



**Australian Government**  
**Productivity Commission**

# Safeguards Inquiry into the Import of Processed Tomato Products

Productivity Commission  
Inquiry Report

No. 68, 12 December 2013

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12 December 2013

The Hon Joe Hockey MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Dear Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's final report on *Safeguards Inquiry into the Import of Processed Tomato Products*.

Yours sincerely

Handwritten signature of Peter Harris in black ink.

Peter Harris  
Presiding Commissioner

Handwritten signature of Paul Barratt in black ink.

Paul Barratt  
Associate Commissioner



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# Terms of reference

## SAFEGUARDS INQUIRY INTO THE IMPORT OF PROCESSED TOMATO PRODUCTS

### *Productivity Commission Act 1998*

I, David Bradbury, Assistant Treasurer, pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake an inquiry into whether safeguard action is warranted against imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff.

The inquiry is to be undertaken in accordance with the World Trade Organization (WTO) safeguard investigation procedures published in the *Gazette* of S297 of 25 June 1998, as amended by GN39 of 5 October 2005.

The Commission is to report on:

- whether conditions are such that safeguard measures would be justified under the WTO Agreement;
- if so, what measures would be necessary to prevent or remedy serious injury and to facilitate adjustment; and
- whether, having regard to the Government's requirements for assessing the impact of regulation which affects business, those measures should be implemented.

In undertaking the inquiry, the Commission is to consider and provide an accelerated report on whether critical circumstances exist where delay in applying measures would cause damage which it would be difficult to repair. If such circumstances exist, and pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury, the Commission is to recommend what provisional safeguard measures (to apply for no more than 200 days) would be appropriate.

The Commission is to provide the accelerated report to the Government as soon as possible but not later than 3 months and a final report within 6 months of receipt of this reference. The reports will be published as soon as practicable.

The Commission is to consult widely, hold hearings and call for submissions for the purpose of the inquiry.

David Bradbury  
Assistant Treasurer

Received 25 June 2013



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# OVERVIEW



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# Overview

In this report the Commission assesses whether ‘safeguard’ measures are warranted under World Trade Organization (WTO) rules for Australian producers of processed tomato products. WTO members can take safeguard action when a surge in imports can be demonstrated to have caused, or threatens to cause, serious injury to a domestic industry.

The Commission completed an Accelerated Report which assessed the case for imposing provisional measures before the inquiry was finalised. It found that the requirements for the imposition of provisional safeguards were not met. Since the release of the Accelerated Report, the Commission has further developed its analysis in light of updated data on imports and exports, submissions received from interested parties, and evidence presented at a public hearing.

## **Background to the inquiry**

Over the past decade, the Australian processed fruit and vegetable industry has undergone substantial change. Several large manufacturers, including Heinz, Simplot, McCain Foods, National Foods (Berri juices), Rosella Group and Windsor Farm Foods have consolidated or closed processing facilities.

SPC Ardmona has been signalling for some time that it faces challenges in maintaining profitability, production and sales levels of its processed fruit and tomato products. It stated in its initial submission to the inquiry that if current trends continue, it will ‘put the viability of the tomato operations under threat’. Specifically, it stated that the continued loss of market share would reduce the value of its Ardmona brand, and that ‘the current and prospective returns to the business do not justify additional capital investment which is required to make the operations competitive’.

In April 2013 these concerns were formally conveyed to the Australian Government in separate written requests for safeguard measures for processed fruit and tomato products. Subsequently, the Australian Government directed the Productivity Commission to undertake the two safeguards inquiries.

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## **SPC Ardmona also requested other forms of assistance**

As well as its requests for safeguard measures, SPC Ardmona requested investigations into whether processed tomato products from Italy and processed peach products from South Africa have been sold in Australia at ‘dumped’ prices. The Anti-Dumping Commission has made a preliminary determination that some Italian producers of processed tomato products were selling to Australia at ‘dumped’ prices with the dumping margins ranging from negligible to 9.1 per cent. Anti-dumping duties can be applied by the Minister following the Anti-Dumping Commission’s final recommendation (due by 30 January 2014). In the interim, from 1 November 2013, the Australian Customs and Border Protection Service has applied ‘securities’ to imports of processed tomatoes made by Italian producers found to have non-negligible dumping margins. The Commission understands that one of the Italian producers found to have a negligible dumping margin (not subject to provisional dumping securities) is a major supplier of private label products to Australian supermarkets.

As well as seeking measures to reduce the impact of import competition, SPC Ardmona asked the Australian and Victorian Governments for \$50 million to upgrade its Shepparton processing facility. At the time of writing this report, a decision on direct financial assistance has not been announced.

## **What is a safeguard action?**

Safeguard action is temporary, emergency action that may be taken by a member country of the WTO where an increase in imports causes or threatens to cause serious injury to a domestic industry. Measures can take the form of an increased tariff, a tariff–quota or a quota. Any measures, initially, may only be put in place for a maximum of four years and must be liberalised progressively in order to promote industry adjustment to import competition.

Safeguard measures are invoked relatively infrequently. As at October 2013, there were 31 definitive safeguard measures in place across 12 WTO member countries. All of those countries classify themselves as developing countries.

WTO rules set out several criteria that must be met before safeguard measures can be implemented (box 1).

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**Box 1      When can safeguard measures be applied?**

Safeguard measures to assist a domestic industry can only be applied if a number of criteria have been satisfied.

1. Imports must have increased in absolute terms or relative to domestic production. The increase in imports must be the result of unexpected and unforeseen developments and be ‘recent enough, sudden enough, sharp enough and significant enough’.
2. The industry must be suffering serious injury, or such injury must be threatened. In assessing injury, factors such as changes in market share, sales, production, productivity, capacity utilisation, profits and losses and employment must be examined.
3. Increased imports must be shown to have caused, or threaten to cause, serious injury. The impact of other factors must be separately identified and assessed. When factors other than increased imports are causing injury to the domestic industry, such injury shall not be attributed to increased imports.

Safeguard measures normally can apply for up to four years (including any provisional measures), and possibly up to eight years. Measures can only be applied to the extent necessary to prevent or remedy serious injury caused by increased imports and to facilitate adjustment.

*Anti-dumping is different to safeguards*

SPC Ardmona and other interested parties questioned the Productivity Commission’s finding that provisional safeguard measures were not warranted, given that the Anti-Dumping Commission found evidence of dumping. Anti-dumping measures are distinct from safeguard measures, and different tests are applied for the two types of trade remedies. There are two key differences.

- Anti-dumping measures are imposed to remedy injury caused by import *prices* that are considered to be below the ‘normal’ value of the product, whereas safeguards are imposed to remedy injury caused by a surge in import *volumes*.
- The injury threshold is different. Anti-dumping duties can be imposed if ‘dumped’ imports are causing or threatening to cause ‘material’ injury to the domestic industry. For safeguards, the test is ‘serious’ injury, which is consistently interpreted as being a more demanding test.

As the two systems are intended to deal with different circumstances, and apply different tests to determine whether measures are warranted, there should be no expectation that a finding that measures are warranted under one system would lead to a similar finding under the other system. Conversely, a finding that measures are

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not warranted under one system would not automatically lead to the same finding under the other system.

### **The scope of the inquiry**

The Australian Government has directed the Commission to assess whether safeguard action is warranted against imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff. The products under reference include prepared or preserved tomatoes in packs not exceeding 1.14 litres. The most common products falling within the classification are retail-sized cans of whole, chopped, diced or crushed tomatoes.

SPC Ardmona is the only significant domestic producer of processed tomato products that are like or directly competitive with the imported products under reference — the company effectively constitutes the domestic industry (box 2). It manufactures products under its own brands and for supermarket private labels.

#### **Box 2      The Australian tomato processing industry**

The Australian tomato processing industry includes the manufacture of tomato pastes, sauces and other products, as well as canned tomatoes. Growers are concentrated in northern Victoria and southern New South Wales. They grow tomato varieties that are suitable for processing, and which differ from tomatoes grown for fresh markets.

The industry is small by world standards, and has consolidated over the past several decades. The number of growers has fallen from 95 in 1993 to 12 in 2013, and the number of processing companies has fallen from at least 14 in 2000-01 to three (SPC Ardmona, Kagome Australia and Billabong Produce).

Virtually all processing tomatoes grown in Australia are harvested and purchased by Kagome Australia. Kagome mainly produces tomato paste and passata for other food manufacturers. It also supplies raw and diced tomatoes to SPC Ardmona. SPC Ardmona's processing involves washing, grading, dicing and canning the tomatoes.

Billabong Produce is a small producer located in Jerilderie in New South Wales which grows its own tomatoes. It supplies tomato passata to retail markets, and large cans of diced tomatoes to the food service sector and SPC Ardmona. In 2013, Billabong processed around 4 per cent of the total harvest.

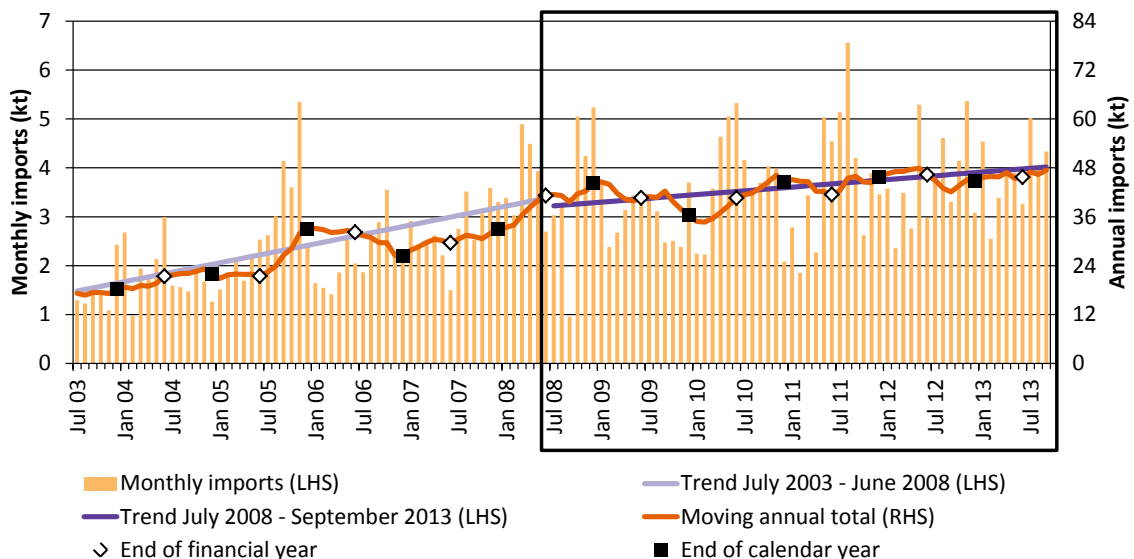
## Have imports increased?

Under WTO rules, safeguard measures can only be imposed if there is clear evidence that imports have increased *either* in absolute terms or relative to domestic production. While a timeframe for the increase in imports is not specified in the Agreement on Safeguards, a rule of thumb that has arisen from the case law is to focus on the last five years for which data are available, and to assess both the trend rate of increase and absolute quantities of imports. The Commission has considered the past five years, but has also looked at earlier data to help it to understand trends in imports of the relevant products.

### Absolute import volumes

In the five years to June 2008, annual imports increased significantly — from about 21 kilotonnes to about 41 kilotonnes (equivalent to a compound annual growth rate of about 18 per cent). However, over the subsequent period under investigation, the rate of import growth was significantly slower (figure 1). Over the five years to June 2013, annual imports increased from about 41 kilotonnes to about 46 kilotonnes (equivalent to a compound annual growth rate of about 3 per cent). In the Commission’s view, this does not meet the standard of a ‘recent, sudden, sharp and significant’ increase in imports, as required under WTO rules.

Figure 1 **There has been no recent surge in imports**

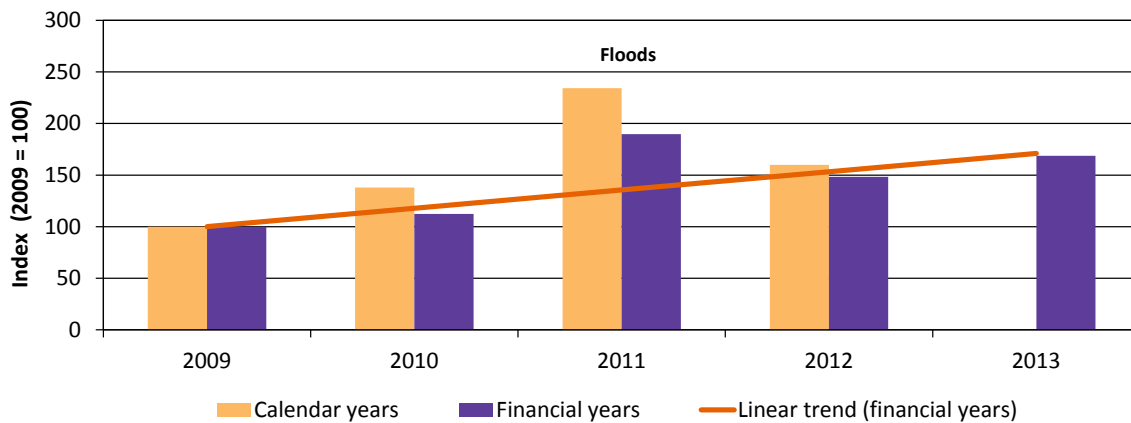


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## Imports relative to domestic production

To assess whether imports have increased relative to domestic production, the Commission calculated the ratio of imports to domestic production (in tonnes) over the period 2009–2013. To preserve the confidentiality of the production data that were supplied by SPC Ardmona, the ratio is presented as an index. Between 2009 and 2013, the ratio increased by about 70 per cent (figure 2). This meets the standard of a ‘recent, sudden, sharp and significant’ increase in imports relative to domestic production.

Figure 2 Ratio of imports to production



Although it constitutes sufficient evidence that imports have increased relative to domestic production, this ratio is not a robust indicator of the impact of import competition. It is sensitive to changes in domestic production levels, and to the initial levels of imports and domestic production. In the case of processed tomatoes, the increase in the ratio is explained mainly by the fact that in the first year of the period under investigation, domestic production (the denominator) was already low relative to imports (the numerator). Where this is the case, the ratio will be highly sensitive to changes in domestic production. Although the Commission cannot disclose the confidential production figures, data from Coles, Woolworths and Metcash supermarkets show that the market share of the domestic industry in those supermarkets was about 30 per cent in 2009. The relative levels of domestic production and imports were broadly consistent with this.

Over the five years from 2009 to 2013 domestic production decreased by about 33 per cent. Floods significantly reduced the supply of tomatoes in 2011. Over the same period, imports increased by about 11 per cent. The net effect was that the ratio of imports to domestic production increased by about 70 per cent. About three quarters of the increase in the ratio can be attributed to the reduction in domestic production.

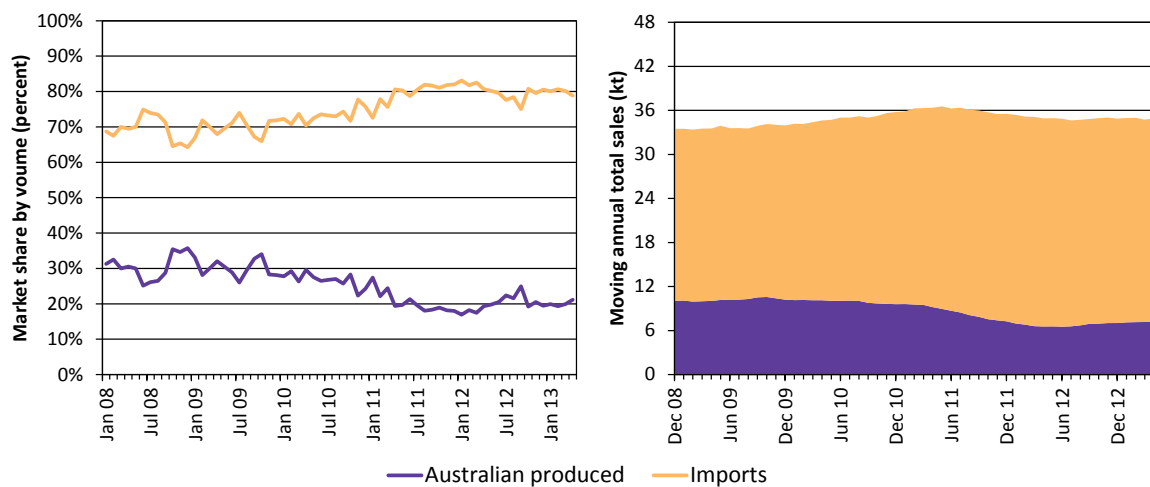


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## Is the industry suffering serious injury?

There is compelling evidence that SPC Ardmona's tomato processing operations have suffered serious injury in recent years. A number of indicators of the injury were identified. Sales of its processed tomato products have decreased, as has its market share across Coles, Woolworths and Metcash supermarkets (figure 3).

**Figure 3 Australian processed tomatoes have lost market share**  
Coles, Woolworths and Metcash supermarkets

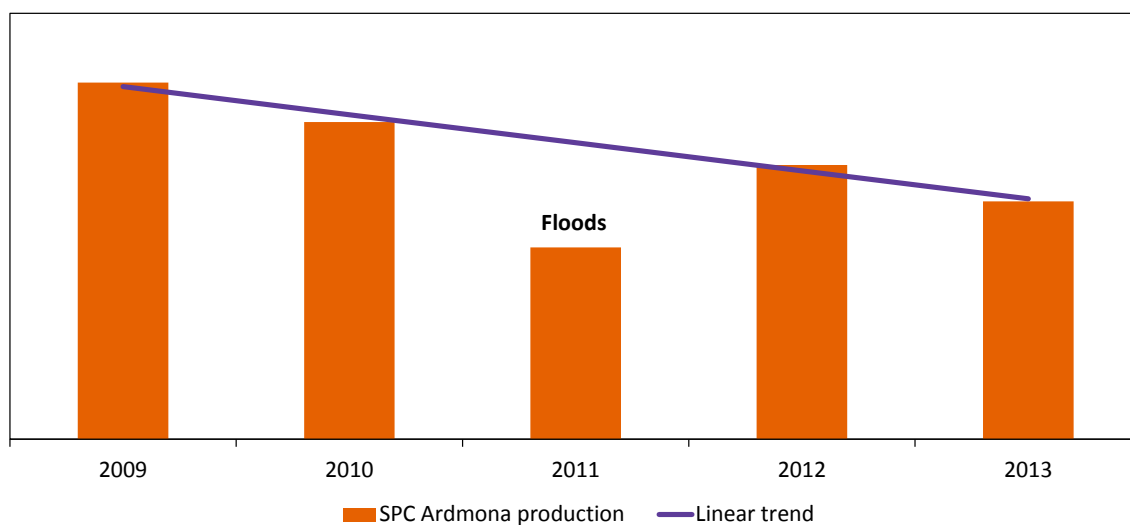


Confidential evidence indicates that domestic production fell by 33 per cent over the period 2009–2013 (figure 4). Lower production has led to a loss of economies of scale, increasing the cost of producing each can of tomatoes (the increased unit cost of production was driven mainly by increased per-unit finance charges and indirect expenditures). As a result, the profitability of SPC Ardmona's tomato processing operations has fallen significantly. The data also indicate that employment in the industry has decreased — the number of labour hours used in tomato processing fell by 47 per cent over the period.

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Figure 4 **SPC Ardmona's production has fallen significantly**

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## Has injury been caused by a recent surge in imports?

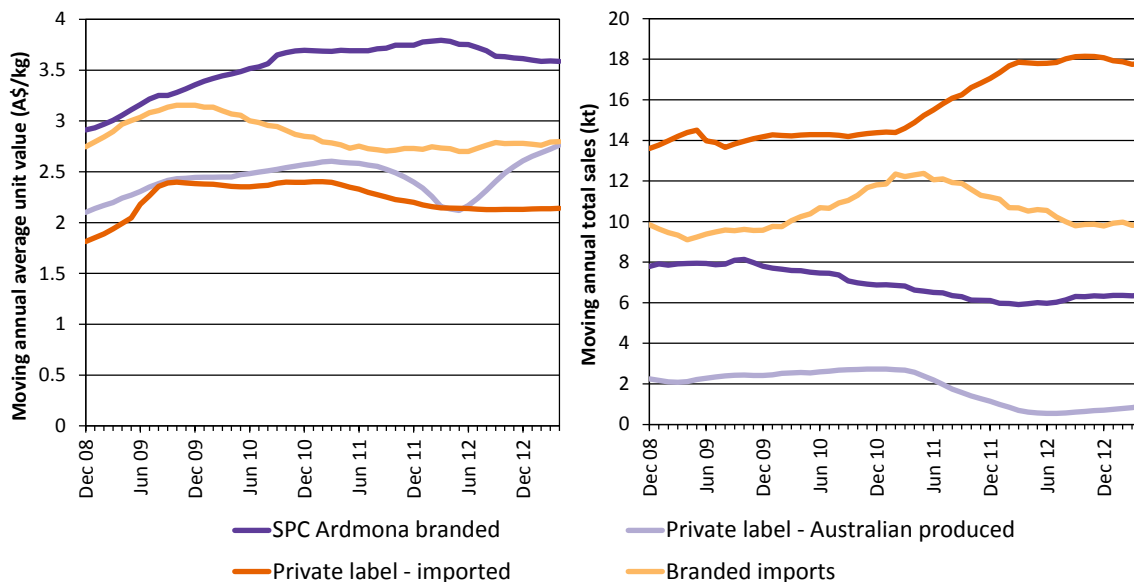
The Agreement on Safeguards does not specify strict tests for how to evaluate the causes of the injury to the domestic industry. However, WTO law requires that there should be at least, a 'coincidence of trends' between the injury and any increase in imports. There has not been a surge in absolute import volumes during the period under investigation. However, the Commission did identify several other trends that coincide with the period of injury and help to explain the reduction in domestic production and consequent increase in the ratio of imports to domestic production.

## The injury coincided with increasing supermarket price competition

SPC Ardmona's branded processed tomato products are sold at a higher retail price than private label products (including imported products and private label products that are manufactured by SPC Ardmona) and imported branded products. Over the period under investigation, there has been a large and increasing gap between the supermarket unit values of SPC Ardmona branded products and of private label products (figure 5). Initially, the supermarket unit value of imported branded products was only slightly lower than the SPC Ardmona unit value. However, by 2010 the gap was beginning to widen. The increasing gap coincided with decreasing supermarket sales of SPC Ardmona branded products.

Some of the increase in the gap was caused by increased supermarket unit values of SPC Ardmona products. The rest is due to decreased unit values of imports.

**Figure 5 The gap in unit values has widened and SPC Ardmona sales have decreased**



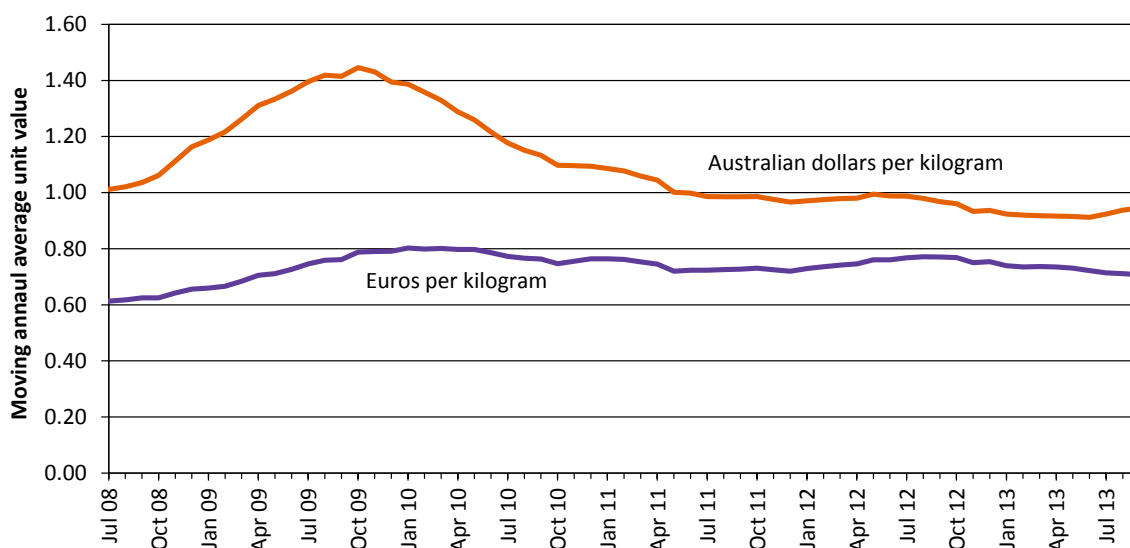
**The increased price pressure was not caused by changes in the world market**

The key mechanism through which an increase in imports can cause injury to the domestic industry is by driving down market prices. This could happen if a decrease in the world price leads to an increase in imports.

Most processed tomatoes that are imported into Australia are sourced from Italy. The import price of these products, expressed in Euros, has not changed significantly over the past five years (figure 6). This, along with the fact that there was no surge in import volumes, shows that the reduction in the supermarket retail price of processed tomato products was not caused by a significant change in the world market price for processed tomato products.

Some of the increase in the supermarket price gap can be attributed to the appreciation of the Australian dollar. Although the unit value of processed tomatoes did not change significantly when expressed in Euros, the appreciation of the Australian dollar from 2009 led to a significant decrease in the price of processed tomato imports to Australia. Unit values decreased from an average of about \$1.40 per kilogram in 2009, to an average of less than \$1 per kilogram in 2013. The lower import price gave supermarkets the option to reduce the prices they charge for processed tomatoes.

Figure 6 The appreciating dollar reduced import prices



### Supermarket private label strategies increased price pressure on SPC Ardmona

Supermarkets have sold private label products for many decades. In recent years competitive developments such as the entry of ALDI into the Australian market in 2001, and the turnaround plan implemented by Coles from 2008 have driven increased use of these products, and increased supermarket price competition. There have also been changes in the way private label products are promoted. Previously, private label products tended to be viewed as low cost and lower quality than branded products. More recently, supermarkets have begun to offer ‘tiers’ of private label products, and they have increased their promotion of these ‘tiers’ during the period under investigation. Some consumers have come to regard some ‘premium private label’ products as close substitutes for branded products.

This strategic decision by supermarkets to increase their offering of private label products has affected the ability of manufacturers like SPC Ardmona to charge premium prices for their own label products without losing market share. Consumers benefit from the increased choice and reduced prices, but private label competition has the potential to reduce the profitability of producers of higher-priced branded products.

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## Floods reduced Australian processed tomato production

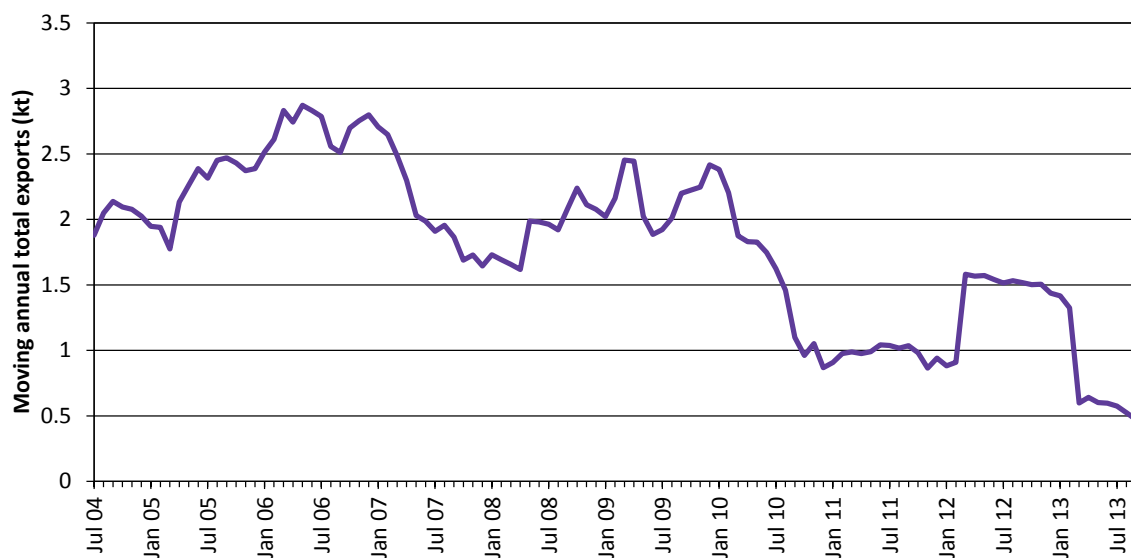
Flooding around the tomato growing areas of Victoria in the 2010-11 growing year reduced the quantity of processing tomatoes harvested by approximately two-thirds, and SPC Ardmona's production decreased significantly. This coincided with increased sales of imported private label products in Coles, Woolworths and Metcash supermarkets, and lower sales of Australian branded and private label products and of imported branded products.

Sales of domestic private label products have not recovered to their pre-flood levels. It is clear that the floods caused significant injury to the domestic industry, and that the injury has persisted as domestically produced products have failed, as yet, to regain market share even after production levels recovered in the following years.

## Exports have decreased over time

Exports of Australian processed tomatoes have decreased significantly over the past five years, coinciding with the appreciation of the Australian dollar (figure 7). This has likely caused injury to SPC Ardmona through decreased production volumes, sales, revenues and profits. However, the extent of any injury caused by reduced exports is likely to have been small, because exports have constituted a relatively small proportion of SPC Ardmona's total sales.

Figure 7 Exports of processed tomatoes have collapsed



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## **Have the criteria for safeguards been met?**

In this report, the Commission has concluded that the WTO requirements for the imposition of definitive safeguard measures have not been met. While absolute imports have not increased in a sudden, sharp or significant manner during the period under investigation, domestic production has fallen significantly. This has caused an increase in the ratio of imports to domestic production that passes the test in the Agreement on Safeguards.

The domestic processed tomato industry is suffering serious injury. However, the injury was caused by other factors, including domestic competitive pressures emanating from decisions made by supermarkets, the appreciation of the Australian dollar and floods in the tomato growing regions of Victoria.

The Commission has concluded that for the products under reference, definitive safeguard measures are not warranted.

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# Findings

## FINDING 2.1

*There has not been a sufficient increase in import volumes of the products under reference to satisfy the requirement under Article 2.1 of the Agreement on Safeguards. However, there is evidence that imports have increased relative to domestic production, sufficient to meet the WTO standard. This change was largely driven by changes in domestic production.*

## FINDING 2.2

*Increased imports of the processed tomato products under reference have not caused serious injury to the domestic industry producing like or directly competitive products. Instead, the injury has resulted from a combination of factors, including:*

- sustained competitive pressure from imports*
- supermarket private label strategies, facilitated by the appreciation of the Australian dollar*
- extreme weather events.*

*Therefore, safeguard action under the WTO Agreement on Safeguards is not warranted.*





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# 1 About the inquiry

## 1.1 What the Commission has been asked to do

On 21 June 2013, the Australian Government asked the Commission to inquire into whether safeguard action under World Trade Organization (WTO) rules is warranted against imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff. The terms of reference are reprinted at the beginning of this report.

Safeguard action is temporary, ‘emergency action’ (using tariffs, tariff-quotas or quotas) implemented in situations where a surge of imports causes or threatens to cause serious injury to a domestic industry. Safeguard measures may be applied for up to four years, and may be extended for a further four years, subject to several conditions (Commonwealth of Australia Special Gazette No. S 297, 1998).

Under WTO rules a government can only take safeguard action if its ‘competent authority’ (in Australia, the Productivity Commission) finds that action is warranted. Although the government can choose not to act, if it does take action it cannot impose measures greater than those considered appropriate by the competent authority.

### **Accelerated report and final report**

In addition to this final report on definitive safeguard measures, the Australian Government asked the Commission to provide an accelerated report on whether provisional safeguard measures should be applied. Provisional safeguards can be applied for up to 200 days if there is clear evidence that increased imports have caused or are threatening to cause serious injury, and that critical circumstances exist where delay in implementing safeguard measures could lead to damage that would be difficult to repair. The Commission completed the accelerated report on 18 September 2013, and it was published on 26 September. The Commission found that provisional safeguard measures were not warranted (box 1.1).

Several interested parties disagreed with the Commission’s assessment of whether critical circumstances existed that would have warranted provisional safeguard measures. However, under the WTO Agreement on Safeguards, the critical

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circumstances test is only relevant to the consideration of provisional safeguard measures. Therefore, the issue of critical circumstances has not formed part of the Commission's consideration on whether definitive safeguards are warranted.

**Box 1.1 The Commission's findings on provisional safeguards**

The Commission found that the Australian industry producing the processed tomato products under reference has suffered serious injury. However, the case for provisional safeguard measures failed several other critical tests.

- The volume of imports had not increased significantly in the previous five years.
- There was only weak evidence that imports had increased relative to domestic production.
- The injury to the domestic industry was not caused by a recent surge in imports.
  - Other factors that caused the injury included long-term competitive pressure from imports, increased promotion of supermarket private label brands, the appreciation of the Australian dollar, decreased exports and floods in the tomato growing region of Victoria.
- There was no compelling evidence that critical circumstances existed that would justify provisional safeguards.

## 1.2 Background

This inquiry, together with the concurrent safeguards inquiry into imports of processed fruit products, was prompted by industry concern about the impact of import competition. Specifically, it follows a request by SPC Ardmona (a food processing company) to the Australian Government to apply safeguard measures against imports of certain processed tomato products.

The Australian Government directed the Commission to inquire into imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff. In accordance with the Australian Government Gazette, the Australian Government designated the products to be examined in the terms of reference sent to the Commission.

The products that come under the subheading are 'Tomatoes, whole or in pieces, prepared or preserved otherwise than by vinegar or acetic acid, in packs not exceeding 1.14 L'. These imports enter at a 5 per cent rate of duty, except for imports from New Zealand, Singapore, the United States, Thailand, Chile, Forum Island Countries (including Papua New Guinea) and ASEAN countries, which enter free of duty. Imports from countries defined as 'Developing Countries' or 'Least

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Developed Countries' in Schedule 1 of the Australian Customs Tariff also enter free of duty under certain conditions.

Processed tomatoes falling within the relevant tariff subheading are imported mostly from Italy. Over the five years to September 2013, Italy supplied about 87 per cent of all imports. The United States supplied 8 per cent and Argentina 3 per cent over the same period. All other countries supplied around 2 per cent of imports, collectively.

### **Safeguards and anti-dumping**

At the same time as its application for safeguard measures, SPC Ardmona requested an anti-dumping investigation into prepared or preserved tomato products exported from Italy. Anti-dumping duties and countervailing duties (which can be applied to offset the trade effects of subsidies paid by foreign governments) have been applied to processed tomato products in the past (box 1.2).

#### **Box 1.2 Anti-dumping measures applied to processed tomato imports**

- **April 1992:** Anti-dumping duties were applied to imports of canned tomatoes from Italy and China, and countervailing duties were applied to imports of canned tomatoes from Italy, Spain and Thailand. Both sets of duties were imposed for a five-year period.
- **April 1997:** Anti-dumping duties and countervailing duties on imports of canned tomatoes from Italy were extended for a further five years until April 2002.
  - In 2001, SPC Limited and Ardmona Foods Limited applied to have the countervailing duties on imports of canned tomatoes from Italy extended for a further five years. The Australian Customs Service ultimately found that such duties would not be warranted.
- **June 2013:** SPC Ardmona applied for anti-dumping duties on prepared or preserved tomato products exported from Italy, and the Anti-Dumping Commission subsequently initiated an investigation on 10 July 2013. To date, the Anti-Dumping Commission has found evidence of dumping by some but not all Italian exporters. It has imposed interim dumping 'securities' of less than 10 per cent on those exporters.

*Sources:* Anti-Dumping Commission (2013a); Australian Customs Service (2003b).

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### *Anti-dumping is a different matter to safeguards*

Anti-dumping measures are distinct from safeguard measures, and different tests are applied for the two types of trade remedies. A key point of difference is that anti-dumping duties are intended to remedy injury caused when the *price* of imports is below their 'normal value'. By contrast, safeguard measures are intended to remedy injury caused by a recent surge in the *quantity* of imports. Dumping could be a factor causing a surge in imports if dumping was a recent occurrence. It does not follow that the imposition of dumping duties means safeguards are also warranted. Dumping may have been occurring over a long period of time, and is not a necessary or sufficient condition for a finding that safeguards are warranted.

A second point of difference relates to the level of injury that the domestic industry must have suffered for the measures to be applied. Anti-dumping duties can be applied if 'dumped' imports are causing or threatening to cause *material* injury to the domestic industry. Safeguard measures can be applied if increased imports are causing or threatening to cause *serious* injury to the domestic industry. Although the WTO Agreement on Safeguards provides no clear guidance on what constitutes serious injury, it is consistently interpreted as being a more demanding test than the material injury test applying in anti-dumping.

Because the two systems are intended to deal with different circumstances, and apply different tests to determine whether measures are warranted, there should be no expectation that a finding that measures are warranted under one system would lead to a similar finding under the other. Conversely, a finding that measures are not warranted under one system would not automatically lead to the same finding under the other.

### *The Anti-Dumping Commission investigation found some products were being dumped*

An investigation was initiated by the Anti-Dumping Commission on 10 July 2013. On 1 November the Anti-Dumping Commission (2013b) released a 'Preliminary Affirmative Determination'. It found that some processed tomato products were being sold in Australia at 'dumped' prices. Formal anti-dumping duties can be applied by the Minister if the Anti-Dumping Commission recommends duties (its final recommendations are due by 30 January 2014). In the interim, from 1 November 2013, the Australian Customs and Border Protection Service will require importers to lodge 'dumping security undertakings' in respect of any interim dumping duty that may become payable following the completion of the investigation. The securities were set at different rates for each exporter, with the rate being equal to the 'dumping margin'.

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The Anti-Dumping Commission calculated dumping margins for a sample of Italian exporters — the difference between the weighted average export price of each manufacturer and the ‘normal value’ calculated by the Anti-Dumping Commission. It found that the dumping margin for two Italian producers was negligible, and interim dumping securities were set at zero. (At least one of these producers — La Doria — is a major supplier of private label products to Australian supermarket chains.) For other exporters, dumping margins were calculated to be between 6.5 per cent and 9.1 per cent. For exporters that were not included in the sample (and therefore did not have a dumping margin calculated for them), the securities will be levied at a rate of 8.6 per cent.

### **1.3 Inquiry procedures and consultation**

The WTO Agreement on Safeguards requires safeguard inquiries to be conducted in an open and transparent manner, with opportunities for interested parties to present their views and to respond to the views of others. Reflecting these requirements, Commonwealth of Australia Special Gazette No. S 297 (1998) states that:

- reasonable public notice must be given to all interested parties in accordance with section 14 of the *Productivity Commission Act 1998* (Cwlth)
- the inquiry must involve public hearings or other appropriate means in which importers, exporters and other interested parties can present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest.

These requirements accord with Productivity Commission public inquiry procedures.

#### **Public notification**

The Australian Government commissioned the inquiry on 21 June 2013 and formally notified the WTO of the safeguards investigation on 27 June 2013. Countries that account for large shares of Australian imports were formally notified by the Department of Foreign Affairs and Trade.

The inquiry was advertised in *The Age*, *Australian*, *Shepparton News* and *Weekly Times* newspapers following receipt of the terms of reference. In early July 2013, an email circular was sent to individuals and organisations that had registered their interest or were considered likely to have an interest in the inquiry. The advertisements and circular outlined the nature of the inquiry and invited parties to

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register their interest. An issues paper setting out matters about which the Commission was seeking comment and information was released on 4 July 2013. The issues paper was sent to interested parties and was placed on the Commission's website.

The accelerated report was released by the Government on 26 September 2013, and the Commission sent an email to interested parties to alert them to its release. The Department of Foreign Affairs and Trade notified the WTO of the release of the report on 26 September, and the WTO Secretariat circulated the notification on 30 September.

### **Informal consultation**

Informal meetings and visits were conducted in the early stages of the inquiry with SPC Ardmona, Coles Supermarkets, Kagome Australia (a tomato processing company in Echuca, Victoria) and Australian Government departments. The Commission also held an informal roundtable in Shepparton on 12 July 2013, with representatives from the processing industry, tomato growers and others. Other parties provided the Commission with information on an informal basis, including the retailers Woolworths and ALDI. Appendix A contains the full list of those consulted.

### **Submissions**

Thirty-seven submissions were received prior to the release of the accelerated report and another 11 prior to the completion of the final report. Interested parties were notified on 7 November that six submissions had been received since the release of the accelerated report. The Commission invited interested parties to make further submissions in response to the points raised in the submissions and in the public hearing and informed interested parties that submissions would be accepted up to 15 November. Following this notification, the Commission received 5 further submissions.

Submissions were received from a range of interested parties, including Australian and overseas participants, and reflected a range of views (box 1.3). All non-confidential submissions were posted on the Commission's website as quickly as possible. Where submissions contained commercial-in-confidence information, the relevant sections were not published. Appendix A lists all submissions received.

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## Public hearings and transcripts

The Commission held a public hearing for the accelerated report in Canberra on 30 July 2013, and a second public hearing for the final report in Melbourne on 28 October 2013. Participants are listed in appendix A and transcripts are available on the Commission's website.

### Box 1.3 An overview of participants' views

Of the 37 initial submissions received, 11 were from industry participants and suppliers to SPC Ardmona (including grower organisations). Virtually all argued that increased imports were the principal cause of reduced profitability and losses, and most supported safeguard measures to reduce imports.

- Local governments and members of parliament generally supported the case for safeguard action, submitting that the closure of SPC Ardmona's facilities would have significant flow-on impacts on the region (Moirra Shire Council, sub. 1; Paul Weller MLA, sub. 8; Senator Bridget McKenzie, subs. 18 and 19; Sharman Stone MP, sub. 35; Shire of Campaspe, sub. 11).
- SPC Ardmona's suppliers submitted that the injury to SPC Ardmona was affecting their businesses and that they were concerned about the closure of facilities (Bean Growers Australia Limited, sub. 14; Drives for Industry, sub. 23; Gouge Linen and Garment Services, sub. 25; Kagome Australia, sub. 12).
- Coles (sub. 20) provided evidence on its sales of Australian and imported canned tomatoes, without arguing for or against safeguard measures.

Fifteen initial submissions were received from representatives of industries in countries that export to Australia and their governments. Most argued that the circumstances of the Australian industry did not satisfy the safeguards criteria. Some governments (including Chile, Egypt, Mexico, Thailand and Turkey) submitted that under the terms of the Agreement on Safeguards exports from their countries were eligible to be excluded from the application of any safeguard measures.

A further 11 submissions were received following publication of the accelerated report. SPC Ardmona (sub. AR38) submitted that the Commission had made several errors that compromised the analysis, and disagreed with the findings that the available evidence did not justify imposing provisional safeguard measures.

- These views were echoed by the Australian Manufacturing Workers' Union (sub. AR40) and Sharman Stone MP (sub. AR41), who submitted that there is sufficient evidence that an increase in imports has caused injury to the domestic industry. They also argued that the Commission applied a standard of evidence that was stronger than required under the Agreement on Safeguards.
- By contrast, the South African Fruit and Vegetable Canners' Association (SAFVCA, subs. AR43 and AR44) supported the Commission's finding that provisional safeguard measures were not warranted, but expressed reservations about the findings on increased imports, unforeseen circumstances and serious injury.

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As is the Commission's standard practice when it conducts public inquiries, it requested that participants provide submissions in advance of the hearing. Most participants did so. However, some interested parties appeared at the hearing before the Commission had received their submissions. Although the Commission prefers to receive submissions prior to hearings, it does not and cannot restrict participation in the hearings to parties from which it has received a submission. In order to accommodate ongoing participation from interested parties, the Commission accepted submissions throughout the inquiry process.

## **Data provision**

Key data used by the Commission in its analysis were placed on its website to enable feedback and to facilitate their use by participants in the inquiry.

## **1.4 What are the requirements for safeguard measures?**

The terms of reference require the Commission to conduct the safeguards inquiry in line with the criteria set out in the Commonwealth of Australia Special Gazette No. S 297, as amended by No. GN 39 (reprinted in appendix B). These criteria largely mirror the terms of the WTO Agreement on Safeguards. The Gazette states that the Commission is to report on whether:

... the product under reference is being imported into Australia in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (Commonwealth of Australia Special Gazette No. S 297, 1998)

As well as complying with the requirements of the WTO Agreement, safeguards investigations and measures must comply with rules and criteria established under the GATT Article XIX on emergency action (1994), and have regard to subsequent WTO panel and appellate body decisions interpreting those requirements. This includes the provision arising from the GATT Article XIX that safeguard action can only be taken if imports have increased as a result of 'unforeseen developments'.

Although the procedures for safeguards inquiries in Australia that are set out in the Gazette largely mirror the provisions of the Agreement on Safeguards, under some circumstances a requirement could be triggered for the investigation to include an extra step that is not part of the Agreement. Specifically, if the Commission finds that safeguards measures are warranted, it must subject any proposed measure to a



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regulatory impact assessment of the community wide costs and benefits before making a recommendation. In addition, the determination must be in accordance with the Productivity Commission Act, which requires that the Commission be guided by the interests of the community as a whole, not just those of any particular industry or group.

However, these additional requirements only come into play if the Commission finds that a safeguard measure is warranted. Up to that point, the requirements for a safeguard investigation in Australia do not go beyond the requirements of the WTO Agreement (and subsequent case law). Some participants to this inquiry raised concern that the Commission had applied a higher standard than required in its accelerated report. The Commission has not applied a standard higher than that required under the Agreement in assessing whether safeguard measures are warranted.

### **A high standard of evidence is required**

The WTO Agreement on Safeguards, and particularly the case law that has interpreted it, has set a high standard for the application of safeguard measures. A high standard of evidence and analysis is also required because the application of safeguard measures could potentially require compensation and the suspension of trade concessions and other obligations against Australian exports of other products.

In the accelerated report, the Commission noted that Australia is a member of the ‘Friends of Safeguards Procedures’ group (FSP). The FSP is an informal grouping of WTO Members whose aim is to discuss safeguard practices. The FSP comprises Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Chinese Taipei, Singapore, and the United States, although all Members are invited to attend FSP meetings (WTO 2012). The FSP held its first meeting on 23 April 2013 and intends on meeting on a semi-annual basis in the margins of the WTO Committee of Safeguards Meetings in Geneva.

Some interested parties queried whether Australia’s membership of this group influenced the Commission’s assessment of the case for provisional safeguards (Australian Manufacturing Workers’ Union, sub. AR40; Sharman Stone MP, sub. AR41; SPC Ardmona, sub. AR38). It did not. Australia’s membership of FSP was noted in the accelerated report as further support for the need for Australia to comply with its obligations given the high level of scrutiny that is applied to safeguard measures and the potential for appeals by other nations.

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## Five steps in the safeguards investigation

The Agreement on Safeguards and GATT Article XIX set out several requirements that must be satisfied to support a determination in favour of safeguard measures. The Commission has partitioned the WTO criteria into five distinct and sequential steps.

1. Define the domestic industry that produces ‘like’ or ‘directly competitive’ products.
2. Assess whether there has been an increase in imports of the product under reference in absolute terms, or relative to domestic production.
3. Establish whether the increase in imports was due to unforeseen developments.
4. Establish whether the relevant industry is suffering serious injury, or serious injury is being threatened.
5. Establish whether the increased imports *caused* or are *threatening to cause* serious injury. Where other factors are causing injury at the same time, this injury cannot be attributed to increased imports.

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## 2 Assessing the case for safeguard measures

Safeguard measures can only be recommended if a World Trade Organisation (WTO) member country has determined that increased imports have *caused* or are threatening to cause *serious* injury to the domestic industry that produces ‘like’ or ‘directly competitive’ products. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury should not be attributed to increased imports. These matters are assessed in the following sections.

### 2.1 Which Australian industry produces like or directly competitive products?

The WTO Agreement on Safeguards defines the ‘domestic industry’ as comprising the producers as a whole of ‘like or directly competitive products’, or the producers whose collective output constitutes a major proportion of the total domestic production of those products. Therefore, the first step is to establish which domestically produced products are like, or directly competitive with, the products under reference.

#### Products under reference

The terms of reference requested the Commission to undertake an inquiry into:

... whether safeguard action is warranted against imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff.

The Commission notes that the ten-digit number in the terms of reference is not a ‘subheading’ as defined in the *Customs Tariff Act 1995* (Cwlth). The subheading is the first eight digits (2002.10.00 — tomatoes prepared or preserved otherwise than by vinegar or acetic acid: tomatoes whole or in pieces). The subheading is further broken down into two ‘statistical codes’ that are administered by the Australian Bureau of Statistics (ABS) to meet the requirements of users of import data.

- 60 — in packs not exceeding 1.14 litres.
- 61 — in packs exceeding 1.14 litres.

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The Commission has considered the terms of the Agreement on Safeguards and the relevant jurisprudence. The Commission's assessment is that it is not precluded from carrying out an inquiry into whether safeguard action is warranted against imports falling within the tariff subheading *and* statistical code as specified in the terms of reference. That is, it is not inconsistent with the Agreement on Safeguards for the Australian Government to designate a product for investigation in the terms of reference that is narrower in scope than the eight-digit tariff subheading. However, the Commission does have to ensure that the domestic industry producing the like or directly competitive product is properly defined.

### *Products covered and not covered by the inquiry*

The products under reference include whole, chopped, diced and crushed tomatoes in packs not exceeding 1.14 litres. Although most processed tomato products imported under this subheading are packaged in cans, other packaging types are also used, including jars, pouches and tetra packs. Some products that consist of tomatoes with a small amount of flavouring such as salt, herbs or added tomato paste also come under this tariff subheading.

A number of imported processed tomato products come under other tariff subheadings, and are not covered by the inquiry, including:

- tomatoes (whole or in pieces) with additives or seasonings such as olives, capsicum, onion, celery, garlic, or chilli
- tomatoes with added tomato sauce
- tomato ketchup and other tomato sauces
- tomato paste
- tomato passata
- tomato juice
- dried tomatoes.

Fresh tomatoes come under another subheading, and are not covered by the inquiry.

### **What are like and directly competitive products?**

'Like product' means a product which is identical, that is, *alike in all respects* to the product under reference, or in the absence of such a product, another product which, although not alike in all respects, has characteristics *closely resembling* those of the product under reference (Commonwealth of Australia Special Gazette No. S 297, 1998).

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The term ‘directly competitive products’ has not been defined in the Agreement on Safeguards or Article XIX of the GATT. However, it has been interpreted, on occasion, by the WTO as including products that are not identical, provided they compete in the same market (for example, *Japan – Alcoholic Beverages II* (DS 8, 10, 11)).

The products under reference for this inquiry comprise retail-size packs of tomatoes, whole or in pieces, including tomatoes with a small addition of herbs, salt or tomato paste. They are typically sold to household consumers through supermarkets and other retail outlets. Domestically produced processed tomatoes, whole or in pieces, in packs not exceeding 1.14 litres are considered like imported products.

Tomato products with the addition of a small amount of vegetables could be competitive with imported processed tomato products. Household consumers could be expected to substitute readily between these products in response to changes in relative prices. Such products are considered directly competitive for the purposes of defining the domestic industry.

Tomatoes in packs exceeding 1.14 litres are covered under a different statistical code of the tariff subheading (2002.10.00.61). The most common packaging size is three kilogram cans. Some important characteristics of these products suggest that household consumers are not likely to readily substitute between the products under reference and the larger packs.

- The products are usually sold to different consumers — smaller packs to household consumers and larger packs to the food service industry.
- The products are usually sold through different channels — smaller packs through retail outlets (primarily supermarkets) and larger packs directly to the food service industry (sometimes through contracts involving competitive tender).

Other processed tomato products (including tomato paste and tomato sauces) are also sold to household consumers through retail outlets. Although there is some substitution between these products, the Commission considers that these products are not directly competitive for the purposes of defining the domestic industry.

Although processed and fresh tomato products are to some degree substitutable and in competition with each other, the relationship is insufficiently close for fresh tomatoes to be considered directly competitive for the purposes of a safeguards investigation. Fresh and processed tomatoes have distinct physical characteristics and involve different production processes. The processing of tomatoes typically involves peeling and cooking the tomatoes and materially transforms the fruit from

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its original state. The potential end uses of the two products are not identical, with fresh tomatoes allowing a broader range of applications.

### **Who are the domestic producers of like and directly competitive products?**

SPC Ardmona is the major producer of products that are like and directly competitive with the products under reference. Its output constitutes almost the entire domestic production of these products. It produces its own branded products and private label products for supermarkets. Simplot Australia produces one product under its Edgell brand that would meet the definition of directly competitive (the only Australian-made product sold in supermarkets that the Commission has identified that is not produced by SPC Ardmona). Two other tomato processing companies were identified — Kagome Australia and Billabong Produce — and neither produces similar products in containers of 1.14 litres or less (box 2.1). No other domestic producers were identified in the course of this investigation.

#### *Tomato growers do not produce like or directly competitive products*

Growers are significantly affected by the business decisions and performance of tomato processing companies. Almost all tomatoes that are grown in Australia for processing (into paste, passata, or diced or whole tomatoes for canning or further processing) are grown or purchased by Kagome Australia. Kagome Australia supplies raw and processed tomatoes to SPC Ardmona, and in 2013 supplied about 28 000 tonnes (either as raw tomatoes or diced) (Kagome Australia, sub. 12). Clearly the interests of growers are aligned with the interests of the domestic tomato processing industry.

However, the Agreement on Safeguards sets a different threshold for being considered a domestic producer. The WTO appellate body has previously determined that a ‘substantial coincidence of economic interests’ is not sufficient on its own to be considered a domestic producer (*US — Lamb* (DS 177, 178)). Some inquiry participants submitted that, for this reason, growers should not be considered part of the domestic industry for the purposes of the safeguards investigation (for example, ANICAV, sub. 27).

As noted earlier, the Commission has determined that fresh tomatoes are not like or directly competitive with the processed tomato products under reference. As such, tomato growers are not part of the domestic industry as it is defined according to the Agreement on Safeguards. Raw tomatoes that are destined for processing are purchased by processors as an intermediate input and at that point growers’

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involvement in the production process terminates. Nevertheless, any injury to SPC Ardmona could potentially have a flow-on impact on growers, as well as on other suppliers and the broader Shepparton region (Essential Economics 2013). Likewise, factors leading to a severe reduction in raw tomato supply would have adverse effects on SPC Ardmona.

**Box 2.1 Kagome Australia and Billabong Produce**

**Kagome Australia**

Kagome Australia (formerly Cedenco, and based in Echuca, Victoria) is the largest Australian processor of raw tomatoes. It processed 182 000 tonnes in 2013, of which 100 000 tonnes were grown by the company and the remainder sourced from contract growers.

Kagome Australia produces tomato paste, passata and diced tomatoes. These are sold to other food processors (such as manufacturers of pasta sauces) and the food service sector. Kagome Australia does not directly supply retail markets. In 2013, Kagome Australia supplied about 18 000 tonnes of raw tomatoes, and about 7500 tonnes of processed diced tomatoes, to SPC Ardmona.

**Billabong Produce**

Billabong Produce grows and processes tomatoes at Jerilderie, NSW. In 2013, it processed about 8000 tonnes of raw tomatoes. The company manufactures:

- passata for sale in ALDI supermarkets (under a private label brand)
- branded passata and pasta sauce products for sale in specialty retail shops
- diced tomatoes in 3 litre cans and large aseptic bags (of 5 litres or more) for sale to the food service sector and to SPC Ardmona (Billabong does not sell these products directly to the retail market).

In 2013, Billabong Produce supplied diced tomatoes to SPC Ardmona, equivalent to 573 tonnes of unprocessed raw tomatoes.

*Sources:* Billabong Produce (pers. comm., 23 July 2013); Kagome Australia (sub. 12).

## 2.2 Have imports increased?

Under the Agreement on Safeguards, safeguard measures can only be imposed if a product is being imported ‘in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry’ (Article 2.1). The Agreement sets two tests for assessing the increase in imports: an absolute increase in imports, or an increase in imports relative to domestic production. Satisfying either of these tests is

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sufficient to warrant further investigation of whether the industry is suffering injury and whether the injury was caused by increased imports.

The requirement that imports be entering ‘in such increased quantities’ has been interpreted by the WTO appellate body as a requirement that ‘the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause “serious injury”’ (*Argentina – Footwear (EC)* (DS 121), para. 131).

Although a timeframe for the increase in imports is not specified in the Agreement on Safeguards, a rule of thumb is to focus on the last five years for which data are available, and to assess both the trend rate of increase and absolute quantities of imports (Sykes 2003). Analysis of this period is considered in this report. The Commission has also considered shorter and more recent periods of import activity within the last five years, and has examined earlier data to help it to understand trends in imports of the relevant products.

The Commission’s analysis of import volumes used data from the ABS. These data are available on the Commission’s website. The Commission has also used confidential data provided by SPC Ardmona on its production volumes. SPC Ardmona expressed concern about the Commission’s decision to report evidence drawn from these data in the Accelerated Report.

The Commission has taken care to respect the confidentiality of the SPC Ardmona data. It did not publish any of the confidential numbers provided by SPC Ardmona. Instead, data were reported in ways that preserved their confidentiality, such as removing values and units of measurement from the vertical axes of charts, and reporting data in percentage changes or indexes. Where possible, publicly available data were used to support the inferences drawn from the confidential information and to provide interested parties with publicly available information relevant to understanding the Commission’s assessment.

Throughout this report, data on prices and values are reported in nominal terms.

### **Imports in absolute terms**

The Commission focused on the period from July 2008 to September 2013 (approximately five years) for its analysis of whether imports have increased in a way that would satisfy the requirements of Article 2.1 of the Agreement on Safeguards. Longer-term trends in imports over the period July 2003 to September 2013 are also noted.



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Imports of processed tomato products fluctuate from month to month and from year to year. To account for the potential effects of monthly and seasonal fluctuations, data are presented in several formats, including import volumes by:

- month
- calendar year and financial year
- moving annual total (a 12-month total calculated monthly)
- trends.

In the five years to June 2008, monthly import volumes increased by approximately 32 tonnes per month on a trend basis, equivalent to an increase in annual imports of 4.6 kilotonnes per year (figure 2.1). Annual imports increased from 21.4 kilotonnes in financial year 2003-04 to 41.2 kilotonnes in 2007-08 — equivalent to a compound annual growth rate of about 18 per cent.

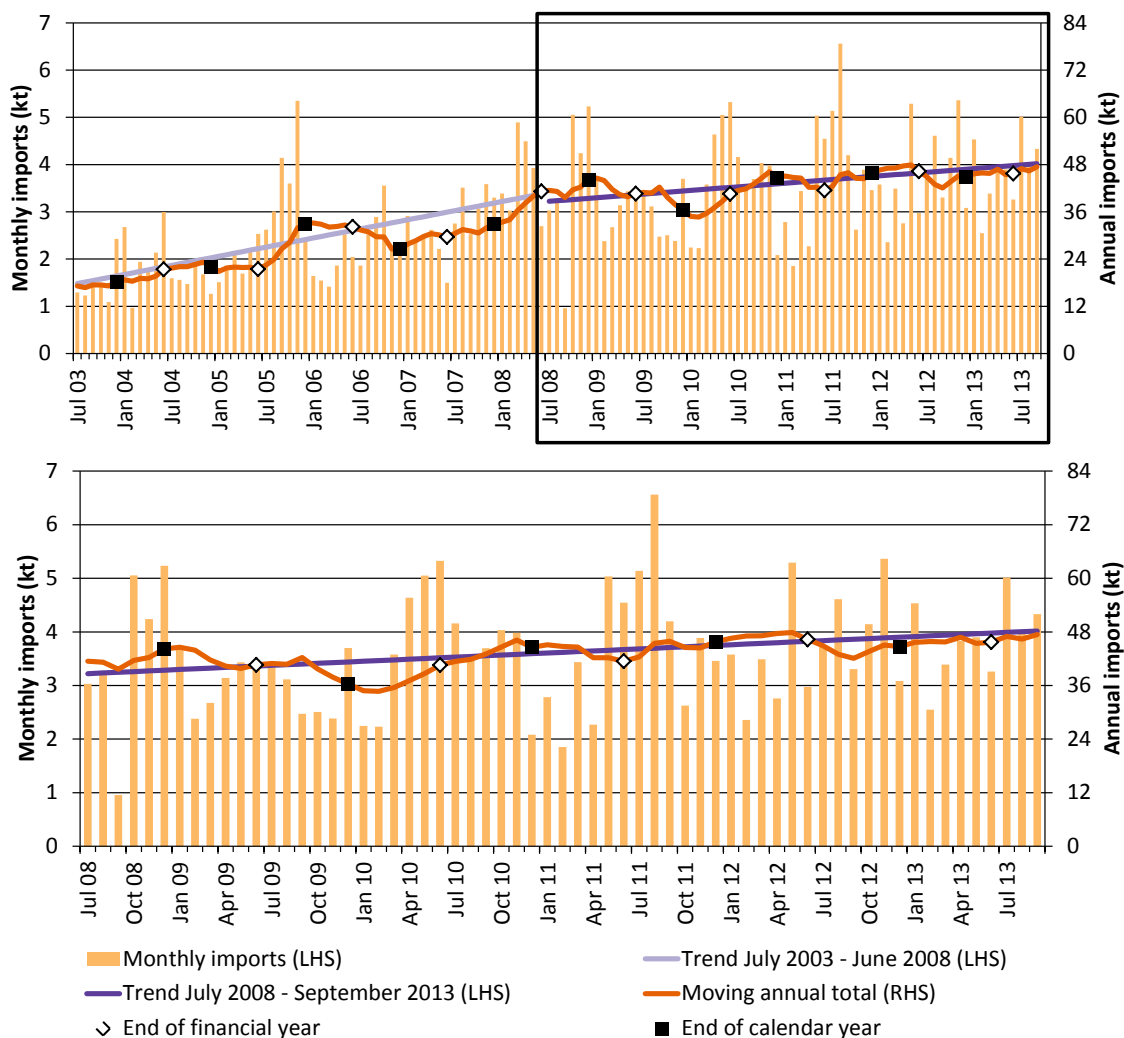
The growth in imports has subsequently slowed. From July 2008 to September 2013, monthly import volumes increased by 13 tonnes per month on a trend basis, equivalent to an increase in annual imports of 1.8 kilotonnes per year. This slower trend growth is reflected in the moderately positive slope of the trend line in the lower panel of figure 2.1. Imports in financial year 2012-13 totalled 45.7 kilotonnes, equivalent to a compound annual growth rate of about 3 per cent since 2008-09.

#### *The Commission's assessment*

Over the period July 2008 to September 2013, the trend increase in annual imports was about 1.8 kilotonnes per year. This is a significantly slower growth rate than over the five years to June 2008. For various shorter periods within the five years to September 2013, imports grew at faster or slower rates. However, in the Commission's view, any conclusion that is based on selecting start and end points that yield the maximum possible increase in imports would not be consistent with WTO jurisprudence.

On balance, examination of the trend in imports over the past five years leads to the conclusion that the absolute volume of imports has not increased in a way that satisfies the requirement of being recent sudden, sharp or significant.

**Figure 2.1 Import volumes, monthly and moving annual total<sup>a</sup>**  
 Tariff subheading 2002.10.00 (statistical code 60)



<sup>a</sup> The trend lines were estimated, allowing for a break in the trends, by regressing monthly import volumes (for July 2003 to September 2013) on the monthly time period, a binary variable (indicating the period July 2008 onwards) and the product of the time period and binary variable.

Sources: ABS (unpublished); Productivity Commission estimates.

### Imports relative to domestic production

Even though there was no surge in the absolute volume of imports of processed tomato products in the period under investigation, the Agreement on Safeguards permits a country to implement safeguard measures if imports have increased relative to domestic production (Article 2.1).

To assess whether this test was met for processed tomato products, the Commission calculated the ratio of imports to domestic production over the period 2009–2013. It

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used ABS data on import volumes and confidential data provided by SPC Ardmona on its production of processed tomato products on an annual basis for the period 2009–2013.<sup>1</sup> The Commission requested data for 2008, but SPC Ardmona did not provide it. Although these data could not be corroborated against independent data sources, they are the only data available to assess trends in imports relative to domestic production. The Commission is aware that SPC Ardmona may import some processed tomato products and sell them under SPC Ardmona branding (SAFVCA, sub. AR43), or possibly as private label products. Any such imports would be included in the import data but not included in production volumes by the company.

The ratio of imports to domestic production can contribute to the analysis of whether imports have increased in a way that would meet the requirements of the Agreement on Safeguards. SPC Ardmona questioned the reliability of examining imports relative to domestic production. It submitted that this ratio would not take account of the carryover of stock from year to year, stock write-offs and differences in timing between domestic production, imports and the sale of goods (SPC Ardmona, sub. AR38). The Commission agrees that there are reasons to interpret the ratio with caution, as set out in box 2.2. However, it has included the ratio in its analysis in order to meet the requirement of the Agreement on Safeguards to assess trends in imports relative to domestic production.

**Box 2.2     Interpreting the ratio of imports to domestic production**

The ratio of import volumes to domestic production is sensitive to several factors that should be taken into account when interpreting changes in the ratio over time.

- Import volumes are highly variable from month to month, and over years. As such, the ratio of imports to domestic production is sensitive to the period chosen.
- There is a high degree of natural variability in the supply of processing tomatoes. This reflects variability in growing conditions. For example, severe flooding in the tomato growing region of Victoria significantly decreased SPC Ardmona's production in 2011. Imports in 2011 were only slightly higher than in 2010, but the impact of the floods caused a 'spike' in the ratio of imports to domestic production. Production recovered in 2012, and the ratio of imports to domestic production decreased.

(Continued next page)

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<sup>1</sup> Processing tomatoes are harvested and processed from January to March in Australia. This means that the calendar-year production data that SPC Ardmona provided can also be considered as financial-year data (and compared with financial-year import data). For example, production for the 2012 calendar year was also production for the 2011-12 financial year.

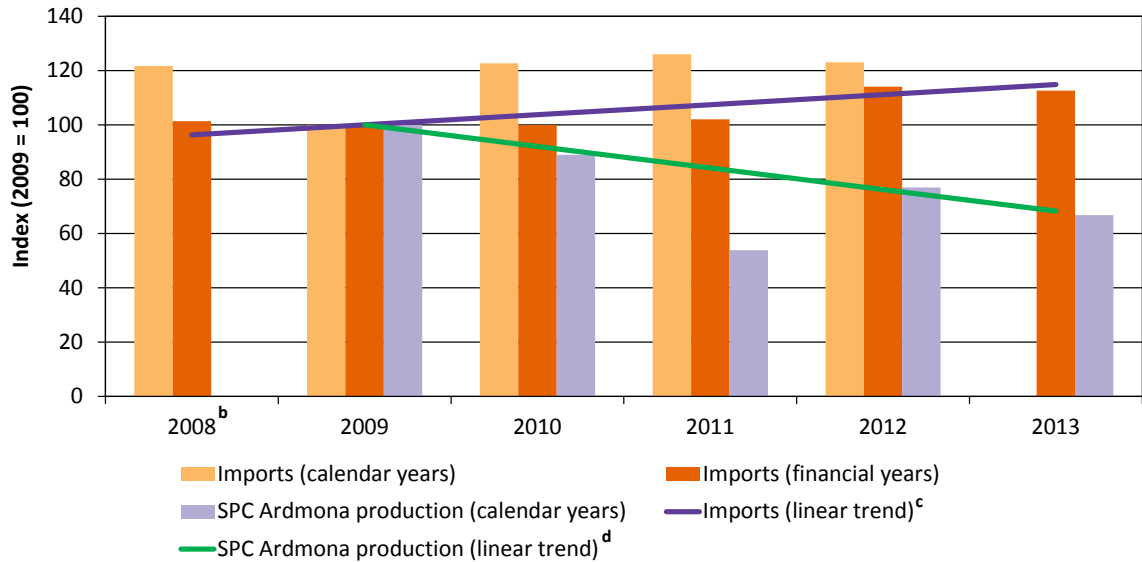
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Box 2.2 (continued)

- The base level of domestic production relative to imports will influence the measure. As domestic production is the denominator in the ratio, where domestic production is substantially lower than import volumes (as is the case for processed tomatoes), small changes in domestic production can lead to comparatively large changes in the ratio of imports to domestic production.
- The fact that SPC Ardmona is itself an importer of processed tomato products means that yearly fluctuations in the ratio can be affected by SPC Ardmona's commercial decisions. For example, SPC Ardmona imported about 5000 tonnes of processed tomatoes to meet a contract in 2009 (SPC Ardmona, sub. 17), and also imported processed tomatoes in 2011 (the year of the floods) to meet its commitments to customers (SPC Ardmona cited in SAFVCA sub. 36, att. 1). This would affect the ratio of imports to domestic production in those years.

SPC Ardmona's production of processed tomato products decreased by approximately 33 per cent between 2009 and 2013 (figure 2.2). This is equivalent to an average decrease of 8 per cent of 2009 production levels each year. Over the period July 2008 to June 2013, imports increased by an average of about 1.5 kilotonnes per year — equivalent to a compound annual growth rate of about 3 per cent. The net effect of these two trends was that the ratio of imports to domestic production increased by about 70 per cent over the period 2009–2013. About three quarters of the increase in the ratio can be attributed to the reduction in domestic production (figure 2.3).

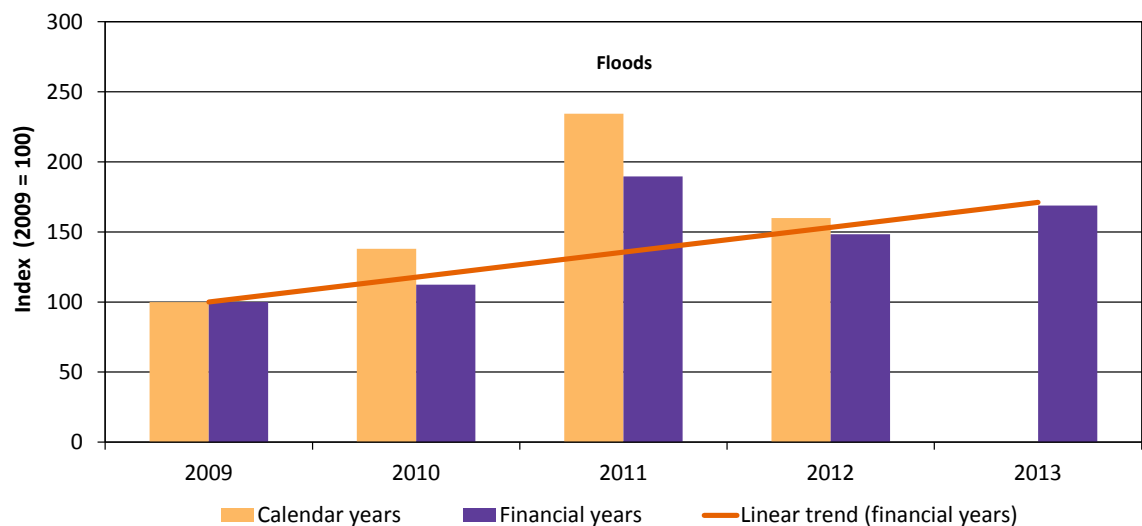
**Figure 2.2 Imports and SPC Ardmona processed tomato production<sup>a</sup>**  
Index values



<sup>a</sup> Financial-year data represent the financial year ending in the year marked on the axis. <sup>b</sup> SPC Ardmona did not provide production data for 2008. <sup>c</sup> The import trend line is the same as in figure 2.1, drawn through the trend values for July in each year, then converted to index values. <sup>d</sup> The SPC Ardmona production trend line was calculated by regressing annual production on the year and a binary variable to capture the effects of the 2011 floods, which led to lower production levels. This was then converted to index values.

Sources: ABS (unpublished); SPC Ardmona (confidential); Productivity Commission estimates.

**Figure 2.3 Index of the ratio of imports to domestic production<sup>a,b</sup>**



<sup>a</sup> The trend line was calculated by regressing the ratio of imports to domestic production for financial years on the year and a binary variable to capture the effects of the 2011 floods, which led to lower production. This was then converted to index values. <sup>b</sup> The trend in the ratio for calendar years was not statistically significant.

Sources: ABS (unpublished); SPC Ardmona (confidential); Productivity Commission estimates.

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### *The Commission's assessment*

The Commission examined the evidence on imports relative to domestic production in accordance with the Agreement on Safeguards. Bearing in mind the limitations of this indicator that were set out in box 2.2, the evidence indicates that over the period under analysis the ratio of imports of processed tomato products to domestic production increased in a way that meets the standard of a 'recent, sudden, sharp and significant' increase in imports relative to domestic production.

#### FINDING 2.1

*There has not been a sufficient increase in import volumes of the products under reference to satisfy the requirement under Article 2.1 of the Agreement on Safeguards. However, there is evidence that imports have increased relative to domestic production, sufficient to meet the WTO standard. This change was largely driven by changes in domestic production.*

## **2.3 Was the increase in imports a result of unforeseen developments?**

Case law has affirmed that the original GATT Article XIX and the WTO Agreement on Safeguards comprise a 'package' of requirements — that is, the Agreement on Safeguards does not supplant GATT Article XIX, but clarifies and reinforces it. Consequently, the requirements of both must be met.

Although the Agreement on Safeguards is silent on the matter, Article XIX provides that WTO members may only take emergency action if, as a result of 'unforeseen developments and the effect of obligations incurred by a WTO member', an increase in imports causes or threatens serious injury.

Case law has interpreted this to mean that a requirement for the imposition of safeguard measures is that the trading developments could not reasonably have been foreseen or expected by negotiators when the obligations under the GATT were incurred; in this case, in 1994. The problems associated with applying Article XIX of the GATT in practice have been prominent in commentary on safeguard measures (box 2.3).

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**Box 2.3 GATT Article XIX — critique of meaningfulness of the clause**

In his critique of WTO jurisprudence on safeguard measures, Sykes identified several practical application issues arising from Article XIX of the GATT.

The difficult interpretive issues that the clause raises in a long-lived agreement, which led to its irrelevance in GATT practice, might also have been noted as a basis for letting it remain dormant.

Having embraced the opposite view, the appellate body might at least undertake to explain coherently what Article XIX(1), first clause, now requires. At what point in time must the events in question have been unforeseen — the time of the last tariff concession? What if the last concession on the product in question was decades ago — could anything today have been foreseen? What if the product has been the subject of numerous tariff concessions over time — are expectations associated with the last concession the only relevant ones? ... How does one establish the expectations of trade negotiators as an evidentiary matter? What if there are many negotiators and their accounts of their expectations are incongruent? What if most of them are dead? This list of questions is assuredly incomplete, and the appellate body has yet to afford any meaningful guidance regarding the answers.

*Source: Sykes (2003, pp. 277–8).*

SPC Ardmona has submitted that a number of unexpected events resulted in the increased imports of processed tomato products.

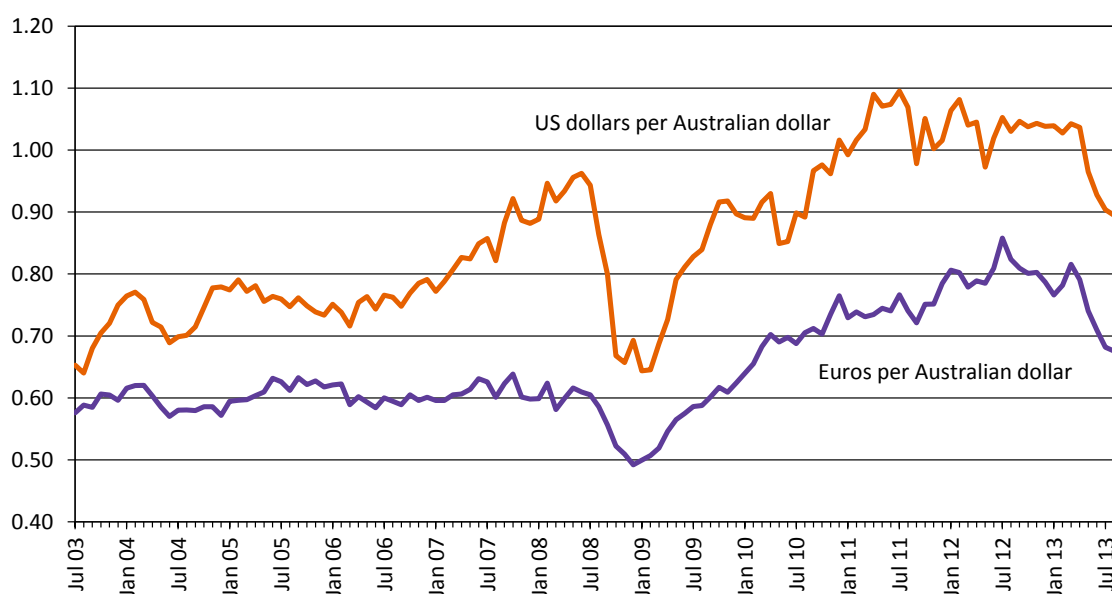
- The appreciation of the Australian dollar.
- The dumping of imported products.
- Supermarkets using low-cost imports to advance their private label product strategies.

### **Appreciation of the Australian dollar**

Over the past five years the Australian dollar has appreciated against the Euro (by about 40 per cent), and against the US dollar (by about 38 per cent) (figure 2.4). Such appreciation would, other things being equal, reduce the price of imported processed tomatoes relative to domestically produced products, making the domestic products less competitive on the domestic market.

One question for this inquiry is whether the appreciation of the Australian dollar should be considered an ‘unforeseen development’. The Australian dollar was floated in 1983 and the fluctuation of the currency would have been foreseeable in 1994. Moreover, the appreciation of the Australian dollar commenced several years before the relevant period for this investigation. However, it seems reasonable to conclude that the extent of the appreciation, and the persistence of the appreciation, were unforeseen in 1994.

Figure 2.4 Australian dollar exchange rate



Source: RBA (2013).

## Dumping

The domestic tomato processing industry has faced competition from imported products for many years, and has at various times successfully applied for anti-dumping and countervailing duties. In 1992, anti-dumping duties were imposed on canned tomato imports from Italy and China, and countervailing duties were imposed on imports from Italy, Spain and Thailand (Anti-Dumping Commission 2013a). These duties were in place for five years. The duties on Italian imports were removed in June 1993 following a court case, but reinstated in 1994. In 1997, anti-dumping and countervailing duties on Italian imports were extended for a further five years (Anti-Dumping Commission 2013a).

In November 2013, the Anti-Dumping Commission made a Preliminary Affirmative Determination that certain prepared or preserved tomato products had been exported from Italy at less than their 'normal' value, and imposed 'provisional dumping securities' on imports sourced from some Italian manufacturers and exporters (Anti-Dumping Commission 2013b). These securities range from 6.5 to 9.11 per cent (on an *ad valorem* basis) across Italian producers, with no securities imposed on imports from two producers that were found to have a negligible dumping margin. The Commission understands that one of the Italian producers found to have a negligible dumping margin (not subject to provisional dumping securities) is a major supplier of private label products to Australian supermarkets.



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The Anti-Dumping Commission's investigation is still underway and is not required to be completed until 30 January 2014. In any event, the anti-dumping and safeguard systems are intended to deal with different circumstances — a finding that measures are warranted under one system would not automatically lead to the same finding under the other system.

### **Supermarket private label strategies**

Supermarket sales of private label products have increased in recent years. Increased private label sales could lead to reduced demand for domestically produced products, if supermarkets use imported products for their private label brands. The availability of private label products could also have a 'price capping' effect on other branded products, reducing the ability of producers to maintain or increase their margins without losing sales and market share. This is discussed further in section 2.5.

The growth of private label sales was to some extent foreseeable in 1994. Private label products have been sold in Australia since the 1960s and the domestic processing tomato industry has faced an increasing market share of such products for many years. For example, the market share of private label brands increased from about 37 per cent in 1989 to 49 per cent in 1990 (Pritchard and Burch 2003).

Overall, although some of the factors cited by SPC Ardmona would have been foreseeable, the *extent* of the developments as well as their combined effect would in principle be unlikely to have been fully foreseeable at the time Australia's obligations under the GATT were incurred.

Notwithstanding this assessment, the Commission suggests that judgements on such a narrow 'unforeseen developments' test should take into account the wider ramifications for public policy generally, and the international trading systems in which Australia is an active player, in particular. Satisfaction of this requirement is not a sound basis for policy decisions, both because this would not take into account broader implications for the Australian economy and because the test itself is inherently ineffective.

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## 2.4 Is the industry suffering serious injury, or is it threatened?

The WTO Agreement on Safeguards defines ‘serious injury’ to mean ‘a significant overall impairment in the position of a domestic industry’ (Article 4.1(a)). The Agreement provides no clear guidance about what constitutes serious injury, although it is consistently interpreted as being a more demanding test than the ‘material’ injury test applying in anti-dumping and countervailing cases (chapter 1).

The Agreement does state that in investigating whether imports have caused or are threatening to cause serious injury, the Competent Authority (the Commission) shall evaluate ‘all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry’ (Article 4.2(a)). The Agreement lists eight factors that must be considered in the analysis:

... the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. (Article 4.2(a))

Subsequent WTO rulings have affirmed that this list constitutes a ‘bare minimum’ of the factors that must be evaluated in every case (*Argentina – Footwear (EC)* (DS 121), *US – Wheat Gluten* (DS 166), *US – Steel* (DS 248, 249, 251, 252, 253, 254, 258, 259)). In cases where a Competent Authority has failed to evaluate all of the listed factors, WTO Panels and the appellate body have found that the safeguards investigation, and any determination that increased imports have caused serious injury, are inconsistent with Article 4 of the Agreement on Safeguards.<sup>2</sup>

### Data sources

SPC Ardmona submitted evidence relating to its claims of serious injury. This was supplemented with data from official sources and other evidence provided by industry organisations and Aztec Australia, a commercial data provider.

The data provided by Aztec Australia cover retail sales by Coles, Woolworths and Metcash supermarkets, but do not include sales by ALDI, Costco and other retailers (box 2.4). In response to the Commission’s Accelerated Report, SPC Ardmona

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<sup>2</sup> Such a finding will generally result in a recommendation that the Dispute Settlement Body request that the nation applying the safeguard measures bring them into conformity with its obligations under the Agreement on Safeguards and GATT. Typically this would be by removing the measures, but the WTO only requires that the Member ‘take such reasonable measures as may be available to it’ to ensure the observance of its obligations.

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(sub. AR38, p. 5) argued that excluding sales by ALDI would understate the growth of private label sales, and if ALDI sales were included this would increase ‘the level and rate of import penetration increasing the justification for safeguards’.

**Box 2.4 Supermarket sales data**

The Commission purchased data on supermarket sales of canned tomatoes from Aztec Australia, a commercial data provider. These data contain retail quantities and values, by month and brand, for Woolworths, Coles and Metcash supermarkets from January 2008 to April 2013. Sales by ALDI, Costco and other retailers are not included.

The data have been aggregated such that individual product lines, pack sizes and the individual retailer of private label products cannot be identified (‘private label’ is classified as one brand). The dataset was restricted to product lines that would fall under tariff subheading and statistical code 2002.10.00.60, drawing on advice provided by the Australian Customs and Border Protection Service. This was done by classifying individual ‘stock keeping units’ (SKUs) provided in a separate list by Aztec Australia.

The Commission also used the list of SKUs to request data disaggregated by the source of products (Australian or imported), as indicated by the websites of supermarkets and importers. Where a SKU’s origin could not be determined, that product was coded as ‘unsure’. However, data in this category were subsequently split between the Australian and imported categories based on a list of SKUs provided by SPC Ardmona (which identified the source of products). Sales of ‘unsure’ private label products were divided between the categories based on sales data for these products provided by SPC Ardmona.

Since private label products could not be disaggregated by retailer or SKU in the data, the estimates for these products are sensitive to the way they were classified as Australian or imported. This classification was based on product origins at a particular point in time (July 2013), with the implication that the data do not reflect past changes in the sources used for individual SKUs. For example, if a particular private label product was sourced from Australian production in some years but from imports in others, and recorded as ‘imported’ in the dataset, sales for that product in all time periods will also be classified to ‘imports’. Similarly, all SPC Ardmona products were classified as Australian produced. Even though the company has imported canned tomatoes in some years (SAFVCA, sub. AR43; SPC Ardmona, sub. 17), information was not available on the relevant volumes and source countries over recent years.

A summary of the data and a description of how the data were transformed are available from the Commission’s website.

The Commission agrees that the supermarket data used in its analysis do not provide complete coverage of the retail market or other sales channels (such as sales to the food service industry). However, comparable data on retail sales through ALDI and other channels were not available. As such, even though the data used by

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the Commission are likely to cover a significant proportion of retail sales, they can only provide an estimate of the trends occurring in the retail sector as a whole.

Nevertheless, inclusion of data on these sales would not change the Commission's findings on serious injury. The non-inclusion of ALDI data would tend to understate the total retail sales of private label products (ALDI only sells private label processed tomatoes). The accelerated report concluded that the domestic industry was suffering serious injury. Including ALDI in the data might strengthen this conclusion, but would not change it. The effect on other conclusions is discussed later in this chapter.

### **SPC Ardmona's claims of serious injury**

SPC Ardmona (sub. 17) submitted that sales volumes of domestically manufactured canned tomatoes decreased by 27 per cent from 2009 to 2012. It also submitted that the decrease in sales led to:

- reduced economies of scale and higher costs of manufacturing per unit
- the discounting of products and increased expenditure on promotions as strategies to attempt to protect market share against import competition (SPC Ardmona, sub. 17).

The company considered that these factors contributed to decreased profitability of its tomato processing operations. It argued that if the trend continues, it will 'put the viability of the tomato operations under threat' (SPC Ardmona, sub. 17, p. 37). Specifically, it submitted that continued loss of market share would reduce the value of its Ardmona brand, and that 'the current and prospective returns to the business do not justify additional capital investment which is required to make the operations competitive' (SPC Ardmona, sub. 17, p. 11).

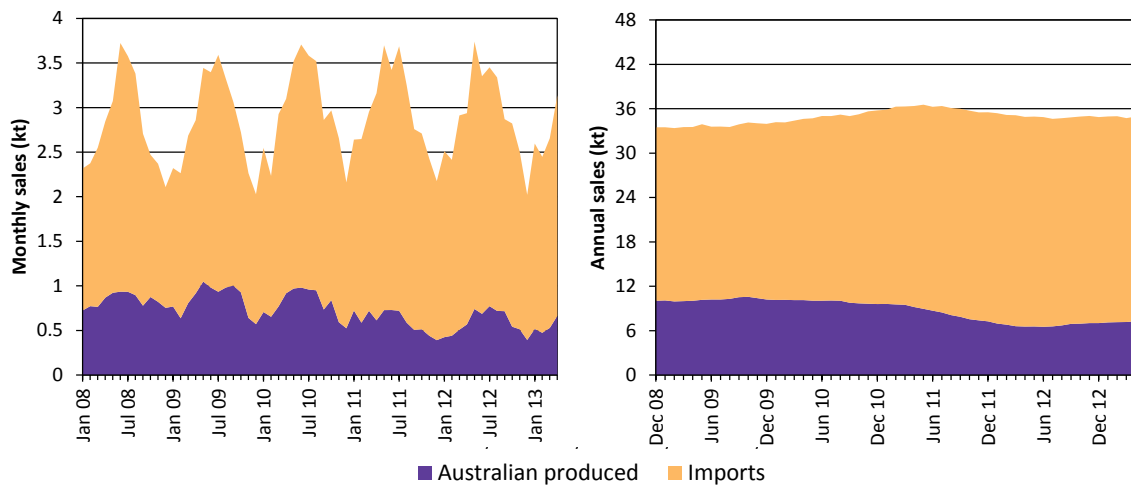
### **Changes in market share**

SPC Ardmona (sub. 17) submitted that the market share of imports sold in supermarkets increased from 63 per cent in 2009 to 82 per cent in 2012.

The Commission's analysis of Aztec Australia data covering Coles, Woolworths and Metcash supermarkets suggests that in 2008-09 about 70 per cent of sales were imported products (figure 2.5). The corresponding share for 2012-13 (to April) was about 79 per cent, broadly in line with SPC Ardmona's submission. This increase coincided with a rise in sales of private label imported products (from 42 per cent of sales to 52 per cent). The market share of branded imports was initially about 28 per

cent, then increased until late 2010 (peaking at about 33 per cent), before it decreased back to about 27 per cent in 2013.

**Figure 2.5 Processed tomato products — supermarket sales**  
Monthly data (LHS) and moving annual totals (RHS)



Sources: Aztec Australia (unpublished); Productivity Commission estimates.

## Changes in domestic sales

SPC Ardmona (sub. 17) submitted that its sales decreased over the period 2009 to 2012.

- Sales by supermarkets of its SPC Ardmona branded canned tomatoes decreased from 8975 tonnes to 6619 tonnes (a 26 per cent decrease)
- The value of retail sales of SPC Ardmona products decreased from \$30 million to \$24 million (a 20 per cent decrease).
- The number of SPC Ardmona product lines (known as Stock Keeping Units) sold in supermarkets decreased.

SPC Ardmona provided confidential information on its sales volumes. The data referred to ‘ex-factory sales of domestically produced goods’. The data show that over the period 2009–2012:

- SPC Ardmona’s sales of branded tomatoes (including Ardmona and other brands) decreased by 21 per cent.
- SPC Ardmona’s sales of private label products decreased by 42 per cent.

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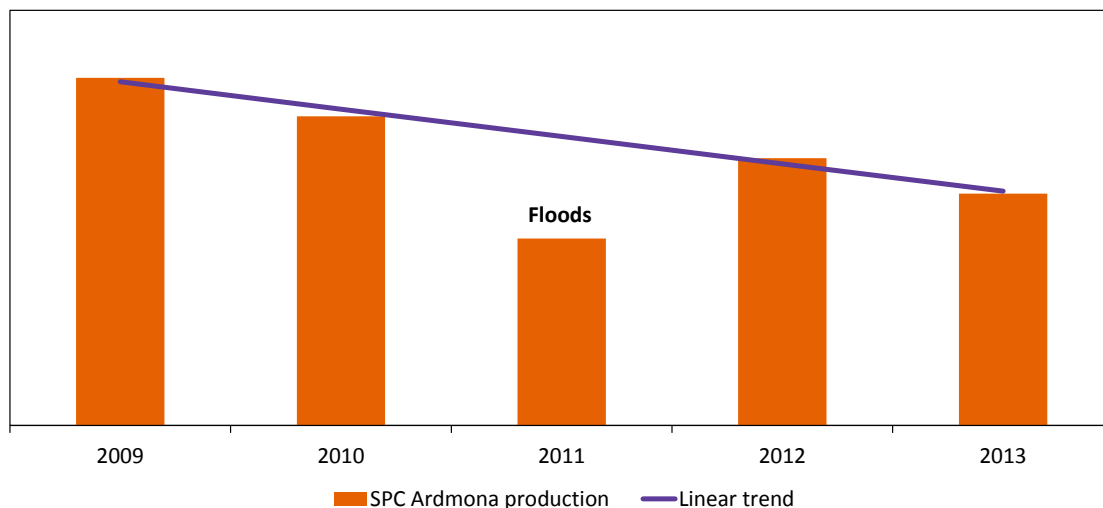
Commission analysis of data covering Coles, Woolworths and Metcash supermarkets confirms that supermarket sales of domestically produced processed tomato products decreased over the period 2009–2012 (in calendar years).

- Sales of SPC Ardmona branded products decreased by 19 per cent.
- Sales of Australian-produced private label products decreased by 71 per cent.

## Production levels

SPC Ardmona’s production levels decreased by 33 per cent over the period 2009–2013 (figure 2.6). Production decreased by 40 per cent in 2011 compared to 2010, and recovered somewhat in 2012. This reflects the impacts of flooding in the tomato-growing region of Victoria in the 2010-11 season.

Figure 2.6 **SPC Ardmona production of processed tomato products<sup>a</sup>**



<sup>a</sup> The trend line is the same as in figure 2.2.

Sources: SPC Ardmona (confidential); Productivity Commission estimates.

## Capacity utilisation and productivity

SPC Ardmona provided confidential data on its production capacity and capacity utilisation for the period 2009–2013. The data indicate that SPC Ardmona’s production capacity was constant over the period. Accordingly, capacity utilisation increased and decreased in line with production levels. The trend over the five-year period was for decreasing capacity utilisation, driven by the decreasing production volumes shown in figure 2.6.

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SPC Ardmona also provided confidential data on labour productivity in tomato processing. The data indicate that labour productivity related to the production of the relevant tomato products increased from 2009 to 2013.

### **Profits and losses**

SPC Ardmona provided confidential financial information covering the period 2010 to 2013. The data indicate that profit margins — calculated as earnings before interest and tax divided by sales revenue (net of discounts) — were positive but decreased slightly every year over the period.

The data also indicate that the reduction in profit margins was driven largely by increased finance charges and indirect expenditures over the period. Per kilogram of processed tomato product, sales revenue (net of discounts) increased by a small amount and the cost of goods sold decreased by a similar amount (with some fluctuation year to year).

### **Employment**

SPC Ardmona currently employs 840 staff on a full-time equivalent basis (SPC Ardmona, sub. 17). It also provided the Commission with confidential data on the hours worked in its tomato processing operations over the period 2009–2013. The data show that the number of labour hours used in the production of processed tomato products decreased by 47 per cent over the period 2009–2013. (Over the same period production decreased by approximately 33 per cent.) The Commission was not able to attribute the decrease in hours worked to permanent employees and seasonal employees. Independent sources of information which can fully corroborate the data have not been found. Overall, the Commission accepts that there has been a substantial decrease in employment in SPC Ardmona’s tomato processing operations.

### **The Commission’s assessment**

There is compelling evidence that SPC Ardmona’s tomato processing operations have suffered serious injury in recent years.

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## 2.5 Have imports caused the injury?

Having established that the domestic industry has suffered serious injury, it is necessary to identify and attribute the causes of that injury. If it can be shown that the injury was *caused* by increased imports, safeguard measures may be permitted under the terms of the WTO Agreement on Safeguards.

In the case of the tomato processing industry, imports did not increase significantly in absolute terms. However, the ratio of imports to domestic production increased over the period 2009–2013. The test for safeguard measures is therefore whether the relative increase in imports caused the injury. The Commission sought to identify the factors that caused the injury to SPC Ardmona, and to assess whether the increase in the ratio of imports to domestic production was a cause of injury. The evidence indicates that a combination of long-term trends and recent acute events caused injury. One aspect of the injury was decreased domestic production, and this explains the majority of the observed increase in the ratio of imports to domestic production. The various causes of injury are summarised in box 2.5 and examined in more detail in the following sections. The role of imports is discussed below.

### Box 2.5 Causes of the injury to the domestic industry

The injury to the domestic tomato processing industry coincides with, and has been caused by, a combination of long-term industry and market trends as well as recent acute events (including floods and appreciation of the Australian dollar).

#### Long-term trends

- Processed tomatoes are an internationally traded product, Australia is a minor producer and other countries have a comparative advantage in tomato processing.
- Imports have been a source of significant competitive pressure for at least the past two decades.
- Increased promotion of private label brands by supermarkets and increased consumer acceptance of private label products have reduced the premiums that producers of branded products can charge without losing market share.

#### Recent acute events over the past five years

- Floods in 2011 reduced the supply of processing tomatoes by two thirds, and significantly decreased SPC Ardmona's production of processed tomatoes.
- Decreased domestic supply and the appreciation of the Australian dollar led retailers to source private label products from imports. Sales of domestically produced private label products have not recovered to date.
- Exports of Australian processed tomatoes have decreased significantly over the past five years, coinciding with the appreciation of the Australian dollar.



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## Requirements for evaluating the causes of the injury

Neither the Agreement on Safeguards, nor the subsequent case law, specifies strict tests for how to evaluate the causes of the injury to the domestic industry. However, the Agreement and case law do provide some guidance, and set some minimum requirements for the analysis.

First, the Agreement specifies that the investigation is required to consider ‘all relevant factors’ that could have contributed to the injury. The Agreement does not specify which other factors should be considered. However, the WTO appellate body interpreted the term to mean that the analysis should not be limited to factors that were raised by an interested party (*US – Wheat Gluten* (DS 166)).

Second, the Agreement on Safeguards stipulates that safeguard measures can only be applied when imports are entering ‘*under such conditions* as to cause or threaten to cause serious injury to the domestic industry’ (Article 2.1) [emphasis added]. Various panel and appellate body interpretations of the italicised phrase suggest this requires analysis of the conditions of competition in the domestic market (for example, *Argentina – Footwear (EC)* (DS 121), Panel Report).

Third, the Agreement requires that any injury that was caused by factors other than increased imports must not be attributed to increased imports. As the Australian Manufacturing Workers’ Union (sub. AR40) submitted, case law suggests that increased imports, together with other factors, can be found to cause serious injury (*US – Wheat Gluten* (DS 166), *US – Lamb* (DS 177, 178)). It is sufficient for the increased imports to be a contributor to the injury after other factors have been netted out, provided that ‘there is a genuine and substantial relationship of cause and effect’ between increased imports and the injury (*US – Wheat Gluten* (DS 166)).

Finally, guidance from WTO case law is that in order to attribute the cause of the injury to imports, there should be, at the very least, a ‘coincidence of trends’ between the injury and any increase in imports (*Argentina – Footwear (EC)* (DS 121)).

## Key mechanisms through which imports can cause injury

There are two key interrelated mechanisms through which imports could cause injury to the domestic industry.

First, imports could reduce or suppress market prices. Initially, this could reduce profitability in the domestic industry, inducing a decrease in production until — and

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if — profitability is restored at the lower price. In short, lower import prices expand the domestic market, but also crowd out higher-cost domestic production.

Second, to the extent that the demand for local products and domestic production volumes decrease, production costs could rise due to loss of any economies of scale previously harnessed by the domestic industry. In this case, the industry may continue to produce using its existing plant and equipment for as long as it can cover the avoidable cost of producing the product, irrespective of the capital attributed to the production process. However, any new capital investment (for example, to replace obsolete plant) may not be commercially justifiable in the new market circumstances.

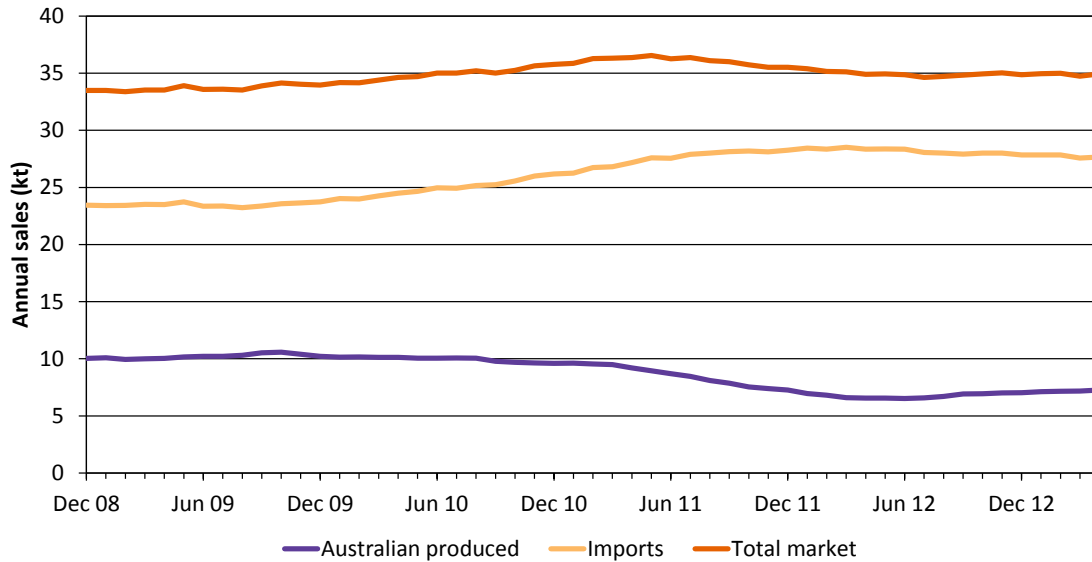
There is evidence that the availability of substitutes in the world market and the conditions of competition in the domestic market have limited SPC Ardmona's ability to increase its prices without losing market share. Decreasing production volumes have reduced economies of scale leading to an increase in the unit cost of production.

### **Some key facts for understanding the causes of the injury**

*Demand has been relatively flat and imports have gradually increased market share*

Domestic consumption of processed tomato products has been relatively flat over the past five years. Over the same period, the composition of the market has gradually changed (figure 2.7). Sales of domestically produced tomatoes in Coles, Woolworths and Metcash supermarkets were relatively steady until the end of 2010, then decreased until the middle of 2012. Since mid-2012, sales of domestic product have at best increased slightly. Sales of imported products increased from late 2009 until mid-2012, and have flattened off or slightly decreased since then. While it is unclear how much sales of each product type would increase if data on sales by ALDI and other supermarkets were included, it is likely that overall sales of SPC Ardmona products have declined in line with reduced production.

Figure 2.7 **Processed tomato products — supermarket sales<sup>a</sup>**  
Moving annual totals



<sup>a</sup> This figure is based on the assumption that all SPC Ardmoma branded products were Australian produced.  
Sources: Aztec Australia (unpublished); Productivity Commission estimates.

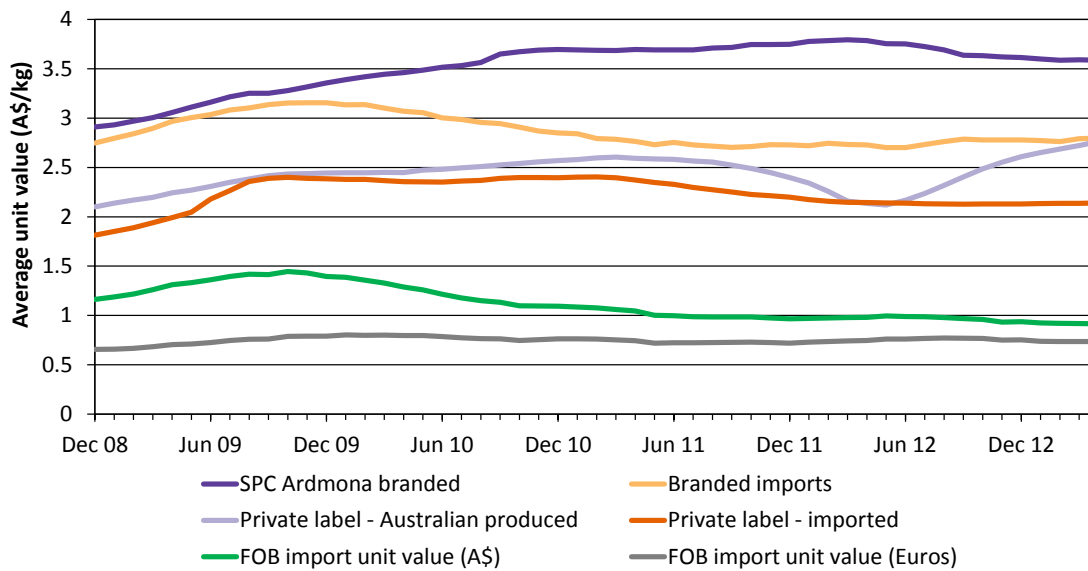
*The supermarket unit value of SPC Ardmoma branded products has increased*

The average unit value of SPC Ardmoma branded products sold in Coles, Woolworths and Metcash supermarkets was higher than the supermarket unit value of imports in all months from January 2008 until April 2013.<sup>3</sup> The gap became significantly wider from 2009 (figure 2.8). This was driven by higher SPC Ardmoma branded product unit values and lower import unit values. The increasing gap coincided with decreasing sales of SPC Ardmoma products (figure 2.9).

<sup>3</sup> Unit values represent an ‘average’ price of the products, which is derived by dividing the sum of the value of all products sold by the total weight (in kilograms) of the products. These values do not necessarily correspond with shelf prices for individual products.

**Figure 2.8 Processed tomato products — supermarket and import unit values**

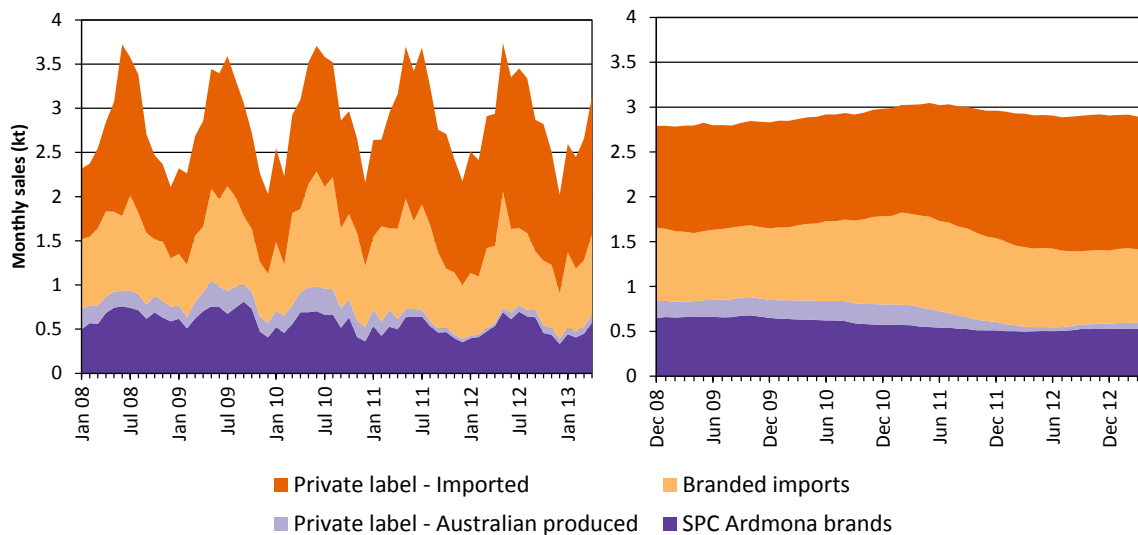
Moving annual averages



Sources: ABS (unpublished); Aztec Australia (unpublished); Productivity Commission estimates.

**Figure 2.9 Processed tomato products — supermarket sales**

Monthly data (LHS) and moving annual averages (RHS)



Sources: Aztec Australia (unpublished); Productivity Commission estimates.

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### *The appreciating Australian dollar reduced the unit value of imports*

One mechanism that could lead to increased imports would be a reduction in the price of imports due to changes in the world price.

The decreased retail unit value of imported processed tomato products from 2009 to 2013 coincided with a decreasing free on board (FOB) value of imports (figure 2.8). This appears to be driven mainly by the appreciation of the Australian dollar. FOB values expressed in Euros — the currency of the major source country for imports (Italy) — did not change significantly over the period. This suggests that the appreciation of the Australian dollar, rather than any significant development in the world market for processed tomato products, was the main factor behind the decrease in FOB and supermarket unit values.

SPC Ardmona (sub. AR38) submitted that the Commission implied in its Accelerated Report that supermarket strategies did not cause injury because the price of imports did not vary when expressed in Euros. This was not the Commission's finding. Rather, the FOB unit value of imports expressed in Australian dollars decreased over the period 2009–2013, almost entirely due to the appreciation of the Australian dollar. In turn, this may have been a relevant factor in supermarkets' procurement decisions for private labels, as discussed further below.

### *SPC Ardmona's market share has decreased*

The increased gap between the supermarket unit value of SPC Ardmona's branded products and the unit value of imports coincided with the decrease in SPC Ardmona's market share (figure 2.9). This has occurred in a context of flat demand overall for processed tomato products in Coles, Woolworths and Metcash supermarkets.

### *The 2011 floods led to significant changes in the market*

Flooding around the tomato growing areas of Victoria reduced the quantity of processing tomatoes harvested in the 2010-11 season by approximately two thirds. SPC Ardmona's production decreased significantly. This coincided with a number of changes in sales in Coles, Woolworths and Metcash supermarkets.

- Sales of domestic private label products decreased.
- Sales of imported private label products increased.
- Sales of imported branded products (not private label) decreased.

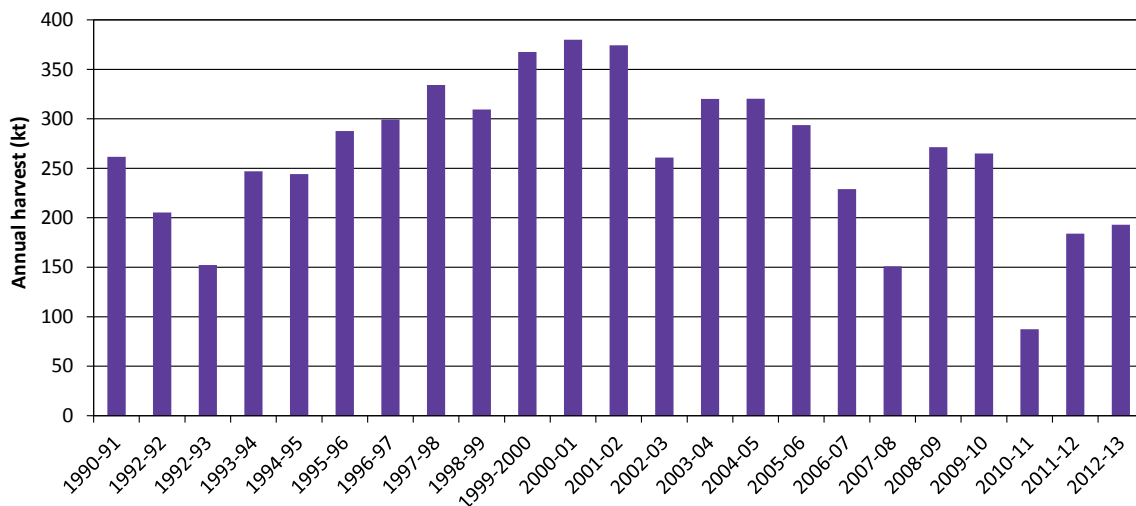
- Sales of SPC Ardmona branded products decreased (albeit less so than sales of domestic private label products and imported branded products).

Sales of domestic private label products have not recovered to their pre-flood levels.

### Long-term import competition has driven industry consolidation

The Australian processed tomato industry (defined broadly to include the manufacture of tomato pastes, sauces and other products, as well as the processed tomato products under reference) is small by world standards. Australian growers produced 184 000 tonnes of tomatoes in 2012 (figure 2.10). In the same year, US growers produced 11.9 million tonnes, Italian growers produced 4.5 million tonnes, and Chinese growers produced 3.2 million tonnes (WPTC 2013).

Figure 2.10 Tomatoes harvested for processing in Australia



Source: APTRC (sub. 15, att. 1).

Over the past several decades, there has been significant consolidation among Australian tomato processors and growers. The number of processing companies has fallen from at least 14 in 2000-01 to three in 2013 (Kagome Australia, sub. 12). The number of growers of raw tomatoes for processing has fallen from 95 in 1993 to 12 in 2013 (APTRC, sub. 15, att. 1). The average size of farms has generally increased over time. This is likely to reflect commercial pressures to improve efficiency.

The availability of low-priced imported products was a significant source of competitive pressure that has driven the consolidation of the industry. This

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competitive pressure is not a recent development. The domestic industry has previously commented on and sought relief from import competition. For example:

- increased imports in the early 1990s from China, Thailand and the European Union were considered a major threat to the domestic industry (Pritchard and Burch 2003). Australia imposed anti-dumping and/or countervailing duties on imported canned tomatoes from China, Thailand and Spain from 1992 to 1997, and on imports from Italy from 1992 to 2002 (and, more recently, provisional dumping securities on imports from Italy from November 2013)
  - in 2001, SPC and Ardmona (prior to the companies merging) applied to the Australian Customs Service (2003a, 2003b) for the extension of countervailing duties on Italian imports (the application was unsuccessful)
- during 2002, SPC Ardmona reported that domestic retail sales in its tomato category were ‘quite difficult’, in part due to competition from low-priced Italian imports that were promoted by supermarkets (SPC Ardmona 2003)
- in 2006, SPC Ardmona’s parent company Coca-Cola Amatil (2007) reported that trading conditions in the tomato category were difficult as low-priced imports were putting pressure on margins.

The available evidence on the industry over the long term suggests that numerous industry participants have experienced ‘injury’ over the past two decades. The challenges facing the industry have included inefficient scale and ongoing competitive pressure from the availability of imports. It is likely that the accumulation of the long-term competitive pressures has culminated (alongside other factors set out below) in the difficult commercial situation that SPC Ardmona currently faces.

*The ‘price-capping’ effect of long-term import competition is not a justification for safeguards*

Competition from imports has been a long-term phenomenon. The domestic industry has faced import competition for at least several decades and has made adjustments over time.

The availability of imports can restrict the ability of companies to increase prices (of the same products and close substitutes) in response to higher domestic costs of production. This ‘price capping’ effect is an inherent feature of competition in trade-exposed markets and is to be expected. For example, the availability of imported processed tomato products to Australian supermarkets constrains the ability of SPC Ardmona to raise the prices of its own brand and private label ranges offered to supermarkets (such as in response to higher processing costs). Any price

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premium achievable by SPC Ardmona for its products will be related to the import price.

Although the impact of price capping can vary depending on the level of import prices (and may become stronger when import prices fall), the price-suppressing effect of the *availability* of imports over a long time period does not necessarily mean that any recent *increase* in import volumes must have been the cause of serious injury.

The original rationale of the safeguard clause in Article XIX of the GATT was to act as a safety valve when the impact of import competition following trade concessions is more serious for a domestic industry than initially expected. It was not intended to shield industries from the long-term effects of import competition. Moreover, imports are expected to increase competition in domestic markets and thus keep consumer prices low. As the Commission has previously argued, the price-suppressing effects of import competition are the source of the gains of trade, and any move to penalise imports because of their ‘price capping’ effects would effectively undermine trade liberalisation (PC 2008).

### **Supermarket private label strategies have increased competition**

Private label products compete with branded products, reducing the ability of domestic producers to achieve premium prices for their own branded products. For example, the potential for a supermarket to switch its supply of private label products to imports could assist it in negotiating lower prices from domestic suppliers of private label products. Increased competition between the major supermarket chains, and the entry of new competitors (such as ALDI and Costco), has intensified this pressure on brand premiums.

Supermarkets have sold private label products in a range of categories since the 1960s. Supermarkets use private label products for multiple reasons, including to:

- offer consumers competitively priced alternatives to branded products
- increase margins
- build customer loyalty by offering products that are not available in competitors’ stores
- have greater control over supply through the use of long-term contracts
- reduce or counter the influence of highly concentrated branded manufacturers and correspondingly improve supermarkets’ buying power (ACCC 2008).



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The market share of private-label products overall is relatively low in Australia compared to many other countries, including the United States and United Kingdom (ACCC 2008; Klug and Queck 2013). However, private-label products have constituted a significant proportion of the market for processed tomatoes for many years. For example, Pritchard and Burch (2003) reported that private labels accounted for 37 per cent of sales in 1989 and 49 per cent in 1990. In 2011-12, the market share of private label tomato products was about 53 per cent across Coles, Woolworths and Metcash supermarkets.

Australian supermarkets have strong incentives to diversify their sources of supply of processed tomatoes. Australian growers of processing tomatoes are geographically concentrated in northern Victoria and southern New South Wales, and as such are particularly susceptible to periods of low production due to bad weather (such as drought in 2006-07 and 2007-08, and the 2011 floods). In addition, SPC Ardmona's status as the single domestic producer of the relevant processed tomato products gives supermarkets an incentive to diversify their supplies of processed tomatoes.

More recently, supermarkets have begun to offer several tiers of private label products across a greater number of categories, at different quality and price levels (ACCC 2008). Some consumers may regard the 'premium' private label products as substitutes for branded products, such as those produced by SPC Ardmona. These private label products could take market share from branded products, and could effectively 'cap' the prices that SPC Ardmona can achieve for its branded products without losing market share. In any competitive market, such developments have the potential to cause injury to producers of incumbent brands, depending on the market outcomes of competition.

#### *Private label strategies can cause injury irrespective of imports*

It is important to note that developments in supermarket private label strategies could cause injury to the domestic industry without any increase in imports. Supermarkets use a mix of domestically produced and imported products for their private label brands. For example, SPC Ardmona processes tomatoes for its own branded products and for supermarket private labels. It appears that there is a significant difference in retail prices for these products, and in prices received by processors for them, even though the direct costs of production for the products would be expected to be similar. It is likely that any supermarket strategy that leads to consumers switching from SPC Ardmona's branded products to domestically sourced private label products would reduce SPC Ardmona's margins and its profitability. Any such injury would not be attributable to increased imports, but

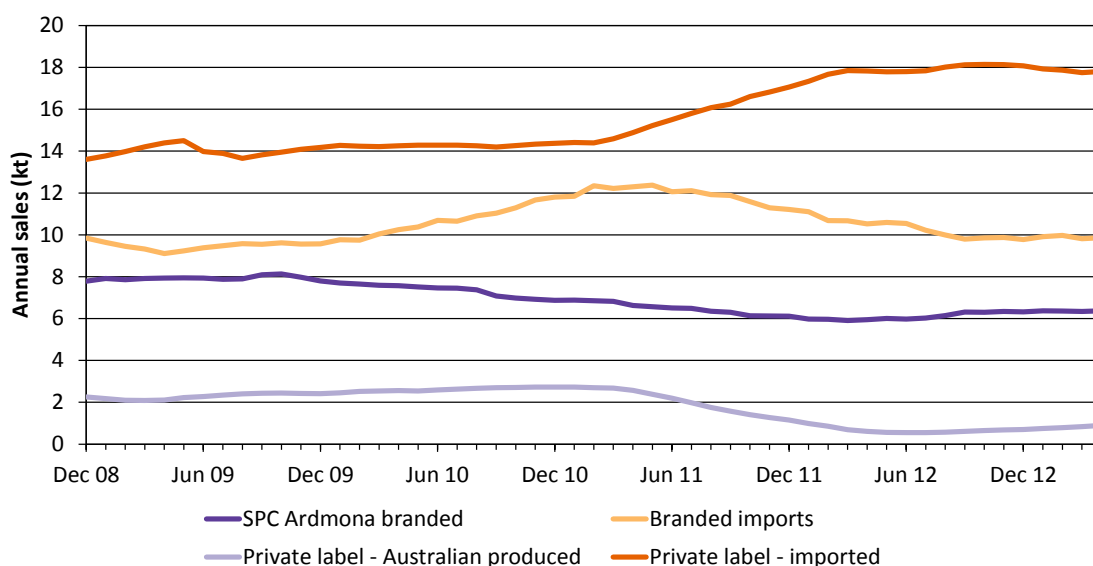
rather to choices made by supermarkets about branded and private label products, and by consumers.

### Recent trends

Sales of processed tomato products are seasonal — sales tend to be higher in winter months than in summer. This can complicate the task of identifying the underlying trends. The discussion below refers to changes in the moving annual total of sales in in Coles, Woolworths and Metcash supermarkets, a measure that smooths seasonal changes and helps reveal long-term trends.

Supermarket sales of private label processed tomato products increased over the period from January 2008 to April 2013 (figure 2.11). Sales of domestic private label products were relatively steady until 2011. Floods in the 2010-11 growing season restricted supply, and caused a change in the trend — from positive to negative. From 2012 to at least April 2013, sales of domestic private label products did not increase.

**Figure 2.11 Processed tomato products — supermarket sales**  
Moving annual totals



Sources: Aztec Australia (unpublished); Productivity Commission estimates.

The initial trend in sales of imported private label products was steady and flat. Following the floods, sales of imported private label products increased significantly as supermarkets chose to respond to the restricted domestic supply by sourcing imports for their private label products. The appreciation of the Australian

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dollar which provided the opportunity for supermarkets to reduce the prices they charged for imported products, may well have supported such a step.

The increased sales of imported private label products also coincided with a reduction in sales of imported branded products. Between financial years 2010-11 and 2011-12, the volume of imported private label products sold in Coles, Woolworths and Metcash supermarkets increased by 2.3 kilotonnes, while the volume of branded imported tomatoes decreased by 1.5 kilotonnes. This is consistent with the analysis of ABS data on imports (section 2.2), which shows that absolute import volumes did not increase significantly over this period.

### *Injury to the domestic industry*

Increased private label sales could cause injury to the domestic industry by restricting its ability to achieve premium prices, thereby reducing profit margins. Access to imports could increase the extent to which private label strategies can cause price suppression.

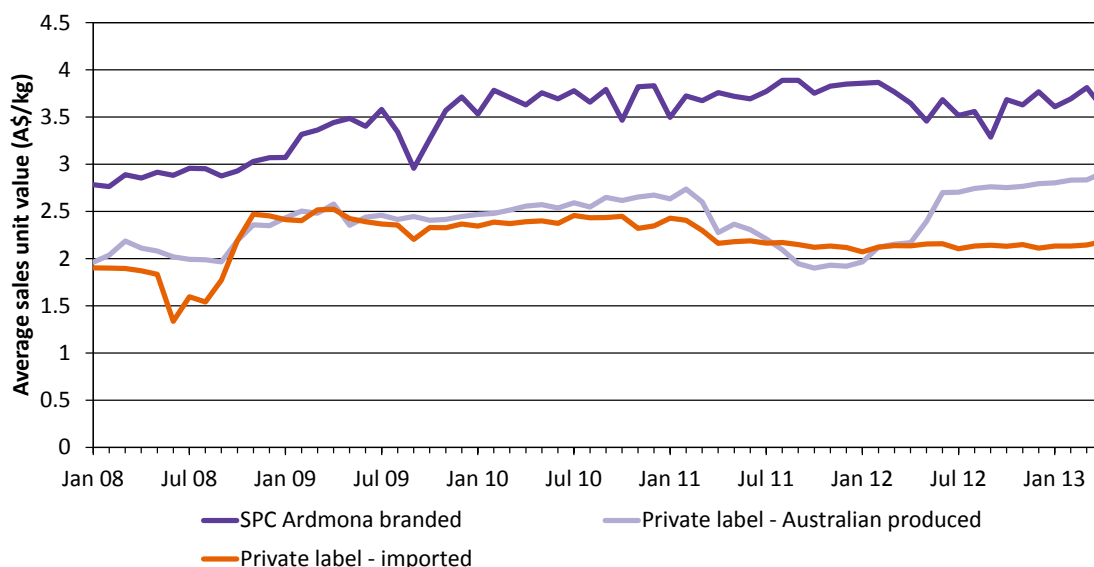
Over the period 2008–2013, unit values of private label products sold in Coles, Woolworths and Metcash supermarkets were consistently and significantly lower than the unit values of SPC Ardmona branded products (figure 2.12). Over this period the unit value of SPC Ardmona branded products increased and its market share decreased as consumers responded to relative price differences. The concurrence between the consistent (and increasing) gap in unit values and the reduction in SPC Ardmona's branded product market share suggests that the presence of private label products has been a source of injury to SPC Ardmona.

However, as detailed in section 2.2, the period of the injury did not coincide with a recent and sharp increase in the volume of imports. Rather, the evidence points to changes in supermarket private label retailing and procurement strategies as being the main drivers of these trends.

The data that were used to draw these conclusions relate only to sales by Coles, Woolworths and Metcash supermarkets. The absence of ALDI and other retailers from the available data means that the data understate total retail sales of private label products (ALDI only sells private label brand processed tomato products). Specifically, total retail sales of private label processed tomato products (from both imported and domestic sources) would be higher than indicated in figure 2.11. However, the absence of these data does not affect the conclusions drawn about the causes of injury to the industry.

If anything, including ALDI in the data would *strengthen* the conclusion that it was the expansion of private label strategies by Australian supermarkets and the increased consumer acceptance of these products that caused the injury to the domestic industry, not a recent, sudden, sharp and significant increase in imports.

Figure 2.12 **Processed tomato products — supermarket unit values**



Sources: Aztec Australia (unpublished); Productivity Commission estimates.

### Export volumes have decreased in recent years

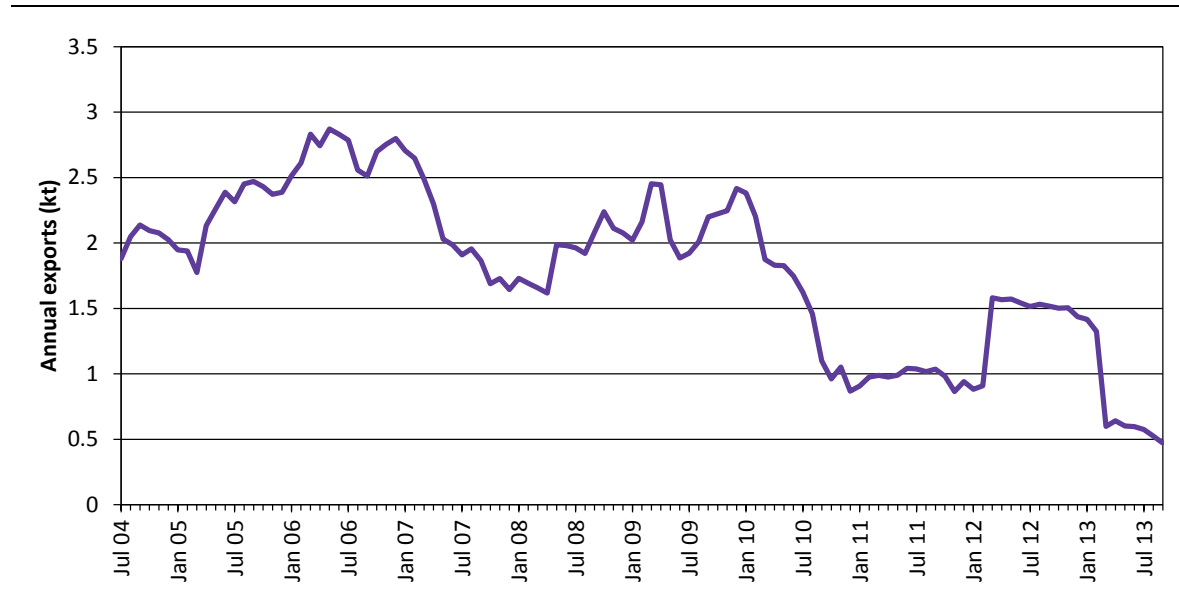
ABS data show that Australian exports of processed tomato products (of all pack sizes) decreased by 45 per cent between 2008-09 and 2010-11 (figure 2.13). It is likely that the appreciation of the Australian dollar, as well as the impacts of the floods in 2010-11, contributed to this decrease.

Although SPC Ardmona did not provide the Commission with information on its export volumes, it is likely that it was the source of most Australian exports of processed tomatoes over recent years. (Kagome Australia (sub. 12) has indicated that the diced tomatoes it does not sell to SPC Ardmona are converted to tomato paste rather than exported.) Any decrease in exports could potentially contribute to injury by reducing throughput and increasing overhead costs per tonne of tomatoes processed by SPC Ardmona.

SPC Ardmona (sub. AR45) questioned the Commission's conclusion in the Accelerated Report that reduced exports were a cause of injury. The company submitted that exports accounted for less than 0.3 per cent of its total sales of

processed tomatoes in 2008. As such, the extent of any injury caused by reduced export volumes would be small.

Figure 2.13 **Processed tomato product export volumes<sup>a</sup>**  
Moving annual total



<sup>a</sup> The export data are for classification 20021000 of the Australian Harmonized Export Commodity Classification. The data are not collected on the basis of pack size (there are no lower level statistical codes) and thus cannot be disaggregated.

Source: ABS (unpublished).

### **The injury to the domestic industry was caused by the combined effect of these developments**

The Australian market for processed tomatoes has been highly competitive for many years. Processed tomatoes are a globally traded product with limited opportunities for product differentiation, and Australia is a small producer on a global scale. Long-term competition from imports and the price-capping effect of this competition have contributed to ongoing consolidation among growers and the closure of processors. Operators that have high costs of production or inefficient scale are particularly susceptible to competitive pressures.

Developments in supermarket private label strategies have added to the competitive pressure. Supermarkets have changed the way they market their private label products, and consumers have come to regard some private label products as substitutes for branded products. This has further reduced the ability of producers of branded products to achieve premium prices without losing market share.

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In the context of these ongoing competitive pressures, a number of specific developments have combined to cause injury to the domestic industry. First, the retail unit value of SPC Ardmona branded products across Coles, Woolworths and Metcash supermarkets increased from 2009, which contributed to a loss of market share. This was exacerbated by the floods in 2011, which caused lower production and a loss of market share for domestic private label products supplied by SPC Ardmona. The ready availability of imported products — assisted by the concurrent appreciation of the Australian dollar — made it possible for supermarkets to increase their use of imports for private label brands and to choose to pass reductions in import prices on to consumers, or to increase their margins. At the same time, exports of processed tomato products decreased, probably as a result of the appreciation of the Australia dollar.

The combined effect of these developments has been a reduction in SPC Ardmona's production, revenues and profits. SPC Ardmona's initial submission (sub. 17), and confidential evidence that it has provided, suggest that it might no longer be producing processed tomatoes at an efficient scale. Undoubtedly this qualifies as injury to the domestic industry. However, this injury has been the result of long-term trends, exacerbated by specific recent developments, and not a recent, sudden, sharp and significant increase in imports.

#### FINDING 2.2

*Increased imports of the processed tomato products under reference have not caused serious injury to the domestic industry producing like or directly competitive products. Instead, the injury has resulted from a combination of factors, including:*

- *sustained competitive pressure from imports*
- *supermarket private label strategies, facilitated by the appreciation of the Australian dollar*
- *extreme weather events.*

*Therefore, safeguard action under the WTO Agreement on Safeguards is not warranted.*

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## A Conduct of the inquiry

This appendix lists parties the Commission consulted with through:

- submissions received (table A.1)
- visits (table A.2)
- a roundtable (table A.3)
- public hearings (table A.4).

The Commission received the terms of reference for this inquiry on 25 June 2013. Following receipt of the terms of reference, the Commission placed notices in the press and on its website inviting public participation in the inquiry. Information about the inquiry was also circulated to people and organisations likely to have an interest in it. The Commission released an issues paper in July 2013 to assist inquiry participants with preparing their submissions. The Commission received 37 initial submissions. The accelerated report was released on 26 September 2013. A further 11 submissions were received.

A roundtable was held in Shepparton on 12 July 2013 and public hearings were held in Canberra on 30 July 2013 and in Melbourne on 28 October 2013.

The Commission consulted with a range of organisations, individuals, industry bodies and government departments and agencies.

**Table A.1 Submissions received**

<i>Individual or organisation</i>	<i>Submission number</i>
Australian Manufacturing Workers' Union	7, AR40
Australian Processing Tomato Growers Inc.	16
Australian Processing Tomato Research Council Inc (APTRC)	15, AR48
Bean Growers Australia Limited	14
BuyAustralianMade	22, AR39
Coles	20
Consulate General of Egypt	24
Croci, Patrick	28
Department of Foreign Trade — Thailand	9
Drives for Industry Pty Ltd	23
European Commission	10, 32, AR46
European Organisation of Tomato Industries	2
Gengos, Ross	26
Gouge Linen and Garment Services	25
Government of Argentina	5
Government of Mexico	6, AR42
Italian National Industry Association of Conserved Vegetables (ANICAV)	27, 33
Kagome Australia	12
McKenzie, Bridget (Senator)	18, 19
Ministry of Economy — Republic of Turkey	13
Ministry of Foreign Affairs — Chile	4
Ministry of Industry and Foreign Trade — Egypt	30
Moira Shire Council	1
National Farmers' Federation	21
NSW Farmers	34
Riordan, Carmel	29
Shire of Campaspe	11
South African Fruit and Vegetable Cannery Association (SAFVCA)	3, 36, 37* AR43, AR44
SPC Ardmona	17*, 31*, AR38, AR45
Stone, Sharman (MP)	35, AR41, AR47
Weller, Paul (MLA)	8

<sup>a</sup> An asterisk (\*) indicates that the submission contains confidential material NOT available to the public. A hash (#) indicates that the submission includes attachments.



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**Table A.2 Visits**

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*Organisation*

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**ACT**

Department of Agriculture, Fisheries and Forestry

Department of Foreign Affairs and Trade

Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education

Department of the Prime Minister and Cabinet

Treasury

**Victoria**

Coles

Kagome Australia

SPC Ardmona

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**Table A.3 Roundtable participants, Shepparton 12 July 2013**

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*Name of participant*

*Organisation*

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Tom Hale

Australian Manufacturing Workers' Union

Robert Rendell

Australian Processing Tomato Research Council

Caroline Smith

Department of State Development, Business and Innovation (Vic)

John Wilson

Fruit Growers Victoria

Gary Godwill

Peter Hall

James Cornish

Jim Geltch

Neil Geltch

Geraldine Christou

Greater Shepparton City Council

Peter Ryan

Goulburn Valley Fruit Growers Strategic Stakeholders Group

Bradley Mills

Horticulture Australia

Jim O'Connor

Regional Development Australia (Hume)

John Brady

Kagome Australia

Peter Kelly

SPC Ardmona

Denis Gerrard

SPC Ardmona

Shalini Valecha

SPC Ardmona

Selwyn Heilbron

SPC Ardmona

Sharman Stone MP

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**Table A.4 Public hearing, Canberra 30 July 2013**

<i>Individual or organisation</i>	<i>Transcript page numbers</i>
Australian Canning Fruitgrowers' Association and Fruit Growers Victoria	5–16
Moira Shire Council	17–21
Sharman Stone MP	22–31
Kagome Australia	32–38
SPC Ardmona	39–61
Greater Shepparton City Council	62–66
South African Department of Trade and Industry	67–71
South African Fruit and Vegetable Cannery Association and Jamieson Trading	72–78
Delegation of the European Union to Australia	79–87
Italian National Industry Association of Conserved Vegetables	88–97
Embassy of the Republic of Chile	98–101

**Public hearing, Melbourne 28 October 2013**

<i>Individual or organisation</i>	<i>Transcript page numbers</i>
Sharman Stone MP	105–114
Greater Shepparton City Council	115–119
BuyAustralianMade	120–121
Turnbull Bros Orchards Pty Ltd	122–127
K Besim & Co	128–131
SPC Ardmona	132–165
South African Fruit and Vegetable Cannery Association	166–169
Embassy of Mexico	170

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## B Commonwealth Gazettes and GATT Article XIX

This appendix consists of:

- the *Commonwealth of Australia Gazette*, ‘Establishment Of General Procedures For Inquiries By The Productivity Commission Into Whether Safeguard Action Is Warranted Under The Agreement Establishing The World Trade Organization’, No. S 297, Thursday, 25 June 1998
- the *Commonwealth of Australia Gazette*, ‘Amendment of general procedures for inquiries by the Productivity Commission into whether safeguard action is warranted under the Agreement establishing the World Trade Organization’, No. GN 39, 5 October 2005
- GATT 1994 Article XIX.



Commonwealth  
of Australia

Gazette

No. S 297, Thursday, 25 June 1998

Published by AusInfo, Canberra

SPECIAL

**ESTABLISHMENT OF GENERAL PROCEDURES FOR INQUIRIES BY THE PRODUCTIVITY COMMISSION INTO WHETHER SAFEGUARD ACTION IS WARRANTED UNDER THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION**

1. In order to comply with the requirements of the Agreement Establishing the World Trade Organization (WTO Agreement), and in particular the Agreement on Safeguards (Safeguards Agreement) and Article XIX of the General Agreements on Tariffs and Trade 1994 (GATT 1994), this notice establishes the general procedures for inquiries into safeguard action by the Productivity Commission (Commission) in respect of a reference under Parts 2 and 3 of the *Productivity Commission Act 1998*.

2. A reference under Parts 2 and 3 of the *Productivity Commission Act 1998* in respect of safeguard action will designate the product being imported and request an inquiry and report by the Commission on:

- (a) whether the conditions are such that safeguard measures would be justified under the WTO Agreement;
- (b) if so, what measures would be necessary to prevent or remedy serious injury and to facilitate adjustment; and
- (c) whether, having regard to the Government's requirements for assessing the impact of regulation which affects business those measures should be implemented.

3. A "**safeguard measure**" means a measure provided for in Article XIX of GATT 1994, the rules for which are established by the Safeguards Agreement. A safeguards measure would be in the form of a quota, a tariff quota, or an increased level of tariff.

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Conditions

4. The Commission is to report on whether the product under reference is being imported into Australia in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

5. Safeguard measures have to be applied to a product being imported irrespective of its source, except:

- (a) product determined to be of New Zealand origin pursuant to the Australia New Zealand Closer Economic Relations Trade Agreement, which shall be excluded from the inquiry; and
- (b) product originating in a developing country Member of the WTO shall be exempted from such measures as long as its share of imports of the product concerned does not exceed 3%, provided that developing country Members of the WTO with less than 3% import share collectively account for not more than 9% of total imports of the product.

Inquiry

6. Reasonable public notice must be given to all interested parties in accordance with section 14 of the *Productivity Commission Act 1998*. The inquiry must involve public hearings or other appropriate means in which importers, exporters and other interested parties can present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest.

7. In accordance with section 12 of the *Productivity Commission Act 1998* a report shall be published promptly setting forth the Commission's findings and reasoned conclusions reached on all pertinent issues of fact and law. The report will include a detailed analysis of the case under inquiry as well as a demonstration of the relevance of the factors examined. All factors specified in these procedures must be considered.

8. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the Commission. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the Commission find

that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, it may disregard such information unless it can be demonstrated to its satisfaction from appropriate sources that the information is correct.

Determination of Serious Injury or Threat Thereof

9. **"Serious injury"** means a significant overall impairment in the position of a domestic industry.
10. **"Threat of serious injury"** means serious injury that is clearly imminent, in accordance with the provisions of paragraphs 13 and 14. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.
11. In determining injury or threat thereof, a **"domestic industry"** means the producers as a whole of the like or directly competitive products operating in Australia, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.
12. **"Like product"** means a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.
13. In the inquiry to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Commission shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
14. The determination referred to in paragraph 13 shall not be made unless this inquiry demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

Application of Safeguard Measures

15. A safeguard measure can only be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

Provisional Safeguard Measures

16. A reference can also be made to the Commission for an accelerated report to determine whether critical circumstances exist where delay in applying measures would cause damage which it would be difficult to repair. The Commission will report to the Minister on whether there is clear evidence that increased imports have caused or are threatening to cause serious injury. If the Commission finds that such circumstances exist, then it will also recommend what provisional measures would be appropriate for up to 200 days. Such measures should take the form of tariff increases unless that would not be sufficient to prevent serious injury. The provisional measures would be revoked when the Government reached a decision on the imposition of safeguard measures following the receipt of the report by the Commission.

Duration and Review of Safeguard Measures

17. The Commission shall also make recommendations about the duration of the measures up to a four year period. The period is to include any period where provisional measures have been in place.

18. Where safeguard measures are imposed, the Minister may refer to the Commission for inquiry and report the question of the extension of the period for safeguard measures beyond four years and up to eight years.

19. The inquiry by the Commission to advise whether the safeguard measure continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is adjusting shall be in conformity with the procedures set out above. A measure so extended is not to be more restrictive than it was at the end of the initial period, and should continue to be liberalized.



## **Amendment of general procedures for inquiries by the Productivity Commission into whether safeguard action is warranted under the Agreement establishing the World Trade Organization**

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In order to comply with the requirements of the Singapore Australia Free Trade Agreement, the Australia United States **Free Trade** Agreement and the Thailand Australia Free Trade Agreement, this notice amends the General procedures for inquiries by the Productivity Commission into whether safeguard action is warranted under the Agreement establishing the World Trade Organization Instrument.

*Note* The general procedures were published in Commonwealth *Gazette* No S 297 of 25 June 1998, and notified to the World Trade Organization. The general procedures relate to inquiries into safeguard action by the Productivity Commission in respect of a reference under Parts 2 and 3 of the *Productivity Commission Act 1998*.



## Amendments

(section 3)

[1] **Paragraph 5 (a)**

*omit*

which shall be excluded from the inquiry; and

*insert*

which shall be excluded; and

[2] **Paragraph 5 (b)**

*omit*

imports of the product.

*insert*

imports of the product; and

[3] **After paragraph 5 (b)**

*insert*

(c) product determined to be of Singapore origin pursuant to the Singapore Australia Free Trade Agreement, which shall be excluded; and

(d) product determined to be of United States origin pursuant to the Australia United States Free Trade Agreement, which may be excluded if those imports are not a substantial cause of serious injury, **or threat thereof**; and

(e) product determined to be of Thai origin pursuant to the Thailand Australia Free Trade Agreement, which may be excluded if those imports are not a cause of serious injury **or threat thereof or of serious damage or actual threat thereof**.

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## **GATT 1994 Article XIX**

### **Emergency Action on Imports of Particular Products**

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Contracting Parties as far in advance as may be practicable and shall afford the Contracting Parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the Contracting Parties, the

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application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the Contracting Parties do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.



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