

RESPONSE TO APPLICATION FOR EXEMPTION FROM DUTY UNDER THE *CUSTOMS TARIFF (ANTI-DUMPING) ACT 1975*

1 Introduction

The Anti-Dumping Commission (the Commission) requests your response to an application for exemption from anti-dumping and countervailing measures under the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act).

Sections 8(7) (a) of the Dumping Duty Act allow the relevant Minister to exercise discretion to exempt goods from duty under certain conditions.

The Commission has received an application for exemption from dumping duty in respect of prepared or preserved tomatoes, for the goods described at section 5 of this form (hereafter referred to as the goods subject to the exemption application).

You have been identified from the Commission's investigation in respect of prepared or preserved tomatoes as the Australian producer of the goods.

The Commission seeks your assistance in this exemption inquiry by responding to the questions in this form. The Commission will use the information you provide in its assessment as to whether an exemption from dumping duties may be recommended to the relevant Parliamentary Secretary to the Minister for Industry (Parliamentary Secretary).

2 Current prepared or preserved tomato measures

In April 2014, the Commission completed an investigation into the alleged dumping of prepared or preserved tomatoes exported to Australia from Italy.

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

Tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

The goods excluded from this definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

The goods are currently classified to the tariff sub-heading 2002.10.00 (statistical code 60) of Schedule 3 to the *Customs Tariff Act 1995*. These goods exported from Italy are subject to 5% Customs duty.

The Parliamentary Secretary accepted the Commission's recommendations that prepared or preserved tomatoes from Italy had been dumped and that dumping had caused material injury to the Australian industry.

A dumping duty notice was published notifying of this decision on 16 April 2014. Anti-Dumping Notice (ADN) No. 2014/32 contains details of the measures.

The reasons for the Parliamentary Secretary's decision in this case are contained in the Commission's Final Report No.217 (REP 217).

3 Application for Exemption from Measures

Applications for exemptions have been made to the Commission by:

1. Leo's Imports and Distributors Pty Ltd (Leo's) [Exemption Inquiry No:EX0023] in relation to canned cherry tomatoes, canned organic tomatoes and canned San Marzano tomatoes; and
2. Kadac Pty Ltd (Kadac) [Exemption Inquiry No:EX0026] in relation to canned organic tomatoes.
3. The grounds for the applications are as follows:
 - that there is no Australian producer of canned cherry tomatoes (as claimed by Leo's);
 - that there is no Australian producer of canned organic tomatoes (as claimed by Leo's and Kadac); and
 - that there is no Australian producer of San Marzano tomatoes (as claimed by Leo's).

The applicants allege that their claims are evidenced by publicly available information from the sole Australian producer of canned tomatoes, SPC Ardmona Operations Ltd (SPCA).

This exemption inquiry is being conducted in relation to both applications as they both relate to prepared or preserved tomatoes exported to Australia from Italy, and overlap in respect of the claims made in relation to organic tomatoes.

4 Exemption Provisions

The Dumping Duty Act allows the Minister to exercise his or her discretion to exempt goods from dumping duties in the following circumstances relevant to this application:

Section 8 (7) The Minister may, by notice in writing, exempt goods from interim dumping duty and dumping duty if he or she is satisfied:

that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade

It is noted at the outset that these exemption provisions are subject to the discretion of the Minister and are not automatically granted where the criteria set out in the provision appear to be met.

5 The goods subject to the exemption application

The goods, the subject of the exemption inquiry, are:

Cherry tomatoes: whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

Certified organic tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients

(including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

Protected denomination of origin (DOP) certified San Marzano tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

The exemption goods are classified to the tariff subheading 2002.10.00 (statistical code 60 of Schedule 3 to the *Customs Tariff Act 1995*. These goods are subject to 5% Customs duty.

6 Instructions on Completing this ‘Response to the Exemption Application’

The Commission has forwarded you this ‘response to exemption’ application (the response) to provide you with the opportunity to participate in this exemption inquiry.

Due date for response

We request a completed response be returned to the Commission by **8 December 2014**.

Responses may be lodged either by mail or by email to the following.

Director Operations 3
Anti-Dumping Commission
Customs House
1010 La Trobe Street
Docklands VIC 3008
Australia

Email: operations3@adcommission.gov.au
Fax: +61 3 9244 8902

Verification of the information that you supply

The Commission may seek to verify some or all of the information supplied in the response. The Commission may request evidence to support the claims such as quotations and offers of sale. An onsite visit by the Commission may be required in some cases. A report will be prepared of visits conducted and a non-confidential version will be made available to the applicant for comment.

There is no legislative timeframe for completion of an exemption inquiry; however a recommendation to the Minister will be made as soon as practicable after obtaining all the relevant information.

Outline of information required by Response

Part A	Company contact information
Part B	Identical goods

Part C	Like or directly competitive goods
Part D	Capability to produce like or directly competitive goods
Part E	Additional comments
Part F	Your declaration

Response to Exemption Application

PART A - Company Information

A.1 Please provide the following company contact information;

Name:	Peter Kelly
Position in company:	Managing Director
Address:	50 Camberwell Road, Hawthorn east
Telephone:	(03) 9861 8902
Facsimile number:	(03) 9861 8999
E-mail address of contact person:	Shalini.valecha@spc.com.au

PART B – Response to Exemption Application

B.1

Does your company oppose or not consent to the request for an exemption?

SPC Ardmoma Response: SPC Ardmoma opposes the request for an exemption of duties on Cherry tomatoes, Organic tomatoes and San marzono tomatoes as described in the section 5 of the application above and as elaborated in the amended anti-dumping notice ADN2014/133 (amending ADN2014/99)

NOTE: If your company does not oppose the request for an exemption, you do not need to complete the questionnaire. Please indicate that you do not oppose the request, sign and return the form as soon as possible.

B.2

If your company opposes or does not consent to the request wholly or in part, provide a description of that part of the request to which your company opposes or does not consent.

SPC Ardmona Response: SPC Ardmona opposes wholly to the request of exemption of duties on cherry tomatoes, organic tomatoes and San Marzono tomatoes as elaborated in the amended anti-dumping notice ADN2014/133 (amending ADN2014/99)

PART C - Identical Goods

C.1

Does your company produce, in Australia, goods that are identical in all respects to the goods described in section 5 of this 'Response to Exemption Form'?

SPC Ardmona Response: SPC Ardmona currently does not manufacture and sell products that are identical goods to the ones requested for exemption in the inquiry.

If no, go to Part D - Like or directly competitive goods.

C.2

Please provide evidence that you have produced and sold in Australia, in the last 12 months, goods that are identical in all respects to the goods subject to this application for exemption.

Evidence can be in the form of production reports and sales invoices. To the extent that production reports or sales invoices do not refer to the goods in the same detail as set out in the description of the goods (section 5), please provide additional information that indicates that identical goods have been produced or sold. The evidence should be attached to this form to ensure that it can be linked to this specific response. Please also include any available product literature respecting the identical goods you have produced and sold.

C.3

Provide evidence of the terms and conditions of sale of these identical goods. Are these products available to all purchasers on equal terms under like conditions? If so, provide evidence and explain why you consider that these products are available to all purchasers on equal terms under like conditions.

Evidence can be in the form of sales invoices, sales contracts, sales reports or advertisements and brochures.

PART D - Like or Directly Competitive Goods

D.1

If your company does not produce identical goods, does it produce and sell in Australia goods that are like or directly competitive to the goods subject to this application for exemption?

In determining whether the goods are like or directly competitive, the Commission will consider whether the goods have characteristics closely resembling each other and are substitutable.

The Commission may also consider;

- Whether physical characteristics of the goods are similar (including size, weight, shape, content, appearance and grade);
- Whether the goods are commercially alike, this may include consideration of the following;
 - whether the goods directly compete in the same market sector;
 - the extent to which participants in the supply chain are willing to switch between the goods and the goods subject to the application for exemption;
 - how the price of the goods and goods subject to the application influences consumption;
 - whether the goods share similar distribution channels; and
 - whether the goods are similarly packaged.
- Functional likeness – whether the goods are suitable with regard to end use, this may include an assessment of;
 - the extent to which the goods are functionally substitutable;
 - the extent to which the goods are used for the same or similar function;
 - whether the goods have the same or similar quality standards; and
 - consumer behavior in relation to the goods and goods subject to this application for exemption.
- Production likeness, this may include an assessment of;
 - the extent to which the goods are manufactured from the same products;
 - the manufacturing process of the goods; and
 - Whether any patented processes or inputs are involved in the production of the goods.

SPC Ardmona response: SPC Ardmona produces and sells goods that are ‘like’ goods and directly compete with the goods described in the amended anti-dumping notice ADN2014/133 (amending ADN2014/99)

SPC Ardmona’s products and the products requested for exemption compete in the same markets and are available on the same supermarket shelves. (Refer SPC confidential attachment XXX).

These products and the types within the category are used **interchangeably** for preparation of home meals such as pasta meals, soups, casseroles, stews, curries, Mexican dishes etc. Refer SPC confidential attachment XXXX which is a taken from the consumer research conducted by SPC Ardmona.

‘Price’ is the key determinant of the purchase criteria. (Refer confidential attachmentXXX) which is taken from Consumer research undertaken by SPC Ardmona .Consumers switch between products based on what is on special and at lower price. Anti-Dumping Commission’s REP 217 concurs with above observation.

Products requested for exemption are just different tomato varieties used by consumers in a similar way and depict similar physical, commercial and functional characteristics.

- San Marzano tomatoes are a type of Roma tomatoes.
- It is our understanding that in Australia, these are sold predominantly in whole peeled format. SPC Ardmona currently sells different varieties of whole peeled tomato products. San Marzano whole peeled are interchangeable to current whole peeled tomatoes. As the price is the key determinant in the category, giving exemption to a particular variety will lead to products switching and will lead to circumvention.
- SPC Ardmona has even manufactured different Roma style tomatoes in the past and is capable of production.
- The protected denomination of origin is not relevant to the consideration of like or directly competitive goods.
- Organic tomatoes are 'like goods' to the current products manufactured by SPC Ardmona. They come in diced/crushed/ whole peeled and value added formats and in the same packaging sizes i.e. < 1.14L sizes. SPC Ardmona's products also come in diced, crushed, whole peeled, value added formats and in similar packaging size i.e. <1.14L sizes.
- Organically grown tomatoes require slightly different growing and harvesting processes. Australia is capable of producing organic processing tomatoes. Refer SPC confidential attachment XXX
- SPC Ardmona is XXXXX (*commercial in confidence*).
- Cherry tomatoes form a very small part of the demand in the category. They compete with SPC Ardmona products on the super market shelves. They are interchangeable to other canned tomatoes and are consumed in the same way. The applicants contend that cherry canned tomatoes are a substitute for fresh cherry tomatoes. Presumably the logic is that in preparation of certain foods such as a salad then canned cherry tomatoes can be substituted. This is unlikely as the canned cherry tomatoes have undergone a high temperature cooking process and the product is therefore far removed from a fresh product. The applicants have not substantiated their claims with factual evidence.

(Refer SPC confidential attachment XXXXX)

Given below are details to suggest that these are similar in physical likeness, commercial likeness and functional likeness.

Physical likeness:

- The products requested for exemption are available in the same size packaging as SPC Ardmona's products. The majority of the products are available in two size groups 400grams and 800grams size group. (SPC confidential attachment XXXX)
- The ingredients in the product requested for exemption are prepared tomatoes. SPC Ardmona's products are also prepared tomatoes and are available with similar composition and liquid.
- Fill weights, brix and drain weights across all canned tomatoes are very similar (SPC confidential attachment XXX comparing physical characteristics)

- SPC Ardmona also produces products which are available in the same cuts such as whole peeled /diced/value added etc.

Commercial likeness:

- Goods requested for exemption and SPC Ardmona’s prepared tomatoes are available on supermarket’s shelves and compete with each other (Refer SPC confidential attachment XXX).
- The key purchase criteria driving the purchase decision is price. Because of extreme price sensitivity, consumers switch between various products in the category.
- It is observed that these products are in the same price range as the rest of the category. Retail pricing of these products is between \$1 - \$2.60 per 400g can. This is in the same price range as other products in the category.

Functional likeness:

- Both imported and SPC Ardmona’s products are used by consumers for preparing similar meals and are interchangeable.

Production of these goods is often undertaken in the same manner and with similar equipment.

The exemption inquiry’s purpose of establishing that ‘like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade’ arises from the applicants’ contention that there are not like goods (Leo’s Imports) and that the imported goods do not directly compete (Kadac).

The relevance of “commercial likeness” and other like goods factors was commented on in GM Holden Limited v Commissioner of the Anti-Dumping Commission [2014] FCA 708. In the GM case, the applicants argued that original equipment (OEM) aluminum road wheels (ARW) were not ‘like’ to after-market (AM) ARWs. But the Court agreed with the ADC and found that in determining like goods the comparison was not between OEM and AM but whether AM wheels were like goods [127].

In the exemption inquiry this is similar as a comparison between the tomato products.

D.2

If you answered yes to question D.1, please provide a description of the goods produced by your company that you consider to be like or directly competitive to the goods subject to this application. Your description of the goods your company produces should refer to all aspects of the goods as set out in the description of the goods in section 5.

Description	Characteristics

Please provide evidence that the goods you consider like or directly competitive to the goods subject to this application for exemption have recently been produced or sold in Australia by your company. Evidence can be in the form of production reports and sales invoices. To the extent that production reports or sales invoices do not refer to the goods described in the above table, please provide additional information that indicates that the goods have been produced or sold. The evidence should be attached to this form to ensure that it can be linked to this specific response. Please also include any available product literature concerning the like or directly competitive goods you produced and sold.

SPC Ardmona Response: SPC Ardmona's products are prepared or preserved tomatoes either whole (peeled or unpeeled) or in pieces (like diced, chopped, or crushed) in water or juice, with or without added vegetables, herbs and /or spices, prepared or preserved otherwise than by vinegar or acetic acid in pack sizes typically up to and including 1.14 L which are suitable for purchase from retailers by individual consumers. ("Domestic prepared or preserved tomatoes")

- SPC Ardmona produces prepared or preserved tomatoes in the form of chopped, flavoured, whole and crushed tomatoes.
- SPC Ardmona's prepared or preserved tomatoes are currently packed into cans. Goods requested for exemption and currently competing with SPC Ardmona's products are also in cans.
- However, goods requested for exemption can be in various forms of packaging formats including glass jars and pouches. These products would be similar to SPC Ardmona's products as they would have similar functional and commercial attributes. The package does not alter the essential characteristics of the product.

The majority of the SPC Ardmona's and imported products in the supermarkets are in 400g (or similar) and 800g size (or similar) cans however consumers switch between these based on prices.

Information on sales of like goods have been submitted to ADC (Refer confidential AppendixXXXX information on like goods sale).

D.3

Provide evidence of the terms and conditions of sale of these like or directly competitive products. Are these products available to all purchasers on equal terms under like conditions? If so, provide evidence and explain why you consider that these products are available to all purchasers on equal terms under like conditions. Evidence can be in the form of sales invoices, sales contracts, sales reports or advertisements and brochures.

SPC Ardmona Response: It is understood that these products are sold on the same terms to major retailers as like goods produced by SPC Ardmona. Terms and contracts of SPCA's like goods are attached. (Refer confidential attachment XXXX)

PART E – Capability to Produce Identical or Like or Directly Competitive Products

E.1

If your company has not produced and sold in Australia products that are identical to, or like or directly competitive to the goods subject to this application for exemption, is your company capable of producing such goods?

SPC Ardmona Response: SPC Ardmona currently produces like goods and directly competitive goods.

E.2

If you answered yes to question E.1, indicate whether the product that you can produce is identical to, or like or directly competitive to the goods subject to this application for exemption.

SPC Ardmona Response: SPC Ardmona currently produces like goods and directly competitive goods and is capable of producing identical goods.

E.3

If you are capable of producing identical, like or directly competitive goods, explain why you have not produced such goods.

Provide evidence of your production capability, including evidence of the production and sale of similar products, certification of the identical, like or directly competitive goods and at what cost they could be produced, as well as any plans for the imminent production of the goods or orders for the goods and any relevant information.

SPC Ardmona response: Confidential attachment XXXXX describes the production process of current like goods. As can be seen from the research presented, consumers do not differentiate products based on variety of tomatoes or process of harvesting. Price is the key purchase criteria. SPC Ardmona has suffered material injury due to ongoing dumping by the imported Italian goods, hence had focused on core products relevant to the range.

E.4

If you are capable of producing identical, like or directly competitive goods, provide reasonable evidence of likely terms and conditions of sale for these goods.

SPC Ardmona response: SPC Ardmona produces like or directly competitive goods. It is our understanding that any other variants will be sold similar to current terms.

PART F – Additional Comments

F.1

Provide any additional comments including any other information that will assist the Commission in reaching a recommendation to the Parliamentary Secretary regarding this application for exemption.

SPC Ardmona response: If these products are exempted from duty, it is likely that the price differential caused due to these will result in SPC Ardmona's loss of share as the consumers shift to lower price products, thereby the impact of the dumping duties applied will be negated. This could lead to possible circumvention through goods with minor modifications.

PART G - Declaration

I hereby declare that SPC Ardmona has completed the attached response to application for exemption and, having made due inquiry, certify that the information contained in this submission is complete and correct to the best of my knowledge and belief.

Name:	Peter Kelly
Signature:	
Position in Company	Managing Director
Date	19th Dec 2014