



**J.BRACIC & ASSOCIATES**  
TRADE REMEDY ADVISORS

PO Box 3026  
Manuka, ACT 2603  
Mobile: +61 499 056 729  
Email: [john@jbracic.com.au](mailto:john@jbracic.com.au)  
Web: [www.jbracic.com.au](http://www.jbracic.com.au)

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## **Review of tomatoes prepared or preserved exported from Italy**

### **Submission on behalf of Leo's Imports & Distributors Pty Ltd**

Dear Ms Fitzhenry,

Please accept this submission on behalf of Leo's Imports & Distributors Pty Ltd (Leo's Imports), pursuant to s.269ZZJ of the *Customs Act 1901* (the Act), in respect of the review initiated by the Anti-Dumping Review Panel on 30 May 2014.

#### **Background**

Leo's Imports is an importer of prepared or preserved tomatoes manufactured and exported by Lodato Gennaro & C. S.p.A. (Lodato Gennaro). In Final Report No. 217, Lodato Gennaro was found to be an uncooperative exporter and had its export price and normal value determined by the Parliamentary Secretary having regard to all relevant information, pursuant to s.269TAB(3) and s.269TAC(6) respectively.

We note that Lodato Gennaro, in its application for review of the decision by the Parliamentary Secretary to publish a dumping duty notice in relation prepared or preserved tomatoes, set out the following grounds for review:

1. 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;
2. 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; and
3. the Minister's decision was not correct or preferable as the calculation of the dumping margin applied to uncooperative exporters is flawed.

We make this submission in support of Ground 3 of Lodato Gennaro's application for review.

#### **Determination of export price**

Policy for determining export price for selected exporters

We submit that the Anti-Dumping Commission (the Commission) did not follow and comply with its own policy guidelines in determining export prices for Lodato Gennaro. The Commission failed to properly investigate and evaluate verified information of cooperating exporters to ensure that it was reasonable in the circumstances to attribute that information to Lodato Gennaro.

Shortly after initiation of the dumping investigation into canned tomatoes from Italy, the Commission contacted each identified supplier of the goods to Australia and invited them to complete an exporter questionnaire. The questionnaire was broken up into two distinct parts.

Part 1 of the exporter questionnaire sought preliminary information about the relevant companies and the goods exported to Australia. Lodato Gennaro was an exporter that properly completed Part 1 of the questionnaire and returned it to the Commission within the required timeframe.

On 8 August 2013, the Commission published a sampling report in which it identified seven selected exporters whose exportations would be further investigated for determining individual dumping margins. Lodato Gennaro was identified as one of those selected exporters.

A selected exporter is defined as “an exporter of goods the subject of the application or like goods whose exportations were investigated for the purpose of deciding whether or not to publish that notice”<sup>1</sup>.

In Report 159D<sup>2</sup> and more recently REP 203<sup>3</sup>, the central issue of those reinvestigations was whether the exportations of non-cooperating exporters were investigated so as to meet the definition of a selected exporter for the purpose of s.269T. At page 16 of Report 159D, the Commission noted that:

*The term ‘investigated’ and ‘investigation’ are not defined in the Act, the Explanatory Memorandum or the Anti-Dumping Agreement. Customs and Border Protection are therefore guided by available WTO and Federal Court decisions to determine what constitutes “investigation”.*

The Commission went on to find that:

*Thus, in conducting an investigation, Customs and Border Protection should undertake an “evaluative, comparative assessment”<sup>4</sup> of information provided by*

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<sup>1</sup> s.269T

<sup>2</sup> Reinvestigation of certain findings in REP 159C – Certain Clear Float Glass,

<sup>3</sup> Reinvestigation of certain findings in REP 177 – Certain Hollow Structural Sections

<sup>4</sup> Appellate Body Report, Mexico – Beef and Rice WT/DS295/R at para 7.167

*interested parties to ensure that “this information [is] the most fitting or appropriate for making determinations...”<sup>5</sup>.*

*As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant information is actively sought from interested parties. Customs and Border Protection will ordinarily have regard to a breadth of information as a result of this inquiry. It is then necessary to critically assess this information to ascertain whether it can be relied upon in order to determine export prices and normal values pursuant to subsections 269TAB(3) and 269TAC(6) respectively. If the information is considered to be unreliable, it is disregarded pursuant to subsections 269TAB(4) and 269TAC(7).*

On page 17 of that same report, the Commission outlined its approach to the use of verified information from cooperating exporters in determining export price or normal values for non-cooperating exporters. It stated:

*Customs and Border Protection must then scrutinise the verified information of cooperating exporters to ensure that it is reasonable in the circumstances to attribute this information to non-cooperating exporters.*

We note that REP 217 contains no evaluative, comparative assessment or any such critical assessment of information from cooperating exporters and cooperating importers. It must be assumed then that the Commission did not undertake such an assessment and did not follow its own policy guidelines in this area.

Further, we contend that had the Commission undertaken such an assessment, it would have concluded that it was not reasonable to attribute the lowest weighted average export price to Lodato Gennaro for the reasons outlined below.

#### Assessment of relevant information.

Given that Lodato Gennaro were not informed by the Commission that their response to Part 1 was deficient, it is assumed that they have properly identified as requested, the various types of canned tomatoes exported to Australia. We understand that Lodato Gennaro exported the following products to Australia during the investigation period:

- ‘Annalisa’ proprietary label products purchased by Leo’s Imports and subsequently sold into the retail sector via Woolworths Limited (Woolworths);
- mid-range private label products sold directly to Woolworths, and
- organic canned tomato products sold directly to Woolworths.

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<sup>5</sup> Appellate Body Report, Mexico – Beef and Rice WT/DS295/R at para 7.167

In addition to the product information provided by Lodato Gennaro, the Commission sought and undertook verification of information provided by Woolworths relating to their purchases and sales of imported canned tomatoes. Once again, we would expect that the Commission was able to properly identify the types of canned tomatoes purchased by Woolworths that were produced and exported by Lodato Gennaro. This would have included the 'Annalisa' proprietary branded product and other products identified above.

As a result, the Commission would have been in a position to reconcile information submitted by Lodato Gennaro at Part 1 of the exporter questionnaire, against information submitted and verified with Woolworths. Therefore, it is reasonable to expect that the Commission had sufficient verified information to be able to determine the types of canned tomato products exported to Australia by Lodato Gennaro during the investigation period.

It is accepted by the Commission, that the different types of canned tomato products reflected significant differences in export prices, selling prices to the retailer sector and corresponding retail shelf prices. At section 5.2.5 of REP 217, the Commission found that:

*Prices could generally be grouped into the following four label categories from highest to lowest priced:*

- *Local proprietary labels;*
- *Italian proprietary labels;*
- *Premium private labels;*
- *Generic or value private labels.*

The report included the following chart showing the price relativities between the various types of label categories.

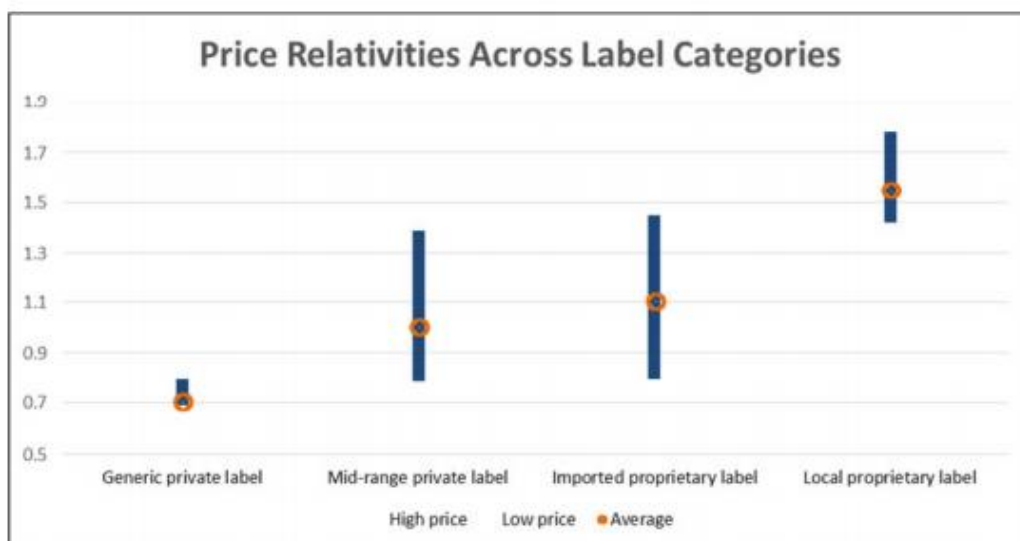


Figure 1 – Retail shelf prices by label categories

A comparison of the average price points shown in the chart above indicates that imported proprietary brands such as 'Annalisa' are approximately 57% and 10% higher than generic private label products and mid-range private label products respectively.

The Commission further concluded on page 23 of REP 217 that:

*Within each of the label categories, further price differentiation was evident which largely reflected differences in the recipes or quality of tomatoes. Whole, chopped or diced cans were generally evenly priced on a per kilo basis, followed by organic and value added goods.*

On page 38 of REP 217, the Commission outlined the key characteristics that were used to identify the various export models, which included:

1. *Type of tomato – whole, chopped, organic, etc;*
2. *Recipe – standard, value-added;*
3. *Can size – 500g, 800g, etc;*
4. *Container – tin easy-open, lacquered, non-lacquered, etc, and*
5. *Drained weight – 60%, 70%.*

It is clear then that the Commission had during the course of its investigation, identified numerous factors which evidence clearly showed had an impact on export prices to Australia. We consider that this placed a greater obligation on the Commission to properly compare and assess the relevant information gathered from cooperating exporters and cooperating importers. This was critical to ensuring that the Commission did not incorrectly attribute information from cooperating exporters to non-cooperating exporters. As outlined earlier, no such assessment appears to have been undertaken by the Commission.

We submit then that the Commission failed to properly consider and have regard to relevant information regarding Lodato Gennaro's exports. If the information used to calculate the lowest weighted average export price for Lodato Gennaro included cheaper priced exports of generic private label products, then the Commission clearly erred by attributing information to Lodato Gennaro that was neither reasonable nor supported by relevant and verified information submitted by Woolworths.

In doing so, the Commission's determination of export price for Lodato Gennaro was neither correct nor preferable. Therefore, we request the Review Panel to recommend that the Parliamentary Secretary revoke the reviewable decision and substitute a specified new decision in accordance with s.269ZZK(1)(b).

The substituted new decision should comply with the Commission's policy guidelines and properly taking into account whether information from cooperating exporters were appropriate and reasonable for determining export prices for the selected exporter Lodato Gennaro, after having regard to all other relevant information.

We contend that the substituted export price for Lodato Gennaro should be based on export sales of proprietary branded products exported by cooperating exporters with a

dumping margin greater than 2%. This would most closely and reasonably reflect the types of goods exported by Lodato Gennaro which have been verified by the Commission.

### **Determination of normal value**

At section 7.5 of REP 217, the Commission outlined in a well written and clear manner, its approach to calculating product dumping margins. In summary it outlined that the key stages included:

- establishing export models after having regard to key physical characteristics;
- based on the export model categories, identifying relevant like models sold on the domestic market;
- performing the ordinary course of trade and sufficiency tests on the domestic like models;
- determining the relevant profit to be used in constructing like models where domestic sales were not appropriate, and
- weighting the normal value for each like model by the volume of the corresponding export model.

The Commission referenced several WTO Panel and Appellate Body findings in support of its methodology for determining dumping margins. It states on page 41 of the report:

*The Commission considers that the Appellate Body has given clear and unambiguous guidance that model matching for the purposes of determining dumping margins is a reasonable approach that is open to an investigating authority.*

We agree with and support the methodology outlined by the Commission and consider it to be the correct and preferable approach to assessing an overall product dumping margin. However, it is not clear that in determining the dumping margin for Lodato Gennaro, the Commission followed and complied with this methodology

We note that in Lodato Gennaro's application for review, it is argued that the Commission failed to provide a meaningful disclosure of the methodology followed to calculate the dumping margin for uncooperative exporters. The final report simply states that the Commission used the lowest export price and highest normal value from exporters found to have a dumping margin greater than 2%.

The Commission appears to have further clarified this by informing Lodato Gennaro that the export price was equal to the lowest weighted average export price from the cooperating exporters with dumping margins greater than 2%, and the normal value was equal to the highest weighted average normal value from the cooperating exporters with dumping margins greater than 2%.

Without any further information, we take this to mean that the Commission did not identify separate export prices and subsequent normal values for the various export and domestic like models that were the basis for the lowest weighted average export price and



highest weighted average normal value. By failing to do so, the Commission has ignored and dismissed its own policy guidelines for determining dumping margins.

The importance of properly identifying the various model categories was reinforced by the Commission in REP 217<sup>6</sup>:

*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.*

*This is a critical step in the determination of dumping as the Commission's practice is to apply the ordinary course of trade tests and sufficiency of sales tests to each model category. Hence, it is important to identify whether different types or models of goods have been exported before assessing whether domestic sales were sold in the ordinary course of trade and in sufficient quantities.*

*A model normal value is only warranted insofar as there are export sales of the particular model. For example, if an exporter has domestic sales of models A, B and C but only exported models A and C during the investigation period, the Commission would not require a normal value for model B to be determined. [Emphasis added]*

Without properly identifying the export models used to calculate the lowest weighted average export price and the domestic like models used to calculate the highest weighted average normal value, the Commission has clearly failed to ensure that like is being compared with like.

As the Commission rightly explains, this is a fundamental principle of the Anti-Dumping framework. A review of other reports by the Commission shows that this principle of comparing like with like has been regularly applied by the Commission in determining dumping margins for non-cooperating exporters. Previous findings include certain hollow structural sections<sup>7</sup> and certain aluminium road wheels<sup>8</sup>.

In fact it has been the Commission's common practice to determine the dumping margin for non-cooperating exporters using the largest dumping margin from a cooperating exporter, less any favourable adjustments. This approach at least ensures that the export

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<sup>6</sup> pages 37-38

<sup>7</sup> In REP 177, the Commission 'used the lowest weighted average export price for the entire investigation period from the selected cooperating exporters, by finish, excluding any part of that price that relates to post-exportation charges.' [emphasis added]; page 64

<sup>8</sup> In REP 181, the Commission 'used the lowest verified weighted average export price for the entire investigation period for each diameter, excluding any part of that price that relates to post-exportation charges.' [emphasis added]; page 16

price and normal value are properly compared by taking into account the various types of products exported to Australia and sold domestically in Italy.

Therefore, we request the Review Panel to recommend that the Minister revoke the reviewable decision and substitute a specified new decision in accordance with s.269ZZK(1)(b).

We consider that the substituted new decision should apply the correct and preferable methodology outlined in REP 217 to ensure that the domestic goods used to determine normal values for the selected exporter Lodato Gennaro, are like to the exported goods used to determine export prices for Lodato Gennaro.

### **Fair comparison of export price and normal value**

We submit that the Commission did not properly apply its own policy guidelines in determining the dumping margins for Lodato Gennaro. By failing to do so, the Commission erred by failing to comply with s.269TAC(8) or s.269TAC(9), in particular, by failing to make certain adjustments which those subsections required be made.

In summary, s.269TAC(8) requires that where the domestic and export prices:

- relate to sales occurring at different times; or
- are not in respect of identical goods; or
- are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;

the price paid or payable for like goods on the domestic market is a price adjusted to allow a fair comparison.

Section 269TAC(9) provides that, where the normal value is calculated using costs, the Minister must make adjustments, in determining the costs, as are necessary to ensure that the normal value so calculated is properly comparable with the export price of those goods.

Chapter 14 of the Commission's Dumping and Subsidy Manual deals with the issue of adjustments and fair or proper comparison between export price and normal value. Under the 'Policy' subheading, the Commission correctly states that:

*Adjustments will be made if there is evidence that a particular difference affects price comparability.*

In the 'Practice' subheading, the Commission goes on to state:

*Section 269TAC(8) places a responsibility on the Commission, as part of its fact finding responsibility throughout an investigation or review, to make adjustments. The Commission seeks relevant data and makes adjustments where evidence exists that a particular difference has affected price comparability.*

We note that neither the Statement of Essential Facts, nor REP 217, identified any such adjustments to the normal values which ensured that a proper comparison was made with the exported goods.



We note the findings of the WTO Appellate Body<sup>9</sup> which recalled its previous statement in U.S. - Hot-Rolled Steel<sup>10</sup>, that:

*[U]nder Article 2.4, the obligation to ensure a "fair comparison" lies on the investigating authorities, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports. (original emphasis)*

This is further supported by the finding of Buchanan J<sup>11</sup> where he stated:

*Unless the like goods were identical, an adjustment was required by s.269TAC(8) to remove the effect of any differences as well as to address other matters affecting a proper comparison. That was a statutory obligation which lay on the Minister and Customs (see GTE at 333).*

His Honour added further<sup>12</sup>:

*However, in the present case the potential consequence of quality and labelling differences had been identified by Customs itself. In these circumstances it was even more clearly an error not to consider, as a part of its own investigation, whether such differences, which were clearly revealed by the factual material, required an adjustment.*

In the circumstances of canned tomatoes, the Commission had also identified significant quality and labelling differences which affect price comparability. Accordingly we submit that the Commission was obliged to consider whether adjustments were necessary to ensure proper comparison. In failing to do so, the Commission's determination of the dumping margin for Lodato Gennaro was neither correct nor preferable.

Therefore, we request the Review Panel to recommend that the Minister revoke the reviewable decision and substitute a specified new decision in accordance with s.269ZZK(1)(b).

In the absence of relevant information to understand the types of canned tomato products used in determining export prices and normal values for Lodato Gennaro, we are unable to identify specific adjustments that are warranted to ensure proper comparison. However, we support the need to adjust for factors outlined in Lodato Gennaro's application for review, which were identified by the Commission as affecting price comparability:

- Type of tomato – whole, chopped, organic, etc;
- Recipe – standard, value-added;

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<sup>9</sup> European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, (WT/DS397/AB/R), para 487

<sup>10</sup> United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, (WT/DS184/AB/R), para 178.

<sup>11</sup> Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs [2008] FCA 443, para 74.

<sup>12</sup> Ibid, para 141.

3 June 2014

**PUBLIC RECORD**

- Can size – 500g, 800g, etc;
- Container – tin easy-open, lacquered, non-lacquered, etc;
- Drained weight – 60%, 70%; and
- Packing.

We consider that any such adjustments to normal value should take into account the relevant factors outlined above.

Yours Sincerely

John Bracic

3 June 2014



# Leo's Imports and Distributors Pty. Ltd.

ACN 006 238 928

121 Somerset Road, Campbellfield, Victoria. 3061

Telephone: (03) 93801038 Facsimile: (03) 9388 0683

Email: [admin@leosimports.com.au](mailto:admin@leosimports.com.au)

[www.leosimports.com.au](http://www.leosimports.com.au)

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Anti-Dumping Review Panel  
c/o Legal Services Branch  
Australian Customs and Border Protection Service  
5 Constitution Avenue  
Canberra, ACT 2601

Dear Ms Fitzhenry,

We are writing to advise that Leo's Imports and Distributors Pty Ltd, an importer of prepared or preserved tomatoes, has engaged J. Bracic & Associates Pty Ltd to represent our company in the review initiated by the Anti-Dumping Review Panel concerning prepared or preserved tomatoes exported from Italy.

All communications concerning this matter should be directed to:

Mr John Bracic  
Director  
J.Bracic & Associates

Phone: +61 499 056 729  
Email: [john@jbracic.com.au](mailto:john@jbracic.com.au)  
Address: PO Box 3026  
Manuka, ACT 2603

Yours sincerely,

Andrew Madafferi

Dated: 03 June 2014