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Australian Government
Anti-Dumping Commission

JOINT EXEMPTION INQUIRY

PREPARED OR PRESERVED TOMATOES EXPORTED TO AUSTRALIA FROM ITALY

APPLICANTS:

Leo's Imports and Distributors Pty Ltd
Kadac Pty Ltd
Food and Wine Connection Pty Ltd
Spiral Foods Pty Ltd
Kirk Foods Associates Pty Ltd and
Zintix (Australia) Pty Ltd

FINAL REPORT

AUGUST 2015

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ABBREVIATIONS

ACBPS	Australian Customs and Border Protection Service
ACO	Australian Certified Organic. ACO is approved and accredited to act as a certifier in Australia by the Australian Quarantine and Inspection Service
ADN	Anti-Dumping Notice
DOP	European Union's Protected Designation of Origin classification
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
exemption goods	See definition in sections 1.1 and 3.3 herein
Feger	Feger di Gerardo Ferraioli S.p.A
FWC	Food and Wine Connection Pty Ltd, an applicant
GM	genetically modified
INV 217	Anti-Dumping Commission's Case No 217, initiated in 2013 following an application by SPCA
Kadac	Kadac Pty Ltd, an applicant
Kirk Foods	Kirk Foods Associates Pty Ltd, an applicant
La Doria	La Doria S.p.A
Leo's	Leo's Imports and Distributors Pty Ltd, an applicant
REP 217	Anti-Dumping Commission's Final Report Number 217 to the Parliamentary Secretary
SPCA	SPC Ardmona Operations Limited, the sole Australian industry
Spiral	Spiral Foods Pty Ltd, an applicant
The Act	<i>Customs Act 1901</i>
the Commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
the goods	the kind of goods to which the anti-dumping measures apply, and in this case, prepared or preserved tomatoes
the Parliamentary Secretary	the Parliamentary Secretary to the Minister for Industry and Science
Zintix	Zintix (Australia) Pty Ltd, an applicant

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1. SUMMARY AND RECOMMENDATIONS

1.1 Background

This report sets out the Anti-Dumping Commission's (the Commission's) findings in response to applications by:

- Leo's Imports and Distributors Pty Ltd (Leo's);
- Kadac Pty Ltd (Kadac);
- Food and Wine Connection Pty Ltd (FWC);
- Spiral Foods Pty Ltd (Spiral);
- Kirk Foods Associates Pty Ltd (Kirk Foods); and
- Zintix (Australia) Pty Ltd trading as Italian Food Australia (Zintix)

(collectively called the 'applicants') requesting exemptions from dumping duty under subsection 8(7)(a) of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) in relation to the export of prepared or preserved tomatoes from Italy.

This report sets out the Commission's findings on which the Commissioner of the Anti-Dumping Commission (the Commissioner) relied on to make a recommendation to the Parliamentary Secretary to the Minister for Industry and Science (the Parliamentary Secretary) on whether to exempt goods from anti-dumping measures.

1.2 Recommendation

The Commission has found that like or directly competitive goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade. Accordingly, the Commission considers the conditions of subsection 8(7)(a) of the Dumping Duty Act for granting an exemption are not satisfied.

The Commissioner recommends to the Parliamentary Secretary that the applications in respect of the exemption from measures for prepared or preserved tomatoes, exported from Italy to Australia not be granted in relation to:

- 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 (Organic tomatoes);
- 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

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(including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume (San Marzano tomatoes); and

- 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 (Cherry tomatoes);

all collectively called the exemption goods.

1.3 Application of law to facts

1.3.1 Application

Applications for exemption have been received from:

1. Leo's [exemption Inquiry No: EX0023] in relation to Organic tomatoes, San Marzano tomatoes and Cherry tomatoes on 24 July 2014;
2. Kadac [exemption Inquiry No: EX0026] in relation to Organic tomatoes on 23 September 2014;
3. FWC [exemption Inquiry No: EX0029] in relation to Organic tomatoes on 1 November 2014;
4. Kirk Foods [exemption Inquiry No: EX0035] in relation to San Marzano tomatoes on 18 December 2014
5. Spiral [exemption Inquiry No: EX0034] in relation to Organic tomatoes on 23 December 2014; and
6. Zintix [exemption Inquiry No: EX0039] in relation to San Marzano tomatoes in glass jars on 8 April 2015.

The applicants have applied for an exemption under subsection 8(7)(a) of the Dumping Duty Act.

1.3.2 Authority to make decision

Subsection 8(7) of the Dumping Duty Act sets out, *inter alia*, the matters to be considered by the Parliamentary Secretary in deciding whether to exercise her discretion to exempt goods from dumping duty.

1.3.3 Initiation of inquiry

The Commission was satisfied that:

- the claims put forward in the applications warranted further inquiry;
- a joint exemption inquiry should commence. The six exemption inquiries, based on three types of tomato products are being run concurrently given similar issues to be considered for all three goods, the subject of the exemption inquiry; and
- that a final report and recommendation to the Parliamentary Secretary be prepared presenting evidence on which the Parliamentary Secretary may rely to exercise her discretion under subsection 8(7)(a) of the Dumping Duty Act.

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The Commission notes that in the event that the Parliamentary Secretary does exercise her discretion and grants one or more exemptions, it is the specific goods which are exempt from the measures and not any one particular applicant. On that basis, the Commission considers it appropriate to consider all applications collectively.

The Commission initiated the exemption inquiry on 28 November 2014, following receipt of applications from Leo's and Kadac. Following initiation, further applications were received from FWC, Kirk Foods, Spiral and Zintix. A description of the exemption goods was provided in Anti-Dumping Notice (ADN) No. 2014/99.

The Commission considered it necessary to amend the description of the exemption goods in ADN No 2014/99¹ to ensure consistency with the description of goods in Anti-Dumping Commission Report No 217. Refer to sections 1.1 and 3.3 for further details.

1.4 Findings and conclusions

The Commission has made the following findings and conclusions based on information provided by the sole Australian manufacturer of prepared or preserved tomatoes, SPC Ardmona Operations Limited (SPCA) and independent inquiries:

- there is an Australian industry producing 'like or directly competitive goods'; and
- the goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

Based on these findings, the Commissioner recommends to the Parliamentary Secretary that all applications in respect of the exemptions from anti-dumping measures be denied.

¹ Anti-Dumping Notice (ADN) 2014/99 refers:
<http://adcommission.authprod.ind/cases/Documents/003-Notice-ADN-2014-99-InitiationofExemptionInvestigation.pdf>

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2. BACKGROUND TO THE MEASURES

2.1 Previous investigations

Detailed history of previous investigations is contained in **Non-Confidential Attachment 1**. The anti-dumping measures the exemption applications relate to were imposed following an investigation initiated in 2013.

On 10 July 2013, an investigation into the dumping of prepared or preserved tomatoes exported to Australia from Italy was initiated by the Commission following an application by an Australian industry (INV 217).² As a result of the Commission's investigation, on 16 April 2014, 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 di Gerardo Ferraioli S.p.A (Feger) and La Doria S.p.A.(La Doria).³

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.⁴ Accordingly, on 20 March 2014, the Commissioner decided to terminate the investigation in accordance with subsection 269TDA(1) in so far as it related to Feger and La Doria.

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

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

On 19 January 2015, the Commission initiated a dumping investigation in respect of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria following an application from the Australian industry. A Statement of Essential Facts relevant to this investigation is due to be published no later than 7 August 2015.

2.2 The goods subject to measures

The goods exported from Italy, covered by the current dumping duty notices 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

² Anti-Dumping Commission case No. 217 refers: <http://www.adcommission.gov.au/cases/ADC217.asp>.

³ Anti-Dumping Notice (ADN) No. 2014/32 and Final Report No 217 refer: http://www.adcommission.gov.au/cases/documents/090-ADN-No201432-Findinginrelationtoadumpinginvestigation_003.pdf

⁴ Anti-Dumping Commission Termination Report No. 217 refers: <http://www.adcommission.gov.au/cases/documents/085-Report-TerminationReport217-Terminationofpartofaninvestigation.pdf>

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Goods excluded from the definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

2.3 Tariff classification

The goods are currently classified to subheading 2002.10.00 (statistical code 60) to Schedule 3 of the *Customs Tariff Act 1995*.

For Italian prepared or preserved tomatoes, a Customs duty rate of 5 per cent applies.

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3. EXEMPTION INQUIRY

3.1 Exemption applications

The following applicants initially applied to the Commission requesting an exemption from measures in relation to its imports of prepared or preserved tomatoes (**Non-Confidential Attachment 2**):

- 1) Leo's in relation to Organic tomatoes, San Marzano tomatoes and Cherry tomatoes; and
- 2) Kadac in relation to Organic tomatoes.

The grounds for the applications are as follows:

- that there is no Australian producer of Organic tomatoes (as claimed by Leo's and Kadac);
- that there is no Australian producer of San Marzano tomatoes (as claimed by Leo's); and
- that there is no Australian producer of Cherry tomatoes (as claimed by Leo's).

Leo's and Kadac alleged that their claims are evidenced by publicly available information from the sole Australian producer of prepared or preserved tomatoes, SPCA.

Following the initiation of the exemption inquiry, further applications for exemption were received from:

1. FWC in relation to Organic tomatoes on 1 November 2014;
2. Spiral in relation to Organic tomatoes on 23 December 2014;
3. Kirk Foods in relation to San Marzano tomatoes on 18 December 2014; and
4. Zintix in relation to San Marzano tomatoes on 18 December 2014.

The post initiation applications were for the same goods and were similarly based on the lack of Australian producer(s) of Organic, San Marzano or Cherry tomatoes. Accordingly, the Commission has considered the applications collectively.

3.2 Exemption inquiry

On 18 November 2014, the Commissioner initiated a joint exemption inquiry based on Leo's and Kadac's applications, by publishing Anti-Dumping Notice (ADN) 2014/99. This ADN was later amended by ADN 2014/133, which amended the description of the exemption goods to ensure consistency with the description of goods in the original investigation (REP 217).

The Commission sent the sole Australian manufacturer of prepared or preserved tomatoes, SPCA, an invitation to respond to Leo's and Kadac's applications on 19 November 2014, by completing the 'Response to exemption Application' questionnaire.

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A completed response from SPCA (**Non-Confidential Attachment 3**) was received on 18 December 2014. SPCA objected to the granting of an exemption for the goods, the subject to Leo's and Kadac's applications.

Given the nature of the post initiation applications and SPCA's response to the questionnaire, the Commission did not consider it necessary to send an additional questionnaire.

3.3 Goods subject to the application for exemption

The goods, the subject for exemption; are described as follows:

- 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 (Organic tomatoes);
- 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 (San Marzano tomatoes); and
- 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, (Cherry tomatoes).

3.4 Legislative requirements for an exemption

The applicants have applied for exemptions under subsection 8(7)(a) of the *Dumping Duty Act*.

Subsection 8(7)(a) provides:

Exemptions

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

The applicants requested the Parliamentary Secretary exercise her discretion to exempt goods from dumping duties on the basis that like or directly competitive goods are not offered for sale in Australia.

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3.5 Definition of 'like or directly competitive goods'

The term 'like goods' is defined in subsection 269T(1) of the *Customs Act 1901*. Section 6 of the Dumping Duty Act provides that the *Customs Act 1901* is incorporated and shall be read as one with the Dumping Duty Act.

Accordingly, the definition of 'like goods' in the Customs Act and the 'like goods' framework in Chapter 2 of the Commission's 'Dumping and Subsidy Manual'⁵ which incorporates this definition, is applicable to the Commission's assessment of whether the exemption goods are 'like goods' under subsection 8(7)(a) of the Dumping Duty Act.

Subsection 269T(1) of the Customs Act provides that '*like goods, in relation to goods under consideration, means 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*'.

The term 'directly competitive' has been considered separately by the Productivity Commission (PC). Citing the World Trade Organisation (WTO) Appellate Body, the PC found that 'directly competitive has been interpreted as encompassing goods with distinct physical characteristics, provided they compete for the same market'.⁶ In addition, the PC had regard to relevant WTO jurisprudence, as the term 'like or directly competitive goods' has been considered by the WTO Dispute Settlement Body (DSB) in a number of cases. The primary characteristics of goods to which the DSB had regard in these cases include:

- a. the competitive commercial relationship between goods in the marketplace;⁷
- b. interchangeability and substitutability, or whether the goods provide 'alternative ways of satisfying a particular need or taste';⁸ and
- c. commercially interchangeability of products.⁹

In the matter of *Korea — Alcoholic Beverages*, the prevailing view of the DSB was that:

'The term 'directly competitive or substitutable' describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word 'competitive' which means 'characterized by competition', and from the word 'substitutable' which means 'able to be

⁵ Anti-Dumping Commission's Dumping and Subsidy Manual

⁶ WTO, Appellate Body, *Japan — Taxes on Alcoholic Beverages* (DS 8)

⁷ *Korea — Alcoholic Beverages* (WT/DS75/AB/R, WT/DS84/AB/R) at 114.

⁸ *ibid* at 115

⁹ *US — Cotton Yarn*, (WT/DS192/AB/R) at 96-98

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substituted'. The context of the competitive relationship is necessarily the marketplace.¹⁰

In the matter of *Japan – Taxes on Alcoholic Beverages*, the DSB expressed the view that a comparison of the 'commercial uses of the products, not of their characteristics'¹¹ is central to the determination of their competitive nature in assessing whether products are 'directly competitive'.

For the purposes of assessing the application for exemption from measures, the term 'like or directly competitive goods' involves a comparison of the imported and domestically produced goods, where the domestically produced goods are either:

- a. alike in all respects, or where not alike in all respects, have characteristics closely resembling those of the imported goods; or
- b. where a competitive commercial relationship exists between the goods in the marketplace having regard to the commercial uses of the products.

Accordingly, the Commission will assess whether the exemptions goods are directly competitive goods, based on the framework outlined above.

3.6 Definition of 'custom and usage of trade'

Although the domestically produced goods may be 'like or directly competitive goods', the Parliamentary Secretary may still grant an exemption to measures in circumstances where the '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'.

The term 'custom and usage of trade' is not defined in the Dumping Duty Act or in the Customs Act. However, for the purpose of this exemption inquiry the Commission has applied its ordinary meaning as being a system, custom or practice of doing business used so commonly that an expectation arises that it will be observed in a particular transaction.

¹⁰ *Korea — Alcoholic Beverages* (WT/DS75/AB/R, WT/DS84/AB/R)

¹¹ *Japan – Taxes on Alcoholic Beverages* at 6.22

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4. LIKE OR DIRECTLY COMPETITIVE GOODS - CLAIMS

4.1 Introduction

This Chapter sets out the claims of the applicants with regards to Organic, San Marzano and Cherry tomatoes, as well as the Australian industry's response to the exemption applications.

4.2 The applicants' claims

4.2.1 Organic tomatoes

Leo's claims

Leo's has stated in its application that the goods manufactured and supplied by the Australian industry are not like or directly competitive to the exemption goods and that it understands that there is no Australian producer of canned Organic tomatoes. More specifically, it has advised that when assessing whether the goods produced by SPCA are 'like' the organic tomatoes imported from Italy, it has applied sections of the Commission's 'like goods' assessment framework as follows:

Physical likeness – Leo's quoted a submission from Woolworths in the original investigation as the basis for distinguishing the exemption goods from the like goods. The Woolworths submission stated that 'organic foods are produced without the use of artificial fertilisers or synthetic chemicals (including pesticides, herbicides and insecticides) and have not been subject to genetic modification. At Woolworths, foods marketed to consumers as organic must be certified as such by an appropriate certification authority accredited by the Australian Government's Department of Agriculture'.¹²

Commercial likeness – Again Leo's quoted from the Woolworths' submission, stating that: 'Australians buy organic foods for a range of health and environmental attributes and these attributes can be perceived as highly valuable by some customers. Woolworths does not believe that the importation of prepared or preserved organic tomatoes is having an adverse effect on Australian producers of prepared or preserved non-organic tomatoes as these are different products with different characteristics'. The two categories of tomatoes are quite distinctly differentiated in the minds of consumers. This is evidenced by the fact that canned organic tomatoes sell at a significant premium to canned non-organic tomatoes and yet are preferred by certain consumers for their organic characteristics.

Leo's also provided evidence that canned organic tomatoes are sold for significantly higher prices than standard canned diced tomatoes.

Functional likeness – Leo's stated that canned organic tomatoes and canned SPCA tomatoes do not differ greatly in their end-use applications. They are

¹² <http://www.adcommission.gov.au/cases/documents/070> - Submission - Importer- Woolworths.pdf

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both used by consumers as ingredients in the making of pasta sauces and sauces generally.

Leo's further considers that the imported products are defined by their 'health and environmental attributes' and the clear distinction exists in the minds of the consumers.

Kadac's claims

Kadac imports organic tomato products from Italy and re-labels the canned tomatoes with its own "Global Organics" labels in its factory. More specifically, it advised that:

- its organic tomato range, 'Global Organics', is priced at the premium high end value market and does not compete with any locally produced products;
- the organic tomatoes imported by it, have a different commercial likeness as they are products that are specific and sought after by a small customer base who have a preference for organically grown tomatoes;
- the organic tomatoes imported do not directly compete with any locally produced products or any locally grown organic tomatoes in Australia; and
- it also believes that no harm is imposed to the Australian industry by the importing of such organic tomato products.

In addition to its application, Kadac also provided a submission on 8 January 2015 in response to the submission by SPCA, advising that:

- Global Organics is a premium brand that has over 25 products within the range. All of its organic products are Australian Certified Organic (ACO) certified and are hence not 'like' products;
- Kadac also advises that its brands do not compete in the same market as SPCA's products as Global Organics are predominantly sold in health food stores and independent stores, rather than supermarkets;
- its customers purposely seek organic canned tomatoes and generally do not interchange between organic and SPCA's tomatoes.;
- the drain weight of SPCA's tomatoes is 57 per cent as compared to Global Organic's tomatoes drain weight of 60 per cent;
- It believes that there should be no dumping duty imposed, as Kadac is not a direct competitor of SPCA.

FWC's claims

FWC, an importer of organically produced tomatoes submits that:

- organically grown tomatoes are not like SPC's products as organically grown tomatoes require different growing and harvesting processes which yields a different and to some, a better quality and healthier product that even tastes better;

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- it does not price its tomatoes lower than their normal value than would otherwise be expected in the ordinary course of its trade and that discounts and specials are done by supermarkets;
- consumers do differentiate between organic and non-organic products with many actively seeking to buy organic due to health and environmental benefits and that the exemption goods and the like goods are not interchangeable;
- that Italian organic tomatoes are considered to be a premium product and regarded world-wide for their quality, richness and consistency;
- its organic tomatoes are certified to European Union standards and that organic certification guarantees that a tomato complies with various laws and regulations during cultivation and the production process;
- it doesn't offer 800g size cans that SPC does;
- that the total cost of the organic tomato is 27% more than the conventional tomato, given lower yields and the added cost of certification;
- the only option for customers if organic tomatoes in cans were unavailable would be to purchase/ grow fresh organic products; and
- the shelf life and the canning procedure is the same for both conventional and organic tomatoes however all certified organic canned products are BPA free lining

FWC provided a submission to support its application which stated that it concurs with the other applicants that there are no producers of canned organic tomatoes in Australia and hence it was difficult to understand how it could be putting at risk an industry that doesn't exist locally.

Spiral's claims

Spiral, an importer of tomato products, provided the following information in relation to like goods:

- its range (Spiral Foods and Campo ranges) is priced at a premium high end value, its wholesale prices are 50 per cent more expensive than the factory price of non- organic tomatoes and that it does not compete with any locally produced non-organic product;
- the production process for organic tomatoes is the same although the raw materials (tomatoes) are different;
- it currently takes three years for a farmer to achieve organic certification which includes a year of 'pre-certification' and two years of 'in conversion' until achieving full certification in the third year. During this time, the farmer has to demonstrate the non-usage of chemicals or pesticides and then the farmer is audited each year to ensure compliance to the Australian Organic Standard or in the case of international growers, the local certifying body;
- with regards substitutability, the people who buy organic tomatoes would be buying them by choice and if they used non-organic tomatoes, they would do so because their choice was limited; and

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Spiral advised that the purpose and end use was the same as ordinary tomatoes except that some people want to eat organic products.

Submissions received

The Commission has received submissions from:

- Coreco Fine Foods (Coreco); and
- Natural Well Pty Ltd trading as First Ray (First Ray)

supporting the applications seeking exemptions for Organic tomatoes. **See Non-Confidential Attachment 4** for more details.

4.2.2 San Marzano tomatoes

Leo's claims

Leo's has stated in its application that the goods manufactured and supplied by the Australian industry are not like or directly competitive to the exemption goods and that it understands that there is no Australian producer of San Marzano tomatoes. More specifically, it has advised that when assessing whether the goods produced by SPCA are 'like' the San Marzano tomatoes imported from Italy, it has applied sections of the Commission's 'like goods' assessment framework as follows:

Physical likeness - canned San Marzano tomatoes differ from all other canned tomatoes sold in the Australian market in that they are a particular tomato variety with a stronger and sweeter taste to the normal roma tomato. Accordingly the goods are protected by Italian law and by the European Union's Protected Designation of Origin classification (DOP classification).

Further Leo's advised that a notification body (Consortium San Marzano) and Product Specification document exists that defines the geographic area of production of the San Marzano tomato, the area of transformation and the required chemical and physical characteristics.

Commercial likeness – Leo's also advised that canned San Marzano tomatoes are not sold into the large retail chains and therefore do not compete with SPCA's locally produced products goods. They are more typically distributed through smaller retail stores stocking premium products and wholesale catering to discerning customers such as premium restaurant and/ or gourmet caterers. Leo's does not believe that there is a switching of products between the imported goods and the locally produced products as the canned San Marzano tomatoes are a premium product sought after by particular consumers. Leo's also advised that there is no price competition between the imported canned San Marzano tomatoes and SPCA's canned tomatoes. Given the DOP classification and premium quality attributes, the imported goods are sold into the market at a significant premium to the locally produced goods when compared on a per kilo basis.

Functional likeness - Leo's confirmed that canned San Marzano tomatoes and SPCA canned tomatoes do not differ greatly in their end-use application as

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they are both used predominantly by consumers as ingredients in making sauces.

Leo's comments that the ultimate user, whether it is an individual or restaurant, purchases the goods having regard to their essential characteristics, being the specific variety of tomatoes and the quality attributes associated with it.

Kirk Foods' claims

Kirk Foods, an importer, sought an exemption from anti-dumping duties in relation to La Bella San Marzano tomatoes. It submits that the tomatoes are from the Nocerino region, which is the DOP San Marzano region. Kirk Foods claims that its La Bella San Marzano tomato range is not certified 'DOP' in an effort to keep costs down.

Zintix's claims

In its exemption inquiry for San Marzano tomatoes, Zintix, an importer of tomato products has advised that it is in the process of importing San Marzano tomatoes in glass and understands that no Australian producer currently supplies whole or chopped tomatoes in glass.

In assessing whether SPCA's products are "like" the imported San Marzano tomatoes, Zintix used sections of the Commission's 'like goods' assessment framework:

Physical likeness – the tomatoes being imported are from a particular geological area in Italy. According to Zintix, they differ to the Australian tomatoes as they have a stronger and sweeter taste.

Commercial Likeness – with regards as to whether the goods are directly competitive in the market, Zintix advised the type of packaging does have a significant impact on the consumer's buying decision. In the consumer's mind, canned diced tomatoes are usually readily interchangeable across labels unless they have a secondary buying trigger like 'Product of Australia' but canned diced tomatoes are different from diced tomatoes in glass jars. Also San Marzano tomatoes are a boutique type tomato that does not compete directly with Australian tomatoes. Zintix further advised that there are no other sources of tomatoes in glass jars in Australia and is not a product that has been previously imported to Australia. The visual and production aspects position the imported products at the premium end of the spectrum and according to Zintix, are currently double the price of Australian tinned tomatoes. From a distribution channel viewpoint, Zintix does not believe there is any direct competition as the tomatoes in glass jars will be sold through smaller retail outlets and wholesalers, supporting the premium food service sector.

Functional likeness – Zintix advises that functionally, the canned tomatoes are interchangeable with the tomatoes in jars. However the consumer perception surrounding preservation in glass as opposed to preservation in

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cans will go some way towards negating this as will San Marzano brand. Zintix anticipates that consumers who buy tomatoes in glass will not necessarily buy tomatoes in cans. The most direct comparison may be with tomato passata, which is traditionally sold in glass and currently exempt from dumping duties.

In conclusion, Zintix believes that no harm is imposed on Australia's local industry through the importation of Italian whole and diced San Marzano tomatoes in glass as there is no local equivalent and the product is priced at the premium end of the market.

Submissions received

The Commission has received a submission from Coreco supporting the applications seeking exemptions for San Marzano tomatoes. See **Non-Confidential Attachment 4** for more details.

4.2.3 Cherry tomatoes

Leo's claims

Leo's has stated in its application that the goods manufactured and supplied by the Australian industry are not like or directly competitive to the exemption goods and that it understands that there is no Australian producer of canned cherry tomatoes. More specifically, it has advised that when assessing whether the goods produced by SPCA are 'like' the cherry tomatoes imported from Italy, it has applied sections of the Commission's 'like goods' assessment framework as follows:

Physical likeness – it advised that the obvious difference between the cherry tomato and the roma-type or round tomatoes used in SPCA's products is the size. In addition the cherry tomatoes are much sweeter than SPCA's products due to their higher sugar content levels.

Commercial likeness - Leo's considers that fresh cherry tomatoes are more directly competitive to the imported canned tomatoes than SPCA's products. It also stated that there is no switching between imported cherry tomatoes and SPCA's canned products as cherry tomatoes are considered to be a niche, premium product. Further from a price perspective, the retail prices of cherry tomatoes are some 53% higher than SPCA's whole peeled tomatoes according to the Woolworth's website. From a distribution viewpoint, canned cherry tomatoes were sold in small retail stores.

Functional likeness – Leo's considers that from an end-use viewpoint, that canned cherry tomatoes are more commonly used as direct ingredients in salads and other meals whereas the SPCA products are predominantly used for making sauces.

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Submissions received

The Commission has received a submission from Coreco supporting the applications seeking exemptions for Cherry tomatoes. See **Non-Confidential Attachment 4** for more details.

4.3 SPCA's response to exemption application

SPCA opposes the requests for exemption. In its response to the application questionnaire received on 18 December 2014, SPCA advised that whilst it doesn't produce goods identical to the exemption goods, it produces and sells goods that are like goods and directly compete with the goods described in ADN 2014/133. Further it advised that with regards the like goods framework:¹³

Physical likeness – the exemption goods are available in the same packaging as SPCA's goods. The majority of the products are available in two sizes – 400g and 800g size cans. SPCA considers that the ingredients have similar composition and liquid and that the fill weight and drain weights across all canned tomatoes are similar. SPCA also produces products which are available in the same cuts as the exemption goods, such as whole peeled, diced etc.

Commercial likeness – SPCA advised that the goods requested for exemption and SPCA's prepared tomatoes are available on supermarket shelves and compete with each other. According to SPCA, the key criteria driving the consumer purchase, is price. Given extreme price sensitivity, consumers switch between various products in the category. SPCA has observed that the exemption goods are in the same price range as its products.

Functional likeness – The exemption goods and SPCA's products are used by consumers for preparing similar meals and are interchangeable.

Production likeness – production of the exemption goods and SPCA's products are often undertaken in the same manner and are interchangeable. In a subsequent submission, SPCA advised that the factory visit during the investigation by the Commission, demonstrated that SPCA has the manufacturing capability to process the exemption goods at its operating plants in Shepparton.

With regards to the different exemption goods specifically, SPCA has advised as follows:

Organic tomatoes

- Organic tomatoes are like goods to the tomatoes produced by SPCA. SPCA's products come in the same packaging and cutting styles as the exemption goods.
- Although organically grown tomatoes require slightly different growing and harvesting processes, SPCA considers that Australia is capable of

¹³ Refer to Chapter 2 of the Dumping and Subsidy Manual

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producing organic processed tomatoes. SPCA is capable of manufacturing organic tomatoes if the trend of preference to organic food increases.

San Marzano tomatoes

- San Marzano tomatoes are a type of roma tomato. It is SPCA's understanding, that in Australia, they are sold predominantly in a whole peeled format. SPCA currently sells different varieties of whole peeled tomatoes. It considers that the San Marzano whole peeled tomatoes are interchangeable to its current whole peeled tomatoes. As the price is the key determinant in the category, SPCA has advised that giving an exemption to a particular variety will lead to product switching by consumers, which in turn could lead to circumvention of dumping duties.
- SPCA has manufactured different roma style tomatoes in the past and is capable of producing them. It considers that the protected denomination of origin is not relevant to the consideration of like or directly competitive goods.

Cherry tomatoes

- According to SPCA, cherry tomatoes form a very small part of the demand in the overall tomato category. They compete with SPCA products on the supermarket shelves. They are interchangeable to other canned tomatoes and are consumed in the same way.
- SPCA states that the applicants have stated that canned cherry tomatoes are a substitute for fresh cherry tomatoes in the preparation of certain food such as a salad. SPCA considers this to be unlikely as the canned cherry tomatoes have undergone a high temperature cooking process and the product is therefore far removed from a fresh product. SPCA further claims that the applicants have not substantiated their claims with factual evidence.

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5. THE COMMISSION'S ASSESSMENT

5.1 Findings

SPCA has acknowledged in its response to the application for exemption that although it does not manufacture and sell products that are identical to the exemption goods, it does produce and sell goods that are like goods and are directly competitive to the exemption goods.

The findings by the Commission with regards to the 'like goods' framework (in relation to physical, commercial, functional and production likenesses) lead to the conclusion that prepared or preserved tomatoes produced by SPCA, whilst not alike in all respects, have characteristics closely resembling those of the exemption goods.

In addition, the Commission finds that like goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

Accordingly the conditions of subsection 8(7) of the Dumping Duty Act for granting an exemption are not satisfied.

5.2 Background

The Commission has examined the evidence presented in the applications together with the submissions received from interested parties (**Non-Confidential Attachment 4**), SPCA's response to the questionnaire and verified information gathered in the previous investigation (REP 217). The Commission was seeking to determine whether the Australian industry produces and sells goods that are like or directly competitive to the goods the subject of the applications and whether those goods are available to all purchasers on equal terms having regard to the custom and usage of trade.

The Commission notes that, in REP No 217 in relation to the previous investigation, it found that 'SPCA produces goods that have characteristics closely resembling the goods exported to Australia, including Italian prepared or preserved tomatoes, using peeled tomatoes, San Marzano variety or organic tomatoes. Consequently the Commission considered in the original investigation that the goods manufactured by SPCA are like goods to the goods under consideration.

REP No 217 noted that the Commission will conduct separate inquiries following the imposition of measures into whether the nominated goods, being organic tomatoes, should be exempt from measures.

The Anti-Dumping Review Panel Report (ADRP) No 14 sections 76 to 78, considered the applicants for the review argument that the Italian products were not like products to the Australian products as there were considerable differences with the physical characteristics, with the Italian tomatoes being

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'long tomatoes' and 'San Marzano tomatoes'.¹⁴ The ADRP Report noted that it 'was unable to see any problem' with the Commission's like goods analysis in the Final Report.¹⁵ The ADRP confirmed that that the imported goods are like goods to the Australian product and whilst not identical, the Australian products have characteristics closely resembling those of the imported products.

5.3 'Like or directly competitive goods' offered for sale in Australia

As noted in Chapter 3, the assessment of whether prepared or preserved tomatoes are 'like or directly competitive' to the exemption goods involves determining whether the goods are:

- alike in all respects, or where not alike in all respects have characteristics closely resembling those of the imported goods; and/or
- where a competitive commercial relationship exists between the goods in the marketplace having regard to the commercial uses of the products.

As discussed in Chapter 4, SPCA has advised that whilst it doesn't produce goods identical to the exemption goods, it does produce and sell goods that are like goods and directly competitive to the exemption goods.

For the purpose of determining if SPCA's goods are like goods to the exemption goods, the Commission has applied the like good framework as set out in its *Dumping and Subsidy Manual*. This involves comparing the exemption goods and the like goods against the following characteristics:

- a. physical likeness;
- b. functional likeness;
- c. commercial likeness; and
- d. production likeness.

For the purpose of determining if the goods are directly competitive, the Commission has assessed whether a competitive commercial relationship exists between the goods in the market place having regard to the commercial uses of the products, including whether SPCA's goods can be substituted for the exemption goods. The Commission notes that there is a high degree of overlap in determining if the exemption goods and the like goods share a commercial likeness and whether they are directly competitive.

5.4 Organic tomatoes

Physical likeness – The Commission considers that Organic tomatoes and SPCA's products are physically alike. As concluded in REP 217, although the recipes differed slightly among the various producers of imported tomatoes, the main ingredient in both the imported goods and SPCA's products were the

¹⁴ www.adreviewpanel.gov.au

¹⁵ ADRP Report No 14, Page 22

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raw tomatoes. The Commission considers that this is also the case with regards organic tomatoes and SPCA's products as they are both tomato products.

Further, the Commission considers that the exemption goods are available in the same size and packaging as SPCA's products, and are available in the same cuts (diced, chopped, whole etc).

The Commission considers that by weight, shape, appearance, content and taste that SPCA's products are like the exemption goods. The Commission notes that in the submission from Natural Well Pty Ltd trading as First Ray (contained in **Non-Confidential Attachment 4**) that organic tomatoes are grown without the use of artificial fertilisers or synthetic chemicals and have not been subject to genetic modification. However, having regard to the characteristics of organic tomatoes and SPCA tomatoes overall, the Commission considers that by weight, shape, appearance, content and taste that SPCA's products are like the exemption goods.

Commercial likeness – the Commission considers that the exemption goods and SPCA's products are commercially alike and largely sold to retail consumers. The Commission observed that both the exemption goods and SPCA's products are available on supermarket shelves and through smaller speciality retail stores.

With regards to pricing, SPCA advised that the key criteria driving purchasing decisions is price and that consumers switch between its own products and the exemption goods, depending on prevailing prices. Some of the applications and submissions have advised that organic tomatoes are a premium product and are priced at a premium to SPCA's products. SPCA has stated and provided the Commission with information which shows that the retail prices of organic tomatoes are competitive with other non-organic tomatoes in the supermarket. The Commission has also independently observed that some organic tomato products are priced at similar levels as SPCA's products.

Functional likeness – the Commission considers that both the SPCA tomato products and the exemption goods have the same end-use for consumers in that they are used in the preparation of meals and are hence comparable and interchangeable.

Production likeness – The Commission considers after visiting SPCA's factory in Shepparton that the processes for both the organic and the SPCA products appear to be the same:

- fresh tomatoes are delivered to the production facility directly by the local tomato growers on the same day as they are harvested from the vine;
- thorough washing and grading of tomatoes;
- once sorted and processed (as required for dicing, cutting or crush cutting), the product is put into cans. Products are then sorted by can size and cut profile. Depending on product requirements, herbs, spices etc may be added;

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- once filled to product specifications, cans are sealed and pasteurised (cooked) to preserve the product; and
- the cans are then labelled as required.

The Commission notes that a number of submissions stated that organic tomatoes were grown differently to SPCA's own products in that organic tomatoes were grown and produced without synthetic chemicals, colourings, preservatives or additives.

The Commission considers that the products that arrive in the various factories for processing are tomatoes and that both the exemption goods and SPCA's products are all processed in the same way although some may be grown under different growing methods.

Directly Competitive

The Commission considers that organic tomatoes and SPCA's products are directly competitive as a commercial relationship exists between the two products, specifically as they share the same distribution channels and are priced at similar price points.

Given the physical and functional likeness outlined above, the Commission is also of the view that SPCA's goods are substitutable for organic tomatoes.

Conclusion

The Commission's findings with regards to physical likeness, commercial likeness, functional likeness and production likeness above lead to the conclusion that SPCA's products, whilst not identical in all respects, have characteristics closely resembling those of the exemption goods assessed in this section. Organic canned tomatoes have a production and packaging likeness to SPCA's canned tomatoes because they are packaged in the same way and are produced using the same facilities and processes as observed in SPCA's factory for non-organic tomatoes. In addition, the Commission considers the exemption goods to be directly competitive to SPCA's products.

5.5 San Marzano tomatoes

Physical likeness – The Commission considers that the San Marzano tomatoes and SPCA's products are physically alike. As concluded in REP217, although the recipes differed slightly among the various producers, the main ingredient in both imported goods and SPCA's products are raw tomatoes. The Commission considers that this is also the case with regards the San Marzano tomatoes and SPCA's products. The definition of San Marzano tomatoes in Leo's application includes the words 'whether peeled or unpeeled'. The Commission concurs with SPCA that as the San Marzano tomatoes sold in Australia are largely sold in the 'whole peeled' form, that they are like the goods produced by SPCA. The Commission is satisfied that SPCA's range includes whole peeled tomatoes and that this product is physically like the whole peeled San Marzano tomatoes.

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The Commission further considers that by weight, shape, appearance and content that SPCA's products are like to the exemption goods. The Leo's application stated that San Marzano tomatoes are a particular tomato variety with a stronger and sweeter taste. The Commission acknowledges that San Marzano tomatoes are classified DOP and grown in the San Marzano area. However, the Commission considers that San Marzano tomatoes are a particular breed of roma tomato and that roma tomatoes are not only grown in the San Marzano area.

As both the San Marzano tomatoes and SPCA's products are tomatoes, the Commission considers that they both have similar physical likenesses.

Commercial likeness – the applicants have advised that San Marzano tomatoes are not sold into the large retail chains and therefore do not compete with SPCA's locally produced goods. They are more typically distributed through smaller retail stores stocking premium or boutique foods and wholesalers catering to premium restaurants and/ or gourmet caterers. The Commission notes that some SPCA products are also sold through these channels and are often co-located with San Marzano tomatoes. On the basis that San Marzano and SPCA products are sold through the same channels, the Commission considers that San Marzano tomatoes and SPCA's products are commercially alike in that they are largely sold to retail consumers.

With regards to pricing, SPCA has advised that the key criteria driving purchasing decisions is the price and that consumers switch between its own products and the San Marzano tomatoes, depending on prevailing prices. Leo's application advised that there is no price competition between the imported San Marzano tomatoes and SPCA's products. Given the DOP classification and premium quality of the San Marzano tomatoes, Leo's advised that they are sold into the market at a significant premium to the SPCA products. The Commission considers that insufficient evidence has been provided by the applicants for the Commission to determine whether San Marzano tomatoes are priced at a premium price or not.

Functional likeness – the Commission considers that both the SPCA tomato products and San Marzano tomatoes have the same end-use for consumers in that they are used in the preparation of meals and are hence comparable and interchangeable.

Production likeness – the Commission considers that, although SPCA's products are not grown under DOP criteria as the San Marzano tomatoes are, the produce that arrive in the various factories for processing, are raw tomatoes and these are processed in the same way as SPCA's products. It is the Commission's view that the particular type of roma tomato is unlikely to alter the production process.

Directly Competitive

The Commission considers that San Marzano tomatoes and SPCA's products are directly competitive as a commercial relationship exists between the two products, specifically as they share the same distribution channels and are priced at similar price points.

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Given the physical and functional likeness outlined above, the Commission is also of the view that SPCA's goods are substitutable for the San Marzano tomatoes.

Conclusion

The Commission's findings with regards to physical likeness, commercial likeness, functional likeness and production likeness above, lead to the conclusion that SPCA's products, whilst not identical in all respects, are substitutable and have characteristics closely resembling San Marzano tomatoes. The Commission considers the exemption goods to be directly competitive to SPCA's products. Although there are minor differing characteristics between SPCA's products and San Marzano tomatoes, the Commission considers that there is an Australian industry that produces like or directly competitive goods.

5.5.1 San Marzano tomatoes in glass jars

With regards to the application from Zintix, the Commission noted in Consideration Report 217, that the application from SPCA in the original investigation (REP 217) stated that the application covered all container sizes up to and including 1.14 litres and that the imported goods could be packaged in different containers such as cans, glass jars, pouches or Tetra packs.¹⁶

With regards to the like goods framework, the Commission considers that comments in Section 5.5 above, in relation to physical and functional likenesses, also apply to San Marzano tomatoes, sold in glass jars. The Commission notes that San Marzano tomatoes sold in glass jars are not yet imported into Australia.

Physical likeness – the Commission notes that there is a degree of difference in the physical characteristics between the SPCA product and San Marzano tomatoes sold in glass jars. However, as noted above, the Commission is of the view that the contents of the containers, being prepared or preserved tomatoes are like goods. As both the San Marzano tomatoes in jars and SPCA's products are tomatoes, the Commission considers that they both have similar physical likenesses.

Commercial likeness – the Commission acknowledges that the tomatoes in glass jars would aesthetically look different to tomatoes in cans and hence may attract a premium price. Zintix claims that San Marzano tomatoes in glass jars are unlikely to be sold in the supermarkets and would more likely be sold in specialised food stores. The Commission notes that as these products are not yet available in Australian market, there is no evidence supporting Zintix's claims in relation to different sales channels.

Production likeness – like the San Marzano tomatoes in cans, discussed in section 5.5 above, the Commission notes that San Marzano tomatoes in glass jars, must be grown in the specific San Marzano region of Italy and produced

¹⁶ Anti-Dumping Commission case No. 217 refers: <http://www.adcommission.gov.au/cases/ADC217.asp>

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in line with the DOP criteria. The Commission considers that the production processes for sterilisation and pasteurisation, will generally be the same or similar for tomatoes in cans and glass jars. The Commission considers there may be slight differences in the production process with respect to filling and sealing tomatoes in containers.

Directly Competitive

The Commission considers that San Marzano tomatoes in glass jars and SPCA's products are likely to be directly competitive. The Commission considers it is likely that a commercial relationship would exist between the two products, specifically as they are likely to share the same distribution channels, being retail outlets.

Given the physical and functional likeness outlined above, the Commission is also of the view that SPCA's goods are substitutable for the San Marzano tomatoes in glass jars.

Conclusion

The Commission's findings with regards to physical likeness, commercial likeness, functional likeness and production likeness above, lead to the conclusion that SPCA's products, whilst not alike in all respects, have characteristics closely resembling those of San Marzano tomatoes in glass jars. The Commission also considers San Marzano tomatoes in glass jars to be directly competitive to SPCA's products.

5.6 Cherry tomatoes

Physical likeness – As concluded in REP 217, although the recipes differed slightly among the various producers, the main ingredient in both imported goods and SPCA's products were the raw tomatoes. The Commission considers that this is also the case with regards cherry tomatoes and SPCA's products.

The Commission considers that by weight and content that SPCA's products are like cherry tomatoes that are subject to this exemption inquiry.

Commercial likeness – Leo's advised that its products are usually sold in smaller retail stores and were not in competition with SPCA's canned tomato range. The Commission however observed that Annalisa cherry tomatoes, which are a product of Leo's, were being sold in mainstream supermarkets, beside SPCA's products.

With regards to pricing, SPCA has advised that the key criteria driving purchasing decisions is price and that consumers switch between its own products and the exemption goods, including cherry tomatoes depending on prevailing prices. Leo's claimed that canned cherry tomatoes are sold at a premium to SPCA's products. The Commission observed that the canned cherry tomatoes being sold in mainstream supermarkets were priced similarly to SPCA's product range in the same can size.

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Functional likeness – the Commission considers that both the SPCA tomato products and tinned cherry tomatoes have the same end-use for consumers in that they are used in the preparation of meals. Leo's application noted that fresh cherry tomatoes are more directly competitive to canned cherry tomatoes, than the products sold by SPCA and could also be used as direct ingredients in salads and other meals. The Commission notes that canned products undergo a high temperature cooking process and hence do not possess similar taste or texture of fresh produce. Therefore, the Commission does not consider that the canned cherry tomatoes are substitutable to fresh cherry tomatoes and considers that the canned cherry tomatoes are like SPCA's products.

Production likeness – The Commission considers that although cherry tomatoes and SPCA's canned tomato products are of different variety of tomatoes, that the products that arrive in the various factories for processing, are tomatoes, which are processed in the same way as SPCA's products.

Directly Competitive

The Commission considers that cherry tomatoes and SPCA's products are directly competitive as a commercial relationship exists between the two products, specifically as they share the same distribution channels and are priced at similar price points.

Given the physical and functional likeness outlined above, the Commission is also of the view that SPCA's goods are substitutable for the canned cherry tomatoes.

Conclusion

The Commission's analysis with regards to physical likeness, commercial likeness, functional likeness and production likeness above lead to the conclusion that SPCA's products, whilst not alike in all respects, have characteristics closely resembling those of the exemption goods that are assessed in this section. The Commission considers the exemption goods to be directly competitive to SPCA's products.

5.7 Equal terms under like conditions having regard to the custom and usage of trade

As noted in Chapter 3, in order for the Parliamentary Secretary to exercise her discretion and grant an exemption from measures, she must be satisfied that 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.

The Commission notes that the applications for exemption do not claim that the goods are not available on equal terms under like conditions having regard to the custom and usage of trade, and has not submitted any

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supporting evidence to this effect. Rather, the applicants claim only that the goods are not like and therefore not available at all in Australia.

In terms of the customs and usage of trade relevant to the purchase of the like or directly competitive goods, Commission considers that apart from a small quantity of sales to the food service industry sector, like or directly competitive goods are sold to retail consumers via supermarkets and grocery stores and the smaller independent food outlets.

Based on the evidence the Commission has gathered, the Commission has found that SPCA's products are readily available for purchase through similar sales channels as the exemption goods. Given this, the Commission is satisfied that SPCA's product range is available to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

5.8 Conclusion

The Commission considers that although SPCA does not manufacture and sell products that are identical to the exemption goods, it does produce and sell goods that are like and directly competitive to the exemption goods.

In addition, the Commission finds that like and directly competitive goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade.

Accordingly, the Commission considers that the conditions of subsection 8(7)(a) of the Dumping Duty Act for granting an exemption are not satisfied.

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6. RECOMMENDATION

Based on the Commission's examination of the applications to exempt goods from interim dumping duty and dumping duty under subsection 8(7)(a) of the Dumping Duty Act, the Commission considers that 'like or directly competitive' goods are offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the 'custom and usage of trade'.

Accordingly, the Commission recommends that the Parliamentary Secretary not exempt the goods the subjects of the applications from interim dumping duty and dumping duty.

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7. ATTACHMENTS

Non - Confidential Attachment 1	Previous investigation - history
Non- Confidential Attachment 2	Exemption applications received from Leo's, Kadac, FWC, Spiral, Kirk Foods and Zintix
Non - Confidential Attachment 3	SPCA's response to the applications for exemption
Non - Confidential Attachment 4	Submissions received