APPENDIX 2 - REASONS

PREPARED OR PRESERVED TOMATOES FROM ITALY

1. A number of parties[1] have approached the Anti-Dumping Review Panel submitting that they be allowed to comment on the re-investigation report by the Anti-Dumping Commission[2] (**ADC**). This approach was in response to the letter from the Panel dated 12 August 2014 inviting any party who considered that there should be further submissions in response to the re-investigation report to contact the Panel, providing reasons why such further submissions should be allowed. Parties were also asked to address the issue of what regard the Panel could have to any further submissions, given the terms of s.269ZZK(4) and s.269ZZK(4A) of the Customs Act 1901 (**the Act**).

THE PARTIES SUBMISSIONS

2. The arguments put forward by the parties can be summarised in the following way:
   - Submissions to the Panel had raised issues regarding the injury and causation analysis of the original investigation and it was therefore important that the interested parties have a further opportunity to comment on the conclusions in the re-investigation report.
   - Article 6.9 of the WTO Anti-Dumping Agreement[3] requires that interested parties be informed of the essential facts which form the basis for a decision to impose measures and such facts should be disclosed in sufficient time for parties to defend their interest. The ADC had not done this adequately and therefore did not allow the parties to fully exercise their rights of defence.
   - An opportunity to comment on the re-investigation report would allow interested parties to exercise their rights of defence.
   - The restriction in s.269ZZK(4) on the material to which the Panel can have regard in making its recommendation to the Minister operates where there is no re-investigation.
   - S.269ZZK(4A), which applies where there is a re-investigation, does not set out a clear restriction on the type of information to which the Panel can have regard where there is a re-investigation.

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[1] European Commission, Lodato Gennaro & Co S.p A, Attianese S. p A and Leo's Imports & Distributors Pty Ltd
[2] Copies of the letter from the parties are available on the ADRP website
[3] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

- Consequently, s.269ZZK(4A) gives the Panel a discretion to have regard to additional submissions, subject to s.269ZZK(5).

3. For the reasons set out below, I have come to the conclusion that the Panel does not have a discretion to allow additional submissions.

Reasons

4. I do not consider that Article 6.9 of the Anti-Dumping Agreement is relevant to the issue of whether or not further submissions should be allowed. That article refers to the rights of interested parties to be informed of essential facts "before a final determination is made…whether to apply definitive measures". The requirement to disclose essential facts under Article 6.9 is reflected in s.269TDAA of the Act which requires the ADC, in the course of an anti-dumping investigation, to issue a statement of essential facts on which the ADC proposes to base a recommendation to the Minister in relation to an application for anti-dumping measures. The terms of Article 6.9 do not govern the procedure of a review, such as that conducted by the Panel.

5. A more compelling argument that further submissions should be allowed is the requirement to provide procedural fairness. The request to the ADC to re-investigate the finding that dumping was causing material injury was as a result of the Panel's consideration of submissions made by interested parties on this issue. It seems fair then that those parties should have an opportunity to comment on the findings made by the ADC on this issue in the re-investigation report. The ADC may come to different conclusions or have different reasons to those on which the recommendation to the Minister was made.

6. It can be accepted that Australian law requires the Panel in conducting a review and making a recommendation to the Minister to comply with the principles of procedural fairness, subject to any restrictions imposed by the legislation[4]. The fact that Division 9 of Part XVB sets out a procedure for the Panel to follow in a review does not necessarily evidence a legislative intention to exclude procedural fairness. It could, however, evidence a legislative intent to reflect what procedural fairness would require in conducting a review[5].

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[4] Commissioner of Police v Tanos (1958) 98 CLR 383; Kioa v West (1985) 159 CLR 550

[5] Re Minister for Immigration and Multicultural Affairs; Ex parte Miah [1985] HCA 81

7. In order to decide whether or not principles of procedural fairness would require that interested parties be given an opportunity to comment on the re-investigation report, it is necessary to consider the statutory context. As was stated in *Kioa v West*:

> *"To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require."*[6]

8. The relevant legislation is, of course, Division 9 of Part XVB of the Act. The context for a review under that division is also relevant. A review by the Panel of a decision by the Minister to impose anti-dumping measures follows an investigation by the ADC during which interested parties are given the opportunity to make submissions[7]. As noted above the ADC is required to publish a statement of the essential facts upon which it is proposed to make the recommendation to the Minister and interested parties then have a further opportunity to make submissions in response to the statement of essential facts.[8] There is then a clear legislative intent that interested parties have every opportunity to be informed of the findings made in the investigation and to comment on them before a decision is made.

9. Since parties are given an opportunity to comment on findings made by the ADC in an investigation, it does seem unusual that they would not be given an opportunity to comment on any further or different findings made by the ADC in the course of a re-investigation. Is this the effect of the Division 9? From a consideration of the terms and overall scheme of the division, it would seem that this is the case.

10. The first point to be made is that the legislation has set out the course a review of a Ministerial decision was expected to take. In s.269ZZB there is a diagram which is stated to be an overview of a review of a Ministerial decision. This shows the steps in a review from the application for a review through to the recommendation to the Minister and the Minister's decision. It also shows the possible step by which the Panel may require the ADC to undertake a further investigation, followed by the ADC giving a report to the Panel. The Panel then reports to the Minister.

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[6] [1985] HCA 81 per Brenan J at para 33
[7] S.269TC(4)(c)
[8] S.269TC(4)(f)

11. There is no step shown in the s.269ZZB diagram for the making of further submissions after the reinvestigation report is received by the Panel. While it could be argued that this is a matter for the Panel and it is up to the Panel how to conduct the actual review, there is a specific step in the diagram for submissions to the Panel which occurs before any re-investigation. S.269ZZB is not conclusive on the issue of whether further submissions can be taken, but it does indicate that it was not envisaged by the drafter of the legislation that there would be such a step.

12. Section 269ZZI provides for the Panel to issue a public notice before it begins to conduct a review which, among other things, must invite interested parties to lodge with the Panel within 30 days submissions concerning the application. Section 269ZZJ provides for those who may make submissions which includes interested parties, trade unions and downstream users of the goods. Again, these provisions are not conclusive that the only submissions allowed are to be those received by the Panel pursuant to them. However, it does indicate that attention was given to the invitation for submissions, the timing of any submissions and who was allowed to make them. If the Panel is allowed to take submissions after a re-investigation there is no express provision as to who is to be allowed to make them or the timing for them. These matters are not matters left to the discretion of the Panel with regard to submissions under section 269ZZJ. This would seem to mitigate against it being intended that the Panel had a discretion at large as to whether or not it called for submissions, the timing of any such submissions and who could make them in response to a re-investigation.

13. Section 269ZZK does though appear to conclusively rule out any discretion being left with the Panel to consider submissions outside the terms of section 269ZZJ. This section deals with the report to be made by the Panel to the Minister. Subsection 269ZZK(4) provides that in making the report to the Minister, the Panel:

    "(a) must not have regard to any information other than the relevant information; and

    (b) must only have regard to the relevant information and any conclusions based on the relevant information that are contained in in the application for the review or in any submissions received under section 269ZZJ within the period of 30 day referred to in that section."

14. This is a clear legislative prohibition on the Panel having regard to any submissions except those received under section 269ZZJ and accordingly would rule out any discretion being allowed to the Panel to have regard to any submissions received after the 30 day period prescribed by section 269ZZJ and hence any submissions in response to a re-investigation.

15. Subsection 269ZZK(4) is however expressed to be subject to subsections (4A) and (5). Subsection (4A) provides that if the Panel gives the ADC a notice under subsection 269ZZL(1) (which is a notice requiring a re-investigation) then in making the recommendation to the Minister the Panel "must have regard to the report the Commissioner gives the Panel under subsection 269ZZL(2)".

16. Some of the parties argue that subsection (4A) applies where there is a re-investigation and it does not have a clear restriction on that to which the Panel can have regard and hence, where this subsection applies, the Panel has a discretion to have regard to further submissions. There are a number of difficulties with this argument.

17. It is not clear that Parliament intended in enacting subsection (4A) that it would be read separately to subsection (4) or operate independently from the restrictions in subsection (4). The terms of s.269ZZK mitigate against such a reading. If subsection (4A) was to stand alone then there would be nothing to restrict the Panel from having regard to information which was not "relevant information" as that term is defined. This cannot be the intention. It would seem an absurd interpretation that the Panel was restricted in making a report to the Minister to only have regard to relevant information, except, when there is a re-investigation, the Panel has a discretion at large as to that which it can have regard, provided it also has regard to the re-investigation report.

18. Subsection (4A) was inserted into Division 9 by item 63 of the Customs Amendment (Anti-Dumping Improvements) Act (No. 1) 2012. The Explanatory Memorandum accompanying the Bill for this Act, states:

    "71. Item 63 amends paragraph 269ZZK(4)(b) to ensure that the Review Panel in making its recommendation to the Minister must have regard to any reinvestigation report provided by the CEO to the Panel."

19. There is nothing in the Explanatory Memorandum, or indeed the language of section 269ZZK, which indicates that anything further was intended by the insertion of subsection (4A) other than to ensure that where there is a re-investigation, the Panel must take that into account the report made as a result.

20. If the Panel is limited to relevant information in making a report to the Minister following a re-investigation, then subsection (4A) has to be read as applying with subsection (4). If this is the proper construction then the Panel is limited by paragraph (b) of subsection (4) to only have regard to submissions made under section 269ZZJ. It would be a contorted interpretation to read subsection (4A) with paragraph (a) of subsection (4) (which limits the information to which the Panel can have regard to "relevant information") but not paragraph (b).

21. Another flaw with the construction of subsection (4A) which would have it applying where there is a re-investigation without the limits in subsection (4) is that subsection (4) is made subject to subsection (5) but subsection (4A) is not. Subsection (5) provides that the Panel cannot have regard to a submission under subsection (4) if the party making it claims that it contains confidential information but does not give the Panel a non-confidential version of that submission. There is no reason why there would not be a similar restriction on submissions made in response to a re-investigation which contained confidential information.

22. The only sensible reading of section 269ZZK is to read subsections (4) and (4A) together such that they both apply when there is a re-investigation.

23. A further indication that this is the intention of the legislation is to be found in the terms of section 269ZZX. This section provides for the public record to be maintained by the Panel in relation to each application for a review. Where the review is of a Ministerial decision, the section requires that the Panel must maintain a public record containing a copy of the application and "any submissions received under section 269ZZJ within the period of 30 days referred to in that section". The legislative intention is recommendation to the Minister. The reference in section 269ZZX to only those submissions received under section 269ZZJ is yet another indication of a legislative intention to limit submissions to only those made under that section. Further, there is no mention made in section 269ZZX to the publication of a re-investigation report. Again, if it was intended that there be further submissions in response to a re-investigation, it could be expected that there would have been a legislative requirement to publish the report.

24. Given the terms of section 269ZZK and in particular subsection (4) and the overall scheme of Division 9, there does not appear to be any discretion left to the Panel to have regard to submissions made in response to a re-investigation.