



CUSTOMS ACT 1901 - PART XVB

STATEMENT OF ESSENTIAL FACTS NO. 276
AND
PRELIMINARY AFFIRMATIVE DETERMINATION NO. 276

ALLEGED DUMPING OF
PREPARED OR PRESERVED TOMATOES
EXPORTED FROM ITALY
BY FEGER DI GERARDO FERRAIOLI S.P.A.
AND LA DORIA S.P.A.

4 September 2015

CONTENTS

CONTENTS.....	2
ABBREVIATIONS.....	4
1 SUMMARY AND RECOMMENDATIONS	5
1.1 INTRODUCTION	5
1.2 PROPOSED RECOMMENDATION TO THE PARLIAMENTARY SECRETARY	5
1.3 PRELIMINARY AFFIRMATIVE DETERMINATION	5
1.4 APPLICATION OF LAW TO FACTS	5
1.5 FINDINGS AND CONCLUSIONS	7
1.6 RESPONDING TO THIS SEF.....	8
2 BACKGROUND.....	10
2.1 INITIATION	10
2.2 NATURE AND SCOPE OF THE INVESTIGATION.....	10
2.3 PREVIOUS INVESTIGATION AND EXISTING MEASURES	13
2.4 EXTENSIONS OF TIME FOR THE STATEMENT OF ESSENTIAL FACTS	13
2.5 SUBMISSIONS RECEIVED FROM INTERESTED PARTIES	14
3 THE GOODS AND LIKE GOODS.....	15
3.1 FINDING	15
3.2 LEGISLATIVE FRAMEWORK	15
3.3 THE GOODS	15
3.4 THE COMMISSION’S LIKE GOODS ASSESSMENT.....	16
4 THE AUSTRALIAN INDUSTRY	18
4.1 FINDING	18
4.2 LEGISLATIVE FRAMEWORK	18
4.3 AUSTRALIAN INDUSTRY.....	18
4.4 CONCLUSION	20
5 AUSTRALIAN MARKET.....	21
5.1 FINDING	21
5.2 MARKET STRUCTURE.....	21
5.3 IMPORTERS	22
6 DUMPING INVESTIGATION.....	24
6.1 FINDING	24
6.2 LEGISLATIVE FRAMEWORK	24
6.3 ALLEGATION OF MARKET SITUATION	24
6.4 DETERMINATION OF DUMPING MARGINS	26
7 ECONOMIC CONDITION OF THE INDUSTRY	30
7.1 FINDING	30
7.2 INTRODUCTION	30
7.3 COMMISSION’S APPROACH TO INJURY ANALYSIS.....	30
7.4 VOLUME EFFECTS.....	32
7.5 PRICE EFFECTS.....	33
7.6 PROFITS AND PROFITABILITY	34
7.7 OTHER ECONOMIC FACTORS	35
8 HAS DUMPING CAUSED MATERIAL INJURY?	38
8.1 FINDINGS.....	38
8.2 INTRODUCTION	38
8.3 SIZE OF THE DUMPING MARGIN	38

Public Record

8.4	VOLUME OF DUMPED GOODS.....	38
8.5	PRICE EFFECTS.....	39
8.6	VOLUME EFFECTS.....	41
8.7	PROFIT EFFECTS.....	41
8.8	OTHER POSSIBLE CAUSES OF INJURY	42
8.9	CONCLUSION	43
9	WILL DUMPING AND MATERIAL INJURY CONTINUE?	44
9.1	FINDING	44
9.2	INTRODUCTION	44
9.3	WILL DUMPING CONTINUE?	44
9.4	WILL MATERIAL INJURY CONTINUE?	44
10	NON-INJURIOUS PRICE.....	46
10.1	FINDING	46
10.2	INTRODUCTION	46
10.3	THE COMMISSION'S ASSESSMENT OF NON-INJURIOUS PRICE (NIP).....	46
11	PROPOSED MEASURES.....	48
11.1	PROPOSED RECOMMENDATION	48
11.2	INTRODUCTION	48
11.3	SUBMISSIONS FROM INTERESTED PARTIES.....	48
11.4	PROPOSED MEASURES.....	48
11.5	RETROSPECTIVE MEASURES	49
12	PRELIMINARY AFFIRMATIVE DETERMINATION (PAD)	50
12.1	FINDING	50
12.2	SECURITIES.....	50
13	APPENDICES AND ATTACHMENTS.....	51
	APPENDIX 1 - ASSESSMENT OF MARKET SITUATION	52

ABBREVIATIONS

the Act	<i>Customs Act 1901</i>
ACBPS	Australian Customs and Border Protection Service
ADA	WTO Anti-Dumping Agreement
ADN	Anti-Dumping Notice
the applicant	SPC Ardmona Operations Limited, also referred to as SPCA
CAP	European Union Common Agricultural Policy
CCA	Coca-Cola Amatil Limited
the Commission	Anti-Dumping Commission
the Commissioner	Commissioner of the Anti-Dumping Commission
CON 276	Consideration Report 276
EC	European Commission
EPR	Electronic Public Record
EU	European Union
Feger	Feger di Gerardo Ferraioli S.p.A.
GAAP	Generally accepted accounting principles
the goods	the goods the subject of the application (also referred to as the goods under consideration)
the investigation period	1 January 2014 to 31 December 2014
La Doria	La Doria S.p.A.
the Minister	the Minister for Industry and Science
NIP	Non-injurious Price
the Parliamentary Secretary	the Parliamentary Secretary to the Minister for Industry and Science
PAD	Preliminary Affirmative Determination
PO	Producer Organisations
SEF	Statement of essential facts
REP 217	Anti-Dumping Commission Report Number 217
SEF	Statement of Essential Facts
SPCA	SPC Ardmona Operations Limited
WTO	World Trade Organization

1 SUMMARY AND RECOMMENDATIONS

1.1 Introduction

This statement of essential facts (SEF) relates to the investigation by the Anti-Dumping Commission (the Commission) into allegations made by SPC Ardmona Operations Limited (SPCA) that prepared or preserved tomatoes (the goods) exported to Australia from Italy by Feger di Gerardo Ferraioli S.p.A. (Feger) and La Doria S.p.A. (La Doria) at dumped prices has caused material injury to the Australian industry producing like goods.

This SEF sets out the essential facts on which the Commissioner of the Anti-Dumping Commission (the Commissioner) proposes to base a recommendation to the Parliamentary Secretary to the Minister for Industry and Science (Parliamentary Secretary) in relation to SPCA's application.

1.2 Proposed recommendation to the Parliamentary Secretary

Based on the findings in this SEF, and subject to any submissions received in response to this SEF, the Commissioner proposes to recommend to the Parliamentary Secretary that a dumping duty notice be published in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

1.3 Preliminary affirmative determination

For the purpose of the Preliminary Affirmative Determination (PAD), the Commissioner is satisfied that their appear to be sufficient grounds to publish a dumping duty notice regarding prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

The Commissioner considers it is appropriate for the Commonwealth to require and take securities under section 42 of the *Customs Act 1901* (the Act)¹ in respect of the interim dumping duty that may become payable on imports of prepared or preserved tomatoes exported from Italy by Feger and La Doria. The Commissioner is satisfied that the taking of securities is necessary to prevent material injury to Australian industry occurring while the investigation continues.

Securities will apply to imports of prepared or preserved tomatoes exported from Italy by Feger and La Doria on or after 11 September 2015.

1.4 Application of law to facts

1.3.1 Authority to make decision

Division 2 of Part XVB of the Act sets out, among other matters, the procedures to be followed and the matters to be considered by the Commissioner in conducting investigations in relation to the goods covered by an application.

¹ Unless otherwise specified, all legislative references in this SEF are to the *Customs Act 1901*.

1.4.2 Application

On 24 November 2014, SPCA lodged an application requesting that the then Parliamentary Secretary to the Minister for Industry publish a dumping duty notice in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

1.4.3 Initiation of investigation

After examining the application, the Commissioner was satisfied that:

- the application complied with subsection 269TB(4);
- there was an Australian industry in respect of like goods; and
- there appeared to be reasonable grounds for the publication of a dumping duty notice in respect of goods the subject of the application (the goods).²

The Commissioner decided not to reject the application, and notice of the initiation of this investigation was published on 19 January 2015.³

1.4.4 Requirements for a preliminary affirmative determination

In accordance with section 269TD, the Commissioner may make a PAD if he is satisfied that there appears to be sufficient grounds for the publication of a dumping duty notice, or that it appears that there will be sufficient grounds subsequent to the importation into Australia of the goods. In deciding whether to make a PAD, the Commissioner must have regard to the application and any submissions received within 40 days of the initiation of the investigation. The Commissioner may also have regard to any other matters that he considers relevant.

The Commissioner may make a PAD at any time after day 60 of the investigation. If a PAD is made, the Commonwealth may require and take securities under section 42 if the Commissioner is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues. The Commissioner must give public notice of the PAD and of a decision by the Commonwealth to require and take securities.

1.4.5 Statement of essential facts

The Commissioner must, within 110 days after the initiation of an investigation, or such longer period as the Parliamentary Secretary allows under subsection 269ZHI(3), place on the public record a statement of the essential facts on which the Commissioner proposes to base his recommendation to the Parliamentary Secretary.⁴

In formulating the SEF the Commissioner must have regard to the application concerned, and any submissions concerning publication of the notice that are received within 40 days

² Subsection 269TC(1).

³ Subsection 269TC(4).

⁴ Subsection 269TDAA(1).

after the date of initiation of the investigation,⁵ and may have regard to any other matters that he considers to be relevant.⁶

1.5 Findings and conclusions

The Commissioner has made the following findings and conclusions based on all available information at this stage of the investigation.

1.5.1 The goods and like goods (Chapter 3 of this report)

Locally produced prepared or preserved tomatoes are like to the goods under consideration.

1.5.2 Australian industry (Chapter 4 of this report)

There is an Australian industry producing like goods, comprising of one Australian producer of prepared or preserved tomatoes, being SPCA.

1.4.3 Australian market (Chapter 5 of this report)

The Australian market for prepared or preserved tomatoes is supplied by the Australian industry and by imports, predominantly from Italy.

1.5.4 Dumping investigation (Chapter 6 of this report)

The dumping margins for prepared or preserved tomatoes exported from Italy by Feger and La Doria are outlined below.

Exporter / Manufacturer	Preliminary Dumping Margin
Feger	7.5%
La Doria	5.1%

Table 1- Dumping margins

1.5.5 Economic condition of the Australian industry (Chapter 7 of this report)

During the investigation period, the Australian industry producing like goods has experienced:

- price suppression;
- reduced profits;
- reduced profitability;
- reduced revenue; and
- reduced capacity utilisation.

⁵ Subsection 269TDAA(2)(a).

⁶ Subsection 269TDAA(2)(b).

1.5.6 Has dumping caused material injury? (Chapter 8 of this report)

Prepared or preserved tomatoes have been exported to Australia from Italy by Feger and La Doria at dumped prices and the dumping has caused material injury to the Australian industry producing like goods.

1.5.7 Will dumping and material injury continue? (Chapter 9 of this report)

Prepared or preserved tomatoes exported from Italy by Feger and La Doria in future may be at dumped prices, and continued dumping may cause further material injury to the Australian industry.

1.5.8 Non-injurious price (Chapter 10 of this report)

The non-injurious price (NIP) should be based on SPCA's cost to make and sell, and because the NIP is higher than the normal values for Feger and La Doria it is appropriate to recommend that dumping duties should be based on the full margins of dumping .

1.5.9 Proposed anti-dumping measures (Chapter 11 of this report)

The Commissioner proposes to recommend to the Parliamentary Secretary that a dumping duty notice be published in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

The Commissioner proposes to recommend that the method of working out interim dumping duty be in accordance with the combination of fixed and variable duty method.

1.6 Responding to this SEF

This SEF represents an important stage in the investigation. It informs interested parties of the facts on which the Commissioner proposes to base his recommendation to the Parliamentary Secretary and invites them to make submissions in response to the SEF. It is important to note that the SEF may not represent the final views of the Commissioner.

The Commissioner must have regard to submissions received in relation to this SEF within 20 days of the SEF being placed on the public record before making a final decision to terminate the investigation or submit a final report to the Parliamentary Secretary. The Commissioner's final report must be provided to the Parliamentary Secretary by 19 October 2015, recommending whether or not a dumping duty notice should be published, and the extent of any interim duties that are, or should be, payable.⁷

Responses to this SEF should be received by the Commissioner no later than **24 September 2015**. The Commissioner is not obliged to have regard to any submission made in response to the SEF received after this date if to do so would, in the opinion of the Commissioner, prevent the timely preparation of the report to the Parliamentary Secretary.⁸

Submissions should preferably be emailed to operations1@adcommission.gov.au. Alternatively, they may be sent to fax number +61 3 8539 2499, or posted to

⁷ Subsection 269TEA(1).

⁸ Subsection 269TEA(4).

Public Record

Director Operations 1
Anti-Dumping Commission
Level 35, 55 Collins Street
MELBOURNE VIC 3000
AUSTRALIA

Confidential submissions must be clearly marked accordingly and a non-confidential version of any submission is required for inclusion on the public record. A guide for making submissions is available on the Commission's website, www.adcommission.gov.au.

The public record contains non-confidential submissions by interested parties, the non-confidential versions of the Commission's verification visit reports and other publically available documents. It is available by request in hard copy in Melbourne (phone +61 3 8539 2445 to make an appointment), or online at www.adcommission.gov.au.⁹

Documents on the public record should be read in conjunction with this SEF.

⁹ Electronic Public Record (EPR) No. 276 refers.

2 BACKGROUND

2.1 Initiation

On 24 November 2014, SPCA lodged an application for the publication of a dumping duty notice in respect of prepared or preserved tomatoes (the goods) exported to Australia from Italy by Feger and La Doria.

Following consideration of the application, the Commissioner decided to not reject the application and initiated the investigation. Public notification of the initiation of the investigation was made on 19 January 2015 in *The Australian* newspaper and in ADN No. 2015/05.

In respect of the investigation, the Commission established an:

- investigation period of 1 January 2014 to 31 December 2014 for the purpose of assessing dumping.
- injury analysis period commencing 1 January 2010 for the purpose of determining whether material injury has been caused to the Australian industry.

2.2 Nature and scope of the investigation

2.2.1 Legality of the investigation

Feger and La Doria in their joint submission of 20 February 2015 stated that initiation of the investigation by the Commission violates World Trade Organization (WTO) law by:

- limiting the investigation to two exporters and not the whole of Italy; and
- the investigation is a disguised review of the exporters dumping margin from investigation 217.¹⁰

However, as the exporters acknowledge in their submission, the WTO Anti-Dumping Agreement (ADA) does not explicitly state that anti-dumping investigations must be conducted or initiated with respect to all exporters from an exporting country.¹¹ In fact, Article 5 of the ADA simply sets out the information that an applicant is required to provide an investigating authority in support of its application. Article 5 further provides directives to the investigating authority regarding how the information provided by an applicant should be assessed.

Section 269TB of the Act which outlines the requirements for making an application for the publication of a dumping duty notice does not require an application for the publication of a dumping duty notice to cover all exporters from an exporting country. Further, section 269TC of the Act does not require the Commissioner to be satisfied that the application covers all exporters from an exporting country.

Therefore, the Commission is satisfied that the initiation of the investigation by the Commissioner on 19 January 2015 is compliant with the Act.

¹⁰ EPR013 Exporter submission.

¹¹ Ibid p 5.

2.2.2 Investigating Market Situation

In their submission of 27 February 2015 Feger and La Doria submit that the Commission's investigation of a market situation being present in the market in Italy for prepared or preserved tomatoes can only be addressed in the framework of a countervailing investigation and is outside the framework of an anti-dumping investigation in violation of WTO law.¹² The exporters also submit that addressing questions concerning subsidies in an anti-dumping investigation would be in breach of WTO rules.

Article 2.2 of the ADA introduces the concept of a particular market situation in the context of establishing normal value for dumping purposes. Paragraph 269TAC(2)(a)(ii) of the Act sets out an exception to determining normal value under subsection 269TAC(1) where the Parliamentary Secretary is satisfied that, because the situation in the market in the country of export is such that sales in that market are not suitable for use in determining a price under subsection 269TAC(1), the normal value of the goods exported to Australia cannot be ascertained under subsection 269TAC(1). Neither the ADA nor the Act provides any definition of a market situation.¹³

The Commission's Dumping and Subsidy Manual¹⁴ states:

In considering whether sales are not suitable for use in determining a normal value under subsection 269TAC(1) because of the situation in the market of the country of export, the Commission may have regard to factors such as:

- *whether the prices are artificially low; or*
- *whether there is significant barter trade; or*
- *whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under subsection 269TAC(1) of the Act.*

Government influence on prices or costs could be one cause of "artificially low pricing". Government influence means influence from any level of government.

In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.

The Commission emphasises that in examining the effect of support schemes administered under the European Union's Common Agricultural Policy (CAP) in this investigation (along with certain other factors), it has done so in the context of assessing

¹² EPR 012, 029 – Exporter submission. See also EPR 014 – European Union submission, EPR 015 – Italian Government submission.

¹³ See Appendix 1 of this report for a full description of the legislative provisions relating to 'market situation'.

¹⁴ Available online at http://adcommission.authprod.ind/accessadsystem/Documents/DumpingandSubsidyManual-December2013_001.pdf

normal values and dumping margins. In particular, the Commission has undertaken a practical assessment as to whether the payments made to Italian tomato growers under the CAP distorted the prevailing market prices in Italy for prepared or preserved tomatoes. This was done for the purpose of considering whether to recommend a dumping duty notice under section 269TG of the Act. These considerations are distinctly different to investigations of subsidy programs for the purpose of recommending countervailing duties under section 269TJ.

The Commission is of the view that it is not limited in terms of the factors it may examine when assessing whether there is a situation in the Italian market such that sales of prepared or preserved tomatoes in that market are unsuitable for use in determining normal values under subsection 269TAC(1).

2.2.3 Initiation of new investigation within 12 months of previous investigation

The Commission recognises that paragraph 7.1 of the Doha Ministerial Decision states that:

7.1 investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.¹⁵

In making his decision to initiate the investigation, the Commissioner considered the SPCA application which contained a considerable amount of new factual information provided by SPCA regarding allegations of a market situation. The new factual information related to allegedly trade distorting measures such as the Single Payment Scheme (SPS), regulations on imports of raw tomatoes and measures and support offered through Italian Producers Organisations.

Further, the SPCA application presented:

- export price, normal value and dumping margin estimates based on a different period to the one used as the investigation period (1 July 2012 to 30 June 2013) in the previous investigation; and
- claims of dumping and injury caused by dumping in a manner that was reasonably confined to exports of the goods by Feger and La Doria.

In considering the application, the Commission established that the volume of prepared or preserved tomatoes exported to Australia by Feger and La Doria (in aggregate) had increased since the investigation period used for the purpose of REP 217. Similarly, the share of the Australian market held by sales of Feger and La Doria products had increased. The Commission considers these findings demonstrate that circumstances had changed and were particularly relevant in the context of an application that was alleging that Feger and La Doria were dumping and that the dumping by those two exporters caused material injury.

¹⁵ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1997, 7.1.

The new factual information raised by SPCA in its application, including its new claims of dumping, injury and causation, was examined in the context of the changed circumstances. The examination was undertaken with special care in line with the Doha Ministerial decision. Based on information contained in the application and other information the Commissioner considered relevant, the Commissioner decided not to reject the application.

It should be further noted that despite an investigation into the same product only recently being completed, neither the Act nor the ADA places any restriction upon the Commissioner's ability to initiate another investigation into the same product.¹⁶

2.3 Previous investigation and existing measures

In *Consideration Report 276* (CON 276), the Commission noted that a previous investigation into the alleged dumping of prepared or preserved tomatoes exported to Australia from Italy had been initiated on 10 July 2013.¹⁷ As a result of the Commission's investigation, and the Commissioner's recommendation, the then Parliamentary Secretary to the Minister for Industry decided to impose dumping duties on prepared or preserved tomatoes exported from Italy except by Feger and La Doria.¹⁸

During the investigation it was found that goods exported by Feger and La Doria, had been dumped during the investigation period (1 July 2012 to 30 June 2013) but the dumping margin was less than 2 per cent. Accordingly, on 20 March 2014, the Commissioner decided to terminate the investigation in accordance with subsection 269TDA(1)(b)(ii) in so far as it related to Feger and La Doria.¹⁹

The current anti-dumping measures on exports of prepared or preserved tomatoes to Australia from Italy expire on 15 April 2019.

After accepting a request by certain parties to review the then Parliamentary Secretary to Minister for Industry's decision, the Anti-Dumping Review Panel (ADRP) ultimately affirmed the decision to impose dumping duties on prepared or preserved tomatoes exported from Italy (except by Feger and La Doria).

2.4 Extensions of time for the statement of essential facts

The public notice of the initiation advised that the SEF for the investigation would be placed on the public record by 9 May 2015.

The Parliamentary Secretary granted an extension of 90 days to the date for the publication of the SEF. That extension required the SEF to be published by 7 August 2015, and the final report and recommendations to be provided to the Parliamentary Secretary by 21 September 2015. ADN No. 2015/56 provides further details and is available on the Commission's website at <http://www.adcommission.gov.au>.

¹⁶ Subsection 269TC, *Anti-Dumping Agreement*, Article 5.

¹⁷ Case No. 217 refers: <http://www.adcommission.gov.au/cases/ADC217.asp>.

¹⁸ ADN No. 2014/32.

¹⁹ ADN No. 2014/22.

Public Record

On 7 August 2015, the Parliamentary Secretary granted a further extension of 28 days for the publication of the SEF. That extension required the SEF to be published by 4 September 2015, and the final report and recommendations to be provided to the Parliamentary Secretary by 19 October 2015. ADN No. 2015/97 provides further details and is available on the Commission's website at <http://www.adcommission.gov.au>.

2.5 Submissions received from interested parties

The Commission has received numerous submissions from interested parties during the course of the investigation. Each submission has been considered by the Commission in reaching the conclusions contained within this SEF.

3 THE GOODS AND LIKE GOODS

3.1 Finding

The Commissioner considers that locally produced prepared or preserved tomatoes are like to the goods the subject of the application (the goods).

3.2 Legislative framework

In making his assessment of like goods, the Commissioner must firstly determine that the goods produced by the Australian industry are “like” to the imported goods. Subsection 269T(1) defines like goods as:

“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”.

An Australian industry can apply for relief from injury caused by dumped or subsidised imports even if the goods it produces are not identical to those imported. The industry must however, produce goods that are “like” to the imported goods.

Where the locally produced goods and the imported goods are not alike in all respects, the Commissioner assesses whether they have characteristics closely resembling each other against the following considerations:

- i. Physical likeness;
- ii. Commercial likeness;
- iii. Functional likeness; and
- iv. Production likeness.

3.3 The goods

The goods the subject of the application (the goods) are:

Tomatoes (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 (prepared or preserved tomatoes), exported from Italy by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. The following tomato products do not form part of this application: pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

Additional product information

The application contains the following further information in relation to the goods the subject of the application:

The common container sizes of the imported prepared or preserved tomatoes the subject of this application are 300grams to 850grams, but the application covers all container sizes up to and including 1.14L.

The imported goods could be packaged in different containers such as cans, glass jars, pouches or Tetra packs.²⁰

Products sold in multi-unit packs, for example 3x400gram cans, are to be considered as three single packs.

The imported prepared or preserved tomatoes can be labelled with a generic, a house brand / private label for retailer or a proprietary label. The imported goods the subject of this application covers all imported prepared or preserved tomatoes regardless of how labelled.

3.3.1 Tariff classification

The goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

- 2002.10.00 (statistical code 60).

The general rate of duty is currently 5% for goods imported from Italy.

3.3.2 Tariff Concession Orders

There are no Tariff Concession Orders in place for the nominated goods.

3.4 The Commission's like goods assessment

From the available information as well as information collected during investigation 217, the Commission has not identified any Australian producers of like goods apart from SPCA. Based on information gathered from SPCA, exporters and importers the Commission is satisfied that the Australian industry produces like goods on the following grounds.

3.4.1 Physical likeness

The physical likeness of the locally produced goods and the imported goods are alike. Product recipes differ however the major ingredient of the locally produced goods and the imported goods is raw tomatoes. The locally produced goods and the imported goods are available in similar packaging sizes of 400 gram and 800 gram net weighted cans. SPCA may use tomato paste as a thickening agent while the exporters subject to the investigation use tomato juice concentrate for similar purposes.

3.4.2 Commercial likeness

The locally produced goods and the imported goods are sold to the same customers and directly compete with each other. Therefore the locally produced goods and the imported goods are commercially alike.

²⁰ Tetra packs are proprietary packaging mediums produced, under copyright, by the Tetra Pack Company.

3.4.3 Functional likeness

Both the locally produced goods and the imported goods are functionally alike because they have the same end use.

3.4.4 Production likeness

Based on visiting SPCA's production facility and visits to the exporters, the Commission has confirmed that the locally produced goods and the imported goods are manufactured in a similar way.

The Commission notes that the previous investigation revealed that there are other Australian manufacturers of prepared and preserved tomatoes in containers exceeding 1.14 litres. In line with the previous investigation findings that these goods are primarily destined for the food, service and industrial sector and do not compete against imports in the retail sector, the Commission considers that these other manufacturers do not produce like goods and are therefore not considered part of the Australian industry.

4 THE AUSTRALIAN INDUSTRY

4.1 Finding

The Commissioner has found that there is an Australian industry consisting of SPCA that produces like goods in Australia and those like goods were wholly manufactured in Australia.

4.2 Legislative framework

The Commissioner must be satisfied that the “like” goods are in fact produced in Australia. Subsection 269T(2) of the Act specifies goods are not to be taken to have been produced in Australia unless the goods were wholly or partly manufactured in Australia. Subsection 269T(3) further specifies that the goods shall not be taken to have been partly manufactured in Australia unless as least one substantial process in the manufacture of the goods was carried out in Australia.

4.3 Australian industry

4.3.1 Corporate, organisational and ownership structure

The company commenced commercial trading as SPCA in 2002 following the merger of two previously unaffiliated commercial entities – Shepparton Preserving Company (SPC) and Ardmona Fruit Products Co-Op (Ardmona).

SPCA is currently a wholly owned subsidiary of SPC Ardmona Ltd which is wholly owned by Coca-Cola Amatil Limited (CCA) following completion of commercial acquisition of SPCA by CCA in 2005. SPCA’s head office is located at Hawthorn East in Melbourne, Victoria.

The SPCA financial year operates from January to December. Being part of CCA, SPCA provided CCA’s audited financial statements and annual reports.

4.3.2 Applicant’s manufacturing operations and production process

SPCA operates manufacturing facilities in Shepparton and Mooroopna, located in regional Victoria. SPCA is the sole Australian manufacturer of like goods.

The manufacture of the goods occurs, subject to weather, between February and April each year at its Mooroopna facility near Shepparton, Victoria. The Commission was informed this is the only manufacturing facility in Australia for like goods.

On 13 February 2014 the Commission visited the manufacturing facilities of SPCA and observed the production of prepared or preserved tomatoes to gain an understanding of the production process.²¹

The Commission observed that the finished goods follow two main processes; canning of the goods followed by labelling and packing. SPCA advised that the goods are manufactured up to the bright can stage, i.e. no labels.

²¹ EPR No. 276/9 refers.

When tomatoes are not being processed, the Mooroopna tomato processing lines are left idle.

SPCA advised the production process in relation to prepared or preserved tomatoes is standardised for all products with marginal differences made at various production stages depending on specific product variables (such as cut profile and value adding).

The Commission observed the following production activities at SPCA Mooroopna manufacturing facility:

- The raw tomatoes are delivered to SPCA's Mooroopna facility directly by the local tomato growers on the same day that they are harvested from the vine.
- The delivered raw tomatoes are moved immediately to the processing line, so as to be washed and graded.
- The higher quality raw tomatoes are then steam-peeled whilst the lower quality tomatoes are graded for use in the production of juice which is either used as filling in the canning process or evaporated and used to produce concentrates and paste products.
- The peeled raw tomatoes are graded a second time, so as to be sorted for processing as either whole tomato products if they are higher quality or if they are lower quality raw tomatoes, these are graded a third time for dice, chop or crush cut profiles.
- Once sorted and processed according to cut profile, all raw tomatoes are put into cans. Each can is filled with standardised ratios of raw tomatoes to liquid filling stage (juice that is derived from step 3 above). Products are then sorted by can size and cut profile. At this stage, depending on specific product requirements, certain cans are produced with additional ingredients such as herbs, spices and other flavouring (referred to as 'value added' products).
- Once filled to product specifications, cans are sealed and pasteurised (cooked) to preserve the product and moved to cool to ambient temperature.
- Once cooled, all unlabelled cans (referred to as the 'bright can' stage) are moved to storage according to product grouping.
- Cans are labelled on an as-needed basis prior to shipping, depending on specific order requirements and customer demands.

4.3.3 Other producers

As discussed at Section 3.3.4 of this report, the Commission was aware of other manufacturers of prepared or preserved tomatoes however, the goods produced are in containers exceeding 1.14 litres, do not compete against imports in the retail sector and are not considered to be like goods.

4.3.4 Product range

The applicant makes a range of goods for sale in Australia under its own labels and that for private and generic labels. The broad categories are:

- Whole peeled;
- Diced, chopped and crushed; and
- Value added.

The value added range includes minor amounts of herbs and spices and/or tomato paste and other vegetables.

There are two typical can sizes. During the investigation period, the majority of SPCA's manufactured prepared or preserved tomatoes were in container sizes being in the 400g or the 800g pack groups.

4.3.5 Close processed agricultural goods

In its application, SPCA indicated that prepared or preserved tomato products are not close processed agricultural goods.²² SPCA explained that the fresh tomatoes used in the production of prepared or preserved tomato products are not substantially devoted to the production of prepared or preserved tomato products. SPCA noted they are also used for consumption in the fresh form and they are used to manufacture other products such as paste, puree and sauces.

At its visit to SPCA's manufacturing plant, the Commission was advised that SPCA sourced its raw tomatoes from local suppliers who are also tomato growers.²³

The Commission considers that the goods are not close processed agricultural goods. Therefore, the Commission considers that the Australian Industry for prepared or preserved tomatoes does not include the person or persons producing the raw agricultural goods from which the processed goods are derived.

4.4 Conclusion

The Commissioner is satisfied that:

- there is an Australian industry producing like goods in Australia, consisting of SPCA;
- the prepared or preserved tomatoes produced by SPCA are like to the imported goods; and
- the like goods are wholly manufactured in Australia.

²² Within the meaning of subsection 269T(4B).

²³ EPR No. 276/9 refers.

5 AUSTRALIAN MARKET

5.1 Finding

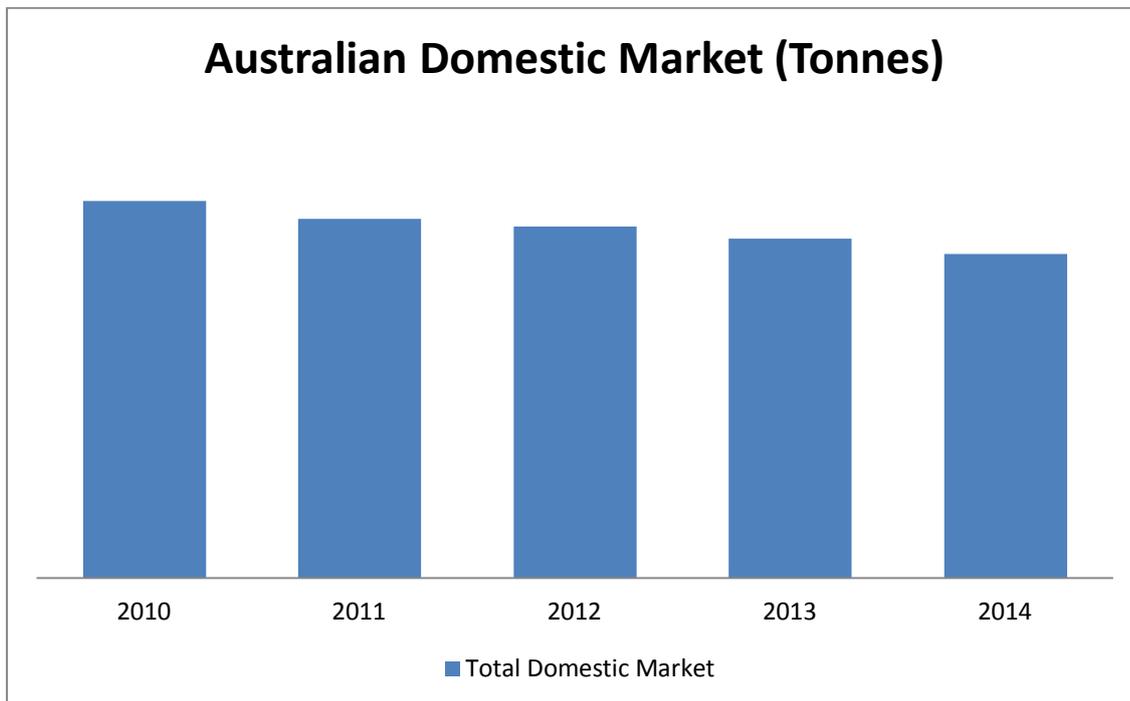
The Commissioner found that there is an Australian market for prepared or preserved tomatoes which the Commission estimates comprised sales of approximately 49,500 tonnes during the investigation period. The Australian market is supplied by SPCA and by imports, primarily from Italy, with the goods and like goods sold in the retail sector.

5.2 Market structure

5.2.1 Market size

SPCA submitted in its application estimates of the Australian market size and share of prepared or preserved tomatoes for each calendar year during the period 2010-2013 and for the first half of the 2014 calendar year. Following the initiation of the investigation, the Commission obtained SPCA's updated sales volumes and net sales values for the second half of the 2014 calendar year.

Using SPCA's sales data and the then Australian Customs and Border Protection Service (ACBPS) import database, the Commission has presented the size of the Australian market for prepared or preserved tomatoes in the following graph. The graph shows the changes in the Australian domestic market size for prepared or preserved tomatoes across the calendar years from 2010 through to 2014.



Graph 1: The Australian domestic market size for prepared or preserved tomatoes

Graph 1 demonstrates that the size of the Australian domestic market for prepared or preserved tomatoes has decreased each year since 2010.

The Commission estimates that in 2014, the size of the Australian market for prepared or preserved tomatoes was approximately 49,500 tonnes. The Commission observes that the market size has decreased by approximately 13% when compared to the 2010 calendar year.

Details of the Australian prepared or preserved tomatoes market share and size are at **Confidential Attachment 1**.

5.2.2 Market supply

SPCA is the only manufacturer of the like goods in Australia. All other prepared or preserved tomatoes supplied to the market are imported, primarily from Italy.

Whilst there are a large number of importers of prepared or preserved tomatoes from Italy, the vast bulk of the imported goods are either purchased directly by the major supermarkets or on their behalf via a smaller subset of importers.

SPCA explained that it sells directly to the major supermarkets and other retail outlets that generally purchase a combination of imported and locally-produced prepared or preserved tomatoes.

5.3 Importers

At the commencement of the investigation, the Commission identified a number of importers of the goods from the then ACBPS import database. The Commission noted that there were six importers that, in aggregate, accounted for approximately 95 per cent of the import volume of the goods to Australia in the investigation period.

On 23 January 2014, the Commission contacted these six importers and invited them to cooperate with the investigation by completing an importer questionnaire, which requested information relevant to the investigation.

The due date for responses to the importer questionnaire was set as 16 February 2015.

The Commission received responses from all but one of the importers of the goods. Responses received included:

- company information for the importer;
- overseas supplier information;
- details of imported goods (including cost to import and sell);
- details of selling expenses for the goods;
- details of Australian sales of the goods;
- details of forward orders of the goods;
- contracts for supply of the goods; and
- supporting documentation for selected importations of the goods identified by the Commission.

Public Record

The Commission considers that for the purpose of this investigation, it is not necessary to undertake on-site visits to verify the importers information and data.²⁴ Instead, the Commission:

- has verified certain importers' costs and sales data to the source documentation provided; and
- considers that the composition of the updated importers' costs and sales data is closely aligned to previously verified data.²⁵

Accordingly, the Commission considers that the data is suitable for use for the purpose of this investigation as follows:

- corroborating evidence in relation to export price;
- determining selling prices in Australia for goods exported from Italy by Feger and La Doria; and
- assessing the post-exportation costs incurred in relation to goods exported by Feger and La Doria.

The Commission found the importers generally operated in one of two ways:

- importing the goods and acting as a distributor to retailers; or
- importers purchasing the goods either directly from the exporter or via an intermediary and then selling the goods in their store to retail customers.

²⁴ EPR No. 276/38 refers.

²⁵ Investigation 217.

6 DUMPING INVESTIGATION

6.1 Finding

The Commissioner has found the following dumping margins:

Exporter / Manufacturer	Dumping Margin
Feger	7.5%
La Doria	5.1%

6.2 Legislative framework

Dumping occurs when a product from one country is exported to another country at a price less than its normal value. Under the Act, the export price and normal value of goods are determined under section 269TAB and section 269TAC respectively.

Usually, the normal value reflects the price paid for like goods in the domestic market of the country of export. However, sometimes the goods are not sold in that market, or the price paid in that market cannot, for some reason, be used. Section 269TAC gives several methods by which normal values may be obtained, with the choice of methods being determined by the circumstances of the case.

Subsection 269TAC(1) provides that, subject to certain conditions, the normal value is the price at which like goods are sold in the domestic market of the country of export.

Subsection 269TAC(2)(c) provides for the normal value to be constructed from the cost to make and sell of the goods in the country of export, and on the assumption the goods have been sold for home consumption in the ordinary course of trade, adding amounts for administrative, selling and general costs associated with the sales and an amount of profit on those sales. Subsection 269TAC(2)(d) provides for the normal value to be based on the price of exports from the country of export to a third country.

Dumping margins are determined under section 269TACB.

6.3 Allegation of Market Situation

SPCA submitted in its application that domestic prices of prepared or preserved tomatoes in Italy are not suitable for the determination of normal values under subsection 269TAC(1) of the Act, as a particular market situation in relation to those goods renders those domestic selling prices unsuitable.²⁶

6.3.1 The Act

Subsection 269TAC(1) provides 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.

²⁶ Subsection 269TAC(2)(a)(ii).

However, subsection 269TAC(2)(a)(ii) provides that the normal value of the goods exported to Australia cannot be determined under subsection (1) where the Parliamentary Secretary is satisfied that:

the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1).

Where such a market situation exists, normal value cannot be established on the basis of domestic sales. Instead, the normal value may be determined on the basis of a cost construction (subsection 269TAC(2)(c)) or third country sales (subsection 269TAC(2)(d)).

6.3.2 The Commission's assessment

The Commission has considered all available relevant evidence and information and is not satisfied that there is a situation in the market in Italy for prepared or preserved tomatoes that makes sales of prepared or preserved tomatoes in that market unsuitable for use in determining a price under subsection 269TAC(1).

A full evaluation of the Commission's investigation of market situation can be found in **Appendix 1** of this report.

6.3.3 Assessment of cost reasonableness

In terms of costs of manufacture or production, Regulation 43 of the *Customs (International Obligations) Regulation 2015* requires that if:

1. an exporter keeps records relating to like goods that are in accordance with generally accepted accounting principles (GAAP) in the country of export; and
2. those records reasonably reflect competitive market costs associated with the production or manufacture of like goods;

the Minister must work out the cost of production or manufacture using information set out in the exporter's records.

Where the conditions of Regulation 43 are not met, it is not mandatory to use only the cost records kept by that exporter in working out their costs, and the Commission may resort to other information to calculate these costs.

During this investigation, the Commission has assessed that the accounting records of Feger and La Doria have been kept in accordance with the Italian GAAP (with reference to the auditor's opinions in each company's audited financial statements).

However, the Commission considers that the cost of raw tomatoes contained in Feger and La Doria's records do not reasonably reflect competitive market costs associated with the production or manufacture of like goods. The Commission is of the view that the magnitude of the CAP payments made to tomato growers is such that those CAP payments have affected the prevailing market prices in Italy for raw tomatoes. The Commission considers it is reasonable to replace the cost submitted by Feger and La Doria in relation to raw tomatoes when assessing the exporters' cost of production or manufacture for the purpose of Regulation 43. The Commission's approach to replacing those costs is set out in the next section.

6.3.4 Replacement of costs of raw tomatoes

Having considered all available relevant evidence, the Commission has estimated a per hectare payment made to growers of tomatoes in Italy under the CAP. Noting that, under Article 54(2)(b) of EC Regulation 73/2009, 75% of the national ceiling for tomatoes was available to growers of tomatoes as of 1 January 2012 and having established the total hectares grown in 2012, the Commission has calculated a subsidy rate of €2041 per hectare by dividing the total hectares into the amount available under the national ceiling for tomatoes:

- €137,975,250 (75% of €183,967,000)²⁷
- 67,586 hectares (GAIN Report 2012)

The Commission has replaced the Feger and La Doria costs of raw tomatoes establishing cost of production in accordance with Regulation 43. It has done so by increasing the cost of the raw tomatoes per kilo by an amount equal to the value of the CAP payments. The Commission has not replaced or changed any of the other exporters' costs of production or expenses from the data supplied by Feger and La Doria and verified by the Commission.

6.4 Determination of dumping margins

The Commission received completed exporter questionnaires from Feger and La Doria. The Commission undertook on-site verification visits in relation to each of the exporters to verify the data contained in their responses to the exporter questionnaires.

Feger and La Doria have fully cooperated with the investigation.

6.4.1 Feger

Export Price

The Commission found, in relation to Feger's exports of the goods to Australia in the investigation period:

- the goods were exported to Australia otherwise than by the importer; and
- the purchases of the goods by the importer were arm's length transactions.

However, the Commission found that in some cases the goods were not purchased by the importer from the exporter.

Where the goods were purchased by the importer from the exporter, export prices of the goods exported to Australia by Feger have been determined under subsection 269TAB(1)(a), being the price paid by the importer less transport and other costs arising after exportation.

Where the goods were not purchased by the importer from the exporter, the export price has been determined under subsection 269TAB(1)(c), having regard to all the circumstances of exportation. Specifically, the Commission has determined export prices

²⁷ Annex X EC Regulation 73/2009.

using the price paid by the importer less transport and other costs arising after exportation.

Normal value

The Commission found that Feger made domestic sales of like goods for some models of the goods and that there was an absence of domestic sales for the remaining models of the goods exported to Australia.

In relation to the exported models for which Feger had sales of a comparable models, the Commission determined normal values under subsection 269TAC(1), based on a sufficient volume of comparable domestic sales having been sold in the ordinary course of trade in arms length transactions. The ordinary course of trade tests were conducted using comparisons of net selling prices and the costs to make and sell inclusive of the replacement of costs of raw tomatoes.

In relation to the models exported to Australia where there was an absence of comparable domestic sales, normal value (inclusive of the replacement of costs of raw tomatoes) was ascertained under subsection 269TAC(2)(c).

In accordance with subsection 269TAC(2)(c) of the Act, the Commission established normal value by using Feger's cost of production of the exported goods²⁸ and on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, added amounts determined to be administrative, selling and general costs associated with the sales. When adding profit on those sales the Commission added an amount of profit using data relating to the production and sale of like goods by Feger, in the ordinary course of trade prior to the replacement of costs of raw tomatoes.²⁹

To ensure normal values were properly compared to exports prices, it was necessary to make adjustments, in accordance with subsections 269TAC(8) and (9), for differences in domestic and export prices that were caused by differences in;

- packing;
- commissions;
- transportation;
- handling and logistics; and
- credit terms.

Further adjustment claims by Feger

On the basis of information obtained from Feger, and in line with the Dumping and Subsidy Manual,³⁰ the Commission has determined that Feger have not provided sufficient evidence to satisfy the Commission that adjustment for advertising and/or quality costs should be made in calculating normal values.

After these claims for adjustment were initially rejected by the verification visit team, Feger provided further information to the Commission to support its claims. The

²⁸ Subsection 269TAC(2)(c)(i).

²⁹ Subsection 269TAC(2)(c)(ii).

³⁰ See pages 72-3.

Commission has assessed the arguments and evidence submitted. The Commission acknowledges that Feger may have incurred some component of its advertising and quality control expenses in relation to domestic sales of prepared or preserved tomatoes. However, the Commission considers that the evidence submitted by Feger does not satisfactorily demonstrate what proportion of such expenses could reasonably be allocated to those goods sold domestically. Therefore the Commission is not satisfied that the effect, if any, on domestic prices can be reasonably quantified by using the allocations of expenses as presented by Feger for these two adjustment claims. Further analysis of these adjustment claims is contained in **Confidential Attachment 2**.

The dumping margin presented below has been calculated without making adjustments to normal values for any difference between export and domestic prices that may arise from differences in advertising and quality control expenses.

Dumping margin

The Commission has calculated the dumping margin in accordance with subsection 269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

The dumping margin for Feger is 7.5%.

The Commission's calculations of export prices, normal values and dumping margins for Feger are at **Confidential Attachment 3**.

6.4.2 La Doria

Export Price

The Commission found, in relation to La Doria's exports of the goods to Australia in the investigation period:

- the goods were exported to Australia otherwise than by the importer; and
- the purchases of the goods by the importer were arm's length transactions.

However, the Commission found that in some cases the goods were not purchased by the importer from the exporter.

Where the goods were purchased by the importer from the exporter, export prices of the goods exported to Australia by La Doria have been determined under subsection 269TAB(1)(a), being the price paid by the importer less transport and other costs arising after exportation.

Where the goods were not purchased by the importer from the exporter, the export price has been determined under subsection 269TAB(1)(c), having regard to all the circumstances of exportation. Specifically, the Commission has determined export prices using the price paid by the importer less transport and other costs arising after exportation.

Normal Value

The Commission found that La Doria made domestic sales of like goods for some models of the goods and that there was an absence of domestic sales for the remaining models of the goods exported to Australia.

In relation to the exported models for which La Doria had sales of a comparable models, the Commission determined normal values under subsection 269TAC(1), based on a sufficient volume of comparable domestic sales having been sold in the ordinary course of trade in arms length transactions. The ordinary course of trade tests were conducted using comparisons of net selling prices and the costs to make and sell inclusive of the replacement of costs of raw tomatoes.

In relation to the models exported to Australia where there was an absence of comparable domestic sales, normal value (inclusive of the replacement of costs of raw tomatoes) was ascertained under subsection 269TAC(2)(c).

In accordance with subsection 269TAC(2)(c) of the Act, the Commission established normal value by using La Doria's cost of production of the exported goods³¹ and on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, added amounts determined to be administrative, selling and general costs associated with the sales. When adding profit on those sales the Commission added an amount of profit using data relating to the production and sale of like goods by La Doria, in the ordinary course of trade prior to the replacement of costs of raw tomatoes.³²

To ensure normal values were properly compared to exports prices, it was necessary to make adjustments, in accordance with subsections 269TAC(8) and (9), for differences in domestic and export prices that were caused by differences in;

- inland transport;
- credit terms;
- commissions;
- handling and logistics; and
- warranty and cost of credit insurance.

Dumping margin

The Commission has calculated the dumping margin in accordance with subsection.269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

The dumping margin for La Doria is 5.1%.

The Commission's calculations of export prices, normal values and dumping margins for La Doria are at **Confidential Attachment 4**.

³¹ Subsection 269TAC(2)(c)(i).

³² Subsection 269TAC(2)(c)(ii).

7 ECONOMIC CONDITION OF THE INDUSTRY

7.1 Finding

The Commissioner found that SPCA has experienced injury in the form of:

- price suppression;
- reduced profits;
- reduced profitability;
- reduced revenue; and
- reduced capacity utilisation.

7.2 Introduction

This chapter outlines the economic condition of the Australian industry and an assessment as to whether the Australian industry has suffered injury.

In its application, SPCA claimed that the Australian industry has suffered material injury caused by prepared or preserved tomatoes being exported to Australia from Italy by Feger and La Doria at dumped prices. SPCA claimed that the injurious effects of dumping have been:

- reduced sales volumes;
- reduced market share;
- price undercutting;
- price depression;
- price suppression;
- reduced profits;
- reduced profitability; and
- reduced capacity utilisation.

CON 276 advised that the Commission will examine the Australian market and the economic condition of the Australian industry from 1 January 2010 for the purposes of its injury analysis. Under subsections 269TG(1) and (2) of the Act, one of the matters that the Parliamentary Secretary must be satisfied of in order to publish a dumping duty notice is that, because of the dumping, material injury has been, or is being caused, or has been threatened to the Australian industry producing like goods.

7.3 Commission's approach to injury analysis

The Commission considers that for the purpose of analysing the economic condition of the Australian industry for this investigation, it is not necessary to undertake on-site verification of the Australian industry's information and data.³³

The Commission is satisfied that the cost and sales data provided by SPCA for the purpose of this investigation is of a similar nature and in similar detail to that provided for

³³ See EPR 038 for a full discussion of the Commission's approach to analysing the economic condition of the Australian Industry.

the purpose of the previous investigation of the same goods. The Commission notes that SPCA's cost and sales data was subject to on-site verification by the Commission during the previous investigation, which found the sales data to be reasonably complete, relevant and accurate and was suitable for assessing the economic condition of the Australian industry.³⁴

In this context, the Commission has accepted the costs, sales and other financial data submitted by SPCA for the purpose of this investigation, including such data up to and including the calendar year 2014, as suitable for assessing the economic condition of the Australian industry producing prepared or preserved tomatoes.

This approach towards formulating the SEF in so far as it relates to the economic condition of the Australian industry was foreshadowed by the Commission in a file note published on the Commission's electronic public record on 3 July 2015.³⁵

In response to the file note, the Commission received a submission from the exporters raising their concerns about the Commission's approach to injury analysis. Specifically, the exporters submitted that the decision not to verify SPCA's data is not equal to the treatment of the exporters. The exporter's also submitted that had SPCA's data been verified, the Commission would make the finding that SPCA's financial position has considerably improved.³⁶ However, the Commission notes that the evidence contained in Coca-Cola Amatil Annual Report of 2014, provided by the exporters, is evidence of the SPCA's overall profitability and not specific to the goods under consideration.

The Commission considers that the exporters' submission does not provide a compelling reason for setting aside the financial data submitted by SPCA specifically for the purpose of this investigation. It also does not provide a persuasive argument that on-site verification of the SPCA sales, cost and other financial data is necessary, particularly in light of the Commission's satisfaction with the verification of very similar SPCA data for the purpose of the previous investigation. Therefore, the Commission has not adjusted its investigative approach to its analysis of the economic condition of the Australian industry.

As the sole Australian manufacturer of prepared or preserved tomatoes,³⁷ the Commission has considered only SPCA's costs, sales and other financial data for the purposes of the Australian industry economic condition analysis.

The following analysis is based on:

- SPCA's updated sales, cost and other financial data;
- the then ACBPS import database; and
- SPCA's other relevant economic factors data.

Charting and analysis has been completed on an annualised basis for the five years ending 31 December 2014. The annualised charts are aligned with the calendar year, being January to December.

³⁴ Investigation 217 Australian industry visit report, p.25.

³⁵ File note folio EPR 038.

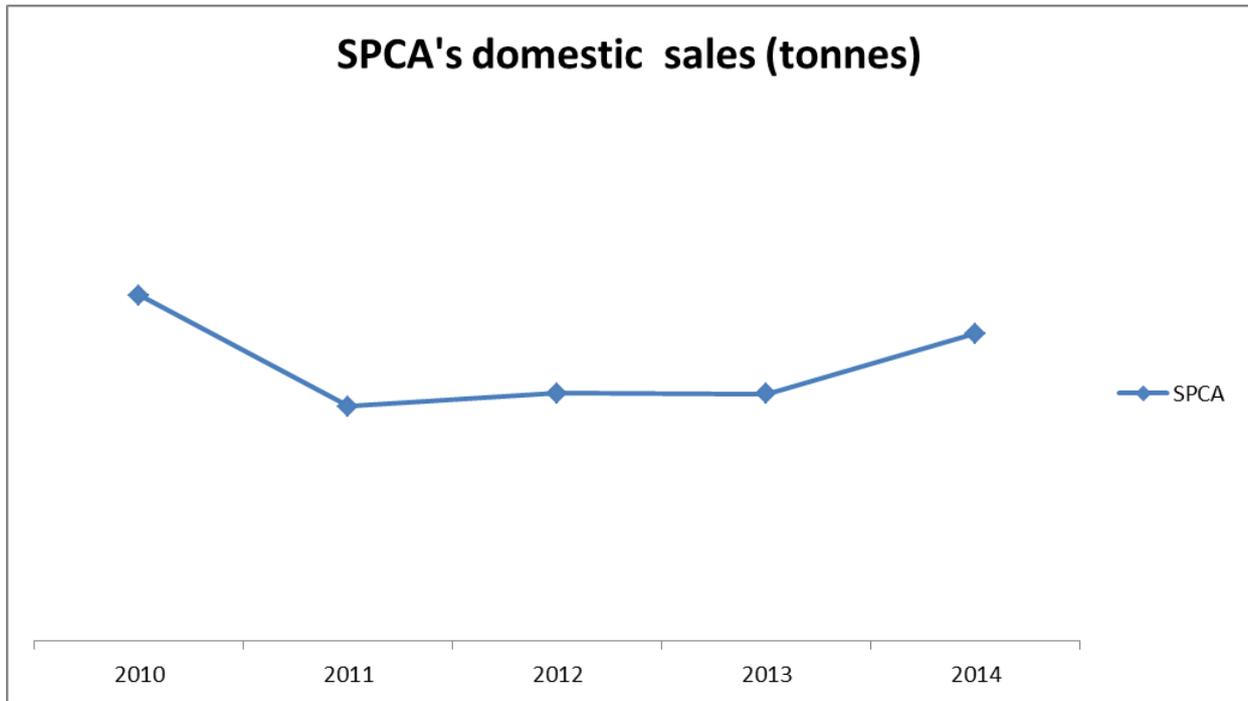
³⁶ Submission EPR 043.

³⁷ CON 276, p.10.

7.4 Volume effects

SPCA claimed in its application that the market share held by dumped goods is significant, with market volume and market share impacted by pricing activity. However at the time of writing CON 276, the Commission did not consider there to be reasonable grounds to support SPCA's claims that it had suffered injury in the form of reduced sales volume and reduced market share.³⁸

The following graph illustrates the annual volume of SPCA's domestic sales over the injury analysis period.

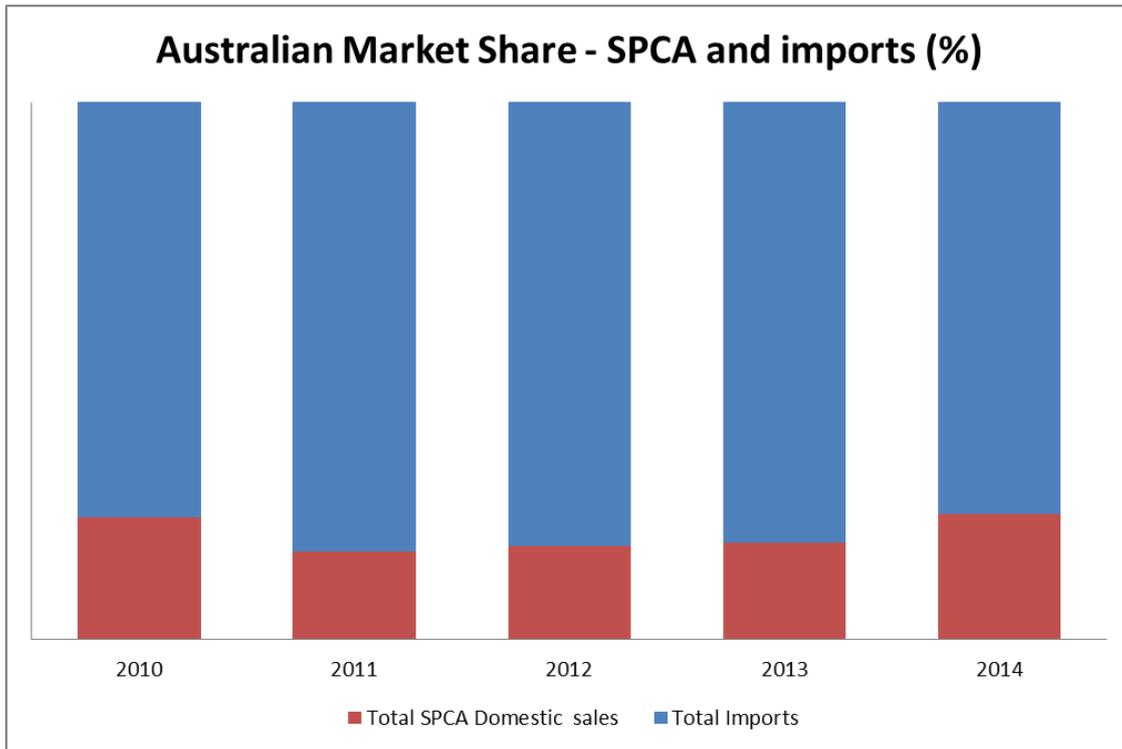


Graph 2 – SPCA's annual domestic sale volumes of prepared or preserved tomatoes

Graph 2 shows that following a significant fall of SPCA domestic sales in 2011, sales volumes increased in the following years but have not returned to the level observed in 2010.

Using SPCA's sales data and the then ACBPS import database, the Commission has displayed the distribution of market share in the Australian market for prepared and preserved tomatoes. The following graph shows the changes in SPCA's domestic market share for prepared or preserved tomatoes across the calendar years from 2010 through to 2014.

³⁸ CON 276, p.28.



Graph 3 - Australian domestic market share for prepared or preserved tomatoes

Graph 3 shows that SPCA’s market share decreased from 2010 to 2011 before slightly improving in each subsequent year. It can be observed that SPCA’s market share in 2014 has returned to a comparable level to 2010.

7.4.1 Volume effects – Commission conclusion

In a market slightly decreasing in size, the Commission found that:

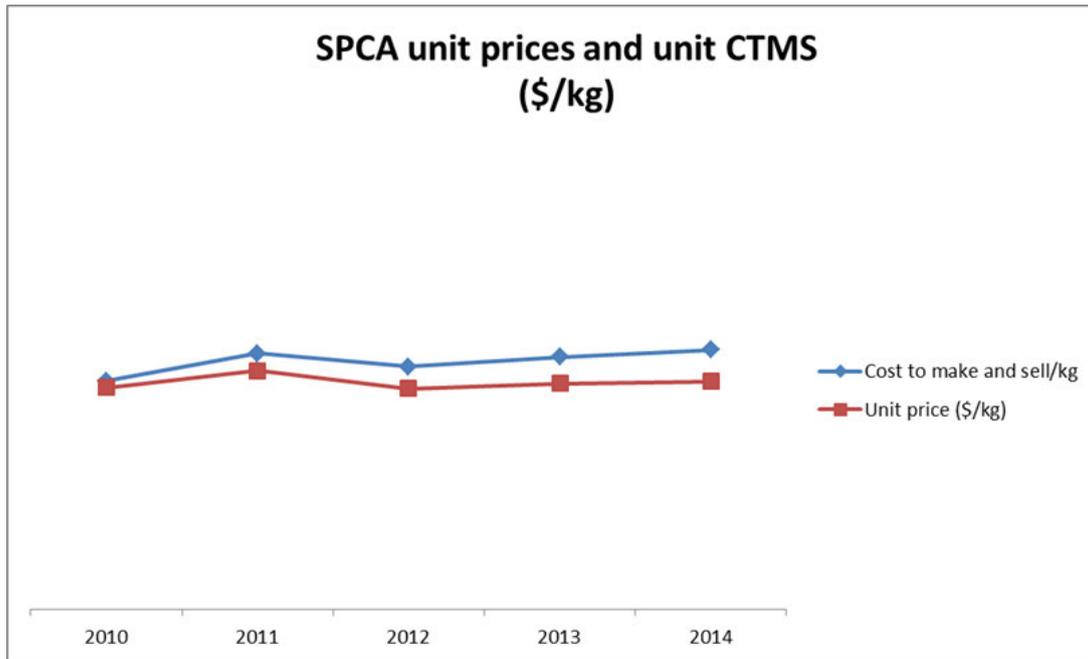
- SPCA’s sales volumes increased from 2011 to 2014 but did not reach the sales volume level observed in 2010; and
- SPCA’s market share has returned to almost the same level as that for 2010.

Based on the above analysis, the Commission does not consider there to be evidence to support SPCA’s claim that the Australian industry has suffered injury in the form of reduced sales volume and/or reduced market share.

7.5 Price effects

Price depression occurs when a company, is forced to reduce prices in order to compete with imported goods. Price suppression occurs when price increases, which otherwise would have occurred, have been prevented. An indicator of price suppression may be the margin between revenues and costs.

The Commission has analysed the weighted average net unit (per kilogram) prices obtained by SPCA over the period 1 January 2010 to 31 December 2014. Graph 4 illustrates the movements in and relationship between SPCA’s unit cost to make and sell and unit selling prices for its domestic sales of its prepared or preserved tomatoes.



Graph 4 – SPCA’s prepared or preserved tomatoes unit price and unit cost to make and sell

The Commission has observed from Graph 4 that the unit prices for prepared or preserved tomatoes increased from 2010 to 2011 and then fell in 2012. The unit prices then increased in 2013 and slightly again in 2014. SPCA’s unit cost to make and sell followed a similar trend. The Commission notes that SPCA’s unit cost to make and sell has been above its unit selling price throughout the injury analysis period and that the amounts by which costs have exceeded prices has increased in all of the years.

7.5.1 Price effects – Commission conclusion

The deteriorating margin between revenue and cost to make and sell for SPCA is indicative of price suppression as SPCA has been unable to raise its prices to a level that would enable it to either make a profit or reduce its losses.

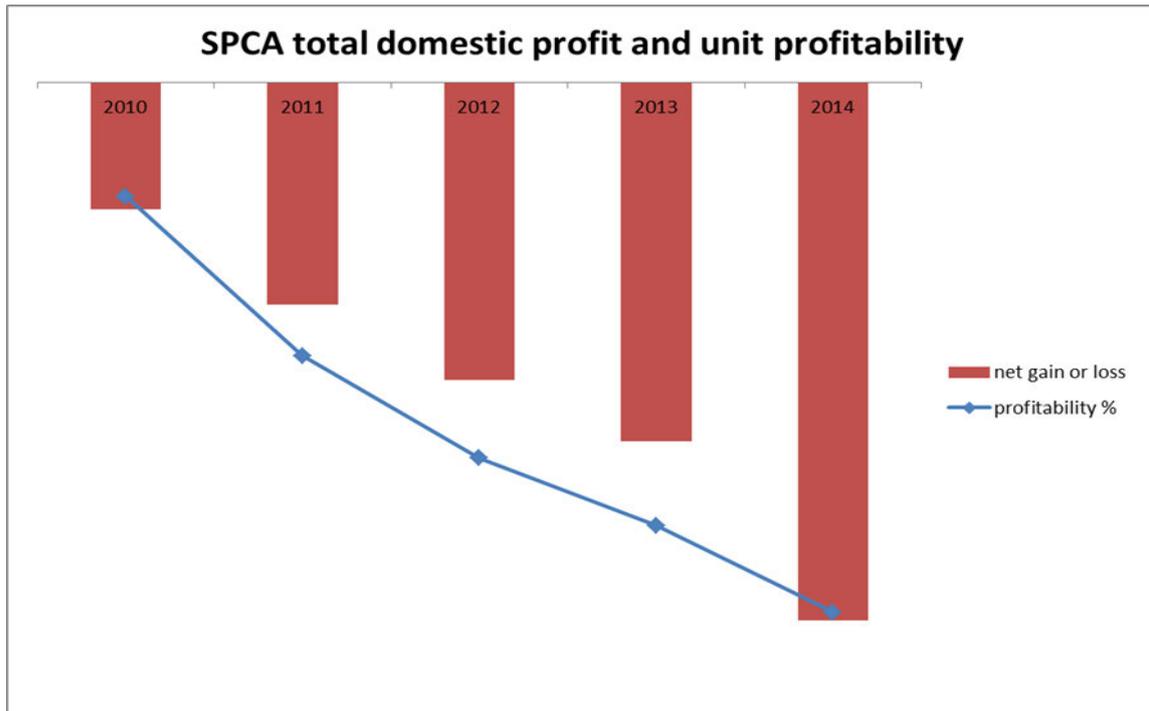
SPCA’s unit prices have been reasonably stable for the last three years of the injury analysis period, albeit with slight increases in 2013 and 2014.

Accordingly, the Commission considers that the above analysis supports SPCA’s claim that the Australian industry has experienced injury in the form of price suppression but not with respect to price depression.

Details of the price effects analysis are at **Confidential Attachment 5**.

7.6 Profits and profitability

In Graph 5 the Commission has displayed the annualised total profit and profitability (profits measured as a percentage of revenue) for SPCA’s sales of prepared or preserved tomatoes on the Australian market over the period 1 January 2010 to 31 December 2014.



Graph 5 – SPCA total profits and unit profitability for prepared or preserved tomatoes

Graph 5 indicates that SPCA's profits and profitability in respect of domestic sales of prepared or preserved tomatoes have been negative since 2010 and the losses worsened significantly for 2014.

The Commission notes that the exporters have observed in Coca Cola Amatil's 2014 financial report, information that SPCA's financial situation has improved in the 2014 financial year.³⁹ However, as discussed at section 8.3, the information contained in the report is not specific to prepared or preserved tomatoes. For the purposes of assessing injury to the Australian industry, the Commission's profit and profitability effects analysis is on SPCA's sales data of *like goods*.

7.6.1 Profit and profitability effects – Commission conclusion

Based on the analysis outlined above, the Commission has found that the Australian industry has experienced injury in the form of reduced profits and reduced profitability.

7.7 Other economic factors

In support of its claims of material injury, SPCA completed Confidential Appendix A7 (other injury factors) for each of the years from 2010 to 2013 and the first half of 2014. Since initiating the investigation, the Commission received a revised Confidential Appendix A7 from SPCA, with updated data covering the entire 2014 calendar year.

As was noted in CON 276, the data provided by SPCA was at times in respect of the total SPCA business, and at other times it was specific to prepared or preserved tomatoes. In relation to the two other economic factors particular to prepared or preserved tomatoes, these showed:

³⁹ Submission EPR 276/043, refers.

- reduced revenue; and
- reduced capacity utilisation.

Details of the Commission's analysis of other relevant economic factors are at **Confidential Attachment 6**.

7.7.1 Assets

SPCA provided information on the value of its assets in Appendix A7, which is representative of the whole company. The Commission observes a reduction of assets from a companywide perspective. However, the Commission notes that SPCA has not separated the data specific to the production of prepared or preserved tomatoes, and therefore it cannot make any injury assessments in relation to assets that may be particular to prepared or preserved tomatoes.

7.7.2 Capital investment

SPCA provided information on the value of capital investment representative of the whole company. The Commission observes a reduction in the value of capital investment from a companywide perspective. However, the Commission notes that SPCA has not separated the data specific to the production of prepared or preserved tomatoes, and therefore it cannot make any injury assessments in relation to capital investment that may be particular to prepared or preserved tomatoes.

7.7.3 Domestic sales revenue

Domestic sales revenue particular to prepared or preserved tomatoes substantially declined in 2011 where it stayed at a relatively constant level until 2014, where there was a moderate improvement. The 2014 revenue has not recovered to a comparable level to 2010 indicating revenues have reduced in the injury analysis period.

7.7.4 Capacity

SPCA provided information regarding its capacity representative of its production of prepared or preserved tomatoes which the Commission observes has remained static since 2010.

7.7.5 Capacity utilisation

SPCA provided information on its capacity utilisation, which is based on production volumes and budgeted capacity. The Commission notes that other than improvements in 2012 and 2013, SPCA's capacity utilisation has trended downwards over the injury analysis period.

7.7.6 Stocks

SPCA provided information regarding its closing stock levels which decreased in 2011 before increasing in 2012 and in 2013 before reducing in 2014 to a level higher than observed in 2010.

7.7.7 Additional observations

The Commission has received several submissions from interested parties that argue injury should be considered by taking into account the overall economic condition of the Australian industry to properly consider if injury is material.⁴⁰ This includes claims of the recent improvements in SPCA's financial position and SPCA's low investment in its infrastructure.

The Commission does not consider that improvements in relation to particular economic factors, of itself, preclude a finding that the Australian industry has been injured in respect of other factors. This is consistent with the Ministerial Direction on material injury (dated 27 April 2012), which states that '... [a] material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance'.

The Commission notes that SPCA provided values of its capital investment across the injury analysis period in its response to Confidential Appendix A7; however these values were representative of the whole company. Whilst the Commission can see a reduction in capital investment from a company-wide perspective, SPCA did not separate the specific components for the production of like goods. Therefore, the Commission cannot determine the degree to which SPCA's investments in infrastructure contributed to the injury suffered. However, the Commission observes that the decision to invest is guided by a range of considerations, including prevailing market conditions, and that the presence of dumped goods in the market may discourage investment.

The exporters' submission quotes from the Coca-Cola Amatil Annual Report of 2014, that "SPCA delivered a significant improvement in earnings....". Firstly the quote is incorrect in so far as the report states "SPC showed a significant improvement in earnings...". The "improvement" quoted in the report therefore appears to relate to a range of entities and products and is not necessarily representative of SPCA or prepared or preserved tomatoes. The Commission's injury analysis set out above is particular to prepared or preserved tomatoes.

⁴⁰ EPR 017, 043.

8 HAS DUMPING CAUSED MATERIAL INJURY?

8.1 Findings

The Commissioner has found that prepared or preserved tomatoes have been exported to Australia from Italy by Feger and La Doria at dumped prices and the dumping has caused material injury to the Australian industry producing like goods.

The Commission has found that SPCA has suffered material injury caused by dumping in the form of:

- price suppression;
- reduced profits;
- reduced profitability;
- reduced revenue; and
- reduced capacity utilisation.

8.2 Introduction

This section examines whether the dumped imports of prepared or preserved tomatoes exported from Italy by Feger and La Doria are, through the effects of dumping, causing material injury to the Australian industry.

Section 269TAE outlines factors that the Parliamentary Secretary may have regard to in determining, for the purposes of section 269TG, whether material injury has been or is being caused or is threatened due to those dumped imports.

8.3 Size of the dumping margin

The size of the dumping margin is a relevant consideration when assessing whether dumping has caused material injury.⁴¹

The Commission found that Feger and La Doria exported the goods to Australia in the investigation period at dumped prices, with dumping margins of 7.5% and 5.1% respectively.

8.4 Volume of dumped goods

The quantity of goods exported to Australia at dumped prices is also a relevant consideration when assessing whether dumping has caused material injury.⁴² The Commission has found that the volume of dumped goods exported to Australia from Italy by Feger and La Doria is not negligible.⁴³ Rather, the Commission considers the volume of such goods represents a significant proportion of the Australian market and is in sufficient volume to influence prevailing market prices in Australia.

⁴¹ Paragraph 269TAE(1)(aa) of the Act.

⁴² Paragraph 269TAE(1)(a) of the Act.

⁴³ Subsection 269TDA(4) of the Act.

8.5 Price effects

8.5.1 Price sensitivity

SPCA submitted in its application that the product category of prepared or preserved tomatoes is highly price sensitive. SPCA advised that the key purchasing criterion for consumers is retail price and for this reason, the pricing activity from dumped imports significantly impacts on the pricing of the product category.

The Commission has established, based on evidence gathered, that retail sales volumes move, with a high degree of correlation, when there are incremental changes in price.

Consistent with the previous investigation findings, information gathered by the Commission for the purpose of this investigation shows that the major supermarket retailers dominate the Australian market for prepared or preserved tomatoes. The concentration of large volume supply contracts amongst a few large retailers has resulted in strong and aggressive price negotiations driven by competition between suppliers to secure these contracts.

The major retailers tender annually for supply of their respective volume and product mix requirements for prepared or preserved tomatoes. The Commission has observed from information gathered that the initial tender price submitted by suppliers represents the starting point for further price negotiations and that these negotiations are intended to extract the best possible price on behalf of the retailer.

The Commission is satisfied, based on the available evidence, that price is the key consideration when suppliers and the major retailers negotiate supply contracts. The Commission is also satisfied that the Australian market for prepared or preserved tomatoes is highly price sensitive both at retail and wholesale levels.

8.5.2 Price undercutting

The Commission has undertaken an analysis of price undercutting claims by SPCA, noting that price undercutting occurs when the imported product is sold at a price below that of the Australian manufactured product.

In conducting this analysis, the Commission has undertaken a comparison between the price (in AUD) per kg of imports of prepared or preserved tomatoes from Italy at free into store (FIS) terms and the price (in AUD) per kg of comparative SPCA products at delivered terms for the 2014 calendar year, being the investigation period.

In the course of this analysis, the Commission has used, in relation to the investigation period:

- domestic sales data of SPCA's prepared or preserved tomatoes
- sales and cost data of importers in relation to sales in Australia of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria; and
- data collected from the then ACBPS import database.

The data is sufficiently detailed to enable the Commission to undertake a comparison of selling prices of prepared or preserved tomatoes in the Australian domestic market during the investigation period for sales of goods supplied by:

- SPCA;
- Feger;
- La Doria; and
- other Italian exporters already subject to anti-dumping measures.⁴⁴

The Commission has used importers' actual sales data, as submitted in responses to importer questionnaires, where the Commission was satisfied that those sales related to goods exported by Feger or La Doria. Otherwise, the Commission has constructed the prices where exporters sell directly to retailers by using data from the then ACBPS import database. Specifically, the Commission constructed weighted average unit (AUD/kg) selling prices by taking the sum of free on board export prices, amounts for duty and where applicable the dumping duty. Where available, the Commission used amounts for shipping and importation costs, into-store costs and the gross margins for importers for 2014. Otherwise, the Commission used such data ascertained from verified importers data from the previous dumping investigation.

The Commission's price undercutting analysis is described below and is at **Confidential Attachment 7**.

Comparison of aggregate weighted average FIS prices to selected customers

A comparison of aggregate weighted average FIS prices for selected customers means that sales values of all prepared or preserved tomato products for any given supplier have been included in each weighted average calculation of Australian selling prices to selected customers. Because of this, variations in product mix may contribute to price differences. The Commission notes that by focusing only on sales to selected major retail customers, a large proportion of all imports of the goods by Feger and La Doria were captured in this analysis.

This comparison showed that Feger and La Doria products were sold in Australia at prices that undercut SPCA by significant margins in each month of the investigation period.

The comparison also showed that the selection of other imports, being prepared or preserved tomatoes exported to Australia from Italy already subject to anti-dumping measures, were sold in Australia at prices that also undercut SPCA in each month of the investigation period but not to the extent of Feger and La Doria products.

Comparison of aggregate weighted average FIS prices for selected products to selected customers

A comparison of weighted average FIS prices for selected products to selected customers was conducted to minimise the potential for any price differences, such as those resulting from different product mixes, which may have affected the analysis above. In order to conduct this comparison meaningfully, the Commission has identified products of a certain cut profile and container size profile. These products represented a large proportion of SPCA's domestic sales of prepared or preserved tomatoes and a large proportion of both Feger and La Doria's products sold in Australia.

⁴⁴ The Commission has used the then ACBPS import data in relation to a significant proportion of the goods exported by other Italian exporters (i.e other than Feger and La Doria).

This comparison showed that Feger and La Doria products were sold in Australia at prices that undercut SPCA by significant margins in each month of the investigation period.

The comparison also showed that the selection of other imports of the same certain cut profile and container size profile, being prepared or preserved tomatoes exported to Australia from Italy already subject to anti-dumping measures, were sold in Australia at prices that also undercut SPCA in each month of the investigation period but not to the extent of Feger and La Doria products.

8.5.3 Conclusion – price effects

The price comparisons outlined by the Commission in the preceding sections demonstrated that Feger and La Doria products, when sold in Australia, consistently undercut SPCA prices by significant margins. The prices of Feger and La Doria products were also lower than prices of other goods imported from Italy that were supplied by all other exporters, which are all subject to anti-dumping measures.

The Commission considers that the price pressure exerted on SPCA by competing with goods that were exported by Feger and La Doria at dumped prices caused SPCA to experience price suppression.

8.6 Volume effects

In its application, SPCA submitted that whilst it had experienced improvement in its sales volume and market share in 2014, this improvement would have been greater if it had not lost sales in 2014 to the dumped exports from Feger and La Doria.

The Commission has charted, for the purposes of its analysis of volume effects, the change in volume of exports to Australia of prepared or preserved tomatoes, over the investigation period. The Commission's analysis of volume effects is in **Confidential Attachment 8**.

The Commission has observed that the volume of Feger and La Doria exports to Australia exceeded the volume of exports of Italian goods subject to anti-dumping measures over the investigation period. The Commission also notes that the volume of sales in Australia of Feger and La Doria products, in aggregate, represented a significant share of the Australian Market during the investigation period.

Notwithstanding these findings, the Commission established earlier in this report that the evidence does not support SPCA's claim that the Australian industry has suffered injury in the form of reduced sales volume and/or reduced market share. Therefore, the Commission considers that the prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria has not caused injury to the Australian industry in terms of adverse volume effects.

8.7 Profit effects

8.7.1 Reduced profit and profitability

As described earlier in this report, the Commission has found that SPCA has experienced declines in its profit and profitability.

SPCA has stated that a decline in its sales volumes caused by imported products has resulted in higher costs to make and sell because of reduced economies of scale which in turn leads to poor fixed cost recovery and eroded profits and profitability.

Whilst the Commission has not established that dumped imports from Feger and La Doria have caused injury in the form of lost sales volume, it has been established that imports from Feger and La Doria have caused injury in the form of adverse price effects for SPCA, particularly in the form of price suppression.

The price suppression caused by dumping, which has been demonstrated by the lower margin between unit prices and unit costs, has resulted in lower profits and reduced profitability for SPCA.

Accordingly, the Commission considers that SPCA has suffered injury in the form of reduced profits and profitability caused by dumped imports of prepared or preserved tomatoes from Italy by Feger and La Doria.

The Commission's analysis of the profit and profitability effects is at **Confidential Attachment 9**.

8.8 Other possible causes of injury

8.8.1 Competition with goods from Italy already subject to anti-dumping measures

The price undercutting analysis detailed above demonstrates that SPCA has been experiencing a degree of price competition from goods exported to Australia from Italy already subject to anti-dumping measures.

However, the aggregate volume of this category of goods was lower than the combined volume of dumped goods from Feger and La Doria in the investigation period, and the Australian selling prices of this category of goods were higher than the Australian selling prices for the dumped goods from Feger and La Doria.

8.8.2 Supermarkets

The Commission notes the significant buying power concentrated among the major supermarkets and the effect this has on competitive pricing among suppliers of prepared and preserved tomatoes. SPCA provided confidential information to the Commission indicating that the major supermarkets buying power exerts downward pressure on prices.⁴⁵ This evidence also indicated that the supermarkets references prices of Italian products when negotiating price with SPCA and SPCA is urged to be more competitive on price in this context. While the Commission notes the potential for supermarkets to exert downward pressure on prices it is apparent SPCA must still compete with the prices of Italian products. This includes the dumped prices of Feger and La Doria that appear to be the lowest in the market.

8.8.3 Exchange rates

Interested parties, in their submissions, claimed that the appreciation of the Australian dollar has caused a loss of competitiveness to the Australian industry.

⁴⁵ Confidential attachment to SPCA's initial application.

A comparison of the start to the end of the investigation period of the AUD/EUR exchange rate shows there has been a small appreciation (approximately 4%) of the AUD. A slightly larger appreciation in the AUD relative to the EUR of 6% was observed in a comparison between the start of 2010 and the end of 2014.

The Commission notes that the AUD has appreciated over the course of the investigation period and over the course of the injury analysis period. The Commission considers that the increased strength of the AUD relative to the EUR is likely to have made it more attractive for Australian purchasers to source prepared or preserved tomatoes from overseas suppliers. However, the Commission notes the degree of appreciation in the AUD relative to the EUR over the timeframes described above is moderate and the Commission considers this does not detract from its finding that dumping of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria has caused material injury to the Australian industry.

Furthermore, the Commission acknowledges the European Commission's assessment, in its submission dated 27 February 2015, whereby it states:

"It should be noted that the exchanged rate [sic] AUD/EUR significantly depreciated since spring 2013, causing a considerable price increase of Italian imports (approximately +25%). Therefore, the exchange rate cannot be considered a cause of injury anymore".⁴⁶

8.9 Conclusion

The Commission has established that the Australian market for prepared or preserved tomatoes exhibits a high degree of price sensitivity. Feger and La Doria have exported goods to Australia in the investigation period at dumped prices and that dumping has provided those entities and importers of goods from those entities a comparative advantage on price. The dumping has contributed to Feger's and La Doria's capacity to undercut SPCA's prices, and the prices of other Italian goods, when competing for sales in the Australian market.

The price pressures created by the Australian sales of goods exported from Italy by Feger and La Doria at dumped prices has caused SPCA to experience a significant degree of price suppression. Consequently, the dumping has also caused SPCA to experience reduced profits and profitability. The injury caused through these adverse price and profit outcomes is material.

The Commissioner considers that other possible causes of injury, such as goods imported from other Italian exporters, supermarket price negotiation and a stronger AUD, do not detract from the assessment that dumping has caused material injury to the Australian industry.

The Commissioner finds that prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria at dumped prices have caused material injury to the Australian industry producing like goods.

⁴⁶ EPR 014.

9 WILL DUMPING AND MATERIAL INJURY CONTINUE?

9.1 Finding

The Commissioner has found that prepared or preserved tomatoes exported from Italy by Feger and La Doria in future may be at dumped prices, and that continued dumping may cause further material injury to the Australian industry.

9.2 Introduction

Pursuant to subsection 269TG(2) of the Act, where the Parliamentary Secretary is satisfied that material injury to an Australian industry producing like goods has been caused by dumping, anti-dumping measures may be imposed on future exports of like goods if the Parliamentary Secretary is satisfied that the dumping and material injury may continue.

9.3 Will dumping continue?

The Commission found that Feger and La Doria exported the goods during the investigation period at dumped prices, with dumping margins of 7.5% and 5.1% respectively.

Consistent with the findings of REP 217, the Commission considers that due to a significant proportion of goods being sold to a small number of retail organisations that exert significant buying power over the suppliers of those goods, Feger and La Doria will continue to compete on price to secure large volume supply contracts offered by retailers.

The Commission considers that Feger and La Doria have a price advantage over other Italian exporters because they are the only Italian exporters not presently subject to dumping duties.

The Commission notes that Feger and La Doria have well established channels to market in Australia and the volume of goods imported from those exporters, in aggregate, represents a significant share of the Australian market.

Having regard to the factors outlined above, the Commission considers that, in the absence of dumping duties being imposed on future exports as a result of this investigation, Feger and La Doria will continue to export prepared or preserved tomatoes to Australia at dumped prices.

9.4 Will material injury continue?

The Commission has reviewed the Australian industry's performance over the injury analysis period and has made a finding that prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria at dumped prices have caused material injury to the Australian industry.

The Commission considers that the continuation of price competition from dumped imports from Italy is likely to have a continuing adverse impact on the Australian industry's economic condition.

Public Record

Based on the available evidence, the Commission considers that exports of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria in the future may be at dumped prices and that continued dumping may cause further material injury to the Australian industry.

10 NON-INJURIOUS PRICE

10.1 Finding

The Commissioner has found that the non-injurious price (NIP) should be based on SPCA's cost to make and sell, with deductions for post exportation expenses in order to express the value in the same terms as the export prices and normal values.

10.2 Introduction

Dumping duties may be applied where it is established that dumped imports have caused or threatened to cause material injury to the Australian industry producing like goods. The level of dumping duty imposed by the Minister cannot exceed the dumping margins, but the Minister must have regard to the desirability of fixing a lesser amount of duty if it is sufficient to remove injury.⁴⁷ This mechanism is commonly referred to as the lesser duty rule.

The lesser duty rule is given effect through the calculation of a non-injurious price (NIP). The NIP is the minimum price necessary to remove the injury or a recurrence of the injury caused to the Australian industry by dumping.⁴⁸

10.3 The Commission's assessment of non-injurious price (NIP)

The Commission generally derives the NIP by first establishing a price at which the Australian industry might reasonably sell its product in a market unaffected by dumping. This price is referred to as the unsuppressed selling price (USP).

Having calculated the USP, the Commission then calculates a NIP by deducting the costs incurred in getting the goods from the export FOB point (or another point if appropriate) to the relevant level of trade in Australia. The deductions normally include overseas freight, insurance, into-store costs and amounts for importer expenses and profit. The Commission's assessment of non-injurious price (NIP)

The Commission has not received any submissions in relation to the USP or the NIP.

The Commission's approach (as outlined in the *Dumping and Subsidy Manual*) is to establish a USP based on one of the following:

- Australian industry's weighted average selling prices at a time unaffected by dumping;
- constructed prices for the Australian industry based on its cost to make and sell and an amount for profit; or
- selling prices of undumped imports.

In REP 217, the Commission considered it was appropriate to construct a USP⁴⁹ using SPCA's cost to make and sell. The Commission did not add an amount for profit. The Commission then deducted from the USP amounts for post exportation expenses⁵⁰ which

⁴⁷ Subsection 8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975*.

⁴⁸ Subsection 269TACA(a).

⁴⁹ REP 217, p70 – the Commission used the expression “notional minimum price”.

⁵⁰ REP 217, p71 – the Commission used the expression “adjusted the minimum price to reflect a free-on-board price”

Public Record

comprised amounts for overseas freight and insurance, into-store costs, and importer selling, general and administrative expenses.

In the absence of any submission on the issue of USP or NIP, and to maintain consistency with the outcomes of REP 217, the Commission considers that NIP should be assessed for this investigation in the same manner as it was for the purpose of REP 217.

The Commission has found that the NIP is higher than the normal values for Feger and for La Doria. Accordingly, the Commissioner considers it is appropriate to recommend that dumping duties should be based on the full margins of dumping.

The Commission's calculations of the NIP are at **Confidential Attachment 10**.

11 PROPOSED MEASURES

11.1 Proposed recommendation

The Commissioner proposes to recommend to the Parliamentary Secretary that a dumping duty notice be published in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria.

The Commissioner proposes to recommend that the method of working out interim dumping duty be in accordance with the combination of fixed and variable duty method.

11.2 Introduction

The methods for working out the amount of interim dumping duty the Parliamentary Secretary may apply are prescribed in the *Customs Tariff (Anti-Dumping) Regulation 2013*. The methods are:

- combination of fixed and variable duty method (combination method);
- floor price duty method;
- fixed duty method; and
- ad valorem duty method (i.e. a percentage of the export price).⁵¹

11.3 Submissions from interested parties

The Commission has not received any submissions related to the proposed form of measures.

11.4 Proposed measures

For the purposes of the SEF, the Commissioner proposes to recommend that interim dumping duties be calculated using a combination method. This approach is the same as that taken for the purpose of the dumping duty notice that presently applies to all other exporters of prepared or preserved tomatoes from Italy.

Specifically, the Commission proposes to recommend that interim dumping duties be applied in the form of a fixed amount of duty (calculated as a percentage of the FOB export price or the ascertained export price whichever is higher, at the rate specified in the table below) plus a variable amount of duty if the actual export price per kilogram is below the ascertained export price per kilogram.

⁵¹ Regulation 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013*

Exporter / Manufacturer	Proposed rate of interim dumping duty (fixed component)	Duty method
Feger	7.5%	combination method
La Doria	5.1%	combination method

Table 2 - Proposed measures – Feger and La Doria

11.5 Retrospective measures

When considering the publication of a dumping duty notice, the Parliamentary Secretary may, pursuant to section 269TN, issue a retrospective notice on goods that entered home consumption up to 90 days before securities were taken (or when the Commonwealth had the right to require and take securities).

In making a recommendation to the Parliamentary Secretary in this regard, the Commissioner will have regard to whether:

- the importer knew, or ought to have known, that the amount of the export price of the goods was less than the normal value of the goods and that by reason thereof material injury would be caused to an Australian industry; or
- the goods are of a kind the exportation of which to Australia on a number of occasions has caused, or, but for the publication of a notice under section 269TG in respect of goods of that kind, would have caused, material injury to an Australian industry by reason of the amount of the export price of the goods exported being less than the normal value of the goods exported.

The Commission has not found any evidence to indicate that either of these grounds existed in relation to prepared or preserved tomatoes exported to Australia from Italy by Feger or La Doria.

12 PRELIMINARY AFFIRMATIVE DETERMINATION (PAD)

12.1 Finding

The Commissioner, having made the finding that prepared or preserved tomatoes exported from Italy by Feger and La Doria have been exported at dumped prices and the dumping has caused material injury to the Australian industry, is satisfied that it is necessary to make a PAD under section 269TD. The Commissioner considers it is appropriate for the Commonwealth to require and take securities under section 42 to prevent material injury to the Australian industry occurring while the investigation continues.

12.2 Securities

The PAD, including the level of securities, will be publically notified by way of an Australian Dumping Notice on 11 September 2015. Securities will be collected on and after 11 September 2015. This report has set out the reasons for the determination, including all material findings of law and fact on which the determination is based.

The Commonwealth will base the amount of securities payable on a fixed amount (calculated as a percentage of the FOB export price or the ascertained export price whichever is higher, at the rates specified in the table below) plus a variable amount if the actual export price per tonne is below the ascertained export price per tonne. The effective rate for the calculation of the fixed component of securities for Feger and La Doria is shown below:

Country	Exporter / Manufacturer	Effective Rate of Securities (Fixed component)	Duty Method
Italy	Feger	7.5%	Fixed and variable
	La Doria	5.1%	

Table 3 - Proposed securities – Italy (Feger and La Doria)

13 APPENDICES AND ATTACHMENTS

Appendix 1	Market situation assessment
Confidential Attachment 1	Australian Market Share
Confidential Attachment 2	Feger Adjustments Claims
Confidential Attachment 3	Feger Dumping Margin
Confidential Attachment 4	La Doria Dumping Margin
Confidential Attachment 5	Price Effects
Confidential Attachment 6	Other relevant economic actors
Confidential Attachment 7	Price Undercutting Analysis
Confidential Attachment 8	Volume effects
Confidential Attachment 9	Profit and Profitability Effects
Confidential Attachment 10	NIP Calculations
Confidential Attachment 11	Flow on Calculations

APPENDIX 1 - ASSESSMENT OF MARKET SITUATION

1. Allegations of a market situation

In its application, SPCA claims that, in accordance with subsection 269TAC(2)(a)(ii) of the Act, there is a situation in the Italian market for prepared or preserved tomatoes that renders domestic sales unsuitable for determining normal value under subsection 269TAC(1) of the Act (i.e. that a 'market situation' exists), and constructed normal values should be used to ascertain whether the goods exported by Feger and La Doria have been sold at dumped prices.⁵²

SPCA submits that the supply and price of raw tomatoes in the Italian market is influenced by direct and indirect payments made to tomato growers under the European Union's Common Agriculture Policy (CAP).⁵³ In particular, SPCA points to payments made to tomato growers under the Single Payment Scheme (SPS). In addition, SPCA claims there are regulations on imports of raw tomatoes and other trade distorting measures and support offered through Italian Producer Organisations (POs).

SPCA alleges that in the absence of these factors:

*..the prices of raw tomatoes would have been higher than the historical and current prices paid by the tomato processors; this in turn would impact the normal value of prepared and preserved tomatoes in Italy.*⁵⁴

Whilst acknowledging the findings of the previous investigation⁵⁵, SPCA includes in its application a Non-Confidential Attachment B-4.1. Here, further detail on the market situation claims has been provided as well as reference to publically available supporting material, which includes EU regulations relevant to the delivery of the CAP and SPS. The Commission notes that SPCA has drawn upon various new materials that had not been considered in the previous investigation.⁵⁶

SPCA estimated that the amount paid in 2013 under the SPS was up to 37% of the price paid for raw tomatoes by the prepared or preserved tomato processors.⁵⁷ SPCA claims that the direct payments have had an influence on the supply and pricing of raw tomatoes, and the pricing of the finished products and eventually the impact on the processor's overall profitability.

Feger and La Doria made a joint submission dated 20 February 2015 in response to the market situation allegations by SPCA.⁵⁸ The submission states:

⁵² EPR003: SPCA application.

⁵³ SPCA claims that under the CAP, EU member states are allowed to provide payments to growers of fruit and vegetables, see also EPR 019.

⁵⁴ EPR003: SPCA application, p. 25.

⁵⁵ In REP 217 (p. 26), the Commission found that "...there is no situation in the market in Italy such that sales in Italy are not suitable for use in determining a price under subsection 269TAC(1) of the Act".

⁵⁶ See also EPR027 – SPCA make further clarifications regarding the new information provided to the Commission has part of their application.

⁵⁷ EPR004: SPCA application non-confidential attachment B-4.2.

⁵⁸ EPR013: Exporter submission.

- SPCA has not put forward new information since the previous investigation⁵⁹ that should change the market situation finding. Circumstances underpinning that decision have not changed, and therefore do not warrant reinvestigation.
- The evidence put forward by the applicant regarding the material impact of the alleged support on domestic sales prices of prepared or preserved tomatoes merely point out the existence of support rather than prove it has a materially distorting impact on prepared or preserved tomato prices.
- CAP payments have no distortionary impact on production and the payments are WTO compatible as they are paid on the basis of hectares of land (decoupled) rather than by tomato production (coupled), and even though payments were coupled historically it is not a relevant consideration for the investigation period. In that regard, the CAP payments are not an incentive to produce prepared or preserved tomatoes and have no trade distortionary impact on production levels, and are a "green box" measure that complies with the Agreement on Agriculture.⁶⁰
- The investigation into subsidies is outside of the context of an anti-dumping investigation and is contrary to WTO law.

Importers, Italian government, and European Commission (EC) also made submissions to the same effect, additionally questioning the legality of limiting the investigation to particular exporters rather than all exporters of that country.⁶¹

The Commission stands by its view set out in CON 276 that new evidence has been put forward by the applicant to warrant consideration of a market situation.⁶² The evidence put forward by SPCA includes supporting material related to the delivery of the EU CAP and SPS, along with claims that these payments have an influence on the supply and pricing of raw tomatoes and the pricing of prepared or preserved tomatoes. After considering SPCA's application, it was the Commissioner's view that, under subsection 269TC(1) of the Act, there appeared to be reasonable grounds to not reject the application. The new evidence warranted an examination of potential flow-on impacts arising from CAP payments on the price of prepared or preserved tomatoes.

2. Independent research of market situation allegations

The Commission engaged a consultant – the Law and Economics Consulting Associates (LECA) – to provide a full appraisal of the factors put forward in the submissions in relation to a market situation in Italy. Specifically, the scope for the LECA engagement was:

- To provide a report that analyses and explains matters relevant to the Commission's assessment about whether the situation in the domestic market in Italy for prepared or preserved tomatoes is such that sales in that market are not suitable for assessing the normal value of prepared or preserved tomatoes in Italy

⁵⁹ Previous investigation refers to case 217.

⁶⁰ EPR048

⁶¹ EPR014: European Commission submission; EPR015: Italian government submission; EPR016: Importer submission.

⁶² See section 2.2.3.

Public Record

- during the investigation period of 1 January 2014 to 31 December 2014.
- The report should include information relevant to the production and sales of:
 - prepared or preserved tomatoes; and
 - raw tomatoes (raw tomatoes being the primary raw material used in the manufacturing of prepared or preserved tomatoes).
 - The report should include, but not be limited to, examination of:
 - direct and indirect payments made to tomato growers under the European Union's (EU) Common Agriculture Policy (CAP);
 - regulations on imports of raw tomatoes; and
 - support offered through Italian Producer Organisations.
 - The analysis and explanations should include discussion of whether and to what extent certain specified factors impact upon supply and demand and prevailing prices in the relevant markets. Supporting evidence should be included with appropriate references.
 - The report should not draw conclusions as to whether a 'market situation' exists.

This appendix details the findings from the LECA report and the submissions received in relation to that report's findings. The Commission has had regard to all relevant evidence submitted by all interested parties in their submissions and it has focussed on the matters that are deemed to be material to the investigation, which are also detailed in this appendix.

This appendix also sets out the Commission's assessment as to whether there is a situation in the Italian market for prepared or preserved tomatoes that renders domestic sales in the investigation period unsuitable for determining normal value under subsection 269TAC(1) of the Act.

3. Australian legislation

Subsection 269TAC(1) of the Act states:

Subject to this section, for the purposes of this Part, 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 arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

However, subsection 269TAC(2)(a)(ii) provides:

Subject to this section, where the Minister is satisfied that because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);

the normal value of the goods for the purposes of this part is:

(c) except where paragraph (d) applies, the sum of:

- (i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export;*
- and*

- (ii) *on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export--such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale*

The Act does not provide any definition of particular circumstances or factors which would satisfy the Minister that a 'market situation' exists in a domestic market. The WTO Anti-Dumping Agreement is similarly silent regarding the definition of the concept of a 'particular market situation' referred to within Article 2.2.

4. Policy and practice

In relation to market situation, the Commission's Dumping and Subsidy Manual⁶³ states:

In considering whether sales are not suitable for use in determining a normal value under s. 269TAC(1) of the Act because of the situation in the market of the country of export, the Commission may have regard to factors such as':

- *whether the prices are artificially low; or*
- *whether there is significant barter trade; or*
- *whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s. 269TAC(1) of the Act.*

Government influence on prices or costs could be one cause of 'artificially low pricing'. Government influence means influence from any level of government'.

In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market'.

The Commission's Dumping and Subsidy Manual also goes on to state:

Prices may also be artificially low or lower than they would otherwise be in a competitive market due to government influence and distortion of the costs of inputs. Again the mere existence of any government influence on the costs of inputs would not be enough to make sales unsuitable. Rather, the Commission looks at the effect of this influence on market conditions and the extent to which domestic prices can no longer be said to prevail in

⁶³ Available online at <http://www.customs.gov.au/site/page5719.asp>.

a normal competitive market. It should be noted government influence on costs can only disqualify the sales if those costs can be shown to be affecting the domestic prices.

In this context, the Commission considers it is reasonable, for the purpose of assessing whether a market situation exists, to examine any factors that may have affected the competitive conditions in the market for prepared or preserved tomatoes in Italy in the investigation period. This includes the examination of payments made to growers of tomatoes made under the CAP.⁶⁴

5. Evidentiary threshold

The Commission notes that the Act does not provide any guidance, implicit or explicit, to the evidentiary standard required to warrant a finding being made that a situation exists in the market for the purposes of subsection 269TAC (2)(a)(ii). Ultimately, the Parliamentary Secretary must be satisfied that because of the situation in the domestic market, domestic prices are not suitable for determining normal values under subsection 269TAC(1).

The Commission considers that the issues as to whether or not a 'market situation' exists in the domestic market of an exporting country, is a matter for the Parliamentary Secretary to consider. In doing so the Parliamentary Secretary ought to be satisfied on the basis of consideration of the totality of all relevant available evidence that a 'market situation' exists for the purposes of subsection 269TAC(2)(a)(ii).

It is considered that the assessment as to whether a market situation exists in a particular market constitutes a positive test. That is, before actual selling prices are rejected, the Commission needs to identify a 'market situation', and be satisfied that the 'market situation' renders the sales in that market not suitable for normal value purposes.

Although it is for the Commission to establish the nature and consequence of the 'market situation', including an evaluation of whether there is an impact on domestic prices, it is considered that the pricing effect does not necessarily have to be quantified.

6. Previous Investigation

In case 217, the Commission undertook a market situation assessment because it became aware of the various forms of support and development assistance being provided to agricultural sectors in the EU, including the cultivation of raw tomatoes for processing. Specifically, the CAP payments in relation to the cultivation of raw tomatoes for processing formed the main component of the market situation assessment for case 217. The assessment was based primarily on questionnaire responses from the Italian government, the EC, and select exporters regarding the benefits received by the exporters, directly or indirectly related to the production of the final product.

It was determined that, based on questionnaire responses, the direct payments under the CAP and other miscellaneous government payments were not material. This finding was backed by comparing the price paid by Italian exporters for the raw tomato input against a

⁶⁴ The Commission considers it is possible for a degree of government influence to exist in a market without rendering the situation in the market such that sales are unsuitable for establishing normal value under s.269TAC(1). However, the Commission considers that significant government influence in relation to relevant market factors could distort prices to a degree that those prices may be unsuitable for use in determining normal value.

competitive market price benchmark for tomatoes, taken to be the Australian industry purchase price for tomatoes from local suppliers. Based on this benchmark, the prices in the Italian market were found to be similar or higher than the Australian prices paid. On this basis, the Commission concluded that the payments provided directly to tomato growers in Italy were not being passed through to processors in the form of lower prices.⁶⁵

7. Assessment of Market Situation

In the course of this investigation, the Commission has received various submissions relating to a market situation in the Italian market for prepared or preserved tomatoes. Having regard to the submissions put forward by interested parties, the Commission concluded that the key question being contended is:

“Do CAP payments to tomato growers materially distort competitive conditions such that prices for prepared or preserved tomatoes in the domestic market in Italy are not suitable for use in determining normal value?”

The Commission engaged LECA, an independent consultant, to assess the overall impact of the key drivers that are material to a market situation assessment, including the claims made by SPCA and submissions made in response to SPCA’s application. Further submissions were received in response to the LECA report with regards to various assumptions made in the modelling of the flow-on impacts of the CAP payments to tomato growers. The Commission considered all submissions received in response to the application and in response to the LECA report, and has referenced these submissions and other independent publications in making its assessment and arriving at its conclusion.

The following sections outline the matters that the Commission considered in formulating its market situation assessment.

7.1 Assessment of Government Policies

The LECA report assessed the impact of factors that are deemed to be material to a market situation as put forward in the SPCA application and in submissions.⁶⁶ Full details of the report, the application and all submissions, can be found in the Electronic Public Record (EPR). The findings from the LECA report, along with the Commission’s response to submissions in relation to these findings, are summarised in the following sections.

In particular, the LECA report identified a high level of distortion in the raw tomato market in Italy, which is relevant to the market for prepared or preserved tomatoes. LECA identified the following three main factors:

- CAP payments – LECA considered that the CAP payments appeared to have resulted in particularly distortionary effects on the raw tomato market in Italy. LECA identified the three features of CAP payments that serve to generate distortionary effects as (i) lack of uniformity across different types of agricultural products; (ii) the

⁶⁵Anti-Dumping Commission case No. 217 refers: <http://www.adcommission.gov.au/cases/ADC217.asp>.

⁶⁶ EPR040.

generally high level of the subsidies; and (iii) the extent to which they are “coupled” to the level of output.

- the risk of Italian Producer Organisations engaging in cartel like behaviour; and
- regulation of imports of raw tomatoes.

While the LECA report was largely focused on the CAP payments, it also examined the role and effect of producer organisations and tariff controls on imports. The Commission notes the LECA report findings that these two factors merely have an offsetting effect on any potential price distortion caused by the CAP payments. LECA explained that its estimates of price effects for prepared or preserved tomatoes attributable to CAP payments incorporate the simultaneous impact of support offered through Italian Producer Organisations, and regulations on imports of raw tomatoes.

The factors are discussed in further detail below.

7.2 CAP Payments

LECA made the following observations in its report:

- Until 2003 CAP payments were directly linked to the level of production for specific agricultural products (“coupled payments”), and were paid mainly by crop type, area aid (by hectare), or by livestock (per animal). While there have been attempts to decouple payments since 2003 Fischler reforms, raw tomatoes remained one of the last agricultural products to be totally decoupled as it was politically difficult to adjust.
- The 2003 reforms to decouple payments under the SPS were incomplete in Italy and total farm assistance for tomatoes has not been fully decoupled. EU CAP payments continue to be based on historical levels received by farmers in previous years, which were based on the past system of coupled payments. These “historical reference” payments meant Italy retained the historically high subsidy levels for tomato farms. To the extent the total payment was transferred to a per hectare payment, by dividing the total payment by the hectares in production at the time, this implied that increased production might still be rewarded with greater assistance. The CAP payments are thus implicitly tied to output and encourage farmers to maintain production to ensure continuation of the support.
- Historically, tomato growers received higher average CAP payments than other sectors. The LECA report calculated a subsidy rate for tomato growers based on data in the FADN database, and showed that tomato growers received more than double the average of other industries.

The EU and exporters’ submissions claim that CAP payments under the SPS is a “green box” measure that has no, or at most minimal, trade distorting effect on production. This claim is premised upon related claims that SPS payments are not coupled to tomato production.⁶⁷ SPCA, in response submitted that despite notions of the SPS being a “green box” measure, there is yet no evidence that decoupled payments have no trade distorting effects.⁶⁸ The Commission is of the view that whether the CAP payments are

⁶⁷ EPR036, EPR044, EPR048.

⁶⁸ EPR026, EPR039.

explicitly coupled to production is not of critical importance for its assessment of whether there is a market situation such that renders the sale of prepared or preserved tomatoes unsuitable for use as normal value. Rather, in the context of its investigation into alleged dumping, the Commission considers it is more important to make a practical assessment as to whether the effect (if any) of the CAP payments made to tomato growers is such that it has distorted the price of the prepared or preserved tomatoes to a degree that renders the sales unsuitable for use in calculating normal value.

The LECA report suggests that reforms to CAP payments have been incomplete and delayed, such that payments to tomato growers continue to be referenced by historic production and have the effect of encouraging farmers to maintain production levels to ensure CAP payments are sustained over time. This suggests that the CAP payments have an influence over industry production capacity and supply. The exporter's response to the LECA report included a report produced for the exporters by an Italian producer's organisation in regards to the decoupled nature of payments.⁶⁹ The Commission considered that submission and concluded that it references much the same EU policies as the LECA report but does not outweigh the LECA report's assessment that the nature of SPS payments influences the production decision of tomato growers. The Commission has also observed further independent evidence that demonstrates the payments made to growers of tomatoes in Italy under the SPS are based on historical base periods prior to the introduction of the SPS.⁷⁰

7.3 The Role of Producer Organisations

LECA made the following observations in its report:

- Under the 1996 CAP reforms, CAP payments are paid to processors approved by the Member States on the basis of a contract with recognised producer organisations (POs).
- The 2000 reforms meant the subsidies are paid to the farmer via a PO instead of the processor. This arrangement remains to date.
- While POs and inter-branch organisations may provide efficiency enhancing, or transaction cost minimising services that help the operation of markets, there is scope for potential distortions in the market due to POs' ability to engage in cartel like behaviour.
- The derogations from competition law offered to POs give them an ability to control supplies of tomatoes to the market, effectively capturing a larger share of the subsidy for tomato growers and maintaining prices in the market.⁷¹
- In effect, the market power held by POs has a reducing impact on the degree of flow-on of the CAP payments to the final market price for prepared or preserved tomatoes.

⁶⁹ EPR049: Attachment – UNAPROA.

⁷⁰ Rickard, B. J. and Sumner, D. A. (2011). 'Was there policy reform? Evolution of EU domestic support for processed fruits and vegetables.' *Food Policy*, 36(3), 438-449.

⁷¹ EPR031 – This issue is emphasised in SPCA's submission.

The LECA report only refers to POs ability to exercise market power in a cartel-like manner, and by no means alleges that POs are cartels. The exporters submitted any such allegation should be treated as baseless and unfounded by evidence. The Commission agrees with the EU and exporter's observation that the POs' market power may lead to prices of raw tomatoes to be maintained, which is in alignment with the conclusion drawn by the LECA report that POs may have, in part, an off-setting effect to the CAP payments.⁷²

7.4 Entry/external tariff controls on imports

LECA made the following observations in its report:

- LECA states there are regulations on the importation of raw tomatoes to Italy from outside the EU for local sale. Such imports are only allowed (at a duty) for processing so long as they re-export the processed product. Processed tomato products are thus traded but face ad valorem tariffs in the EU.
- The import regulations on the purchase of raw tomatoes restrict the degree of competition in the Italian market.
- Notwithstanding the import regulations, the perishability of raw tomatoes makes it difficult for producers to import the raw product.
- The limited competition in Italy for raw tomatoes increases the POs market power, allowing them to limit the supply of tomatoes to the market and holds a significant part of the market for Italian processing tomatoes captive.
- The difficulty in importing raw tomatoes to Italy therefore has a reducing impact on the degree of flow-on of the CAP payments to the final market price for prepared or preserved tomatoes.

The EU and exporter's submission to the LECA report contested the existence of 'prohibitions' on imports of fresh tomatoes from outside the EU.⁷³ However, the EU submission also confirms the current existence of import duties on raw tomatoes.⁷⁴ The LECA report refers to the limitation of imports in the form of import duties, referencing a publication by Rickard and Sumner (2008) in a well-regarded journal. The purpose is to identify the barriers to competition in the Italian raw tomatoes market which increases the market power of Italian POs. The point LECA makes is that the limited competition causes prices of raw tomatoes to be maintained, and may have, in part, an off-setting effect to the CAP payments.

7.5 Rate of CAP Payments to Growers of Tomatoes

The Commission provided the Italian Government and the European Union with questionnaires at the commencement of the investigation. The questionnaires inter alia, requested information regarding the CAP, the SPS and payments made to growers of tomatoes. The Commission did not receive a response regarding these specific issues.

⁷² EPR044, EPR045, EPR048.

⁷³ EPR048, EPR044, EPR045.

⁷⁴ EPR044.

Therefore, the Commission has considered the LECA report, submissions made by the other interested parties and independent sources of evidence regarding the operation of the CAP, how payments are made under the SPS, and the amount of subsidy that is paid per hectare to growers of tomatoes as part of its assessment of market situation.

The LECA report stated that an average of €775 per hectare was paid to tomato growers under the CAP in 2011. The figure has been quoted in the article by Solazzo, as referenced in the LECA report and has been substantiated by LECA using FADN data.⁷⁵ The report goes on to state that growers of tomatoes receive more than double the amount of uniform national payments under the CAP. SPCA submitted that the figure stated in the LECA report substantially underestimates the subsidy paid to tomato growers.⁷⁶

SPCA submitted as part of their application and subsequent submissions that the subsidy amount paid to growers of tomatoes during the transition period of 2008 to 2010 and onwards from 1 January 2011 is €2802 per hectare. SPCA calculated this amount by dividing the total ceiling amount allocated to tomatoes under the CAP (€184,000,000) by the total hectares (65,672) of tomatoes grown in 2011.⁷⁷ Annex X of EC Regulation 73/2009 contains the applicable ceiling amount available for tomatoes and other fruit and vegetables. SPCA submits that due to limited publically available information about the distribution of the ceiling amount allocated to tomatoes post 2012 and the limited information provided to the Commission from other interested parties, this calculation is the correct way in which the subsidy amount paid under the CAP to growers of tomatoes must be worked out.

The Commission has observed that during the transition period the total ceiling amount referred to by SPCA was available for payment to growers of tomatoes under the CAP in a combination of coupled and decoupled forms.⁷⁸ This represents the 'soft landing' that LECA has described in its report.⁷⁹ The Commission has further observed that at the completion of the transition period and beginning on 1 January 2012, only 75% of the total ceiling amount for tomatoes was available for payments to growers of tomatoes under the CAP.⁸⁰ The Commission expects that this reduction reflects the modulation component of EC Regulation 73/2009.

In their article regarding CAP reform, Rickard and Sumner indicate that during the transition period growers of tomatoes received only €17.25 per tonne, which is half the amount received by growers of tomatoes prior to the transition period.⁸¹ Some submissions have represented that this assertion meant that the growers of tomatoes have had their payment entitlements under the CAP reduced by half under the SPS.⁸² However, as Rickard and Sumner correctly point out, during the transition period, growers

⁷⁵ ERP040.

⁷⁶ EPR046

⁷⁷ EPR046, EPR056.

⁷⁸ EC Regulation 73/2009, Article 54(1).

⁷⁹ EC Regulation 73/2009, Article 68. The Italian Government utilised this Article in order to continue to provide a portion of their national ceiling for tomatoes in coupled form during the transition period.

⁸⁰ EC Regulation 73/2009, Article 54(2)(b).

⁸¹ Rickard, B. J. and Sumner, D. A. (2011). 'Was there policy reform? Evolution of EU domestic support for processed fruits and vegetables.' *Food Policy*, 36(3), 438-449. SPCA also provided as part of their application an article by these authors from 2008 discussing CAP reform and CAP subsidy payments to growers of tomatoes.

⁸² EPR 055 – Exporter Submission

of tomatoes were also entitled to an additional Single Farm Payment (SFP) at 50% of the full base rate on support they received between 2000 and 2002. They further point out that beyond 2011 growers of tomatoes will only receive one SFP under the SPS, but at the full rate of support received during 2000 to 2002. It is apparent from this evidence that while a per tonne subsidy is removed from the CAP beyond 2011, indicating that decoupling has in theory occurred, growers of tomatoes still have access to approximately €138 million, that being 75% of the full ceiling allocated to tomatoes in 2011, as part of the SPS.

The exporters have submitted that SPCA's calculation of the payment amount received by growers of tomatoes is grossly overestimated and while not explicitly rebutting the figure arrived at by LECA, have submitted that in practical terms growers of tomatoes will more often than not receive less than €775 per hectare.⁸³

The exporters submitted that the national ceiling for tomatoes was no longer available because it was absorbed into the SPS as of 1 January 2012 and the SPS only provides for one national ceiling covering payments for all agricultural related payments.⁸⁴ The Commission accepts that a proportion (seemingly 50%) of the national ceiling was absorbed into the SPS. However the evidence available to the Commission indicates that additional payments (in accordance with historical reference payments) continued to be paid to growers of tomatoes.⁸⁵

The exporters also submitted that the payments to growers of tomatoes have been decreased further by modulation required under the SPS.⁸⁶ The LECA report suggests that despite any notions of modulation, its application has been limited based on growers of tomatoes receiving payments both during the transition period and under the SPS constructed from historical payments they have received. The exporter's submissions and independent research have acknowledged this point.⁸⁷

Finally, the exporters have provided evidence in a confidential submission that suggests not all growers of tomatoes in fact receive the average of €775 or the €2802 per hectare under the SPS.⁸⁸ EC Regulation 73/2009 states that payments do have to be applied for by growers and activated in order to receive payment.⁸⁹ The Commission notes it does appear there is potential that the total ceiling available to tomatoes is not exhausted on an annual basis. This can be attributed to new growers entering the industry during the historical base period or growers failing to utilise their entire entitlements or growers failing to be registered with the National Entitlement Register during that period.⁹⁰ However, the Commission has reviewed this evidence and is not satisfied that it demonstrates that a majority or significant proportion of recipients of SPS payments for growing tomatoes firstly would fail to access their entitlements and secondly receive less than €775 per hectare as described in the LECA report.

⁸³ EPR048, EPR055.

⁸⁴ EPR 048.

⁸⁵ The national ceiling relating to payments for tomatoes is applicable post 1 January 2012 because of the continuation of EC Regulation 73/2009 through Article 21(2) of EC Regulation 1307/2013.

⁸⁶ EPR 048, EPR055.

⁸⁷ EPR 048.

⁸⁸ EPR 048.

⁸⁹ EC Regulation 73/2009, Article 19, 34, 42.

⁹⁰ EPR 048, Annex 1.

The Commission notes the evidence was based on a very small sample of tomato growers in Italy, and it is not clear how the sample was selected. Specifically, the exporter provided a copy of five select “declarations” issued by AGEA (Italian agency managing the SPS) which holds information on CAP payments received by farmers.⁹¹ Without further information regarding these select CAP payments, the Commission was unable to form a view on the representativeness of these sample payments.

8. Assessment of the Flow-On Impact of Government Policies on Domestic Prepared or Preserved Tomatoes Prices in Italy

The LECA report models the flow-on impact of the CAP payments to raw tomato growers on the final prepared or preserved tomato price. The influence of various factors discussed (CAP payment, POs, import tariffs) are captured by various assumptions about the market conditions along the value chain to assess the flow-on impact. The Commission wishes to reiterate its view that PO’s and import tariffs may have, in part, an off-setting effect with respect to the CAP payments. The LECA models have effectively incorporated such off-setting effects when modelling the flow-on impact of CAP payments. Readers are encouraged to refer to the LECA report for further details on the modelling (EPR040). Interested parties have also put forward alternative calculations of the flow-on impact in response to the LECA report.

The four different calculations and the respective outcomes are summarised in turn below. The Commission has then set out its preferred model for the purpose of this assessment.

8.1 Method 1 - Flow-on impact evaluated by LECA:

- The LECA report uses production data for 2011 drawn from the FADN database.
- Based on FADN data, the subsidy per hectare received by tomato farms in Emilia Romagna (one of the major tomato production regions in Italy and one where there is a very high degree of specialisation with almost half of the entire horticultural area covered by processing tomato) was on average €775/ha⁹² for 2011.
- LECA modelled the variable cost of production based on the same FADN data and arrived at a variable cost of production of €3232/ha.
- The subsidy rate as a proportion of variable costs (net of the subsidy) was 32% per hectare.⁹³
- In the extreme scenario, where 100% of the mark up on costs flows-on through the value chain, the price of final prepared or preserved tomatoes price would also increase by 32%.

⁹¹ The declarations were provided in confidence and not placed on the EPR.

⁹² The LECA report incorrectly used €776 as the subsidy paid to growers of tomatoes into the flow calculations in their report. The first reference to the subsidy rate is on page 23 of the report. LECA have stated here that the average subsidy rate from FDAN data is €775/ha. The Commission has not altered the figure to ensure consistency with the LECA report regarding the calculations of flow on.

⁹³ $32\% = \frac{€776}{(€3232 - €776)} \times 100$.

- In a realistic scenario, the market condition at each point in the value chain would dictate the degree to which the CAP payment flows-on. The likely scenario is that 73%⁹⁴ of the 32% subsidy would flow onto the cost of raw tomatoes for prepared or preserved tomato production.⁹⁵ That is, if subsidies were removed, the cost of raw tomatoes would increase by 23% (73% x 32%).
- La Doria's data shows that the cost share of raw tomatoes in their total production cost are approximately █%. This means that █% of production costs would increase by 23% if subsidies were removed, i.e. a flow-on in prepared or preserved tomato production costs of █% (23% x █%).
- Overlaying the market conditions for the market for prepared or preserved tomatoes (i.e. assuming the same variables of supply and demand as used above, 73% of the cost flows-on), a █% increase in production cost leads to a █% increase in prepared or preserved tomatoes prices.

The estimated flow-on impact of the CAP payments on the final prepared or preserved tomato price is █%.

8.2 Method 2 - Flow-on impact evaluated by the Commission using the Rickard and Sumner (2008) model:

SPCA made a submission on 28 July 2015 in relation to the LECA report, and challenged various assumptions used in the model, in particular the subsidy rate.⁹⁶

SPCA provided to the Commission a journal publication by Rickard and Sumner (2008).⁹⁷ The publication modelled the impact of a 50% reduction in EU domestic support for tomato growers. The Commission also found a further publication by the same authors in 2011 to corroborate key figures.⁹⁸ A summary of Rickard and Sumner (2008) findings relevant to this investigation are as follows:

- Tomato growers faced market prices of €80/tonne for raw tomatoes.
- The CAP set up in 2001 stipulated domestic support paid to tomato growers of €34.5/tonne.
- Based on these figures, the subsidy rate as a proportion of price received for raw tomatoes was 43%.⁹⁹
- The production cost share of raw tomatoes in a can is 39% of prepared or preserved tomatoes.

⁹⁴ EPR040.

⁹⁵ Market conditions meaning the responsiveness of the demand and supply to price changes in the market (elasticities), and references Rickard and Sumner (2008). The Commission corroborated the key figures in Rickard and Sumner (2011).

⁹⁶ EPR046.

⁹⁷ Rickard, B.J. and Sumner, D.A. (2008), 'Domestic support and border measures for processed horticultural products.' *American journal of agricultural economics*, 90(1), 55-68.

⁹⁸ Rickard, B. J. and Sumner, D. A. (2011). 'Was there policy reform? Evolution of EU domestic support for processed fruits and vegetables.' *Food Policy*, 36(3), 438-449.

⁹⁹ 43%=€34.5/€80 x100

Public Record

- If subsidy rates were reduced by 50% (from 43% to 21.5%), assuming certain market conditions (similar to that assumed in the LECA report), the Rickard and Sumner (2008) model estimates the flow-on increase in the cost of raw tomatoes to prepared or preserved tomato producers is 12.2%.¹⁰⁰

The Commission applied the last step in the LECA report to determine the degree of flow-on in cost of production to final prepared or preserved tomatoes price:

- Overlaying the market conditions for prepared or preserved tomatoes as per the LECA model (assuming 73% of the cost flows-on), a 12.2% increase in production cost leads to an 8.9% increase in prepared or preserved tomato prices.

However, Rickard and Sumner (2011) pointed out that the CAP payment fell by half to €17.25/ton between 2008 and 2011.¹⁰¹ As a result:

- If the Rickard and Sumner (2008) model applied a subsidy rate of 21.5% (half of 43%) the flow-on increase in the cost of raw tomatoes to prepared or preserved tomatoes producers is likely to be less than 12.2%.
- Overlaying the market conditions for prepared or preserved tomatoes as per the LECA model, a less-than 12.2% increase in production cost leads to a less than 8.9% increase in prepared or preserved tomatoes prices.

To the extent that the CAP payments have been reduced since 2011, the estimated 8.9% flow-on impact on final prepared or preserved tomato prices is likely an over-estimate.

8.3 Method 3 - Flow-on impact evaluated by SPCA:

SPCA also provided the Commission with confidential calculation of the flow-on impacts of the CAP payments to raw tomato growers on the final prepared or preserved tomatoes price.¹⁰² The following describes the key steps:

- SPCA assumed a CAP payment of €2801/ha and yield of 73t/ha. This equates to a subsidy of €38/tonne.¹⁰³
- SPCA have assumed raw tomato price of €92/tonne. ¹⁰⁴ SPCA arrived at a subsidy rate, as a proportion of price received for raw tomatoes, of 42%.¹⁰⁵
- SPCA assumes the scenario where 100% of the mark up on costs flow-on through the value chain, such that the cost of raw tomatoes for prepared or preserved tomatoes production increases by 42%.

¹⁰⁰ Rickard and Sumner (2008), p 17.

¹⁰¹ Rickard and Sumner (2011), p.440.

¹⁰² The calculations were provided in confidence and not placed on the EPR.

¹⁰³ €2801/ha was calculated based on the National Ceiling in 2011 for CAP payments to tomato growers, divided by the hectares of tomatoes grown in 2011.

¹⁰⁴ SPCA's confidential submission submitted 28 July 2015.

¹⁰⁵ $42\% = \frac{€38}{€92} \times 100$.

- Assuming the proportion of raw tomatoes in a can makes up █% of prepared or preserved tomatoes, the final price of prepared or preserved tomatoes would increase by █% (█% x 42%).

The subsidy rate calculated by SPCA uses a different method to LECA. The LECA report calculates subsidy rate as a proportion of variable costs (net of the subsidy), whereas SPCA calculated the subsidy rate as a proportion of price received for raw tomatoes.

8.4 Method 4 - Flow-on impact evaluated by the exporters based on the Department of Science, Agriculture, Food and environment (SAFE) report:

The exporter has submitted suggested adjustments to variables in the LECA report to arrive at alternative flow-on impacts on prepared or preserved tomatoes prices (e.g. use a higher variable cost, using gross variable costs in calculating subsidy rate, excluding transportation cost in the price of raw tomatoes).¹⁰⁶ The exporters in particular referred to a report produced by SAFE, who was engaged by the exporters to estimate the variable costs of producing tomatoes.¹⁰⁷

It is the Commission's view that the variable cost produced by SAFE is one example of production costs incurred by tomato growers.

- The SAFE report provided an example of operating costs of a tomato farm in Southern Italy, of €█/ha.
- The exporter assumed a subsidy of €776/ha (taken from the LECA report), and calculated a subsidy rate of █% (using the same method as LECA).
- The Commission applied the LECA model to this subsidy rate, and arrived at a flow-on increase in the final price of PPT of █%.

The estimated █% increase is likely an under-estimate of the impact, considering that the sampled variable cost in the LECA report is 40% lower than the SAFE estimate.

See **confidential attachment 11** for details of the flow-on calculations.

9 Conclusions

The relevant evidence obtained by the Commission about the CAP underlines the potential extent to which subsidies per hectare are being paid to growers of tomatoes in Italy. The Commission notes that the key variables in all of the potential flow-on impacts modelled above are the CAP payment per hectare, and the variable cost of raw tomato production.

Based on calculations 1-4, the Commission observed that the possible range of flow-on impacts from the CAP payments to growers of tomatoes on the final prepared or preserved tomatoes price is █% - 8.9%. The Commission considers that the extremes are likely to be over and under estimates of price impact, if any.

¹⁰⁶ EPR048, P.10.

¹⁰⁷ EPR049, Attachment – Department of Science, Agriculture, Food and environment (SAFE).

Public Record

Having regard to the scale of the possible price effects, if any, the Commission is of the view that there is not a situation in the market in Italy for prepared or preserved tomatoes that renders the sales in Italy of prepared or preserved tomatoes unsuitable for use in determining normal value under subsection 269TAC(1) of the Act.