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## Non-confidential

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

Email: [ADRP\\_support@customs.gov.au](mailto:ADRP_support@customs.gov.au)

Dear Sir/Madam

### COMMENTARY ON APPLICATIONS AND SUBMISSIONS TO THE ANTI-DUMPING REVIEW PANEL FOR A REVIEW OF A DECISION WHETHER TO PUBLISH A DUMPING DUTY NOTICE-ANTI-DUMPING COMMISSION INVESTIGATION FINAL REPORT NO.217

1. SPC Ardmona (SPCA) wishes to comment on the grounds raised by the applications as set out in the Notice and notes that these grounds are not limited to those shown in the Notice. This submission has been written with assistance of our trade consultants Blackburn Croft and Co.
2. Before addressing the relevant grounds, SPCA notes that the consultant for Leo's Imports and Distributors Pty Ltd was the Director with the Commission leading the Anti Dumping Commission's investigation into Prepared and Preserved Tomatoes from Italy. The applicant's consultant has chosen to criticize the investigation for which, as far as SPCA knows, the consultant was ultimately responsible for while employed by the Commission. This unusual turn of events may signal that the observations now made from the "other side of the fence" have little merit. If there is some value in the consultant's observations, then SPCA is very concerned that these observations may be linked to confidential information which should have remained within the control of the Commission.
3. The submission on behalf of Leo's Imports refers to Report 159D[C] to support an argument relating to information from cooperating and non-cooperating exporters. It is our view that the references to that Report are not relevant. At the time of the Report 159C, the Act did not support the Commission's interpretation. The Act did not provide at that time for cooperative and uncooperative exporters. (See paragraphs 17-21 Explanatory Memorandum Customs Amendment {Anti-dumping Improvements} Bill {No.3} 2012.)

4. Commentary on the grounds published in the Notice follow. It appears that the applicants' argument and interpretation are similar to the responses already made to the SEF and discussed in the Final Report (the Report). Some of the applications share common grounds and arguments. For reasons of conciseness, specific arguments in each of the applications have not been addressed.

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

5. Interested parties have presented arguments that '*ADA requires that the injury analysis should be based on dumped imports only*' and that the Commission has erred due to inclusion of un-dumped imports in the undercutting analysis.

The above has been addressed on page 53 of the Report under section 8.4.2

*'In addressing the first issue that un-dumped imports had been incorrectly included in the undercutting analysis, the Commission notes that Figure 1 of SEF 217 clearly shows that retail shelf prices for all Italian imports undercut corresponding prices of Australian industry's products, irrespective of whether imports were dumped or un-dumped.*

However...

*A further examination and comparison of import prices shows that dumped prices from selected exporters undercut the lowest un-dumped prices by up to 18 percent.*

*The Commission also compared the declared export prices of the residual exporters derived from the commercial import database to un-dumped prices and found that these prices were approximately 10% below the lowest un-dumped prices.'*

The above highlights that price undercutting by the dumped imports was identified and separated from the undumped imports.

SPCA agrees with the Commission's approach of establishing price undercutting at both the retail level and wholesale level. Whilst the former lead to loss of sales volumes to the consumer and increased price discounting of SPCA products, the latter lead to the inability of SPCA to compete in various contracts.

The other argument presented is that '*assessment was carried out on the basis of an unproven assumption that correlation would exist between wholesale prices and retail prices.*'

The Commission has addressed this in the same section 8.4.2 where it presents

*‘...the Commission is satisfied that a strong correlation exists between free into store wholesale prices and retail shelf prices after examining verified information gathered during the investigation. Figure 4 below shows that from 2010 retail prices decreased at similar rates to wholesale prices through to 2012’*

Importantly, the Commission concludes in section 8.8.1 on page 63 that un-dumped prices would be higher if there was no dumping.

It is SPCA’s observation as well that within the categories there is a strong correlation between wholesale prices and retail prices.

SPCA disagrees with the applicant’s (ANICAV page 3) statement

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

Cost structure, economics and pricing behavior of small players can be vastly different to large players.

**Lack of consideration of the factors other than dumped imports that caused injury to the Australian industry.**

6. Interested parties have suggested that the ‘authorities must separate and distinguish injurious effects of dumped imports from injurious effects of other factors’.

The Commission has adequately covered and analyzed ‘other causes of the injury’ in section 8.8 of the Report. (Page 63-65) and in the Statement of Essential Facts.

SPCA agrees with the Commission’s views that

- The floods of 2011 did not hamper SPCA’s ability to source raw tomatoes for the production of prepared or preserved tomatoes during the investigation period. (8.8.5)
- The decrease in exports has not caused injury as export volumes have been negligible compared to volume sold in Australia. (8.8.4).

7. The applicant’s submissions on exchange rates appear to be answered by the Commission in 8.8.3 (page 64) of the Report.

*‘it is important to note that when export prices are examined in EUR, unit prices have also fallen by 11.9% between June 2010 and June 2013. This suggests that decreases in export prices were not solely driven by the appreciation of the Australian dollar’*

8. Private label strategies and supply diversification have been examined by the Commission in Section 8.8.6 of the Report. The Lodato application refers to the similarity of the channels of distribution and competition between SPCA branded products and imported products (Page 13).

SPCA's view has been that the channels of distribution and competition on supermarket shelves have increased the injurious effects of dumping.

In the Van Bael and Bellis text (EU Anti-dumping and Other Trade Defence Instruments) it was noted that in an EU dumping investigation:

*... the Union Institutions pointed out that the fact that the products are aimed at the same customers through similar sales channels increases the depressing effect of dumped imports (page 341).*

9. SPCA disagrees with the statement made by the applicants that '*the ADC recognized that the supermarkets "boycotted" SPCA's branded products in order to implement private label strategies*'.
10. SPCA disagrees with the statement on page 13 of the Attianese SpA and Lodato Gennaro & CSpA applications inferring that the private label products through supermarkets are the 'only competitors' of SPCA branded products. SPCA products compete with various proprietary labelled products from Italy, within supermarkets and other distribution channels as well. This can be verified by the information submitted to the Commission by SPCA.
11. The approach taken by the Commission, to assess the materiality of the injury caused by dumping only, ensures that the effects of other factors in causing injury are isolated. (page 67 of the Report).

#### **Injury determination based on a flawed like products definition.**

12. The applicants (Government of Italy and ANICAV) seek to argue that the Italian peeled tomatoes are not like goods. Like goods as defined in the Act are:

*Goods that are identical in all respects to the goods under consideration or that although not alike in all respects to the goods under consideration have characteristics closely resembling those of the goods under consideration.'*

There is little argument in the applications that would challenge the definition of like goods. ANICAV refers to a different type of tomato but that is merely a slight difference in raw material and is of no significance to the definition of like goods.

Products mentioned in the application compete in the same category in retail markets and demonstrate "physical likeness, commercial likeness, functional likeness and production likeness" with the other prepared or preserved tomato products in the category.

SPCA disagrees with the applicants' views that the injury has been based on flawed like goods.

**The failure to distinguish and separate the injurious effects of factors other than dumping.**

13. In Section 8.4.4 (page 55) the Commission describes its practice and WTO decisions relating to isolating other injury factors. It is generally recognized that disentangling the effects that a range of factors have on the domestic industry is not an exact science. Nevertheless, the Commission has explained that other injury factors are examined in the Report.

**The Anti-dumping Commission's (ADC) decision to treat IMCA as an uncooperative exporter.**

14. The Commission's decision on an uncooperative exporter relies on the Commissioner being satisfied that certain conditions have been met. SPCA is not in a position to comment on the Commissioner's decision.

**The ADC's decision not to verify the data provided by IMCA was erroneous and unreasonable.**

15. The Commission's decision on its reasoning to treat IMCA as an uncooperative exporter and the resultant course of action not to verify data is not something on which SPCA is able to make a meaningful comment.

**The assessment methodology utilized by the ADC in the calculation of the dumping margin applied to uncooperative exporters was flawed.**

16. The Commission's calculation of the dumping margin for uncooperative exporters is set out in section 7.12 of the Report and appears to follow the requirements of the Act.

**The injury suffered by the Australian industry was caused by factors other than dumped imports.**

17. Section 8.8 (on page 63 of the Report) examines other causes of injury. Paragraph 6-9 above, cover the comments.

**The injury caused by dumped imports, if any, was not material.**

18. Section 8.9 (page 66) of the Report discusses the materiality of the injury.

The Commission established price undercutting as one of the factors causing injury. Price injury was examined at both the retail and wholesale levels of trade (section 8.5.2, page 57). The Commission determined that there was a strong relationship between FIS wholesale prices and retail prices based on the evidence collected during the verification process (page 53).

Having established this, to assess the materiality of the injurious effects of dumped imports from Italy, the Commission adjusted retail shelf prices upwards to account for the weighted average margin of dumping for all dumped goods exported to Australia. (page 66).

- By considering only the dumped imports in the calculation for establishing the price adjustment, the Commission has excluded injury caused by other factors.

The magnitude of the price increase (9%) was established based on '*dumping margins of selected exporters and weighted average dumping margin using declared import value.*' (page 67).

- This is interpreted as the margin attributable to the selected exporters which included two non-cooperative exporters and the residual exporters.
- Page 49 of the Report suggests that the Commission used positive evidence of dumping from the sample and performed an objective examination to obtain a rate for the non-examined exporters.

The Prepared and Preserved tomato category in the Australian supermarkets has recognizable price points. Pricing tiers for the category is explained in 5.2.5 of the Report.

Confidential evidence was presented to the Commission by SPCA that demonstrated the impact and dynamics of price relativity between SPCA products and imported Italian tomato products.

In addition to the above, page 23 of the Report states:

*'the Commission examined the impact of price discounting and volume impacts from the information supplied by retailers and found a strong correlation between price reductions and increased (sic) sales volumes'*

Furthermore the materiality analysis was not based on "mere conjecture"; as in determining materiality the Commission took into account the impact of un-dumped import prices (page 66).

- As highlighted in para 5 above, the price of un-dumped imports was considered by the Commission when it found that residual exporters were approximately 10% below the lowest un-dumped prices (page 53).
- The Commission also found that selected importers found to be dumping undercut un-dumped prices (page 53)

The Lodato application suggests that 'ADC should have demonstrated that factors other than imports of dumped goods, considered in isolation, were unable to cause injury suffered by SPCA.' (page 20).

However, the Commission has covered this aspect in section 8.8 (page 63-65) of the report.

**The decision is in stark contradiction with the findings of the Productivity Commission (PC)**

19. In Section 8.4.3 (page 54) the Commission addresses this matter. SPC Ardmona has maintained that it disagrees with the findings and conclusions of the Productivity Commission's reports. SPCA believes that the reports contain many factual, analytical and judgemental errors and lack evidential support to the conclusions.

The transcript of SPCA's view on the PC report is available at [www.pc.gov.au](http://www.pc.gov.au)

**The ADC's determination of the volume of dumped imports for the purpose of the injury assessment was flawed.**

20. The Lodato application suggests that the imports from residual exporters were erroneously treated as dumped. However section 7.11 (page 49) of the Report demonstrates the Commission's use of the Act's provisions to calculate the dumping margin of the residual exporters.
21. The applicant alleges that there has not been an 'objective examination' carried out on residual exporters. The objective examination requirement in the Anti Dumping Agreement supports the extrapolation to non-examined producers as shown in paragraph 137 of the AB report footnote 25 on page 52.

*Indeed, in cases where the examination has been limited to a select number of producers under the authority of the second sentence of Article 6.10, it is difficult to conceive of a determination based on "positive evidence" and an "objective examination" that is made other than through some form of extrapolation of the evidence. This could be done, for example, by extrapolating from the import volumes attributed to examined producers found to be dumping to the import volumes attributed to non-examined producers.*

It appears that there has been an objective examination of the non-examined exporters by the Commission when it calculated the average dumping margin for residual exporters as 14% using the weighted average normal value for all cooperative exporters (Page 53).

22. The Lodato, Attianese and ANICAV Applications refer to the EC-Bed Linen Appellate Body Report which in turn is referenced to footnote 25 on page 52 of the Report.

23. The Lodato application (on page 22) notes:
- *in EC - Bed linen, the fact that producers accounting for 47% of total imports attributable to examined producers were found to be dumping was considered not a sufficient basis to justify treating imports from unexamined exporters as dumped for the purpose of the injury analysis. It is submitted that the above conclusion applies a fortiori in the present case in which only 37% (compared to 47% in the Bed Linen case) of the total exports attributable to examined producers (i.e. 26% out of 70%) were found to be dumped by the ADC, while 63% of the total exports attributable to examined producers (i.e. 44% out of 70%) were found to be undumped;*
24. As a matter of interpretation the '47%' in EC-Bed Linen was not a benchmark for the volume of dumped imports attributable to examined producers as is suggested. Rather the 47% (which was the percentage of examined producers in the sample found to be dumping) was "positive evidence", but an "objective examination" was not performed on this evidence. The Appellate Body was not addressing the quantum of examined imports found to have been dumped in the sample but how '*...it relates to the appropriate treatment of imports from producers or exporters that were not examined individually in such an investigation (Para 116)*'.
25. In fact the calculations used by the applicants (and which appeared in the EPR document 078, page 6) do not appear to address the fact that although 44% of total exports were not dumped, this actual figure as presented in the Report did not necessarily relate directly to the sample. As a proportion of the 70% sample this suggests that around 31% of examined imports were not dumped (44% of 70%) and 39% were dumped. So that the available information in the Report could be interpreted as indicating that the volume of dumped imports attributable to examined producers was 39%.
26. Actual volumes of dumped and non-dumped imports examined in the sample are not shown in the Report. The sample of 7 selected exporters is approximately 70% of total exports (page 36 Final Report). The balance not in the sample (30%) is the unexamined exporters comprising residual exporters (who by definition are not uncooperative) and uncooperative exporters. Note that two of the seven (Lodato and IMCA) selected exporters were found to be uncooperative.
27. Applying the same proportion to unexamined imports, there is an assumption that 44% is not dumped and that 56% (page 50 of the Report) is dumped. Therefore applying 56% to the unexamined exporters results in dumped volumes of around 17%. This gives total dumped volumes of around 56% (39% of the sample + 17% of unexamined). Therefore, the applicants' figure of 26% compares to 39%.
28. However, as noted, the quantum of the examined imports found to have been dumped is not the relevant issue here as raised by the applicants. It is how the examined imports were then used to determine the volume of dumped imports for non-examined exporters.



29. It is commonly accepted that any volume of dumped imports can cause material injury depending on the circumstances of the case. Small volumes of dumped tomato can result in an immediate adverse effect on prices and volumes. The prepared and preserved tomato category is highly price sensitive. This volume and price sensitivity to small price fluctuations has been explained in the Final Report, section 5.2.5 on page 22.

SPCA has submitted confidential evidence to support this observation (factual evidence through consumers switching at different points, evidence from research conducted with 1,500 buyers).

### **Conclusion**

SPCA believes that the issues raised by the applicants do not justify changes to the original decision. SPCA would be available to discuss any of the above matters, if required.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'PKelly', written in a cursive style.

Peter Kelly  
Managing Director