

**APPLICATION FOR REVIEW OF
DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY
NOTICE OR COUNTERVAILING DUTY NOTICE**

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☒ a dumping duty notice(s), and/or
☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or
☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

- ☒ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).
- ☒ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.
- ☒ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.
- ☒ Full description of the imported goods to which the application relates.
- ☒ The tariff classification/statistical code of the imported goods.
- ☒ A copy of the reviewable decision.
- ☒ Date of notification of the reviewable decision and the method of the notification.
- ☒ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

- ☐ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature:.....

Name:.....STEPHEN KLOTZ

Position:.....PARTNER, NORTON ROSE FURBRIGHT

Applicant Company/Entity:

FOR I.M.C.A. SpA

Date: 16 / 5 / 14

2 Specified interest in a review

- 2.1 IMCA is an 'interested party' in that it is a company directly concerned with the exportation to Australia of the goods the subject of the ADC's investigation. IMCA participated in the ADC's investigation as an exporter of the goods under consideration and provided data and submissions to the ADC.
- 2.2 The ADC subsequently found that IMCA was an 'unco-operative exporter' and, as published in the Notice, decided that the appropriate dumping margin for IMCA was 26.35%. IMCA seeks a review of those findings.

3 Full description of the goods to which this application relates

- 3.1 The goods the subject of this application are the same goods as were the subject of the ADC's investigation, namely:
- 'Tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume' (Goods).*
- 3.2 The Goods excluded from the above definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.
- 3.3 The Goods are classified to subheading 2002.10.00 (statistical code 60) to Schedule 3 of the *Customs Tariff Act 1995*. For Italian prepared or preserved tomatoes a Customs duty rate of 5% applies.

4 Findings for review by the ADRP

- 4.1 The ADC's reasons for publishing the Notice are set out in the ADC's report to the Minister dated 21 March 2014 and titled 'Final Report No. 217 – Alleged dumping of prepared or preserved tomatoes export exported from Italy' (**Report**). Copies of the Report and the Notice are enclosed.
- 4.2 By way of background, during investigation 217, the ADC formed the view that the number of exporters of the Goods that provided initial information to the ADC was too large to determine dumping margins for each of them. As a result, the ADC undertook a sampling exercise by which it identified 7 exporters to assess individually (including IMCA). Those selected exporters accounted for approximately 70% of the export volume of the Goods to Australia (see page 36 of the Report).
- 4.3 IMCA seeks review of the following incorrect and/or not preferable decisions contained in the Report:
- (1) the ADC's decision to treat IMCA as an unco-operative exporter;
 - (2) the ADC's decision not to verify the data provided by IMCA (by way of a verification visit or 'desktop audit' or otherwise); and
 - (3) the ADC's assessment of IMCA's dumping margin to be 26.35% using the following methodology:
 - (a) determination of IMCA's export prices pursuant to section 269TAB(3) of the *Customs Act 1901 (Act)* having regard to all relevant information, using the lowest export price from exporters found to have a dumping margin greater than 2%; and
 - (b) determination of IMCA's normal values pursuant to section 269TAC(6) of the Act having regard to all relevant information, using the highest normal value from all cooperative exporters found to have a dumping margin greater than 2%,

(together, the **Decisions**).

5 Relevant background

- 5.1 IMCA is a small, family-owned company which employs just 8 office workers, 20 factory workers and 190 additional workers (during high season only). We are instructed that none of the company's senior management speak English and the company's written and oral communications with the ADC were done with the interpretive assistance of Mr Alfonso Pepe's assistant, who speaks some English. The ADC's investigation took place during the busiest time of the year for IMCA, being the tomato production and processing season which occurs in August, September and October each year. During this time, all of the company's management and staff work long hours to facilitate this process.
- 5.2 The following chronology of IMCA's correspondence with the ADC shows why the ADC's view that IMCA was unco-operative is untenable and unfair:
- (1) On 6 August 2013 IMCA sought an extension from the ADC to the deadline for it to submit its completed Exporter Questionnaire and, in relation to the scheduling of a verification visit, informed the ADC that *'it's rather difficult to fix any appointment now since we expect we will be fully committed with the new season process until mid-November'*.
 - (2) On 12 August 2013 the ADC granted IMCA an extension until 30 September 2013 for the completion of the Exporter Questionnaire and noted in its email that the ADC was *'planning to undertake verification visits in the month of October. Any time beyond that will make it very difficult to finalise the investigation within a timely manner. Therefore, I urge you to reconsider your company's availability during October.'*
 - (3) Later on 12 August 2013, IMCA wrote to the ADC and stated that *'Unfortunately we cannot meet you before November since we are fully committed with the production. For your info the tomato processing is carried out during 3 months only: August, September and October and all the management and staff are deeply involved in it. The verification by your team during the production time would not allow us to assist or give you any support to the best of our ability.'*
 - (4) On 23 September 2013, having not received any response to the 12 August 2013 email, IMCA wrote to the ADC and asked when the verification visit would take place.
 - (5) On 24 September 2013, the ADC responded to IMCA's email and noted *'As I mentioned in my earlier email on 12 August 2013, we are proposing to undertake verification visits during October. If your company is available to assist with the verification, then we would be expecting to spend 3 or 4 days at your company's premises checking the information that you provide in the exporter questionnaire response. Please advise whether the week 14-17 October would suit your company?'*
 - (6) Later on 24 September 2013, IMCA responded to the email from the ADC sent earlier that day and stated *'Sorry it will not be possible those days. We will be able to meet you from 28 to 31 October.'*
 - (7) On 27 September 2013 IMCA provided the ADC with its Exporter Questionnaire (**27 September Data**).
 - (8) On 1 October 2013, IMCA wrote to the ADC again requesting further information about the timing of the verification visit, as the ADC had not responded to its email dated 24 September 2013.
 - (9) Later on 1 October 2013, the ADC confirmed by email that the verification visit would commence on 29 October 2013 and that further arrangements would be made shortly.
 - (10) On 11 October 2013, IMCA wrote to the ADC and requested an agenda for the upcoming verification visit.

- (11) On 11 October 2013, the ADC wrote to IMCA asserting that there were a number of 'critical deficiencies' in the data provided by IMCA in the 27 September Data and requesting that IMCA provide more and complete information by 17 October 2013. The ADC noted that the critical deficiencies would need to be remedied before the verification visit took place. Those critical deficiencies were stated to be that:
- (a) IMCA had not provided or completed the necessary information requested in the income statement spreadsheet;
 - (b) IMCA had not provided or completed cost to make and sell information for the goods exported to Australia;
 - (c) IMCA had not provided or completed cost to make and sell information for like goods sold on the domestic market in Italy;
 - (d) IMCA had not provided or completed details of exports to other third country export markets; and
 - (e) IMCA had not provided a non-confidential version of its questionnaire response for placing on the public record.
- (12) On 15 October 2013 IMCA provided the ADC with an amended Exporter Questionnaire spreadsheet (**15 October Data**), together with explanations of the data provided and a note in the covering email that stated, '*[w]e wish to give you our support co-operation in the best way and trust you find this satisfactory. Please let us know when the officers will come since we have to fix an appointment with our external accountants.*'
- (13) On 16 October 2013, IMCA wrote to the ADC and requested confirmation of the date of the verification visit.
- (14) On 17 October 2013, IMCA again wrote to the ADC requesting confirmation of the date of the verification visit, as no response had been received to the email IMCA sent the previous day.
- (15) On 17 October 2013, the ADC wrote to IMCA stating that the revised information provided on 15 October still contains numerous critical deficiencies, that IMCA must be treated as an unco-operative exporter (**17 October Decision**) and that the ADC would provide a list of the remaining critical deficiencies the next day.
- (16) Later on 17 October 2013, IMCA wrote to the ADC stating that '*[w]e are very frustrated and disappointed you came to the conclusion we are not co-operative. We have shown you our willingness to co-operate with you and yr organization, if you do not intend to come to our factory just let us know. You did not take into account that during the production we have spent time to fill in the questionnaire overlooking our work. Since we do not understand (we are Italians) what you are after, you are welcome in our premises any time you wish and we are sure you will be satisfied with any reports.*'
- (17) On 18 October 2013 the ADC provided IMCA with a list of the remaining critical deficiencies in the data provided on 15 October 2013 and stated '*Prior to undertaking verification visits the Anti-Dumping Commission (the Commission) needs to undertake an assessment of the information provided by applying relevant legislative provisions that operate to determine which sales are sold in the ordinary course of trade prior to performing a preliminary dumping analysis. To undertake the ordinary course of trade tests, information requested in the various spread sheets in the format identified is critical to this preliminary assessment.*' In addition, the ADC stated, '*the Commission considers the matters pertaining to the Income Statement, Turnover, Australian Sales, Domestic Sales, and the Domestic and Export Cost to Make and Sell worksheets as critical deficiencies.*'
- (18) Later on 18 October 2013, IMCA wrote to the ADC stating '*we don't agree that you have already undertaken a decision against IMCA without meeting us in Italy. It is relevant you*

come to meet us to review all the documentation. What's more, we think it's normal that there are some deficiencies because our accountants do not speak English and experienced problems in filling in the spread sheets. Since the start of the investigation we have shown you our willingness to co-operate and we regret you say don't.'

- (19) Following the above correspondence, on 18 October 2013 IMCA provided the ADC with further revised data (**18 October Data**), remedying the deficiencies outlined in the ADC's email of the same date.
 - (20) On 21 October 2013, the ADC wrote to IMCA stating '*a decision was made last Thursday as to the completed state of I.M.C.A. S.p.A.'s exporter questionnaire response where critical deficiencies were still identified. This follows an additional extension to correct the original critical deficiencies. The Commission will not visit I.M.C.A. S.p.A. to verify the information provided. With regard to scheduling visits, I understand Mr Bracic invited responses from selected exporters and on or about 13 August 2013 I.M.C.A. S.p.A. indicated it was not available. This would explain why a scheduled visit had not been planned and an alternative approach was considered in late September 2013 following your correspondence on or about 23 September 2013.*' It appears that the ADC had paid no regard to the 18 October Data.
 - (21) Later on 21 October 2013, IMCA responded to the email from the ADC from earlier that day and stated, '*We totally disagree with yr decision. The deficiencies found at your end, but not according to our accountants, had to be verified in our offices supported by your officers' explanations to compile the questionnaire correctly.*'
 - (22) On 25 October the ADC announced that the deadline for the publication of the SEF had been extended to 16 December 2013.
 - (23) On 13 December 2013 the ADC announced that the deadline for the publication of the SEF had been further extended to 4 February 2014.
 - (24) On 4 February 2014 the ADC published its Statement of Essential Facts (**SEF**).
 - (25) On or about 21 February 2014, IMCA provided the ADC with a further revised Exporter Questionnaire (**February 2014 Data**) and a submission on its behalf by Van Bael & Bellis. The ADC seems to have had no regard to the February 2014 Data.
 - (26) On 16 April 2014 the ADC published the Notice.
- 5.3 Copies of the correspondence referred to above are available in the ADC's file for this investigation and accordingly the ADRP is able to review this correspondence for the purposes of this application. Alternatively, IMCA would be happy to provide copies of this correspondence to the ADRP upon request.
- 5.4 IMCA draws the ADRP's attention to and relies on the following:
- (1) Section 239T of the Act which states that an exporter may be treated as unco-operative '*where the Commissioner was satisfied that the exporter did not give the Commissioner the information the Commissioner considered to be relevant to the investigation, review or inquiry within a period the Commissioner considered to be reasonable*';
 - (2) Sections 269TAB(3) and 269TAC(6) of the Act which provide that where the Minister is satisfied that sufficient information has not been furnished, or is not available, to enable the export price or normal value to be ascertained using the other methods described in those sections, the export price and normal value is such an amount as is determined by the Minister having regard to **all relevant information** (emphasis added);
 - (3) Page 51 of the Anti-Dumping Commission's Dumping and Subsidy Manual dated December 2013 (**Manual**) which states that '*an interested party is not uncooperative if it does not*

supply all of the information requested but, nevertheless, has substantially complied with the requirements of the questionnaire';

- (4) Article 6.13 of the World Trade Organisation Anti-Dumping Agreement (**ADA**), which requires the ADC to take due account of any difficulties experienced by interested parties and provide any assistance practicable;
- (5) Paragraph 5 of Annex II to the ADA which provides that *'even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided that the interested party has acted to the best of its ability';* and
- (6) Paragraph 6 of Annex II to the ADA which provides that *'if evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in published determinations.'*

6 Reasons that the Decisions are not the correct or preferable decisions

6.1 IMCA submits that, for the following reasons, the ADC has incorrectly treated it as an unco-operative exporter, that it was unreasonable and unfair for the ADC to treat IMCA as an unco-operative exporter, and that the ADC has not met its obligations under the ADA in deciding to treat IMCA as an unco-operative exporter:

- (1) On its face, the volume and content of the correspondence between IMCA and the ADC, shows that IMCA has acted to the best of its ability for the purposes of paragraph 5 of Annex II to the ADA, especially in light of the ADC's awareness that:
 - (a) IMCA is a small company with limited resources that was impeded by a significant language barrier;
 - (b) IMCA continued to attempt to provide data that would be accepted by the ADC and showed an overall willingness to co-operate;
 - (c) the ADC requested data to be provided in specific formats (which are not the formats IMCA normally uses); and
 - (d) the timing of the ADC's request for information made IMCA's task very difficult, being in the middle of the busy tomato harvesting season.
- (2) The 27 September Data included completed Australian Sales and Domestic Sales spreadsheets. On 11 October 2013 the ADC wrote to IMCA providing details of the alleged critical deficiencies in the 27 September Data. At that time the ADC did not set out any deficiencies in respect of the Australian Sales and Domestic Sales spreadsheets. From this response it was reasonable for IMCA to infer that the Australian Sales and Domestic Sales Spreadsheets were acceptable to the ADC and did not contain any critical deficiencies. Additionally, it was also reasonable for IMCA to infer that data with a similar level of detail would be acceptable to the ADC. The 15 October Data included the same Australian Sales and Domestic Sales spreadsheets as included in the 27 September Data. However, in response to the 15 October Data the ADC informed IMCA by email dated 18 October 2013 of alleged critical deficiencies in the Australian Sales and Domestic Sales spreadsheets. This was the first time the ADC had informed IMCA of any deficiencies with the Australian Sales and Domestic Sales spreadsheets. The same ADC email containing that notification also included notification of the ADC's decision that IMCA would be treated as an unco-operative. It is clearly unfair that the ADC should accept certain information without comment on one occasion and then on a later date deem deficiencies in that same information to justify the categorisation of IMCA as an unco-operative exporter without IMCA being given any opportunity to rectify those alleged deficiencies. Had the ADC notified IMCA of the alleged deficiencies in the Australian Sales and Domestic Sales spreadsheets in its 11

October 2013 email, it can be assumed that the alleged deficiencies would have been rectified by IMCA in the 15 October Data. This presumption is justified by the fact that the alleged deficiencies were in fact rectified by IMCA in the 18 October Data, provided the same day that IMCA first received notification of the alleged deficiencies.

- (3) IMCA was informed that there were deficiencies in the 15 October Data on 17 October 2013 and was not informed of the specific deficiencies in that data until 18 October 2013 when the deadline for completion of the revised Exporter Questionnaire had lapsed. In addition, the 18 October Data appears to have been completely disregarded by the ADC. IMCA submits that, in accordance with the definition of 'unco-operative exporter' in section 239T of the Act, a reasonable time period for IMCA to provide further refined information extends beyond 17 October 2013, in circumstances where the SEF was not published until 4 February 2014.
- (4) The 17 October Decision was particularly egregious given that the ADC must have known (or it would have been reasonable for the ADC to assume) at the time of making that decision, and at the time of reaffirming its position in relation to that decision on 21 October 2013, that the deadline for the publication of the SEF (then 28 October 2013) was about to be extended by two months. We note that the revised deadline was subsequently extended again to 4 February 2014. Accordingly, the ADC had substantial additional time to liaise with IMCA in relation to the provision of additional data and verification of that data (even if that were necessary and IMCA submits below that it was not).
- (5) By the ADC's email dated 18 October 2013, which sets out the deficiencies in the 15 October Data, it was reasonable for IMCA to believe that the ADC was willing to receive further data from IMCA, to review that data and attempt to verify it. It is now evident that the ADC simply failed to review the 18 October Data, as well as the February 2014 Data.
- (6) Further and in the alternative, in circumstances where:
 - (a) the ADC was made aware that IMCA is a small company with limited resources and was impeded by a significant language barrier;
 - (b) it was clear to the ADC that even though IMCA did not understand how the data it provided was deficient it was attempting to co-operate to the best of its ability, including in the provision of data and scheduling of a verification visit; and
 - (c) the SEF was not published until 4 February 2014,

it was unreasonable for the ADC to make the 17 October Decision at such an early stage in the investigation and refuse to depart from it, given that there was ample time for IMCA to provide further data, that IMCA did provide further data and the ADC had further time in which to verify that further data (but failed or refused to do so).
- (7) It took the ADC 3 days from when the 15 October Data was provided to inform IMCA of the specific deficiencies in that data. By that time, the deadline for the provision of information had closed and IMCA was unable to remedy those deficiencies. In all of the circumstances, it was unreasonable for the ADC to make the 17 October Decision given it contributed to IMCA's non-compliance with the deadline and where a timely response from the ADC would have given IMCA the opportunity to rectify the problems with the data before the deadline expired, as evidenced by the provision by IMCA of the 18 October Data on the same day it received a list of the deficiencies in the data it had previously provided.
- (8) As set out in part 1 of the EY Report, if the ADC had properly considered the 15 October Data and the 18 October Data (which the ADC appears to have completely disregarded), it would have been able to calculate IMCA's normal values and export prices, and therefore an individual dumping margin. Accordingly, it is submitted that IMCA:
 - (a) has substantially complied with the requirements of the Exporter Questionnaire for the purposes of page 51 of the Manual; and

- (b) should have been treated as a co-operative exporter for the purposes of the ADC's investigation.
- (9) The ADC has failed in its obligations under article 6.13 of the ADA and paragraph 6 of Annex II to the ADA in that:
 - (a) the ADC failed to provide assistance to IMCA in circumstances where it was clear to the ADC that IMCA did not understand how the data it provided was deficient;
 - (b) in its correspondence with IMCA, the ADC failed to adequately (and in a timely way) describe the alleged deficiencies in the data IMCA provided, even though it was aware that IMCA was experiencing difficulties in understanding the ADC's requests and providing the necessary data;
 - (c) by emails from IMCA dated 15 October 2013, 17 October 2013 and 18 October 2013, the ADC was aware that IMCA was experiencing difficulties with providing the required information and failed to take due account of this in making the 17 October Decision; and
 - (d) notwithstanding that the ADC granted IMCA an extension to submit its Exporter Questionnaire and provided IMCA with an additional period to remedy deficiencies in that data, in circumstances where the SEF was not published until 4 February 2014, the ADC failed to provide IMCA with additional time to provide further explanations and data after 17 October 2013; and
 - (e) the ADC failed to publish specific reasons for the rejection of the information IMCA provided in the Report.
- 6.2 IMCA submits that, for the following reasons, the ADC has erroneously and unreasonably decided not to verify the data provided by IMCA, either by way of a verification visit or 'desktop audit':
 - (1) IMCA relies on the submissions contained in paragraph 6.1 above in relation to the unreasonableness and incorrectness of the 17 October Decision and the consequent failure by the ADC to review or verify the 18 October Data.
 - (2) As set out in part 1 of the EY Report, IMCA provided sufficient data (the 15 October Data and the 18 October data) to enable the ADC to calculate IMCA's export prices and normal values, such data comprising substantial compliance with the requirements of the Exporter Questionnaire and able to be verified by way of a verification visit or otherwise.
 - (3) The extensive correspondence between IMCA and the ADC demonstrates that, despite initial scheduling difficulties, IMCA was ready and willing for the ADC to visit its premises for the purposes of verifying the data provided.
 - (4) The ADC had substantial time to verify the data and such verification would not have compromised the timing of the investigation, given:
 - (a) the two extensions to the publication date for the SEF, which was not ultimately published until 4 February 2014; and
 - (b) the public record shows that the ADC conducted verification visits to other exporters in Italy up until 6 November 2013 (i.e. after the 28 October 2013 deadline for the publication of the SEF).
- 6.3 IMCA submits that, for the following reasons, the ADC has erroneously and unreasonably assessed IMCA's dumping margin to be 26.35%:
 - (1) IMCA relies on the submissions contained in paragraph 6.1 and 6.2 above in relation to the timing and quality of data it provided to the ADC and the ADC's refusal to review or verify any data provided by IMCA after 15 October 2013.

- (2) As set out in part 2 of the EY Report, in calculating the dumping margin of 26.35%:
 - (a) the ADC's methodology was flawed;
 - (b) the ADC failed to explain why normal values and export prices of exporters with dumping margins of less than 2% were not considered; and
 - (c) the unco-operative exporter rate determined by the ADC appears to be so disproportionate to the verified dumping margins that it cannot be based on all relevant information and could be characterised as a penalty rate.
 - (3) As further set out in part 2 of the EY Report, not only did the ADC disregard the 18 October Data (which was able to be verified) for the purposes of calculating an individual dumping margin for IMCA, it also disregarded the data (as 'all relevant information') for the purposes of calculating the unco-operative exporter rate in accordance with sections 269TAB(3) and 269TAC(6) of the Act.
 - (4) Further, as set out in the EY Report, when analysed together, the 15 October Data and the 18 October Data:
 - (a) was sufficient for the ADC to calculate IMCA's export prices and normal values, and therefore an individual dumping margin;
 - (b) was able to be verified by way of a verification visit or otherwise; and
 - (c) when properly assessed, result in an individual dumping margin of 0%.
- 6.4 Accordingly, IMCA submits that the ADRP should recommend to the Minister that the Decisions be revoked and that the relevant correct and preferable decisions are as follows:
- (1) IMCA is a co-operative exporter for the purposes of the ADC's investigation; and
 - (2) the ADC should have verified the data provided by IMCA and upon this verification determined that IMCA had not exported the Goods to Australia at dumped prices during the investigation period.
- 6.5 However, if it is found that the ADC has correctly treated IMCA as an unco-operative exporter (which is rejected), IMCA submits that the correct and preferable finding is that the ADC's calculation of unco-operative exporter dumping margin according to sub-sections 269TAB(3) and 269TAC(6) of the Act failed to take into account all relevant information and that margin, once re-assessed, should be nil.

Please contact us if you have any queries.

Yours faithfully



Stephen Klotz
Partner
Norton Rose Fulbright Australia

Mr. Stephen Klotz
Partner
Norton Rose Fulbright
Level 18, Grosvenor Place
225 George Street
SYDNEY NSW 2000

16 May 2014

**Investigation into the alleged dumping of prepared or preserved tomatoes
exported from Italy (“Investigation”)
I.M.C.A. S.p.A**

Dear Mr. Klotz

We have been provided with a copy of the versions of the exporter questionnaire and financial information submitted by I.M.C.A. S.p.A. (“**IMCA**”) to the Anti-Dumping Commission (“**ADC**”) on 27 September 2013 (“**27 September Information**”), 15 October 2013 (“**15 October Information**”) and 18 October 2013 (“**18 October Information**”). We have reviewed that information for the purpose of assessing:

- for the purposes of the section 269 of the *Customs Act 1901* (“**Act**”) definition of uncooperative exporter, whether IMCA did not give the ADC information the ADC considered to be relevant to the Investigation;
- if IMCA was deemed to be an uncooperative exporter within the meaning of section 269 of the Act what was an appropriate export price and normal value in respect of IMCA under subsections 269TAB(3) and 269TAC(6) of the Act; and
- whether the 15 October Information and/or the 18 October Information was reliable.

In conducting our review, we have not considered whether the ADC was obliged to, or should have considered the information provided by IMCA at different stages. Rather, we have considered whether if the information was considered, what use could reasonably have been made of it by the ADC.

This report has been prepared for Norton Rose Fulbright solely for the purpose of being included in an application to the Anti-Dumping Review Panel on behalf of IMCA for a review of a decision whether to publish a dumping duty notice in respect of Anti-Dumping Commission investigation 217 (“**Investigation**”). The report is based on instructions received from Norton Rose Fulbright and a review of the information provided by IMCA to the ADC in respect of the Investigation. Other than the Anti-Dumping Review Panel, the information in this report should not be relied on by third parties without our written consent.

For the reasons set out below, it is our view that:

- a) the 15 October Information, either with minor clarification or when read with the 18 October Information would have enabled the ADC to determine:
 - an export price for diced and chopped tomatoes exported by IMCA;

- the level of domestic sales of like goods by IMCA;
 - the IMCA constructed normal value;
 - a dumping margin specific to IMCA (which would have been 0);
- b) the uncooperative exporter rate determined by the ADC does not take into account all relevant information as:
- IMCA export prices have not been considered;
 - a constructed IMCA normal value has not been considered;
 - it appears that normal values and export prices have not been calculated on a product by product basis, meaning the dumping margin is not calculated by reference to comparable goods or transactions; and
 - normal values and export prices in respect of all cooperative exporters has not been considered; and
- c) subject to one exception, the 15 October Information and the 18 October Information is on its face reliable. Like all information in exporter questionnaires, the level of confidence in the information can be improved through the standard post questionnaire submission verification activities such as reviewing source documents, third party verification or the undertaking of a verification visit.

The findings of our review are set out in detail below.

1. The provision of information relevant to the investigation within a reasonable period
a. Legislative requirements

In the context of a dumping investigation, the initial task of the ADC is to determine whether dumping has occurred and if so, the level of dumping. The test to determine this is set out in section 269TACB of the Act. That section sets out that the dumping margin shall be determined by the differential between the export price of the goods and the normal value of the goods.

As such, the crucial information required by the ADC is information necessary to determine the export price and the normal value of the goods. Each of these elements is considered below.

b. Export price

For a third party export sale¹, section 269TAB of the Act sets out that the export price of the goods is the price paid for the goods by the importer other than any part of that price that represents a charge in respect of the transport of the goods after exportation.

Accordingly, to determine the export price the Commissioner requires:

- the identity of the exporter;
- the identity of the importer;
- details as to any relationship between the importer and exporter;
- the amount paid for the goods; and
- any post exportation transport costs in respect of the goods.

¹ We understand that IMCA is not related to its Australian customers.

The 15 October Information included substantial information in respect 97 export sales to Australia. That information included the invoice price of the goods, the identity of the exporter and importer and details of the shipping terms sufficient to identify that there were no post exportation transport costs.

In addition, we note that the 27 September Information included a completed exporter questionnaire that stated that IMCA and its Australian customers were not related.

Based on the 15 October Information it is our view that the ADC could have determined a preliminary export price for all of the like goods exported by IMCA to Australia. We note that for most exports the price per “12x400g” tin or “2x6x800g” tin was calculated. This information would have enabled the ADC to determine a preliminary export price for exported goods in the aforementioned categories.

In particular we note the following:

- details of 55 transactions with Woolworths were disclosed totaling €590,860 where the price was either €2.892 per 12x400g cans or €5.784 per 12x800g can. We note that under either pricing, the price per kg is the same being €0.60375 (“**Woolworths Sales**”);
- details of 25 identical transactions with Metcash were disclosed totaling €269,054 where the detailed price was €2.87 per 12x400g cans of diced tomatoes (“**Metcash DT Sales**”);
- details of 9 transactions with Metcash was disclosed of either 12x400g cans of diced tomatoes or 12x400g cans of peeled tomatoes where the price was either €2.87 per pack of 12x400g of diced tomatoes or €3.1 per 12x400g of peeled tomatoes.

While details of whether the Woolworths Sales were of diced or peeled tomatoes were not included in the 15 October 2014 information, such clarification could have been easily requested by the ADC and was in fact provided in the 18 October 2014 information. That clarification set out that the product type was immaterial as the price was the same for both peeled and diced tomatoes in respect of sales to Woolworths.

We also note that an FOB per 12x400g or 12x800g price was not provided in respect sales to Coreco Fine Foods. We note that as set out in the 15 October Information these sales were on an ex works basis and therefore IMCA would not be privy to the information necessary to determine an FOB price (such as inland freight). In respect of the Coreco sale, there were 4 transactions with an average 12x400g can ExWorks price of €2.95.

Adopting a conservative approach of using the lowest IMCA export price, it is clear that the ADC could have established a minimum Australian export price of €2.87 per 12x400g can, or €0.5979 per kg of diced or peeled tomatoes (“**IMCA Export Price**”).

Accordingly, it is our view that this information was sufficient to determine an export price subject to verification and clarification by the ADC.

We note that further product details were provided in the 18 October information. That information may have allowed some greater precision as to pricing. However, it is considered that this greater precision would have been relatively insignificant, and in any event, in favor of IMCA.

c. Normal value

Sub-section 269TAC(1) of the Act sets out 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 arm’s length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

Subsection 269TAC(1) of the Act is qualified by subsection 269TAC(2) of the Act. Relevantly, subsection 269TAC(2) of the Act prevents the sale of domestic like goods by the exporter as forming the basis of the normal value due to the low volume of those domestic sales.

In the document entitled Dumping and Subsidy Manual dated December 2013 (“**Manual**”) the ADC states that “*low volume is defined in s. 269TAC(14) as less than 5% of the total volume of the goods under consideration that are exported to Australia by the exporter ... in assessing whether there are sufficient sales made in the ordinary course, the following tests are performed:*

- *calculate whether the aggregate volume of all domestic ordinary course of trade sales of the goods is 5% or more of the overall export sales volume to Australia from that country; and*
- *if the aggregate volume is greater than 5%, the test is applied individually for each model or type of like goods.”²*

Accordingly, as a starting point, the information the ADC requires regarding domestic transactions is the level of IMCA’s sales.

The 15 October Information contained details of domestic sales in the domestic sales tab. That information set out that there had only been €11,613.10 of domestic sales of like goods across 14 transactions. The information disclosed also revealed that of the 14 transactions 12 had a value of €400 or less. Ultimately, the information demonstrated that the value of domestic transactions clearly below the 5% threshold set out in subsection 269TAC(14) of the Act.

This information would have clearly enabled the ADC to make an assessment as to whether there were sufficient domestic sales by IMCA to enable calculation of the normal value under subsection 269TAC(1) of the Act. We note that the 15 October Information did not specify individual products. However, the above extract from the Manual makes clear that individual model assessment is not required to be undertaken where the aggregate volume is less than 5% of the export sales to Australia.

As such, sufficient information was provided in the 15 October Information to enable the ADC to form the view that due to low domestic sales volumes, the normal value of goods could not be based on the domestic sale of like goods by IMCA.

In these circumstances the normal value of goods would be required to be calculated according to subsection 269TAC(2)(c) of the Act (constructed value) or subsection 269TAC(2)(d) of the Act (sales to third countries).

Each of these is considered below.

i. Constructed value

In order to calculate the constructed value, the ADC would have required the cost of production and the administrative, selling and general costs of the exported goods. The 15 October Information included a completed “Australian CTMS” spreadsheet. We note that other than the delivery expense amount, this information in this spreadsheet is the same as the “Domestic CTMS” spreadsheet. In both cases the information does not relate solely to Australian production or domestic production. This is evidenced by the amounts being identical on both sheets and the costs of production being over 10 times the volume of goods sold to Australia. From this we have inferred that this information relates to IMCA’s entire production.

In this sense, the information neither distinguishes between product types, Australian sales, domestic sales or third country sales.

However, it is contended that the failure to make this distinction did not impact of the ADC’s ability to calculate a preliminary normal value for the following reasons:

- the production, selling and general costs of peeled and diced tomatoes are almost identical (the variance is less than 1%);
- as set out in the 18 October Information:
 - sales of standard peeled and diced tomatoes accounted for 96.9% of the sales to Australia during the relevant period;

² Page 32 and 33 of the Manual.

- o the balance of the sales were of organic tomatoes and accounted of only €33,000 of sales to Australia during the relevant period; and
- o other than approximately €1000 of sales, all domestic sales were of chopped or peeled tomatoes.

While the entirety of these facts may not have been immediately apparent from the 15 October Information, it could have been easily clarified by the ADC either by email or as part of a verification visit or obtained from the 18 October Information.

In any event, the information was sufficient to enable a preliminary assessment of production, sale and general costs to be determined subject to a verification visit being undertaken.

We note that in respect of domestic sales the cost to manufacture and sell was calculated as €0.4938 per kilogram. In respect of Australian sales the cost to manufacture and sell was calculated as €0.5154 per kilogram. As illustrated by the INCOTERMS listed in the Australian Sales Spreadsheet included in the 15 October Information, most Australian sales are on an FOB basis. This means that there are additional inland freight costs associated with Australian sales. The “Australian CTMS” sets out that this equates to approximately the extra €0.02 per kg cost on Australian sales.

In respect of calculating a profit margin, regulation 181A(2) of the *Customs Regulations 1926* provides that, if reasonably possible, the Minister must work out the profit amount by using data relating to the production and sale of like goods by the exporter or producer in the ordinary course of trade.

The domestic sales information provided in the 15 October Information sets out that there were only 2 material domestic transactions (all others were under €400) (“**Material Sales**”) and those transactions were the only 2 that do not appear to be “private sales”. This information was sufficient to highlight to the ADC that the level of domestic profit would need to be calculated by reference to profit on the Material Sales. Given there were only 2 Material Sales, the ADC could have calculated the profit margin on those domestic transactions as part of any verification visit or request for further information.

We note that the price per kilogram of the Material Sales was made clear in the 18 October Information. That information set out that the price per kilogram of the Material Sales was €0.5625. The ADC could have compared this sale price per kilo to the domestic cost per kilo to determine a level of domestic profit made on the sale of the goods under consideration. Such a comparison would have indicated a domestic profit of 12.21% (“**Preliminary Domestic Margin**”).

Using the Preliminary Domestic Margin, the ADC could have calculated a preliminary normal value. This could have been calculated by taking the Australian costs to make and sell and adding the Preliminary Domestic Margin. This would have produced a constructed normal value of €0.578 per kilo (“**Preliminary Constructed Value**”).

If the ADC considered that this calculation was not possible, Regulation 181A(3) of the *Customs Regulations* (1926) enables the Minister to calculate the profit margin by reference to the sale of the same general category of goods (not applicable as there were no other material sales), the weighted average of the actual amounts realized by other exporters or producers from the sale of like goods in the domestic market or any other reasonable information. Presumably this information was available to the ADC or it could reasonably have been expected to have been obtained through the verification visits it was undertaking in October and November 2014.

If, prior to conducting a verification visit or otherwise verifying the information provided by IMCA, the ADC wished to determine a profit margin for calculating a constructed normal value by one of these above mentioned measures, it could have done so by reference to the weighted average margin of other Italian producers or exporters it was investigating.

ii. Sales to third countries

At the ADC's election, it could have sought to determine the normal value by reference to sales by IMCA to third countries. We note that the 15 October Information included details of comparable volumes of sales to a number of countries including New Zealand. The ADC did not request in the exporter questionnaire product details in respect of those third country sales. Had the ADC requested further information in respect of third country sales, it would have had sufficient information to determine a normal value and calculate a dumping margin. Given the potential for low levels of domestic sales of like goods, such a request could reasonably have been expected to have been made by the ADC.

We note that in various exporter verification reports it was stated by the ADC that the normal value could not be based on the price of like goods exported to third parties as sufficient information regarding those sales was not available. We note that the ADC only requested very basic information in respect of such sales. In particular, the exporter questionnaire did not request the costs to make and sell goods sold to third countries or product details of the goods sold to third parties.

d. Preliminary dumping margin

Based on the 15 October Information with minor clarification, or the addition of the 18 October Information, the ADC could have determined a preliminary normal value (being the Preliminary Constructed Value), export price and dumping margin for IMCA. That preliminary dumping margin would have been a negative amount as the Preliminary Export Price was higher than the Preliminary Constructed Value. That is, subject to verification and any adjustment by the ADC, no dumping duties would have been assessed against exports by IMCA.

This is consistent with the fact that the 15 October Information and 18 October Information set out that IMCA's costs to manufacture and sell the goods to Australia are significantly less than its export prices.

e. Assessment of 15 October Information

The 15 October Information was sufficient to enable the ADC to:

- to determine an export price of the goods;
- determine the level of domestic sales of the goods;
- identify the only 2 material individual domestic transactions to be reviewed to determine the domestic profit margin;
- identify exports to third countries for the purpose of determining a normal value based on such exports;
- identify the costs to make and sell IMCA's products; and
- identify the information that needed to be verified either by way of site visit or request for further information to determine a normal value.

We have noted that there was a clear error in the provision of the domestic and Australian sales cost to manufacture and sell information. That error was that the information provided was not specific to domestic production or Australian exports (as appropriate). However, this error was obvious and could have been investigated on review and was ultimately not significant as the production costs for over 90% of products are materially the same regardless of whether the sale is domestic or export provided the tomatoes are standard peeled or chopped tomatoes.

Given the stage of the investigation (100 days prior to the Statement of Essential Facts being issued) and that a verification visit was scheduled to occur before IMCA's information was finalized, we consider that the information provided as at 15 October 2013 combined with further standard verification work would have enabled the ADC to calculate an individual dumping margin in respect of IMCA.

Further, to the extent that there were deficiencies by reasons of the Australian sales and domestic sales not fully detailing the product type, such deficiencies were rectified by the provision of the 18 October Information.

2. If IMCA was deemed to have been uncooperative
a. Export price

If IMCA was deemed to have been an uncooperative exporter pursuant to subsection 269TAB(3) of the Act the export price of the goods is to be determined by the Minister having regard to all relevant information.

In an email to IMCA dated 17 February 2014 the ADC stated that the export price for the purpose of subsection 269TAB(3) of the Act was €0.564 (presumably per kg) ("**ADC Determined Export Price**").

It is our view that the most relevant information is the actual export prices charged by IMCA. The ADC was provided with the export prices in the 15 October Information and by 18 October 2014 had full details as to the products the subject of each individual export.

The IMCA export prices appear to be very relevant based on the fact that consistent pricing is adopted (the vast majority of sales are to Woolworths and Metcash at almost identical pricing) and is in sufficient quantities to be reliable (€1,000,000 of sales over the investigation period).

The export prices charged by IMCA could have been easily verified by way of a request for copies of purchase orders, invoices and payment records. Further, the export prices could have been verified by contacting Woolworths or Metcash.

It is our view that export prices charged by other exporters are not relevant to determining the export price charged by IMCA. Those prices bear no relationship to the amounts charged by IMCA as all that is relevant is the price actually charged by IMCA.

Based on the 18 October Information (which was clearly available to the ADC at the time of assessing IMCA's dumping margin) the weighted average export price of peeled and diced tomatoes exported by IMCA to Australia was approximately €0.614. Further, the ADC would have been aware that there was not a single export of any IMCA product to Australia with an average price per kg at or below the ADC Determined Export Price. Based on the 18 October Information, the lowest price IMCA exported goods to Australia at was at €0.5975, which is 5.98% higher than the ADC Determined Export Price.

b. Normal value

If IMCA was deemed to have been an uncooperative exporter then pursuant to subsection 269TAC(6) of the Act the normal value was to be determined by the Minister having regard to all relevant information.

In an email to IMCA dated 17 February 2014 the ADC stated that the uncooperative exporter normal value was €0.713 (presumably per kg).

We have set out above that there were sufficient details of IMCA's domestic sales and domestic profit margin to enable a constructed IMCA specific constructed value to be determined. We consider that this is the most relevant information under subsection 269TAC(6) of the Act. The Preliminary Constructed Normal Value was €0.578, some 23.3% lower than the above mentioned rate.

Even if the 15 October Information and the 18 October Information was disregarded, there is a variety of information that could have been considered relevant and which was reasonably available. In particular we note that IMCA provided substantial details of exports in comparable quantities to countries comparable to Australia such as New Zealand and the United Kingdom.

The ADC did not request details as to the product type of those third country exports. Had it requested and obtained product details, very relevant comparisons could have been made. Given the potential for there to have not been significant domestic sales of the goods by some exporters, it is surprising that

this information was not requested by the ADC. Given that this information was not requested, the ADC should not be permitted to disregard sales to third countries on the basis that insufficient information was provided.

Other additional information could have been the average domestic selling price of like goods by other Italian producers. The 15 October Information made clear that IMCA had very low levels of domestic sales. In these circumstances, and given the nature of the product, it could have been considered relevant to consider the domestic selling price of like goods by other Italian producers. A weighted average selling price of comparable goods could have been used ensuring that individual producers' domestic selling prices were kept confidential.

However, in this respect we note that the ADC has disclosed that some normal values of cooperative exporters were determined by using a constructed value. We do not consider that a constructed normal value of a single other Italian producer is relevant, reasonable, or appropriate to determining the normal value of goods exported by IMCA. A constructed normal value only has a relationship to the export sale by which it is constructed. By definition, a constructed value is calculated by reference to the cost of production and sale of an exported product plus a profit margin. The logic of this approach can be seen where the constructed value is compared to the corresponding export price. In this instance the constructed normal value acts to essentially test the profitability of a particular export.

However, if a constructed normal value is compared to an export value that does not share the same cost base, differentials are naturally likely to occur between the constructed normal value and the export price that are unrelated to the profitability of the export transaction. The difference will be distorted by differing costs of production and potentially using transactions that are not appropriate to compare. For example, transactions at different trade levels or different products, such as organic tomatoes compared to regular tomatoes. Significant cost differences could also be expected due to the size of the transaction, level of production and economies of scale.

c. Uncooperative exporter dumping margin

The ADC stated on page 37 of Final Report No. 217 ("**Final Report**") in respect of the Investigation that:

"In instances where there are numerous and various types of export sales to Australia, the Commission will seek to establish model categories. These model categories will then be used to identify whether relevant domestic sales of comparable like goods exist and to identify a subset of corresponding normal values to ensure that like is being compared with like. These are commonly referred to as model export prices and model normal values."

Relatedly, at page 40 of the Final Report it is stated:

"The weighted average product margin is then calculated by multiplying the weighted average unit normal value for each comparable like model by the export volume of the corresponding export model. This result would be a weighted average normal value for the goods exported during the investigation period, which is then compared to the corresponding weighted average export price for the goods exported during the investigation period, to provide a product dumping margin over the investigation period."

Each of the above quotes demonstrate the importance the ADC placed on ensuring that normal values for one category of tomato products were being compared with the corresponding export price of the same category of goods.

The provisions under the Act relating to uncooperative exporters only detail how the normal value and export price should be calculated. Once those amounts are determined, section 269TACB of the Act which sets out how a dumping margin is to be calculated does not differentiate between cooperative and non-cooperative exporters.

Therefore, the Act requires that the same logic be applied to determining the dumping margin for uncooperative exporters as it does for cooperative exporters. Based on the ADC's above stated positions regarding the importation of model comparison, it should be expected that the ADC would ensure that export price and dumping margin used by the ADC to calculate the uncooperative exporters dumping margins are of comparable goods.

In this respect we note that the legislation does not prescribe that the uncooperative exporter rate be a penalty rate. Rather, the rate is calculated by reference to an export price and normal value which are determined having regard to all relevant information.

In the 17 February 2014 email from the ADC to IMCA setting out the non-cooperative exporter dumping margin the ADC set out that the margin was based in a weighted average normal value and a weighted average export value. It has not been disclosed whether those weighted average numbers:

- concern comparable transactions;
- concern comparable goods;
- cover multiple categories of goods;
- were based on sales of like goods or computed normal values; or
- cover multiple exporters.

It is also not explained why normal values and export prices of exporters with dumping margins of less than 2% were not considered relevant to the ADC's assessment of the uncooperative exporter margin.

Ultimately, the uncooperative exporter rate determined by the ADC appears to be so disproportionate to the verified dumping margins that it cannot be based on all relevant information. We say this because the only verified relevant information indicated dumping margins of 5% or less. As we have also noted, IMCA's unverified information suggests its export price is higher than its normal value indicating that there should be no dumping margin.

3. Verification of information

We understand that despite IMCA being available, the ADC elected not to undertake a verification visit in respect of its facilities.

It is our view that the failure to conduct a verification visit did not prevent the information provided by IMCA being relevant for the purpose of determining the export price and normal value of goods sold by IMCA. We say this because:

- there is nothing to suggest the export prices are not reliable. Rather, the pricing is consistent across a number of transactions;
- the ADC could have verified the export prices by contacting the Australian importers or requesting source documents from IMCA;
- there is nothing to suggest that the domestic sales prices are not reliable. Domestic sales prices could have been confirmed by source documents from IMCA;
- while it is clear that the cost to manufacture and sell information does not relate specifically to either domestic sales or exports to Australia, the ADC could have verified information by requesting the data be further refined or seeking confirmation that the costs to manufacture and sell are the same regardless of the market.

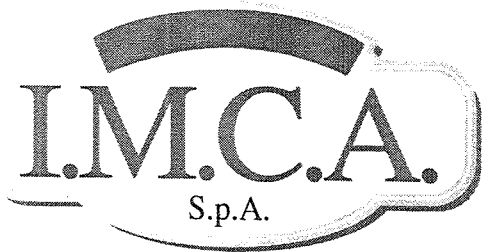
We note that the ADC made the election to assess like goods on a product by product basis. Domestic and Australian sales information was not in the 15 October Information categorized by product type. However, this detail was provided in the 18 October Information. While the domestic and Australian cost to manufacture and sell information was not categorized by product, given the relatively timeliness of the provision of information to the ADC by IMCA, it is reasonable to believe that had IMCA not been declared an uncooperative exporter in October 2013, that this level of product detail could have been provided and verified well before the publication of the Statement of Essential Facts in February 2014.

Please contact me (02 9248 5553) if you have any questions.

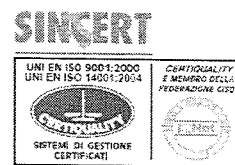
Yours sincerely



Marc Bunch
Partner – Global Trade



INDUSTRIA MERIDIONALE
CONSERVE ALIMENTARI



12/05/14

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City ACT 2601
AUSTRALIA
Dear Sir/Madam

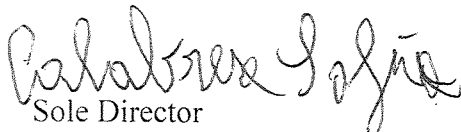
Application to Anti-Dumping Review Panel for a review of a decision whether to publish a dumping duty notice – letter of authority

I.M.C.A. SPA - Industria Meridionale Conserve Alimentari (**IMCA**) has engaged Norton Rose Fulbright Australia to represent it and act for it in relation to its application to Anti-Dumping Review Panel for review of the Minister's decision to publish a dumping duty notice under section 269TG(2) of the *Customs Act 1901*. The notice was published on 16 April 2014 and relates to prepared or preserved tomatoes exported from Italy.


We authorise the Anti-Dumping Review Panel to liaise with and provide information to Norton Rose Fulbright Australia on IMCA's behalf for the purposes of the application.

Yours faithfully

Sofia Calabrese

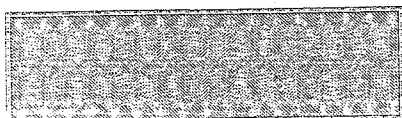

Sofia Calabrese
Sole Director

Cognome **CALABRESE**
 Nome **SOFIA**
 nato il **10-02-1935**
 (atto n. **00027** P. **1** S. - **1935**)
 a **SAN MARZANO SUL SARNO (SA)**
 Cittadinanza **Italiana**
 Residenza **SANT'EGIDIO DEL MONTE ALBINO (SA)**
 Via **NAZIONALE 117**
 Stato civile **Omessa L. 129/97 art. 2 comma 9**
 Professione **Omessa Art. 35 DPR 223-30-5-89**
 CONNOTATI E CONTRASSEGNI SALIENTI
 Statura **165**
 Capelli **Castani**
 Occhi **Verdi**
 Segni particolari **NESSUNO**


 Firma del titolare *Sofia Calabrese*
 SANT'EGIDIO DEL MONTE ALBINO 05-02-2014
 Impronta del dito indice sinistro *Il Sindaco*
Supremo Alberto


Scadenza : 10-02-2024
 Diritti : 6,00

AS 7177071





ANTI-DUMPING NOTICE NO. 2014/32

Prepared or Preserved Tomatoes

Exported from Italy

Findings in Relation to a dumping investigation

Customs Act 1901 – Part XVB

I, Dale Seymour, Commissioner of the Anti-Dumping Commission have completed the investigation, which commenced on 10 July 2013, into the alleged dumping of prepared or preserved tomatoes (“the goods”), exported to Australia from Italy.

The goods are currently classified to tariff subheadings 2002.10.00 statistical code 60 in Schedule 3 of the *Customs Tariff Act 1995*.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2013/59. This ADN is available at the Anti-Dumping Commission website www.adcommission.gov.au. Findings and recommendations were reported to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) in *Anti-Dumping Commission Report No. 217* (REP 217), in which it outlines the investigations carried out by the Commission and recommends the publication of a dumping duty notice in respect of the goods. The Parliamentary Secretary has considered REP 217 and has accepted the recommendations and reasons for the recommendations, including all material findings of fact or law on which the recommendations were based, and particulars of the evidence relied on to support the findings.

Notice of the Parliamentary Secretary’s decision was published in *The Australian* newspaper and the *Commonwealth of Australia Gazette* on 16 April 2014.

On 20 March 2014, I terminated the dumping investigation into the goods exported by La Doria SpA and Feger di Gerardo Ferraioli from Italy. *Termination Report No. 217* sets out the reasons for these terminations. This report is available on the Commission’s website.

In REP 217, it was found that:

- prepared or preserved tomatoes exported from Italy to Australia were dumped with margins ranging from 3.25% to 26.35%;
- the dumped exports caused material injury to the Australian industry producing like goods; and
- continued dumping may cause further material injury to the Australian industry.

The duty that has been determined is an amount worked out in accordance with the combination of fixed and variable duty method, as detailed in the table below.

Particulars of the dumping margins established for each of the exporters and the effective rates of duty are set out in the following table.

Exporter / Italy	Dumping Margin	Effective rate interim dumping duty	Duty Method
De Clemente Conserve S.p.A.	3.25%	3.25%	<i>combination of fixed and variable duty method</i>
Attianese S.p.A.	4.24%	4.24%	
Fiamma Vesuviana Srl	4.24%	4.24%	
Greci Industria Alimentare S.p.A.	4.24%	4.24%	
Menu Srl	4.24%	4.24%	
Mutti S.p.A.	4.24%	4.24%	
Nolana Conserve Srl	4.24%	4.24%	
Princes Industrie Alimentari SRL	4.24%	4.24%	
Rispoli Luigi & C (S.R.L.)	4.24%	4.24%	
Steriltom Srl	4.24%	4.24%	
Conserve Italia Soc. Coop Agr	4.54%	4.54%	
I.M.C.A. S.p.A.	26.35%	26.35%	
Lodato Gennaro & C. S.p.A.	26.35%	26.35%	
Uncooperative exporters (All other)	26.35%	26.35%	

NB: Pursuant to section 12 of the Customs Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act), conversion of securities to interim duty will not exceed the level of security taken. The rate of conversion for securities will be required per the notices published on 1 November 2013 and 4 February 2014.

Where the non-injurious price (NIP) is the operative measure the lesser duty rule has taken effect to reduce the duties to a level sufficient to remove the injury caused by dumping.

Measures apply to goods that are exported to Australia after publication of the Parliamentary Secretary's notice.

The actual duty liability may be higher than the effective rate of duty due to a number of factors. Affected parties should contact the Commission on 1300 884 159 or +61 2 6275 6066 (outside Australia) or at clientsupport@adcommission.gov.au for further information regarding the actual duty liability calculation in their particular circumstance.

Any dumping securities that have been taken on and from 1 November 2013 will be converted to interim dumping duty.¹ Importers will be contacted by the National Temporary Imports Securities Section detailing the required conversion action for each security taken.

To preserve confidentiality, the export price, normal value and non-injurious price applicable to the goods will not be published. Bona fide importers of the goods can obtain details of the rates from clientsupport@adcommission.gov.au.

Clarification about how measures securities are applied to 'goods on the water' is available in ACDN 2012/34, available at the Commission website.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel in accordance with the requirements in Division 9 of Part XVB of the Act within 30 days of the publication of the Parliamentary Secretary's notice.

REP 217 and *Termination Report No.217* have been placed on the Commission's public record, which may be examined at the Commission office by contacting the Case Manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number 02 62744948, fax number 1300 882 506 or +61 2 6275 6888 (outside Australia) or operations1@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

16 April 2014

¹ Within the time limitations of section 45 of the *Customs Act 1901*.