



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI

**TRADE  
REMEDIES  
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# **Note on the basis for reconsideration**

## **Preserved Peaches from China**

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# Note on the Basis for Reconsideration of Review of Preserved Peaches from the People's Republic of China

## Purpose

1. This Note sets out the basis for the reconsideration by the Ministry of Business Innovation and Employment (MBIE) of the sunset review of preserved peaches from the People's Republic of China (China), following a statement of claim for judicial review by the New Zealand producer Heinz Wattie's Limited (HWL) and subsequent Orders of the High Court of New Zealand.
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 process is aligned with 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]<sup>1</sup> and Court Orders resulting from settlement of the claim made in respect of preserved peaches from China.
4. 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 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).
5. The proposed process for the reconsideration was sent for comment to the Government of China (GOC) and HWL prior to initiation.
6. HWL considered the proposed process and provided no further comments.
7. The GOC considered the proposed process and emphasised the importance of taking an approach that is consistent with the relevant WTO rules in order to protect the legitimate rights of Chinese companies.
8. MBIE will take this into consideration, and notes that it takes a rules-based approach to trade remedies investigations which is fair and robust.

## Background

### 2017/18 Review

9. New Zealand first imposed anti-dumping duties on preserved peaches from China on 21 August 2006. MBIE initiated a review under the Act of the imposition of anti-dumping duties on 14 July 2017, following the receipt of an application from HWL providing

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

positive evidence justifying the need for a review. This was the second review of the need for the duties.

10. The goods under review were described as:

*Peaches in preserving liquid, in containers up to and including 4.0 kg*
11. HWL is the sole New Zealand producer of preserved peaches “like” those imported from China, and constituted the domestic industry for the purposes of the review.
12. Following the initiation of the review, MBIE requested information from identified importers, two intermediary exporters and a sample of Chinese manufacturers accounting for 86 per cent of the preserved peaches exported from China to New Zealand in the year ended 30 June 2017.
13. Three of the importers responded fully to MBIE’s questionnaire and one other provided a limited response. A full response was made by one intermediary exporter and a limited response by the other exporter. Limited responses were received from two of the Chinese manufacturers but no responses were received from the other two manufacturers.
14. MBIE released an Interim Report to interested parties in December 2017. Interested parties were given the opportunity to make submissions on the Interim Report, which were considered by MBIE in its Final Report.
15. 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 found that two of the Chinese manufacturers were dumping, but one of these was dumping at below the *de minimis* level of 2 per cent. Dumping by the other manufacturer was also considered not to be causing material injury because its exports were for the charity sector, and not competing with goods produced by HWL.
16. MBIE concluded that:
  - “the expiry of anti-dumping duties on preserved peaches from China would not be likely to lead to a recurrence of dumping capable of causing material injury to the domestic industry”
  - “the continued imposition of anti-dumping duties on preserved peaches from China is not necessary to prevent a recurrence of dumping causing material injury to the New Zealand industry.”
17. The review, which was conducted in accordance with New Zealand legislation and the AD Agreement, was completed in February 2018 and resulted in the termination of the anti-dumping duties with effect from 17 July 2017. The Final Report for that review can be found at <https://www.mbie.govt.nz/assets/61d16d11c1/final-report-on-preserved-peaches-from-china.pdf>.

## **Court Order**

18. On 3 August 2018, HWL lodged a Statement of Claim in Judicial Review which challenged MBIE's findings in respect of dumping and the termination of anti-dumping duties.
19. Following conferral between the claimant and MBIE, Court directions were sought. The High Court subsequently issued a Court Order based on the directions in *Heinz Wattie's Ltd v MBIE*<sup>2</sup>. The Court Order:
  - Quashes the decision of the Minister of Commerce & Consumer Affairs of 8 February 2018 to terminate the anti-dumping duty.
  - Directs MBIE to re-consider its sunset review of the justification for an anti-dumping duty against Chinese preserved peaches.
  - Directs MBIE to conduct the re-consideration of the review on terms that consider past, present and future conduct in the import of the relevant products but without triggering s 14(9)(b) of the Act, with the consequence that any anti-dumping duty is only to be restored once a decision justifying such duty is made and then only prospectively from the date of such decision.
  - Directs MBIE to conduct the reconsideration on the terms of the Dumping and Countervailing Duties Act 1988 in force as at July 2017 when MBIE initiated the sunset review.

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

20. The Minister's decision to terminate anti-dumping duties was quashed by the Court Orders. No duties will apply during the reconsideration and anti-dumping duties will only be restored prospectively if and when a decision justifying duty is made.
21. The reconsideration under this process will effectively be a continuation of the review that was initiated on 14 July 2017. The quashing of the termination decision, by the Court Order, means that no final determinations have yet been made on the need for the continued imposition of the anti-dumping duties.
22. The reconsideration of the review will consider all of the information already available in respect of the review, as well as any new information. This will result in a new Interim Report and Final Report.
23. The reconsideration will be carried out in accordance with the Dumping and Countervailing Duties Act 1988 (the Act) as it stood at the time of the 2017/18 review, and will also need to take into account New Zealand's obligations under the WTO AD Agreement. No public interest test will be carried out as that is not 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).

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<sup>2</sup> *Heinz Wattie's Ltd v Ministry of Business, Innovation and Employment* [2018] NZHC 2309.

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 2018 to 31 December 2018 (the 2017/18 review analysed dumping over the year ended 30 June 2017).
  - Injury analysis - the Period of Review for Injury (POR(I)) is 1 January 2015 to 31 December 2018, where information is available (HWL's application for the review provided information from 2015).

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

In light of the Court Order resulting from settlement of the claim made in respect of preserved peaches from China, the matters to be reconsidered 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
  - c) If anti-dumping duties are necessary, a reassessment of the rate or amount of duty required.
27. The reconsideration of these matters will be set out in two further reports:
- An Interim Report
  - A Final Report.
28. 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. Parties will then have an opportunity to make submissions before the Final Report is prepared for the Minister.

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

29. Interested parties who will be given notice of the reconsideration will be those who are identified at 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 (namely exporters, foreign producers and importers of preserved peaches imported from China in the calendar year 2018), and the applicant in relation to the goods.
30. In the original review the interested parties included the New Zealand producer, HWL; the GOC; four Chinese manufacturers of the subject goods; two trading intermediaries; and four importers.

31. Interested parties will be confirmed once MBIE has received information from the relevant importers and exporters following initiation.

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

32. 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 responses from the four importers (one of which was partial), the two intermediary exporters (one of which was partial) and partial responses from two of the four selected Chinese manufacturers.
33. Information used in the reconsideration will consist of all relevant information available and used during the 2017/18 review or subsequently made available, in order to recognise the Court Order's requirement 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 during MBIE's verification visits to HWL
  - Responses to importer/exporter/manufacture questionnaires and Requests for Information
  - 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 Court Order's requirement that MBIE "consider past, present and future conduct in the import of the relevant products."
34. As this is not a new review, MBIE may use text of previous reports for the review where there has been no change to the facts or may amend text to reflect changes resulting from the reconsideration.
35. In light of the Court Order, when conducting its reconsideration, MBIE will consider all sources of information on the sales of preserved peaches in China and use retail pricing information as appropriate, including that provided by HWL in its application for the sunset review as a permissible relevant consideration for the normal value assessment.
36. 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 under section 14(8) of the Act.

#### ***E. Timeframe and Procedures***

37. 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.


38. The key steps in the reconsideration are as follows:

- Notice of the initiation of reconsideration.
- Issuance of Questionnaires to interested parties for information – issued with advice of initiation, and response to these expected to be provided within 30 or 37 days as appropriate. 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 significant relevant information.
- Following consideration of the information available and the matters raised, and in light of the Court Orders, MBIE will publish an Interim Report. 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.
- If substantive new material becomes available after the Interim Report, MBIE will circulate that information to interested parties and will provide a further 10 working days for comment on that substantive new material, if it is likely to be relied on to reach a conclusion contrary to that signalled in MBIE's Interim Report.
- 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.
- At the end of the review, MBIE will conclude whether or not there is a need for the continued imposition of anti-dumping duties. If there is a need for the continued imposition of the 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 for the continued imposition of the anti-dumping duties, the duties will lapse.

### **Invitation for Submissions**

39. Interested parties are invited to make submissions in relation to the reconsideration at: [traderem@mbie.govt.nz](mailto:traderem@mbie.govt.nz).
40. MBIE is required to ensure that all interested parties have reasonable opportunity to access all non-confidential information used by MBIE in the consideration. Non-confidential information used in the investigation is contained on MBIE'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.

41. 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 MBIE.



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