter of like goods keeps records relating to the like goods, and those records:

1. are in accordance with generally accepted accounting principles (GAAP) in the country of export; and
2. reasonably reflect competitive market costs associated with the production or manufacture of like goods;

then the amount to be the cost of production or manufacture must be worked out using information set out in the exporter's records.

During this investigation, the Commission has verified that the accounting records of Feger and La Doria have been kept in accordance with the Italian GAAP, relying on the auditor's opinion in each company's audited financial statements.

#### 6.4.3 Submission on competitive market costs

Feger and La Doria submitted that the costs referred to in Article 2.2.1.1 of the ADA, upon which subsection 43(2) of the Regulation is based, are the charges *actually incurred* by the producer and are those associated with the production and sale of the goods under consideration. They submit that the Regulation does not enable the Commission to take into account the upstream inputs, and that the notion of reasonableness refers to an obligation to reflect costs, not the costs themselves.

#### 6.4.4 The Commission's assessment – interpretation of Regulation 43(2)

The Commission considers that the question to be answered for the purpose of the Regulation is whether Feger and La Doria's records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods.<sup>29</sup>

If the Commission believes that where Feger and La Doria's records do not reasonably reflect competitive market costs, which include the costs of the upstream inputs, it is open to the Parliamentary Secretary to calculate a cost of production from all relevant information that is available. This may then necessitate an adjustment to the costs contained in Feger and La Doria's records in order to reflect competitive market costs associated with the manufacture or production of the goods under consideration.<sup>30</sup> The Commission does not agree with the submission by Feger and La Doria regarding the interpretation of Article 2.2.1.1. Australian courts have held that Article 2.2.1.1 has the same qualifications regarding cost of production or manufacture that are found in

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<sup>29</sup> *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 (30 August 2013) Nicholas J [91].

<sup>30</sup> *Ibid* [41] – [42].

subsection 43(2) of the Regulation and is silent on how upstream inputs are to be costed if their costs do not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>31</sup>

#### **6.4.5 Assessment of whether recorded costs associated with the production of like goods reasonably reflect competitive market costs**

During the investigation period the rules relating to direct income support payments to growers of raw tomatoes in Italy under the SPS were contained in *Council (EC) Regulation No 73/2009*. Under that regulation, the Italian Government, each year, sets a national ceiling for total income support payments to be made under the SPS.<sup>32</sup> Contained within the national ceiling are amounts relating to individual crop type. Growers of raw tomatoes then lodge their claim to their entitlements under the SPS and receive their direct income support payments which are calculated by reference to a historical production period of 2004 to 2006.<sup>33</sup> The exporters, the European Commission (EC) and the Italian Government have stated that the national ceiling does not contain a breakdown of amounts allocated to crop type and that they are unable to establish an amount that has been paid to growers of raw tomatoes during any particular period.<sup>34</sup>

As part of a submission, Feger and La Doria provided a letter from the Italian Ministry of Agriculture and Forestry.<sup>35</sup> The letter indicates that the total amount of financial support available for raw tomatoes during the transition period of 2008 to 2010 was transferred into the SPS from 1 January 2011. This evidence is further supported in an Annex to another submission made by Feger and La Doria on 28 July 2015.<sup>36</sup> The Annex referred to is a letter addressed to Feger and La Doria from Unaproa Societa' Consortile A R.L.<sup>37</sup> The letter states that:

- direct payments are made to farmers in the possession of an area of land allocated to agricultural activity; and
- that these payments, which termination was originally fixed for 31 December 2013, was extended to 31 December 2014.

This evidence, provided by Feger and La Doria, confirms that the SPS and the national ceiling that the Italian Government allocated to direct income support payments via the SPS under *EC Regulation 73/2009* was operational during the investigation period.<sup>38</sup>

As part of a confidential submission made in response to the SEF, Feger and La Doria provided the Commission with sample entitlement certificates of direct payments made to

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<sup>31</sup> *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs (No 2)* [2015] FCA 1332. Nicholas J [47].

<sup>32</sup> Those ceilings are published in Annex VIII of EC Regulation 73/2009.

<sup>33</sup> EC Regulation 73/2009, Title III, Chapter 1, Article 40, 34 and 35, see the LECA Report, p 18, see also Solazzo, R, Donati, Arfini F, Petriccine G, A PMP model for the impact assessment of the Common Agricultural Policy reform 2014-2020 on the Italian tomato sector, [www.iamb.it/share/img\\_new\\_medit\\_articli/976\\_9solazzzo.pdf](http://www.iamb.it/share/img_new_medit_articli/976_9solazzzo.pdf) for confirmation of the historical base period.

<sup>34</sup> EPR 055. This information was provided during a meeting via video link between the exporters, the EC, the Italian Government and the Commission on 1 October 2015.

<sup>35</sup> See EPR 048, 049.

<sup>36</sup> EPR 055.

<sup>37</sup> UNAPROA is the most prominent organisation which represents the fruit and vegetables producers in Europe. They also collaborate with the Italian agencies responsible for dispensing the public payments for agriculture.

<sup>38</sup> EC Regulation 1307/2013, Article 21(2). This article extends Regulation 73/2009 until 31 December 2014.

their suppliers of raw tomatoes under the SPS during the investigation period. Feger and La Doria submit that these certificates demonstrate that their suppliers of raw tomatoes receive very modest amounts of direct income support payments and that the amount paid directly to each grower is dependent on a number of factors, such as the number of entitlements owned by each farmer.<sup>39</sup>

The Commission considers that the sample certificates confirm that growers of raw tomatoes are entitled to direct income support payments under the SPS. However, the certificates pertain to a select group of growers who collectively account for 0.5% of the total volume of raw tomatoes produced in Italy during the investigation period.<sup>40</sup> Further, the entities the subject of these certificates are individuals that appear to be smaller scale growers of raw tomatoes. The Commission is not satisfied that the evidence is representative of the payments made to all growers of raw tomatoes under the SPS during the investigation period.<sup>41</sup>

In respect of a submission made by SPCA on this matter, it is further evident that coupled aid was phased out at the end of 2010. The 50% of coupled aid that was available to growers of raw tomatoes during the transition period was then fully absorbed into the SPS from 1 January 2011, thus making 100% of Italy's national annual ceiling, an amount of €183,967,000 allocated to raw tomatoes available under the SPS as of 1 January 2011.<sup>42</sup>

The Commission has obtained a publically available Italian Ministerial Decree dated 17 October 2013 that contains a table updating the components of Italy's national ceiling contained in Annex VIII of *EC Regulation 73/2009*.<sup>43</sup> SPCA has also provided the Commission with a copy of the decree as part of its submission in response to the SEF.<sup>44</sup> The table states that, of Italy's national ceiling of €3,634,620,000 dedicated to the SPS in 2014, €183,970,000 is the component relating to income support payments to growers of raw tomatoes (**Confidential Attachment 2** refers).

This evidence is consistent with the evidence provided by Feger and La Doria and demonstrates that:

- The SPS was applicable to raw tomatoes from 1 January 2011;
- the Italian Government set national ceilings under the SPS; and
- direct income support payments are made on an annual basis to growers of raw tomatoes in Italy.

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<sup>39</sup> EPR 063. See also EC Regulation 73/2009 Article 15, and 18,

<sup>40</sup> The calculation of the percentage has been from the confidential information supplied by exporters in their submission in response to the SEF.

<sup>41</sup> The certificates provided are copies that are difficult to read and decipher. They do not contain any official Italian Government stamp, which makes their verification difficult.

<sup>42</sup> EPR 056, Annex 1, "Window on the CAP". SPCA stated this position in its original application and has maintained its position throughout the investigation regarding the ceiling amount available to growers of raw tomatoes in Italy during the investigation period.

<sup>43</sup> Ministerial Decree made by an agency of the Italian Government. Il Ministro delle politiche agricole alimentari e forestali – Decreto n. 12706 del 17/10/2013 Modifiche al decreto 24 marzo 2005, concernente la gestione della riserva nazionale del regime di pagamento unico della PAC.

<sup>44</sup> EPR 063.

In conclusion, the totality of the evidence provided by Feger and La Doria, the EC, the Italian Government and SPCA, combined with publically available information obtained by the Commission, demonstrates that a national ceiling was fixed by the Italian Government under the SPS for 2014<sup>45</sup> and within that national ceiling was an allocation of €183,970,000 for direct income support payments to be made to growers of raw tomatoes.<sup>46</sup>

#### **6.4.6 Price of raw tomatoes in Italy**

Feger and La Doria have submitted that the prevailing market prices for raw tomatoes in Italy are almost the highest in the world unaffected by the CAP.<sup>47</sup> Fully decoupled income support payments under the SPS, implemented since 2011, may partly explain the decline in tomato production and high price.<sup>48</sup> LECA endorses this concept in its report by explaining that, consistent with economic theory, even the limited reforms to the CAP are associated with the falls in tomato production and the increase in prices in Italy.<sup>49</sup> Solazzo also suggests that post 2011, thanks to prices agreed with the processing industry, which were higher than those in the period before the reform, the reduction in output has not been as large as it could have been. This suggests that the relatively high prices referred to by the exporters, would have been higher without the influence of the direct income support to growers of raw tomatoes.<sup>50</sup>

There are a number of economic factors, such as growing conditions, operating conditions or scale that can affect a product's final market price of raw tomatoes. The Commission is not satisfied that a comparatively high price for raw tomatoes in Italy is reflective of competitive market costs.

#### **6.4.7 Views of the interested parties**

The Commission notes that the Italian Government, the EC, Feger, La Doria, and SPCA have made assertions regarding whether government funding is classified under the appropriate provisions of the WTO Agreement on Agriculture (AOA). The Commission considers that such assertions are not relevant to an examination of the existence of injurious dumping under the ADA or Article VI of the GATT.

Therefore, the Commission's analysis has turned on whether the recorded cost of raw tomatoes reasonably reflects competitive market costs. The Commission is satisfied that under the Act, the labelling of a measure or a program does not, of its self, lead to any particular conclusion being applied in a dumping investigation.

#### **6.4.8 The Commission's conclusion**

The Commission is satisfied that the totality of direct income support payments made to growers of raw tomatoes in Italy have significantly affected the prevailing market prices in Italy for raw tomatoes. Consistent with its usual policy and practice, the Commission is

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<sup>45</sup> EC Regulation 73/2009, Title III, Chapter 1, Article 40.

<sup>46</sup> See Ministerial Decree at footnote 32.

<sup>47</sup> EPR 055, 063.

<sup>48</sup> Solazzo, R, Donati, Arfini F, Petriccine G, A PMP model for the impact assessment of the Common Agricultural Policy reform 2014-2020 on the Italian tomato sector, [www.iamb.it/share/img\\_new\\_medit\\_articli/976\\_9solazzo.pdf](http://www.iamb.it/share/img_new_medit_articli/976_9solazzo.pdf)

<sup>49</sup> LECA Report p 19.

<sup>50</sup> See Solazzo, p 10.



therefore satisfied that the costs recorded by Feger and La Doria for raw tomatoes in their records do not reasonably reflect competitive market costs for the purposes of section 43(2) of the Regulation.

In these circumstances, the Commission may try to identify a suitable benchmark price for the raw material input. However, noting that raw tomato prices are not tracked by a central global market index and the variability in prices for raw tomatoes from country to country, as indicated by Feger and La Doria in their submission,<sup>51</sup> the Commission has preferred to make an adjustment to the verified recorded costs to offset the direct income support payments in order to calculate the true cost of production.

#### 6.4.9 Method of cost adjustment

Having considered all available relevant evidence, the Commission has calculated an amount reflecting the direct income support payments made to growers of raw tomatoes under the SPS in EUR per kg of raw tomatoes produced during the investigation period. This amount has been worked out by dividing the total identified amount of SPS payments available for tomato production in Italy under the national ceiling in 2014 by the total volume of raw tomatoes produced in Italy in 2014.<sup>52</sup> The calculation is:

$$\text{amount per kg (€)} = \frac{\text{Total grower payments for tomatoes in 2014}}{\text{Total production volume in 2014}} = \frac{€ 183,970,000}{4,911,000,000 \text{ kg}} = €0.037 \text{ per kg}$$

This amount has been added on a per kg basis to the Feger and La Doria's recorded cost of raw tomatoes used in production.

#### 6.4.10 Flow-on analysis

Feger and La Doria have submitted that the Commission created a contradiction in the SEF by adjusting the cost of production by the total amount of income support payment received, whereas for the purposes of the market situation analysis the Commission surmised that only 73% of the income support payment would flow on to the price paid by Feger and La Doria for raw tomatoes.

The Commission notes that the 73% figure was derived by LECA solely for its analysis of the market situation claims.

A flow on analysis for the purposes of an assessment of market situation and the adjustment of the cost of production while conducting the OCOT test are separate and distinct processes. As discussed at 6.4.2, a significant component of the OCOT test is to establish competitive market costs. This process is in direct contrast with an attempt via economic modelling to establish the potential flow on to downstream purchasers from a payment made to upstream producers.

The Commission believes that Feger and La Doria have misunderstood the context in which these calculations have been carried out.

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<sup>51</sup> EPR 025.

<sup>52</sup> World Processing Tomato Council, Crop update as of 30 October 2014.

## 6.5 Dumping margins

The Commission received completed exporter questionnaires from Feger and La Doria. The Commission undertook on-site verification visits in relation to each of the exporters to verify the data contained in their responses to the exporter questionnaires.

### 6.5.1 Consequences of cost adjustment

Having adjusted the cost for raw tomatoes in Feger and La Doria's respective costs of production, the Commission has determined that there is a consequential impact on the OCOT test. The additional cost of raw tomatoes results in a higher cost of production, which results in a higher proportion of unprofitable transactions.

### 6.5.2 Submissions relevant to dumping margin calculations following publication of SEF 276

The Commission received submissions from Feger and La Doria on 26 September 2015 relating to the dumping margin calculations.<sup>53</sup> The following paragraphs summarise the Commission's regard to those submissions.

### 6.5.3 Determination of profit

For the purpose of constructing normal values under subsection 269TAC(2)(c) for those export models that were found to have an absence or a low volume of domestic sales of corresponding models, the Commission added an amount of profit. The amount of profit was determined by comparing the actual costs recorded relating to the production and sale of like goods in the ordinary course of trade by Feger and La Doria. The cost data was not adjusted for the uplift in the cost of raw tomatoes.<sup>54</sup>

The exporters, in their respective submissions, state that using a profit margin computed from the "non-adjusted" cost to make (CTM) and then applying it to the "adjusted" CTM to calculate an amount of profit gives rise to a double counting of the impact of the "subsidy" allegedly granted to tomato growers.

As per subsection 269TAC(5B), an amount of profit used in the construction of normal value is to be worked out in accordance with section 45 of the Regulation. Section 45 provides that when determining an amount of profit, the Parliamentary Secretary must, if reasonably practicable, work out an amount of profit by using data relating to the production and sale of like goods by the exporter or producer in the ordinary course of trade.

It is important to note that when determining an amount of profit the Commission is attempting to determine an actual amount of profit that the exporter has generated from its domestic sales based on the exporter's own data. Further, the intent of section 45 is to determine an amount of profit so that normal value can be compared to the export price in accordance with section 269TACB, in this particular instance because of an absence and/or low volume of domestic sales in the ordinary course of trade.

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<sup>53</sup> EPR 061 and 062

<sup>54</sup> Subsection 269TAC(2)(c)(ii).



In *Mullins Wheels Pty Ltd v Minister for Customs & Consumer Affairs*, Burchett J described section 269TAC as a consistent pattern of provisions.<sup>55</sup> The emphasis urged by Burchett J when discussing section 269TAC is first and foremost, and where possible, a comparison of actual domestic sale prices and actual export prices. His description of the intent of section 269TAC is further amplified when he adopts the following words stated by Moore J in *Metal Manufacturers Limited v The Comptroller-General of Customs*<sup>56</sup>:

*"It is plain that the value constructed under s 269TAC(2)(c) is to provide a price that would have emerged from the operation of s 269TAC(1) had there been goods sold in the ordinary course of trade for home consumption in arms length transactions. [...] It is also plain that the component costs identified in ss 269TAC(2)(c)(i) and (ii)(A) and (B),<sup>57</sup> namely the production costs, delivery charges and other sale costs and profit, are intended to give a composite figure that would be equivalent in its characteristics to a price emerging from the operation of s 269TAC(1)"<sup>58</sup>*

An examination of La Doria's 2014 Annual Report indicates, *inter alia*, that strong profits in 2014 were principally generated from the ability to transfer the increased costs of a number of agricultural raw materials onto sale prices.<sup>59</sup> Despite this statement only being applicable to La Doria, the statement indicates that, where possible, processors will attempt to pass on any increased costs of raw materials in order to maintain profit margins. However, any attempt by the Commission to determine an amount of profit after the cost adjustment would not be compliant with section 45 of the Regulation and is also in divergence to the emphasis emerging from section 269TAC as described above.

Accordingly, the Commission is satisfied that it is reasonable to calculate the amount of profit from the exporters' actual CTMS data (i.e. prior to the adjustment of raw tomatoes costs) and verified domestic selling prices from sales made in the ordinary course of trade during the investigation period. The Commission believes this approach to determining an amount of profit prior to the adjustment of the cost of raw tomatoes is in accordance with the Regulation and that this amount of profit provides for a price comparison between domestic sales and export sales as intended by subsection 269TACB.

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<sup>55</sup> [1999] FCA 1232.

<sup>56</sup> Unreported, 13 April 1995.

<sup>57</sup> These provisions have been replaced by the current subsections 269TAC(2)(c)(i) and (ii). See *Customs Legislation (World Trade Organization Amendments) Act* 1994 No. 150 of 1994 – Sect 10.

<sup>58</sup> [1999] FCA 1232 p 9.

<sup>59</sup> La Doria 2014 Annual Report, [www.gruppoladoria.com/EN/investor\\_relations](http://www.gruppoladoria.com/EN/investor_relations).

#### **6.5.4 Goods sold and not produced by Feger**

Feger's domestic sales include some sales of like goods that were not produced by Feger. Rather, Feger purchased the like goods and resold them domestically. In regard to those sales, Feger submitted that its dumping margin calculation should only include the goods that it manufactured.

Having regard to Feger's claims in respect of its domestic sales of purchased like goods, the Commission considers the following:

- In determining normal values under subsection 269TAC(1), domestic sales of purchased like goods have not been included in the calculations. The models purchased by Feger and sold domestically do not correspond to any models exported to Australia during the investigation period; therefore no comparison of Feger's purchased goods has been made to its export sales. In conjunction to this, due to inherent differences in costs associated with purchased goods sales, those goods have been excluded from calculations of adjustments under subsection 269TAC(8).
- In determining normal values under subsection 269TAC(2)(c), it is reasonable to exclude purchased goods in the calculations. That subsection refers to calculations based on goods that are produced or manufactured not purchased. Likewise, the exclusion of purchased goods in the calculation of adjustments under subsection 269TAC(9) is also reasonable.

Accordingly, the Commission has excluded purchased goods when ascertaining normal values.

#### **6.5.5 Adjustment to reflect Feger's different administration costs**

Feger's cost data included amounts for an 'administration' cost. Feger submitted that this cost was less for its sales to Australia than for its domestic sales. Based on this, Feger claimed that a downward adjustment to the normal value to compensate for this difference is warranted.

The Commission considers that adjustments will not be made for administration expenses that relate more to the general cost of doing business and are spread across all sales of the company. The Commission has considered Feger's claims and considers that general expenses of this nature do not fall within the scope of the term 'differences in conditions and terms of sale'. On this basis, the Commission has not made adjustments for Feger's administration cost.

#### **6.5.6 Feger's Finance cost**

Feger claimed that the Commission's calculation of a finance cost, which has been applied to the CTMS for domestic and export sales, requires correcting. Feger claimed that the finance cost reported in its financial statement relates to borrowings that have no relationship to the production of tomatoes. However, sufficient evidence was not provided to the Commission to substantiate the net amount of finance expense recorded, particular to prepared or preserved tomatoes in Feger's 2014 income statement.

The Commission has calculated an amount for finance cost based on evidence in the form of Feger's 2014 income statement, which contains Feger's total net finance cost as a percentage of total revenue. The Commission has applied this percentage to Feger's net invoice values of like goods only, to determine an accurate finance cost related specifically to each sale of like goods.

## 6.6 Dumping margin calculation: Feger

A comparison of Feger's Australian export prices to corresponding normal values has been made at free on board (FOB) cash terms.

### Export Price

The Commission found, in relation to Feger's exports of the goods to Australia in the investigation period:

- the goods were exported to Australia otherwise than by the importer; and
- the purchases of the goods by the importer were arm's length transactions.

However, the Commission found that in some cases the goods were not purchased by the importer from the exporter.

Where the goods were purchased by the importer from the exporter, export prices of the goods exported to Australia by Feger have been determined under subsection 269TAB(1)(a), being the price paid by the importer, and where applicable, less transport and other costs arising after exportation.

Where the goods were not purchased by the importer from the exporter, the export price has been determined under subsection 269TAB(1)(c), having regard to all the circumstances of exportation. Specifically, the Commission has determined export prices using the price paid to the exporter, and where applicable, less transport and other costs arising after exportation.

### Normal Value

As discussed at 6.4.9, the Commission has adjusted Feger's cost of production for the purpose of conducting the OCOT test. Where below cost sales for an individual model accounted for less than 20% of the total volume of domestic sales of that model, all sales for that model were treated as being in the OCOT.<sup>60</sup> Noting that the recoverability test could not be satisfied (as explained at 6.4.1), for those models where the below cost sales accounted for greater than 20% of the total volume of sales of those models, all below cost sales were found not to be in the OCOT and therefore were excluded from the normal value calculation.<sup>61</sup>

These tests then provided the Commission with Feger's OCOT sales for the investigation period. The Commission then tested that the volume of each model sold domestically was not less than 5% of the comparable model exported to Australia, in accordance with subsection 269TAC(14) of the Act.

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<sup>60</sup> Subsection 269TAAD(2).

<sup>61</sup> Subsection 269TAAD(3).

As a result of these tests, the Commission found that Feger made sufficient domestic sales of like goods for some models of the goods. For these models, the Commission determined normal value under subsection 269TAC(1), based on a sufficient volume of comparable domestic sales having been sold in the OCOT in arms length transactions.

For the remaining models where there was an absence or low volume of domestic sales in the OCOT, normal value was ascertained under subsection 269TAC(2)(c). For this purpose, the Commission established normal value from the sum of:

- the adjusted cost of production of the exported goods;<sup>62</sup>
- on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, amounts determined to be administrative, selling and general costs associated with the sales; and
- on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, an amount of profit. The amount of profit has been determined by using data relating to the production and sale of like goods by Feger, in the ordinary course of trade prior to the adjustment of costs of raw tomatoes.<sup>63</sup>

#### Adjustments

To ensure a fair comparison between the export price and normal value, the Commission made necessary adjustments, in accordance with subsections 269TAC(8) and (9), for differences in:

- packing materials;
- inland transport;
- logistics;
- palletisation;
- trade credit terms;
- rebates;
- commissions;
- labelling;
- handling;
- assistance; and
- packaging.

#### Further adjustment claims by Feger

On the basis of information obtained from Feger, and in accordance with the *Dumping and Subsidy Manual*,<sup>64</sup> the Commission determined at the time of the SEF that Feger had not provided sufficient evidence to satisfy the Commission that a downwards adjustment for advertising and/or quality control costs should be made in calculating normal values.

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<sup>62</sup> Refer to 6.4.9 for the Commission's findings regarding the determination of an amount for cost of production.

<sup>63</sup> Refer to 6.5.2 for the Commission's findings regarding the determination of an amount for profit.

<sup>64</sup> See pages 72-3.

After these claims for adjustment were initially rejected by the verification visit team, Feger provided further information to the Commission to support its claims. The Commission has assessed the arguments and evidence submitted. The Commission acknowledges that Feger may have incurred some component of its advertising and quality control expenses in relation to domestic sales of prepared or preserved tomatoes. However, the Commission considers that the evidence submitted by Feger does not satisfactorily demonstrate what proportion of such expenses could reasonably be allocated to those goods sold domestically. The Commission is therefore not satisfied that the effect, if any, on domestic prices can be reasonably quantified by using the allocations of expenses as presented by Feger for advertising and quality control adjustment claims. Further analysis of these adjustment claims is contained in **Confidential Attachment 3**.

The dumping margin presented below has been calculated without making adjustments to normal values for any difference between export and domestic prices that may arise from differences in advertising and quality control expenses.

#### Dumping margin

The Commission has calculated the dumping margin in accordance with subsection 269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

The dumping margin for Feger is 8.4%.

The Commission's calculations of export prices, normal values and dumping margins for Feger are at **Confidential Attachment 4**.

### **6.7 Dumping margin calculation: La Doria**

#### Export Price

The Commission found, in relation to La Doria's exports of the goods to Australia in the investigation period:

- the goods were exported to Australia otherwise than by the importer; and
- the purchases of the goods by the importer were arms length transactions.

However, the Commission found that in some cases the goods were not purchased by the importer from the exporter.

Where the goods were purchased by the importer from the exporter, export prices of the goods exported to Australia by La Doria have been determined under subsection 269TAB(1)(a), being the price paid by the importer, and where applicable, less transport and other costs arising after exportation.

Where the goods were not purchased by the importer from the exporter, the export price has been determined under subsection 269TAB(1)(c), having regard to all the circumstances of exportation. Specifically, the Commission has determined export prices using the price paid to the exporter, and where applicable, less transport and other costs arising after exportation.

### Normal Value

As discussed at 6.4.9, the Commission has adjusted La Doria's cost of production for the purpose of conducting the OCOT test. Where below cost sales for an individual model were found to be less than 20% of the total volume of sales, all sales for that model were treated as being in the OCOT.<sup>65</sup> Noting that the recoverability test could not be satisfied (as explained at 6.4.1), for those models where the below cost sales accounted for greater than 20% of the total volume of sales of those models, all below cost sales were found not to be in the OCOT and therefore were excluded from the normal value calculation.<sup>66</sup>

These tests then provided the Commission with La Doria's OCOT sales for the investigation period. The Commission then tested that the volume of each model sold domestically was not less than 5% of the comparable model exported to Australia, in accordance with subsection 269TAC(14) of the Act.

As a result of these tests, the Commission found that La Doria made sufficient domestic sales of like goods for some models of the goods. For these models, the Commission determined normal value under subsection 269TAC(1), based on a sufficient volume of comparable domestic sales having been sold in the OCOT in arms length transactions.

For the remaining models where there was an absence or low volume of domestic sales in the OCOT, normal value was ascertained under subsection 269TAC(2)(c). For this purpose, the Commission established normal value from the sum of:

- the adjusted cost of production of the exported goods;<sup>67</sup>
- on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, amounts determined to be administrative, selling and general costs associated with the sales; and
- on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, an amount of profit. The amount of profit has been determined by using data relating to the production and sale of like goods by La Doria, in the ordinary course of trade prior to the adjustment of costs of raw tomatoes.<sup>68</sup>

### Adjustments

To ensure a fair comparison between the export price and normal values, the Commission made necessary adjustments, in accordance with subsections 269TAC(8) and (9), for differences in:

- inland transport;
- commissions;
- trade credit terms;
- handling;
- warranty;

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<sup>65</sup> Subsection 269TAAD(2).

<sup>66</sup> Subsection 269TAAD(3).

<sup>67</sup> Refer to 6.4.9 for the Commission's findings regarding the determination of an amount for cost of production.

<sup>68</sup> Refer to 6.5.2 for the Commission's findings regarding the determination of an amount for profit.

- other discounts;
- other expenses;
- loading;
- insurance; and
- technical assistance.

#### Dumping margin

The Commission has calculated the dumping margin in accordance with subsection 269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

The dumping margin for La Doria is 4.5%.

The Commission's calculations of export prices, normal values and dumping margins for La Doria are at **Confidential Attachment 5**.



## 7 ECONOMIC CONDITION OF THE INDUSTRY

### 7.1 Finding

The Commissioner found that SPCA has experienced injury in the form of:

- price suppression;
- reduced profits; and
- reduced profitability.

### 7.2 Introduction

This chapter outlines the economic condition of the Australian industry and an assessment of the injury experienced by the Australian industry.

In its application, SPCA claimed that the Australian industry has suffered material injury caused by prepared or preserved tomatoes being exported to Australia from Italy by Feger and La Doria at dumped prices. SPCA claimed that the injurious effects of dumping have been:

- reduced sales volumes;
- reduced market share;
- price undercutting;
- price depression;
- price suppression;
- reduced profits;
- reduced profitability; and
- reduced capacity utilisation.

CON 276 advised that the Commission will examine the Australian market and the economic condition of the Australian industry from 1 January 2010 for the purposes of its injury analysis. Under subsections 269TG(1) and (2) of the Act, one of the matters that the Parliamentary Secretary must be satisfied of in order to publish a dumping duty notice is that, because of the dumping, material injury has been, or is being caused, or has been threatened to the Australian industry producing like goods.

### 7.3 Injury analysis period

In response to the SEF, Feger and La Doria submit that the injury analysis period cannot encompass any period of time prior to 1 July 2013 due to a finding of *de minimis* dumping margins for Feger and La Doria in Inv 217.<sup>69</sup>

As discussed at section 2.2.1 of this report, the Commission is satisfied that the current investigation is a new investigation encompassing a different investigation period. Moreover, there is nothing in the legislation which requires the Commission to limit its injury analysis to a period where dumping has occurred or where significant dumping margins have been found to exist. In fact, subsection 269T(2AD) implicitly allows the Parliamentary Secretary to examine periods before the investigation period for the

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<sup>69</sup> EPR – 063.



purpose of determining whether material injury has been caused to the Australian industry.<sup>70</sup>

## 7.4 Commission's approach to injury analysis

The Commission considers that for the purpose of analysing the economic condition of the Australian industry for this investigation, it is not necessary to undertake on-site verification of the Australian industry's information and data.<sup>71</sup>

The Commission is satisfied that the cost and sales data provided by SPCA for the purpose of this investigation is of a similar nature and in similar detail to that provided for the purpose of the previous Inv 217. The Commission notes that SPCA's cost and sales data was subject to on-site verification by the Commission during the previous investigation, which found the sales data to be reasonably complete, relevant and accurate and was suitable for assessing the economic condition of the Australian industry.<sup>72</sup>

In this context, the Commission has accepted the costs, sales and other financial data submitted by SPCA for the purpose of this investigation, including such data up to and including the calendar year 2014, as suitable for assessing the economic condition of the Australian industry producing prepared or preserved tomatoes.

This approach towards formulating the final report in so far as it relates to the economic condition of the Australian industry was foreshadowed by the Commission in a file note published on the Commission's electronic public record on 3 July 2015.<sup>73</sup>

In response to the file note, the Commission received a submission from Feger and La Doria raising their concerns about the Commission's approach to injury analysis. Specifically, the exporters submitted that the decision not to verify SPCA's data is not equal to the treatment of the exporters. The exporters also submitted that had SPCA's data been verified, the Commission would make the finding that SPCA's financial position has considerably improved.<sup>74</sup> The exporters made similar submissions on this point following the publication of the SEF.

The Commission notes that the *Coca-Cola Amatil Annual Report of 2014*, referred to by Feger and La Doria to support this argument, is evidence of SPCA's overall profitability but is not specific to the goods under consideration. The Commission considers that Feger and La Doria's submission does not provide a compelling reason for setting aside the financial data submitted by SPCA specifically for the purpose of this investigation. It also does not provide a persuasive argument that on-site verification of the SPCA sales, cost and other financial data is necessary, particularly in light of the Commission's satisfaction with the complete, accurate and relevant data that was verified for the purpose of the previous investigation. Therefore, the Commission has not adjusted its investigative approach to its analysis of the economic condition of the Australian industry.

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<sup>70</sup> Subsection 269T(2AD).

<sup>71</sup> See EPR 038 for a full discussion of the Commission's approach to analysing the economic condition of the Australian Industry.

<sup>72</sup> Inv 217, Australian industry visit report, p.25.

<sup>73</sup> File note folio EPR 038.

<sup>74</sup> Submission EPR 043.

As the sole Australian manufacturer of prepared or preserved tomatoes, the Commission has considered SPCA's costs, sales and other financial data for the purposes of analysing the economic condition of the Australian industry.

The following analysis is based on:

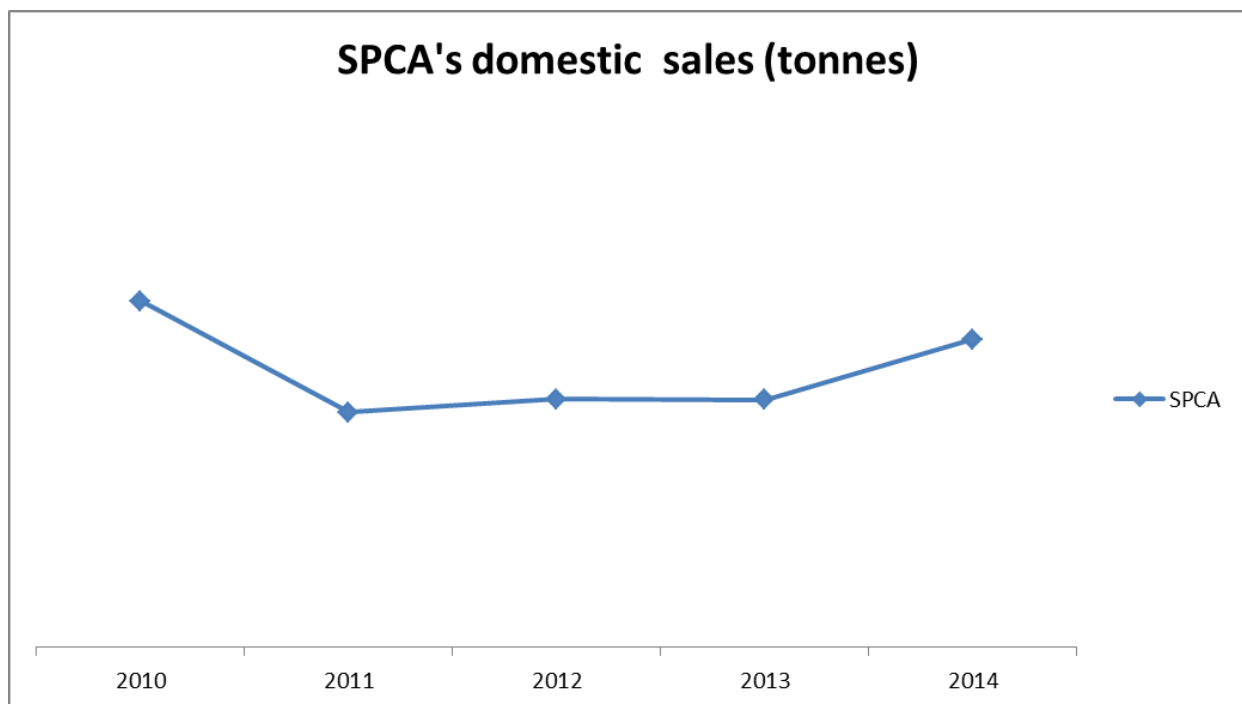
- SPCA's sales, cost and other financial data;
- the then ACBPS import database; and
- SPCA's other relevant economic factors data.

Charting and analysis has been completed on an annualised basis for the five years ending 31 December 2014. The annualised charts are aligned with the calendar year, being January to December.

## 7.5 Volume effects

SPCA claimed in its application that the market share held by dumped goods is significant, with market volume and market share impacted by pricing activity. However at the time of writing CON 276, the Commission did not consider there to be reasonable grounds to support SPCA's claims that it had suffered injury in the form of reduced sales volume and reduced market share.<sup>75</sup>

The following graph illustrates the annual volume of SPCA's domestic sales over the injury analysis period.



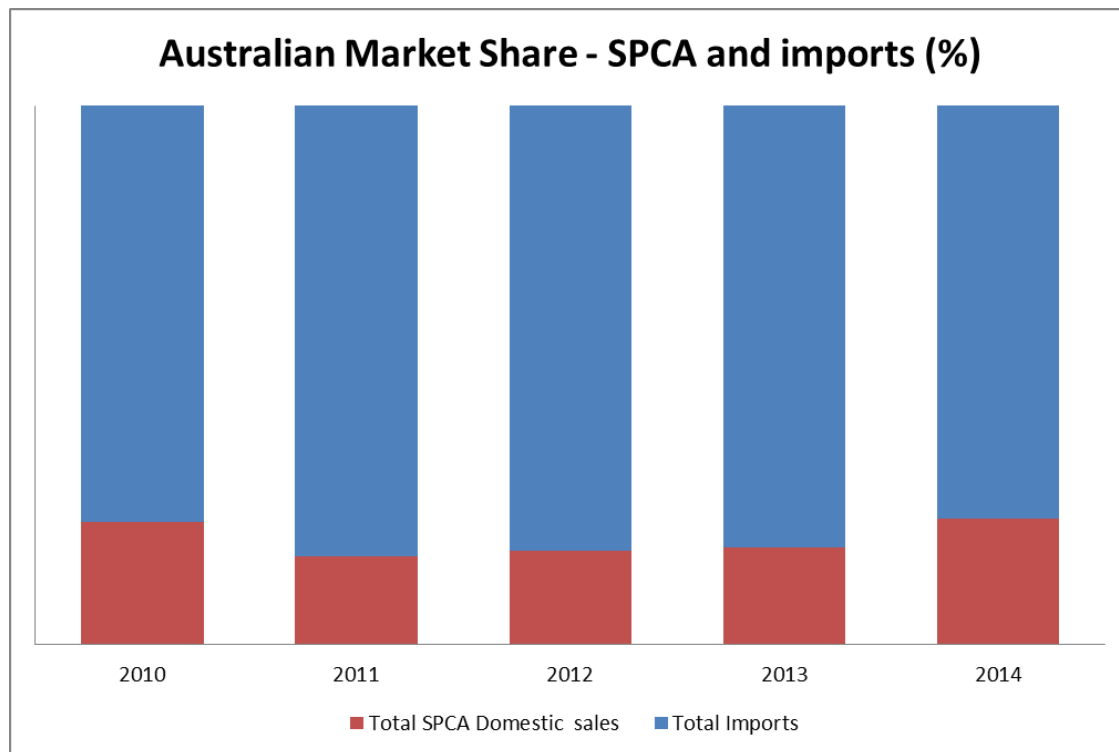
Graph 2 – SPCA's annual domestic sale volumes of prepared or preserved tomatoes

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<sup>75</sup> CON 276, p.28.

Graph 2 shows that following a significant fall of SPCA domestic sales in 2011, sales volumes increased in the following years, particularly in line with the imposition of the measures relating to the previous investigation, but have not returned to the level observed in 2010.

Using SPCA's sales data and the then ACBPS import database, the Commission has displayed the distribution of market share in the Australian market for prepared and preserved tomatoes. The following graph shows the changes in SPCA's domestic market share for prepared or preserved tomatoes across the calendar years from 2010 through to 2014.



**Graph 3 - Australian domestic market share for prepared or preserved tomatoes**

Graph 3 shows that SPCA's market share decreased from 2010 to 2011 before slightly improving in each subsequent year. It can be observed that SPCA's market share in 2014 has returned to a comparable level to 2010.

#### **7.5.1 Volume effects – Commission conclusion**

In a market decreasing in size, the Commission found that:

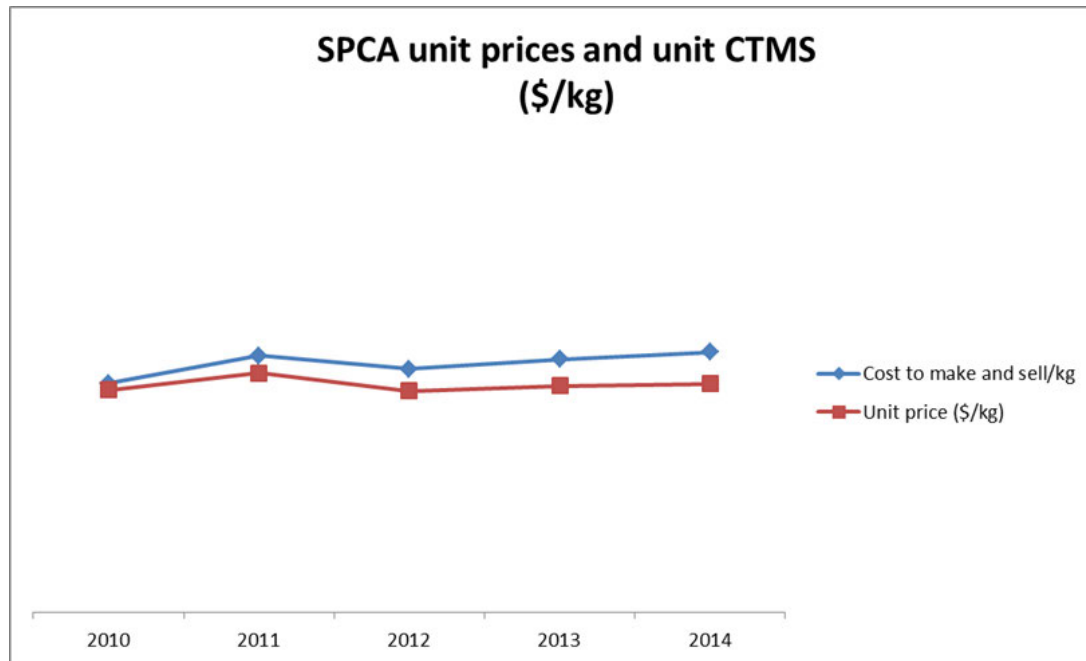
- SPCA's sales volumes increased from 2011 to 2014 but did not reach the sales volume level observed in 2010; and
- SPCA's market share has returned to almost the same level as that for 2010.

Based on the above analysis, the Commission does not consider there to be evidence to support SPCA's claim that the Australian industry has suffered injury in the form of reduced sales volume and/or reduced market share.

## 7.6 Price effects

Price depression occurs when a company is forced to reduce prices for some reason. Price suppression occurs when price increases, which otherwise would have occurred, have been prevented. An indicator of price suppression may be the margin between revenues and costs.

The Commission has analysed the weighted average net unit (per kilogram) prices obtained by SPCA over the period 1 January 2010 to 31 December 2014. Graph 4 illustrates the movements in and relationship between SPCA's unit CTMS and unit selling prices for its domestic sales of its prepared or preserved tomatoes.



**Graph 4 – SPCA's prepared or preserved tomatoes unit price and unit cost to make and sell**

The Commission has observed from Graph 4 that the unit prices for prepared or preserved tomatoes increased from 2010 to 2011 and then fell in 2012. The unit prices then increased in 2013 and slightly again in 2014. SPCA's unit CTMS followed a similar trend. The Commission notes that SPCA's unit CTMS has been above its unit selling price throughout the injury analysis period. The amounts by which costs have exceeded prices have been increasing every year during the injury period culminating in the most significant increase during the investigation period. Further, the divergence between SPCA's unit price and its CTMS has more than doubled during the injury period. (see graph 5 below)

### 7.6.1 Price effects – Commission conclusion

The deteriorating margin between revenue and CTMS for SPCA is indicative of price suppression as SPCA has been unable to raise its prices to a level that would enable it to either make a profit or reduce its losses.

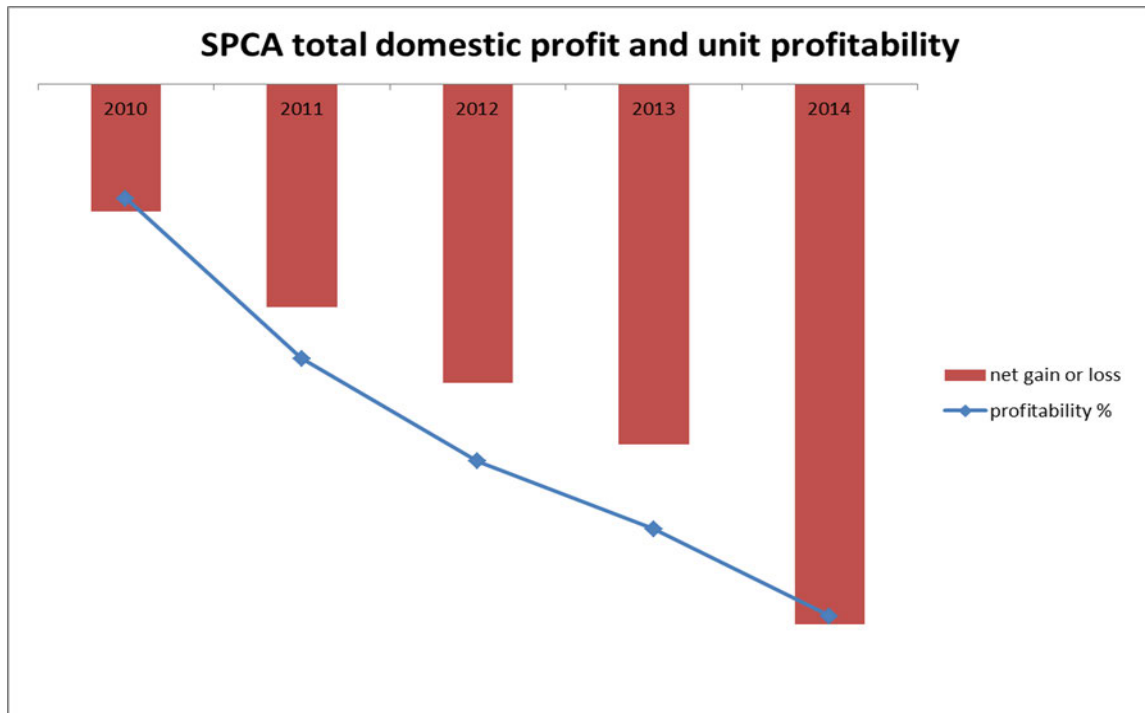
SPCA's unit prices have been reasonably stable for the last three years of the injury analysis period, with slight increases in 2013 and 2014.

Accordingly, the Commission considers that the above analysis supports SPCA's claim that the Australian industry has experienced injury in the form of price suppression but not with respect to price depression.

Details of the price effects analysis are at **Confidential Attachment 6**.

## 7.7 Profits and profitability

In Graph 5 the Commission has displayed the annualised total profit and profitability (profits measured as a percentage of revenue) for SPCA's sales of prepared or preserved tomatoes on the Australian market over the period 1 January 2010 to 31 December 2014.



**Graph 5 – SPCA total profits and unit profitability for prepared or preserved tomatoes**

Graph 5 indicates that SPCA's profits and profitability in respect of domestic sales of prepared or preserved tomatoes have been negative since 2010 and the losses worsened significantly for 2014.

The Commission notes that the exporters refer to the *Coca-Cola Amatil Annual Report of 2014* as evidence that SPCA's financial situation has improved in the investigation period.<sup>76</sup> However, as discussed at section 7.4, the information contained in the report is not specific to the like goods, being prepared or preserved tomatoes. For the purposes of assessing injury to the Australian industry, the Commission's profit and profitability effects analysis is derived only from SPCA's sales and cost data of like goods.

### 7.7.1 Profit and profitability effects – Commission conclusion

Based on the analysis outlined above, the Commission has found that the Australian industry has experienced injury in the form of reduced profits and reduced profitability.

<sup>76</sup> Submission EPR 276/043, refers.

## **7.8 Other economic factors**

In support of its claims of material injury, SPCA completed Confidential Appendix A7 (other injury factors) for each of the years from 2010 to 2013 and the first half of 2014. Since initiating the investigation, the Commission received a revised Confidential Appendix A7 from SPCA, with updated data covering the entire 2014 calendar year.

Details of the Commission's analysis of other relevant economic factors are at **Confidential Attachment 7**.

### **7.8.1 Assets**

SPCA provided information on the value of its assets in Appendix A7, which is representative of the whole company. The Commission observes a reduction of assets from a companywide perspective. However, the Commission notes that SPCA's accounts do not provide this data specifically by reference to the production of prepared or preserved tomatoes, and therefore it cannot make any injury assessments in relation to assets that may be particular to prepared or preserved tomatoes.

### **7.8.2 Capital investment**

SPCA provided information on the value of capital investment representative of the whole company. The Commission observes a reduction in the value of capital investment from a companywide perspective. However, the Commission notes that SPCA's accounts do not provide this data specifically by reference to the production of prepared or preserved tomatoes, and therefore it cannot make any injury assessments in relation to capital investment that may be particular to prepared or preserved tomatoes.

### **7.8.3 Domestic sales revenue**

Domestic sales revenue particular to prepared or preserved tomatoes substantially declined in 2011 where it stayed at a relatively constant level until 2014, where there was a moderate improvement. The 2014 revenue has not recovered to a comparable level achieved in 2010.

### **7.8.4 Capacity**

SPCA provided information regarding its capacity representative of its production of prepared or preserved tomatoes which the Commission observes has remained static since 2010.

### **7.8.5 Capacity utilisation**

SPCA provided information on its capacity utilisation, which is based on production volumes and budgeted capacity. The Commission notes that SPCA's actual production of like goods has been consistently below production capacity throughout the injury analysis period and during the investigation period.

### **7.8.6 Stocks**

SPCA provided information regarding its closing stock levels which decreased in 2011 before increasing in 2012 and in 2013 before reducing in 2014 to a level higher than observed in 2010.

### 7.8.7 Additional observations

The Commission has received several submissions from interested parties that argue injury should be considered by taking into account the overall economic condition of the Australian industry to properly consider if injury is material.<sup>77</sup> This includes claims of the recent improvements in SPCA's financial position and SPCA's low investment in its infrastructure.

The Commission does not consider that improvements in relation to particular economic factors, of itself, preclude a finding that the Australian industry has suffered material injury in respect of other factors. This is consistent with the *Ministerial Direction on Material Injury* (dated 27 April 2012), which states that '... [a] material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance'. As noted above, although SPCA's overall financial position may have improved, the Commission's analysis is focused on injury experienced by SPCA concerning prepared or preserved tomatoes.

The Commission notes that SPCA provided values of its capital investment across the injury analysis period in its response to Confidential Appendix A7; however these values were representative of the whole company. Whilst the Commission can see a reduction in capital investment from a company-wide perspective, SPCA could not provide evidence concerning what components were specific to production of the like goods. Therefore, the Commission cannot determine the degree to which SPCA's investments in infrastructure or lack thereof contributed to the injury suffered. However, the Commission observes that the decision to invest is guided by a range of considerations, including prevailing market conditions, and that the presence of dumped goods in the market may discourage investment.

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<sup>77</sup> EPR 017, 043.

## 8 HAS DUMPING CAUSED MATERIAL INJURY?

### 8.1 Findings

The Commissioner has found that prepared or preserved tomatoes have been exported to Australia from Italy by Feger and La Doria at dumped prices and the dumping has caused material injury to the Australian industry producing like goods.

The Commission has found that SPCA has suffered material injury caused by dumping in the form of:

- price suppression;
- reduced profits; and
- reduced profitability.

### 8.2 Introduction

This section examines whether the dumped imports of prepared or preserved tomatoes exported from Italy by Feger and La Doria are, through the effects of dumping, causing material injury to the Australian industry.

### 8.3 Size of the dumping margin

The size of the dumping margin is a relevant consideration when assessing whether dumping has caused material injury.<sup>78</sup>

The Commission found that Feger and La Doria exported the goods to Australia in the investigation period at dumped prices, with dumping margins of 8.4% and 4.5% respectively.

### 8.4 Volume of dumped goods

The quantity of goods exported to Australia at dumped prices is also a relevant consideration when assessing whether dumping has caused material injury.<sup>79</sup> The Commission has found that the volume of dumped goods exported to Australia from Italy by Feger and La Doria is not negligible.<sup>80</sup>

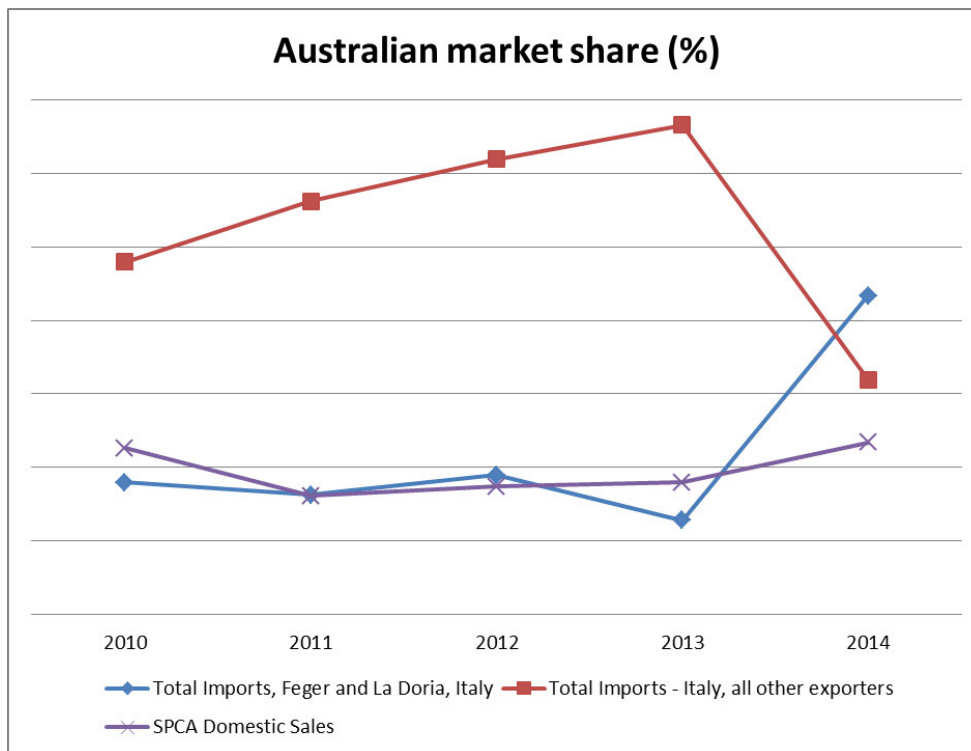
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<sup>78</sup> Subsection 269TAE(1)(aa).

<sup>79</sup> Subsection 269TAE(1)(a).

<sup>80</sup> Subsection 269TDA(4).





**Graph 6 – SPCA Australian market share for prepared or preserved tomatoes**

Graph 6 confirms that SPCA's market share has returned to the levels achieved in 2010. However, the graph also demonstrates that the dumped exports of prepared or preserved tomatoes by Feger and La Doria have significantly increased their market share from 2013 to 2014, which encompasses the investigation period. The increase in dumped exports by Feger and La Doria coincides with a sharp decrease in exports from all other Italian exporters, which also coincides with the implementation of dumping duties imposed on all other exporters of prepared or preserved tomatoes from Italy as a result of the finding in REP 217.

The Commission considers the volume of dumped goods by Feger and La Doria represents a significant proportion of the Australian market and is in sufficient volume to influence prevailing market prices in Australia.

## 8.5 Price effects

### 8.5.1 Price sensitivity

SPCA submitted in its application that the product category of prepared or preserved tomatoes is highly price sensitive. SPCA advised that the key purchasing criterion for consumers is retail price, and for this reason the pricing activity from dumped imports significantly impacts on the pricing of the product category.

Consistent with the previous investigation findings, information gathered by the Commission for the purpose of this investigation shows that the major supermarket retailers dominate the Australian market for prepared or preserved tomatoes. The concentration of large volume supply contracts amongst a few large retailers has resulted

in strong and aggressive price negotiations driven by competition between suppliers to secure these contracts.

The major retailers tender annually for supply of their respective volume and product mix requirements for prepared or preserved tomatoes. The Commission has observed from information gathered that the initial tender price submitted by suppliers represents the starting point for further price negotiations and that these negotiations are intended to extract the best possible price on behalf of the retailer.

The Commission is satisfied, based on the evidence provided by SPCA and Feger and La Doria in their submissions, meetings held with SPCA and Feger and La Doria and information gathered during the exporter verification visits, that price is the key consideration when suppliers and the major retailers negotiate supply contracts. As part of its application SPCA provided the Commission with results of independent market research they obtained about the overall prepared or preserved tomatoes market. This evidence demonstrates that customer buying habits do shift in response to price movements (**Confidential Attachment 8** refers).

The Commission is satisfied from the totality of this evidence that the Australian market for prepared or preserved tomatoes is highly price sensitive both at retail and wholesale levels. However, the Commission also notes that the price differential between SPCA and Feger and La Doria's wholesale prices (**Confidential Attachment 9**) suggest that price, while significant, is not the only factor in purchasing decisions.

### 8.5.2 Price undercutting

The Commission has undertaken an analysis of price undercutting claims by SPCA, noting that price undercutting occurs when the imported product is sold at a price below that of the Australian manufactured product.

In conducting this analysis, the Commission has undertaken a comparison between the price (in AUD) per kg of imports of prepared or preserved tomatoes from Italy at free into store (FIS) terms and the price (in AUD) per kg of comparative SPCA products at delivered terms for the 2014 calendar year, being the investigation period.

In the course of this analysis, the Commission has used, in relation to the investigation period:

- domestic sales data of SPCA's prepared or preserved tomatoes;
- sales and cost data of importers in relation to sales in Australia of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria; and
- data collected from the then ACBPS import database.

The data is sufficiently detailed to enable the Commission to undertake a comparison of selling prices of prepared or preserved tomatoes in the Australian domestic market during the investigation period for sales of goods supplied by:

- SPCA;
- Feger;
- La Doria; and

- other Italian exporters already subject to anti-dumping measures.<sup>81</sup>

The Commission has used importers' actual sales data, as submitted in responses to importer questionnaires, where the Commission was satisfied that those sales related to goods exported by Feger or La Doria. Otherwise, the Commission has constructed the prices where exporters sell directly to retailers by using data from the then ACBPS import database. Specifically, the Commission constructed weighted average unit (AUD/kg) selling prices by taking the sum of FOB export prices, amounts for duty and where applicable the dumping duty. Where available, the Commission used amounts for shipping and importation costs, into-store costs and the gross margins for importers for 2014. Otherwise, the Commission used such data ascertained from verified importers' data from Inv 217.

The Commission's price undercutting analysis is described below and is at **Confidential Attachment 9**.

#### Comparison of aggregate weighted average FIS prices to selected customers

A comparison of aggregate weighted average FIS prices for selected customers means that sales values of all prepared or preserved tomato products for any given supplier have been included in each weighted average calculation of Australian selling prices to selected customers. Because of this, variations in product mix may contribute to price differences. The Commission notes that, by focusing only on sales to selected major retail customers, a large proportion of all imports of the goods by Feger and La Doria were captured in this analysis.

This comparison showed that Feger and La Doria products were sold in Australia at prices that undercut SPCA by significant margins in each month of the investigation period.

The comparison also showed that the selection of other imports, being prepared or preserved tomatoes exported to Australia from Italy already subject to anti-dumping measures, were sold in Australia at prices that also undercut SPCA in each month of the investigation period but not to the extent of Feger and La Doria products.

#### Comparison of aggregate weighted average FIS prices for selected products to selected customers

A comparison of weighted average FIS prices for selected products to selected customers was conducted to minimise the potential for any price differences, such as those resulting from different product mixes, which may have affected the analysis above. In order to conduct this comparison meaningfully, the Commission has identified products of a certain cut profile and container size profile. These products represented a large proportion of SPCA's domestic sales of prepared or preserved tomatoes and a large proportion of both Feger and La Doria's products sold in Australia.

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<sup>81</sup> The Commission has used the then ACBPS import data in relation to a significant proportion of the goods exported by other Italian exporters (i.e other than Feger and La Doria).

This comparison showed that Feger and La Doria products were sold in Australia at prices that undercut SPCA by significant margins in each month of the investigation period.

The comparison also showed that the selection of other imports of the same cut profile and container size profile, being prepared or preserved tomatoes exported to Australia from Italy already subject to anti-dumping measures, were sold in Australia at prices that also undercut SPCA in each month of the investigation period but not to the extent of Feger and La Doria products.

### 8.5.3 Price Suppression

Graph 4, presented at section 7.5 of this report, confirms that SPCA has suffered price suppression in the period of 2010 to 2014. During that period the price suppression suffered by SPCA has ensured negative profit margins that have almost doubled during the period of 2010 to 2014 (**see Confidential Attachment 10**). The most considerable increase in the negative profit margin suffered by SPCA was during 2014 coinciding with a significant increase in the market share of dumped imports from Feger and La Doria as depicted in graph 6 at section 8.4 of this report.

The Commission considers that the increase in market share captured by the dumped imports by Feger and La Doria during the investigation period has caused SPCA to suffer price suppression. The overall increase in dumped imports by Feger and La Doria has also neutralised SPCA's ability to recover its costs, exacerbating the negative impact on profitability resulting from its increased market share.

### 8.5.4 Conclusion – price effects

The price comparisons outlined by the Commission in the preceding sections demonstrated that Feger and La Doria products, when sold in Australia, consistently undercut SPCA prices by significant margins. The prices of Feger and La Doria products were also lower than prices of other goods imported from Italy that were supplied by all other exporters, which are all subject to anti-dumping measures.

The Commission considers that the price pressure exerted on SPCA by competing with goods that were exported by Feger and La Doria at dumped prices caused SPCA to experience price suppression.

## 8.6 Volume effects

In its application, SPCA submitted that whilst it had experienced improvement in its sales volume and market share in 2014, this improvement would have been greater if it had not lost sales in 2014 to the dumped exports from Feger and La Doria.

The Commission has charted, for the purposes of its analysis of volume effects, the change in volume of exports to Australia of prepared or preserved tomatoes over the investigation period. The Commission's analysis of volume effects is in **Confidential Attachment 11**.

The Commission has observed that the volume of Feger and La Doria exports to Australia exceeded the volume of exports of Italian goods subject to anti-dumping measures over the investigation period. The Commission also notes that the volume of sales in Australia

of Feger and La Doria products, in aggregate, represented a significant share of the Australian market during the investigation period.

Notwithstanding these findings, the Commission established earlier in this report that the evidence does not support SPCA's claim that the Australian industry has suffered injury in the form of reduced sales volume and/or reduced market share. Therefore, the Commission considers that the prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria has not caused injury to the Australian industry in terms of adverse volume effects.

## 8.7 Profit effects

### 8.7.1 Reduced profit and profitability

As described earlier in this report, the Commission has found that SPCA has experienced declines in its profit and profitability.

Whilst the Commission has not established that dumped imports from Feger and La Doria have caused injury in the form of lost sales volume, it has been established that imports from Feger and La Doria have caused injury in the form of price suppression. As per the Commission's analysis in **Confidential Attachment 9**, the price trends for Feger and La Doria free into store (FIS) wholesale prices closely resemble the trend for SPCA. The FIS prices for all other exporters already subject to measures show a high degree of variability, which coincides with the sharp decline in sales volumes following the imposition of anti-dumping measures. The Commission considers that the relative influence of the dumped goods exported by Feger and La Doria on SPCA's prices has increased as a result.

Accordingly, the Commission considers that SPCA has suffered injury in the form of reduced profits and profitability caused by dumped imports of prepared or preserved tomatoes from Italy by Feger and La Doria.

The Commission's analysis of the profit and profitability effects is at **Confidential Attachment 12**.

## 8.8 Other possible causes of injury

Subsection 269TAE(2A) requires the Parliamentary Secretary to consider whether any injury to SPCA is being caused by a factor other than the exportation of the dumped goods.

### 8.8.1 Competition with goods from Italy already subject to anti-dumping measures

The price undercutting analysis detailed above demonstrates that SPCA has been experiencing a degree of price competition from goods exported to Australia from Italy already subject to anti-dumping measures. While these imports may have contributed to the price suppression and reduced profits and profitability experienced by SPCA, the Commission recognizes that the volume of these imports decreased in 2014 at a time when SPCA experienced the greatest degree of price suppression and reduced profits and profitability. Similarly, while these imports continue to compete with SPCA on price, it is the dumped goods from Feger and La Doria which are the lowest priced goods in the market.

The Commission notes the injury being caused to SPCA from the price undercutting of the other imports and points to *Ministerial Direction on Material Injury* (dated 27 April 2012), which states that ‘... [a] material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance’. The *Ministerial Direction* also directs that dumping need not be the sole cause of injury to the industry. The Commission is satisfied that the significant shift in volumes to Feger and La Doria has placed downward pressure on prices. This is evidenced by the price suppression suffered by SPCA from the dumped goods during the investigation period. Therefore, the Commission satisfied that the injury being suffered by SPCA is not immaterial, insubstantial or insignificant.

### 8.8.2 Supermarkets

The Commission notes, as do Feger and La Doria,<sup>82</sup> the significant buying power that is concentrated among the major supermarkets and the effect this has on competitive pricing among suppliers of prepared and preserved tomatoes. However, the Commission has obtained no evidence which suggests that the negotiation of prices by the major supermarkets has any greater effect on any particular supplier that is different to its effect on other suppliers. Further, as there is a high degree of price sensitivity at the retail level for sales of prepared or preserved tomatoes, the Commission considers that the chief considerations of the major supermarkets in these negotiations is to obtain a secure and consistent supply of the goods at the lowest possible price. This point is emphasised in confidential information provided to the Commission by SPCA regarding their negotiations with the major supermarkets, which demonstrates that the major supermarkets exert downward pressure on prices.<sup>83</sup> This evidence also indicated that the major supermarkets refer to the competitive prices offered by other suppliers when negotiating price with SPCA and that SPCA is encouraged to be more competitive on price in this context. It is apparent that SPCA competes with the prices offered by the Italian exporters, including the dumped prices of Feger and La Doria. These dumped prices were the lowest available in the market during the investigation period.

### 8.8.3 Exchange rates

Interested parties, in their submissions, claimed that the appreciation of the Australian dollar has caused a loss of competitiveness to the Australian industry.

The Commission notes that the AUD/EUR exchange rate has experienced noticeable change throughout the injury analysis period. The Commission considers that any appreciation of the AUD relative to the EUR is likely to have made it more attractive for Australian purchasers to source prepared or preserved tomatoes from Italian suppliers. However, the Commission notes that during the injury analysis period, although the AUD steadily appreciated against the EUR, the peak was reached in mid 2012, prior to a relatively steeper depreciating trend returning to original levels. The Commission notes that the change in the yearly average between 2010 and 2014 was actually a depreciation of the AUD against the EUR of 2.1% which, in isolation, would likely have the effect of imports of the goods becoming less attractive to Australian purchasers.

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<sup>82</sup> EPR – 063.

<sup>83</sup> Confidential attachment to SPCA's initial application.



Furthermore, the Commission acknowledges the EC's assessment, in its submission dated 27 February 2015, whereby it states:

*"It should be noted that the exchange rate AUD/EUR significantly depreciated since spring 2013, causing a considerable price increase of Italian imports (approximately +25%). Therefore, the exchange rate cannot be considered a cause of injury anymore".<sup>84</sup>*

The Commission notes that there was an upward trend in the AUD relative to the EUR for a part of the injury analysis period which, based on a 90 day moving average, was moderate. The Commission also notes a steep depreciation trend following this, and that injury factors continued throughout the entire analysis period and not simply for part of the period. Based on an analysis of the available evidence and an examination of the entire injury analysis period, the Commission considers the material injury that the Australian industry has suffered, as described in this report, is not attributable to the effects of the changes in the exchange rate in the investigation period (**Confidential Attachment 13** refers).

#### 8.8.4 SPCA's export sales

The Commission notes the comments made by Feger and La Doria, in their submission<sup>85</sup> dated 24 September 2015, that the injury has been caused by a drop in SPCA's exports. This assertion is based on a safeguards inquiry report by the Productivity Commission in 2013<sup>86</sup> that depicted a downward trend in SPCA's exports over a period of ten years to July 2013. It is important to note, however, that a safeguards inquiry is not concerned with dumping nor material injury and is intended to deal with different circumstances by applying different principles.

The Commission has analysed SPCA's sales data for the injury analysis period relevant to this investigation and has identified changes in export volumes across the period. The Commission has observed that the proportion of SPCA's total sales of like goods that are exported is at a level that is insignificant. Accordingly, the Commission does not consider that minor changes in SPCA's export volumes have caused material injury.

### 8.9 Conclusion

The Commission has established that the Australian market for prepared or preserved tomatoes exhibits a high degree of price sensitivity. Feger and La Doria have exported goods to Australia in the investigation period at dumped prices and that dumping has provided those entities and importers of goods from those entities a comparative advantage on price. The dumping has contributed to Feger's and La Doria's capacity to undercut SPCA's prices, and the prices of other goods subject to measures, when competing for sales in the Australian market.

The price pressures created by the Australian sales of goods exported from Italy by Feger and La Doria at dumped prices has caused SPCA to experience a significant degree of

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<sup>84</sup> EPR 014.

<sup>85</sup> EPR 063.

<sup>86</sup> Productivity Commission 2013, Safeguards Inquiry into the Import of Processed Tomato Products, Final Inquiry Report, Report no. 68, Canberra.

price suppression. Consequently, the dumping has also caused SPCA to experience reduced profits and profitability. The injury caused through these adverse price and profit outcomes is material.

The Commission acknowledges that the degree of price undercutting experienced by SPCA is greater than the level of dumping margins found. However, the downward pressure that the dumped goods exert on SPCA's prices restrains its ability to increase its prices by a similar margin and be in a position where it is able to recover its costs or reduce its losses. Noting the substantial profit and profitability injury, the Commission considers that the impact of the dumping is material. The Commission considers that other possible causes of injury, such as goods imported from other Italian exporters, supermarket price negotiation, a stronger AUD, and SPCA's export sales performance do not detract from this assessment.

The Commission finds that prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria at dumped prices have caused material injury to the Australian industry producing like goods.



## **9 WILL DUMPING AND MATERIAL INJURY CONTINUE?**

### **9.1 Finding**

The Commissioner has found that prepared or preserved tomatoes exported from Italy by Feger and La Doria in future may be at dumped prices, and that continued dumping may cause further material injury to the Australian industry.

### **9.2 Introduction**

Pursuant to subsection 269TG(2) of the Act, where the Parliamentary Secretary is satisfied that material injury to an Australian industry producing like goods has been caused by dumping, anti-dumping measures may be imposed on future exports of like goods if the Parliamentary Secretary is satisfied that the dumping and material injury may continue.

### **9.3 Will dumping continue?**

The Commission found that Feger and La Doria exported the goods during the investigation period at dumped prices, with dumping margins of 8.4% and 4.5% respectively.

Consistent with the findings of REP 217, the Commission considers that due to a significant proportion of goods being sold to a small number of retail organisations that exert significant buying power over the suppliers of those goods, Feger and La Doria will continue to compete on price to secure large volume supply contracts offered by retailers. The Commission considers that Feger and La Doria have a price advantage over other Italian exporters because they are the only Italian exporters not presently subject to dumping duties. The Commission notes that Feger and La Doria have well established channels to market in Australia and the volume of goods imported from those exporters, in aggregate, represents a significant share of the Australian market.

Having regard to the factors outlined above, the Commission considers that, in the absence of dumping duties being imposed on future exports as a result of this investigation, Feger and La Doria will continue to export prepared or preserved tomatoes to Australia at dumped prices.

### **9.4 Will material injury continue?**

The Commission has reviewed the Australian industry's performance over the injury analysis period and has made a finding that prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria at dumped prices have caused material injury to the Australian industry.

The Commission considers that the continuation of the price advantage of dumped imports from Italy, in the absence of anti-dumping measures, is likely to have a continuing adverse impact on the Australian industry's economic condition.

## 10 NON-INJURIOUS PRICE

### 10.1 Finding

The Commissioner has found that the NIP should be based on SPCA's CTMS.

### 10.2 Introduction

Dumping duties may be applied where it is established that dumped imports have caused or threatened to cause material injury to the Australian industry producing like goods. The level of dumping duty imposed by the Parliamentary Secretary cannot exceed the dumping margins, but the Parliamentary Secretary must have regard to the desirability of fixing a lesser amount of duty if it is sufficient to remove injury.<sup>87</sup> This mechanism is commonly referred to as the lesser duty rule.

The lesser duty rule is given effect through the calculation of a NIP. The NIP is the minimum price necessary to remove the injury or a recurrence of the injury caused to the Australian industry by dumping.<sup>88</sup>

### 10.3 The Commission's assessment of non-injurious price

The Commission generally derives the NIP by first establishing a price at which the Australian industry might reasonably sell its product in a market unaffected by dumping. This price is referred to as the unsuppressed selling price (USP).

Having calculated the USP, the Commission then calculates a NIP by deducting the costs incurred in getting the goods from the export FOB point (or another point if appropriate) to the relevant level of trade in Australia. The deductions normally include overseas freight, insurance, into-store costs and amounts for importer expenses and profit.

The Commission has not received any submissions in relation to the USP or the NIP.

The Commission's approach (as outlined in the *Dumping and Subsidy Manual*) is to establish a USP based on one of the following:

- Australian industry's weighted average selling prices at a time unaffected by dumping;
- constructed prices for the Australian industry based on its CTMS and an amount for profit; or
- selling prices of undumped imports.

In REP 217, the Commission considered it was appropriate to construct a USP<sup>89</sup> using SPCA's CTMS. The Commission did not add an amount for profit. The Commission then deducted from the USP amounts for post exportation expenses<sup>90</sup> which comprised amounts for overseas freight and insurance, into-store costs, and importer selling, general and administrative expenses.

In the absence of any submission on the issue of USP or NIP, and to maintain consistency with the outcomes of REP 217, the Commission considers that the NIP

<sup>87</sup> Subsection 8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975*.

<sup>88</sup> Subsection 269TACA(a).

<sup>89</sup> REP 217, p70 – the Commission used the expression “notional minimum price”.

<sup>90</sup> REP 217, p71 – the Commission used the expression “adjusted the minimum price to reflect a free-on-board price”.

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should be assessed for this investigation in the same manner as it was for the purpose of REP 217.

The Commission has found that the NIP is higher than the normal values for Feger and for La Doria. Accordingly, the Commissioner considers it is appropriate to recommend that dumping duties should be based on the full margins of dumping.

The Commission's calculations of the NIP are at **Confidential Attachment 14**.

## 11 ANTI-DUMPING MEASURES

### 11.1 Finding

The Commissioner recommends to the Parliamentary Secretary that a dumping duty notice be published in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

### 11.2 Form of measures available

The methods for working out the amount of interim dumping duty the Parliamentary Secretary may apply are prescribed in the *Customs Tariff (Anti-Dumping) Regulation 2013*. The methods are:

- combination of fixed and variable duty method (combination method);
- floor price duty method;
- fixed duty method; and
- ad valorem duty method (i.e. a percentage of the export price).<sup>91</sup>

### 11.3 Submissions from interested parties

The Commission has not received any submissions related to the proposed form of measures.

### 11.4 The Commissioner recommends that the Parliamentary Secretary impose anti-dumping measures

The Commissioner recommends that anti-dumping measures be imposed and be calculated using a combination method. This approach is the same as that taken for the purpose of the dumping duty notice that presently applies to all other exporters of prepared or preserved tomatoes from Italy.

Specifically, the Commission recommends that anti-dumping measures be applied in the form of a fixed amount of duty (calculated as a percentage of the FOB export price or the ascertained export price whichever is higher, at the rate specified in the table below) plus a variable amount of duty if the actual export price per kilogram is below the ascertained export price per kilogram.

Exporter / Manufacturer	Proposed rate of interim dumping duty (fixed component)	Duty method
Feger di Gerardo S.p.A	8.4%	combination method
La Doria S.p.A	4.5%	combination method

Table 2 - Proposed measures – Feger and La Doria

<sup>91</sup> Regulation 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013*

## 11.5 Retrospective measures

When considering the publication of a dumping duty notice, the Parliamentary Secretary may, pursuant to subsection 269TN(3), issue a retrospective notice on goods that entered home consumption up to 90 days before securities were taken (or when the Commonwealth had the right to require and take securities).

In making a recommendation to the Parliamentary Secretary in this regard, the Commissioner will have regard to whether:

- the importer knew, or ought to have known, that the amount of the export price of the goods was less than the normal value of the goods and that by reason thereof material injury would be caused to an Australian industry; or
- the goods are of a kind the exportation of which to Australia on a number of occasions has caused, or, but for the publication of a notice under section 269TG in respect of goods of that kind, would have caused, material injury to an Australian industry by reason of the amount of the export price of the goods exported being less than the normal value of the goods exported.

The Commission has not found any evidence to indicate that either of these grounds existed in relation to prepared or preserved tomatoes exported to Australia from Italy by Feger or La Doria.

## 12 RECOMMENDATION

### 12.1 Recommendation

The Commissioner is satisfied that the dumping of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria has caused material injury to the Australian industry producing like goods.

**The Commissioner recommends that the Parliamentary Secretary be satisfied:**

- in accordance with subsection 269TAC(2)(a)(i), that because of low volume of sales of certain models of like goods sold by Feger and La Doria in Italy that would be relevant for the purposes of determining normal value under subsection 269TAC(1), the normal value of those models cannot be ascertained under subsection 269TAC(1);
- in accordance with subsection 269TG(1), the amount of the export price of the goods exported to Australia from Italy by Feger and La Doria is less than the amount of the normal value of like goods and because of that, material injury to the Australian industry producing like goods has been, and is being caused; and
- in accordance with subsection 269TG(2) the amount of the export price of like goods exported to Australia from Italy by Feger and La Doria is less than the amount of the normal value of those goods and the export price of like goods that may be exported to Australia from Italy by Feger and La Doria in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been, or is being caused or is threatened.

**The Commissioner recommends that the Parliamentary Secretary determine:**

- in accordance with subsection 269TAB(1)(c), that the export price of certain models of the goods exported to Australia by Feger and La Doria cannot be determined using subsection 269TAB(1)(a) or (b) and, having regard to the circumstances of the exportation, is to be determined using the price paid by the importer deducting, where applicable, transport and other costs after exportation; by;
- in accordance with subsection 269TAC(2)(c), that, for the purposes of calculating the normal value for certain models of goods for which there are a low volume of sales sold by Feger and La Doria in Italy the cost of production or manufacture of the goods in the country of export is as set out in **confidential attachments 4 and 5**, and the administrative, selling and general costs associated with the sale and the profit on that sale is as set out in **confidential attachments 4 and 5**
- in accordance with subsection 269TACB(1), that, by comparison of the weighted average export prices of goods the subject of the application over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period in accordance with paragraph 269TACB(2)(a), that exports of the goods from Italy by Feger and La Doria were dumped.



**The Commissioner recommends that the Parliamentary Secretary direct:**

- in accordance with subsection 269TAC(8), that the price paid or payable for like goods sold in Italy by Feger and La Doria be adjusted for differences in the terms and circumstances between domestic and export sales to ensure a fair comparison.
- in accordance with subsection 269TAC(9), for goods for which the normal value was ascertained in accordance with subsection 269TAC(2)(c), that the necessary adjustments (**confidential attachments 4 and 5**) in determining the costs to produce or manufacture the goods and the administrative, selling and general costs be made to ensure that the ascertained normal value is properly comparable with the export price of the goods.

**The Commissioner recommends that the Parliamentary Secretary compare:**

- the weighted average of export prices of the goods over the whole of the investigation period with the weighted average of corresponding normal values of like goods over the whole of that period.

**The Commissioner recommends that the Parliamentary Secretary declare:**

- in accordance with subsection 269TG(1), by public notice, that section 8 of the Dumping Duty Act applies to:
  - the goods exported from Italy by Feger and La Doria to the extent permitted by section 269TN; and
  - like goods that were exported to Australia from Italy by Feger and La Doria after the Commissioner made a PAD under section 269TD on 11 September 2015 but before publication of the notice, to the extent permitted by section 269TN; and
- in accordance with subsection 269TG(2), by public notice, that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia from Italy by Feger and La Doria after the date of publication of the notice.

**The Commissioner recommends the Parliamentary Secretary not have regard:**

- in accordance with subsection 8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975*, to the desirability of fixing amount of duty less than the dumping margins found, in light of the findings at chapter 10 that the Commission has found the NIP to be higher than the normal values for Feger and for La Doria and noting that in such circumstances the Parliamentary Secretary is not required to have regard to the desirability of fixing a lesser rate of duty.

## 13 APPENDICES AND ATTACHMENTS

<b>Appendix 1</b>	Market situation assessment
<b>Confidential Attachment 1</b>	Australian Market Share
<b>Confidential Attachment 2</b>	Italian Ministerial Decree of 17 October 2013
<b>Confidential Attachment 3</b>	Feger Adjustments Claims
<b>Confidential Attachment 4</b>	Feger Dumping Margin
<b>Confidential Attachment 5</b>	La Doria Dumping Margin
<b>Confidential Attachment 6</b>	Price Effects
<b>Confidential Attachment 7</b>	Other relevant economic factors
<b>Confidential Attachment 8</b>	SPCA Market Research
<b>Confidential Attachment 9</b>	Price Undercutting Analysis
<b>Confidential Attachment 10</b>	Price Suppression
<b>Confidential Attachment 11</b>	Volume effects
<b>Confidential Attachment 12</b>	Profit and Profitability Effects
<b>Confidential Attachment 13</b>	Exchange rate effects
<b>Confidential Attachment 14</b>	NIP Calculations
<b>Confidential Attachment 15</b>	Flow on Calculations



## APPENDIX - ASSESSMENT OF MARKET SITUATION

### 1. Allegations of a market situation

In its application, SPCA claims that, in accordance with subsection 269TAC(2)(a)(ii) of the Act, there is a situation in the Italian market for prepared or preserved tomatoes that renders domestic sales unsuitable for determining normal value under subsection 269TAC(1) of the Act (i.e. that a 'market situation' exists), and constructed normal values should be used to ascertain whether the goods exported by Feger and La Doria have been sold at dumped prices.<sup>92</sup>

SPCA submits that the supply and price of raw tomatoes in the Italian market is influenced by direct and indirect payments made to tomato growers under the European Union's Common Agriculture Policy (CAP).<sup>93</sup> In particular, SPCA points to payments made to tomato growers under the Single Payment Scheme (SPS). In addition, SPCA claims there are regulations on imports of raw tomatoes and other trade distorting measures and support offered through Italian Producer Organisations (POs).

SPCA alleges that in the absence of these factors:

*...the prices of raw tomatoes would have been higher than the historical and current prices paid by the tomato processors; this in turn would impact the normal value of prepared and preserved tomatoes in Italy.*<sup>94</sup>

Whilst acknowledging the findings of the previous investigation<sup>95</sup>, SPCA includes in its application a Non-Confidential Attachment B-4.1. Here, further detail on the market situation claims has been provided as well as reference to publically available supporting material, which includes EU regulations relevant to the delivery of the CAP and SPS. The Commission notes that SPCA has drawn upon various new materials that had not been considered in the previous investigation.<sup>96</sup>

SPCA estimated that the amount paid in 2013 under the SPS was up to 37% of the price paid for raw tomatoes by the prepared or preserved tomato processors.<sup>97</sup> SPCA claims that the direct payments have had an influence on the supply and pricing of raw tomatoes, and the pricing of the finished products and eventually the impact on the processor's overall profitability.

Feger and La Doria made a joint submission dated 20 February 2015 in response to the market situation allegations by SPCA.<sup>98</sup> The submission states:

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<sup>92</sup> EPR003: SPCA application.

<sup>93</sup> SPCA claims that under the CAP, EU member states are allowed to provide payments to growers of fruit and vegetables, see also EPR 019.

<sup>94</sup> EPR003: SPCA application, p. 25.

<sup>95</sup> In REP 217 (p. 26), the Commission found that "...there is no situation in the market in Italy such that sales in Italy are not suitable for use in determining a price under subsection 269TAC(1) of the Act".

<sup>96</sup> See also EPR027 – SPCA make further clarifications regarding the new information provided to the Commission has part of their application.

<sup>97</sup> EPR004: SPCA application non-confidential attachment B-4.2.

<sup>98</sup> EPR013: Exporter submission.

- SPCA has not put forward new information since the previous investigation<sup>99</sup> that should change the market situation finding. Circumstances underpinning that decision have not changed, and therefore do not warrant reinvestigation.
- The evidence put forward by the applicant regarding the material impact of the alleged support on domestic sales prices of prepared or preserved tomatoes merely point out the existence of support rather than prove it has a materially distorting impact on prepared or preserved tomato prices.
- CAP payments have no distortionary impact on production and the payments are WTO compatible as they are paid on the basis of hectares of land (decoupled) rather than by tomato production (coupled), and even though payments were coupled historically it is not a relevant consideration for the investigation period. In that regard, the CAP payments are not an incentive to produce prepared or preserved tomatoes and have no trade distortionary impact on production levels, and are a "green box" measure that complies with the Agreement on Agriculture.<sup>100</sup>
- The investigation into subsidies is outside of the context of an anti-dumping investigation and is contrary to WTO law.

Importers, the Italian government, and the EC also made submissions to the same effect, additionally questioning the legality of limiting the investigation to particular exporters rather than all exporters of that country.<sup>101</sup>

The Commission stands by its view set out in CON 276 that new evidence has been put forward by the applicant to warrant consideration of a market situation.<sup>102</sup> The evidence put forward by SPCA includes supporting material related to the delivery of the EU CAP and SPS, along with claims that these payments have an influence on the supply and pricing of raw tomatoes and the pricing of prepared or preserved tomatoes. After considering SPCA's application, it was the Commissioner's view that, under subsection 269TC(1) of the Act, there appeared to be reasonable grounds to not reject the application. The new evidence warranted an examination of potential flow-on impacts arising from direct income support payments on the price of prepared or preserved tomatoes.

## 2. Independent research of market situation allegations

The Commission engaged a consultant – the Law and Economics Consulting Associates (LECA) – to provide a full appraisal of the factors put forward in the submissions in relation to a market situation in Italy. Specifically, the scope for the LECA engagement was:

- To provide a report that analyses and explains matters relevant to the Commission's assessment about whether the situation in the domestic market in Italy for prepared or preserved tomatoes is such that sales in that market are not

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<sup>99</sup> Inv 217.

<sup>100</sup> EPR048

<sup>101</sup> EPR014: European Commission submission; EPR015: Italian government submission; EPR016: Importer submission.

<sup>102</sup> See section 2.2.3.

suitable for assessing the normal value of prepared or preserved tomatoes in Italy during the investigation period of 1 January 2014 to 31 December 2014.

- The report should include information relevant to the production and sales of:
  - prepared or preserved tomatoes; and
  - raw tomatoes (raw tomatoes being the primary raw material used in the manufacturing of prepared or preserved tomatoes).
- The report should include, but not be limited to, examination of:
  - direct and indirect payments made to tomato growers under the European Union's (EU) Common Agriculture Policy (CAP);
  - regulations on imports of raw tomatoes; and
  - support offered through Italian Producer Organisations.
- The analysis and explanations should include discussion of whether and to what extent certain specified factors impact upon supply and demand and prevailing prices in the relevant markets. Supporting evidence should be included with appropriate references.
- The report should not draw conclusions as to whether a 'market situation' exists.

This appendix details the findings from the LECA report and the submissions received in relation to that report's findings. The Commission has had regard to all relevant evidence submitted by all interested parties in their submissions and it has focussed on the matters that are deemed to be material to the investigation, which are also detailed in this appendix.

This appendix also sets out the Commission's assessment as to whether there is a situation in the Italian market for prepared or preserved tomatoes that renders domestic sales in the investigation period unsuitable for determining normal value under subsection 269TAC(1) of the Act.

### 3. Australian legislation

Subsection 269TAC(1) of the Act states:

*Subject to this section, for the purposes of this Part, 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 transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*

However, subsection 269TAC(2)(a)(ii) provides:

*Subject to this section, where the Minister is satisfied that because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);*

*the normal value of the goods for the purposes of this part is:*

*(c) except where paragraph (d) applies, the sum of:*

- (i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export;*

- and
- (ii) *on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export--such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale*

The Act does not provide any definition of particular circumstances or factors which would satisfy the Minister that a 'market situation' exists in a domestic market. The WTO Anti-Dumping Agreement is similarly silent regarding the definition of the concept of a 'particular market situation' referred to within Article 2.2.

#### 4. Policy and practice

In relation to market situation, the Commission's *Dumping and Subsidy Manual*<sup>103</sup> states:

*In considering whether sales are not suitable for use in determining a normal value under s. 269TAC(1) of the Act because of the situation in the market of the country of export, the Commission may have regard to factors such as':*

- *whether the prices are artificially low; or*
- *whether there is significant barter trade; or*
- *whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s. 269TAC(1) of the Act.*

*Government influence on prices or costs could be one cause of 'artificially low pricing'. Government influence means influence from any level of government'.*

*In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market'.*

The Commission's *Dumping and Subsidy Manual* also goes on to state:

*Prices may also be artificially low or lower than they would otherwise be in a competitive market due to government influence and distortion of the costs of inputs. Again the mere existence of any government influence on the costs of inputs would not be enough to make sales unsuitable. Rather, the Commission looks at the effect of this influence on market conditions*

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<sup>103</sup> Available online at <http://www.customs.gov.au/site/page5719.asp>.

*and the extent to which domestic prices can no longer be said to prevail in a normal competitive market. It should be noted government influence on costs can only disqualify the sales if those costs can be shown to be affecting the domestic prices.*

In this context, the Commission considers it is reasonable, for the purpose of assessing whether a market situation exists, to examine any factors that may have affected the competitive conditions in the market for prepared or preserved tomatoes in Italy in the investigation period. This includes the examination of payments made to growers of tomatoes made under the CAP.<sup>104</sup>

## 5. Evidentiary threshold

The Commission notes that the Act does not provide any guidance, implicit or explicit, to the evidentiary standard required to warrant a finding being made that a situation exists in the market for the purposes of subsection 269TAC (2)(a)(ii). Ultimately, the Parliamentary Secretary must be satisfied that because of the situation in the domestic market, domestic prices are not suitable for determining normal values under subsection 269TAC(1).

The Commission considers that the issues as to whether or not a 'market situation' exists in the domestic market of an exporting country, is a matter for the Parliamentary Secretary to consider. In doing so the Parliamentary Secretary ought to be satisfied on the basis of consideration of the totality of all relevant available evidence that a 'market situation' exists for the purposes of subsection 269TAC(2)(a)(ii).

It is considered that the assessment as to whether a market situation exists in a particular market constitutes a positive test. That is, before actual selling prices are rejected, the Commission needs to identify a 'market situation', and be satisfied that the 'market situation' renders the sales in that market not suitable for normal value purposes.

Although it is for the Commission to establish the nature and consequence of the 'market situation', including an evaluation of whether there is an impact on domestic prices, it is considered that the pricing effect does not necessarily have to be quantified.

## 6. Previous Investigation

In Inv 217, the Commission undertook a market situation assessment because it became aware of the various forms of support and development assistance being provided to agricultural sectors in the EU, including the cultivation of raw tomatoes for processing. Specifically, the CAP payments in relation to the cultivation of raw tomatoes for processing formed the main component of the market situation assessment for Inv 217. The assessment was based primarily on questionnaire responses from the Italian government, the EC, and select exporters regarding the benefits received by the exporters, directly or indirectly related to the production of the final product.

It was determined that, based on questionnaire responses, the direct payments under the CAP and other miscellaneous government payments were not material. This finding was

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<sup>104</sup> The Commission considers it is possible for a degree of government influence to exist in a market without rendering the situation in the market such that sales are unsuitable for establishing normal value under s.269TAC(1). However, the Commission considers that significant government influence in relation to relevant market factors could distort prices to a degree that those prices may be unsuitable for use in determining normal value.

backed by comparing the price paid by Italian exporters for the raw tomato input against a competitive market price benchmark for tomatoes, taken to be the Australian industry purchase price for tomatoes from local suppliers. Based on this benchmark, the prices in the Italian market were found to be similar or higher than the Australian prices paid. On this basis, the Commission concluded that the payments provided directly to tomato growers in Italy were not being passed through to processors in the form of lower prices.<sup>105</sup>

## 7. Assessment of Market Situation

In the course of this investigation, the Commission has received various submissions relating to a market situation in the Italian market for prepared or preserved tomatoes. Having regard to the submissions put forward by interested parties, the Commission concluded that the key question being contended is:

*“Do CAP payments to tomato growers materially distort competitive conditions such that prices for prepared or preserved tomatoes in the domestic market in Italy are not suitable for use in determining normal value?”*

The Commission engaged LECA, an independent consultant, to assess the overall impact of the key drivers that are material to a market situation assessment, including the claims made by SPCA and submissions made in response to SPCA's application. Further submissions were received in response to the LECA report with regards to various assumptions made in the modelling of the flow-on impacts of the CAP payments to tomato growers. The Commission considered all submissions received in response to the application and in response to the LECA report, and has referenced these submissions and other independent publications in making its assessment and arriving at its conclusion.

The following sections outline the matters that the Commission considered in formulating its market situation assessment.

### 7.1 Assessment of Government Policies

The LECA report assessed the impact of factors that are deemed to be material to a market situation as put forward in the SPCA application and in submissions.<sup>106</sup> Full details of the report, the application and all submissions, can be found in the Electronic Public Record (EPR). The findings from the LECA report, along with the Commission's response to submissions in relation to these findings, are summarised in the following sections.

In particular, the LECA report identified distortion in the raw tomato market in Italy, which is relevant to the market for prepared or preserved tomatoes. LECA identified the following three main factors:

- CAP payments – LECA considered that the CAP payments appeared to have resulted in distortionary effects on the raw tomato market in Italy. LECA identified the three features of CAP payments that serve to generate distortionary effects as (i) lack of uniformity across different types of agricultural products; (ii) the generally

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<sup>105</sup> Inv 217 refers: <http://www.adcommission.gov.au/cases/ADC217.asp>.

<sup>106</sup> EPR040.



high level of the subsidies; and (iii) the extent to which they are “coupled” to the level of output.

- the risk of Italian Producer Organisations engaging in cartel like behaviour; and
- regulation of imports of raw tomatoes.

While the LECA report was largely focused on the CAP payments, it also examined the role and effect of producer organisations and tariff controls on imports. The Commission notes the LECA report findings that these two factors merely have an offsetting effect on any potential price distortion caused by the CAP payments. LECA explained that its estimates of price effects for prepared or preserved tomatoes attributable to CAP payments incorporate the simultaneous impact of support offered through Italian Producer Organisations, and regulations on imports of raw tomatoes.

The factors are discussed in further detail below.

## 7.2 CAP Payments

LECA made the following observations in its report:

- Until 2003 CAP payments were directly linked to the level of production for specific agricultural products (“coupled payments”), and were paid mainly by crop type, area aid (by hectare), or by livestock (per animal). While there have been attempts to decouple payments since 2003 Fischler reforms, raw tomatoes remained one of the last agricultural products to be totally decoupled as it was politically difficult to adjust.
- The 2003 reforms to decouple payments under the SPS were incomplete in Italy and total farm assistance for tomatoes has not been fully decoupled. EU CAP payments continue to be based on historical levels received by farmers in previous years, which were based on the past system of coupled payments. These “historical reference” payments meant Italy retained the historically high subsidy levels for tomato farms. To the extent the total payment was transferred to a per hectare payment, by dividing the total payment by the hectares in production at the time, this implied that increased production might still be rewarded with greater assistance. The CAP payments are thus implicitly tied to output and encourage farmers to maintain production to ensure continuation of the support.
- Historically, tomato growers received higher average CAP payments than other sectors. The LECA report calculated a subsidy rate for tomato growers based on data in the FADN database, and showed that tomato growers received more than double the average of other industries.

The EU and exporters’ submissions state that CAP payments under the SPS is a “green box” measure that has no, or at most minimal, trade distorting effect on production. This claim is premised upon related claims that SPS payments are not coupled to tomato production.<sup>107</sup> SPCA, in response submitted that despite notions of the SPS being a “green box” measure, there is yet no evidence that decoupled payments have no trade distorting effects.<sup>108</sup> The Commission is of the view that whether the CAP payments are

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<sup>107</sup> EPR036, EPR044, EPR048.

<sup>108</sup> EPR026, EPR039.

explicitly coupled to production is not of critical importance for its assessment of whether there is a market situation such that renders the sale of prepared or preserved tomatoes unsuitable for use as normal value. Rather, in the context of its investigation into alleged dumping, the Commission considers it is more important to make a practical assessment as to whether the effect (if any) of the CAP payments made to tomato growers is such that it has distorted the price of the prepared or preserved tomatoes to a degree that renders the sales unsuitable for use in calculating normal value.

The LECA report suggests that reforms to CAP payments have been incomplete and delayed, such that payments to tomato growers continue to be referenced by historic production and have the effect of encouraging farmers to maintain production levels to ensure CAP payments are sustained over time. This suggests that the CAP payments have an influence over industry production capacity and supply. The exporter's response to the LECA report included a report produced for the exporters by an Italian producer's organisation in regards to the decoupled nature of payments.<sup>109</sup> The Commission considered that submission and concluded that it references much the same EU policies as the LECA report but does not outweigh the LECA report's assessment that the nature CAP payments influences the production decision of tomato growers. The Commission has also observed further independent evidence that demonstrates the payments made to growers of tomatoes in Italy under the SPS are based on historical base periods prior to the introduction of the SPS.<sup>110</sup>

### 7.3 The Role of Producer Organisations

LECA made the following observations in its report:

- Under the 1996 CAP reforms, CAP payments are paid to processors approved by the Member States on the basis of a contract with recognised producer organisations (POs).
- The 2000 reforms meant the subsidies are paid to the farmer via a PO instead of the processor. This arrangement remains to date.
- While POs and inter-branch organisations may provide efficiency enhancing, or transaction cost minimising services that help the operation of markets, there is scope for potential distortions in the market due to POs' ability to engage in cartel like behaviour.
- The derogations from competition law offered to POs give them an ability to control supplies of tomatoes to the market, effectively capturing a larger share of the subsidy for tomato growers and maintaining prices in the market.<sup>111</sup>
- In effect, the market power held by POs has a reducing impact on the degree of flow-on of the CAP payments to the final market price for prepared or preserved tomatoes.

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<sup>109</sup> EPR049: Attachment – UNAPROA.

<sup>110</sup> Rickard, B. J. and Sumner, D. A. (2011). 'Was there policy reform? Evolution of EU domestic support for processed fruits and vegetables.' *Food Policy*, 36(3), 438-449.

<sup>111</sup> EPR031 – This issue is emphasised in SPCA's submission.



The LECA report only refers to POs ability to exercise market power in a cartel-like manner, and by no means alleges that POs are cartels. The exporters submitted any such allegation should be treated as baseless and unfounded by evidence. The Commission agrees with the EU and exporter's observation that the POs' market power may lead to prices of raw tomatoes to be maintained, which is in alignment with the conclusion drawn by the LECA report that POs may have, in part, an off-setting effect to the CAP payments.<sup>112</sup>

#### **7.4 Entry/external tariff controls on imports**

LECA made the following observations in its report:

- LECA states there are regulations on the importation of raw tomatoes to Italy from outside the EU for local sale. Such imports are only allowed (at a duty) for processing so long as they re-export the processed product. Processed tomato products are thus traded but face ad valorem tariffs in the EU.
- The import regulations on the purchase of raw tomatoes restrict the degree of competition in the Italian market.
- Notwithstanding the import regulations, the perishability of raw tomatoes makes it difficult for producers to import the raw product.
- The limited competition in Italy for raw tomatoes increases the POs market power, allowing them to limit the supply of tomatoes to the market and holds a significant part of the market for Italian processing tomatoes captive.
- The difficulty in importing raw tomatoes to Italy therefore has a reducing impact on the degree of flow-on of the CAP payments to the final market price for prepared or preserved tomatoes.

The EU and exporter's submission to the LECA report contested the existence of 'prohibitions' on imports of fresh tomatoes from outside the EU.<sup>113</sup> However, the EU submission also confirms the current existence of import duties on raw tomatoes.<sup>114</sup> The LECA report refers to the limitation of imports in the form of import duties, referencing a publication by Rickard and Sumner (2008) in a well-regarded journal. The purpose is to identify the barriers to competition in the Italian raw tomatoes market which increases the market power of Italian POs. The point LECA makes is that the limited competition causes prices of raw tomatoes to be maintained, and may have, in part, an off-setting effect to the CAP payments.

#### **7.5 Rate of CAP Payments to Growers of Tomatoes**

The Commission provided the Italian Government and the European Union with questionnaires at the commencement of the investigation. The questionnaires inter alia, requested information regarding the CAP, the SPS and payments made to growers of tomatoes. The Commission did not receive a response regarding these specific issues. Therefore, the Commission has considered the LECA report, submissions made by the

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<sup>112</sup> EPR044, EPR045, EPR048.

<sup>113</sup> EPR048, EPR044, EPR045.

<sup>114</sup> EPR044.

other interested parties and independent sources of evidence regarding the operation of the CAP, how payments are made under the SPS, and the amount of subsidy that is paid per hectare to growers of tomatoes as part of its assessment of market situation.

The LECA report stated that an average of €775 per hectare was paid to tomato growers under the CAP in 2011. The figure has been quoted in the article by Solazzo, as referenced in the LECA report and has been substantiated by LECA using FADN data.<sup>115</sup> The report goes on to state that growers of tomatoes receive more than double the amount of uniform national payments under the CAP. SPCA submitted that the figure stated in the LECA report substantially underestimates the subsidy paid to tomato growers.<sup>116</sup>

SPCA submitted as part of their application and subsequent submissions that the subsidy amount paid to growers of tomatoes during the transition period of 2008 to 2010 and onwards from 1 January 2011 is €2802 per hectare. SPCA calculated this amount by dividing the total ceiling amount allocated to tomatoes under the CAP (€184,000,000) by the total hectares (65,672) of tomatoes grown in 2011.<sup>117</sup> Annex X of EC Regulation 73/2009 contains the applicable ceiling amount available for tomatoes and other fruit and vegetables. SPCA submits that due to limited publically available information about the distribution of the ceiling amount allocated to tomatoes post 2012 and the limited information provided to the Commission from other interested parties, this calculation is the correct way in which the subsidy amount paid under the CAP to growers of tomatoes must be worked out.

The Commission has observed that during the transition period the total ceiling amount referred to by SPCA was available for payment to growers of tomatoes under the CAP in a combination of coupled and decoupled forms.<sup>118</sup> This may represent the 'soft landing' that LECA has described in its report.<sup>119</sup> The Commission stated in the SEF that "at the completion of the transition period and beginning on 1 January 2012, only 75% of the total ceiling amount for tomatoes was available for payments to growers of tomatoes under the CAP."<sup>120</sup> The Commission expects that this reduction reflects the modulation component of EC Regulation 73/2009". In response to the submissions received from all interested parties the Commission is satisfied that Italy did not make use of any transitional payment options provided for under this Regulation as stated above. The Commission is satisfied that as of 1 January 2011, all direct income support payments made to growers of raw tomatoes in Italy were made under the SPS.

In their article regarding CAP reform, Rickard and Sumner indicate that during the transition period growers of tomatoes received only €17.25 per tonne, which is half the amount received by growers of tomatoes prior to the transition period.<sup>121</sup> Some submissions have represented that this assertion meant that the growers of tomatoes

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<sup>115</sup> ERP040.

<sup>116</sup> EPR046

<sup>117</sup> EPR046, EPR056.

<sup>118</sup> EC Regulation 73/2009, Article 54(1).

<sup>119</sup> EC Regulation 73/2009, Article 68. The Italian Government utilised this Article in order to continue to provide a portion of their national ceiling for tomatoes in coupled form during the transition period.

<sup>120</sup> EC Regulation 73/2009, Article 54(2)(b).

<sup>121</sup> Rickard, B. J. and Sumner, D. A. (2011). 'Was there policy reform? Evolution of EU domestic support for processed fruits and vegetables.' *Food Policy*, 36(3), 438-449. SPCA also provided as part of their application an article by these authors from 2008 discussing CAP reform and CAP subsidy payments to growers of tomatoes.

have had their payment entitlements under the CAP reduced by half under the SPS.<sup>122</sup> However, as Rickard and Sumner correctly point out, during the transition period, growers of tomatoes were also entitled to an additional Single Farm Payment (SFP) at 50% of the full base rate on support they received between 2000 and 2002. They further point out that beyond 2011 growers of tomatoes will only receive one SFP under the SPS, but at the full rate of support received during 2000 to 2002. It is apparent from this evidence that while a per tonne subsidy is removed from the CAP beyond 2011, indicating that decoupling has occurred, growers of raw tomatoes still have access to direct income support payments, as part of the SPS.

The exporters have submitted that SPCA's calculation of the payment amount received by growers of tomatoes is grossly overestimated and while not explicitly rebutting the figure arrived at by LECA, have submitted that in practical terms growers of tomatoes will more often than not receive less than €775 per hectare.<sup>123</sup>

The exporters submitted that the national ceiling for tomatoes was no longer available because it was absorbed into the SPS as of 1 January 2011 and the SPS only provides for one national ceiling covering payments for all agricultural related payments.<sup>124</sup> The Commission now accepts that Italy did not make use of any transitional payment arrangements post 1 January 2011.<sup>125</sup>

The exporters also submitted that the payments to growers of tomatoes have been decreased further by modulation required under the SPS.<sup>126</sup> The LECA report suggests that despite any notions of modulation, its application has been limited based on growers of tomatoes receiving payments both during the transition period and under the SPS constructed from historical payments they have received. The exporter's submissions and independent research have acknowledged this point.<sup>127</sup>

Finally, the exporters have provided evidence in a confidential submission that suggests not all growers of tomatoes in fact receive the average of €775 or the €2802 per hectare under the SPS.<sup>128</sup> EC Regulation 73/2009 states that payments do have to be applied for by growers and activated in order to receive payment.<sup>129</sup> The Commission notes it does appear there is potential that the total ceiling available to tomatoes is not exhausted on an annual basis. This can be attributed to new growers entering the industry during the historical base period or growers failing to utilise their entire entitlements or growers failing to be registered with the National Entitlement Register during that period.<sup>130</sup> However, the Commission has reviewed this evidence and is not satisfied that it demonstrates that a majority or significant proportion of recipients of SPS payments for growing tomatoes firstly would fail to access their entitlements and secondly receive less than €775 per hectare as described in the LECA report.

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<sup>122</sup> EPR 055 – Exporter Submission

<sup>123</sup> EPR048, EPR055.

<sup>124</sup> EPR 048.

<sup>125</sup> The national ceiling relating to payments for tomatoes is applicable post 1 January 2011 because of the continuation of EC Regulation 73/2009 through Article 21(2) of EC Regulation 1307/2013.

<sup>126</sup> EPR 048, EPR055.

<sup>127</sup> EPR 048.

<sup>128</sup> EPR 048.

<sup>129</sup> EC Regulation 73/2009, Article 19, 34, 42.

<sup>130</sup> EPR 048, Annex 1.

The Commission notes the evidence was based on a very small sample of tomato growers in Italy, and it is not clear how the sample was selected. Specifically, the exporter provided a copy of five select “declarations” issued by AGEA (Italian agency managing the SPS) which holds information on CAP payments received by farmers.<sup>131</sup> Without further information regarding these select CAP payments, the Commission was unable to form a view on the representativeness of these sample payments.

## **8. Assessment of the Flow-On Impact of Government Policies on Domestic Prepared or Preserved Tomatoes Prices in Italy**

The LECA report models the flow-on impact of the CAP payments to raw tomato growers on the final prepared or preserved tomato price. The influence of various factors discussed (CAP payment, POs, import tariffs) are captured by various assumptions about the market conditions along the value chain to assess the flow-on impact. The Commission wishes to reiterate its view that PO’s and import tariffs may have, in part, an off-setting effect with respect to the CAP payments. The LECA models have effectively incorporated such off-setting effects when modelling the flow-on impact of CAP payments. Readers are encouraged to refer to the LECA report for further details on the modelling (EPR040). Interested parties have also put forward alternative calculations of the flow-on impact in response to the LECA report.

The four different calculations and the respective outcomes are summarised in turn below. The Commission has then set out its preferred model for the purpose of this assessment.

### **8.1 Method 1 - Flow-on impact evaluated by LECA:**

- The LECA report uses production data for 2011 drawn from the FADN database.
- Based on FADN data, the subsidy per hectare received by tomato farms in Emilia Romagna (one of the major tomato production regions in Italy and one where there is a very high degree of specialisation with almost half of the entire horticultural area covered by processing tomato) was on average €775/ha<sup>132</sup> for 2011.
- LECA modelled the variable cost of production based on the same FADN data and arrived at a variable cost of production of €3232/ha.
- The subsidy rate as a proportion of variable costs (net of the subsidy) was 32% per hectare.<sup>133</sup>
- In the extreme scenario, where 100% of the mark up on costs flows-on through the value chain, the price of final prepared or preserved tomatoes price would also increase by 32%.

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<sup>131</sup> The declarations were provided in confidence and not placed on the EPR.

<sup>132</sup> The LECA report incorrectly used €776 as the subsidy paid to growers of tomatoes into the flow calculations in their report. The first reference to the subsidy rate is on page 23 of the report. LECA have stated here that the average subsidy rate from FDAN data is €775/ha. The Commission has not altered the figure to ensure consistency with the LECA report regarding the calculations of flow on.

<sup>133</sup>  $32\% = \frac{€776}{(€3232 - €776)} \times 100$ .

- In a realistic scenario, the market condition at each point in the value chain would dictate the degree to which the CAP payment flows-on. The likely scenario is that 73%<sup>134</sup> of the 32% subsidy would flow onto the cost of raw tomatoes for prepared or preserved tomato production.<sup>135</sup> That is, if subsidies were removed, the cost of raw tomatoes would increase by 23% (73% x 32%).
- La Doria's data shows that the cost share of raw tomatoes in their total production cost are approximately ■%. This means that ■% of production costs would increase by 23% if subsidies were removed, i.e. a flow-on in prepared or preserved tomato production costs of ■% (23% x ■%).
- Overlaying the market conditions for the market for prepared or preserved tomatoes (i.e. assuming the same variables of supply and demand as used above, 73% of the cost flows-on), a ■% increase in production cost leads to a ■% increase in prepared or preserved tomatoes prices.

The estimated flow-on impact of the CAP payments on the final prepared or preserved tomato price is ■%.

## 8.2 Method 2 - Flow-on impact evaluated by the Commission using the Rickard and Sumner (2008) model:

SPCA made a submission on 28 July 2015 in relation to the LECA report, and challenged various assumptions used in the model, in particular the subsidy rate.<sup>136</sup>

SPCA provided to the Commission a journal publication by Rickard and Sumner (2008).<sup>137</sup> The publication modelled the impact of a 50% reduction in EU domestic support for tomato growers. The Commission also found a further publication by the same authors in 2011 to corroborate key figures.<sup>138</sup> A summary of Rickard and Sumner (2008) findings relevant to this investigation are as follows:

- Tomato growers faced market prices of €80/tonne for raw tomatoes.
- The CAP set up in 2001 stipulated domestic support paid to tomato growers of €34.5/tonne.
- Based on these figures, the subsidy rate as a proportion of price received for raw tomatoes was 43%.<sup>139</sup>
- The production cost share of raw tomatoes in a can is 39% of prepared or preserved tomatoes.

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<sup>134</sup> EPR040.

<sup>135</sup> Market conditions meaning the responsiveness of the demand and supply to price changes in the market (elasticities), and references Rickard and Sumner (2008). The Commission corroborated the key figures in Rickard and Sumner (2011).

<sup>136</sup> EPR046.

<sup>137</sup> Rickard, B.J. and Sumner, D.A. (2008), 'Domestic support and border measures for processed horticultural products.' *American journal of agricultural economics*, 90(1), 55-68.

<sup>138</sup> Rickard, B. J. and Sumner, D. A. (2011). 'Was there policy reform? Evolution of EU domestic support for processed fruits and vegetables.' *Food Policy*, 36(3), 438-449.

<sup>139</sup>  $43\% = \frac{€34.5}{€80} \times 100$

- If subsidy rates were reduced by 50% (from 43% to 21.5%), assuming certain market conditions (similar to that assumed in the LECA report), the Rickard and Sumner (2008) model estimates the flow-on increase in the cost of raw tomatoes to prepared or preserved tomato producers is 12.2%.<sup>140</sup>

The Commission applied the last step in the LECA report to determine the degree of flow-on in cost of production to final prepared or preserved tomatoes price:

- Overlaying the market conditions for prepared or preserved tomatoes as per the LECA model (assuming 73% of the cost flows-on), a 12.2% increase in production cost leads to an 8.9% increase in prepared or preserved tomato prices.

However, Rickard and Sumner (2011) pointed out that the CAP payment fell by half to €17.25/ton between 2008 and 2011.<sup>141</sup> As a result:

- If the Rickard and Sumner (2008) model applied a subsidy rate of 21.5% (half of 43%) the flow-on increase in the cost of raw tomatoes to prepared or preserved tomatoes producers is likely to be less than 12.2%.
- Overlaying the market conditions for prepared or preserved tomatoes as per the LECA model, a less-than 12.2% increase in production cost leads to a less than 8.9% increase in prepared or preserved tomatoes prices.

To the extent that the CAP payments have been reduced since 2011, the estimated 8.9% flow-on impact on final prepared or preserved tomato prices is likely an over-estimate.

### 8.3 Method 3 - Flow-on impact evaluated by SPCA:

SPCA also provided the Commission with confidential calculation of the flow-on impacts of the CAP payments to raw tomato growers on the final prepared or preserved tomatoes price.<sup>142</sup> The following describes the key steps:

- SPCA assumed a CAP payment of €2801/ha and yield of 73t/ha. This equates to a subsidy of €38/tonne.<sup>143</sup>
- SPCA have assumed raw tomato price of €92/tonne. <sup>144</sup> SPCA arrived at a subsidy rate, as a proportion of price received for raw tomatoes, of 42%.<sup>145</sup>
- SPCA assumes the scenario where 100% of the mark up on costs flow-on through the value chain, such that the cost of raw tomatoes for prepared or preserved tomatoes production increases by 42%.

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<sup>140</sup> Rickard and Sumner (2008), p 17.

<sup>141</sup> Rickard and Sumner (2011), p.440.

<sup>142</sup> The calculations were provided in confidence and not placed on the EPR.

<sup>143</sup> €2801/ha was calculated based on the National Ceiling in 2011 for CAP payments to tomato growers, divided by the hectares of tomatoes grown in 2011.

<sup>144</sup> SPCA's confidential submission submitted 28 July 2015.

<sup>145</sup>  $42\% = \frac{€38}{€92} \times 100$ .



- Assuming the proportion of raw tomatoes in a can makes up █% of prepared or preserved tomatoes, the final price of prepared or preserved tomatoes would increase by █% (█% x 42%).

The subsidy rate calculated by SPCA uses a different method to LECA. The LECA report calculates subsidy rate as a proportion of variable costs (net of the subsidy), whereas SPCA calculated the subsidy rate as a proportion of price received for raw tomatoes.

#### **8.4 Method 4 - Flow-on impact evaluated by the exporters based on the Department of Science, Agriculture, Food and environment (SAFE) report:**

The exporter has submitted suggested adjustments to variables in the LECA report to arrive at alternative flow-on impacts on prepared or preserved tomatoes prices (e.g. use a higher variable cost, using gross variable costs in calculating subsidy rate, excluding transportation cost in the price of raw tomatoes).<sup>146</sup> The exporters in particular referred to a report produced by SAFE, who was engaged by the exporters to estimate the variable costs of producing tomatoes.<sup>147</sup>

It is the Commission's view that the variable cost produced by SAFE is one example of production costs incurred by tomato growers.

- The SAFE report provided an example of operating costs of a tomato farm in Southern Italy, of €█/ha.
- The exporter assumed a subsidy of €776/ha (taken from the LECA report), and calculated a subsidy rate of █% (using the same method as LECA).
- The Commission applied the LECA model to this subsidy rate, and arrived at a flow-on increase in the final price of PPT of █%.

The estimated █% increase is likely an under-estimate of the impact, considering that the sampled variable cost in the LECA report is 40% lower than the SAFE estimate.

See **Confidential Attachment 15** for details of the flow-on calculations.

## **9 Conclusions**

The relevant evidence obtained by the Commission about the CAP underlines the potential extent to which direct income support payments paid to growers of raw tomatoes in Italy. The Commission notes that the key variables in all of the potential flow-on impacts modelled above are the CAP payment per hectare, and the variable cost of raw tomato production.

Based on calculations 1-4, the Commission observed that the possible range of flow-on impacts from the CAP payments to growers of tomatoes on the final prepared or preserved tomatoes price is █% - 8.9%. The Commission considers that the extremes are likely to be over and under estimates of price impact, if any.

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<sup>146</sup> EPR048, P.10.

<sup>147</sup> EPR049, Attachment – Department of Science, Agriculture, Food and environment (SAFE).

## **Public Record**

Having regard to the scale of the possible price effects, if any, the Commission is of the view that there is not a situation in the market in Italy for prepared or preserved tomatoes that renders the sales in Italy of prepared or preserved tomatoes unsuitable for use in determining normal value under subsection 269TAC(1) of the Act.