

**AUSTRALIAN CUSTOMS SERVICE
Trade Measures Branch
Customs Act 1901 - Part XVB**

Statement of Essential Facts No 52

CONTINUATION INQUIRY:

CANNED TOMATOES

**EXPORTED
FROM ITALY**

21 January 2002

CONTENTS

1	PURPOSE OF STATEMENT OF ESSENTIAL FACTS	1
2	ABBREVIATIONS	2
3	INTRODUCTION	3
3.1	Inquiry process.....	3
3.2	Public notification.....	3
3.3	Goods under inquiry.....	4
4	THE AUSTRALIAN INDUSTRY AND MARKET	5
4.1	Like goods	5
4.2	Industry structure.....	5
4.3	Production process	5
4.4	Market structure	6
5	THE ECONOMIC PERFORMANCE OF THE INDUSTRY.....	8
5.1	Applicants' claim.....	8
5.2	Assessment of the economic performance	8
6	CONTINUATION OF SUBSIDY	14
6.1	History of the measures	14
6.2	EC subsidy arrangements.....	15
6.3	Assessment of subsidy benefit.....	17
6.4	Conclusion	23
7	CUSTOMS' ASSESSMENT	24
7.1	Assessment procedure	24
7.2	Continuation of subsidy.....	24
7.3	Recurrence of material injury.....	25
7.4	Causal link.....	29
7.5	Conclusions	30

1 PURPOSE OF STATEMENT OF ESSENTIAL FACTS

Where Customs undertakes a formal 155 day inquiry on dumping or countervailing matters, the *Customs Act 1901* requires that a Statement of Essential Facts (SEF) be published by day 110 of the inquiry period. The SEF comprises the facts on which Customs proposes to base its recommendations to the Minister.

The purpose of a SEF is to allow interested parties the opportunity to comment on the essential facts in relation to an inquiry before a recommendation is made to the Minister.

In preparing its recommendation to the Minister, Customs is required to have regard to any submissions made in response to an SEF that are received within 20 days of the SEF being published. Customs is not obliged to have regard to any submission received after this period if, to do so, would prevent the timely preparation of the report to the Minister.

Submissions in response to the SEF may be sent (by pre paid post or delivered) to:

Director (Dumping Liaison)
Trade Measures Branch
Australian Customs Service
Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2601; or

by facsimile on (02) 6275 6990; or

by email to larry.roux@customs.gov.au

Any submissions in response to this SEF should also include a non-confidential version for placement on the Public File.

The Public File is available for viewing and copying by all interested parties by contacting the Trade Measures Branch Office Staff by telephone (02) 6275 6057 or by the Internet on dumping@customs.gov.au .

**The deadline for submissions in response to this SEF is
Monday 11 February 2002.**

2 ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACDN	Australian Customs Dumping Notice
ADA	Anti-Dumping Authority
ANICAV	Associazione Nazionale Industriali Conserve Alimentari Vegetali, Italy
Ardmona	Ardmona Foods Limited, Mooroopna, Vic.
Customs	Australian Customs Service
Customs Act	Customs Act 1901
EC	European Commission
ECU	European Currency Unit
ICCI	Italian Chamber of Commerce and Industry, Australia
kg	Kilogram
NA	Not Applicable
No.	Number
SEF	Statement of Essential Facts
SPC	S.P.C. Operations Limited, Shepparton, Vic.
WTO	World Trade Organization

3 INTRODUCTION

3.1 Inquiry process

Under section 269TM of the Customs Act, dumping and countervailing duty notices automatically expire five years after the date on which they were published, unless they are revoked earlier.

Section 269ZHB of the Customs Act stipulates that – not later than nine months before an anti-dumping or countervailing measure expires – Customs must announce that the notice is due to expire on a specified day and invite interested parties to apply to Customs within 60 days for the continuation of the measures. If no application for the continuation of the measures is received by Customs within the period allowed in the notice, the measures will automatically expire on the specified date.

If an application for continuation of an anti-dumping or countervailing measure is lodged and it complies with the legislative requirements, Customs must initiate a formal inquiry. Customs then has up to 155 days to inquire and report to the Minister on whether the measures should be continued.

Before recommending the continuation of the measures, Customs must be satisfied that the expiration of the measures would lead (or would be likely to lead) to a continuance of (or recurrence of) the material injury that the anti-dumping or countervailing measures were intended to prevent.

Where the Minister decides to continue anti-dumping or countervailing measures, the notice will remain in force after the specified date for a period of five years (unless the relevant notice is revoked before the end of that period).

Unlike the Minister's decision in relation to an investigation or a review of measures, the decision of the Minister in a continuation inquiry is not subject to review by the Trade Measures Review Officer.

3.2 Public notification

Customs announced in a notice in the *Australian Financial Review* of 9 July 2001 that the dumping and countervailing duties applying to imports of canned tomatoes from Italy were due to expire on 28 April 2002. The notice invited interested parties to apply, within 60 days from the date of the notice, for continuation of the measures.

An application was received from Ardmona Foods Limited (Ardmona) and SPC Limited (SPC), for the continuation of the countervailing measure for a further five years.

Following prima facie examination of the applicant's claims, Customs announced the commencement of an inquiry on 2 October 2001 in the *Australian Financial Review* and in Australian Customs Dumping Notice No 2001/57.

The application did not request the continuation of the dumping duty notice. Accordingly, the dumping duties will expire on 28 April 2002. This report, therefore, will focus solely on the issue of the countervailing measure.

During the inquiry, Customs undertook investigations at the premises of the following companies:

Canned tomatoes processors

- Ardmona; and
- SPC.

Importers

- Bon Food Pty Ltd;
- Conga Foods Pty Ltd;
- Leo's Import and Distributors Pty Ltd; and
- Valcorp Fine Foods Pty Ltd.

Customs also received submissions from the European Commission (EC) and combined submissions from the Associazione Nazionale Industriali Conserve Alimentari Vegetali in Italy (representing certain Italian exporters) and the Italian Chamber of Commerce and Industry (representing certain Australian importers) in Australia.

3.3 Goods under inquiry

The goods under inquiry are whole (peeled or unpeeled), diced or crushed tomatoes, canned in water or juice. Other processed tomato products, such as pastes, sauces and dried tomatoes packed in oil are not covered by the measures.

The notice imposing the measures in April 1992 covered all sizes of cans.

The three main can sizes are 500 gram, 800 gram and 3 kg. The net content of the cans vary considerably; for example the net contents of 500 gram cans vary from 400 to 450 gram while the net content of the 3 kg ranges between 2.5 to 2.9 kg.

Canned tomatoes are classified under sub-headings 2002.10.00 (statistical code 60 and 61) and 2002.90.00 (statistical code 30 and 31) in Schedule 3 to the *Customs Tariff Act 1975*. Prior to July 1999, canned tomatoes were classified to 2002.10.00 (statistical codes 08 and 09).

Since January 1998, imports of canned tomatoes from Italy have attracted a tariff duty of 5 per cent.

4 THE AUSTRALIAN INDUSTRY AND MARKET

4.1 Like goods

In the context of a dumping or subsidy inquiry, subsection 269T(1) of the Customs Act defines “like goods” as follows:

“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.

From its investigations, Customs confirmed that the Australian industry produces canned tomatoes at the respective plants in Victoria. Accordingly, Customs is satisfied that the canned tomatoes produced in Australia are like goods in terms of subsection 269T(1) of the Customs Act to the canned tomatoes exported from Italy.

4.2 Industry structure

Subsection 269T(4) of the Customs Act specifies that the Australian industry consists of the producer or producers of like goods in Australia.

The application stated that Ardmona and SPC accounted for the majority of the total Australian industry production of canned tomatoes. Another smaller producer of canned tomatoes is Windsor Farm Foods Pty Ltd (previously Cowra Export Packaging).

From the information available, Customs is satisfied that Ardmona and SPC effectively constituted the Australian Industry producing canned tomatoes.

The major Australian producers are located in Victoria - SPC at Shepparton and Ardmona at Mooroopna. Both companies produce a wide range of processed fruit and vegetable products.

In September 2001 it was publicly announced that both companies would be merged to form a new entity. This formally occurred on 3 January 2002 and the new entity is known as SPC Ardmona Limited.

4.3 Production process

Ardmona and SPC source fresh tomatoes from growers in Victoria and NSW. The growers deliver the tomatoes to the processors on the same day as they are picked. Similarly, the processors aim to bring the fresh tomatoes to the ‘bright can’ stage (that is, an unlabelled can) within 24 hours of delivery.

Once tomatoes are received at the canning factory, they are washed, graded and steam peeled. The tomatoes may be left whole or diced or crushed prior to being put into cans. After juice is added, the cans are then sealed and cooked. The 'bright cans' are warehoused pending sale. Labelling normally occurs just prior to sales confirmation.

Subsections 269T(2) and 269T(3) of the Customs Act specify that for manufactured goods to be regarded as produced in Australia:

- they must be wholly or partly manufactured in Australia; and
- where the goods have been partly manufactured in Australia, then at least one substantial process in the manufacture of the goods must be carried out in Australia.

Customs has examined the operations of the Ardmona and SPC and is satisfied that both companies wholly manufacture and produce canned tomatoes in Australia.

Customs is also satisfied that canned tomatoes produced in Australia do not fall within the legislative provisions under subsection 269(T)(4B) relating to close processed agricultural goods. This provision states, among other things,

“that processed agricultural goods derived from raw agricultural goods are not to be taken to be close processed agricultural goods unless the Minister is satisfied that:

- (a) the raw agricultural goods are devoted substantially or completely to the processed agricultural goods.....”.

In this regard, Customs notes that the annual fresh tomato harvest in Australia is neither completely nor substantially destined for use in canned tomato production.

4.4 Market structure

The Australian canned tomatoes market is supplied by local production and by imports from a number of countries, including Italy.

The canned tomatoes are sold either as whole peeled, diced, crushed or mixed (that is, mixed with another additive such as basil). The mixed category is sometimes also referred to as value added product. Based on the information available, Customs noted that the biggest category is whole peeled, followed by diced and then mixed. Canned tomatoes are sold under at least 60 different labels in the Australian market.

Broadly, the market for canned tomatoes comprises the following segments:

1. sales to the major supermarkets (such as Coles, Woolworth/Safeway and Metcash – a hybrid group serving a number of independent super markets);

2. sales to continental stores and smaller foodstores; and
3. sales to the food services industry. This segment mainly consists of sales to the catering industry, restaurant trade and institutions such as hospitals, nursing homes and prisons.

Customs found that the Australian industry and the importers (visited by Customs) had a similar understanding of the size of the major supermarket segment of the Australian canned tomatoes market. Neither group was able to estimate the size of the other two segments of the market.

To gain an understanding of the size of the retail sector (comprising major supermarkets and continental stores) and the food services segment, Customs used sales information provided by the Australian industry and import records. The latter source was extracted from the Customs commercial database where can sizes were clearly identified. Where identified, Customs excluded from its assessment those tomatoes not packed in cans (for example, in aseptic bags).

Based on the can sizes (and volumes) identified from the Australian industry sales records and the import data, Customs estimated the size of the retail sector (that is, the major supermarkets and the continental stores) and that of the food services segment. In this, Customs assumed that all can sizes of less than one kg went to the retail sector while those can sizes above this weight were sold to the food services segment.

Using this methodology, Customs found that the retail sector was more than twice the size of the food services segment.

However, Customs also identified a significant amount of canned tomato imports that could not be allocated to either the retail sector or to the food services segment due to a lack of information of the can sizes. Of this amount, almost ten tonnes were sourced from Italy.

5 THE ECONOMIC PERFORMANCE OF THE INDUSTRY

Customs must consider whether the expiration of the countervailing measure is likely to lead to a continuation, or recurrence, of the material injury that the measure was intended to prevent. For this reason, Customs examines in this chapter the economic performance of the Australian canned tomatoes industry.

5.1 Applicants' claim

In its application, the Australian industry did not claim that it is currently suffering material injury.

5.2 Assessment of the economic performance

5.2.1 Volume trends

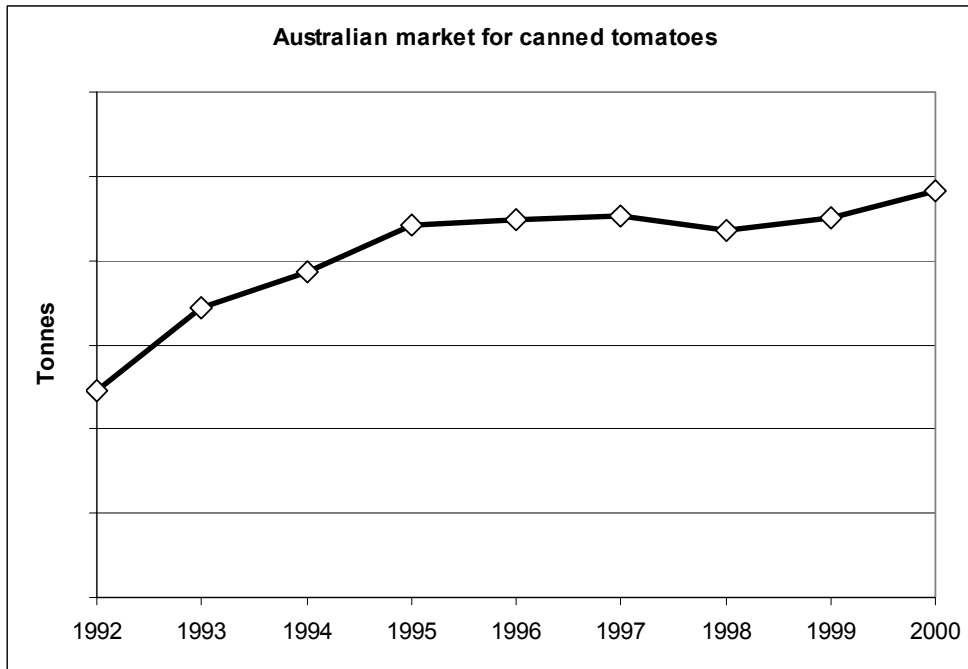
Customs examined the Australian market covering the period 1992 to the first half of 2001. Customs relied on the market analysis in ADA report no. 169 for the period 1992 to 1996. For the period 1997 to the first half of 2001, Customs used actual sales information provided by the Australian industry and import data extracted from the Customs' commercial database. Where identified, Customs excluded from the import data those products that were clearly misclassified as well as those not subject to the investigation, such as tomatoes packed in aseptic bags.

During the period of investigation, the Australian industry had imported a quantity of canned tomatoes. Sales of these imports have been included in the sales data for the Australian industry. To avoid double counting, Customs excluded these imports from the import data. Customs found that the imports from Italy by the Australian industry were of a particular can size and that these imports were negligible in terms of the total known imports of that can size from Italy.

Customs found that since 1992 the Australian market for canned tomatoes increased annually (with the exception of 1998). Customs estimated that the market grew by 6 per cent between 1996 and 2000.

The information available to Customs indicates that both the Australian industry and those importers visited by Customs underestimated the size of the Australian market for canned tomatoes.

The growth in the Australian canned tomatoes market is reflected in the following graph.



Sales by the Australian industry

Customs examined annual sales volumes of canned tomatoes by the Australian industry between 1996 and 2000 and the first half of 2001. Customs established that the sales volume increased each year between 1996 and 1999. In 2000, the volume declined slightly. Information provided for the first half of 2001 indicates a rise in the sales volume for 2001 on a pro rata basis. Customs found that the sales volume achieved by the Australian industry in 2000 was greater than in 1996.

Customs found that the main can size in terms of volume sold by the Australian industry was the 415 gram can, which comprised around half the annual sales volume.

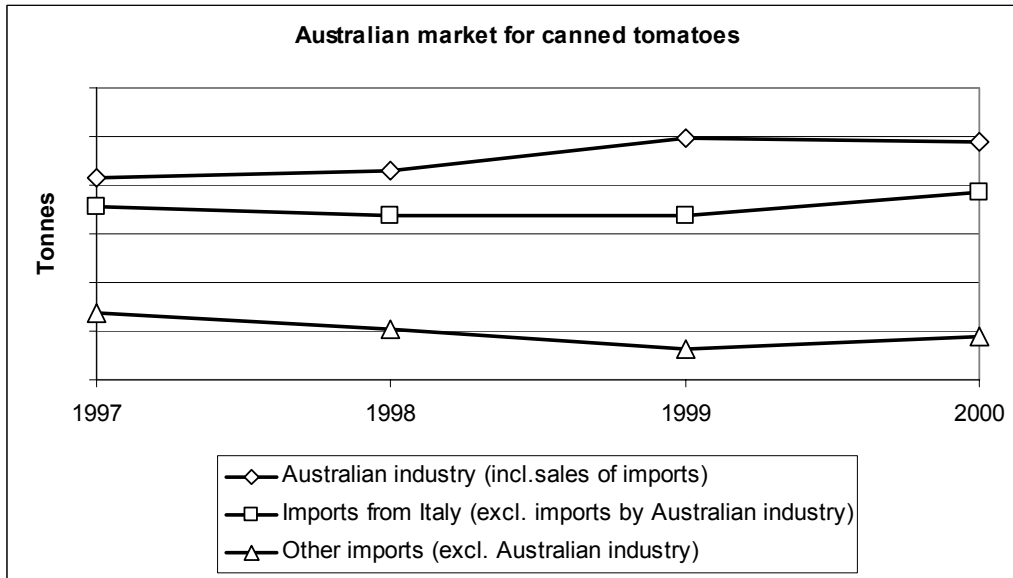
Import volume

Customs examined imports of canned tomatoes from all countries on an annual basis over the period 1997 to 2001. Total imports declined in 1998 and 1999 and then increased in each of the following two years. Customs found that total imports were 7 per cent greater in 2001 than in 1997.

For the period examined, Italy remained the prime source of imports of canned tomatoes. In 2001, Italy accounted for around 90 per cent of total imports of canned tomatoes. The balance of imports was largely sourced from Thailand and New Zealand.

Imports of canned tomatoes from Italy declined in 1998 and then increased in each of the following three years. Customs found that Italian imports in 2001 were 35 per cent greater than the import volume from that source in 1997.

The following chart shows the sales volume by the Australian industry and imports of canned tomatoes from Italy and other sources:

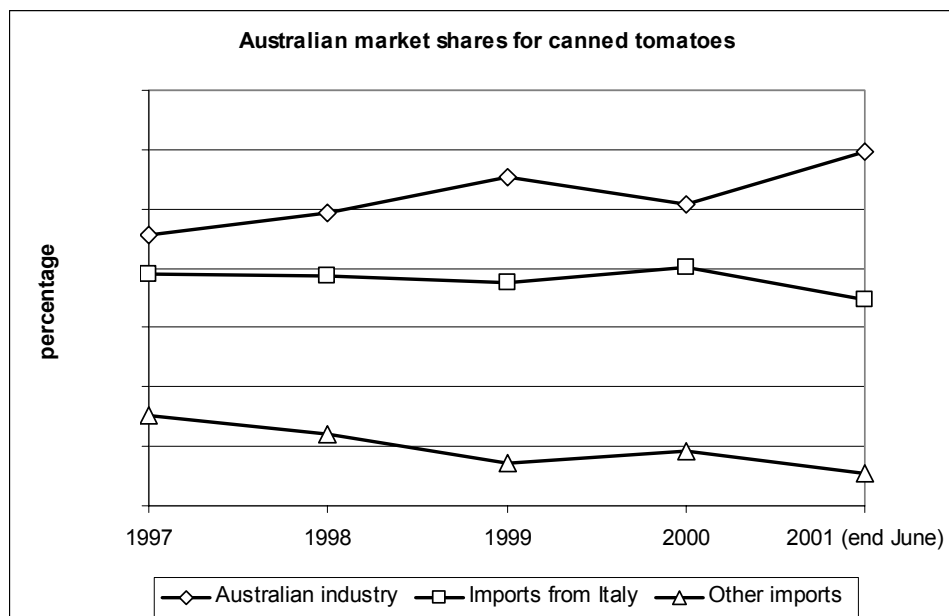


5.3.2 Market shares

Based on the evidence available, Customs found that the market share held by the Australian industry increased in 1998 and 1999, declined in 2000 and then increased in the first half of 2001.

The Australian market share held by Italian imports remained stable over the period 1997 to 1999 and then increased in 2000. In the first half of 2001, the market share declined. Customs found that the market share held by other imports fluctuated over the period examined. The share held by these imports in the first half of 2001 was less than in 1997.

The market share movements are shown in the following graph:



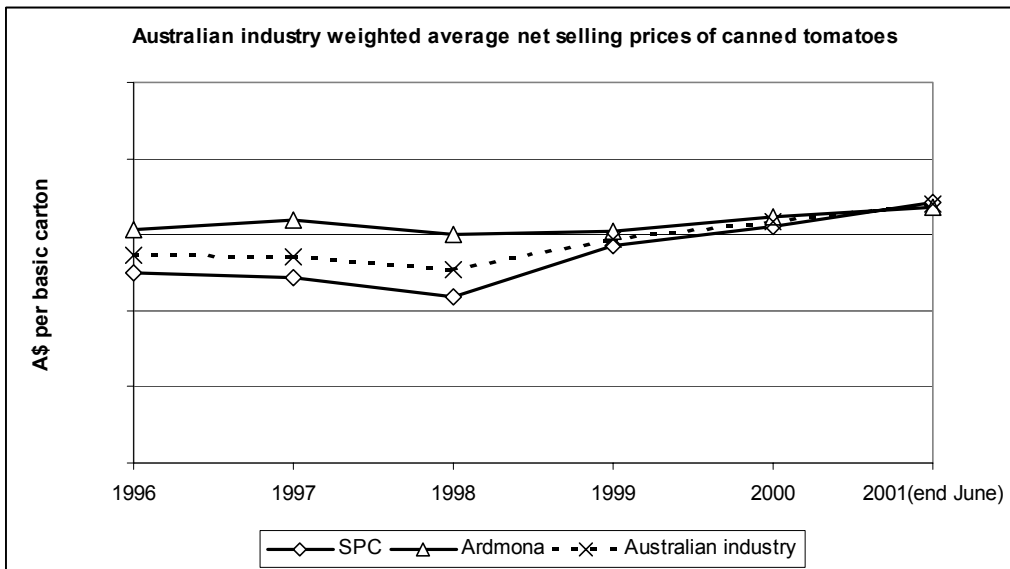
5.3.3 Price trends

Australian industry

Customs examined the price information provided by Ardmona and SPC for the period 1996 to the first half of 2001.

In its examination Customs focused on can sizes 415 gram and 3 kg because they accounted for the majority of Australian industry sales. Over the period examined, Customs found that the weighted average selling prices for Ardmona and for SPC for these cans fluctuated within a narrow band. Customs noted that prices in 2001 were above those for 1996.

The graph below illustrates the annual weighted average selling prices for all can sizes for the Australian industry. The graph shows that prices achieved in the first half of 2001 were higher than those achieved in 1996.



Price undercutting

Price undercutting occurs when a company sells goods at a price below that of its competitors.

In addition to the information gathered from the Australian industry, Customs obtained pricing information from the four importers visited by Customs. These importers represented the majority of imports of canned tomatoes. The pricing information covered 2000 and the first half of 2001 and included extractions from sales records, sales invoices and price lists.

Customs compared the prices of Italian imported canned tomatoes with the prices of the SPC and Ardmona products of the same can size, variety and at the same level of trade.

Customs analysis showed that the prices of the selected imported canned tomatoes from Italy were, at times, lower than those of either SPC or Ardmona.

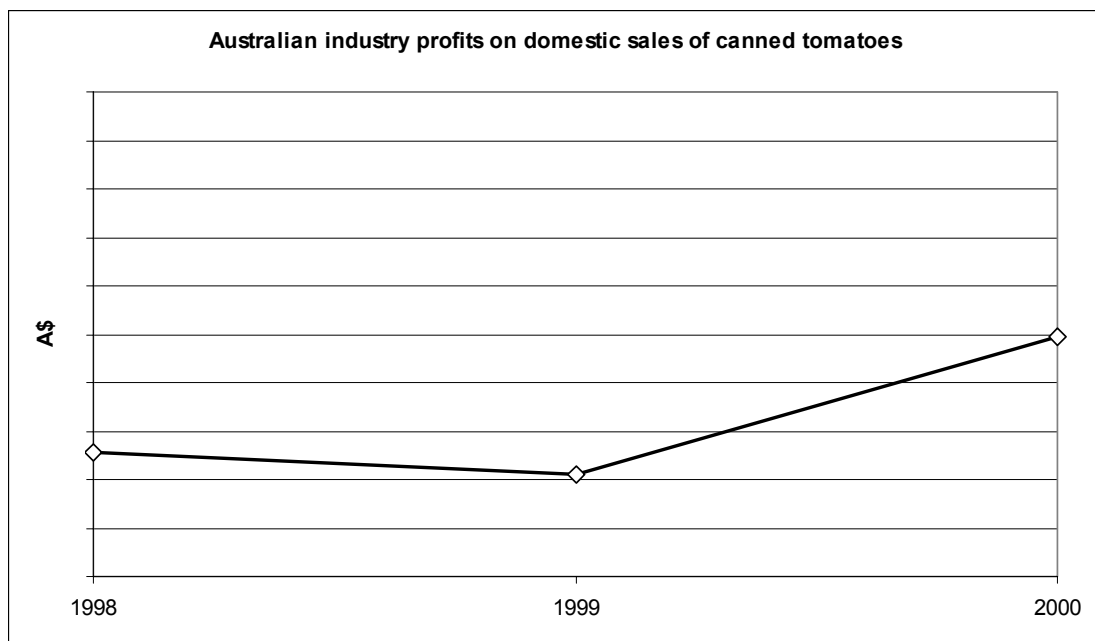
5.3.4 Profit

Customs analysed the trend in profits and profitability for the Australian industry covering the years 1996, 1998, 1999 and 2000. Customs was not able to analyse the profits for the Australian industry for 2001 as the twelve month cost data was not available at the time of this report.

For 1996 data, Customs relied on the information provided by the Australian industry during the 1997 ADA continuation inquiry. Because of the lack of readily accessible costing data covering 1997 from one of the two local producers, Customs was precluded from analysing profit and profitability for that year. For the period 1998 to 2000, Customs relied on detailed financial information provided by the Australian industry.

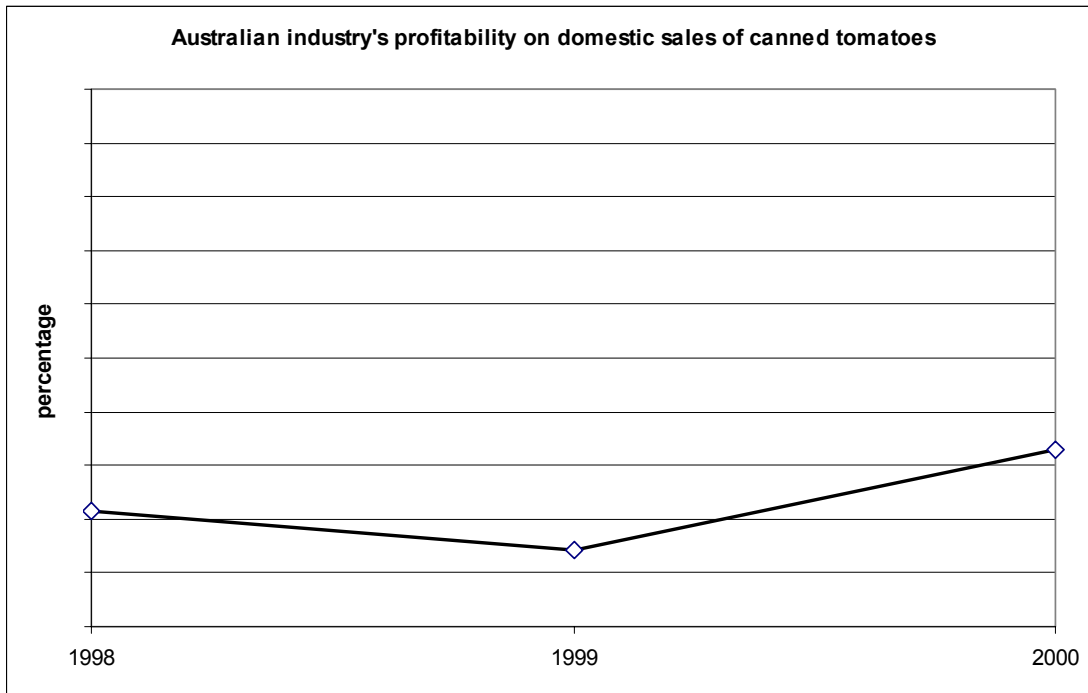
The Australian industry's profit declined from 1996 to 1999 and then increased significantly in 2000. The profit for 2000 was greater than the profit achieved in 1996.

The following graph illustrates the trend in profit from 1998 to 2000.



5.3.5 Profitability

The following graph shows the Australian industry's profitability (profits expressed as a percentage of sales) from 1996 to 2000. It shows that profitability declined in 1999 and then increased in 2000.



5.4 Conclusion

Customs' analysis of the available information for the period examined has shown that since the continuation of the measures in 1997:

- *the Australian industry has increased its sales volume and market share;*
- *the Australian industry's weighted average selling prices for canned tomatoes have increased; and*
- *the profit and profitability of the Australian industry have improved.*

On the basis of the available evidence, Customs concludes that the Australian canned tomatoes industry is not suffering material injury.

6 CONTINUATION OF SUBSIDY

One of the main issues to be addressed by Customs in this continuation inquiry is whether the expiration of the countervailing measure would lead to a continuation, or recurrence, of the subsidised imports. This chapter examines the information obtained during the inquiry on the subsidy arrangements.

6.1 History of the measures

A summary of the history of the imposition of countervailing duties on canned tomatoes from Italy is as follows:

- In April 1992, the then Minister for Customs accepted the recommendations of the Anti-Dumping Authority in its report (No. 68 of April 1992) and imposed countervailing duties on canned tomatoes from Italy, Spain and Thailand and dumping duties on the same goods from Italy and China.
- Following a Federal Court challenge by an Italian exporter, the countervailing and dumping duties on canned tomatoes from Italy were removed in June 1993. A subsequent appeal to the Full Bench of that Court by the ADA and the Minister reinstated the duties. In February 1994, as a result of the Court decision, importers were advised that dumping and countervailing duties would be payable on future imports but that the amount of duty was to be reassessed. This was addressed in ADA report No. 124 of May 1994.
- Also in May 1994, exporters from Italy and Thailand sought a revocation of the countervailing and dumping duties on canned tomatoes. The recommendations in the subsequent ADA report (No. 137 of September 1994) not to revoke the duties on canned tomato imports from Italy were accepted by the Minister.
- A request by importers of canned tomatoes from Italy for a review of the level of the countervailing duties resulted in a review by Customs in January 1996. The Customs review report (Dumping Finding No. 96/02) reflecting the reductions in the subsidy amounts was accepted by the Minister.
- A continuation inquiry by the ADA (Report No. 169 of March 1997) recommended that the countervailing and dumping duties on canned tomatoes from Italy be continued for a further five years. This was accepted by the Minister.
- There has been no review since the measures were continued in April 1997.

6.2 EC subsidy arrangements

As part of its assessment of the subsidy arrangements applying to exports of canned tomatoes from Italy, Customs considered submissions and/or information from the EC, the Australian industry and the Department of Foreign Affairs and Trade. Customs also extracted publicly available information on EC regulations via the Internet.

Since 1978/79 the EC has operated a **production aid system** for processed tomatoes. This includes products such as tomato paste, tomato juice, tomato sauce, etc. as well as canned tomatoes. The subsidy system has been subject to several changes over its twenty four year period of operation to date.

Since the countervailing duties were continued in 1997, there have been two major changes to the EC subsidy arrangements for processed tomatoes.

Under Council Regulation No. 2201/96 of 28 October 1996, the EC continued the production aid system based on subsidies paid to tomato processors for purchasing fresh tomatoes from growers at not less than prescribed minimum prices. The subsidy amount was based on the net weight of the processed product and, for canned tomatoes, varied according to the variety of tomato and the degree of processing involved.

The Regulation was designed to strengthen the role of the producer organisations in the contractual arrangements between the growers and the processors. The proportion of contracts between processors and growers was scheduled to decline to no more than 25 per cent of the total contracted quantity by 2001/02. The changes took effect from 1997/98.

In another modification to the subsidy arrangements, Council Regulation No. 2699/2000 of 4 December 2000 changed the subsidy payments from the processors to the producer organisations representing the growers. The subsidy amounts granted to the producer organisations for the quantities delivered under contracts to processors were, in turn, to be paid to the grower members. The Regulation also amended the method of fixing the subsidy amount in terms of the weight of raw materials and discontinued the minimum price arrangements.

The amount of aid for processing tomatoes was said to be fixed on the basis of aid granted in the most recent marketing years preceding 2001/02. One of the stated outcomes of the changes was that the overall support for the tomato processing sector would be maintained at roughly the same level as in 1999/2000.

The EC advised that the production aid subsidy amount for fresh tomatoes contracted for processing would be fixed at €34.5 per tonne for an indefinite period. The €34.50 per tonne paid to the growers was stated to correspond to €41.40 for processed tomatoes (that is, 1.2 kg of fresh tomatoes are required to produce 1 kg net weight of peeled tomatoes).

In addition the EC also operates an **export refund system** for fruit and vegetables including canned peeled tomatoes containing more than one kilogram net weight of tomatoes. This grants a specific payment amount to exporters of these products. The purpose of the export subsidy is stated to cover the difference between EC domestic market prices and world prices to enable the EC goods to be sold in export markets.

During this inquiry, Customs identified the only exports of canned peeled tomatoes from Italy to be eligible for the export subsidy were those in can sizes of 2.55 kilogram (ie otherwise known as A9 can size). Customs noted that the export refund subsidy amount for canned tomatoes has declined since 1997.

The annual production aid and export refund amounts are shown below:

CANNED TOMATOES: EC SUBSIDY ARRANGEMENTS

	1997/98* Paid to processors	1998/1999* Paid to processors	1999/00* Paid to processors	2000/01* Paid to processors	2001/02* Paid to growers
	ECU/tonne	€/tonne	€/tonne	€/tonne	€/tonne
Production aid					
-San Marzano, whole peeled	101.77	92.76	82.15	82.15	
-Roma, whole peeled	61.01	55.61	57.94	57.94	
-Peeled tomatoes (from EC submission)	71.72	65.42	57.94	46.04	
-all fresh tomatoes contracted for processing					34.50
	Paid to exporters	Paid to exporters	Paid to exporters	Paid to exporters	Paid to exporters
Export refund (only for cans above 1 kg net weight) -all peeled tomatoes, whole or in pieces	45	50	50	45	45

* Marketing year from 15 June to 14 June

Note: ECU: European Currency Units €: Euros (1ECU=1€)

6.3 Assessment of subsidy benefit

6.3.1 EC submissions

In its submissions, the EC contended that the revisions to the production aid system in 2000 no longer conferred a direct benefit to the processors of the canned tomatoes exported to Australia. The new system operating from the 2001/02 marketing year abolished the minimum prices to the growers of fresh tomatoes and opened the transactions between the growers and the processors to market influences. These transactions were said to be arms length and made under “normal market conditions”.

In addition the EC pointed to the reduced amount of subsidy involved and that this was not going to be reversed. The EC said there was no likelihood of a recurrence of the subsidy at the levels that were found in the original dumping investigation because of its adherence to the WTO subsidy reduction requirements.

The EC stated that Customs must demonstrate that the production aid conferred a benefit (in the context of Article 1 of the WTO Subsidies Agreement) to the processors – that is, the producers of the canned tomatoes exported to Australia. It was not sufficient to presume that there is an “indirect” or “upstream” benefit that flows from the payment to the tomato growers, since the latter group does not produce the canned tomatoes that are subject to the countervailing duties.

In support, the EC referred to a recent WTO appellate body finding concerning action by the United States of America in imposing countervailing duties on certain hot rolled lead and bismuth carbon steel products exported from the United Kingdom. Based on the findings in this case, the EC contended that Australia has a legal obligation to demonstrate that the aid to tomato growers has been ‘passed through’ to the processors.

According to the EC, there was no countervailable “upstream” subsidy in the present case because there was no evidence that the two main conditions for this existed. These were said to be:

- the price for the subsidised input (fresh tomatoes) is lower than the price the processor would pay for an unsubsidised input in a normal arms length transaction; and
- the authority that provides the subsidy sets the price so as to guarantee that the benefit of the subsidy is passed through to the buyer.

In the absence of positive evidence that the canners have bought tomatoes at less than the market price due to subsidisation, the EC maintained there was no basis for continuation of the countervailing action.

For the export refund system, the EC acknowledged that a subsidy was still paid to exporters but only for canned tomatoes containing one kilogram net weight of tomatoes or more. The annual subsidy had fallen by 35 per cent

since 1997 in compliance with the Uruguay Round Agreement. In this regard the EC pointed to Article 19.4 of the WTO Agreement on Subsidies and Countervailing Measures, which requires, in effect, that any calculation of the amount of a subsidy should be based on the current level.

6.3.2 Other submissions

Submissions were also received from the Associazione Nazionale Industriali Conserve Alimentari Vegetali (ANICAV) representing certain exporters of canned tomatoes from Italy as well the Italian Chamber of Commerce and Industry (ICCI) in Australia representing certain importers. These submissions largely echoed the points made by the EC.

An additional point raised was that even if the aid to producer organisations flowed through to the canners, this would not be a subsidy within s.269T of the Customs Act. This was said to be because the tomato canners no longer receive any production aid. Therefore there was “no longer a subsidy within the meaning of the Act in respect of the production or manufacture of canned tomatoes”. A reference to an earlier legal opinion regarding another subsidy case concerning wheel rims from South Africa was offered in support.

Another issue raised by the ANICAV and the ICCI related to the export refund system. The benefit of the refund amount to exporters was said to be reduced by an estimated one percentage point of the FOB export price because of the finance and administrative costs incurred. This net benefit was said to be further reduced by the increasing numbers of exporters not claiming the lower export refund amount. However, it was acknowledged that there was no evidence in support of this latter claim.

It was further claimed in the ANICAV and ICCI submissions that the Italian exporters of canned tomatoes were unable to receive the benefit of the export refund because the Australian Customs Service no longer certified customs entries. These certifications were used by the Italian exporters as evidence to EC authorities to prove export occurred. As a result the Italian exporters of 2.55 kg cans of canned tomatoes were claimed to no longer receive the export refund.

6.3.3 Customs' assessment

Any assessment of a subsidy by Customs must accord with the provisions of the Customs Act. In turn, the Customs Act reflects the requirements of the WTO Agreement on Subsidies and Countervailing Measures to which Australia is a signatory. The Customs Act defines a subsidy in relation to goods exported to Australia, in part, as:

a financial contribution:

.... by a public bodyof which the government of the country of export is a member....

that is made in connection with the production, manufacture or export of the goods and that involves

a direct transfer of funds from thatbody to the enterprise (by whom the goods are produced, manufactured or exported) contingent on particular circumstances occurring if that financial contribution confers a benefit in relation to those goods.

The following outlines Customs' assessment of whether the provisions of the Customs Act apply to the subsidy arrangements for processed tomatoes exported from Italy.

Legal Precedents

Customs examined the WTO appellate case cited by the EC and found that while countervailing duties were involved, the case related to a capital injection of funds by the Government to a Government-owned company that was subsequently privatised in an arms length transaction. The issue then was whether the capital injection (the subsidy) "travelled" when a change in ownership of the legal entity occurred.

As such, Customs questions the relevance of the issues raised in the case cited with those faced in respect to the subsidy for tomatoes used for processing. No past subsidies are involved and neither is the ownership of any entities an issue.

Customs noted the reference in the ANICAV and ICCI submissions to a legal opinion for an earlier case to determine whether a subsidy was paid by the South African government for certain wheel rims exported to Australia. This case dealt with export credits acquired by the exporter and the money received by the exporter on the transfer of the credits to other parties. This was not considered to be a "financial contribution" within the meaning of the Customs Act and therefore did not constitute a subsidy.

Again, the circumstances of the wheel rims case do not appear to relate to those of the subsidy arrangements for tomatoes used for processing. While there are export refunds for certain processed goods, there is no evidence of any export credits involved. Similarly, the production aid arrangements for processed tomatoes appear to have no relevance to the issues raised in the wheel rims case.

Financial Contribution by a Public Body

From the evidence available, there has been a production aid subsidy for tomato processing granted by the EC since 1978/79. While there have been several amendments to this system in recent years, the basic structure of a financial contribution by the EC for tomato processing in Italy and other EC countries has remained unchanged. The amount of the financial contribution for this purpose is advised at the commencement of each year.

Similarly, the EC has made available an export refund to exporters of certain processed tomatoes since at least 1990. This includes exports from Italy of peeled tomatoes in containers (cans, aseptic packs, etc.,) with a net weight of

1 kg or more. Again, the amount of the financial contribution is set each year by the EC.

Production, Manufacture or Export of the Goods

For a subsidy to fall within the definition in the Customs Act, there must be, among other things, a financial contribution made in connection with the production, manufacture or export of the goods. In this case, the goods are canned tomatoes which are a form of processed tomatoes. Therefore any subsidy made in connection with either the production, manufacture or export of processed tomatoes would satisfy this part of the legislative definition.

From 2001/02 onwards, the EC has amended the subsidy arrangements for processed tomatoes so that the subsidy (financial contribution) is now paid to producers of fresh tomatoes. However, the subsidy is only paid on the condition that the fresh tomatoes are supplied under contract for processing. In the absence of these conditions, no subsidy is paid.

Accordingly, the available evidence shows that there is a financial contribution made in connection with the production of fresh tomatoes that are destined to be processed. The resulting processed tomatoes manufactured from these subsidised fresh tomatoes include products such as canned tomatoes, some of which are exported from Italy to Australia.

Insofar as the export refund system is concerned, submissions from the ANICAV and ICCI claimed that the exporters no longer received the export refund because of a lack of documentation from Australian Customs. However, there was no evidence proffered in support other than some communications from Customs. From these, it appears that the previous practice of Customs providing a documentary certification of export consignments was dispensed with because it was no longer valid with the electronic import clearance system for commercial cargo operated by Australia.

Customs also noted that the revised International Convention on the Simplification and Harmonisation of Customs Procedures deals with the exportation of goods. Specifically Annex C, Chapter 1, Standard 3 relates to evidence of arrival at destination. The Standard includes a requirement that "The Customs shall not require evidence of the arrival of the goods abroad as a matter of course". Both Italy and Australia are signatories to this Convention. However, Customs sighted no evidence from authoritative EC sources of administrative changes to the export refund system that excluded exports of canned tomatoes to Australia from the export refund system.

Accordingly, Customs considers that the evidence for the export refund arrangements shows that the EC makes a financial contribution for the export of certain goods including canned tomatoes of 1 kg net weight or more exported to Australia from Italy.

Direct Transfer of Funds

Under this part of the legislative definition of a subsidy, there must be a direct transfer of funds from the public body to the enterprise by whom the goods are produced, manufactured or exported subject to particular circumstances occurring.

For the production aid arrangements applying from 2001/02, the EC paid a set production aid amount to producer organisations on the condition that the amount was paid to growers that contracted to deliver fresh tomatoes for processing in accordance with the prescribed arrangements. For those delivery contracts between processors and growers, the payments were made to the growers.

The existing export refund arrangements involve the EC making a financial contribution to exporters for the export of certain goods, including canned tomatoes with a net weight of 1 kg or more.

Benefit to Exported Goods

To assess whether a financial contribution made by the EC to growers for the production of tomatoes for processing was reflected in the canned tomatoes exported to Australia from Italy, Customs examined the operation of the production aid subsidy system.

Prior to the changes to the subsidy arrangements from 2001/02, the processors paid at least a minimum price to producers for fresh tomatoes. The minimum price was partly offset by the payment of a subsidy to the processors. The subsidy amount in 2000/01 represented a difference in costs to processors of 52 per cent. In other words, the subsidy offset a substantial proportion of the raw material costs incurred by processors in that year.

From 2001/02, the subsidy is being paid to the producers instead of the processors and no set minimum price applies. If all prices remained equal under these new arrangements, the producers would receive the equivalent of the full minimum price plus the subsidy. This would mean a substantial increase in the costs to the processors. Commercial reality indicates that the processors would not be able to continue to pay the equivalent of the minimum price to the producers in the absence of the subsidy that was available in 2000/01.

Instead, all things being equal, the processors would expect to pay no more in 2001/02 for fresh tomatoes than was paid in the previous year. This is demonstrated below using the minimum price for peeled tomatoes in 2000/01 as a reference:

Peeled Tomatoes: EC Subsidy Arrangements*

	Up to 2000/01	From 2001/02	From 2001/02
	€/tonne	€/tonne	€/tonne
		Scenario 1	Scenario 2
Subsidy	46	34.50	34.50
Minimum Price	88	NA	NA
Price paid by processors for fresh tomatoes			
-gross	88	88	42 (+ 41.40** = 83.40)
-net	42 (88 – 46)	88	42 (+ 41.40** = 83.40)
Price received by producers of fresh tomatoes (for processing)			
-gross	88	122.50 (88 + 34.50)	76.50 (42 + 34.50)
-net	88	122.50 (88 + 34.50)	76.50 (42 + 34.50)

* The above example is based on the minimum price being the sale price and there being no change in market circumstances between 2000/01 and 2001/02.

** Subsidy equivalent to produce one tonne of processed tomatoes.

From the above, the purchase price shown in scenario 1 would not be commercially acceptable to processors even though it is a continuation of the gross price paid in the previous year. The absence of an offsetting subsidy to the processor in 2001/02 would mean a substantial increase in the raw material costs. Cost increases such as these would encourage the processor to consider alternative options such as imports, notwithstanding the tariff barrier of 14 per cent for imports of fresh tomatoes into the EC.

Rather, with the changed arrangements for 2001/02, the processors would be expected to at least maintain (or reduce) the net cost for fresh tomatoes used for processing. This is shown in scenario 2. The burden of the reduced subsidy amount would be borne by the producers. This accords with statements in EC documents that the overall level of support for the tomato processing sector would be maintained at about the same level as applied in 1999/2000.

Customs is not convinced of the validity of the claims made in submissions by the EC that the transactions between the processors and producers were arms length and made under “normal market conditions”. No evidence has been provided to support these claims.

The commercial reality is that both processors and producers have operated in a subsidised environment for the past twenty four years and continue to do so. A market where one party sells goods (that benefit from a subsidy amount) to another party that is required to process the goods is not considered by Customs to be normal. Selling arrangements in such a market would be distorted by the impact of the subsidy.

Customs also notes that if the subsidy was intended to only benefit the grower, there would be no need for discrimination between the end-uses of the fresh tomatoes. However, as the aid is only paid to the grower when the tomatoes are used for processing, it follows that there is intended to be a benefit passed to the end-user – in this case the processor.

From this, Customs concludes that the subsidy paid to producers of fresh tomatoes used for processing in Italy continues to benefit the tomato processors in that country. The benefit shows in that the purchase price of fresh tomatoes is much lower than it had been previously. The extent of the subsidy benefit in terms of finished processed tomatoes is €41.40 per tonne. The cost of production for processed tomatoes is lower than otherwise because of the benefit provided by the subsidy to the producer. The resulting production cost benefit is reflected in the export price of canned tomatoes from Italy to Australia.

Customs notes that while the amount of the export refund payable by the EC has fluctuated between €45 and €50 per tonne since 1998, there remains a benefit payable to exporters in Italy of certain canned tomatoes. In 2001/02, the amount of this benefit is €45 per tonne of processed tomatoes. Customs estimated this to be almost 5 per cent of the FOB export price for the most popular can size in the category of one kilogram and over in the last quarter of 2001.

Actionable subsidy

Based on the evidence available, Customs considers that the production aid and the export refund systems operated by the EC fall within the definition of an actionable subsidy under the Customs Act.

6.4 Conclusion

From the above, Customs concludes that a countervailable subsidy continues to be provided by the EC for the benefit of processed tomatoes. In turn, this provides assistance to the processors of tomatoes in Italy. As a result, any canned tomatoes exported to Australia are at subsidised prices.

7 CUSTOMS' ASSESSMENT

Subsection 269ZHF(2) of the Customs Act states that

The CEO must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the CEO is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.

It is important to note that the test to be applied by Customs is a positive one. In other words, Customs needs to be satisfied that material injury caused by subsidisation is likely to occur. Customs is not able to recommend that measures continue on the basis that it cannot be satisfied that these events will not occur (that is, a negative test).

The main issue to be addressed by Customs in this continuation inquiry is whether the expiration of the countervailing measures would lead to the recurrence of material injury to the Australian tomato canning industry by subsidised imports of canned tomatoes from Italy.

7.1 Assessment procedure

Under the Australian legislation (and the WTO Subsidies Agreement), there are three issues to be addressed in considering whether the countervailing duty in this case should be continued. These are whether:

- there is likely to be a continuation of the subsidisation of the imported goods;
- there is likely to be a recurrence of material injury suffered by the Australian industry; and
- there is a causal link between the subsidised imports and any likely recurrent material injury.

Each of these issues is addressed in the following.

7.2 Continuation of subsidy

In its submission the EC contended that as the subsidy is now paid to the tomato grower, there is no benefit to the tomato processor. In addition the EC claimed that a market price for tomatoes used for processing would operate under the new aid system with no guaranteed minimum purchase price.

Based on the information available and in the absence of any substantive evidence from the EC of the operation of normal price system in a market affected by subsidy payments, Customs has concluded that the processors of

tomatoes in Italy benefit from the payment of a subsidy to the growers. The subsidy amount is €41.40 per tonne which is the processed tomato equivalent of the subsidy paid to the growers of fresh tomatoes to be used for processing.

While the available data shows that the amount of the subsidy has reduced since 1996, Customs notes that the subsidy - which is not insignificant - continues to be paid and will be paid for the foreseeable future.

Similarly, Customs found that the export refund subsidy continues to be paid to Italian exporters for exports of canned tomatoes with a net weight of one kilogram or more. The amount of the subsidy in 2001/02 is €45 per tonne.

Conclusion

From the evidence obtained in this inquiry, Customs is satisfied that countervailable subsidies will continue to be paid for the foreseeable future by the EC for the processing of tomatoes and for certain exports of canned tomatoes. Customs is also satisfied that the prices of canned tomatoes exported from Italy benefit from the subsidy amounts.

7.3 Recurrence of material injury

In respect to material injury to the Australian industry, Customs has found that since the last review of the measures in 1996, the Australian industry has consolidated its position. While the Australian industry has not suffered material injury during this period when countervailing measures have been in place, the issue to be addressed is whether there is likely to be a recurrence of material injury if the measures are not continued.

To address this issue, Customs examined the potential for imports of canned tomatoes from Italy at subsidised prices to occur.

7.3.1 Export prices from Italy

Using data from the TradStat World Trade Statistical Service, Customs examined the export prices from Italy of those processed tomatoes falling within Tariff item HS 20021010 over the period 1997 to 2000. This item covers peeled and unpeeled tomatoes (whether whole or in pieces) and preserved otherwise than by vinegar or acetic acid.

Customs found that the weighted average FOB export prices to Australia (in Lire) in 2000 were among the highest export prices from Italy. By comparison, the export prices to Australia exceeded the weighted average export prices to New Zealand in 2000 by over 15 per cent. In 2000 Customs found that over 90 per cent of total exports of processed tomatoes from Italy were priced below those exported to Australia.

The percentage difference between the export prices to Australia and all other countries are shown in the following table:

**Certain Processed Tomatoes: Exports from Italy
Difference between FOB Weighted Average Export Prices
Australia : All Countries
(Lire/tonne)**

	1997	1998	1999	2000
Percentage Difference	13%	17%	12%	23%

7.3.2 Impact of subsidy

Customs calculated the weighted average FOB export prices for the major sizes of canned tomatoes exported to Australia in the last half of 2001. Using this as a basis for comparison, Customs measured the impact of the respective subsidy amounts on these prices.

This showed that the benefit of the production aid to exporters in Italy of the 400 gram range of cans represented 7 per cent of the FOB price. For the 2.55kg cans, Customs found that the combined benefit of the production aid and the export refund amounted to 17 per cent.

Customs noted that these proportions were well above those defined as negligible countervailable subsidy amounts in s.269TDA (16) of the Customs Act. This section excludes those subsidies in developed countries that are less than one per cent of the export price.

7.3.3 Capacity for exports from Italy

Customs examined the worldwide production data of tomatoes for processing from the European publication, *Tomato News*. This data covered 1997 to 2001 and showed that Italian production of tomatoes for use in processing increased by 31 per cent over that period. Customs noted also that Italy continues to be one of the world's largest producers and exporters of processed tomatoes.

From the TradStat data, Customs noted that between 1997 and 2000 Italian exports of the processed tomatoes under consideration increased by 15 per cent. Over the same period exports to Australia increased by 5 per cent.

Throughout this period, the proportion of exports to Australia as a percentage of the total exports from Italy remained constant at 3 per cent, notwithstanding the increase in volume.

From the above Customs considers that Italy has a large tomato processing production capacity and that a relatively small volume of subsidised exports of these goods from Italy would be expected to have a substantial impact in a small market such as Australia.

In addition, Customs noted that Italy had exported processed tomatoes to over 130 countries in 2000 (which is the latest period for which export data is readily available). This demonstrates a capacity by the Italian tomato processing industry to have the flexibility to increase the volume of subsidised exports to Australia in the absence of countervailing measures.

7.3.4 Actions against exports from Italy

Customs examined the semi-annual WTO returns covering about anti-dumping and countervailing actions by members for the last half of 2000 and for the first half of 2001. There was no evidence of any countervailing actions against exports of processed tomatoes from Italy by countries other than Australia.

7.3.5 Imports from other sources

Using data from the Customs Commercial database, Customs noted that the volume of imports of canned tomatoes from sources other than Italy has declined by almost 60 per cent over the period from 1997 to 2001. Other than Italy, the only other noteworthy sources of canned tomato imports into Australia over this period, albeit minor, were from Thailand and New Zealand.

Customs noted that in 2001 the weighted average FOB export prices for canned tomatoes from Thailand and New Zealand were all above the comparable price for the same goods from Italy.

7.3.6 Selling prices of Australian industry

Some importers referred to the low prices of locally produced canned tomatoes on supermarket shelves in 2001. It was claimed that SPC and Ardmona saw strong growth due to heavy discounting at the expense of a decline in other brands.

During the inquiry Customs compared the delivered-into-store prices of the Australian industry with those of the comparable imported can sizes in 2000 and the first half of 2001. This showed that there was price undercutting, at times, by the imported canned tomatoes from Italy.

Customs queried the relevance of claims made by importers about retail prices on supermarket shelves. From the evidence provided, Customs noted that the majority of low priced brands were imported from Italy and that some of these were volume lines. However, Customs was not able to draw any definite conclusions from this supermarket price data because it involved an assessment of net margins by supermarkets. This was an additional level of trade and outside the scope of this inquiry which is directed at the prices to the supermarkets.

7.3.7 Profitability of Australian industry

Submissions by the EC, ANICAV and ICCI pointed to the healthy economic state of the Australian industry in recent years. This was confirmed by Customs investigations during this inquiry.

In the circumstances of this case where countervailing duties act to offset the impact of subsidies, it is not unexpected that the Australian industry has returned to profitability. This was the basis for which the duties were imposed in the first place.

In the absence of the countervailing duties, there is a strong likelihood that import prices would fall by the amount of the subsidies. As imports from Italy have a substantial share of the Australian market for canned tomatoes, the lower import prices are likely to have an adverse impact on the profitability of the Australian industry.

7.3.8 Non-injurious FOB price

Pre-1993 countervailing measures operate like a minimum export price scheme. There is no countervailing duty to be paid on imports except where the export price is below the prescribed minimum export price. In the case of pre-1993 countervailing duties, the minimum export price is set at the non-injurious free-on-board price (NIFOB).

A NIFOB price is the minimum price necessary to prevent injury or the recurrence of injury to the Australian industry caused by subsidisation and/or dumping. To establish the NIFOB price, Customs first determines an 'unsuppressed selling price' (USP) for the goods in Australia – that is, what price the Australian industry would be selling the goods for in the absence of subsidisation and/or dumping. From the USP, Customs deducts all relevant costs that would be incurred by an importer including overseas freight and insurance to arrive at an FOB price.

In determining a USP, Customs first preference is to look to the marketplace for guidance. Customs looks for prices of the locally produced goods at a time when the market was not affected by subsidisation. For the purposes of this inquiry, Customs has used the weighted average selling prices achieved by the Australian industry in the first half of 2001 to establish the USP.

Customs calculated the weighted average overseas freight costs, post importation charges and selling and administration costs incurred by the four importers visited during this inquiry and deducted those amounts from the USP. Customs further deducted an amount for profit based on the average profit by the importers to arrive at the NIFOB.

Based on the available information, Customs found that the NIFOBs for canned tomatoes had increased since last reviewed. While the subsidies have declined since 1996, the sum of the 2001 weighted average FOB export prices from Italy and the 2001/02 subsidy amounts was below the NIFOB. In other words, the full amount of the countervailing duty would be payable.

Conclusion

In view of the large quantities exported by Italy relative to the Australian market, Customs concludes that there is ample capacity for Italy to increase the volume of subsidised canned tomatoes to the Australian market in the absence of countervailing measures. The resulting lower prices would put further price pressure on the Australian market for canned tomatoes. This would be likely to lead to material injury to the Australian industry.

7.4 Causal link

In addressing whether there would be a causal link between subsidised imports of canned tomatoes from Italy and the likelihood of a recurrence of material injury to the Australian industry, Customs examined the known factors involved.

Customs has examined the economic performance of the Australian canned tomatoes industry over the period from 1996 to 2000 and concluded that there is no evidence of material injury. While there were imports from other countries during this period, Customs found that these were of relatively small volumes. Italy remains the major source of imports of canned tomatoes into Australia. Despite increases since 1997, the weighted average FOB export prices of canned tomatoes from Italy were the lowest of all noteworthy imports of these goods in 2000 and 2001.

The EC observed in its submissions that the Australian industry has been protected from imports of canned tomatoes from Italy for a period of ten years. Further protection was not warranted because of changes to the export refund system and the reduction in the export subsidy amount. This, together with the increased export prices of canned tomatoes from Italy and the healthy state of the Australian canned tomatoes industry, meant that it was unlikely that removal of the countervailing measures would lead to a recurrence of injury. These views were largely repeated in the submissions from ANICAV and ICCI.

While Customs acknowledges that the countervailing measures have been in place since 1992, this has resulted from the continued payment by the EC of subsidies on processed tomatoes since 1978. In the absence of the subsidies (and the resulting injury or threat thereof to the Australian industry), there would have been no basis for countervailing duties to be imposed. .

Notwithstanding observations about the duration of the measures, Customs is required to assess in this inquiry whether the current identifiable circumstances warrant continuation of the existing countervailing measures.

In examining the collection of the countervailing duties on canned tomatoes over the period from 1997 to 2001, Customs noted that the annual duty amount has declined. This would appear to reflect the increase in export prices from Italy.

However, as the measures were originally imposed before 1993, countervailing duty is only collected where the export price is found to be below the non-injurious FOB price. For these pre-1993 measures, the duty collection method used by Customs identifies the countervailing duty liability first and then the dumping duty liability. As a result, the amount of countervailing duty collected annually since 1997 has ranged between 80 per cent and 96 per cent of the total countervailing and dumping duties collected. This means that the prime injury remedy mechanism has been the countervailing duty.

Customs found that there is close price competition in all segments of the Australian canned tomatoes market. In the absence of countervailing duties it is likely that there would be a substantial volume of subsidised imports at lower prices than those currently prevailing in the market. The introduction of lower priced canned tomatoes into the Australian market would have a wide impact on all market segments. In turn, this would adversely affect the profits and profitability of the Australian canned tomatoes industry. It is likely that this would result in material injury to that industry as the price effects flowed across the small Australian market.

Conclusion

Based on the evidence available, Customs is of the view that if the countervailing duties were allowed to expire, it would be likely that there would be a recurrence of exports to Australia at subsidised prices which would cause material injury to the Australian industry.

7.5 Conclusions

On the evidence available, Customs considers that

- *exports of canned tomatoes from Italy continue to be subsidised;*
- *there is likely to be a recurrence of material injury to the Australian canned tomatoes industry in the absence of the current countervailing measures; and*
- *the material injury could be linked with exports of canned tomatoes at subsidised prices from Italy.*

Accordingly, Customs is inclined to recommend that the countervailing duty currently applying to imports of canned tomatoes from Italy be continued for a further five years beyond its scheduled expiry date of 28 April 2002.