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# Note on the basis for reconsideration of review of preserved peaches from Spain

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12 March 2019

# Note on the Basis for Reconsideration of Review of Preserved Peaches from Spain

## Purpose

1. This Note sets out the basis for the reconsideration of the sunset review of preserved peaches from Spain, following the decision of the High Court in *Heinz Wattie's Ltd v the Ministry of Business, Innovation and Employment* [2018] NZHC 2309 [4 September 2018] (the Judgment)<sup>1</sup>.
2. The matters addressed in this Note include:
  - A. the period of investigation in relation to (a) dumping and (b) injury
  - B. the matters to be reconsidered
  - C. the interested parties to be involved
  - D. the information to be used in the reconsideration
  - E. the timeframe and procedures for the investigation.
3. The reconsideration is to be carried out in accordance with the Dumping and Countervailing Duties Act 1988 (the Act) as it stood at the time of the original review, and will also need to take into account New Zealand's obligations under the World Trade Organization (WTO) Agreement on Implementation of Article VI of GATT 1994 (AD Agreement).

## Background

### *Original Review*

4. The Ministry of Business, Innovation and Employment (MBIE) initiated a review under the Act of the imposition of anti-dumping duties on peaches in preserving liquid on 4 August 2016, following the receipt of an application providing positive evidence justifying the need for a review from Heinz Wattie's Ltd (HWL).
5. The goods under review were described as:

*Peaches in preserving liquid, in containers up to and including 4.0 kg*
6. HWL is the sole New Zealand producer of preserved peaches, goods "like" those imported from Spain, and constituted the domestic industry for the purposes of the review.
7. Following the initiation of the review, MBIE requested information from identified importers, intermediary exporters, Spanish manufacturers, and the Government of Spain (GOS). Two of the three importers did not respond to MBIE's questionnaire and one provided a limited response. A limited response was made by one intermediary exporter, but no responses were received from other exporters or from Spanish manufacturers.
8. MBIE advised interested parties of the essential facts and conclusions that were likely to form the basis for the Minister to make a determination through an Interim Report released on 30 January 2017. The report concluded that anti-dumping duties should continue. MBIE then received a submission from the European Commission and carried out further research. These new materials were used in reaching different conclusions in the Final Report.

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<sup>1</sup> Available at <http://www.nzlii.org/nz/cases/NZHC/2018/2309.html>

9. In the Final Report, MBIE considered the likelihood of a continuation or recurrence of dumping causing a continuation or recurrence of material injury, should anti-dumping duties be removed. MBIE concluded that:
  - “preserved peaches originating from Spain continue to be dumped in very small quantities”
  - “should the anti-dumping duties be removed, there is likely to be a continuation of dumping although there is insufficient positive evidence to assess volumes”
  - Imports from Spain “have slowed down significantly since anti-dumping duties were imposed in 2011”
  - “In the absence of duties, imports of preserved peaches from Spain are likely to be priced below HWL’s canned peaches should they resume in significant volumes”.
10. The Final Report stated that “based on the lack of positive evidence available to it MBIE is not able to conclude that it is ‘likely’ that the Spanish industry will resume exports to New Zealand at quantities sufficient to cause material injury to the domestic industry.”
11. In March 2017, MBIE completed its review of the continued need for the imposition of anti-dumping duties on preserved peaches from Spain. The review, which was conducted in accordance with New Zealand legislation and the AD Agreement, resulted in the termination of the anti-dumping duties with effect from 23 February 2017, based on the finding that there was not likely to be a continuation or recurrence of injury following the removal of duties.

### ***Judicial Review Outcome***

12. HWL challenged, through judicial review in the High Court of New Zealand, the decision of the Minister to terminate anti-dumping duties on imports of peaches from Spain on the grounds of a breach of natural justice.
13. On 4 September 2018, the High Court
  - held that HWL had an inadequate opportunity to advance arguments in support of the anti-dumping duties continuing
  - issued a declaration that MBIE’s process breached obligations of natural justice owed to HWL as an interested party, by failing to convey to HWL the new material relied on by MBIE in its final report to reach a conclusion contrary to that signalled in MBIE’s interim report
  - quashed the Minister’s decision to terminate the anti-dumping duties; and
  - directed MBIE to reconsider its sunset review of the justification for an anti-dumping duty against Spanish preserved peaches. The review is to be conducted on terms that consider past, present and future conduct in the import of the products, but without triggering s 14(9)(b) of the Act, so that any anti-dumping duty would only be restored once a decision applying the duty is made. Any duty would only be charged prospectively, and the review (reconsideration) is to be carried out on the terms of the Act as in force in August 2016.

### ***Consultation on the Proposed Process***

14. MBIE proposed a process for the reconsideration and sent this for comment to the European Commission (EC), the GOS and HWL prior to initiation.
15. HWL considered the process proposed and provided no further comments.
16. Representatives of the GOS and the EC sought a meeting with MBIE. MBIE met with them on 4 March 2019.
17. The GOS did not comment on the process proposed, although it made reference to matters that will need to be looked at as part of the reconsideration itself.
18. The EC expressed some concerns about the proposed process, which included that
  - updating the period of the investigation is equivalent to initiating a new anti-dumping investigation while maintaining standards of assessment applicable to review investigations
  - assessing the likelihood of recurrence of dumping and injury based on 2018, when no duty is in force, is contrary to an objective examination
  - based on the AD Agreement, the EC does not see how anti-dumping duties could be reinstated more than 2 years after expiry.
19. MBIE notes that it is legally obliged to conduct the process in accordance with the directions given by the High Court. Paragraphs 90(b) and (c) of the judgment set out the Court's directions on the way in which the reconsideration is to be conducted. MBIE will address the specific matters raised by the EC in the Interim Report.

### ***Legal Framework for the Reconsideration***

20. The Minister's decision to terminate anti-dumping duties was quashed by the Court. No duties will apply during the reconsideration and anti-dumping duties will only be restored prospectively if and when a decision to apply duties is made.
21. The reconsideration under this process will effectively be a continuation of the review that was initiated on 4 August 2016. The quashing of the termination decision by the Court means that no final determinations have yet been made on the need for anti-dumping duties.
22. The reconsideration of the review will consider all of the information already available in respect of the review, and new information, which will result in a new Interim Report and Final Report.
23. The reconsideration will be carried out in accordance with the Act as it stood at the time of the original review, and in light of New Zealand's obligations under the AD Agreement. No public interest test will be carried out as no such test is provided for under that version of the Act.
24. The reconsideration will examine whether, in light of the circumstances of the continuation, "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury" (AD Agreement 11.3).

25. If the duties are restored, they may be applied at a reassessed rate to take account of changes in circumstances since the duties were last calculated.

## **Approach to Reconsideration**

### ***A. Period of Investigation***

26. The reconsideration will involve analysis of data in the following periods:
- Dumping analysis – the Period of Review for Dumping (POR(D)) is 1 January to 31 December 2018 (the original review analysed dumping over the period 1 July 2015 to 30 June 2016).
  - Injury analysis – the Period of Review for Injury (POR(I)) is 1 January 2014 (the start date in the original review) to December 2018, where information is available.

### ***B. Matters to be Reconsidered***

27. In light of the Judgment, MBIE proposes that the matters to be reconsidered should include the following:
- a) Whether the absence of anti-dumping duties is likely to lead to a continuation or recurrence of dumping;
  - b) Whether such dumping is likely to cause a continuation or recurrence of material injury to the New Zealand industry.
28. If anti-dumping duties are to be applied, a reassessment of the rate or amount of duty may be required.
29. The reconsideration of these matters will be set out in two further reports:
- An Interim Report
  - A Final Report.
30. The Interim Report will set out the essential facts and conclusions that will likely form the basis for any final determination to be made. Parties will then have an opportunity of 10 working days to make submissions before the Final Report is prepared for the Minister.
31. Where information is made available in response to the Interim Report, MBIE will circulate that information to interested parties. If any substantive new material is likely to be relied on to reach a conclusion contrary to that signalled in MBIE's Interim Report, MBIE will circulate an additional Interim Report to interested parties and provide a further 10 working days for comment.
32. At the end of the review, MBIE will make its recommendation and the Minister will determine whether anti-dumping duties are to be applied from the date of the decision. If duties are applied, the Minister may determine a new rate or amount of duty following a reassessment by MBIE under section 14(6) of the Act.

### ***C. Interested Parties***

33. Interested parties who will be given notice of the reconsideration will be those who are to be given notice for the purpose of section 9 of the Act, and are the Government of the country of

export, exporters and importers known to have an interest in the goods, and the applicant in relation to the goods. Article 6.11 of the AD Agreement describes interested parties who shall be included and Article 6.12 provides opportunities for some other parties to participate.

34. In the original review the interested parties included the New Zealand producer, HWL; the European Commission and the Government of Spain; three Spanish manufacturers of the subject goods; two trading intermediaries; and three importers. In calendar year 2018, Customs data shows two suppliers of the subject goods.
35. The names of suppliers in the POR(D) for this reconsideration, namely calendar year 2018, are listed in the table below in alphabetical order:

**Table 1.1\***

Alcurnia Alimentacion SL
Euroaliment SL

36. The names of importers in the POR(D) for this reconsideration, namely calendar year 2018 are listed in the table below in alphabetical order:

**Table 1.2\***

Mediterranean Foods (Wgtn) Limited
Mediterranean Foods South Island Ltd
Sabato Limited

*\*Excluded from Table 1.1 are imports that claim tariff concession 998447L<sup>2</sup>. Excluded from Table 1.2 are importers that import only peaches that claim said concession code.*

#### **D. Information to be Used**

37. In the original review, MBIE used the following information:
- information contained in HWL’s application and subsequent submissions
  - information obtained during MBIE’s verification visit to HWL
  - information in the limited responses from one importer and one intermediary exporter, but no responses were received from other exporters or from Spanish manufacturers
  - information provided by the European Commission
  - information arising from MBIE’s independent research into matters arising in the investigation.
38. Information used in the reconsideration will consist of all relevant information available and used during the original review or subsequently made available, in order to recognise the Court’s direction that MBIE “consider past, present and future conduct in the import of the relevant products.” The information will include the following:
- the HWL application relevant to the review and subsequent submissions
  - information obtained from a questionnaire to HWL

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<sup>2</sup> 998447L: Diced/sliced peaches in drums exceeding 188kgs and cans exceeding 4.1kgs, aseptically packed, with no additives

- information obtained during MBIE’s verification visit to HWL
  - responses to importer/exporter/manufacturer questionnaires
  - submissions by interested parties
  - relevant information arising from MBIE’s independent research into matters arising during the course of the reconsideration
  - relevant information subsequently made available and projected information, to recognise the Judgment’s requirement that MBIE “consider past, present and future conduct in the import of the relevant products.”
39. As this is not a new review, MBIE may use text of previous reports for the reconsideration where there has been no change to the facts or may amend text to reflect changes resulting from the reconsideration.
40. In light of the Judgment, when conducting its reconsideration of the review of peaches from Spain, MBIE will circulate to all interested parties a non-confidential version of the information received subsequent to the release of the Interim Report in the original review and other information it relied on subsequent to the Interim Report in the review.
41. The information relied on in the reconsideration will be summarised in the Interim Report outlining the essential facts and conclusions likely to form the basis for the outcome of MBIE’s review (reconsideration) under section 14(8) of the Act.

***E. Timeframe and Procedures***

42. MBIE intends to complete the reconsideration as quickly as possible. It is expected that the reconsideration will be completed within 180 days of the reconsideration being initiated, unless there are extenuating circumstances. At this stage, the proposed time line for the process is as follows:
- Notice of the initiation of reconsideration in March 2019.
  - Issuance of Questionnaires to interested parties for information – issued with advice of initiation, and response to be provided by April 2019. Questionnaires will be sent to exporters, foreign manufacturers and importers. HWL will be asked to provide up-to-date information. Non-confidential versions of questionnaire responses and submissions will be circulated to all parties.
  - MBIE may choose to carry out on-site or desk top verification of information provided by HWL and foreign manufacturers depending on the receipt of relevant information.
  - Following consideration of the information available and the matters raised, and in light of the Judgment, MBIE will publish an Interim Report, possibly by August 2019. The Interim Report will set out the advice of the essential facts and conclusions that will likely form the basis for any final determination to be made.
  - There will be a period of at least 10 working days to allow interested parties to make submissions on the Interim Report before the Final Report is prepared for the Minister.

- Where information is made available in response to the Interim Report, MBIE will circulate that information to interested parties and will provide a further 10 working days for comment on any substantive new material.
- On the basis of the Interim Report and the comments received on it, MBIE will prepare the Final Report as the basis for the Minister's final determination.
- Subject to this timetable, a final determination could possibly be made in September 2019.

At the end of the review, MBIE will conclude whether or not there is a need for anti-dumping duties. If there is a need to apply duties, the Minister may determine a new rate or amount of duty following a reassessment by MBIE under section 14(6) of the Act. If there is no need to apply anti-dumping duties, the duties will lapse.

### **Invitation for Submissions**

43. Interested parties are invited to make submissions in relation to the reconsideration at: [traderem@mbie.govt.nz](mailto:traderem@mbie.govt.nz).
44. The Ministry is required to ensure that all interested parties have reasonable opportunity to access all non-confidential information used by the Ministry in the reconsideration. Non-confidential information used in the investigation is contained on the Ministry's public file for this reconsideration. Interested parties and members of the public are able to request copies of any documents which have been placed on the public file.
45. Any information which is by nature commercially confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect on the person supplying the information or upon the person from whom the information was acquired) or which is provided on a confidential basis by parties to an investigation will, upon good cause being shown, be treated as confidential by the Ministry.

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8 March 2019