



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

# Safeguards Inquiry into the Import of Processed Tomato Products

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Accelerated Report

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18 September 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 accelerated 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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# 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 justified 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).

The Commission is to provide a report to the Australian Government by 20 December 2013 on whether safeguard measures are justified. In addition, the Commission is to provide an ‘accelerated report’ by 20 September 2013, as to whether *provisional* safeguard measures should be put in place. According to Article 6 of the WTO Agreement on Safeguards, provisional measures may be implemented:

[i]n critical circumstances where delay would cause damage which it would be difficult to repair ... pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.

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. They stipulate that before recommending any safeguard measures, the Commission must:

- determine whether safeguard measures would be justified under the WTO Agreement and, if so,
- consider what measures would be necessary to prevent or remedy serious injury and to facilitate adjustment.

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Australia's procedures for safeguard inquiries go beyond what is essential under the WTO Agreement. In assessing whether measures should be implemented, the Commission must also have regard to the Government's requirements for assessing the impact of regulation which affects business. This requires the Commission to subject any proposed measures to a regulatory impact assessment of the community-wide costs and benefits, before making a recommendation.

Under WTO rules, a government can only take safeguard action (whether final or provisional) if its 'competent authority' finds that action is justified. Although the government can choose not to act, if it does take action it cannot impose measures greater than those considered appropriate by the authority (in this case, the Productivity Commission).

## 1.2 Background

This inquiry, together with the concurrent safeguards inquiry into the import 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 to the import of certain processed tomato products.

SPC Ardmona also applied for an anti-dumping investigation into prepared or preserved tomato products exported from Italy. An investigation was initiated by the Anti-Dumping Commission on 10 July 2013.

Anti-dumping measures are distinct from safeguard measures. Anti-dumping duties can be applied in circumstances where products are sold into the domestic market at 'dumped' prices and this is causing or threatening to cause *material* injury to the domestic industry. Safeguard measures can be applied if imports have increased rapidly, and this increase is causing or threatening to cause *serious* injury to the domestic industry. For safeguard measures, there is no requirement that the increased imports are being 'dumped'. 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.

Following investigations, 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 1.1).

This safeguards inquiry relates only to imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff. This

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subheading is defined as ‘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 Developed Countries’ in Schedule 1 of the Australian Customs Tariff also enter free of duty under certain conditions.

**Box 1.1 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.

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

Processed tomatoes falling within the relevant tariff subheading are imported mostly from Italy. Over the five years to June 2013, Italy supplied about 86 per cent of all imports. The United States supplied 8 per cent and Argentina 4 per cent over the same period. All other countries supplied less than 2 per cent of imports, collectively.

### **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 states that:

- reasonable public notice must be given to all interested parties in accordance with section 14 of the *Productivity Commission Act 1998* (Cwlth)

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- 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 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.

### **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. Appendix A contains the full list of those consulted.

### **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.

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## Submissions

Given the timeframe for the accelerated report, participants were requested to provide initial submissions by 18 July 2013. Thirty-seven submissions have been received and all non-confidential submissions have been posted on the Commission's website as quickly as possible (box 1.2). Where submissions contained commercial-in-confidence information, however, the relevant sections were not published or were redacted. Appendix A lists all submissions received.

### Box 1.2 **An overview of participants' views**

Normally in its inquiry reports, the Commission extensively cites views put to it in submissions and at public hearings. For this accelerated report, although all submissions have been read and taken into account, the ordinary level of citation has not been possible. To date, 37 submissions have been received from a variety of stakeholders and interested parties. This material is vital in helping the Commission understand key issues and concerns, as well as providing the evidence base that informs conclusions.

Of the 37 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 (Moira Shire Council, sub. 1, Paul Weller MP, 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).
- The Australian Manufacturers Workers' Union (sub. 7) submitted that safeguard measures are needed to ensure manufacturing capacity and jobs in the food processing industry are not lost.
- Coles (sub. 20) provided evidence on its sales of Australian and imported canned tomatoes, without arguing for or against safeguard measures.

Fifteen 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 safeguard 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.

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A number of foreign governments stated in their submissions and at the initial public hearing that they did not have adequate information to make a submission to the inquiry by the due date. In particular, they stated that the decision by SPC Ardmona not to provide a non-confidential summary of its application for safeguard measures limited the ability of interested parties to respond to the specifics of the claim.

SPC Ardmona's initial submission to this inquiry was confidential and lodged by the due date. A non-confidential summary of the submission was provided on 22 July 2013, and was available online to interested parties on 23 July 2013. In the interests of fairness and due process, the Commission made efforts to accommodate interested parties that were affected by SPC Ardmona's delay in providing public information about its claims, including by accepting submissions after the due date.

### **Initial public hearing and transcripts**

A public hearing was held in Canberra on 30 July 2013. Participants are listed in appendix A and a transcript is available on the Commission's website.

### **Release of report**

This accelerated report on provisional measures is a report in its own right (not a draft report). The terms of reference state that both the accelerated and final reports will be published as soon as practicable after their delivery to government.

### **Next steps**

This report presents the Commission's assessment as to whether *provisional* safeguard measures should be put in place for up to 200 days. The final safeguard report, due by 20 December 2013, will determine whether there is a case for definitive safeguard measures (which can apply for up to four years) and will consider further a number of issues raised in this accelerated report.

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

As set out in the terms of reference, provisional measures can be recommended only where it is found that 'critical circumstances' exist such that delay in applying measures would cause damage that would be difficult to repair (box 1.3). Although

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this is a necessary condition, it is not a sufficient condition for the imposition of provisional measures. A recommendation for provisional measures also requires a preliminary determination that there is *clear evidence* that increased imports have *caused* or are threatening to cause *serious* injury to the domestic industry.

**Box 1.3 Requirements for provisional measures**

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.

*Sources:* Terms of Reference; Commonwealth of Australia Special Gazette No. S 297 (1998).

A high standard of evidence and analysis is required to determine the case for provisional safeguard measures. Determinations that are not based on a high standard of evidence and analysis could be vulnerable to challenge by other nations under WTO dispute resolution procedures (see, for example, *EC – Provisional Steel Safeguards* (DS 260)). If provisional safeguard measures are revoked following a successful challenge or because the findings in the final report on definitive safeguards do not support ongoing safeguards, the value of the measures (tariff revenue) must be refunded to importers.

Applying a high standard is consistent with the stated position of the Australian Government, which as a member of the ‘Friends of Safeguards Procedures’ group of WTO member countries, has stated that it has concerns with the poor quality of some countries’ determinations on provisional safeguards (WTO 2012).

Accordingly, the Commission considers that a preliminary determination requires that all matters relevant to a safeguards inquiry need to be considered. However, given the accelerated nature of the investigation and its preliminary status, such considerations are to a lesser extent than those of the full investigation.

**What requirements must the Commission’s analysis adhere to?**

Safeguards investigations and measures must comply with rules and criteria established under the WTO Agreement on Safeguards (1994) the GATT Article XIX on emergency action (1994), and have regard to subsequent WTO panel and appellate body decisions interpreting those requirements.

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Member countries can only impose safeguard measures if the competent authority determines that safeguard measures are justified under the WTO agreement. Australia's procedures for safeguards inquiries are set out in the Commonwealth of Australia Special Gazette No. S 297 (1998). In line with the Agreement on Safeguards, this requires that:

... 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 clarified in subsequent WTO panel and appellate body decisions, these conditions must be read in conjunction with GATT Article XIX, which provides that action can only be taken if increased imports have occurred as a result of 'unforeseen developments'.

To assess the case for provisional 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.

The Commission will also examine whether the aforementioned 'critical circumstances' required for provisional measures (box 1.3) exist.

The determination must be in accordance with the *Productivity Commission Act 1998* (Cwth), 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. In addition, before safeguard measures can be implemented in Australia, the terms of reference require that regard must be given to the Government's requirements for assessing the impact of regulation which affects business.



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## 2 Assessing the case for provisional measures

Provisional safeguard measures can only be recommended subject to a preliminary determination that there is *clear evidence* that increased imports have *caused* or are threatening to cause *serious* injury to the domestic industry, and that ‘critical circumstances’ exist such that delay in applying measures would cause damage which would be difficult to repair. 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 request 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 specified in the terms of reference. That is, it is not inconsistent with the Agreement on Safeguards for the terms of reference to refer to a product that is narrower in scope than the eight-digit tariff subheading so long as 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 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 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 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 (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)).

*Preliminary assessment of like and directly competitive products*

The products under reference for this inquiry comprise retail-size packs of tomatoes, either 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. Fresh tomatoes and processed tomatoes have distinct physical characteristics and involve different production

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processes. The processing of tomatoes typically involves peeling and cooking the tomatoes and materially transforms the fruit from its original state. Second, the potential end uses of the two products are not identical, with fresh tomatoes allowing a broader range of applications.

#### FINDING 2.1

*For the purposes of this safeguards investigation, Australian-produced processed tomatoes, whole or in pieces, including processed tomatoes with a small addition of flavouring (tomato paste, herbs or salt) sold in packs not exceeding 1.14 litres are 'like' processed tomato products imported under the tariff subheading 2002.10.00 and statistical code 60. Processed tomato products with a small addition of vegetables are considered 'directly competitive' for the purpose of defining the domestic industry.*

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

SPC Ardmona is the major processor 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 branded products and private label products for supermarkets. Simplot Australia (under its Edgell brand) produces one product that would meet the definition of 'directly competitive'.<sup>1</sup> Two other tomato processing companies were identified: Kagome Australia and Billabong Produce. Neither produces similar products in containers of 1.14 litres or less (box 2.1). It is possible that other producers exist, such as producers of gourmet preserved tomatoes, although none have been identified in the course of this preliminary investigation.

#### *Growers of tomatoes 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 for processing into paste, passata and diced or whole tomatoes for canning or further processing are sold to Kagome Australia. Kagome supplies fresh and processed tomatoes to SPC Ardmona. In 2013, Kagome sold about 28 000 tonnes of tomatoes to SPC Ardmona (either as raw tomatoes or diced) (Kagome Australia, sub. 12). Clearly the interests of growers are aligned with the interests of the domestic tomato

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<sup>1</sup> Edgell's 'Tomato Supreme' product contains diced tomato, tomato paste and vegetables. It is sold in 300 gram cans. It is the only Australian-made product sold in supermarkets that the Commission has identified that is not produced by SPC Ardmona.

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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)).

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’ involvement in the production process terminates. Nevertheless, any injury to SPC Ardmona could potentially have a flow-on impact on growers. 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 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).

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## FINDING 2.2

*SPC Ardmona is the only significant producer of products that are like or directly competitive with the imported processed tomato products covered under the relevant tariff subheading and statistical code.*

## **2.2 Have imports increased?**

Under WTO rules, provisional 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 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, more recent periods of import activity within the last five years.

Further, the WTO appellate body has ruled that ‘the increase in imports also must be recent enough, sudden enough, sharp enough and significant enough’ (*Argentina – Footwear (EC)* (DS 121)).

The analysis of import volumes uses 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. Throughout this report, data on prices and values are reported in nominal terms.

### **Imports in absolute terms**

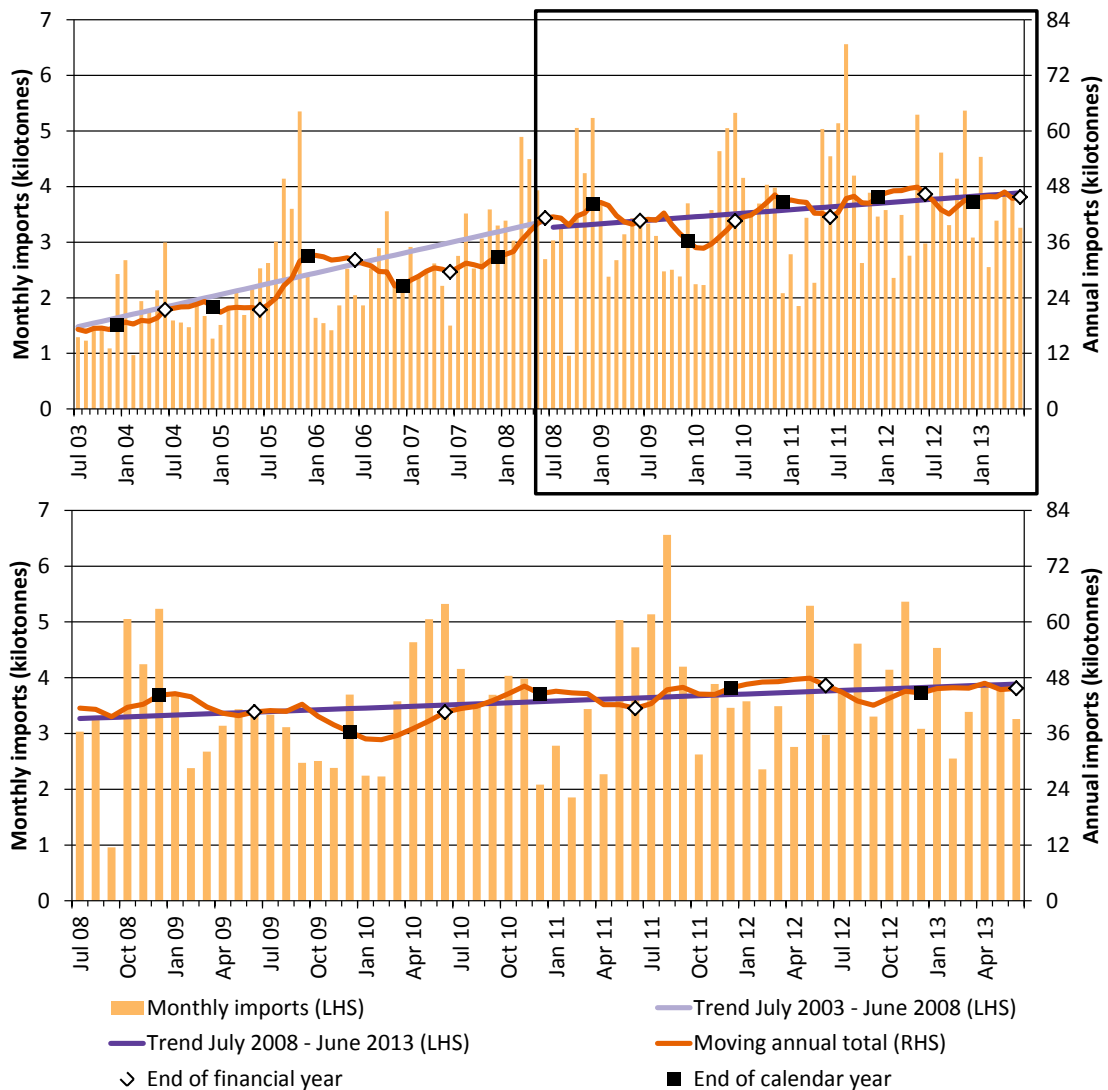
The Commission has focused on the five-year period to June 2013 for its analysis of whether imports have increased in a way that would satisfy the requirement under Article 2.1 of the Agreement on Safeguards. Longer-term trends in imports over the period July 2003 to June 2013 are also noted.

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, the 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.

Over the five-year period from financial year 2003-04 to 2007-08, annual imports increased from 21.4 kilotonnes to 41.2 kilotonnes — an average increase of 4.6 kilotonnes per year on a trend basis (upper panel of figure 2.1). This is equivalent to a compound annual growth rate of about 18 per cent. Over the five financial years to June 2013, annual imports increased from 41.2 kilotonnes to 45.7 kilotonnes, an average of 1.5 kilotonnes per year on a trend basis (equivalent to a compound annual growth rate of about 3 per cent). This trend increase is reflected in the moderately positive slope of the trend line in the lower panel of figure 2.1 over this more recent period.

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 June 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.

Data sources: ABS (unpublished); Productivity Commission estimates.

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### *Preliminary assessment of imports in absolute terms*

Over the five years to June 2013, the increase in imports was equivalent to a compound annual growth rate of about 3 per cent. This is a significantly slower growth rate than the previous five-year period. For various shorter periods within the five years to June 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 satisfy the requirement for 'clear evidence' of a sudden increase in imports.

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

### **Imports relative to domestic production**

The Agreement on Safeguards states that a member country may apply safeguard measures if it has determined that a product is being imported into its territory 'in such increased quantities ... *relative to domestic production* and under such conditions as to cause or threaten to cause serious injury to the domestic industry' (Article 2.1).

SPC Ardmona provided confidential data on its production of processed tomato products for 2009–2013. The Commission requested data for 2008, but SPC Ardmona did not provide it. While these data could not be corroborated against independent data sources, for this accelerated report it is the only information that is available to assess trends in imports relative to domestic production.

ABS data on import volumes and SPC Ardmona's confidential production data were used to estimate the ratio of annual imports to annual domestic production.<sup>2</sup> This ratio can contribute to the analysis of whether imports have increased relative to domestic production. However, for the reasons set out in box 2.2, it should be interpreted with due caution.

Based on the data, 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. As noted above, over the period July 2008 to June 2013, imports increased by an

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<sup>2</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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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 imports increased relative to domestic production over the period 2009–2013, with about three quarters of the increase in the ratio of imports to domestic production caused by the reduction in domestic production (figure 2.3).

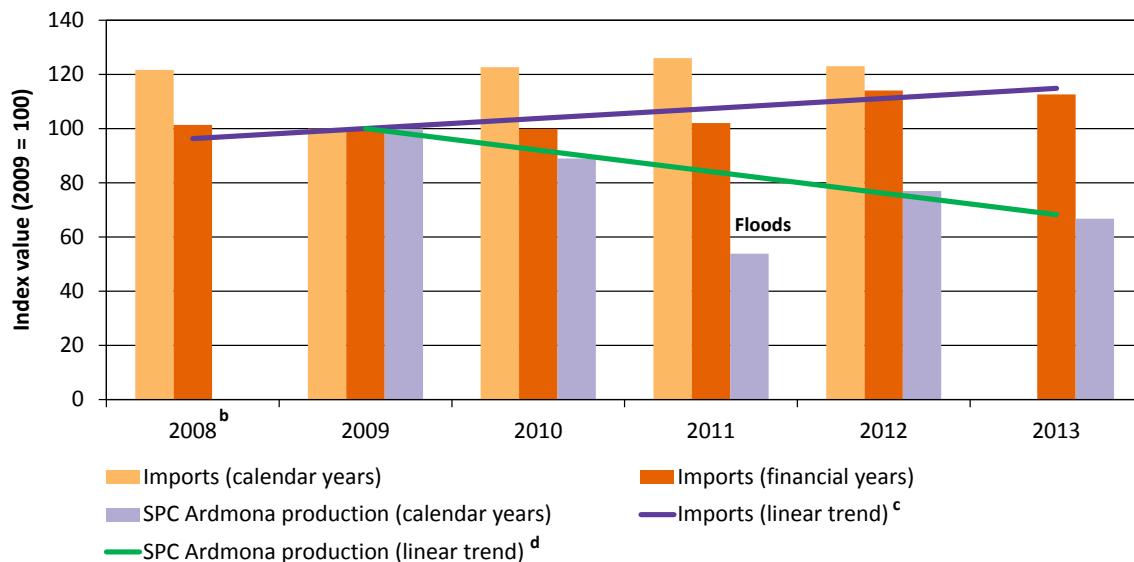
The considerations set out in box 2.2 affirm the importance of assessing the trend in the ratio of imports relative to domestic production. Over the period 2009–2013 there is a clear positive trend in the ratio of imports to domestic production. This trend line (figure 2.2) is steeper than the trend in absolute import volumes (figure 2.1). However, a trend based on only five data points needs to be interpreted with care.

**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 processing 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.
- 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, small changes in domestic production lead to comparatively large changes in the ratio of imports to domestic production. In the case of tomatoes, Australian production is small compared with imports. In this situation, small changes in Australian production lead to relatively large changes in the ratio of imports to domestic production.
- Finally, 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 has stated that in order to meet its commitments to customers in 2011 (the year of the floods) it imported processed tomatoes (South African Fruit and Vegetable Canners’ Association, sub. 36, att. 1). This would affect the ratio of imports to domestic production in that year.

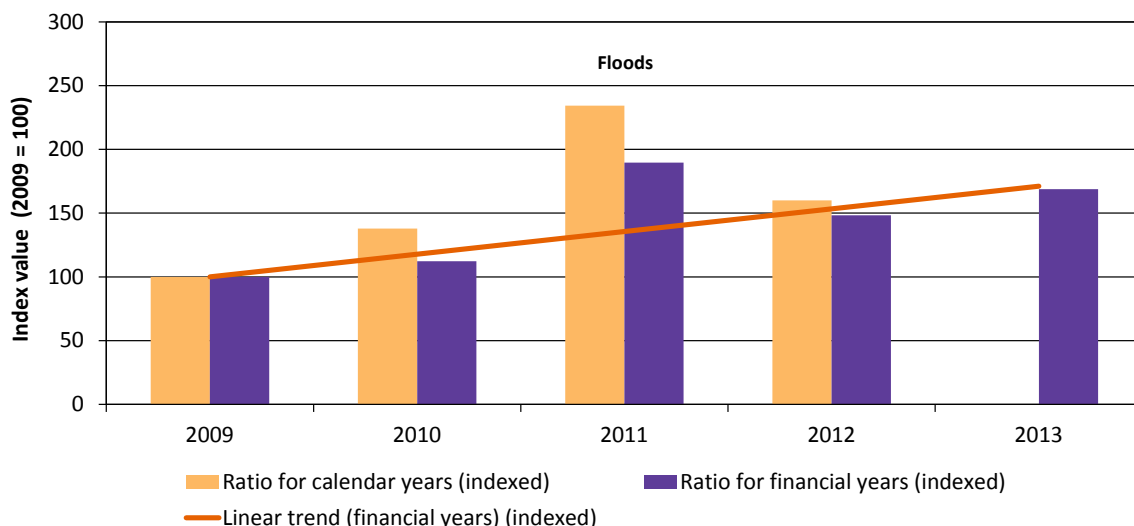
**Figure 2.2 Imports and SPC Ardmona processed tomato production<sup>a</sup>**  
 Index values in 2009 are set to 100



<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.

*Data 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>**  
 Index value of the ratio in 2009 is set to 100



<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.

*Data sources:* ABS (unpublished); SPC Ardmona (confidential); Productivity Commission estimates.

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*Preliminary assessment of the increase in imports relative to domestic production*

The evidence that imports have increased relative to domestic production has limitations, noted earlier. Bearing in mind these limitations, the evidence available to date indicates that over the period under analysis, imports of processed tomato products increased relative to domestic production. On balance, the Commission considers that the available evidence could satisfy, to the standard required for a provisional safeguards investigation, the requirement that the increase in imports relative to domestic production is ‘recent enough, sudden enough, sharp enough and significant enough’.

FINDING 2.3

*The Commission’s preliminary conclusion is that there has not been a sufficient increase in import volumes of processed tomato products falling under tariff subheading 2002.10.00 and statistical code 60 to satisfy the requirement under Article 2.1 of the Agreement on Safeguards. There is, however, preliminary evidence of an increase in imports relative to domestic production which could satisfy the requirement under Article 2.1 of the Agreement on Safeguards.*

## **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’, imports cause or threaten 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, Alan 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 (sub. 17) submitted that a number of unexpected circumstances resulted in increased imports of processed tomatoes.

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

The Commission has also examined other factors that could influence import volumes, including any changes to domestic regulatory settings and changes in the trade policies of Australia's trading partners. The preliminary analysis did not reveal any other factors that would be likely to lead directly to an increase in imports of the relevant products. In examining the causes of injury to the domestic industry (section 2.5) other factors influencing domestic production are considered.

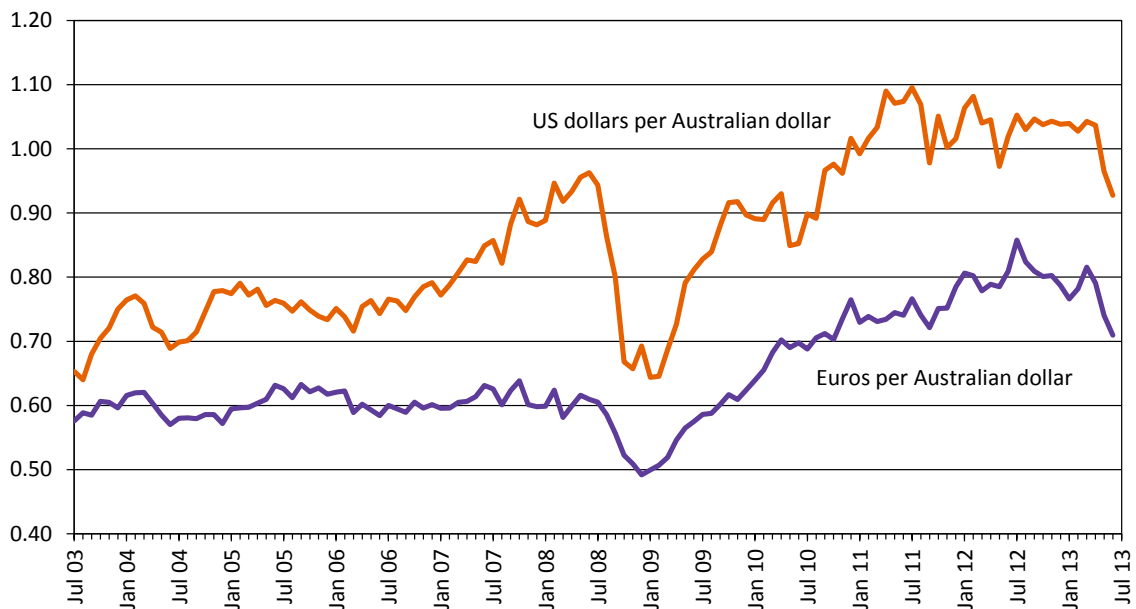
### **Appreciation of the Australian dollar**

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. However, it seems reasonable to conclude that the extent of the appreciation, and the persistence of the appreciation, were unforeseen in 1994.

Notwithstanding this assessment, the Commission suggests that judgements on such a narrow 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.

**Figure 2.4 Australian dollar exchange rate**



Data 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 2013). 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 2013).

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In any event, dumping and anti-dumping measures are a matter for the Anti-Dumping Commission, and are not relevant to safeguard measures. The Commission notes that the Australian Anti-Dumping Commission is currently undertaking an investigation on whether processed tomatoes from Italy are currently being dumped in Australia.

### **Supermarket private label strategies**

Recent years have seen a growth in private label brand sales. 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 charge premium prices for these products.

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, Pritchard and Burch (2003, p. 108) noted that:

Between 1989 and 1990, the share of generic and private label canned tomatoes increased from 36.6 per cent to 48.8 per cent of total market share.

The increased use of private label brands by supermarkets should have been foreseeable. However, it is arguable that the extent of the increase was not.

Overall, although some of the cited factors 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. However, the Commission reiterates that 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.

#### FINDING 2.4

*Over the past five years there have been several developments that could have influenced an increase in imports that could not have been foreseen at the time Australia’s obligations under the GATT were incurred in 1994.*

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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.

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>3</sup>

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 a commercial data provider (box 2.4).

### SPC Ardmona’s claims of serious injury

SPC Ardmona (sub. 17) submitted that sales volume of domestically manufactured canned tomatoes fell by 27 per cent from 2009 to 2012. The decrease in sales led to:

- reduced economies of scale, and higher costs of manufacturing per unit

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<sup>3</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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- discounting of products and increased expenditure on promotions as strategies to try to protect market share against import competition (SPC Ardmona, sub. 17).

SPC Ardmona submitted that these factors contributed to decreased profitability of its tomato processing operations. The company 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).

#### **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 from Aldi and Costco 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 retailers and importers. Where a SKU’s origin could not be determined, that product was coded as ‘unsure’. However, data in this category was 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 by supermarkets 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’.

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



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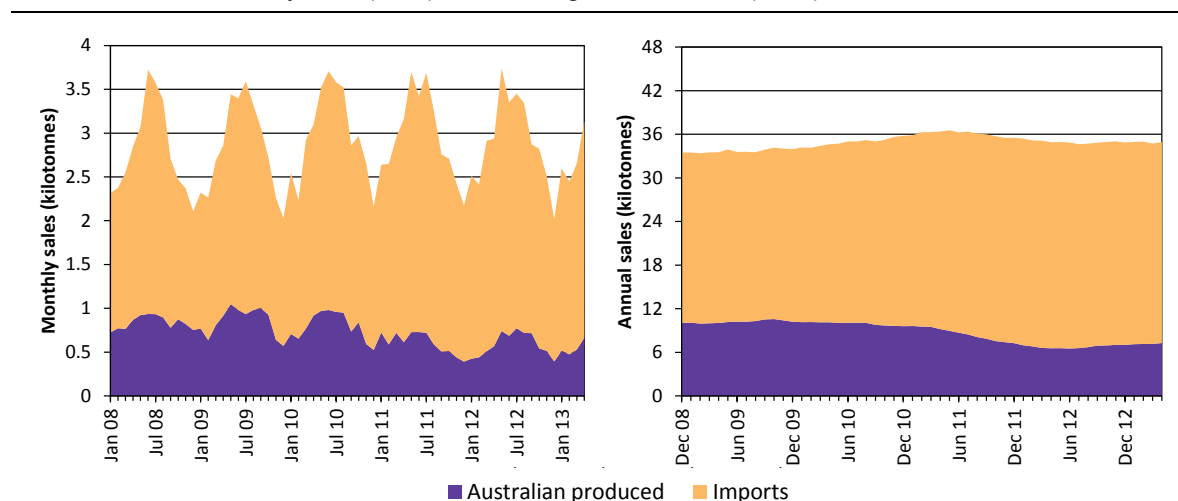
## The market share of imports

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.

Analysis of supermarket sales data showed that in 2008-09, about 70 per cent of supermarket sales were imported products (figure 2.5). The corresponding share for 2012-13 (to April) was about 79 per cent. This increase coincided with a rise in sales of private label imported products (from 42 per cent of total supermarket 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 fell back to about 27 per cent in 2013.

Figure 2.5 **Processed tomato products — supermarket sales**

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



Data sources: Aztec Australia (unpublished); Productivity Commission estimates.

## 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.

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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.

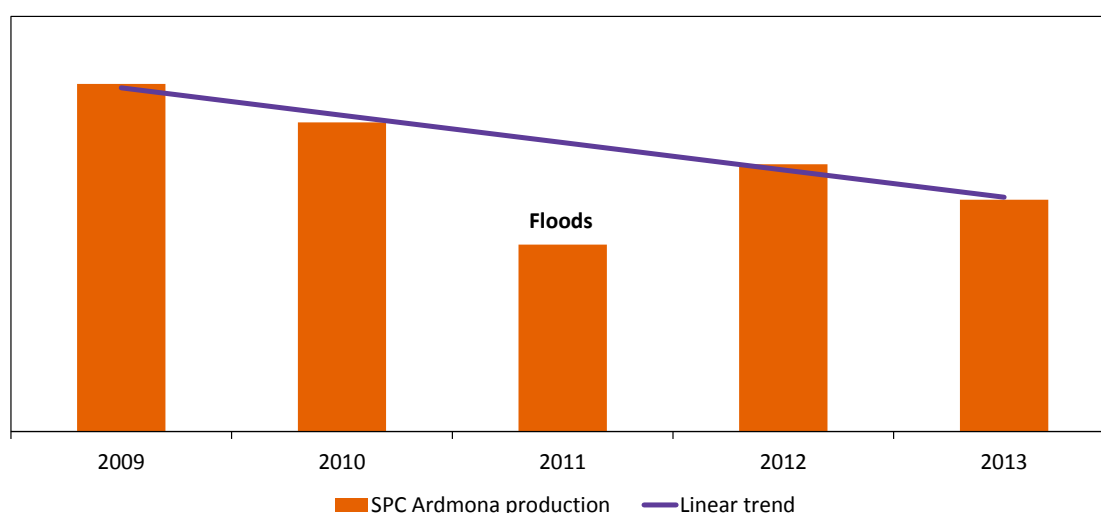
Commission analysis of Aztec Australia supermarket data confirms that supermarket retail sales of domestically produced processed tomato products decreased over the period 2009–2012 (in calendar years).

- 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.

Data sources: SPC Ardmona (confidential); Productivity Commission estimates.

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## 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.

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 every year over the period (by a total of around 5 percentage points).

The data also indicate that the reduction in profit margins was driven largely by the increase in expenses over the period.

- Per kilogram of processed tomato product, sales revenue (net of discounts) increased by around 3 per cent and the cost of goods sold decreased by around 4 per cent (with some fluctuation year to year).
- However, expenses increased by around 73 per cent on a per kilogram basis. This was due mainly to increased finance charges and indirect expenditures.

## 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

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there has been a substantial decrease in employment in SPC Ardmona's tomato processing operations.

#### FINDING 2.5

*Based on the evidence received to date, the Commission is satisfied that there is sufficient cumulative evidence of actual or threatened serious injury to SPC Ardmona.*

## **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, provisional 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, imports did increase relative to domestic production. The test for provisional safeguard measures is therefore whether the relative increase in imports caused the injury.

The Commission has assessed a range of factors that could have contributed to the injury to the domestic industry. The evidence examined thus far indicates that long-term trends and recent acute events have combined in a way that caused injury to the domestic industry. The various causes are summarised in box 2.5 and examined in more detail in the following sections. The role of imports is discussed below.

### **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)).

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**Box 2.5 Preliminary assessment of the 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 and 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 comparative advantage in the tomato processing industry.
- Imports have been a source of significant competitive pressure for at least the past two decades.
- Increased promotion of private label brands by supermarket chains and increased consumer acceptance of private labels have reduced the premiums that producers of branded products can charge without losing market share.

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

- Exports of Australian processed tomatoes have decreased significantly over the past five years, coinciding with the appreciation of the Australian dollar.
- 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 caused retailers to source private label products from imports. Sales of domestically produced private label products have not recovered to date.

Second, the Agreement on Safeguards stipulates that imports must be 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 highlighted 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.

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 the increase in imports.

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## **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 drive down market prices. Initially, this could reduce profitability in the domestic industry, inducing a decrease in production until — and 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.

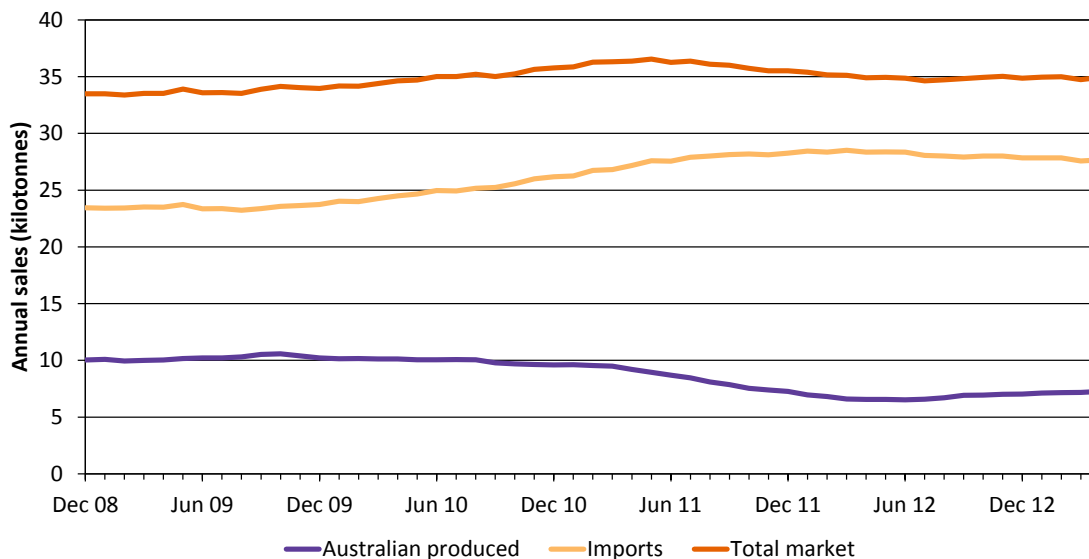
Second, to the extent that the demand for local products and domestic production volumes decrease, imports could affect production costs by reducing any economies of scale previously harnessed by the domestic industry. In this case, the industry may continue to produce using its existing plant and equipment 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.

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

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

Total 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). Supermarket sales of domestically produced tomatoes 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.

Figure 2.7 **Processed tomato products — supermarket sales**  
Moving annual totals



Data sources: Aztec Australia (unpublished); Productivity Commission estimates.

*The gap between the retail unit value of SPC Ardmona branded products and imported products has increased since 2009*

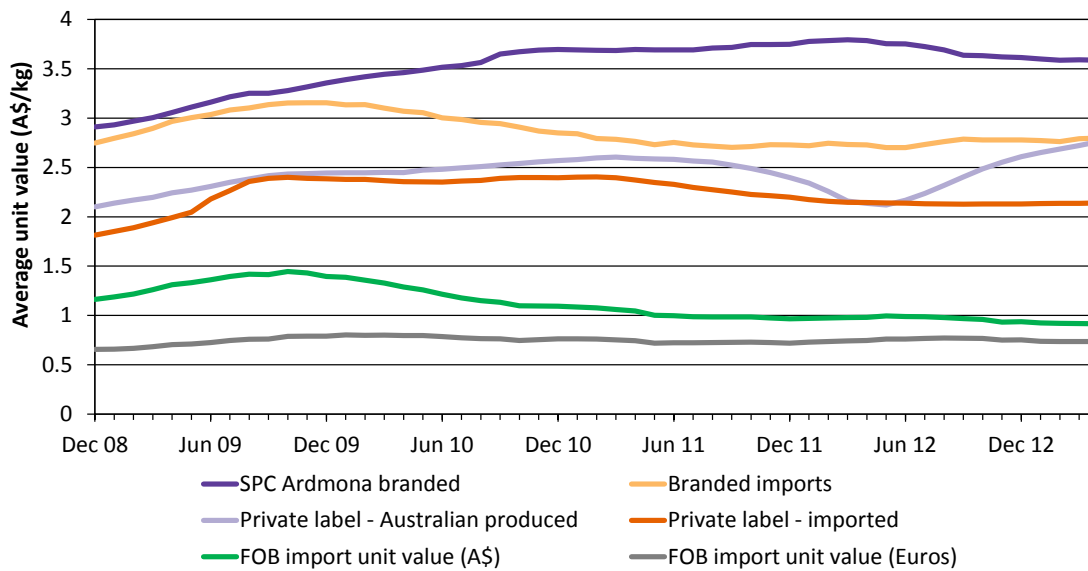
The average retail unit value of SPC Ardmona branded products has been higher than the retail unit value of imports in all months since January 2008.<sup>4</sup> The gap became significantly wider from 2009 (figure 2.8). This was driven by higher SPC Ardmona branded product unit values and lower import unit values. The increasing gap was correlated with decreasing sales of SPC Ardmona products (figure 2.9).

The decreased retail unit value of imported processed tomato products from 2009 to 2013 was correlated with a decreased free on board (FOB) value of imports (when expressed in Australian dollars) (figure 2.8). However, the FOB unit value of imports expressed in Euros did not change significantly over the period. This suggests that the decreased retail unit value of imported processed tomato products was caused by the appreciation of the Australian dollar, rather than by any significant development in the world market for processed tomato products.

<sup>4</sup> Numerous processed tomato products that are covered by this provisional safeguards inquiry are produced locally, imported and sold. 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.

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

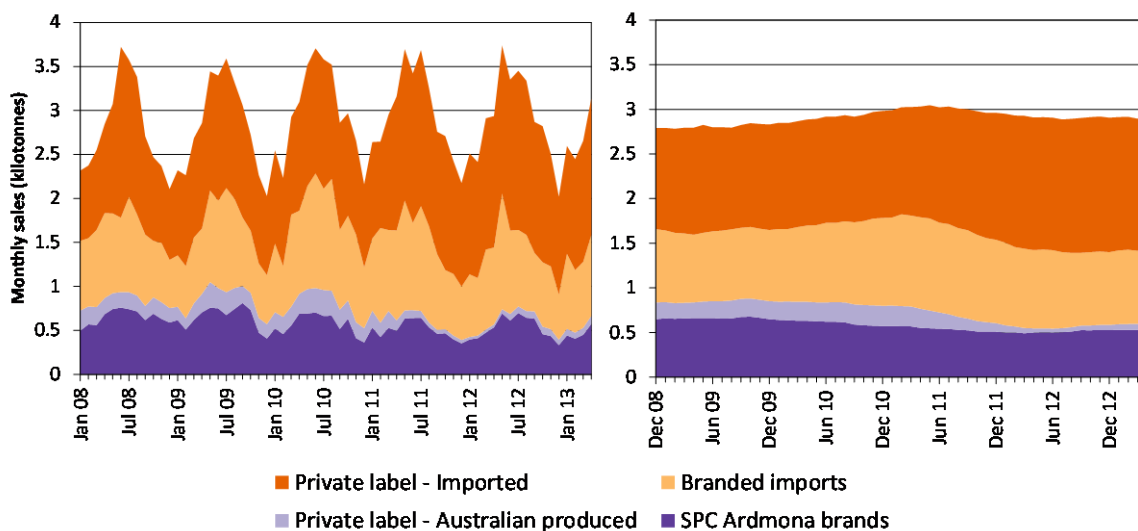
Moving annual averages



Data 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)



Data sources: Aztec Australia (unpublished); Productivity Commission estimates.



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### *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 was correlated with a number of changes in the market.

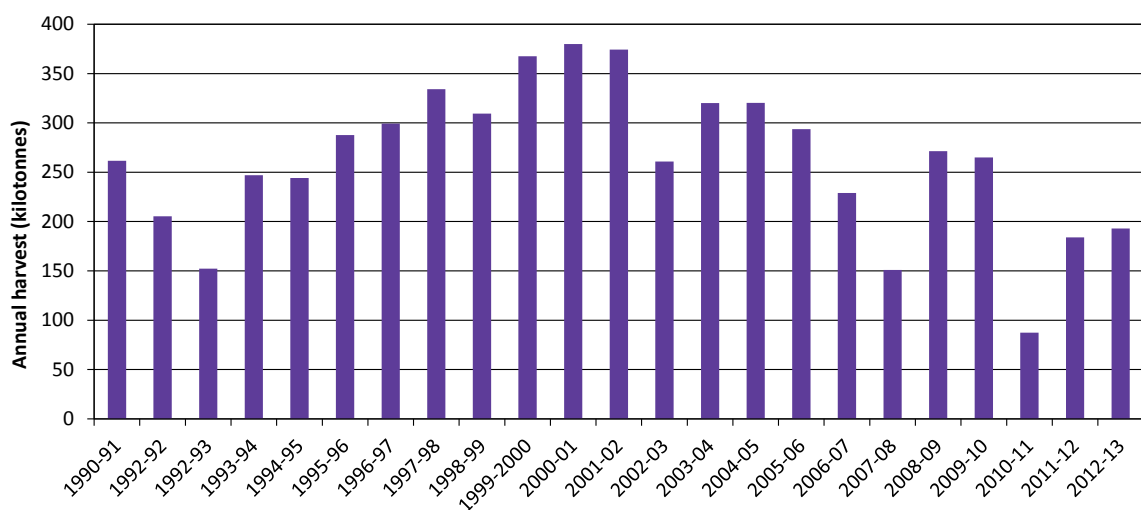
- Sales of domestic private label products decreased.
- Sales of imported private label products increased.
- Sales of imported branded products (not private label) decreased.
- Sales of SPC Ardmona branded products decreased (albeit less so than sales of domestic private label products and imported branded products).

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

### **Long-term import competition has contributed to the injury**

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**

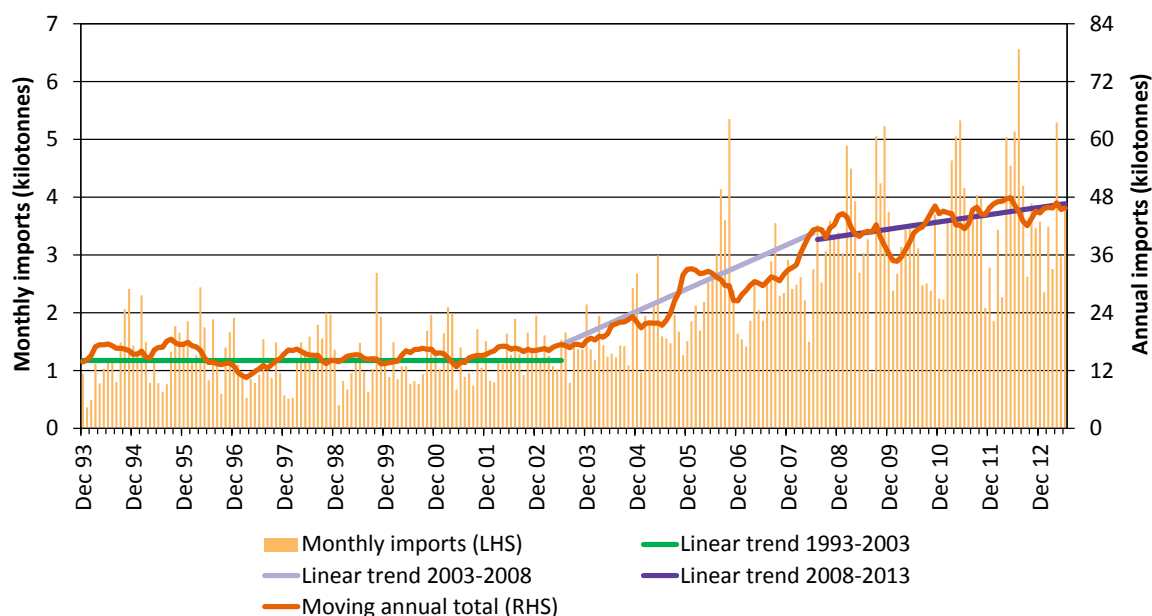


Data source: APTRC (sub. 15, att. 1).

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.

Imports of processed tomato products were stable from 1993 until the early 2000s. The increase in imports was fastest from about 2003 until about 2008 (when imports increased at a compound annual rate of approximately 18 per cent). From 2008 until 2013, imports have increased at a much slower rate (approximately 3 per cent) (figure 2.11).

**Figure 2.11 Import volumes, monthly and moving annual totals<sup>a</sup>**  
 Tariff subheading 2002.10.00 (statistical codes 08 and 60)<sup>b</sup>



<sup>a</sup> The trend lines represent July 2008 – June 2013, July 2003 – June 2008 (both the same as in figure 2.1) and January 1993 – June 2003 (calculated by regressing monthly import volumes on the time period; the slope coefficient was not statistically significant and thus the trend is a flat line). <sup>b</sup> Imports falling under tariff subheading 2002.10.00 and statistical code 60 were classified to statistical code 08 prior to July 1999.

Data sources: ABS (unpublished); Productivity Commission estimates.

The competitive pressure from imported processed tomato products 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

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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

- 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 Limited 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 in the difficult commercial situation that SPC Ardmona currently faces. The available evidence at this point in the inquiry does not indicate that there has been any significant recent change in the world market for tomatoes, or in the volume of imports, that is clearly correlated with the complaints being investigated.

### **Private label strategies have increased competition**

Private label products compete with branded products, reducing the ability of domestic producers to charge premium prices for their own branded products (box 2.6). Increased competition between the major supermarket chains, and the entry of new competitors (such as Aldi), has intensified this competition.

Supermarkets have sold private label products in a range of categories since the 1960s. Supermarkets use private label products for a range of 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).

**Box 2.6 The link between imports and private label prices**

Import competition inevitably constrains domestic prices of substitutable products.

The availability of imported processed tomato products to Australian retailers constrains the ability of SPC Ardmona to raise the prices of its own brand and private label ranges offered to retailers (for example, in response to higher processing costs). Any price premium achievable by SPC Ardmona for its products will be tied to the import price. The potential for a retail chain to switch their supply of private label products to imports could assist it in negotiating lower prices for SPC Ardmona's private label products.

Australia lags many countries in private label market share. As noted by the Australian Competition and Consumer Commission, 'private label penetration is relatively low in Australia compared with some overseas countries' (ACCC 2008, p. 363). In Australia, across all product lines private labels accounted for about 16 per cent of retail market value in 2009. Private label market share in the United States was 18 per cent in 2011, and 42 per cent in the United Kingdom (Klug and Queck 2013).

Notwithstanding the above, 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 in supermarkets was 53 per cent.

In the case of processed tomatoes, Australian supermarkets have strong incentives to diversify their sources of supply. The growers of Australian processing tomatoes are geographically concentrated, 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 as a counterbalance. Consumers may benefit from this behaviour.

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 products could take market share from branded products, and could effectively

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‘cap’ the prices that SPC Ardmona can charge 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 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, driven not by increased imports, but by choices made by supermarkets with their private label brands.

### *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 moving annual total sales, which smooths seasonal changes and helps reveal long-term trends.

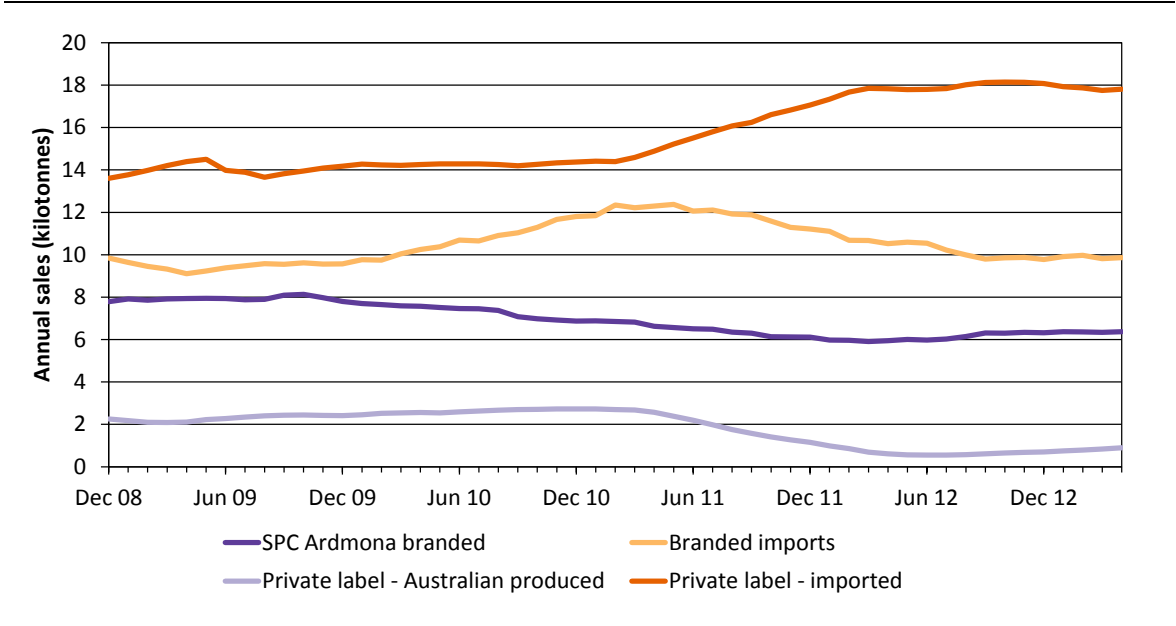
Supermarket sales of private label processed tomato products increased over the period from January 2008 to April 2013 (figure 2.12). Sales of domestic private label products were relatively steady until 2011. Floods in the 2010-11 growing season restricted supply, and caused a change in the trend — from positive to negative. From 2012, sales of domestic private label products plateaued.

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 responded to the restricted domestic supply by sourcing imports for their private label products. The appreciation of the Australian dollar, which reduced the cost of imports, may well have supported such a step.

The increased sales of imported private label products were also correlated 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 Australian supermarkets increased by 2.3 kilotonnes, while the volume of branded imported tomatoes fell 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 over this period.

**Figure 2.12 Processed tomato products — supermarket sales**  
Moving annual totals



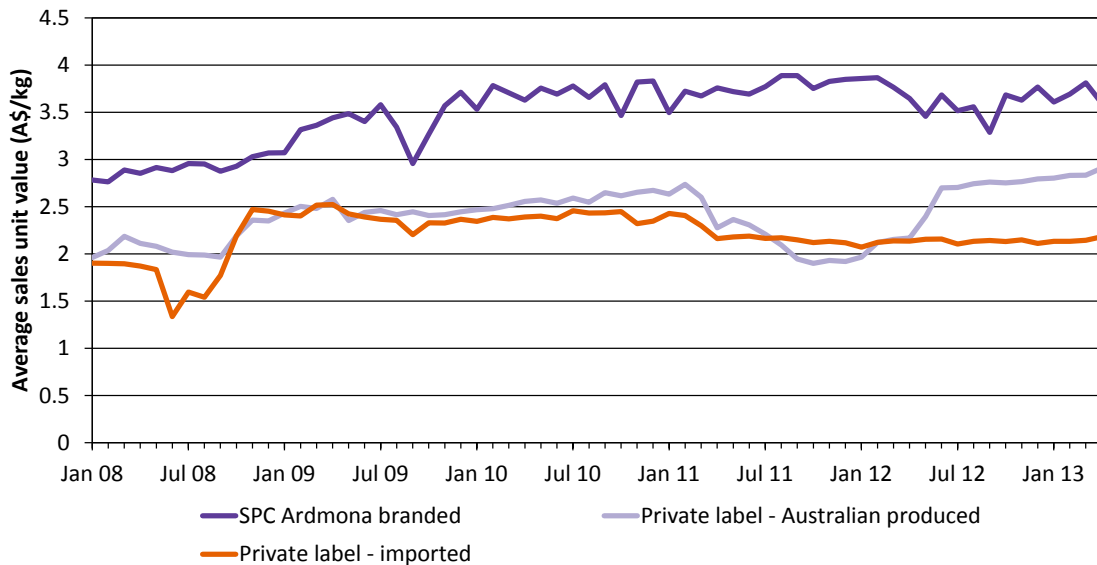
Data sources: Aztec Australia (unpublished); Productivity Commission estimates.

*Injury to the domestic industry*

Increased private label sales could cause injury to the domestic industry by restricting its ability to charge premium prices, thereby reducing profit margins. Access to low-priced 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 were consistently and significantly lower than the unit values of SPC Ardmona branded products (figure 2.13). Over this period the unit value of SPC Ardmona branded products has increased and its market share has decreased as consumers have responded to relative price differences. The correlation between the consistent (and increasing) gap in unit values and the reduction in SPC Ardmona’s branded product market share suggests that low-priced private label products have been a source of injury to SPC Ardmona. However, as detailed in section 2.2, the period of the injury is not correlated with a recent and sharp increase in the volume of imports.

Figure 2.13 Processed tomato products — supermarket unit values

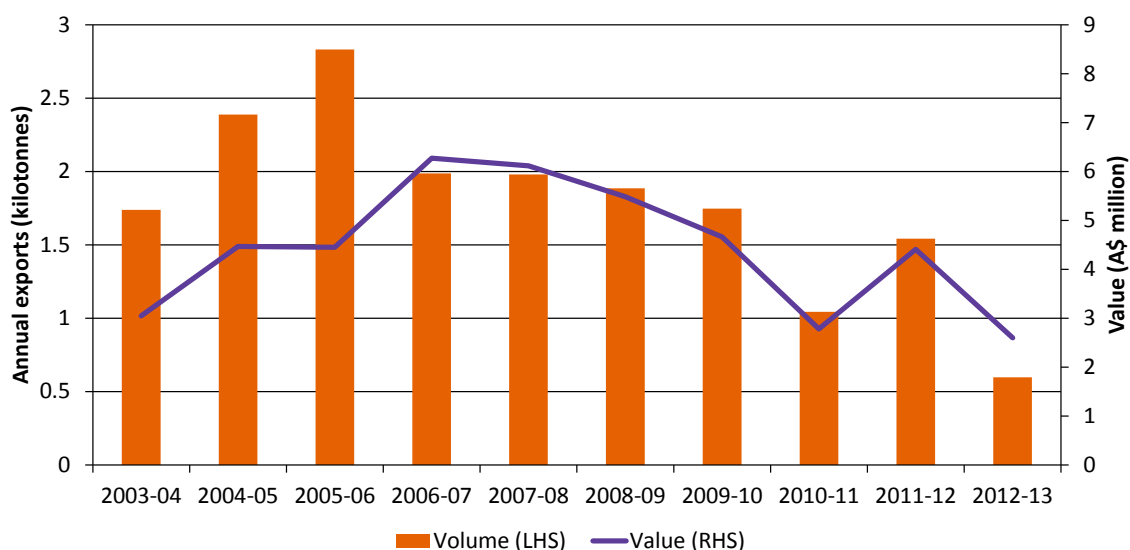


Data sources: Aztec Australia (unpublished); Productivity Commission estimates.

### Decreased exports caused injury to the domestic industry

One of the causes of the injury to SPC Ardmona's tomato processing operations is decreased exports of its products. Australian exports of processed tomato products (including all pack sizes) decreased by 45 per cent between 2008-09 and 2010-11 (figure 2.14). Some of the decrease in exports in 2010-11 was likely related to the impacts of the floods. Exports increased in 2011-12, and then decreased again in 2012-13. Over the period 2008-09 to 2012-13, exports decreased from 1885 tonnes to 597 tonnes (approximately 68 per cent). Over the same period, the value of exports (in FOB terms) decreased from \$5.5 million to \$2.6 million (approximately 53 per cent). It is likely that appreciation of the Australian dollar contributed to the decrease in exports. The loss of throughput from decreased exports would have contributed to the increased overhead cost per tonne of tomatoes processed by SPC Ardmona.

Figure 2.14 Processed tomato product export volumes<sup>a</sup>



<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.

Data 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 a long period of time. Processed tomatoes are a globally traded product with limited opportunities for product differentiation, and Australia is a small producer on a global scale. Competition from imports has contributed to ongoing consolidation among growers and recent closures 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 existing competitive pressure. Supermarkets have changed the way they market their private label products, and consumers may have come to regard some private label products as substitutes for branded products. This has likely reduced the ability of producers of branded products to charge premium prices without losing market share.

In the context of these ongoing competitive pressures, a number of specific developments have combined to cause injury to the domestic processing industry. First, the retail unit value of SPC Ardmona branded products 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



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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. 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 submission, and confidential evidence that it has provided, suggest that it might no longer be producing processed tomato products at an efficient scale. Undoubtedly this classifies as an injury to the industry. However, it appears to be the result of long-term trends, exacerbated by specific recent developments.

### **The increase in imports relative to domestic production appears to be more of a symptom of the injury than the cause**

As noted in section 2.2, the volume of imports of processed tomato products did not increase significantly in absolute terms, but did increase relative to domestic production over the period 2009–2013. Most of the increase was due to decreasing domestic production over the period.

For provisional safeguard measures to be warranted, there would have to be clear evidence that the increase in imports relative to domestic production has caused injury to the domestic industry. The available evidence suggests that the injury to the domestic industry was caused by the range of factors identified above. One aspect of the injury to the industry has been a reduction in domestic production, which is reflected in the increase in the ratio of imports to domestic production. The increase in imports relative to domestic production is more of a symptom of the injury than the cause.

#### FINDING 2.6

*The available evidence at this preliminary point suggests that the injury to the domestic industry producing processed tomato products in packs not exceeding 1.14 litres was caused by a combination of factors, including:*

- *ongoing competition from imports*
- *retailer private label strategies*
- *extreme weather events*
- *decreased exports.*

*The recent increase in imports relative to domestic production appears to be more of a symptom of the injury than the cause.*

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## 2.6 Do critical circumstances exist that would warrant provisional safeguard measures?

The WTO Agreement on Safeguards stipulates that a member country may only apply *provisional* safeguard measures under ‘critical circumstances’ (Article 6). These circumstances must be such that any delay in taking safeguard action would result in damage to the domestic industry that would be difficult to repair.

SPC Ardmona submitted that critical circumstances exist that would warrant provisional safeguard measures. It stated that:

- its requirement for raw tomatoes has fallen by 20 per cent for the 2014 season, which will lead to farmers leaving the industry, SPC Ardmona assets being underutilised and increased costs of operations
- the company needs to make ‘critical capital investment decisions now’, but has no capacity to raise capital to fund investment or innovation
- closure of its facilities ‘is in prospect unless provisional safeguards provide a “breathing space”, followed by full safeguard measures accompanied by an adjustment plan’ (SPC Ardmona, sub. 17, p. 3).

In assessing whether critical circumstances exist, a number of considerations are relevant.

First, SPC Ardmona’s submission indicates that it intends to continue processing tomatoes in 2014, albeit with a reduction of 20 per cent in its requirement for raw tomatoes. Given the company’s forward plans, critical circumstances do not appear to exist. There is no requirement for temporary safeguard measures (which can apply for a maximum of 200 days) to keep the industry operating in the short term.

Second, the Commission has not received evidence that the exit of growers from the industry will accelerate if provisional safeguard measures are not imposed. As SPC Ardmona (sub. 17, p. 16) noted, ‘the decline in the number of growers and volume of production has been a long term trend’.

Third, the submission provided by Kagome Australia (sub. 12) suggests that processing tomatoes will remain available to SPC Ardmona for the coming year in the volumes required. At present the majority of SPC Ardmona’s tomatoes are supplied by Kagome. In 2013 Kagome supplied approximately 18 000 tonnes of raw tomatoes to SPC Ardmona for processing. In total it processed 182 000 tonnes of tomatoes (most of which was used to produce paste, with some going to ‘dice’ production and some to passata). Kagome submitted that it prefers to sell tomatoes to SPC Ardmona for processing than to use them to produce tomato paste because

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the profits are larger (Kagome Australia, sub. 12). In addition, Kagome submitted that it is aiming to increase its production of processing tomatoes. Taken together, these statements suggest that Kagome intends to supply sufficient processing tomatoes to SPC Ardmona for the coming season, and will provide those tomatoes in whatever volumes are required by the company, unless production is disrupted by extreme weather. The availability of tomatoes to SPC Ardmona for the coming season appears does not appear to constitute a critical circumstance.

Fourth, SPC Ardmona did not provide evidence of capital investment decisions that must be made before the report on definitive safeguards is finalised.

Based on the evidence available, the Commission has judged that the requirements for critical circumstances have not been met and that delay in taking safeguard measures would not cause damage which would be difficult to repair.

#### FINDING 2.7

*Although the industry is suffering serious injury, there is no compelling evidence of critical circumstances that would warrant a provisional safeguard measure.*

For the report on definitive safeguards, the Commission will address the question of whether safeguard measures would remedy the injury to the domestic industry and facilitate adjustment. Relevant considerations could include analysis of how safeguard measures would affect consumers, the effects of safeguard measures on investment and production decisions, and the potential impacts of safeguard measures on supermarket strategies.

## **2.7 Concluding remarks**

This Accelerated report represents the Commission's assessment as to whether provisional safeguard measures should be put in place for up to 200 days. The Safeguards (final) report (to be completed by 20 December 2013) will determine whether there is a case for full safeguard measures, which can be applied for up to four years.

The Australian retail market for the processed tomato products that are specified in the inquiry's terms of reference is generally characterised by:

- a continuous growth over many years in import volumes, such that imports are now the dominant source of supply in retail markets
- one domestic producer (SPC Ardmona) that is the most substantial Australian producer and in retail markets is the only significant domestic producer.

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The proactive sourcing by supermarkets of private labels, sourced both from imports and domestic producers, appears to be an important characteristic of this market.

Markets for processed tomatoes have been flat overall in recent years. Canned tomato products are the higher-value product in the processing of tomatoes (for example, by comparison with tomato paste).

Australian tomato growers have exited the industry in large numbers over a sustained period. Remaining growers are highly productive on a global scale, yet have had to absorb minimal price improvement over an extended period, in circumstances of declining purchases (Kagome Australia sub. 12, APTRC, sub. 15). New investment from offshore (for example, by Kagome Australia) is revitalising part of this industry. While for the specific purposes of this inquiry neither growers nor Kagome Australia are part of the relevant domestic industry, they have a stake in the outcome.

The Commission's preliminary finding is that recent increases in imports of processed tomatoes are unlikely to be sufficient to meet the terms of Article 2.1 of the Agreement on Safeguards. However, imports have increased relative to domestic production to a degree that could satisfy the requirements of Article 2.1.

Three other tests must be applied in order to satisfy the requirements of Article 2.1. These are whether the import increase was unforeseen, whether the industry has suffered actual or threatened serious injury, and if so whether the injury was caused by the imports.

The Commission's preliminary view is that the first two of these three tests are likely to be met. The Commission notes that the test of whether an event is unforeseen is archaic — being rooted in the circumstances of 1994 — and will increasingly be so, but this has not influenced its judgment.

The Commission then examined causation. The Commission's view at this time is that the damage to the domestic industry was caused by a range of factors. Loss of exports, extreme weather events and persistent high levels of imports, rather than recently surging imports, have been significant, along with private label strategies by supermarkets. Imports and domestic supply enabled certain supermarket pricing strategies to take place, but the price of imports themselves did not vary (when expressed in Euros). Supermarket decisions on pricing strategies and product sourcing were made domestically, rather than being caused by changes in the world market for processed tomato products.

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For this accelerated report, the Commission has not received compelling evidence of the existence of critical circumstances sufficient to justify the application of immediate provisional safeguard measures. The available evidence suggests that waiting a few months for a decision, until completion of the final safeguards report in December, is unlikely to cause injury to the domestic industry that would be difficult to repair.

The Commission seeks comment on all aspects of this accelerated report as part of its process for preparing the final safeguards report, and will propose further public hearings to allow those responses to be heard. The Commission will seek further data on recent import trends and on private label strategies. The Commission also seeks comment from interested parties on its present views on ‘causation’.



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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)
- a public hearing (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 submissions.

A roundtable was held in Shepparton on 12 July 2013 and a public hearing was held in Canberra on 30 July 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>
Moira Shire Council	1
European Organisation of Tomato Industries	2
South African Fruit and Vegetable Canners' Association	3
Ministry of Foreign Affairs — Chile	4
Embassy of the Argentine Republic	5
International Trade Practices Unit — Mexico	6
Australian Manufacturing Workers' Union	7
Weller, Paul (MLA)	8
Department of Foreign Trade — Thailand	9
European Commission	10
Shire of Campaspe	11
Kagome Australia	12
Ministry of Economy — Republic of Turkey	13
Bean Growers Australia	14
Australian Processing Tomato Research Council	15
Australian Processing Tomato Growers	16
SPC Ardmona *	17
McKenzie, Bridget (Senator)	18
McKenzie, Bridget (Senator)	19
Coles	20
National Farmers' Federation	21
BuyAustralianMade	22
Drives for Industry	23
Consulate General of Egypt	24
Gouge Linen and Garment Services	25
Gengos, Ross	26
Italian National Industry Association of Conserved Vegetables	27
Croci, Patrick	28
Riordan, Carmel	29
Ministry of Industry and Foreign Trade — Egypt	30
SPC Ardmona *	31
European Commission	32
Italian National Industry Association of Conserved Vegetables	33
NSW Farmers	34
Stone, Sharman (MP)	35
South African Fruit and Vegetable Canners' Association	36
South African Fruit and Vegetable Canners' Association *	37

<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

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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.



**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.



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## **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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