



Anti-Dumping Commission
Ground Floor Customs House
Docklands
1010 La Trobe Street
Docklands VIC 3008

Anti-Dumping Review Panel
C/O Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
CANBERRA CITY ACT 2601

Dear Ms Fitzhenry

ADRP review - prepared or preserved tomatoes exported from Italy

I write to you in response to your letter of 30 May 2014 inviting the Anti-Dumping Commission (the Commission) to comment on the applications for review of the decision by the Parliamentary Secretary to the Minister for Industry to publish a dumping duty notice in relation to prepared or preserved tomatoes exported from Italy.

The Commission has prepared its responses to the issues raised by the applicants in a non-confidential form (see Attachment A). Also provided for your reference are the related confidential attachments. The Commission considers that only this letter and non-confidential Attachment A are suitable for publication. The confidential attachments are not suitable for publication.

The Commission has observed the request in your letter of 30 May 2014 and responded to the four specific matters. For each matter the Commission has separately identified information that is not *relevant information* as defined in section 269ZZK(6) of the *Customs Act 1901*.

In relation to the remaining three matters (factual claims disputed, commentary and background) the Commission provided its responses collectively given the high degree of overlap in content.

Given the nature and extent of the claims I would also like to offer assistance in the form of a meeting and or teleconference as soon as practicable to provide further clarification and or relevant material should you so require.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Dale Seymour'.

Dale Seymour
Commissioner
Anti-Dumping Commission
23 June 2014



Australian Government
Anti-Dumping Commission

Attachment A

Anti-Dumping Commission response

**Applications for Review of Decision relating to Prepared or Preserved Tomatoes
exported from Italy**

Abbreviations

| | |
|-------------------------|---|
| ADRP | Anti-Dumping Review Panel |
| Attianese | Attianese SpA |
| Conserve Italia | Conserve Italia Soc. Coop. Agr |
| EQR | exporter questionnaire response |
| FIS | Free Into Store |
| FOB | Free on Board |
| IMCA | I.M.C.A. SPA |
| Lodato | Lodato Gennaro & C S.P.A. |
| NIP | Non-injurious price |
| Parliamentary Secretary | Parliamentary Secretary to the Minister for Industry |
| PC Report | Productivity Commission <i>Safeguards Inquiry into the Import of Processed Tomato Products No. 68, 12 December 2013</i> |
| REP 217 | Anti-Dumping Commission Final Report 217 |
| SEF 217 | Anti-Dumping Commission Statement of Essential Facts 217 |
| SPCA | SPC Ardmona Limited |
| the Act | Customs Act 1901 |
| WTO ADA | World Trade Organization Anti-Dumping Agreement |

Key points of note in reading responses to applicant claims

- (i) Whilst the Anti-Dumping legislation (Part XVB of the *Customs Act 1901* (“the Act”) and the *Customs Tariff (Anti-Dumping Act) 1975* (the “Dumping Duty Act”)) refers to the Minister, for the purposes of this response all references to the Minister or Parliamentary Secretary should be considered interchangeably. This approach reflects the Minister for Industry’s delegation of responsibility for Ministerial decision-making (under the Act and the Dumping Duty Act) to the Parliamentary Secretary for the Minister for Industry.
- (ii) In drafting responses to the issues raised by the applicants to the Anti-Dumping Review Panel (ADRP), the Commission has had regard to all information submitted to it in accordance with legislative timeframes during the investigation up until the day the Final Report 217 (REP 217) was submitted to the Parliamentary Secretary. This information will include the Statement of Essential Facts (SEF 217), visit reports and submissions from interested parties. In drafting this response the Commission has also had regard to the analysis the Commission performed during its investigation. The Commission confirms that, in drafting this response, no new information has been considered or further analysis undertaken.
- (iii) The Commission notes several interested parties’ reference to the Productivity Commission Report, titled, *Safeguards Inquiry into the Import of Processed Tomato Products No. 68, 12 December 2013* (“PC Report”). This inquiry, conducted concurrently with the Commission’s anti-dumping investigation, involved an examination of the same Australian industry as that examined by the Commission. In contrast, however, the safeguard inquiry was an examination to determine if a surge of imports of prepared or preserved tomatoes was causing serious injury to the Australian industry. The safeguard inquiry did not examine whether dumping was causing material injury. The PC Report was released before REP 217.
- (iv) The applications from Attianese SpA and Lodato Gennaro & C S.P.A refer to certain annexures. These annexures were not provided to the Commission. The Commission believes, based on the titles applying to some of those annexures, that such information was not before the Commission during the period that it made its findings and recommendations in the final report to the Parliamentary Secretary. More specific discussion of the annexures is contained at section 6.1.

Order of responses

To aid the ADRP with the number of applicants and claims, the Commission has responded to the Applicant's claims as set out below and in the order of issues identified in the application and in the letter of request by the ADRP. Due to a number of claims being identical or very similar, the Commission has responded to those identical or similar claims in a single response with relevant references.

- The Government of Italy and Associazione Nazionale Industriali Conserve Alimentari Vegetali (ANICAV)
- Attianese SpA and Lodato Gennaro & C SpA
- Lodato Gennaro & C SpA (separate claims)
- Conserve Italia Soc. Coop. Agr
- I.M.C.A. SpA.

The Government of Italy and Associazione Nazionale Industriali Conserve Alimentari Vegetali (ANICAV)

1 *Erroneous assessing of the volume of dumped imports by the “residual exporters”*

Information that is not relevant information as defined

- 1.1 The Commission considers that the applications contain new information that was not before the Commissioner when making the findings set out in REP 217, and is therefore not considered *relevant information* as defined in s. 269ZZK(6) of the Act. Specifically, the Commission considers that new information is contained in the paragraph commencing with:

“Pursuant to the official data (ie Information Resources s.r.l, The Nielsen Company)...”

Factual claims disputed, commentary, and background

- 1.2 The applicants consider that the Commission erred in the material injury assessment, claiming that:

“the decision to treat the goods exported by the (unexamined) residual exporters – representing 30% of the total exports – as dumped imports is contrary to the relevant case-law of the WTO...”

- 1.3 The Commission disputes this claim and notes the statement does not acknowledge the assessment that the Commission performed. Consistent with Article 3.1 of the WTO Anti-Dumping Agreement and with the Appellate Body in DS141 (Bed Linen case), the Commission undertook an objective examination of positive evidence – pages 52-53 of REP 217 refer.

1.4 DS141 examines the issue of injury assessment. Some interested parties (including ANICAV and the Government of Italy) consider that DS141 supports their view that the Commission cannot have regard to the residual exporters found to be dumping when assessing material injury caused by dumping. This view is based on the fact that residual exporters are given a dumping margin without the benefit of an examination.

1.5 However, the Commission notes ([page 52 REP 217](#)) that the key issue before the Appellate Body in DS141 was whether *the European Communities' determination of the volume of dumped imports attributable to non-examined producers was based on an "objective examination" of positive evidence*. The Appellate Body in DS 141 noted, after outlining examples of certain types of evidence, that:

"...such categories of evidence may qualify as affirmative, objective, and verifiable, and thus form part of the "positive evidence" that an investigation authority may properly take into account when determining, on the basis of an "objective examination", whether or not imports from non-examined producers are being dumped."
(WT/DS141/AB/RW, 8 April 2003, European Communities – Anti-dumping duties on imports of cotton-type bed linen from India, footnote 162).

1.6 The Commission undertook such an objective examination of positive evidence based on statistical data obtained from importers' declared export prices and volumes (in relation to residual exporters) that were entered into the Australian Customs and Border Protection Service import database. The Commission used the export prices and calculated a weighted average export price and compared these to the weighted average normal value of cooperating exporters. The information showed that the average dumping margin for the residual exporters was approximately 14%. See [page 53 Rep 217](#). These calculations are contained at **Confidential Attachment 1**.

1.7 The applicants also express the view that:

"...common sense would suggest that the export prices of producers exporting smaller volumes (i.e. the residual unexamined cooperating exporters) were not lower than those of the market leaders. So if two producers with the largest sales volumes were found not to be dumping, the same could be asserted for the rest of the Italian producers".

1.8 The Commission disputes this claim. As noted above, the Commission's objective examination of positive evidence at **confidential attachment 1** generates a substantial dumping margin for these residual exporters.

1.9 Finally, the Commission notes the applicants' view that it is:

"totally unreasonable to claim that... less than 26% of Italian imports would be able to act as price leaders so as to influence the price level in the market".

1.10 The Commission considers that the reference to 26% is misleading in the context of the applicants claim. The total dumped volume for injury analysis purposes was 56% of the total volume exported to Australia from Italy in the investigation period. See section 7.13 of REP 217. While the Commission does not consider there needs to be any particular threshold reached in this regard, it certainly considers that a dumped volume of this magnitude can be, and in this case was, sufficient to cause material injury to an Australian industry. Further, it is important to note that Italian exports accounted for a large proportion of the Australian market in the investigation period. See section 8.6.1 of REP 217.

2 Erroneous consideration of the effects of undumped imports on prices in the injury determination.

Information that is not relevant information as defined

2.1 Nil

Factual claims disputed, commentary, and background

2.2 The applicants assert that the Commission erred in its price undercutting analysis by not eliminating the undumped goods from the Commission's assessment and that the price undercutting analysis was undertaken at the retail level of trade.

2.3 The Commission disputes these claims.

2.4 The Commission's price undercutting analysis identifies that all of the Italian goods were sold in Australia below the prices of SPC Ardmona (SPCA). The Commission demonstrates this in two charts namely Figure 1 and Figure 6 of REP 217.

2.5 Figure 1 chart at page 23 of REP 217 identifies the prices from a retail perspective and Figure 6 at page 58 from a wholesale perspective.

2.6 Importantly Figure 6 disproves the applicant's claim that the Commission only examined price undercutting at the retail level. Figure 6 examines price undercutting from the wholesale level calculated at FIS (free into store) pricing.

2.7 Further, the Commission examined and compared import prices of the goods exported that were dumped and goods exported that were undumped. On page 53 of REP 217, the Commission identified that for selected exporters found to be dumping they undercut the lowest of the undumped prices by up to 18%.

2.8 The Commission also compared the declared export prices of residual exporters derived from the commercial import database to undumped prices and found that these prices were approximately 10% below the lowest undumped prices. See section 8.4.2 of REP 217.

2.9 The applicants assert in paragraph three of their application that the Commission's undercutting was carried out on the shelf/retail prices of goods:

"...marketed by Coles and Woolworths, which were also supplied by companies found not have engaged in dumping".

2.10 This statement is partially correct but misleading in that it fails to acknowledge that Coles and Woolworths are also selling products that the Commission found were dumped.

2.11 Further to this, the Commission analysed specific exporter prices at the wholesale FIS trading term levels. See Figure 6 and page 53 of REP 217. The Commission also examined export prices of various products and suppliers - see **Confidential Attachment 2**. The charts demonstrate that the prices of various products from various sources were undercutting the prices of SPCA. These charts were not included in REP 217 due to confidentiality considerations, but did provide the foundation for the Commission's findings of fact in relation to injury analysis.

2.12 Despite the claim that the Commission did not correctly assess price undercutting, dumped or otherwise, it is clearly evident that at both the retail and FIS levels of trade, the Italian goods were undercutting those goods sold by SPCA.

2.13 In a separate point related to the analysis of price injury, the applicants indicated that the Commission used an *"unproved assumption"* that a correlation existed between wholesale and retail prices. The Commission disputes this assertion - see Figure 4 page 54 of REP 217.

2.14 The applicant's claim there is relevant jurisprudence to support their view (however no reference to this jurisprudence was provided) and consider such assumptions need to be:

"derived as reasonable inferences from a credible basis of facts and should be sufficiently explained so their objectivity and credibility can be verified".

2.15 The Commission provides the source data of Figure 4 of REP 217 for the ADRP. See **Confidential Attachment 3**.

2.16 The Commission considers its approach of using verified information gathered during the investigation represents an objective examination of positive evidence.

3 Lack of consideration of the factors other than dumped imports that caused injury

Information that is not relevant information as defined

3.1 Nil

Factual claims disputed, commentary, and background

- 3.2 The applicant's claim the Commission has not had regard to Article 3.5 of the World Trade Organization Anti-Dumping Agreement (WTO ADA).
- 3.3 The Commission disputes this claim.
- 3.4 Section 269TAE(1) of the Act identifies circumstances in relation to the exportation of goods that the Minister can have regard to in determining whether material injury to an Australia industry has been caused by dumping. Furthermore, the section provides that these circumstances do not limit the Minister's assessment of material injury.
- 3.5 Section 269TAE(2A) of the Act requires that the Minister must consider other factors that may have caused injury and not attribute such injury to the exportation of the goods.
- 3.6 The Commission notes that the *Ministerial Direction on Injury 2012* indicates that the identification of material injury be based on facts and not assertions unsupported by fact, material injury is injury that is not immaterial, insubstantial or insignificant. Furthermore the Ministerial Direction indicates there is no threshold amount that is capable of general application and that the materiality of injury is dependent on the current economic conditions of the industry.
- 3.7 At section 8.8 of REP 217, the Commission identified and addressed a number of other possible causes of injury to the Australian industry which includes:
 - a. Appreciation of the Australian dollar;
 - b. Supermarket's private label strategies;
 - c. Extreme weather events;
 - d. Decrease of SPCA's export sales.
- 3.8 The Commission's findings of fact relevant to the causation analysis can be summarised as follows:
 - a. Despite the appreciation of the Australian dollar leading to a decline in the AUD purchase price, export prices in EUR declined up to 11.9% during the injury analysis period indicating that not all of the price reductions were due to currency movements; page 64 REP 217;
 - b. Dumped and undumped Italian exports undercut the Australian industry prices; Page 58 REP 217;
 - c. Dumped prices for residual and selected exporters were below those of undumped goods by up to 18%; page 53 REP 217;
 - d. The size of the dumping margins, which were from 3.25% to 26.35%; Section 7 of REP 217;
 - e. 56% of all Italian exports were dumped; Section 7.13 of REP 217;

- f. The Commission calculated a weighted average dumping margin for all dumped products of approximately 9%; page 67 REP 217;
- g. Prepared or preserved tomatoes are very sensitive to price movements particularly so in the higher priced products. Page 24 REP 217 and **Confidential Attachment 4**;
- h. The supermarket procurement strategies drive prices lower for both dumped and undumped goods; page 56 REP 217;
- i. SPCA's export sales performance had a negligible impact due to its insignificant export sales volume; page 65 REP 217;
- j. The magnitude of injury to the Australian industry was significant; Section 8 REP 217;
- k. The PC Report had identified that the Australian industry had been suffering injury from a range of factors (exclusive of dumping) for a number of years eroding its financial viability and increasing its sensitivity to injury caused by dumping; page 66 REP 217;
- l. A number of interested parties concur that the vast majority of injury is being caused by other factors, but not the totality of injury, thereby inferring that other injury is being caused by dumping; page 55 REP 217.

3.9 At section 8.9.1 of REP 217 the Commission assessed the materiality of injury caused by dumping. This section includes discussion of a notional uplift to retail prices to account for the weighted average dumping margin, to reflect retail selling prices in a market unaffected by dumping. Having regard to the correlation between retail and wholesale prices, the Commission considered that higher (undumped) import prices would have translated to higher wholesale prices and higher retail prices. The Commission considered this approach also ensures that factors other than dumping that may have contributed to the injury being experienced by SPCA are isolated from the effects of dumping.

3.10 The Commission maintains that it has complied with Article 3.5 of the WTO ADA and relevant case law.

4 The injury determination carried out by the ADC is ill-founded in so far as it is based on an a flawed like products definition

Information that is not relevant information as defined

4.1 Nil

Factual claims disputed, commentary, and background

4.2 The applicants claim that *Italian long; organic and or San Marzano varieties under investigation are not like products to the Australian tomatoes.*

4.3 The Commission disputes this claim.

4.4 The relevant legislation to consider the issue of like goods is s.269T of the Act:

“Like goods in relation to goods under consideration , means 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”.

4.5 The test is whether the Australian industry manufactures goods that are either identical or having characteristics that closely resemble the goods under consideration (i.e. the goods the subject of the application for a dumping duty notice).

4.6 In Section 3 of REP 217 the Commission examines this issue. The Commission notes that where the locally produced goods and the imported goods are not alike in all respects, it then assesses whether they have characteristics closely resembling each other with reference to the following considerations:

- a. Physical likeness;
- b. Commercial likeness;
- c. Functional likeness;
- d. Production likeness.

4.7 Following examination of the above characteristics, the Commission considered that notwithstanding the claimed differences in the types of tomatoes used by Italian manufacturers, the Australian industry manufactures prepared or preserved tomatoes that closely resemble the goods exported to Australia from Italy.

4.8 The Commission considers that it undertook an objective examination and had regard to relevant information in forming this conclusion.

Attianese SpA and Lodato Gennaro & C SpA

5 The minister's decision was not correct or preferable insofar as it did not conclude that the injury suffered by the Australian industry was caused by factors other than dumped imports

- a. *The injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets to promote their own private labels products.*
- b. *The injury suffered by the Australian industry was also caused by additional factors other than dumped imports.*
- c. *The Minister’s decision is in stark contradiction with the findings of the Productivity Commission.*
- d. *The injury caused by dumped imports if any was not material.*

Information that is not relevant information as defined

5.1 Nil.

Factual claims disputed, commentary, and background

5a The injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets to promote their own private labels products

- 5.2 The Commission notes the statement, on page 14 of the Attianese SpA and Lodata Gennaro & C SpA applications that, “...the ADC recognized that the supermarkets boycotted SPCA’s branded products in order to implement their private label strategies”. The Commission disputes this statement, and confirms that it did not make such a comment or infer such behaviour in any published material.
- 5.3 The Commission understands the applicant’s claim at 5a in relation to commercial strategies to be a reference to the procurement and selling behaviour of the major supermarkets.
- 5.4 The Commission does not agree with the applicant’s proposition set out at 5a. Indeed, the Commission considers that an examination of the behaviours of the supermarkets, in isolation from the effects of the behaviours in the marketplace, and in the context of a dumping investigation, is not appropriate.
- 5.5 Woolworths explained during the importer visit (page 14 of the Woolworths visit report) that prepared and preserved tomatoes are “...an important item that helps retain and introduce new customers to the Woolworths retail experience. It understands that the goods are part of a group of goods that customers always need”. The Commission considered that, in this context, major supermarkets will compete on price and other factors to entice customers to their stores. The Commission also noted that major supermarkets offer tenders for the supply of large volumes of goods with the initial tender price usually a starting point for further negotiations (see [page 56 REP 217](#)).
- 5.6 The Commission disagrees with the applicant’s proposition that the major supermarkets are SPCA’s main competitors (see page 13 of Attianese SpA and Lodata Gennaro & C SpA applications). At [page 20 of REP 217](#), the Commission identifies the different parties that comprise the supply chain. The major supermarkets are a distribution channel in which the majority of the goods are sold, hence all goods sold via this distribution channel need to compete with one another to find shelf placement in these stores.
- 5.7 From visits to the major supermarkets by the Commission, it was found that the major supermarkets tend to place products with high sales volumes in prominent shelf positions and products with declining or lesser sales volumes to inferior shelf locations. If sales volumes continue to fall, these goods may be deleted from the shelf space. SPCA provided evidence at the verification visit of shelf placements strategies that are

consistent with the comments made by the major supermarkets. See **confidential attachment 5**.

- 5.8 From its inquiries, the Commission established that SPCA had to increase its promotional spending with the major supermarkets in order to maintain sales volumes (see **Confidential Attachment 6** and Figure 2 of REP 217). This evidence provided further support for the Commission view about the price sensitive nature of the product (see also **Confidential Attachment 4**). Furthermore, the Commission considered it was necessary for SPCA to compete with both Italian private labelled and proprietary labelled products. This was evident in price data provided by SPCA (see **Confidential Attachment 7**) which indicates the pricing behaviour of all product tiers as prices dropped .
- 5.9 The Commission found the major supermarkets operate with a view of obtaining a certain yield (page 14 Woolworths visit report, page 11 Grocery Holdings (Coles) visit report) from the sales of a product category – in this instance prepared or preserved tomatoes for all sizes and brands. Following examination of relevant evidence, the Commission concluded that the purchase price of the goods has a meaningful degree of correlation with the selling price of the goods. See Figure 4 REP 217.
- 5.10 Furthermore, the Commission was informed by an exporter that they would not tender for major supermarket business because the price they had to contend or compete with, was considered too low for their cost structure. See **Confidential Attachment 8**.
- 5.11 In summary, the Commission found that dumped goods were being acquired by the major supermarkets. It is reasonable to conclude that, in the absence of dumping, export prices would be higher causing importers to increase their prices, leading to higher prices for SPCA as a result of the yield considerations of the major supermarkets.

5b The injury suffered by the Australian industry was also caused by additional factors other than dumped imports

Information that is not relevant information as defined

- 5.12 Nil.

Factual claims disputed, commentary, and background

- 5.13 The Commission considers its response at paragraphs [3.2 to 3.10] adequate to respond to this claim.
- 5.14 The Commission does however make the following comment with regard to the floods of 2011.
- 5.15 The Investigation period was from 1 July 2012 to 30 June 2013. The Commission considered this investigation period for injury analysis in relation to the dumping established during this period to determine any causation between dumped goods and

injury to the domestic industry. Whilst the claim that the 2011 floods did affect the Australian industry is correct, the Commission notes that the focus of the injury and causation assessment was on information from the investigation period and not from 2011.

- 5.16 It is correct to say that the injury analysis period for the purpose of determining whether material injury was caused to the Australian industry was from 1 January 2009. However, a period longer than the investigation period is usually selected for injury analysis purposes to ensure due consideration is given to contextual factors, including trends, events, and the normal ebb and flow of business.

5c The Minister's decision is in stark contradiction with the findings of the Productivity Commission

Information that is not relevant information as defined

- 5.17 Nil.

Factual claims disputed, commentary, and background

- 5.18 At pages 11-13 of REP 217 the Commission acknowledges the PC Report and outlines the key differences between safeguards inquiries and anti-dumping investigations.

- 5.19 Pages 54-55 of REP 217 contains the Commission's views on the submissions of interested parties that claimed there were inconsistencies between the Commission's views and the PC Report on injury, and causes of injury, to SPCA. Page 55 of Rep 217 referred to certain PC Report findings and considered these were

"...generally consistent with the findings of SEF 217".

- 5.20 The applicant has taken the Commission's statement out of context. The report states:

"...factors other than dumping ...have played a contributing role to the injury experienced by SPCA during the investigation period". Page 55 REP 217.

- 5.21 In order to impose anti-dumping measures, the Commission must find that the Australian industry is suffering material injury, dumping is occurring, and that the dumping is causing material injury.

- 5.22 To impose safeguard measures, different tests apply. To impose safeguard measures, an examination is undertaken to determine whether there has been a surge of imports [emphasis added] which caused or threatens to cause serious injury [emphasis added] to a domestic industry. The PC Report states at page 20 that purpose of safeguard measures is:

" ... intended to remedy injury caused by a recent surge in the quantity of imports."

Therefore dumping may (or may not) be occurring, however a safeguards inquiry does not seek to determine whether dumping is occurring or causing material injury.

- 5.23 Whilst the Productivity Commission may in a safeguards inquiry find a number of factors are causing injury to the Australian industry, such findings do not preclude the Commission from establishing that dumping has caused material injury.

5d The injury caused by dumped imports if any was not material

Information that is not relevant information as defined

Nil

Factual claims disputed, commentary, and background

- 5.24 The Commission has responded to this claim in paragraphs [3.2 to 3.10].

6 The Minister's decision was not correct or preferable insofar as the ADC's determination of the volume of dumped imports for the purpose of the injury assessment is flawed

Information that is not relevant information as defined

- 6.1 The Commission considers that the applications may contain new information that was not before the Commissioner when making the findings set out in REP 217, and, if so, would not be relevant information as defined in s. 269ZZK(6) of the Act. Specifically, the Commission considers (based on the description of the documents), that information contained in Annex 1 and in Annex 3 to the applications may contain new information but it cannot be certain as these documents were not provided to the Commission.

Factual claims disputed, commentary, and background

- 6.2 The Commission has addressed a number of these issues and refers the ADRP to paragraphs [1.3 to 1.6].
- 6.3 Further, the applicants claim that the calculation of the 14% dumping margin needs to be based on exporter specific information. The Commission considers this claim is incorrect. The 14% dumping margin calculation is derived for the purposes of determining if the residual exporters are likely to be dumping and an indication of the level of any dumping - both relevant considerations for assessing whether such dumping is a cause of injury to the domestic industry. This analysis, based on positive evidence, and the dumping margin derived is not for the purpose of imposing dumping duties.
- 6.4 DS141 articulates the Appellate Body's position of attributing residual exporters export volume to the injury analysis. It can only be attributed to the injury analysis if an objective examination is undertaken with positive evidence which finds residual exporters to be

dumping. The 14% dumping margin is calculated on verifiable information (see paragraph 1.6) not the information that the Parliamentary Secretary has used to calculate and impose dumping duties. **Confidential attachment 1** shows the calculation of the 14% dumping margin.

- 6.5 On page 22 of the applicants' submission is a reference to the Bed Linen case. The applicants state:

"[t]he fact that producers accounting for 47% of total imports attributable to examined producers were found to be dumping was considered not a sufficient basis to justify treating imports from unexamined exporters as dumped for the purposes of injury analysis."

- 6.6 This statement is irrelevant as the Commission used positive evidence (namely declared export prices and weighted average normal values) to objectively examine the degree in which residual exporters were likely to be dumping. In total the Commission found that 56% of the Italian export volume was dumped for injury analysis purposes.

Lodato Gennaro & C SpA

7 The Minister's decision was not correct or preferable as the calculation of the dumping margin applied to uncooperative exporters is flawed

7a The ADC failed to provide a meaningful disclosure of the methodology followed to calculate the dumping margin applied to uncooperative exporters

7b The Minister's decision was not correct or preferable insofar as the calculation of the dumping margin applied to uncooperative exporters is flawed.

7c ADC Failed to set a deadline for the applicant to comment on its decision to use best available information.

Information that is not relevant information as defined

- 7.1 Nil.

Factual claims disputed, commentary, and background

7a The ADC failed to provide a meaningful disclosure of the methodology followed to calculate the dumping margin applied to uncooperative exporters

- 7.2 The Commission addressed the calculation of dumping margins in Section 7 of SEF 217. The approach for uncooperative exporters is discussed at Section 7.5 of SEF 217. The discussion included references to the legislation, the means by which export prices and normal values were established in practice, and the resulting dumping margin.

- 7.3 Similarly, the Commission addressed the calculation of dumping margins in Section 7 of REP 217. With regard to uncooperative exporters, REP 217 addresses these issues in Sections 7.3, 7.3.1, 7.9, 7.10 and 7.12.
- 7.4 The applicant considers that the Commission did not provide a meaningful understanding of the factors included to calculate the uncooperative dumping margins. The Commission notes that, due to confidentiality limitations, the Commission cannot release certain information where the interested parties that provided that information do not expressly consent to its disclosure. In this case, the values for determining dumping margins were derived from information provided by certain other exporters subject to the investigation. All interested parties, including the applicant, were informed in both SEF 217 and REP 217 that the visit reports to the exporters should be read together with SEF 217 and REP 217. In the Commission's view, the information in those public file versions of the exporter visit reports is the limit to which the Commission can release information on the factors included to calculate the uncooperative dumping margins.

7b The Minister's decision was not correct or preferable insofar as the calculation of the dumping margin applied to uncooperative exporters is flawed.

- 7.5 The Commission considers that the dumping margin calculation methodology was appropriate in the circumstances.
- 7.6 The Commission notes that the calculation methodology used for uncooperative exporters was detailed in SEF 217. The applicant responded to SEF 217 asserting that it should have been considered a cooperative exporter. In its submission to SEF 217, the applicant did not submit that the calculation of the dumping margin for uncooperative exporters was flawed. See page 48 REP 217.
- 7.7 Due to the lack of response from uncooperative exporters and noting the significant variations in the circumstances of trade¹ and model mixes identified at exporter verification visits, the Commission considered that it was not appropriate to infer that uncooperative exporters had the same or similar circumstances of trade or model mix as those of verified exporters.
- 7.8 The Commission considered it appropriate to use verified information from cooperative exporters to determine a dumping margin for uncooperative exporters. Pages 49-50 REP 217 refer to the manner in which the uncooperative exporter dumping margins were calculated.

"Pursuant to s.269T(1) of the Act, the Commissioner was satisfied that the exporters did not give information the Commissioner considered to be relevant to the inquiry were considered uncooperative exporters.

¹ Circumstances of trade is a reference to items such as; rebates and discounts, delivery terms, payment terms, packaging, port and wharfage costs, (non-exhaustive list) etc.

For uncooperative exporters, the Commission established export prices pursuant to s.269TAB(3) of the Act having regard to all relevant information by reference to export prices determined with verified information of cooperating exporters over the investigation period. The Commission used the lowest export price from cooperative selected exporters found to have a dumping margin greater than 2%.

Normal values were established pursuant to s.269TAC(6) of the Act having regard to all relevant information. The Commission used the highest normal value from cooperative selected exporters found to have a dumping margin greater than 2%.”

7.9 This approach is consistent with the provisions of section 269TACAB of the Act, which requires that section 269TAB and section 269TAC be used to determine export price and normal value respectively for uncooperative exporters.

7.10 In circumstances where there is a lack of positive evidence to the contrary (noting the variables that can cause costs and prices to vary significantly from one exporter to another), the Commission considers it is reasonable to base its export price determination for uncooperative exporters upon the lowest verified export price for cooperative exporters. Similarly, the Commission considers it is reasonable to base its normal value determination for uncooperative exporters upon the highest verified normal value for cooperative exporters.

7c ADC Failed to set a deadline for the applicant to comment on its decision to use best available information.

7.11 The applicant asserts in footnote 33 of its application to the ADRP, that the Commission did not provide a deadline for the applicant to comment on the (Commission’s) decision to use best available information.

7.12 The Commission provides instructions with the exporter questionnaire issued to exporters at the commencement of the investigation. It clearly identifies the date on which the exporter questionnaire response (EQR) is due. Furthermore the exporter questionnaire states the consequences should an exporter not respond to the questionnaire within the stipulated timeframe.

7.13 In this instance the Commission did not receive a completed exporter questionnaire response from the applicant by the specified due date.

Conserve Italia Soc. Coop. Agr (Conserve italia)

8 The reasons why the Parliamentary Secretary’s decision is not correct or preferable

8.1 Conserve Italia does not make any specific claim as to why the Parliamentary Secretary’s decision is not the correct or preferable decision. The Commission has considered this application and responds to the following key points.

8a Injury from other factors.

8b Price undercutting analysis is flawed.

8c The effect of the 9% notional dumping margin.

8d Consideration of undumped import prices and injurious effects of dumping in of itself is material.

8e 9% weighted average dumping margin is not a correct basis for analysis.

8f "But for" principle.

8g Consideration of the PC Report.

Information that is not relevant information as defined

8.2 Nil.

Factual claims disputed, commentary, and background

8a Injury from other factors

8.3 The Commission considers it has responded to this issue raised by The Government of Italy and ANICAV. See paragraphs [3.2 to 3.10].

8b Price undercutting analysis is flawed

8.4 The Commission considers this issue has been considered in its response to The Government of Italy and ANICAV. See paragraphs [2.2 to 2.16].

8.5 However, further consideration is required in response to the apparent suggestion of the applicant that the private label products do not compete with the proprietary label products.

8.6 The Commission highlights two findings of fact established in the investigation:

- a. Private labels are sold as both a premium product (for example, Woolworths Select) and as a value product (for example, Black and Gold or Woolworths Home Brand).
- b. The premium segment of private labels competes directly with the proprietary labels such as SPC Ardmona and the Italian proprietary brands such as Conserve Italia's Cirio. See page 58 REP 217.

8.7 The applicant claims on page 5 of its submission that the Commission has the knowledge that the vast majority of imports are private labels. The Commission accepts that it was in possession of a significant volume of data but it did not calculate private label import volume nor the volume split between premium private label and value private label. Therefore the applicant's claim that the Commission has knowledge that the vast

majority of imports are private labels is not entirely correct. The Commission considers its information with regard to label (private versus proprietary) was not accurate, however the prices were considered accurate. The Commission considers that any calculation performed to determine the volume split between private and proprietary label products would lead to an inaccurate assessment.

8.8 At page 23 of REP 217, the Commission found that for prepared or preserved tomatoes, apart from the “value” private labels since their prices remain static throughout the investigation period, the sales volumes of the goods were very sensitive to price reductions. See **Confidential Attachment 4**.

8.9 Also the Commission was provided evidence of the price behaviour across the market which demonstrates that SPCA prices decreased in line with the imported goods. See **Confidential Attachment 7**.

8c The effect of the 9% notional dumping margin

8.10 The applicant claims that the calculation of the 9% dumping margin for all exports from Italy is flawed.

8.11 The Commission’s use of this calculation was to identify the impact of dumping across all exports of prepared or preserved tomatoes exported to Australia from Italy. It was not to be considered a value to be used in the administration of imposing dumping duties. It is a means to explore and analyse the market dynamics and examine this in the context of potential price movements.

8.12 Importantly, the Commission was informed by interested parties (see Woolworths and Grocery Holdings visit reports) that the retailer of the goods aims to achieve a yield on these goods. Consequently to maintain the yield if prices go up, the shelf price will need to rise by the same degree. The applicant asserts that the retail price will not increase by 9% but by a significantly lesser percentage. The Commission notes that the applicant’s assertion with regard to the quantum of the retail price rise are not supported with the provision of any factual material to establish this view.

8.13 The Commission further notes the applicant’s contention that in making the 9% dumping margin calculation the Commission has practiced “zeroing” by not including the values and volumes of exporters found not to be dumping. **Confidential Attachment 9** establishes that this was not the case.

8d Consideration of undumped import prices and injurious effects of dumping in of itself is material

8.14 The Commission considers this claim as another way of referring to the obligation to ensure injury caused by factors other than dumping is not attributed to dumping. The Commission considers this issue has been addressed at paragraph [3.2 to 3.10].

8e 9% weighted average dumping margin is not a correct basis for analysis

- 8.15 At point 3 of page 7 of the applicant's submission is their analysis of the correct methodology of the 9% dumping margin calculation.
- 8.16 The Commission considers this analysis is not appropriate due to its exclusion of total export volumes of those exporters found to be dumping (selected, uncooperative and residual). Furthermore the Commission notes that the applicant's calculation is based on export volume estimates rather than actual export volumes.

8f "But for" principle

- 8.17 The applicant considers that the Commission has applied a "but for" principle to demonstrate the dumping has caused injury to the Australian industry.
- 8.18 The Commission considers that it has found substantial evidence of the causes of injury, the magnitude of dumping, and it has separated the injury caused by other factors from the injury caused by dumping. The Commission considers this issue has been addressed at paragraphs [3.2 to 3.10].

8g Consideration of the PC Report

- 8.19 The Commission considers this issue has been addressed in its response to issues raised by Attianese and Lodato; see paragraphs [5.17 to 5.22].

I.M.C.A. SpA

9 The Commission failed to provide due process to I.M.C.A. SpA

9a The ADC's decision to treat IMCA as uncooperative.

9b The ADC's decision not to verify the data provided by IMCA (by way of verification visit or desk top audit or otherwise).

9c The ADC's assessment of IMCA's dumping margin to be 26.35% using the following methodology...

- a. s.269TAB(3) determining export prices having regard to all relevant information , using the lowest export price from exporters found to have a dumping margin greater than 2%.
- b. s.269TAC(6) determining normal values having regard to all relevant information, using the highest normal values from exporters found to have a dumping margin greater than 2%.

9d The ADC could have determined export prices and normal values from information received by the applicant – Ernst Young analysis

Information that is not relevant information as defined

9.2 Nil

Factual claims disputed, commentary, and background

9a The ADC's decision to treat IMCA as uncooperative

9.3 The Commission considers that IMCA was afforded due process and given every opportunity to respond to the exporter questionnaire.

9.4 Pursuant to Article 6.1.1 of the WTO ADA, an authority only needs to provide 30 days to an exporter to respond to the exporter questionnaire. A footnote to that article provides that the 30 days commences from date of receipt of the questionnaire, which shall be taken to be one week from the date it was sent to the respondent.

9.5 Article 6.8 of the WTO ADA states:

"In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph".

9.6 Annex II of the WTO ADA provides:

"The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry."

9.7 The Commission provides instructions with the exporter questionnaire issued to exporters at the commencement of the investigation. It clearly identifies the date on which the exporter questionnaire response (EQR) is due. Furthermore the exporter questionnaire states the consequences should an exporter not respond to the questionnaire within the stipulated timeframe.

9.8 Section 269TAB(3) of the Act provides that the Minister may determine export price having regard to all relevant information, provided he/she is satisfied that sufficient information has not been furnished or is not available to enable the export price of goods to be ascertained under preceding sections. Under section 269TAB(4), the Minister may disregard information considered unreliable.

9.9 Section 269TAC(6) of the Act provides that the Minister may determine normal value having regard to all relevant information, provided he/she is satisfied that sufficient information has not been furnished or is not available to enable the normal value of

goods to be ascertained under preceding sections. Under section 269TAC(7), the Minister may disregard information considered unreliable.

9.10 In this instance the applicant was given an extension when the Commission became aware of the tomato harvest and processing issue. A six week extension was provided to alleviate time pressures associated with completing the EQR. In total the applicant was provided 72 days to respond to the exporter questionnaire.

9.11 On 27 September 2013 the applicant submitted the EQR within the agreed timeframe. On 11 October 2013, the Commission emailed feedback to the applicant including the identification of a number of “critical” deficiencies in the EQR as follows:

- a. IMCA has not provided or completed the necessary information requested in the income statement spreadsheet;
- b. IMCA has not provided or completed cost to make and sell information for the goods exported to Australia;
- c. IMCA has not provided or completed cost to make and sell information for like goods sold on the domestic market in Italy;
- d. IMCA has not provided or completed details of exports to other third country export markets;
- e. IMCA has not provided a non-confidential version of its EQR for placing on the public record.

9.12 In its email of 11 October 2013, the Commission stated:

“...failure to remedy these deficiencies will result in IMCA being considered to be an uncooperative exporter”.

9.13 The Commission allowed the applicant until 17 October 2013 to rectify those critical deficiencies. The Commission was concerned with the prospect of visiting the applicant given the magnitude and nature of the critical deficiencies, which effectively denied the Commission information that is essential to establishing normal values, and therefore dumping margins.

9.14 On 15 October 2013, the applicant provided more information. The Commission examined this information and considered that it did not satisfy the requirements of a substantively complete EQR that was free of critical deficiencies.

9.15 The Commission contacted the applicant on 17 October 2013 advising them that critical deficiencies still remain.

9.16 The Commission considers it was very accommodating of the applicant’s circumstances providing them an extended timeframe to provide a complete EQR.

9b The ADC’s decision not to verify the data provided by IMCA by way of verification visit or desk top audit or otherwise)

- 9.17 The Commission does not embark on a desk audit of an EQR unless the EQR is satisfactorily complete and free of critical deficiencies. Having regard to the critical deficiencies identified in paragraph [9.10] (which, in the view of the Commission were never satisfactorily addressed by the applicant), a desk audit approach was not considered appropriate.
- 9.18 The Commission considered that it was inappropriate to establish export prices or normal values from the information supplied. The Commission was not satisfied with regard to the completeness, relevance, accuracy or reliability of the information contained in the EQR.

9c The ADC's assessment of IMCA's dumping margin to be 26.35% using the following methodology...9c (a) and (b) refers

- 9.19 The Commission disputes the applicant's claim that the methodology was flawed. The Commission considers this approach the most appropriate manner to establish export prices and normal values and a dumping margin for non-cooperative exporters.
- 9.20 The Commission considers that it has responded to this issue via paragraphs [7.5 to 7.10].

9d The ADC should have determined export prices and normal values from information received by the applicant – Ernst & Young analysis

Information that is not relevant information as defined

- 9.21 Nil.

Factual claims disputed, commentary, and background

- 9.22 The Commission notes that the Ernst & Young analysis was not before either the Commission in making its findings and recommendations from the investigation, nor the Parliamentary Secretary in making his decision.
- 9.23 The Commission disputes the assessment made by Ernst & Young that the Commission could have determined export prices and normal values for the applicant.
- 9.24 The analysis by Ernst & Young overlooks the critical deficiencies identified by the Commission in the EQR data provided by the applicant, which in the assessment of the Commission renders the information not worthy of verification.
- 9.25 While making no comment on the validity or otherwise of the Ernst & Young analysis, the Commission reiterates its view that the applicant was an uncooperative exporter (as defined in the Act) because the EQR contained critical deficiencies.