



**ANTI-DUMPING COMMISSION  
REPORT TO THE ANTI-DUMPING REVIEW PANEL**

**REINVESTIGATION OF CERTAIN FINDINGS IN REPORT 349  
AND 354**

**PREPARED OR PRESERVED TOMATOES  
EXPORTED TO AUSTRALIA FROM ITALY BY AR INDUSTRIE  
ALIMENTARI S.P.A AND BY ALL EXPORTERS OTHER THAN  
BY FEGER DI GERARDO FERRAIOLI S.P.A AND LA DORIA  
S.P.A**

11 December 2017

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## ABBREVIATIONS

the Act	<i>Customs Act 1901</i>
ADN	Anti-Dumping Notice
ADRP	Anti-Dumping Review Panel
AGEA	Agenzia per le Erogazioni in Agricoltura (Agency for Agricultural Payments)
ARIA	AR Industrie Alimentari S.p.A.
CAP	<i>Common Agricultural Policy</i>
the Commission, or ADC	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
Conserve Italia	Conserve Italia Soc. Coop. Agricola
DTL	Dole Thailand Limited
EC	European Commission
<i>EC – Salmon (Norway)</i>	<i>European Communities – Anti-Dumping Measures on Farmed Salmon from Norway</i>
EU	European Union
Feger	Feger di Gerardo Ferraioli S.p.A
FOB	Free on Board
ha	hectare(s)
kg	kilogram(s)
La Doria	La Doria S.p.A
LSI	Le Specialità Italiane S.R.L.
Manual	Dumping and Subsidy Manual
Natural	Natural Fruit Co., Ltd
OCOT	ordinary course of trade
the Parliamentary Secretary	the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science
the then Parliamentary Secretary	the then Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science
PPT	prepared or preserved tomatoes (also referred to as “the goods” or “GUC”)
REP 196	<i>International Trade Remedies Branch Report No. 196</i>
REP 217	<i>Anti-Dumping Commission Report No. 217</i>

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REP 250	<i>Anti-Dumping Commission Report No. 250</i>
REP 276	<i>Anti-Dumping Commission Report No. 276</i>
REP 349/354	<i>Anti-Dumping Commission Report Nos. 349 and 354</i>
REP 351	<i>Anti-Dumping Commission Report No. 351</i>
REP 360	<i>Anti-Dumping Commission Report No. 360</i>
SAICO	Siam Agro-Food Industry Public Company Limited
SEF 349/354	<i>Statement of Essential Facts Nos. 349 and 354</i>
SPCA	SPC Ardmona Operations Ltd
SPS	Single Payment Scheme
TPC	Thai Pineapple Canning Industry Corp Ltd
WTO	World Trade Organization

# 1 INTRODUCTION AND FINDINGS

## 1.1 Introduction

This report provides the results of the reinvestigation by the Commissioner of the Anti-Dumping Commission (the Commissioner) of certain findings in *Anti-Dumping Commission Report Nos. 349 and 354* (REP 349/354), relating to the dumping of certain prepared or preserved tomatoes (PPT, or “the goods”) exported to Australia from Italy.

As required by the Anti-Dumping Review Panel (the ADRP), the Anti-Dumping Commission (the Commission) has reinvestigated four specific questions that were contained in a letter sent from ADRP Panel Member Leora Blumberg to the Commissioner on 11 September 2017. This letter is available on the ADRP website at <http://www.adreviewpanel.gov.au>.

The four findings that are subject to reinvestigation are as follows:

### **Finding 1: The Application of findings in REP 360 to Reviews 349/354.**

The ADRP has requested that the Commission take into consideration SPC Ardmona Operations Ltd’s (SPCA) submissions in the course of Reviews 349/354 relating to its critical comments on the regression analysis used by the Commission in *Anti-Dumping Commission Report No. 360* (REP 360), including the unsuitability of the data for a regression analysis and the absence of certain fundamental conditions relating to regression analysis.

In reinvestigating this finding the ADRP has directed the Commission to take into consideration the relevance to its findings of SPCA’s submissions relating to a range of other factors listed in the ADRP’s reinvestigation request.

### **Finding 2: Normal value for Conserve Italia Soc. Coop. Agricola (Conserve Italia) of Certain Product Codes with the CIRIO trademark.**

The ADRP has requested that the Commission, in determining a normal value for Conserve Italia, take into consideration the claim raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia, as set out in the third ground of review in its application for review.

### **Finding 3: Methodology used to calculate Le Specialità Italiane S.R.L.’s (LSI) ascertained normal value using the weighted average of the ascertained normal values from the five verified exporters whose normal value was determined under subsection 269TAC(1) of the *Customs Act 1901* (the Act).<sup>1</sup>**

The ADRP has requested that the Commission reconsider its reasoning for finding that LSI’s sales in the domestic market of bright cans (unlabelled) were unsuitable for use in “calculating a domestic sale price as it is uncertain whether these will be entered into home consumption” because “the unlabelled goods can be either exported or sold

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<sup>1</sup> All legislative references in this report are to the *Customs Act 1901*, unless otherwise specified.

*domestically, and the manufacturer does not have control over (or potentially awareness of) the end destination for the goods.”*

**Finding 4: Methodology used to calculate LSI’s ascertained export price using the weighted average of the ascertained export prices from the five verified exporters whose export prices were determined under subsection 269TAB(1).**

The ADRP has requested that the Commission reinvestigate its finding in regards to LSI’s ascertained export price. The ADRP has requested that the Commission, in reinvestigating this finding, also take into consideration other relevant information as detailed in its reinvestigation request.

## **1.2 Summary of findings**

### **1.2.1 Finding 1: Application of findings in REP 360 to Review 349/354 (Chapter 4)**

The Commission has reconsidered the application of findings in REP 360 within the context of submissions by all interested parties to the reviews and to the ADRP, as well as other relevant information, and finds that the verified evidence of the growers supplying raw tomatoes to Feger and La Doria is the most persuasive information in establishing the quantum of the income support payments actually received. On this basis, the Commission affirms its view that the amounts established in REP 360 are correct.

Further, the Commission has reviewed the statistical analysis of this data and affirms the finding that the cost of raw tomatoes recorded by Italian tomato processors are competitive market costs.

### **1.2.2 Finding 2: Conserve Italia normal value (Chapter 5)**

The Commission’s reinvestigation finds that, during the course of the review, it did not have sufficient information to allow Conserve Italia’s claimed adjustment for the different value of the CIRIO trademark in Italy and Australia to be assessed. The Commission has, however, as part of its reinvestigation, given consideration to the additional information presented to the ADRP by Conserve Italia in its application for review.

The Commission does not consider that price differences an exporter can achieve between a domestic and export market is a factor warranting adjustment to ensure fair comparison between export prices and normal values, and therefore this claim is rejected.

### **1.2.3 Finding 3: LSI normal value (Chapter 6)**

The Commission’s reinvestigation finds that during the conduct of the review the Commission did not take sufficient steps to justify the exclusion of all bright cans from domestic sales for all exporters on the grounds that those bright cans were not entered for home consumption in Italy. As such, LSI’s sales of bright cans ought to have been considered to have been entered for home consumption for the purposes of section 269TAC(1).

The Commission is further satisfied that LSI’s domestic sales are suitable for the purposes of calculating a normal value under subsection 269TAC(1). Noting the circumstances of LSI’s production and sales, the Commission has made a range of adjustments under subsection 269TAC(8)(b) to account for the differences between the

goods sold domestically and the goods that would be exported. This has resulted in a change to LSI's normal value.

#### **1.2.4 Finding 4: LSI export price (Chapter 7)**

The Commission affirms its finding that, in the current circumstances, where LSI has not exported goods during the review period, and therefore cannot have an export price determined under subsection 269TAB(1), the most relevant and reliable information available for the determination of an export price under subsection 269TAB(3) is the weighted average of the ascertained export prices from the five verified exporters whose export prices were determined under subsection 269TAB(1).

### **1.3 Conclusion**

The Commissioner considers that, in light of the above findings, the correct and preferable decision is that:

- the cost of raw tomatoes recorded by Italian tomato processors are competitive market costs;
- the adjustment to normal value claimed by Conserve Italia should be rejected;
- LSI's domestic sales are suitable for the purposes of calculating a normal value under subsection 269TAC(1), with necessary adjustments under subsection 269TAC(8)(b) to account for the differences between the goods sold domestically and the goods that would be exported; and
- LSI's ascertained export price be determined under subsection 269TAB(3) having regard to all relevant information, specifically the weighted average ascertained export price from the five verified exporters whose export prices were determined under subsection 269TAB(1).

## 2 BACKGROUND

### 2.1 Review 349 and 354

On 1 April 2016, AR Industrie Alimentari S.p.A. (ARIA) lodged an application requesting a review of the anti-dumping measures as they apply to its exports of PPT to Australia from Italy. ARIA claimed that certain variable factors relevant to the taking of the anti-dumping measures had changed. The application related to the measures imposed following the investigation set out in *Anti-Dumping Commission Report No. 217* (REP 217). The Commissioner initiated the review of measures regarding the goods exported by ARIA on 21 April 2016 (Anti-Dumping Notice (ADN) No. 2016/41 refers).

On 5 May 2016, SPCA lodged an application requesting a review of the anti-dumping measures as they apply to all exports of prepared or preserved tomatoes to Australia from Italy except by Feger di Gerardo Ferraioli S.p.A (Feger) and La Doria S.p.A (La Doria). SPCA claimed that certain variable factors established in REP 217 had changed and should be reviewed. The Commissioner initiated the review of measures regarding the goods exported by all exporters other than Feger, La Doria and ARIA on 25 May 2016 (ADN No. 2016/55 refers).

On 4 May 2017, following the completion of reviews 349 and 354, the Assistant Minister for Industry, Innovation and Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science (Parliamentary Secretary)<sup>2</sup> decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts or law set out in REP 349/354.

ADN No. 2017/46 was published on 4 May 2017, declaring that the dumping duty notice applying to the goods exported to Australia by ARIA was to be taken to have effect as if different variable factors had been fixed in respect of that exporter.

ADN No. 2017/47 was published on 4 May 2017, declaring that the dumping duty notice applying to the goods exported to Australia from Italy for all exporters except Feger, La Doria and ARIA was to be taken to have effect as if different variable factors had been fixed in respect of those exporters.

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<sup>2</sup> The Minister for Industry, Innovation and Science has delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary; accordingly, the Parliamentary Secretary is the relevant decision maker. On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science.



## 3 ADRP REVIEW

### 3.1 Legislative framework

Division 9 of the Act sets out the procedures for review, by the ADRP, of certain decisions by the Minister or the Commissioner.

In relation to decisions by the Minister, a person who is an interested party<sup>3</sup> may apply for review by the ADRP of a reviewable decision.<sup>4</sup> If an application for review is not rejected, the ADRP must make a report to the Minister on the application by recommending that the Minister:

- affirm the reviewable decision; or
- revoke the reviewable decision and substitute a specified new decision.<sup>5</sup>

Before making a recommendation to the Minister, the ADRP may, by written notice, require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified period.<sup>6</sup>

The Commissioner must conduct a reinvestigation as required by the ADRP and give the ADRP a report of the reinvestigation concerning the finding or findings.<sup>7</sup> The report must:

- if the Commissioner is of the view that the finding or any of the findings the subject of reinvestigation should be affirmed, affirm the finding or findings; and
- set out any new finding or findings that the Commissioner made as a result of the reinvestigation; and
- set out the evidence or other material on which the new finding or findings are based; and
- set out the reasons for the Commissioner's decision.<sup>8</sup>

### 3.2 Review and reinvestigation

Applications to the ADRP for a review of the decision made by the Parliamentary Secretary following his consideration of REP 349/354 were made by:

- SPCA;
- Conserve Italia;
- Mutti S.p.A.; and
- LSI.

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<sup>3</sup> As defined in section 269ZX.

<sup>4</sup> Decisions of the Minister that are reviewable decisions are set out in subsection 269ZZA(1).

<sup>5</sup> Under subsection 269ZZK(1).

<sup>6</sup> Under subsection 269ZZL(1).

<sup>7</sup> Under subsection 269ZZL(2).

<sup>8</sup> Subsection 269ZZL(3).

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On 11 July 2017, the ADRP published a notice under subsection 269ZZI(1) indicating its intention to conduct a review.

On 11 September 2017, the ADRP, in conducting its review, wrote to the Commissioner requesting that the Commissioner reinvestigate specific findings that formed the basis of the reviewable decision.

The specific findings the Commissioner has reinvestigated as requested by the ADRP, and any new findings that the Commissioner has made as a result of the reinvestigation, are set out in this report.

## 4 SPCA - THE APPLICATION OF FINDINGS IN REP 360 TO REVIEWS 349/354

### 4.1 Request to reinvestigate

The ADRP's reinvestigation request is presented as follows:

"In its reinvestigation of this finding the [Anti-Dumping Commission, or ADC] should take into consideration SPCA's submissions in the course of Reviews 349/354 relating to its critical comments on the regression analysis used by the ADC in [*Anti-Dumping Commission Report No. 360*, or REP 360], including the unsuitability of the data for a regression analysis and the absence of certain fundamental conditions relating to regression analysis.

In this regard I note the ADC's statement in REP 349/354:

*"The Commission notes that the analysis of the data in REP 360 has been accepted by the ADRP and the Parliamentary Secretary. The Commission does not consider it appropriate to revisit the interpretation of data from REP 360 in these reviews".<sup>9</sup>*

While I also note the ADC's statement in its submission to the ADRP pursuant to s.269ZZJ(aa), that the findings in REP 360 fall into the category of "any other matters that the Commissioner considers relevant" for the purpose of s.269ZD(2), the ADC should also take cognisance of the requirement of s.269ZD(2)(a)(ii) that the Commissioner "must" have regard to "any submissions relating generally to the review" that are received by the Commissioner within the statutory time period. The fact that the analysis of the data in REP 360 was accepted in ADRP Report No. 35 and subsequently accepted by the Parliamentary Secretary, does not, however, detract from the right of SPCA, as an interested party to make submissions to the ADC on the applicability of REP 360 to the Reviews in question, and for such submissions to be considered by the ADC.

During its reinvestigation of this finding, the ADC should at the same time have regard to and take into consideration the relevance to its finding of SPCA's submissions relating to the following:

- 2014 becoming the base year for the new BPS introduced in 2015;
- The value of the identified 'tomato payment' in the application for assistance document that was submitted, and the contention that this evidence was more reliable than the selected data supplied by Feger and La Doria;
- The contention that the use by the ADC of an average value resulted in a lower tomato subsidy amount;

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<sup>9</sup> REP 349/354, page 14.

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- The contention that the ADC did not correctly consider the impact of fallow land or [Single Payment Scheme, or SPS] payments received in respect of other crops;
- The contention that the ADC did not examine the magnitude of the subsidy that it found (even though SPCA considered the data was flawed);
- The contention that the negotiated price of tomatoes does not reflect a competitive cost; and
- the new “coupled” payment to Italian tomato growers of 160 €/ha (the existence of which both the EC and [Associazione Nazionale Industriali Conserve Alimentari Vegetali, or ANICAV] did not dispute).

In its reinvestigation, the ADC should take into consideration SPCA’s relevant submissions to the ADC during the Reviews, other relevant information and documents and as well as other interested parties’ relevant submissions to both the ADC and the ADRP.”

## 4.2 Background

### Anti-Dumping Commission Report No. 276 (REP 276)

An investigation concerning the goods exported to Australia by Feger and La Doria was initiated on 19 January 2015. SPCA, the applicant, alleged that there were significant distortions in the market for PPT in Italy that would make Italian domestic prices unsuitable as a point of comparison with the price of the same goods exported to Australia. As evidence, SPCA pointed to income support payments paid to tomato growers under the European Union’s (EU’s) *Common Agricultural Policy* (CAP).

The Commissioner found that the maximum value of support payments available under the CAP for tomatoes (approximately €183 million during the relevant period) would have affected the raw material costs of tomatoes used by Feger and La Doria. The Commissioner therefore considered that the costs of raw tomatoes recorded by these companies did not reasonably reflect competitive market costs.

The usual practice of the Commission in these circumstances is to identify a suitable benchmark for the replacement of the costs of raw tomatoes, but it was unable to do so in this instance. Accordingly, the Commission *uplifted* Feger and La Doria’s raw tomato costs (by adding an amount of €0.037 per kilogram (kg) to the verified recorded costs of the exporters to offset the direct income support payments) when calculating the normal value. This had the effect of increasing the number of unprofitable transactions, and therefore increasing the normal value.

The then Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the then Parliamentary Secretary) accepted the Commissioner’s recommendations and imposed anti-dumping measures on Feger and La Doria on 11 February 2016.

### Anti-Dumping Commission Reinvestigation Report No. 360

Following applications from Feger, La Doria, the European Commission (EC) and the Government of Italy, the ADRP initiated a review of the then Parliamentary Secretary’s decision and the findings in REP 276 on which it relied.

The ADRP subsequently requested that the Commissioner reinvestigate certain findings. To the extent that the reinvestigation relates to the matters contended for in Reviews 349 and 354, the Commissioner was required to:

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- examine whether the cost for raw tomatoes recorded in the accounts of Feger and La Doria should be considered to be “competitive market costs”, and if not, whether he may adjust those costs in accordance with the Act; and
- assess the magnitude of that cost adjustment (that is, whether €0.037 / kg is the right amount to use in any uplift).

REP 360 found, on the basis of a regression analysis undertaken by the Commission on data obtained during the conduct of the reinvestigation, that the CAP payments received by growers of raw tomatoes did not appear to influence the prices paid by Feger and La Doria. In the absence of any further evidence to the contrary, the Commissioner found that the raw material cost of tomatoes reported in the accounting records of Feger and La Doria reasonably reflected a competitive market cost, and therefore recommended that no uplift be applied in the dumping margin calculation.<sup>10</sup>

The ADRP accepted this particular finding in REP 360, including the finding with regard to the uplift, and recommended to the Parliamentary Secretary that he make a new decision in those terms.<sup>11</sup> The Parliamentary Secretary accepted the ADRP’s recommendations.<sup>12</sup>

### Anti-Dumping Commission Report Nos. 349 and 354

SPCA submitted following the publication of *Statement of Essential Facts Nos. 349 and 354* (SEF 349/354) that the conclusions reached by the Commission were pivoted around the findings of REP 360. SPCA’s submission is contained in full on the electronic public record for those reviews.<sup>13</sup>

In this submission SPCA raised several issues in regard the Commission’s reliance on the findings of REP 360, however for the purposes of this reinvestigation, the key argument was that the data used in Chart 1 of SEF 349/354 (also presented as Chart 4 in REP 360) was not suitable for modelling a linear regression analysis and therefore the conclusions drawn by the Commission from this analysis were incorrect.

SPCA sought comment from a specialist in data analysis on the method employed by the Commission in conducting its analysis. SPCA concluded from the specialist report commissioned that “the ADC’s analysis does not meet the conditions of a linear regression analysis”, “incorrect data has been used...and the regression is not correct” and “the ADC needs to critically examine its reliance on this Chart (and the other Charts in REP 360) and reassess the validity of its conclusions.”<sup>14</sup>

SPCA provided a copy of the specialist report in support of its submission.

In REP 349/354 the Commission stated that “the analysis of the data in REP 360 has been accepted by the ADRP and the Parliamentary Secretary. The Commission does not

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<sup>10</sup> [REP 360](#) is available on the ADRP website.

<sup>11</sup> The ADRP’s findings and recommendations are contained in [ADRP Report No. 35](#).

<sup>12</sup> [Notice](#) of the Parliamentary Secretary’s decision was given on 5 January 2017.

<sup>13</sup> Public record for case 354, [Document 063](#) refers.

<sup>14</sup> *ibid.*, at paragraphs 54 and 55.

consider it appropriate to revisit the interpretation of data from REP 360 in these reviews.”<sup>15</sup>

### 4.3 The Commission’s reinvestigation

The Commission considers that all of the submissions and evidence presented to it in respect of the CAP are relevant only insofar as they enable the Commission to establish whether the cost of raw tomatoes (as recorded by exporters in their accounting records) reasonably reflect competitive market costs associated with the production of like goods.<sup>16</sup> This matter was dealt with in REP 276 and then reinvestigated in REP 360, at which point the Commissioner found that the cost of raw tomatoes reflected competitive market costs.

SPCA’s various submissions to the Commission that were addressed in REP 360 and REP 349/354 (and have now been made to the ADRP) largely question whether the evidence obtained by the Commission is accurate and reliable in light of other evidence that SPCA has obtained. SPCA considers that the evidence it refers to in its submissions is superior, that the evidence demonstrates that the value of CAP payments received by growers is so significant that the costs of raw tomatoes do not reasonably reflect competitive market costs, and that these costs should be uplifted or replaced when calculating normal values in REP 349/354.

That payments are received by growers under the CAP is not in dispute. What is vigorously disputed by SPCA and the EC is the scale of those payments, and their effect (if any) on the market for raw tomatoes.

#### 4.3.1 Value of CAP Payments Received

SPCA sets out in some detail in *Attachment A* to its application its understanding of how the CAP operates.<sup>17</sup> The Commission notes that many of these points have been raised in previous submissions, including the size of the national ceiling (being the amount apparently devoted to tomato payments) and SPCA’s understanding of the amounts apparently received by growers. SPCA contends in *Attachment A* to its application that the amount received is very large (in the order of €0.081 per kg, based on the apparent amount in the “young farmer” application form)<sup>18</sup> and that the market for raw tomatoes is clearly distorted by such an amount.

These views have been strongly rejected in multiple submissions by the EC, which has previously explained that there is no tomato-specific payment, and that it is therefore impossible to establish what amount has been received by tomato growers generally.<sup>19</sup>

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<sup>15</sup> REP 349/354 at page 14.

<sup>16</sup> Subsection 43(2)(b)(ii) of the *Customs (International Obligations) Regulation 2015* refers.

<sup>17</sup> The application and *Attachment A* can be found on the [ADRP website](#).

<sup>18</sup> The original application form (in Italian) was included as [Document 063d](#) on the public record for case 354; an English-language translation was subsequently provided, and is [Document 064b](#) on the same public record. The form apparently indicates that the value of the tomato benefit is €2970.87 per acre, however SPCA consistently refers to the value as a per hectare amount. This appears to simply be an error in the English translation.

<sup>19</sup> See, for example, [Document 014](#) on the public record for case 360; similar points are raised in the EC’s [submission to the ADRP](#).

Regardless, the EC contends that SPCA's estimates are significantly overstated, based on a misleading ceiling amount which, in any event, is not coupled to tomatoes production.

As was explained in some detail in REP 360, the Commission has obtained evidence of actual, verified amounts for CAP payments received by growers supplying raw tomatoes to Feger and La Doria during the relevant investigation period. In this regard, the Commission reiterates the point made in REP 349/354 that it received data relating to all growers supplying tomatoes to Feger and La Doria, supported by certificates covering growers supplying 85 per cent of Feger's raw tomato purchases and 37 per cent of La Doria's raw tomato purchases. The Commission also had access to the Agenzie per le Erogazioni in Agricoltura (AGEA) database which allowed the Commission to confirm the accuracy of the information recorded in the spreadsheets for the certificates provided by Feger and La Doria. This information has been previously provided to the ADRP, along with the original documents (comprising the relevant certificates of land held and CAP payment entitlements received in respect of that land). The Commission observes again that the amounts actually received ranged from €287 per hectare (ha) to €3872 / ha, and that a small proportion of growers (less than 5 per cent by volume supplied) received no CAP payment at all.

The Commission notes Table 2 in *Attachment A* to SPCA's application, which creates a hypothetical farm growing tomatoes, wheat and maize to illustrate the difference between its approach and the "averaging" approach that SPCA considers was used by the Commission. The hypothetical farm is also intended to show the apparent effect of fallow land; SPCA contends that a *doubling* of the apparent subsidy amount is required to establish the true impact of CAP payments on raw tomato prices.

The Commission rejects SPCA's approach. The Commission has no data pertaining to the actual land area used to cultivate crops, nor what crops were cultivated, by the growers that supplied tomatoes to Feger and La Doria. SPCA's hypothetical farm is therefore not "evidence" of the circumstances of those actual tomato growers and the CAP payments they received.

In the Commission's view, the verified information on which the Commission relied in REP 360 is the more reliable evidence of payments actually received. To accept the amount contended for by SPCA as the amount of the CAP payment actually received in respect of a kilogram of raw tomatoes is to take the most charitable reading possible of the relevant Regulations and SPCA's interpretation of them. As has been noted previously, the EC is vehement in its rejection of SPCA's interpretation. The Commission considers the evidence of the EC in respect of the operation of the CAP to be more persuasive than the submissions put forward by SPCA.

As was noted in the Commissioner's submission to the ADRP,

SPCA prefers to rely on data which is circumstantial in nature, and contends that the circumstantial evidence ought to be considered to be more reliable and accurate than the information that the Commission has verified (see section 4.4 of REP 360 for details of verification). In particular, SPCA has relied on a single instance of a particular SPS payment value to determine that actual payments *generally* are of the same quantum.<sup>20</sup>

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<sup>20</sup> [Submission to ADRP](#), page 2 refers.

The Commission has considered the evidence presented by SPCA, but has concluded that the verified evidence of the growers supplying raw tomatoes to Feger and La Doria is more persuasive in establishing the quantum of the CAP payments actually received. On this basis, the Commission affirms its view that the amounts established in REP 360 are correct.

#### 4.3.2 Statistical Analysis

The Commission has subsequently had regard to the submissions made by SPCA regarding the statistical analysis of the CAP payments received by each grower and its previous assessment of the degree to which CAP payments influenced the prices paid for raw tomatoes. The degree of influence is relevant to assessing whether the cost of raw tomatoes recorded in Feger and La Doria's accounting records reasonably reflect a competitive market cost. As a result, the remaining question is whether the statistical analysis of the verified data obtained from Feger and La Doria provides any basis for reaching a different conclusion to the one reached in REP 360.

Noting SPCA's criticisms concerning influential price outliers and variations in the spread of the data (heteroscedasticity) and other matters raised in its submission on the statistical analysis presented in REP 360, the Commission has re-examined the data presented to it. The Commission's new analysis has controlled for tomato type, month of the year and order size and used a "robust standard errors" technique to address these concerns. The Commission accepts that this ought to have been part of the statistical analysis relied on in REP 360, and that taking this approach increases the reliability of the results. The Commission's analysis is included at **Confidential Attachment 1**.

The Commission has examined the effect of CAP payments at the order (i.e. per invoice), farmer, cooperative and association levels. However, only the data provided by Feger was sufficiently detailed to enable this level of analysis; as a result, the Commission was able to weight the responses of individual suppliers in proportion to their market share (in terms of their supply to Feger). This ensures that the analysis reflects the average price paid by Feger during the period, since larger suppliers play a greater role in determining the average price paid. From a statistical point of view, the sample is therefore only valid for drawing conclusions with respect to Feger during the period July to September 2014.

The incorporation of other information not in the Commission's possession (such as other crops produced, actual area of land under cultivation, actual tomato yield rate and greater detail on the types of tomatoes actually produced and sold, not just to Feger and La Doria but to other processors) would have provided additional confidence in this type of analysis. However, there is no timely or practical means by which the Commission would be able to obtain this information, as it would require significant additional voluntary effort by all of the growers supplying to Feger and La Doria, and there is no reasonable prospect of this occurring. The Commission's analysis generates an  $r^2$  of 0.9638, which suggests the additional information would have little practical impact.<sup>21</sup>

At the farmer level, and only when observations have been weighted by their market share, the effect of CAP payments on the prices obtained by growers for raw tomatoes purchased by Feger is statistically significant, but is small. This suggests that many farms

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<sup>21</sup> The  $r^2$  value explains how much the movement in one factor can be used to explain movement in the other, and is expressed as a fraction of 1 (i.e. a perfect explanation will be 1 and no correlation at all will be zero). This 0.9638 indicates a high degree of correlation.



do not reduce prices in response to the subsidy, but those that do happen to supply more tomatoes to Feger. There is no evidence before the Commission which indicates that there is a causal link between the response of individual farms to the CAP payments and the volumes purchased from those growers. The Commission also notes that decisions on tomato production (both to produce at all and the amount of land to allocate to cultivating tomatoes) are made at the farm level, and that there is no evidence to suggest that these decisions are influenced by the cooperatives or associations / producer organisations of which farmers are members.

The Commission notes that tomato prices are negotiated by the associations on behalf of growers (and that a more statistically significant correlation between CAP payments and prices occurs at that level). Whilst this suggests that associations may be aware of the value of CAP payments received by their growers, the Commission's analysis does not account for the impact of aggregating and averaging across farmers (which would increase the impact of quality differences or other factors that are not included in the regression equation, both of which are plausible reasons for this result). Further, this result does not make economic sense - as the size of the seller increases (from farmer to cooperative to association), it would be expected, based on economic theory, that the sellers' bargaining power compared to the purchaser (the tomato processor) would *increase* and the pass-through of the subsidy would be less, rather than more. This suggests that the impact of another, unidentified variable is causing the impact of CAP payments on raw tomato prices at the association level to be overstated. Accordingly, the Commission considers that the more reliable analysis is undertaken at the farmer level.

The upshot of the Commission's analysis of the impact of CAP payments at the farmer level is that 8.4 per cent of the value of CAP payments received by growers is passed on to a reduced raw tomato price. REP 360 established that the weighted average value of CAP payments received by growers supplying Feger was €0.0142 / kg; the present reinvestigation has confirmed that this amount is based on the verified evidence of actual payments received. Accordingly, the Commission has concluded that the amount of the CAP payment that has been passed through to tomato prices paid by Feger is approximately €0.00112 / kg. The Commission therefore considers that CAP payments have had a negligible impact on the prices paid for raw tomatoes by Feger.

However, the absence of greater detail on the circumstances of these farms means that, whilst the Commission has confidence in the accuracy of the analysis of the information before it, some caution must be exercised. A change in the actual yield rate achieved by each grower, for example, which is influenced by soil quality, weather patterns, farming techniques and so on, would fundamentally impact the assessment. The Commission is required to make its findings based on positive evidence; whilst the above analysis is indicative of the circumstances of the growers supplying Feger and the apparent negligible impact of CAP payments on the prices paid by Feger, the Commission does not consider that the regression analysis alone is sufficient to determine that the cost of tomatoes as recorded by Feger are not competitive market costs. Further, the detailed analysis for Feger has little, if any, application to the circumstances which may prevail for La Doria or any other processor.

As set out in REP 360,

[T]here is no evidence to indicate that raw tomatoes were sold to Feger and La Doria at prices which were below cost, nor that prices were negotiated otherwise than at arms length. [...] The Commission is not aware of any evidence of other influence over the

market for raw tomatoes being exerted by the Government of the Italian Republic or the European Union that would artificially depress prices for raw tomatoes.

The Commission observes that prices are negotiated with the tomato processors via producer organisations in most cases. There are a large number of these organisations in Italy, and their market power appears to be relatively diluted given the varying prices which have been paid by Feger and La Doria. As a result, the Commission has no evidence which suggests that the producer organisations are influencing the market in such a way that would artificially depress prices for raw tomatoes.<sup>22</sup>

No evidence has been presented to the Commission at any stage of the original investigation, the reviews of measures or this reinvestigation which would suggest that the bargaining which occurs between associations and tomato processors is not competitive. On the contrary, the evidence before the Commission is that there are a large number of buyers and sellers in the market for raw tomatoes (265 growers across 11 producer associations supplied to Feger, which is just one amongst over one hundred previously identified exporters of PPT to Australia) which indicates a competitive market. Accordingly, the weight of the evidence before the Commission indicates that the cost of raw tomatoes recorded by tomato processors are competitive market costs.

#### **4.3.3 Other Matters**

SPCA submitted that the Commission did not consider that 2014 became the base year for the new Basic Payment Scheme (BPS) introduced in January 2015. SPCA contended that had the Commission examined the changes it would have found that the updated hectare amount was more reliable than the selected information supplied by exporters which was an average value of all farm subsidies, not just tomatoes.

The Commission maintains that submissions made by SPCA in REP 349/354 continue to prosecute the argument that the theoretical value of entitlements was more reliable information than the data supplied by the exporters. The Commission again notes that the certificates issued by AGEA detail grower's name, the year in respect of which the payment has been received, the number of titles held and the amount of land to which they relate, the amount received in respect of each title held, and the regulatory basis for the payment. These entitlements may be received in respect of land being used for multiple crops (which may either dilute or concentrate any potential impact on the cost of production of the goods). The Commission also accepts from the AGEA data that payments may be received in respect of land which lies fallow. The Commission was able to trace the entitlements pertaining to each grower through to the volume and value of raw tomatoes that they sold to Feger and La Doria, and was satisfied as to the accuracy and completeness of the information provided. To accept SPCA's contention would be to conclude that the certificate information obtained by the Commission was somehow incomplete (i.e. that other payments were also received by growers, but not revealed in the AGEA certificates pertaining to their landholdings). The Commission considers that the likelihood of this having occurred is extremely low.

The base years (as posited by SPCA) identify the total pool of funds devoted to CAP payments to tomato growers (i.e. a coupled payment). This apparent pool of funds, when worked out on a per kg basis, is far in excess of what growers supplying Feger and La Doria actually received. SPCA's explanation is that the actual amounts received must be

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<sup>22</sup> REP 360, pages 33-34.

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erroneous because they do not align (when extrapolated) to the total pool identified by SPCA.

The Commission notes that the EC has emphatically rejected any suggestion that the base years operate in the way contended for by SPCA. The detailed evidence available to the Commission (and referred to above) is, in the Commission's view, more persuasive than the evidence presented by SPCA. Having relied on the verified value of CAP payments actually received, the Commission does not consider it necessary to re-examine the question of which year is the "base year".

Finally, although the Commission accepts that a "young growers" payment is available and is coupled to tomato production, the Commission has no information which would enable it to ascertain what proportion of growers supplying tomatoes in Italy are "young growers". The apparent impact of the additional €160 / ha payment on tomato prices would be extremely small (assuming a consistent yield rate of 73,000 kg / ha, the value of the additional payment is approximately €0.0022 / kg), and would be diluted further in line with the proportion of growers that actually received the payment.

## 5 CONSERVE ITALIA - NORMAL VALUE OF CERTAIN PRODUCT CODES WITH THE CIRIO TRADEMARK

### 5.1 Request to reinvestigate

The ADRP's reinvestigation request is presented as follows:

"In its reinvestigation, the ADC should take into consideration the claim raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia, as set out in the third ground of review in its application for review.

The ADC should note that there is evidence that this claim was raised by Conserve Italia in an email to the ADC dated 14 February 2017.<sup>23</sup> In its s.269ZZJ submission to the ADRP the ADC recognises that such a claim was made by Conserve Italia, but states that no evidentiary basis was provided to the ADC to justify how the adjustment was arrived at, nor how it ought to be quantified, and as a result the ADC did not make the adjustment. However, there would appear to be no indication in REP 349/354 (or in any other document on the record) that this claim was considered or the reasons for its rejection provided."

In the third ground of review in its review application, as referenced above by the ADRP, Conserve Italia submitted that the Final Report did not consider its adjustment claim concerning the added value (or higher immaterial value) of the CIRIO trademark in Italy compared to Australia. Conserve Italia submitted that Italian consumers regard CIRIO brand products as premium quality products, whereas the CIRIO brand does not have the same reputation in the Australian market. Conserve Italia contended that the added value of the CIRIO brand in Italy affects the selling price of CIRIO brand products sold in the domestic market as compared to the Australian market, and therefore there should be a downward adjustment to normal value for the difference in brand value.

Conserve Italia contended in its application for review that its claim for a downward adjustment to the normal value of CIRIO branded products is based on verified information provided with the questionnaire response, as well as documents issued by independent research bodies. Conserve Italia calculated the downward adjustment claimed by reference to a product code which represented the one model sold in both Italy and Australia as both a CIRIO and private label brand. The magnitude of the adjustment was calculated by subtracting the difference in the export price between the CIRIO and private label brand sold in Australia from the difference between the normal value of the CIRIO and private label brand sold in Italy.

Conserve Italia further submitted that the Commission simply disregarded the claim for a downward adjustment to normal value without providing any solid ground for rejection other than the timely completion of the Final Report. Conserve Italia submitted that the Commission had sufficient time to consider the adjustment as it was raised by Conserve Italia three days after the disclosure of the dumping calculations which were provided to the company prior to the publication of the SEF.

The ADRP notes in its reinvestigation request that there is evidence that Conserve Italia raised this claim. The ADRP references the subsection 269ZZJ submission made by the Commission to the ADRP in which the Commission acknowledges that Conserve Italia

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<sup>23</sup> See Confidential Annex IV to Conserve Italia's submission to the ADRP.

raised this claim but stated that no evidentiary basis was provided by Conserve Italia to justify how the adjustment was arrived at or ought to be quantified. The ADRP noted in its reinvestigation request that there appears to be no indication in REP 349/354 that the claim was considered or the reasons for its rejection provided.

## **5.2 Background**

Conserve Italia provided the Commission with Australian sales data in accordance with section B and domestic sales data in accordance with section D of its exporter questionnaire response. At section E of the exporter questionnaire the Commission provided information on the fair comparison principle and asked Conserve Italia to quantify the amount of any adjustments sought to ensure the fair comparison of normal values and export prices. Conserve Italia did not make any representation in section E of the exporter questionnaire in relation to product codes with the CIRIO trademark.

Conserve Italia first raised the claim concerning the different value of the CIRIO trademark in Italy and Australia in an email to the Commission on 14 February 2017. This email was in response to the Commission's email of 9 February 2017, which contained a draft of the Conserve Italia verification report and associated calculations which had been prepared following a desktop verification process.

In that email Conserve Italia argued that an adjustment was required to normal value to reflect the different value of the CIRIO trademark in the Italian and Australian markets. Conserve Italia referenced the findings of an Italian market research firm to support the argument that the CIRIO brand attracts a pricing premium in Italy. Based on these market research findings, Conserve Italia proposed, "to be prudent", a reduction to the normal value by a factor "which is lower than the half of the difference" between the CIRIO sales price index and the average sales price index for the whole of the Italian market, as determined by the market research company.

These market research findings were not provided to the Commission by Conserve Italia at the time of the email however were subsequently provided, and confirmed to accord with Conserve Italia's contention.

As the SEF was due on 20 February the Commission did not have sufficient time to fully consider this new claim raised by Conserve Italia and therefore the claimed adjustment was not addressed in SEF 349/354.

Conserve Italia made a submission to the Commission, dated 12 March 2017, in response to SEF 349/354. In this submission Conserve Italia reiterated the reasoning contained within the email of 14 February 2017 for seeking an adjustment for the different value of the CIRIO trademark. Conserve Italia did not submit an actual claim amount, or a method by which the claimed adjustment could be quantified, but rather identified a numerical range from which it proposed that a "reasonable correction factor" could be drawn.

The Commission notes that Conserve Italia's application for review to the ADRP does contain a statement of the amount of the adjustment sought and the method used for calculating it. This information was not, however, before the Commission during the conduct of the review.

### 5.3 The Commission's reinvestigation

Considering the background information detailed above, the Commission finds that no adjustment could be made under subsection 269TAC(8) to the normal value of product codes with the CIRIO trademark.

The Commission is satisfied that Conserve Italia provided reasons in support of its claim for an adjustment to the normal value based on the different value of the CIRIO trademark in the Italian and Australian markets, however the Commission is not satisfied that Conserve Italia was able to quantify, during the conduct of the review, the magnitude of the adjustment sought, or provide a coherent and verifiable method for determining the adjustment.

In this regard the Commission notes that in both the email of 14 February 2017 and the submission of 12 March 2017, Conserve Italia relied upon the data provided by a market research firm to evidence the existence of a brand premium for the CIRIO brand in the Italian market. The Commission accepts the veracity of this evidence. Conserve Italia did not, however, demonstrate to the Commission how this evidence could be applied for the purposes of determining the magnitude of the claimed adjustment, proposing instead that an adjustment be made arbitrarily from within the range of possibilities indicated by the research. The Commission further notes that at no time during the review of measures did Conserve Italia provide any corresponding information of the relative brand positioning of the CIRIO brand within the Australia market. Without any information relating to the positioning of the CIRIO brand within the Australian market, Conserve Italia (and therefore the Commission) had no verifiable basis for asserting that a brand differential existed between the Italian and Australian markets, nor any verifiable basis for quantifying the magnitude of any such brand differential.

As such, the Commission finds that it did not have before it during the course of the review sufficient information to allow the claim that a brand differential existed between the Italian and Australian markets to be assessed.

The Commission notes that the proposed method for calculation of a brand adjustment in Conserve Italia's application for review to the ADRP was not provided to the Commission at any point during the conduct of the review. The Commission further notes that the approach proposed in the application for review represents a significant deviation from the approach proposed during the conduct of the review. The approach proposed in the application for review also evidences the existence of a brand premium in both the Italian and Australian markets, and results in a claim for an adjustment for the brand differential which is significantly less than that claimed during the course of the review.

In the Commission's view the method proposed by Conserve Italia in the application for review, resulting as it does in a significantly smaller claim for adjustment, supports the Commission's finding that insufficient information was provided during the course of the review to allow the adjustment as then claimed by Conserve Italia to be appropriately assessed.

Notwithstanding the Commission's finding that it did not have before it during the course of the review sufficient information to allow Conserve Italia's claimed adjustment to be assessed, the Commission has, as part of its reinvestigation, given consideration to the additional information presented to the ADRP by Conserve Italia in its application for review.

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In assessing Conserve Italia's request for this adjustment, the Commission does not consider that price differences an exporter can achieve between a domestic and export market is a factor warranting adjustment to ensure fair comparison between export prices and normal values. The Commission cannot be satisfied that the additional pricing premium Conserve Italia claims to enjoy in the Italian market is solely related to brand recognition. In an environment where dumping is occurring, as is the case in the Australian market for the goods, a lower price premium between goods sold into a domestic market and export market would be expected. The Commission considers that Conserve Italia's claim for an adjustment based on the different value of the CIRIO trademark between the domestic and Australia market is effectively a claim for an adjustment for dumping, therefore this claim is rejected.

## 6 LSI - METHODOLOGY USED TO CALCULATE LSI's ASCERTAINED NORMAL VALUE

### 6.1 Request to reinvestigate

The ADRP's reinvestigation request is presented as follows:

"In reinvestigating this finding the ADC should reconsider its reasoning for finding that LSI sales in the domestic market of bright cans (unlabelled) were unsuitable for use in *"calculating a domestic sale price as it is uncertain whether these will be entered into home consumption"* because *"the unlabelled goods can be either exported or sold domestically, and the manufacturer does not have control over (or potentially awareness of) the end destination for the goods."*

Section 269TAC(1) provides:

*"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."* [emphasis added]

The reasoning of the ADC in REP 349/354 appears to presume that complete certainty is required by s.269TAC(1)...that the goods sold domestically are entered for home consumption and not exported, if such sales are to be used to determine normal value. The ADC appears to consider that a mere uncertainty concerning the final destination of the goods is sufficient to exclude these goods from the normal value calculation. I do not think that this can be read into s.269TAC(1). Rather, it would appear, as LSI suggests, that the emphasis should be on whether there is some knowledge or presumed knowledge that the goods may actually be exported, that is, *"if like goods are not so sold by the exporter"*(emphasis added). Only if there is such an indication, should the ADC look to like goods so sold, *"by other sellers of like goods"*, to determine normal value.

This would appear to align with the [World Trade Organization] WTO case law and the practice of other WTO members referred to by LSI in its s.269ZZJ submission to the ADRP,<sup>24</sup> as well as the ADC's own past practice.

There is no indication in REP 349/354 that it was evident or that there was any knowledge (or reason to believe) by LSI that the products sold were to be exported. In REP 351 the ADC did not appear to question whether similar sales by LSI entered into home consumption, and stated:

*"As a result of the above analysis, the Commissioner is satisfied that he has sufficient information to rely on Le Specialità's domestic sales for the purposes of calculating a normal value under subsection 269TAC(1)."*<sup>25</sup>

The ADC also indicates in both SEF and REP 349/354 that the approach taken in REP 351 was based on *"the best information available at the time"*, implying that better information became available in Reviews 349/354 (in the form of verified normal values of

<sup>24</sup> See Footnotes 3, 4 and 5 of LSI's submission, page 6.

<sup>25</sup> See REP 351, page 10.



other exporters), which the ADC then **chose** to use.<sup>26</sup> However, s.269TAC(1) does not allow for such a choice of better information. It only provides for the normal value to be determined by other sellers of like goods, “if there are no sales of like goods sold in the ordinary course of trade for home consumption in the country of export” (emphasis added) by the exporter.

Please note that in its reinvestigation of this finding the ADC should only consider information that was before it during the course of the investigation.<sup>27</sup>”

## 6.2 Background

Subsection 269TAC(1) provides that the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade (OCOT) 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.

During the review period, which coincided with the period considered for the accelerated review, LSI only sold unlabelled, or “bright”, cans on the domestic market.

In REP 351, based on the information available to the Commission at that time, the normal value for LSI was determined using LSI’s domestic sales of bright cans, with adjustments made for labelling and packaging to account for the differences between the goods sold domestically and the goods that would be exported.

In REP 349/354 the Commission reviewed the methodology employed to determine a normal value for LSI on the basis of additional information obtained during the course of the review. Specifically, in undertaking on site verification of four other exporters of the goods, the Commission determined that bright cans sold into the domestic market would not necessarily be entered into home consumption. The Commission removed sales of bright cans from the domestic sales of all exporters subject to the review.

In relation to LSI, the Commission concluded in REP 349/354 that:

“LSI’s domestic sales of bright cans are not suitable for use in calculating a domestic sale price under subsection 269TAC(1), as it is uncertain whether these goods will be entered into home consumption in the country of export. This is because the unlabelled goods can be either exported or sold domestically, and the manufacturer does not have control over (or potentially awareness of) the end destination for the goods. This approach is consistent with the approach taken for all other exporters verified in these reviews.”

On the basis of this finding the Commission determined the ascertained normal value for LSI under subsection 269TAC(1) with reference to the price paid or payable for like goods in the OCOT for home consumption in Italy in sales that are arms length transactions by other sellers of like goods. The price was determined using the weighted average of the ascertained normal value for the five verified exporters of the goods whose normal values were determined under subsection 269TAC(1).

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<sup>26</sup> In SEF 349/354 the ADC used the words “chosen instead to determine the ascertained normal value ... (emphasis added), page 19.

<sup>27</sup> In its s.269ZZJ submission, LSI makes reference to a document that does not appear to have been before the ADC when it made its findings as set out in REP 349/354, and would therefore not be considered to be “relevant information” for the purpose of the definition in s.269ZZK.

### 6.3 The Commission's reinvestigation

The Commission has re-examined the information before it during the course of the review within the context of the ADRP's request for reinvestigation of this finding.

As detailed above, subsection 269TAC(1) provides that the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade **for home consumption in the country of export** in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

The Commission's *Dumping and Subsidy Manual* (the Manual) provides little guidance in regards defining or determining what constitutes the like goods being sold for home consumption in the country of export.

The Commission notes that Article 2.1 of the WTO Anti-Dumping Agreement states that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

Clarification of the home consumption issue in Article 2.1 is provided in the *Report of the Panel in European Communities – Anti-Dumping Measure on Farmed Salmon from Norway (EC – Salmon (Norway))* which states "Article 2.1 makes clear that it is only sales that are "destined for consumption in the exporting country" that may qualify as domestic sales. Thus, where a producer sells to an unrelated exporter (or a trader) knowing that the product will be exported, that sale cannot, in our view, qualify as a sale intended for domestic consumption. Such a sale could more properly be characterised as a producer's indirect export sale."

The comments of the Panel indicate that a key determinant is the knowledge of the producer as to whether the goods will be subsequently exported.

This reading is supported by the findings of the International Trade Remedies Branch in Report No. 196 Review of Anti-Dumping Measures – Food Service and Industrial Pineapple Exported from Thailand (REP 196), where it was found that the domestic sales of Natural Fruit Co., Ltd (Natural) were not entered for home consumption in Thailand.

The visit report for Natural states:

"as far as they are aware, none of its Thai customers sold the GUC into the domestic market in Thailand during the review period. For completeness, we confirmed that Natural have no actual knowledge of the final destinations of the GUC provided to Thai trading companies pursuant to these 'domestic' transactions."

Similarly, the visit report for Thai Pineapple Canning Industry Corp Ltd (TPC) and Siam Agro-Food Industry Public Company Limited (SAICO), states:

"We also confirmed that SAICO sold a very small volume of consumer pineapple to traders registered in Thailand. We confirmed that these sales were not 'true domestic' sales as SAICO understood them to be intended for export by the traders.

To satisfy ourselves of the veracity of SAICO's claim that all 'domestic' sales were not 'true domestic' sales, we requested, and TPC provided, a SAP summary report of all sales of canned pineapple by customer.

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We selected the customer with the greatest sales volume (excluding sales from SAICO to TPC) and confirmed that the customer was a Thai trading company whose operations relate to the export of the goods. We are of the opinion that this product was bound for export, and not for consumption in Thailand.”

The Commission further notes in respect of REP 196 that Dole Thailand Limited (DTL) identified the fact that it sold goods into the domestic market to customers who on sold the goods into export markets as well as into the domestic market. Only those goods that were identified as being on sold into an export market were excluded from DTL’s domestic sales listing.

The Commission is of the view that in REP 196 a finding that domestic sales were not entered for home consumption in the country of export was predicated upon the knowledge of the exporter that the goods would be subsequently sold into an export market. This appears consistent with Article 2.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (also referred to as the Anti-Dumping Agreement), and the interpretation espoused in the Report of the Panel in *EC – Salmon (Norway)*. The Commission further notes that in REP 196 the issue of goods being sold for home consumption was considered on an exporter by exporter basis, that verification activities were undertaken to evidence that the exporter’s knowledge as to the subsequent exportation of the goods sold into the domestic market was sound, and only those sales thus identified as having been subsequently exported were removed from the relevant exporter’s domestic sales listing.

This approach is in contrast to that adopted in REP 349/354, where all sales of bright cans were removed from domestic sales for all exporters on the basis that the Commission was uncertain whether the goods, being unlabelled and therefore able to be sold either domestically or exported, would be entered into home consumption in the country of export. This approach removes the knowledge of the exporter as to whether the goods are exported as the determining factor and instead implies that domestic sales can only be considered where the Commission has certainty that the goods will be consumed in the country of export. This shift in approach is, in the Commission’s view, not consistent with the intent of subsection 269TAC(1).

Furthermore, the Commission notes that the exporter questionnaire sent to LSI for the purposes of REP 351, and the exporter questionnaires sent to exporters in REP 349/354 did not contain any specific requests for information about the exporters’ sales of bright cans. The verification activities undertaken by the Commission for the purposes of REP 349/354 did allow the domestic sales of bright cans to be identified and segregated from sales of labelled cans, however there appears to be no evidence that the Commission undertook as part of those verification activities reasonable inquiries to establish the exporters’ knowledge as to whether those bright cans would subsequently be sold into an export market, or indeed research regarding whether the purchasers of those bright cans were on selling them into the domestic market or into an export market.

The Commission’s reinvestigation finds that during the conduct of the review the Commission did not take sufficient steps to justify the exclusion of all bright cans from domestic sales for all exporters on the grounds that those bright cans were not entered for home consumption in Italy. As such, LSI’s sales of bright cans ought to have been considered to have been entered for home consumption for the purposes of section 269TAC(1).

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Based on this finding, for the purposes of the reinvestigation, the Commission has further determined that LSI's domestic sales were in the OCOT having regard to section 269TAAD. As a result of this analysis, the Commission is satisfied that LSI's domestic sales are suitable for the purposes of calculating a normal value under subsection 269TAC(1).

Noting the circumstances of LSI's production and sales, the Commission considers it necessary to make a range of adjustments under subsection 269TAC(8)(b) to account for the differences between the goods sold domestically and the goods that would be exported. The Commission considers it most appropriate to do this on the basis that LSI will export a packed and packaged product which has been labelled and is ready for sale to the customer.

In REP 351, the Commission undertook an uplift to LSI's sales prices to reflect the additional costs associated with manufacturing a labelled can at an ex-works point, as well as the costs associated with getting the cans from an ex-works to a Free on Board (FOB) point.

The Commission has reviewed this approach within the context of the additional information obtained during the course of the review. Specifically, the Commission has undertaken an analysis of the domestic sales of bright cans and labelled cans for each exporter subject to verification. This analysis has been conducted by product type (chopped, peeled etc.), size of can, level of trade and delivery terms. The Commission's analysis indicates that there is a differential between the selling prices of bright cans and labelled cans that significantly exceeds the actual cost associated with labelling a bright can.

Having considered this analysis, the Commission is of the view that the approach taken in REP 351 captured the additional costs LSI would incur in producing a labelled can delivered to an FOB point, but did not capture the pricing differential underlying the domestic tinned tomato market, which is that labelled cans are sold by producers to traders and distributors in the domestic market at a considerably higher price point than bright cans, and well in excess of the actual difference in cost incurred converting a bright can to a labelled can.

Given that over 90 per cent by volume of LSI's domestic sales related to a single product type, the Commission has calculated, for that same product type, the weighted average difference in selling prices to traders and distributors at ex-works delivery terms for the verified exporters that had a normal value determined under subsection 269TAC(1). The Commission has then uplifted LSI's normal value by this amount.

As such, the Commission has made adjustments under subsection 269TAC(8)(b) to LSI's normal value as follows:

- an upward adjustment for the additional production costs incurred by LSI to manufacture bright cans to an ex-works point, using the verified cost data relied upon in REP 351;
- an upward adjustment for the pricing differential between bright cans and labelled cans sold into the domestic market as described above; and
- an upward adjustment for the costs associated with transferring the goods from an ex-works point to an FOB point, calculated as the weighted average FOB costs of the verified exporters having a normal value calculated under subsection TAC(1).

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The Commission recommends, having reinvestigated this ground, that LSI's ascertained normal value be amended.

The Commission's calculation of LSI's ascertained normal value is at **Confidential Attachment 2**.

## 7 LSI - METHODOLOGY USED TO CALCULATE LSI'S ASCERTAINED EXPORT PRICE

### 7.1 Request to reinvestigate

The ADRP's reinvestigation request is presented as follows:

"Since LSI did not export PPT to Australia during the review period, the ADC calculated the AEP [ascertained export price] under subsection 269TAB(3) by having regard to "*all relevant information*" because sufficient information was not available to enable the export price to be determined under the preceding subsections. In REP 349/354 the ADC therefore calculated the weighted average of the AEP from the five verified exporters of the goods whose export prices were determined under subsection 269TAB(1).

In its s.269ZZJ submission the ADC stated that in REP 351, the only relevant information available for the determination of the AEP was the ANV, while in REP 349/354, "*there was significantly more reliable information, namely verified export prices comprising 93 per cent by volume of the exports under review.*" The ADRP has requested that the Commission reinvestigate its finding in regards to LSI's ascertained export price. The ADRP has requested that the Commission, in reinvestigating this finding, also take into consideration other relevant information, including:

- that LSI has a negative dumping margin and therefore its ascertained export price is greater than its ascertained normal value;
- the combination method of the duties may give rise to circumstances where the actual export price is below the ascertained export price but still higher than the ascertained normal value, effectively triggering the variable duty and resulting in a dumping duty being imposed on exports that are not in fact dumped, as they are higher than the normal value; and
- previous practice of the ADC in reviews where there were no exports during the review period, for example:
  - in REP 351 the ascertained export price was set at the same level as the weighted average normal value for LSI, so that a dumping duty would only be incurred where the actual export price is below this, that is, when dumping occurs; and
  - in REP 250, in circumstances where the exporter concerned did not export during the review period, the ADC considered it appropriate to determine the export price to be the same amount as the normal value, so that dumping duty would only be incurred where the actual export price is below this, that is, when dumping occurs.

In reinvestigating this finding, the ADC should also take into consideration:

- Article VI:2 of the GATT and Article 9.3 of the Anti-Dumping Agreement;
- Section 8(2) of the *Customs Tariff (Anti-Dumping) Act 1975* ("The Dumping Duty Act") which provides for a dumping duty to be imposed in relation to which the amount of the export price is less than the amount of the normal value, calculated in accordance with s.8(6) of the Dumping Duty Act (in this case being the difference between the amounts the Minister ascertains to be the export price and the normal value of those particular goods)."

### 7.2 Background

In REP 351, the Commission found that, as LSI did not export the goods to Australia during the review period, an export price was unable to be determined under subsection

269TAB(1). Accordingly, an export price was determined under subsection 269TAB(3), having regard to all relevant information. Specifically, the ascertained export price was determined as being equal to the ascertained normal value.

In REP 349/354, the ascertained export price was similarly determined pursuant to subsection 269TAB(3), having regard to all relevant information. During the course of the review the Commission obtained export price information from five verified exporters representing 93 per cent by volume of exports under review. The Commission considered this information to be more reliable and relevant than the information available in relation to export pricing during the conduct of the accelerated review (REP 351). As such the Commission determined an ascertained export price pursuant to subsection 269TAB(3) for LSI by calculating the weighted average of the ascertained export prices from the five verified exporters of the goods who had export prices determined under subsection 269TAB(1).

For LSI, the ascertained export price determined exceeded the ascertained normal value, and as such LSI did not have a dumping margin.

In REP 349/354, the form of measures applicable to the goods exported to Australia from Italy was recommended to be an amount worked out in accordance with the combination method pursuant to subsection 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013*. The combination method applicable to the dumping duty notice applies duty as a fixed percentage of the actual export price or the ascertained export price of the goods (whichever is the greater), with a variable component if the price is below the ascertained export price for the exporter.

The effect of the Commissioner's recommendations in REP 349/354 is that each exporters' exports of the goods attracts a fixed amount of interim duty which is equal to the dumping margin (i.e. the difference between the export price and the normal value of the goods), expressed as a proportion of the actual export price or ascertained export price (whichever is greatest), plus a variable amount of duty if the export price is below the ascertained export price. For exporters found to have a negative margin, such as LSI, the fixed component of dumping duty would be zero.

### **7.3 The Commission's reinvestigation**

The Commission has re-examined the material before it within the context of the ADRP's request for reinvestigation of this finding.

The Commission is satisfied that in the current circumstances, where LSI has not exported goods during the review period, and therefore cannot have an export price determined under subsection 269TAB(1), the most relevant and reliable information available for the determination of an export price under subsection 269TAB(3) is the verified information obtained in relation to the export sales of other exporters.

During the conduct of the review the Commission obtained verified information relating to 93 per cent of exports by volume to Australia from Italy. The information obtained allowed the Commission to not only understand export pricing, but to develop a detailed understanding of the composition of the Australia market for the goods exported from Italy in terms of product characteristic such as the size of the cans, whether the cans contained whole or chopped tomatoes, whether the tinned tomatoes were organic, or whether the cans also contained herbs or other additives.

## PUBLIC RECORD

From a commercial perspective, the Commission is of the view that an exporter who has not previously exported the goods into the Australia market will foremost, to be competitive, need to make decisions about the types of product demanded by the Australian market, and from that basis, decisions about the pricing of those products. The Commission is further of the view that factors such as product type and pricing will differ across markets, including between domestic markets and export markets. The Commission notes that setting an ascertained export price based on an exporter's normal value as determined under subsection 269TAC(1) fundamentally involves setting the export price to reflect the product composition as it relates to the domestic market. The Commission does not accept that information about an exporter's sales into a domestic market represents the most relevant and reliable information for determining an ascertained export price under subsection 269TAB(3) where comprehensive, verified information about the Australian market is available.

The Commission accepts that within other contexts, such as an accelerated review the best available information to allow an ascertained export price to be determined pursuant to subsection 269TAB(3) may be the exporter's ascertained normal value. The Commission notes that this was in fact the case in relation to both REP 351 and REP 250.

In the current circumstances, for the reasons detailed above, the Commission affirms the reasoning applied in determining an ascertained export price for LSI pursuant to subsection 269TAB(3), having regard to all relevant information, specifically the weighted average of the ascertained export prices of the five verified exporters whose export prices were determined under subsection 269TAB(1).



## 8 ATTACHMENTS

<b>Confidential Attachment 1</b>	SPS subsidies and Italian domestic tomato prices – statistical analysis
<b>Confidential Attachment 2</b>	LSI Normal Value calculations