

Australian Manufacturing Workers' Union

Submission

*Productivity Commission Inquiries into Import of
Processed Fruit Products and Processed Tomato
Products*

October 2013



The Australian Manufacturing Workers' Union (AMWU) represents approximately 100,000 members working across major sectors of the Australian economy. AMWU members are primarily based in the manufacturing industries in particular metal, vehicle and food manufacturing, but also in the industries of mining, building and construction, printing and graphic arts, repair and service and laboratory and technical services. We have large numbers of members employed in the processed fruit and vegetable sector, particularly in the factories of SPC Ardmona, Simplot and Heinz.

In our July submission we dealt with both the processed fruit and tomatoes inquiries jointly and we do so again in responding to the Productivity Commission's (PC's) accelerated reports of September 18th, 2013.

The PC's analysis in its September 18 reports (Reports number 63 and 64) shows that serious damage has been done to both the industries involved in processing tomatoes and those involved in processing fruit.

These reports show that imports, particularly of peaches and mixtures have increased substantially. Similar conclusions are reached in terms of tomatoes.

In finding 2.9 on processed fruit, the PC found that "there is sufficient cumulative evidence of actual or threatened serious injury to SPC Ardmona".

However despite these conclusions in finding 2.10 in its Report the PC concludes "injury to the domestic industry has not been caused by an increase in imports of processed pears, peaches and fruit mixtures. It appears to have resulted from a combination of the following factors:

- reduced export volumes
- rising costs of domestic production driven by increased labour costs and by declining economies of scale due substantially to reduced export volumes
- long term reductions in the domestic demand for processed fruit products
- domestic retailers promoting private label brand products....."

In our assessment the PC has made several fundamental errors in reaching this conclusion

1. The PC misinterprets the test the WTO requires on the link between injury and causes be they imports or other factors. In our view the PC interpretation of causation (at least in terms of the processed fruit report) is more in line with the very strict interpretation in the case law findings in the Argentinian footwear case. However as the PC knows, and as the United States Government and others pointed out, there is an alternative view that emerges in the wheat gluten case (see WTO DSB/ M/ 97 Feb 2001). As the US representative summarised the important difference:

"It was significant that the Appellate Body had rejected the conclusion that the Agreement on Safeguards required that imports by themselves had to cause serious

injury..... The Appellate Body had endorsed the US view that ‘the causal link between increased imports and serious injury might exist even though other factors are also contributing at the same time to the situation of the domestic industry.’ In those proceedings, the representatives from Australia and NZ sought further clarification on this matter but it has been left as a matter of judgement and of evidence presented in proceedings.”

This position was reaffirmed in the Appellate Body determination in US-Lamb (DS177. 178) where the Appellate Body also explained that where several factors are causing injury simultaneously “a final determination about injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated.” **The AMWU’s assessment of the SPC material submitted as evidence is that it satisfies this test, including in how the injury from imports specifically is impacting cash flow, profitability and return on capital that is employed now and the additional capital that will be required if the SPC operations are to be sustained.**

The AMWU submits that serious injury in the processed fruit industry was caused by several factors including imports and that should have been the finding on the evidence particularly the evidence provided by SPC. Further, as noted by SPC the PC analysis will understate the role of imports in causing damage by not taking into account sufficiently the role that imports played in causing stock accumulation and massive stock write off by SPC. In addition as noted by SPC the use of the AZTEC data that excludes Aldi stores also causes an underestimate of the damage done by imports.

2. While setting a very high bar for injury caused by imports the PC sets a very low bar for injury caused by other factors such as labour costs.

The only evidence presented was pointing to one sentence about the dollar value of labour costs from an SPC document (presented in a different context) and a one paragraph assertion on an old slide from a 2012 power point presentation made at an overseas conference with an unsubstantiated statement about increased grower costs and the link to labour costs and no evidence of labour costs at SPC itself.

In fact as SPC demonstrates in its submission in reply average annual wage increases of less than 2.5% since 2010 are below both industry and national average increases.

3. Were these proceedings to end up before an Appellate Body review then the PC analysis might be deemed flawed in terms of the quality of evidence brought to bear on the causal links between imports and other factors such as private brand-label products.

As pointed out by SPC, the AZTEC data utilised by the PC excludes Aldi stores - an omission that is material to the assessment of this issue.

The remarks above referring to processed fruit also apply to processed tomatoes.

The PC clearly states that "over the period 2009-2013 there is a clear positive trend in the ratio of imports to domestic production. This trend line is steeper than the trend in absolute import volumes".

In the assessment of the AMWU it is somewhat disingenuous to then turn around and say "however a trend based on only five data points needs to be interpreted with care" when in both safeguard reports it was the PC itself that advanced the robustness of using a five year timeline.

In Finding 2.6 on tomatoes the PC correctly states that ongoing competition from imports was one of the causes of injury. It satisfies the test required (as set out in US-Lamb) of distinguishing the different factors combined and separately. However the PC then suggests "the recent increase in imports relative to domestic production appears to be more of a symptom of the injury than the cause".

In the AMWU's assessment the dissection of the various variables in the attribution analysis does not lead one to draw such a conclusion. The finding also suffers from some of the other issues identified above in the case of processed fruit.

Finally the PC tries to argue in the case of canned tomatoes that "there is no compelling evidence of critical circumstances that would warrant a provisional safeguard measure". The PC further argues "given the company's forward plans critical circumstances do not appear to exist".

The AMWU disputes this finding. After losing 30% of the casual jobs and 19% of the full time jobs at SPC since 2008 the crisis is very real and the room to move is diminishing at break-neck speed.

Importantly a decisive factor in measuring criticality in our assessment is whether a tipping point has been reached and whether the PC determination in these proceedings has a substantial effect in moving SPC to a tipping point. Such a tipping point could arise in circumstances where the board of SPC and Coca-Cola assess the consequences of this PC decision and the absence of supporting measures as "the final straw ". For many growers who are being forced to withdraw from the industry that conclusion has already been made.

Concluding Remarks

The AMWU submits that the evidence in the proceedings surrounding reports 63 and 64 on processed fruit and tomatoes warrant the imposition of provisional safeguard measures. Critical circumstances exist where delay in applying measures will cause damage which will be difficult to repair.

We think the fundamental problem in these cases is that the Productivity Commission has not been able to strike an appropriate balance between the facts of the case and the PC's

perception of the need for a extraordinary high standard of rigor in applying the WTO Safeguard tests, which case law tells us often requires judgment rather than the application of known formulas.

The AMWU is left pondering the issue of why the standard was so high for showing imports cause injury and why so low for other causal factors such as labour costs. In answering this question we considered the following.

In October 2012 “a new ten-delegation WTO grouping called Friends of Safeguards Procedures (FSP)” made a submission at the WTO Committee on Safeguards meeting on 22 October 2012. The group, including Australia, expressed concern about “procedural, transparency, and due process issues” related to certain safeguard investigations.

In summarising the new group’s position in the WTO publication “Safeguard Measures News Archives” the following commentary was made:

Their joint statement cited the following “examples of where there appears to be an emerging and serious disregard of multilateral rules”:

- *imposition of provisional safeguard measures without clear evidence;*
- *lack of rationale and consistency in the data examined during the investigation;*
- *“suspension” of previously imposed safeguard measures;*
- *untimely notifications to the Committee; and*
- *unwarranted safeguard investigations.*

The United States, on behalf of the FSP group (Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Chinese Taipei, Singapore and the United States) said that over the past few years, there have been improvements in the way members apply safeguard actions without going to dispute settlement as a result of interventions by concerned delegations in the Safeguards Committee. However, it said there has been an alarming increase in safeguard actions in recent years, and members must work together to deal with systemic concerns about safeguard proceedings.

The other members of the FSP group reiterated the concerns expressed in the paper. Other delegations shared the concern of the group about the increasing use of safeguard measures.

At the end of the discussion, the US asked that the Committee take up this agenda item again at the next meeting in spring 2013.”

Australia’s membership in this group and the designated role of the Productivity Commission in operationalising Australia’s safeguard procedures was pointed out by the PC

in these proceedings. In both reports membership of Australia in the “friends” group and the group’s commitment to and the requirement for applying a high standard of evidence and analysis are emphasised by the PC.

The PC received the July 2013 terms of reference for these proceedings only 8 months after “the friends of safeguards” position paper was released calling for a much tougher approach. This raises several issues.

1. Can Australia participate in the drafting of the “friends of Safeguards” Joint Statement calling for a tougher approach and then only eight months later expect the PC to get the right balance of factors in the two cases without imposing **unrealistically** high standards? Alternatively is it simply the case that Australia always applies a higher standard than is required in undertaking and discharging its WTO obligations?
2. To answer that question properly one would need to canvass issues such as:
 - What was Australia’s role in the drafting of the “Joint Statement”?
 - Who when and what involvement of people from which Government agencies attended which meetings prior to the Statement’s formulation, its subsequent publication and the ongoing activities of the Group?
 - What role did any member of the Productivity Commission or their staffs have in reviewing and inputting to the paper and activities of the Friends of Safeguards?
 - In terms of dates, times and places, what contact has the PC had with the origins and ongoing activities of “the friends of Safeguards group”?
3. A simple test of the question of balance is:
 - How high did the PC set the bar in proving whether imports cause injury, the evidence relied on, the case law references chosen to support the PC methodology and the cases ignored in reaching conclusions about standards of evidence and analysis?
 - How high did the PC set the bar in attributing cause of injury to other factors than imports such as labour costs?

The AMWU draws no firm conclusions on the “Friends of Safeguard” linkage at this time. For the AMWU its relevance is simply that the evidence in this case seems to us to suggest exceptionally high standards being applied in some cases and exceptionally low standards in others. We do not see sufficient balance.

Our conclusion is that not enough weight has been given to the following:

- Imports have caused serious injury to the industry, to SPC, to the growers, to workers and their community.
- Imports were not the only factor to cause injury nor do they have to be to arrive at an affirmative finding for implementing provisional safeguard measures
- Critical circumstances exist. For the past six months we have engaged with SPC and its senior management team. Amongst other things we have assessed the following key issues
 - (a) What is happening right now to workers and growers leaving the industry and what is the probability that SPC will close?
 - (b) What impact has the financial situation at SPC (particularly last year, this year and next year) had on the perception of the board, its current view of allocating capital of sufficient size and scope to transform the SPC operations and the environment in which these investment decisions will be made.

In assessing these factors, particularly return on capital employed, we were particularly mindful of the criteria used by the European Union in assessing the role of imports in causing injury:

“Examination of the trend in imports, of the conditions in which they take place and of serious injury or threat of serious injury to Community producers resulting from such imports, shall cover in particular the following factors:

- a) the volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;*
- b) the price of imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Community;*
- c) the consequent impact on Community producers as indicated by trends in certain economic factors such as:*
 - production,*
 - capacity utilisation,*
 - stocks,*
 - sales,*
 - market share,*
 - prices (i.e. depression of prices or prevention of price increases which would normally have occurred),*

- **profits,**
- **return on capital employed,**
- **cash flow,**
- **employment;**

d) factors other than trends in imports which are causing or may have caused injury to the Community producers concerned."

The investment variable in terms of cash flow, profits now and in the future and return on capital employed are the key issues for the future. That is our assessment, the assessment of SPC, the growers and the broader community.

The SPC balance sheet is not the Coca Cola Amatil balance sheet. Given the large capital employed already at SPC and the much larger additional capital required to justify the business case to continue processing fruit and tomatoes, the future environment for doing business is a critical variable in any board's decision making parameters.

If the board's view is that this inquiry is typical of how of standards of evidence and analysis will be set to ensure a level playing field and fair competition relative to imports in the future then it will contribute significantly to a tipping point where a decision to close is when not whether.

This will be reflected in the business case that is brought to the board and the return on capital employed projections assuming different environments and different demand circumstances including the nature of import competition.

For these and the other reasons stated above, the AMWU concludes that the Productivity Commission should recommend strong safeguard measures be applied right now and for the foreseeable future.