



Australian Government
Productivity Commission

Safeguards Inquiry into the Import of Processed Fruit Products

Productivity Commission
Inquiry Report

No. 67, 12 December 2013

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Publications enquiries:

Media and Publications
Productivity Commission
Locked Bag 2 Collins Street East
Melbourne VIC 8003

Tel: (03) 9653 2244
Fax: (03) 9653 2303
Email: maps@pc.gov.au

General enquiries:

Tel: (03) 9653 2100 or (02) 6240 3200

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Australian Government
Productivity Commission

Melbourne Office

Level 12, 530 Collins Street
Melbourne VIC 3000

Locked Bag 2 Collins Street East
Melbourne VIC 8003

Telephone 03 9653 2100

Facsimile 03 9653 2199

Canberra Office

Telephone 02 6240 3200

www.pc.gov.au

□ 12 December 2013

The Hon Joe Hockey MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Harris'.

Peter Harris
Presiding Commissioner

A handwritten signature in black ink, appearing to read 'Paul Barratt'.

Paul Barratt
Associate Commissioner

Terms of reference

SAFEGUARDS INQUIRY INTO THE IMPORT OF PROCESSED FRUIT 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 the following processed fruit products of the Australian Customs Tariff:

- 2008.30.00 Citrus fruit;
- 2008.40.00 Pears;
- 2008.50.00 Apricots;
- 2008.70.00 Peaches, including nectarines;
- 2008.97.00 Mixtures;
- 2008.99.00 Other.

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 No. GN 39 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

Contents

Terms of reference	v
Overview	1
Findings	19
1 About the inquiry	21
1.1 What the Commission has been asked to do	21
1.2 Background	22
1.3 Inquiry procedures and consultation	27
1.4 What are the requirements for safeguard measures?	30
2 Assessing the case for safeguard measures	33
2.1 Which Australian industry produces ‘like’ or ‘directly competitive’ products?	33
2.2 Have imports increased?	40
2.3 Was the increase in imports a result of unforeseen developments?	53
2.4 Is the industry suffering ‘serious injury’, or is it threatened?	59
2.5 Have imports caused the injury?	69
A Conduct of the inquiry	87
B Commonwealth Gazettes and GATT Article XIX	93
References	103

OVERVIEW

Overview

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

The Commission completed an ‘Accelerated Report’ on 26 September 2013, which assessed the case for imposing provisional safeguard measures, before the inquiry was finalised. It found that the requirements for the imposition of provisional safeguards were not met. Since the release of the Accelerated Report, the Commission has further developed its analysis in light of updated data on imports and exports, submissions received from interested parties, and evidence presented at a public hearing.

Background to the inquiry

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

SPC Ardmona had also signalled at various times that it was facing challenges in maintaining profitability, production and sales levels. Early in 2013, it announced reductions of up to 50 per cent in the intakes of fresh fruit for the following season’s production of processed fruit. The company stated that ‘the current level of profitability is unsustainable for the business’ and that ‘the current and prospective returns to the business do not justify additional capital investments which are required to make the operations competitive’.

In April 2013, SPC Ardmona’s concerns were formally conveyed to the Australian Government in separate written requests for safeguard measures for fruit and tomatoes. Subsequently, the Australian Government directed the Productivity Commission to undertake the two inquiries. The Company has also sought several other assistance measures including a \$50 million contribution from the Australian

and Victorian Governments to upgrade its facilities, and anti-dumping measures for the import of processed peach products from South Africa.

At the time of writing of this report, a decision on direct financial assistance has not been announced. The Anti-Dumping Commission has also not finalised its investigation. However, in its Statement of Essential Facts, the Commission proposed to terminate the investigation following a preliminary finding that the dumping margin for peaches imported from South Africa was ‘negligible’.

What is a safeguard action?

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

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

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

Box 1 When can safeguard measures be applied?

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

1. Imports must have increased in absolute terms or relative to domestic production. The increase in imports must be the result of unexpected and unforeseen developments and be ‘recent enough, sudden enough, sharp enough and significant enough’.
2. The industry must be suffering serious injury, or such injury must be threatened. In assessing injury, factors such as changes in market share, sales, production, productivity, capacity utilisation, profits and losses and employment must be examined.

(Continued next page)

Box 1 (continued)

3. Increased imports must be shown to have caused, or threaten to cause, serious injury. The impact of other factors must be separately identified and assessed. When factors other than increased imports are causing injury to the domestic industry, such injury shall not be attributed to increased imports.

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

The scope of the inquiry

The Commission has been asked to assess the case for safeguards on imports of several processed fruit categories, including:

- pears
- apricots
- peaches
- mixtures
- citrus fruit
- ‘other’ fruit.

For the like and directly competitive fruit categories that are produced in Australia, SPC Ardmona has a major share of domestic production, and for several products it is the only domestic processor (box 2). Thus, the focus of this inquiry was on SPC Ardmona, as it represents the domestic industry.

Box 2 **Australia’s processed fruit industry**

Processed fruit production in Australia is concentrated in the Goulburn Valley region in Victoria, where the production facilities of SPC Ardmona are located. SPC Ardmona is the major producer of processed fruit in Australia, and essentially constitutes the domestic industry for the products under investigation.

SPC Ardmona’s history began with the establishment of two grower cooperatives — The Shepparton Preserving Company, in 1917, and Ardmona, in 1921 — both of which were focused on canning fruit. In 1973, Ardmona commenced tomato processing, and the following year SPC launched its canned baked beans and spaghetti products.

(Continued next page)

Box 2 (continued)

In 2002, SPC and Ardmona merged, forming SPC Ardmona, and in 2005 the processor was purchased by Coca-Cola Amatil. SPC Ardmona has plants located in Shepparton, Kyabram and Mooroopna, but under a restructuring program that commenced in 2011, processing is being consolidated into an upgraded Shepparton plant.

The growers who supply SPC Ardmona with fresh fruit are also concentrated in the Goulburn Valley area. In its submission to this inquiry, SPC Ardmona noted it had utilised the products of more than 200 growers and suppliers of semi-processed fruit and vegetable products in recent years. There has been a gradual decline in grower numbers and production volumes over several years, and in April 2013, SPC Ardmona informed around 60 peach and pear growers that it would no longer require their produce.

Not all of the products under reference are of relevance to the domestic industry

The Commission has concluded that imports of processed citrus and ‘other’ fruit have little potential to affect the domestic industry. The investigation did not identify any domestic producers of processed citrus fruit. The category of ‘other’ fruit comprises a heterogeneous mix of products ranging from apples and plums to berries and exotic fruit. It was found that this category is an insignificant part of the domestic industry’s business and is of little relevance to this inquiry.

Thus, the focus of the inquiry was on the remaining four fruit categories — pears, apricots, peaches and mixtures.

Growers are not part of the industry for this safeguards investigation

Much of the public attention and contribution to this inquiry focused on the circumstances of growers affected by the decisions of SPC Ardmona to cut back its purchasing of raw fruit and to reduce the number of contracted growers. The Commission has received many submissions and other information on the significant financial and human consequences to growers of lost or substantially diminished contracts.

The Commission agrees with many inquiry participants that growers have borne a substantial part of the burden of adjustment to date, with reduced volumes, revised quality and variety requirements, loss of contracts and a long period with often minimal real price growth.

However, using the guidance of WTO precedent the Commission determined that the applicant for safeguard measures — SPC Ardmona — and, potentially, other

domestic manufacturers of processed fruit, are the relevant industry for the purposes of this inquiry. There is strong WTO precedent against imposing safeguards with the objective of remedying the injury suffered by the *suppliers* to the industry at the centre of the investigation.

Even in the absence of that hurdle, the requested safeguard measures would not help all growers, in particular those who have lost their contracts. SPC Ardmona indicated that it would be able to recover production volumes through larger contract volumes with the growers it has kept for the coming season, and that the capacity of the selected growers to expand production was one of the reasons for selecting them.

Have imports increased?

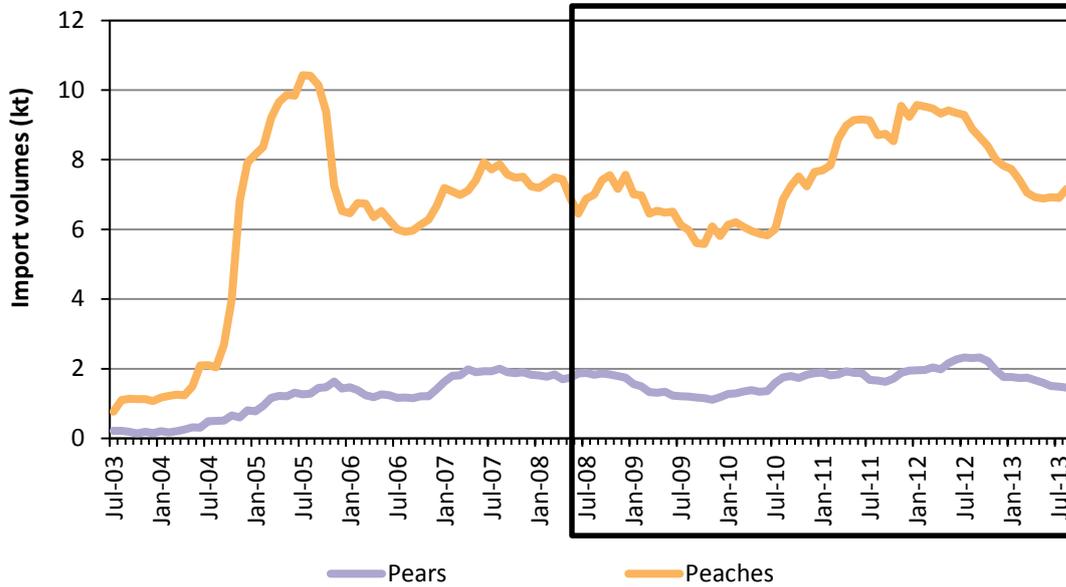
Under WTO requirements, safeguard measures can only be imposed if there is clear evidence of an increase in imports of the relevant goods, *either* in absolute terms or relative to domestic production.

There is WTO precedent that the increase in imports also must be ‘recent enough, sudden enough, sharp enough and significant enough’. While a timeframe for the increase in imports is not specified in the Agreement on Safeguards, a rule of thumb that has arisen from the case law is to focus on the last five years for which data are available, and to assess both the trend rate of increase and absolute quantities of imports. The Commission has considered the past five years, but has also looked at earlier data to help it to understand trends in imports of the relevant products.

Processed pears and peaches — imports have not increased in absolute terms, but have relative to domestic production

Measured in absolute terms, there has not been a recent, sharp, sudden and significant increase in import volumes of pears and peaches. The import volumes of pears increased marginally over the past five years. The import volumes of peaches increased more sharply between 2009 and 2011, but since then have returned to pre-2008 levels (figure 1).

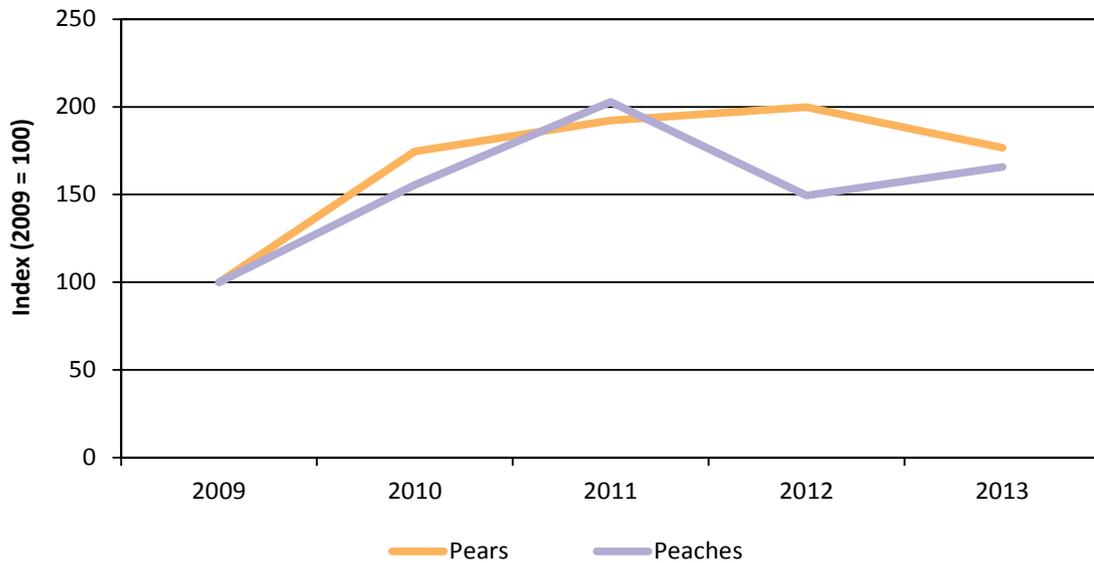
Figure 1 Import volumes — Pears and Peaches
Moving annual totals



To assess whether imports have increased sufficiently relative to domestic production, the Commission calculated the ratio of imports to domestic production for the period 2009 to 2013. The ratio is not a reliable indicator of competition from imports, nor of imports being a source of injury to the domestic industry, because it is sensitive to changes in domestic production levels. Domestic production can fluctuate significantly from year to year and may be influenced by many factors that are unrelated to import competition, for example, weather conditions and export volumes.

In the case of processed pears and peaches, the Commission has found that the ratio of imports to domestic production (presented as an index for data confidentiality reasons) has increased substantially over the investigation period (figure 2). This is sufficient to meet the threshold test of increased imports under the Agreement on Safeguards.

Figure 2 **Ratio of imports to production — Pears and Peaches**



Mixtures — imports have increased in absolute and relative terms

The imports of mixtures have increased substantially in the past five years in both absolute and relative terms (figures 3 and 4). This is sufficient to meet the threshold test under the Agreement on Safeguards.

Figure 3 **Import volumes — Mixtures**

Moving annual totals

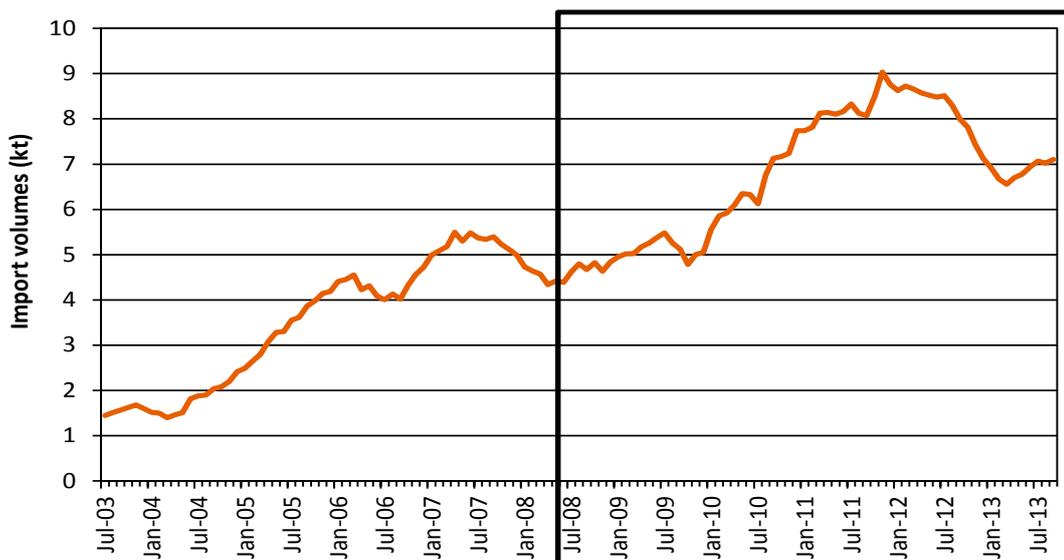
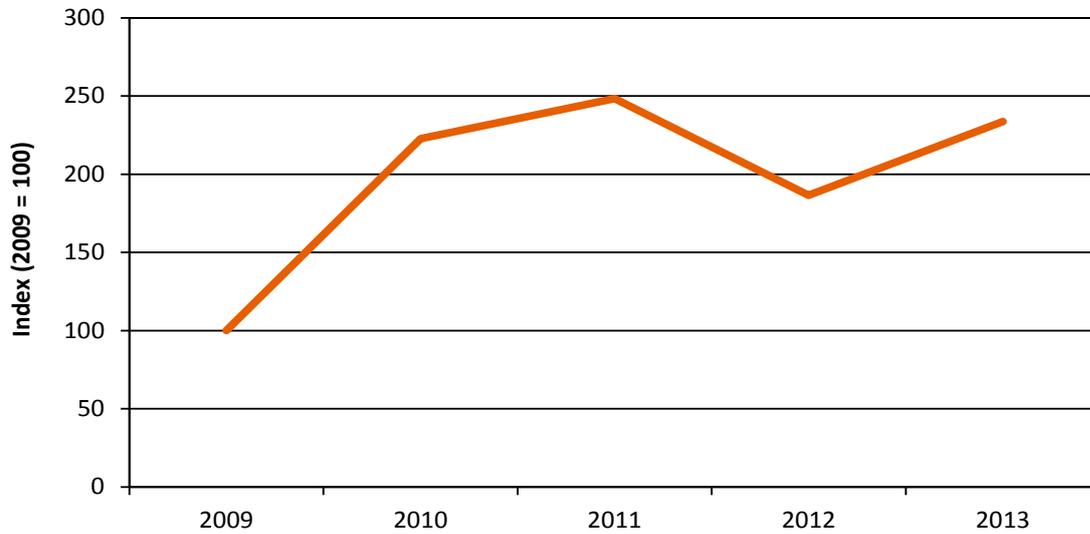


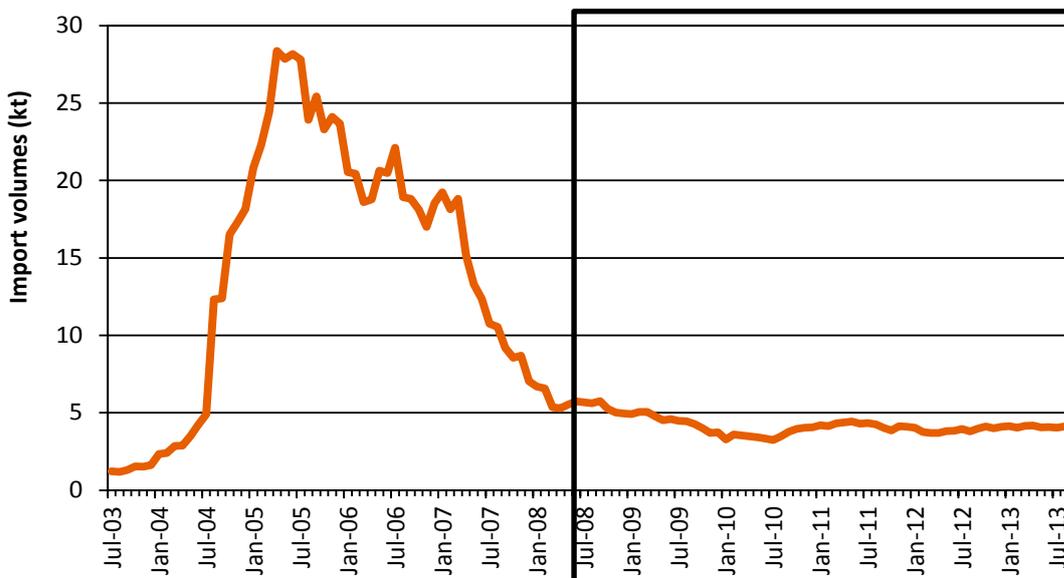
Figure 4 Ratio of imports to production — Mixtures



Apricots — imports have not increased in absolute or relative terms

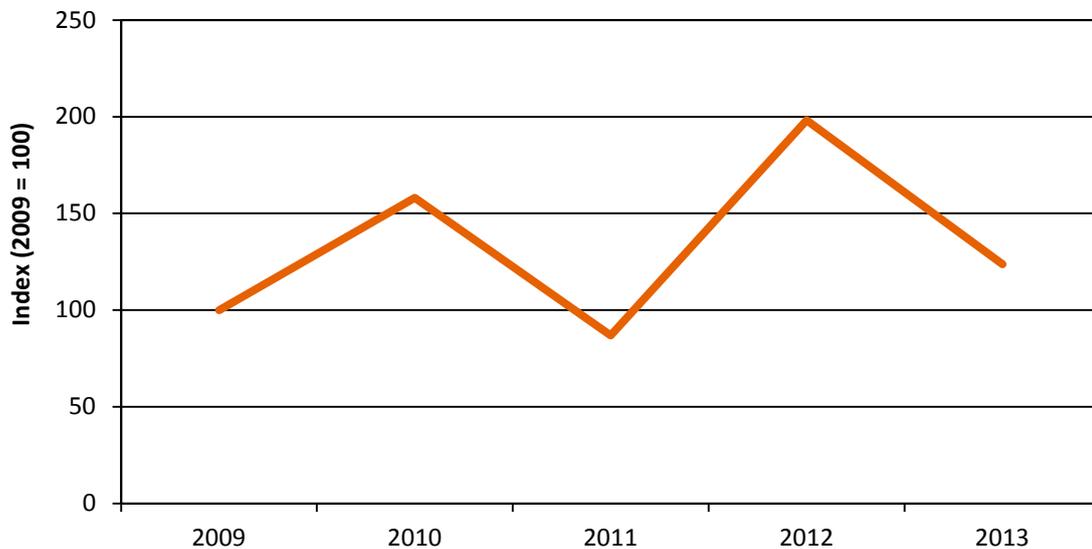
The import volumes of apricots have decreased over the past five years (figure 5).

Figure 5 Import volumes — Apricots
Moving annual totals



The ratio of imports to domestic production has fluctuated but has not increased substantially (figure 6).

Figure 6 **Ratio of imports to production — Apricots**



The case for a safeguards action for processed apricots is not sustainable on the above trends.

Is the industry suffering serious injury?

The Commission has concluded, based on its assessment of the available evidence on the indicators set out in the Agreement on Safeguards, that the domestic industry is suffering serious injury.

- Earlier this year, Coca-Cola Amatil announced a \$146 million write-off of SPC Ardmona's assets.
- Between 2009 and 2012, SPC Ardmona's domestic sales volumes have declined by between 10 and 32 per cent, depending on the fruit category.
- SPC Ardmona's profit margins have declined by over 20 percentage points for all fruit categories between 2010 and 2013, and have been negative from 2011.
- Between 2008 and 2013, there has been a substantial decrease in production volumes. Also, for the 2014 season, SPC Ardmona has announced a 50 per cent reduction in the intakes of peaches and pears.
- Employment levels across SPC Ardmona's production sites have declined substantially between 2008 and 2013.
- The market share of supermarket sales by the domestic industry has decreased slightly, but remained in the order of 70–80 per cent. SPC Ardmona disputed

this finding in its submission on the accelerated report, arguing that it was based on data that excluded the sales of ALDI supermarkets. However, further inquiry and analysis by the Commission has confirmed that the inclusion of ALDI would not materially affect the original finding.

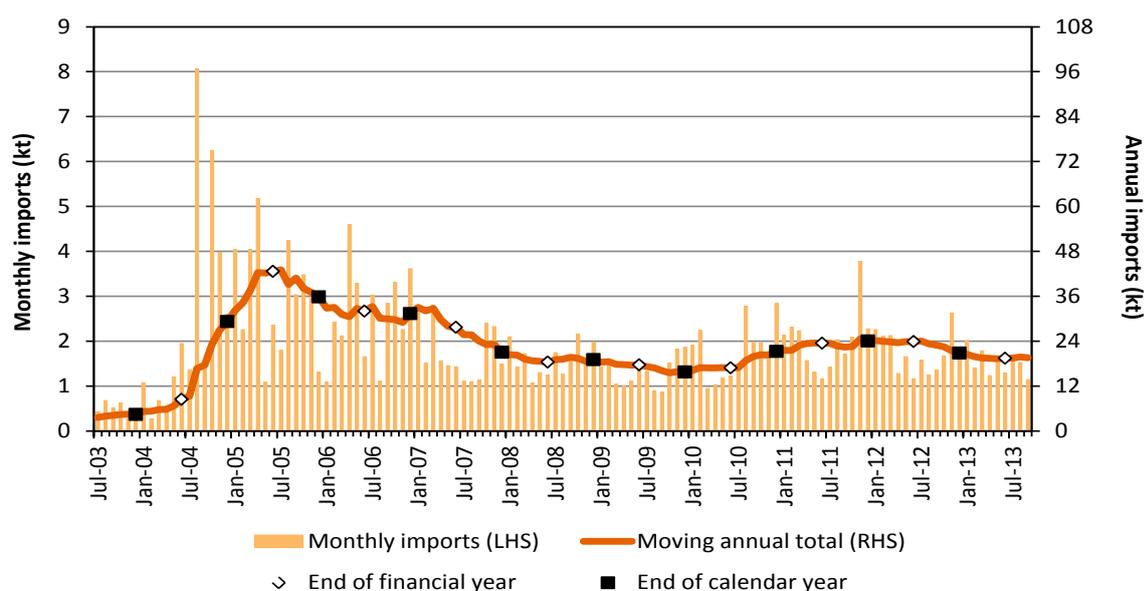
Has injury been caused by a recent surge in imports?

While the domestic processed fruit industry has been suffering serious injury over several years, a key threshold for the imposition of safeguards is whether serious injury was caused by a recent surge in imports. The Agreement on Safeguards states that any injury that was caused by factors other than increased imports must not be attributed to increased imports, nor targeted by the measures.

Increased imports need not be the sole cause of the injury — safeguard measures can be imposed to remedy a portion of the injury that can be attributed to increased imports. However, WTO law requires that there should be at least, a ‘coincidence of trends’ between the injury and any increase in imports.

As discussed above, with the exception of mixtures, no fruit category has exhibited a sharp, recent increase in the absolute *volume* of imports. Overall, the volume of processed fruit imports has not grown substantially in the past five years (figure 7).

Figure 7 Import volumes — Apricots, Pears, Peaches and Mixtures



Establishing a causal link between changes in the *ratio* of imports to domestic production and injury is more difficult, because, as noted earlier, the ratio is

potentially a highly volatile indicator, affected by non-import, as well as import related factors.

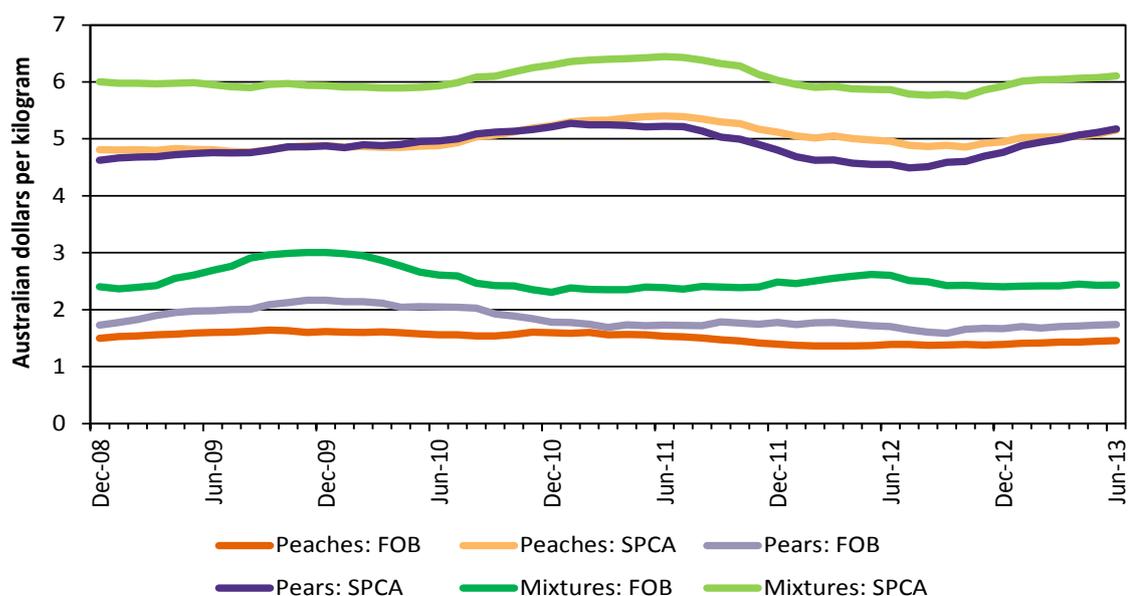
There has been no *increase* in the price pressure from imports

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

SPC Ardmona argued that during the investigation period, the major supermarket chains ‘have moved strongly from 2010 to import products cheapened by the exchange rate appreciation’. However, the Commission’s analysis has not revealed an intensification of competitive price pressure on the domestic producers.

The foreign currency unit values of the imports have *increased* — the opposite of what would have been expected in a safeguards action. The free on board unit values of imported processed fruit, *expressed in Australian dollars*, have remained flat over the period of investigation (figure 8). In the same period, the unit values of SPC Ardmona’s products have fluctuated slightly, falling in 2011 and 2012, but rising more recently.

Figure 8 **Unit values — Peaches, Pears and Mixtures^a**
December 2008 to June 2013



In its submission on the accelerated report, SPC Ardmona disputed the Commission's approach of analysing unit values at the aggregate tariff subheading level, arguing that it masked significant variability (and injury) at individual product levels. To support its claim that some of its branded products were coming under increased price pressure from imported products, SPC Ardmona provided confidential sales data for several product lines.

However, the approach advocated by SPC Ardmona would not meet either the terms of reference as determined by the Government or the requirements of the WTO. The Commission is required under the notice in the Commonwealth of Australia Gazette and its terms of reference to examine the tariff subheadings in their entirety. Furthermore, import data at individual product level are not available from the Australian Bureau of Statistics (ABS). The ABS data are the only source of objective information on import volumes and values at the tariff subheading level.

The Commission did, nevertheless, review the retail level data provided by SPC Ardmona. Of the nine product lines for which SPC Ardmona provided data, five demonstrated *stable* or *increasing* prices, with the remaining four showing only a moderate decrease. This did not provide a basis to conclude that an increase in price pressure from imported products was causing injury to the domestic industry.

This is not to deny that international trade *per se* can affect the prices achievable by the domestic industry. The ready availability of imported products constrains the ability of domestic producers to raise their prices, without losing market share to their international competitors.

However, in the context of relatively stable import unit values, any *changes* in the markets for SPC Ardmona's branded and private label lines relate to other factors.

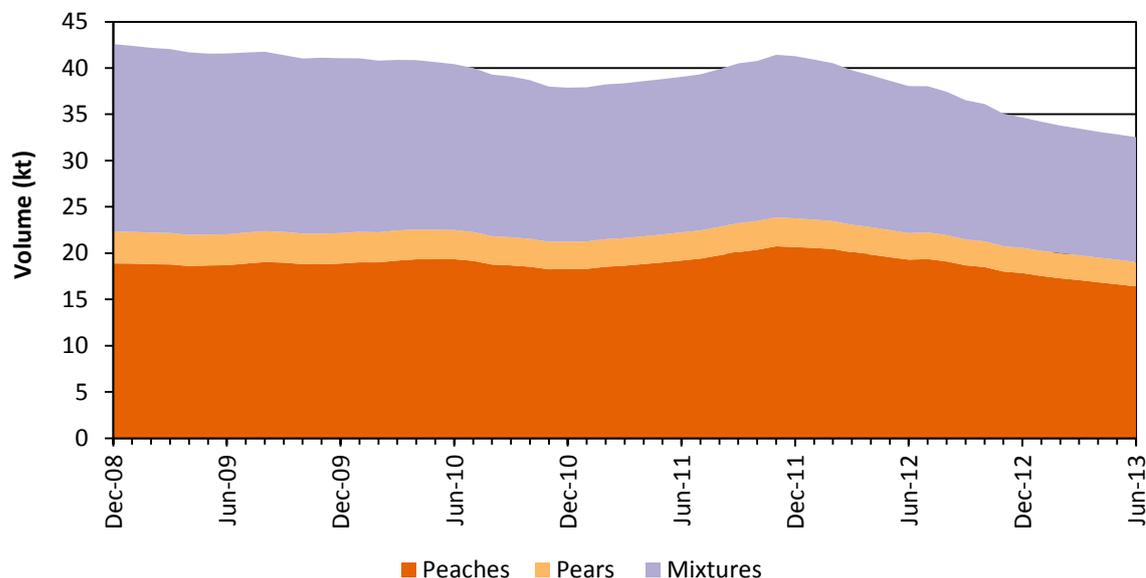
Other factors have caused the injury

Several factors have contributed to the injury suffered by the domestic industry.

Decreasing domestic demand for processed fruit

The domestic demand for processed fruit, irrespective of the country of manufacture, has been decreasing for several decades — a trend that Australia shares with other developed countries. Over the past five years, retail sales of processed fruit have declined by more than 20 per cent (figure 9).

Figure 9 **Supermarket sales — Peaches, Pears and Mixtures**
Moving annual total



Changing consumer preferences toward more convenient processed food alternatives, as well as greater availability and reduced relative prices of fresh fruit have driven this shift in consumption. Supermarket advice, previous presentations by the processing industry and available data on fresh fruit consumption support this conclusion.

Reduced export volumes

Some of the injury to the domestic industry was driven by decreases in the volume of exports of processed fruit — a consequence, at least in part, of the appreciation of the Australian dollar. Exports used to account for a substantial proportion of domestic production — for example in 2009, most of the domestic production of pears was exported.

Between 2009 and 2012, the combined exports of processed peaches, pears, apricots and mixtures have decreased by 57 per cent. These recent years have continued a longer-term trend — since 2003, Australian exports of processed fruit have decreased by 87 per cent.

Rising costs of production

SPC Ardmona’s profit margins have been affected by rising costs of production. While sales revenues per unit remained stable between 2010 and 2013, SPC

Ardmona reported that its production costs increased by around 19 per cent on average.

In large part, those cost increases on a per unit basis appear to be attributable to the loss of economies of scale — a consequence of the contraction of export volumes and the decline in the domestic demand for processed fruit.

Supermarket private label strategies — a feature of domestic competition

The past five years have seen considerable growth in the market share of processed fruit products sold under the supermarkets' private label brands. The emergence of the private label is not a new market development. Such products have been sold since the 1960s, with supermarkets in the past typically marketing them as a lower cost and quality alternative to branded products.

However, in the period under review, the private label strategies have evolved. Supermarkets have begun to offer 'tiers' of private label products, with the premium tier emerging as a direct competitor to the branded product range. This has reduced the capacity of producers of branded products to charge premium prices without losing market share.

The growth in private label sales is not of itself an indication of a surge in imported products — many product lines can be sourced locally. However, imports, or the threat of them, can be used as a negotiating tool for new supply arrangements, for example, to achieve a lower price.

SPC Ardmona has remained a significant (and for two fruit categories, major) supplier of private label products to supermarkets over the past four years. Furthermore, since the investigation commenced, several supermarket chains, including Coles, Woolworths and ALDI, have announced a shift to greater domestic sourcing of their private label processed fruit products.

There are many commercial reasons for supermarkets to promote their private label brands, and several factors were at play in the market for processed fruit in the period under investigation. In particular, the change in Coles' strategic direction under (relatively) new ownership and the entry of ALDI (which has strong experience in private label products), has intensified competition within the Australian retail market and led to greater preference for private label brands by the major supermarket chains.

SPC Ardmona's dominant position in the domestic market for processed fruit may also have encouraged supermarket chains to use private labels to enhance competition in this market.

Imports being used to improve reliability of supply

In Australia, the growing of fruit for processing is geographically concentrated and susceptible to adverse weather events. In the past, supermarkets have shifted to international suppliers to ensure a reliable supply of products, for example, following severe frost in the Goulburn Valley that destroyed most of the 2004 harvest. SPC Ardmona was also at various times an importer of processed fruit products. In this context, an increase in imports is not a cause of the injury to the domestic industry, but a response to factors affecting the domestic industry.

Have the criteria for safeguards been met?

In this report, the Commission has concluded that of the four product categories of relevance, only one (mixtures) demonstrated a sufficient increase in imports in both absolute and relative terms. Two other product categories (pears and peaches) have, nevertheless, demonstrated an increase in imports *relative* to domestic production — also sufficient to pass the threshold test of increased imports under the Agreement on Safeguards.

The domestic processed fruit industry is suffering serious injury. However, injury was not caused by an increase in imports of products under reference.

The clearest indicator of a surge in imports causing injury to the domestic industry is increasing price pressure from imported products. There was no compelling evidence of this for any of the product categories.

Other factors have caused the injury, including: decreasing domestic demand for processed fruit; rising domestic costs of production; and decreasing export volumes. Also playing an important role were domestic competitive pressures in the retail sector, where the availability to the supermarket chain of the option to import provides the threat of reduced margins for SPC Ardmona, but where the choice of that strategy is, ultimately, a domestic decision.

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

Findings

FINDING 2.1

Safeguard measures are not warranted for processed citrus products because there is no domestic industry producing like or directly competitive products.

FINDING 2.2

Safeguard measures are not warranted for processed 'other' fruit products. The domestically produced products that are like or directly competitive with the imported products are an insignificant part of the domestic industry's business. Therefore, there is little potential for imports of processed other fruit to be a contributor to any injury suffered by the domestic industry.

FINDING 2.3

The requirement for an increase in imports over the investigation period under Article 2.1 of the Agreement on Safeguards has:

- been satisfied for processed mixtures on the basis of both an absolute and a relative increase in imports*
- been satisfied for processed peaches and pears, but only on the basis of an increase in imports relative to domestic production*
- not been satisfied for processed apricots either on the basis of an absolute or a relative increase in imports.*

FINDING 2.4

The evidence does not support the conclusion that the injury to the domestic industry has been caused by an increase in imports of processed pears, peaches and fruit mixtures. The injury has resulted from a combination of the following factors:

- long-term reductions in the domestic demand for processed fruit products*
- reduced export volumes*
- rising unit costs of domestic production, driven substantially by declining economies of scale due to lower domestic demand and reduced export volumes*
- domestic retailers promoting private label brand products to compete with the sole domestic producer and with each other, as well as to improve reliability of supply.*

1 About the inquiry

1.1 What the Commission has been asked to do

On 21 June 2013, the Australian Government asked the Commission to inquire into whether safeguard action under World Trade Organization (WTO) rules is warranted against imports of selected processed fruit products falling within subheading 2008 of the Australian Customs Tariff. The subheading is defined as:

Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.

As specified in the terms of reference, the inquiry covers products under the following tariff classifications:

- 2008.30.00 (citrus)
- 2008.40.00 (pears)
- 2008.50.00 (apricots)
- 2008.70.00 (peaches)
- 2008.97.00 (mixtures)
- 2008.99.00 (other).

The terms of reference are reprinted at the beginning of this report.

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

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

Accelerated report and final report

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

Several interested parties disagreed with the Commission's assessment of whether critical circumstances existed that would have warranted provisional safeguard measures. However, under the WTO Agreement on Safeguards, the critical circumstances test is only relevant to the consideration of provisional safeguard measures. Therefore, the issue of critical circumstances has not formed part of the Commission's consideration on whether definitive safeguards are warranted.

Box 1.1 The Commission's findings on provisional safeguards

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

- The volume of imports for most processed fruits, with the exception of mixtures, had not increased significantly in the previous five years.
- The injury to the domestic industry was not caused by a recent surge in imports.
 - Other factors that caused the injury included reduced consumer demand, increased promotion of supermarket private label brands, the appreciation of the Australian dollar resulting in decreased exports and higher production costs.
- There was no compelling evidence that critical circumstances existed that would justify provisional safeguards.

1.2 Background

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

The Australian Government directed the Commission to inquire into imports of processed fruit products falling within tariff subheading 2008 of the Australian Customs Tariff. In accordance with the Australian Government Gazette, the Australian Government designated the products to be examined in the terms of reference sent to the Commission.

The subheadings are defined in detail as follows:

- 2008.30.00 — citrus fruit (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.40.00 — pears (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.50.00 — apricots (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.70.00 — peaches, including nectarines (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.97.00 — mixtures (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.99.00 — other (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included), **not** including
 - 2008.20.00 (pineapples)
 - 2008.60.00 (cherries)
 - 2008.80.00 (strawberries)
 - 2008.91.00 (palm hearts)
 - 2008.93.00 (cranberries).

The specified individual tariff subheadings are the highest level of disaggregation at which the Commission may conduct its analysis for the purpose of determining the relevant domestic producers or the injury.

Importantly, the tariff classifications under reference do not specify the size or type of packaging of the product (in contrast to the classification for the tomato safeguards inquiry). The majority of prepared or preserved fruit products sold at retail level are packed into cans and rigid plastic containers ranging in size from single-serve (typically between 90 and 150 grams) to multi-serve containers of up to

1.5 kilograms (SPC Ardmona, sub. 39). Processed fruit products are also sold in bulk packaging directly to the food service industry.

In its submission to this inquiry, SPC Ardmona sought to have safeguards applied to a different subset of products — ‘multiserve fruit’. However, for reasons set out in box 1.2, the Commission considers that the relevant domestic products for this inquiry must align with the tariff classifications and hence encompass all corresponding processed fruit irrespective of the nature or size of packaging.

Box 1.2 Can the definition of products under reference be changed?

SPC Ardmona (sub. 39) sought safeguard action only on processed fruit in multi-serve cans and plastic containers of sizes 300 grams to 1.5 kilograms. For processed peaches, this narrower subset is consistent with the product definition in SPC Ardmona’s anti-dumping application currently before the Anti-Dumping Commission.

As is the case in the concurrent safeguards inquiry into processed tomato products, the Commission’s assessment is that 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 heading so long as the domestic industry producing the like or directly competitive product is properly defined.

However, for this inquiry, the definition of the products under consideration is as specified in the **terms of reference**. This is a requirement under the Commonwealth of Australia Special Gazette No. S 297, which sets out the safeguard inquiry procedure to be followed by the Commission. The Gazette states that the terms of reference will ‘designate the product being imported’ and requires the Commission to report on that product.

In addition, any attempt to narrow the product description in the World Trade Organization notification and in the **terms of reference** would raise issues for two key aspects of the safeguards investigation, namely:

- obtaining clear evidence of changes in imports (given that the Australian Bureau of Statistics does not separately identify imports at this level of detail)
- defining ‘like or directly competitive’ products (those products would not necessarily be restricted to the narrower product description).

At present, imports of mixtures and citrus fruit have no tariff applied to them. There is also no tariff on imports from New Zealand, Singapore, the United States, Thailand, Chile, Forum Island Countries (including Papua New Guinea) and ASEAN countries. 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. The tariff rate on the remaining imports is currently set at 5 per cent. (The tariff rate for most imports into Australia is either zero or 5 per cent.)

Processed fruit products falling within the relevant tariff subheading are imported mostly from South Africa and China, with Greece and Turkey being key source countries for peaches and apricots respectively. Over the five years to September 2013:

- South Africa supplied 28 per cent of imported processed pears, 47 per cent of apricots, 45 per cent of peaches and 25 per cent of mixtures
- China supplied 46 per cent of pears, 20 per cent of apricots, 29 per cent of peaches and 41 per cent of mixtures
- Greece supplied about 15 per cent of imported processed peaches
- Turkey supplied 31 per cent of imported processed apricots.

Safeguards and anti-dumping

At the same time as its application for safeguard measures, SPC Ardmona requested an anti-dumping investigation into prepared or preserved peach products exported from South Africa. 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 peach and pear products in the past (box 1.3).

Anti-dumping is a different matter to safeguards

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

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

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

Box 1.3 Anti-dumping measures applied to processed fruit imports

- **November 1991:** Anti-dumping duties were applied to imports of canned pears from China. (Under Australia's anti-dumping legislation, anti-dumping measures automatically expire after five years, unless they are revoked earlier or an application for continuation is accepted.)
 - In 1996, the Canned Fruits Industry Council of Australia, acting on behalf of Ardmona Foods Limited and SPC Limited, applied to have the anti-dumping duties on canned pears from China continued for another five years from November 1996. The Anti-Dumping Authority found that such a continuation was not warranted, and (following ministerial acceptance of its recommendation) the duty expired in November 1996.
- **February 1992:** Anti-dumping duties were applied to imports of canned peaches from Greece and China, and countervailing duties were applied to imports of canned peaches from Greece and Spain.
 - In 1996, the Canned Fruits Industry Council of Australia applied for the continuation of these measures. The Anti-Dumping Authority found that such a continuation was not warranted, except in the case of the countervailing measures against canned peaches from Greece, and so the other measures expired in February 1997.
 - In 2001, another continuation inquiry was undertaken by the Australian Customs Service in relation to the countervailing measures against canned peaches from Greece. The measures were extended for a further five years, and expired in February 2007.
- **June 2013:** SPC Ardmona applied for anti-dumping duties on prepared or preserved peach products exported from South Africa, and the Anti-Dumping Commission subsequently initiated an investigation on 10 July 2013. To date, the Anti-Dumping Commission has found negligible dumping activity.

Sources: Anti-Dumping Commission (2013a); Australian Customs Service (1996).

The Anti-Dumping Commission investigation has so far found negligible dumping margins

An investigation was initiated by the Anti-Dumping Commission on 10 July 2013. On 28 October the Anti-Dumping Commission released a 'Statement of Essential

Facts'. It found that the dumping margins for prepared or preserved peach products exported from South Africa were negligible. It calculated a dumping margin of 1.8 per cent for one manufacturer and 1.2 per cent for another. The Anti-Dumping Commission was not satisfied that the domestic industry had suffered material injury as a result of dumped South African exports, and proposed terminating its investigation, subject to any submissions received in response to the Statement of Essential Facts.

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)
- 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.

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

Informal consultation

Informal meetings and visits were conducted in the early stages of the inquiry with SPC Ardmona, Coles Supermarkets and Australian Government departments. The Commission also held an informal roundtable in Shepparton on 12 July 2013, with representatives from the processing industry, fruit growers and others.

Other parties provided the Commission with information on an informal basis, including the retailers Coles, Woolworths and ALDI. Appendix A contains the full list of those consulted.

Submissions

Sixty-one submissions were received prior to the release of the accelerated report and another 17 prior to the completion of the final report. Interested parties were notified on 7 November that 13 submissions had been received since the release of the accelerated report. The Commission invited interested parties to make further submissions in response to the points raised in the submissions and in the public hearing and informed interested parties that submissions would be accepted up to 15 November. Following this notification, the Commission received 4 further submissions.

Submissions were received from a range of interested parties, including Australian and overseas participants, and reflected a range of views (box 1.4). All non-confidential submissions were posted on the Commission's website as quickly as possible. Where submissions contained commercial-in-confidence information, the relevant sections were not published. Appendix A lists all submissions received.

Public hearings and transcripts

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

Box 1.4 An overview of participants' views

Of the 61 initial submissions received about half (31) were from industry participants and suppliers to SPC Ardmona (including 21 from fruit growers and 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.

Individuals and consumer groups, local governments, trade unions and members of parliament generally supported the case for safeguard action, arguing that the closure of SPC Ardmona's facilities would have significant flow-on impacts on the region.

Supermarket companies provided evidence on the retail performance of Australian and imported processed fruit and the performance of the processed fruit category as a whole (as well general information on policies to source products domestically where possible), without arguing for or against safeguard measures.

Eighteen submissions were received from representatives of industries in countries that export to Australia and their governments, with most arguing that the circumstances of the Australian industry did not satisfy the safeguards criteria. Some governments submitted that exports from their country were eligible to be excluded from the application of any safeguard measures.

A further 17 submissions were received following publication of the Accelerated Report. SPC Ardmona (sub. AR63) submitted that the Commission had made several errors that compromised the analysis, and disagreed with the findings that the available evidence did not justify imposing provisional safeguard measures.

- These views were echoed by the Australian Manufacturing Workers' Union (sub. AR068) and Dr Sharman Stone (sub. AR69), who submitted that there is sufficient evidence that an increase in imports has caused injury to the domestic industry. They also argued that the Commission applied a standard of evidence that was stronger than required under the Agreement on Safeguards.
- By contrast, the South African Fruit and Vegetable Canners' Association (SAFVCA, subs. AR73, AR75) supported the Commission's finding that provisional safeguard measures were not warranted, but expressed reservations about the findings on increased imports, unforeseen circumstances and serious injury.

As is the Commission's standard practice when it conducts public inquiries, it requested that participants provide submissions in advance of the hearing. Most

participants did so. However, some interested parties appeared at the hearing before the Commission had received their submissions. Although the Commission prefers to receive submissions prior to hearings, it does not and cannot restrict participation in the hearings to parties from which it has received a submission. In order to accommodate ongoing participation from interested parties, the Commission accepted submissions throughout the inquiry process.

Data provision

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

1.4 What are the requirements for safeguard measures?

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

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

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

Although the procedures for safeguards inquiries in Australia that are set out in the Gazette largely mirror the provisions of the Agreement on Safeguards, under some circumstances a requirement could be triggered for the investigation to include an extra step that is not part of the Agreement. Specifically, if the Commission finds that safeguard measures are warranted, it must subject any proposed measure to a regulatory impact assessment of the community wide costs and benefits before making a recommendation. In addition, the determination must be in accordance

with the Productivity Commission Act, which requires that the Commission be guided by the interests of the community as a whole, not just those of any particular industry or group.

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

A high standard of evidence is required

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

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

Some interested parties queried whether Australia’s membership of this group influenced the Commission’s assessment of the case for provisional safeguards (Australian Manufacturing Workers’ Union, sub. AR68; Sharman Stone MP, sub. AR69; SPC Ardmona, sub. AR63). It did not. Australia’s membership of FSP was noted in the accelerated report as further support for the need for Australia to comply with its obligations given the high level of scrutiny that is applied to safeguard measures and the potential for appeals by other nations.

Five steps in the safeguards investigation

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

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

2 Assessing the case for safeguard measures

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

2.1 Which Australian industry produces ‘like’ or ‘directly competitive’ products?

The WTO Agreement on Safeguards defines the ‘domestic industry’ as comprising the producers as a whole of ‘like or directly competitive products’, or those 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 inquiry covers selected processed fruit products within subheading 2008 of the Australian Customs Tariff. The subheading is defined as:

Fruit, Nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.

The following products fall within the tariff subheadings specified in the terms of reference:

- 2008.30.00 — Citrus fruit (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.40.00 — Pears (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.50.00 — Apricots (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.70.00 — Peaches, including nectarines (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.97.00 — Mixtures (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included)
- 2008.99.00 — Other (prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included). This category comprises various processed fruit products, including (among others):
 - preserved apples and apple blends
 - plums and prunes preserved in syrup
 - berries (excluding cherries, strawberries and cranberries)
 - tropical fruit, such as mango and passionfruit (but excluding pineapples)
 - other exotic fruit, such as lychees, longan, rambutan, jackfruit, guava, papaya and figs.

For the remainder of the report, the Commission has referred to the products under reference by the name of the fruit covered by the tariff subheading, rather than by their respective tariff subheadings.

What are ‘like’ and ‘directly competitive’ products?

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

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

The Commission’s assessment — processed citrus products

The Commission has examined retail data of supermarket sales of processed fruit products over the past five years and has found that this tariff subheading comprises a narrow band of products, consisting primarily of processed mandarin and grapefruit segments (Aztec Australia unpublished). The volume of imports under this tariff subheading is significantly smaller than those of other products under reference, and the Commission has not found any domestically produced products that would fall within it. Moreover, neither the applicant for safeguard measures, nor any other interested party, submitted that the import of products under this tariff subheading is causing or threatening to cause serious injury to domestic producers. Therefore, the Commission has concluded that safeguard measures for imported products under the tariff subheading 2008.30.00 are not warranted.

FINDING 2.1

Safeguard measures are not warranted for processed citrus products because there is no domestic industry producing like or directly competitive products.

The Commission’s assessment — processed pears, apricots and peaches

The Commission has determined that for each type of fruit, the comparable domestic products and imported products that would fall within the same tariff subheading are like or directly competitive products.

The imported and domestically produced products have a similar composition and ingredients, consisting primarily of the relevant fruit and similar preserving liquids (water, syrup or juice). The products are also available in the same cuts (whole, halves, slices and diced) and similar types and sizes of packaging (Aztec Australia unpublished; SPC Ardmona, sub. 39).

The Commission's assessment — processed mixtures

This Tariff subheading covers a heterogeneous group of mixed fruit products, including (among others):

- various combinations of peaches, pears and apricots
- tropical and exotic fruit mixtures
- fruit and berry mixtures.

Analysis of supermarket sales data indicates that for most of the products imported under this tariff subheading, there are domestically manufactured products comprising similar packaging types and sizes and similar or identical combinations of fruit. The Commission has determined that the comparable imported and domestically manufactured products within this tariff subheading are like or directly competitive with each other.

The Commission's assessment — other processed fruit

This tariff subheading is a 'residual' category for processed fruit and is broad and heterogeneous. Analysis of retail data indicates that some of the products imported under this Tariff subheading are also manufactured domestically, and would be like or directly competitive with the corresponding imported products. These include:

- processed apples
- processed blueberries
- processed plums and prunes
- processed mangoes.

However, several products are not produced domestically at a reportable volume. These include most tropical and exotic fruit, such as passionfruit, lychees, figs and guava, as well as some processed berries.

The Commission has determined that only some of the imported products under tariff subheading 2008.99.00 have like or directly competitive products that are domestically produced.

Fresh fruit is not 'like or directly competitive' with the products under reference

The Commission has examined the case for fresh fruit being like or directly competitive with the products under reference. Although processed and fresh fruit products are to some degree substitutable and in competition with each other, the

relationship is insufficiently close for fresh fruit to be considered ‘directly competitive’. Fresh fruit and processed fruit have distinct physical characteristics and involve different production processes. The processing of fruit typically involves cutting and cooking the fruit and materially transforms the fruit from its original state. Second, the potential end uses of the two products are not identical, with fresh fruit allowing a broader range of applications.

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

Processed pears, apricots and peaches

The only party that has registered an interest in this inquiry as a domestic producer is SPC Ardmona. An examination of national supermarket sales data and other information confirms that SPC Ardmona is the only domestic producer of these products. SPC Ardmona produces own brand and private label products for these fruit categories. The Commission has concluded that SPC Ardmona’s production constitutes all of the total domestic production of processed pears, apricots and peaches.

Processed mixtures

Analysis of national supermarket sales data has revealed three domestic producers other than SPC Ardmona — Golden Circle, Kidsnak and Rafferty’s Garden. Those producers collectively accounted for about 15 per cent of the *domestic share* of Coles, Woolworths and Metcash supermarket sales of fruit mixtures in 2012-13, and less than 10 per cent of total retail sales of fruit mixtures. Golden Circle, Kidsnak and Rafferty’s Garden did not register an interest in the inquiry. The Commission has determined that SPC Ardmona’s production, which is sold under both own and supermarket private label brands, constitutes a major proportion of the domestic production of the products under this subheading.

Other processed fruit

Analysis of supermarket sales data in this category also identified three domestic producers other than SPC Ardmona — Rafferty’s Garden, Kidsnak and Riverina Grove. Those producers collectively accounted for about 3 per cent of the *domestic share* of Coles, Woolworths and Metcash supermarket sales of ‘other’ fruit in 2012-13, and less than 2 per cent of total retail sales of ‘other’ fruit. The

Commission has determined that SPC Ardmona's production constitutes a major proportion of the *domestic production* of the products under this subheading.

SPC Ardmona has advised that products under this tariff subheading are a minor part of its business and are not of significance to the domestic industry (SPC Ardmona, Melbourne, pers. comm., 7 August 2013). Consequently, the imports of those products have little potential to contribute to any injury to the domestic industry. The Commission has determined that safeguard measures for products under this tariff subheading are not warranted.

FINDING 2.2

Safeguard measures are not warranted for processed 'other' fruit products. The domestically produced products that are like or directly competitive with the imported products are an insignificant part of the domestic industry's business. Therefore, there is little potential for imports of processed other fruit to be a contributor to any injury suffered by the domestic industry.

Domestic producers who are not selling through retail channels

The Commission's analysis has not identified any domestic producers that sell their product entirely through non-retail channels. These could include, for example, processors supplying their product in bulk to the food services industry, as well as processors supplying other processors with ingredients for further processing.

In the issues paper it was indicated that such processors would form part of the domestic industry. However, no submissions have been received from such processors. Subsequent consultations with stakeholders have also failed to identify any such processors.

Therefore, the domestic industry comprises producers identified in the preceding sections.

Fruit growers are not part of the domestic industry for safeguards purposes

Some growers are significantly affected by the business decisions and performance of the producers of processed fruit. The Commission has received many submissions and has evidence from other sources to that effect. In some cases, reductions in the contract quotas offered by the processor have necessitated the termination or significant restructure of the affected grower's business (box 2.1).

Box 2.1 Impact on fruit growers

The Commission received many submissions from growers of fruit for processing, as well as from industry organisations and local government. Most growers described similar circumstances: after operating for several decades (often as a family business), they have faced reductions in demand for their fruit, and as a consequence have reduced their plantings and have concerns for their future viability.

According to the Australian Canning Fruitgrowers Association (ACFA, sub. 41), 61 growers lost their entire peach and pear quotas with SPC Ardmona (SPC Ardmona), while 53 growers would continue to supply the cannery in 2014. For many growers, their supply to SPC Ardmona generates between 80 and 100 per cent of their income (subs. 3, 5, 8, 9, 11, 14, 19, 42), and so the reduced processing fruit intake has a large impact upon their businesses. For others, SPC Ardmona is responsible for a lesser proportion (between 20 and 60 per cent) of their income (subs. 7, 12, 15, 16), as they also supply fresh fruit markets, or undertake other income-generating activity.

Growers have generally responded to the reduced fruit intakes by removing trees. Some indicated that the varieties they grow are unsuitable for fresh markets (subs. 1, 34), although others noted that diversion of excess fruit to fresh markets has contributed to oversupply and depressed prices (subs. 2, 13, 34). The ACFA claimed that there has been an oversupply of fresh pears for the past three years due to the increase in processing pears on the market. However, the Association commented that attempts to divert clingstone (processing) peaches to fresh markets have been unsuccessful due to consumer preferences for freestone peaches (trans., pp. 11–12).

Many fruit growers have experienced decreased profitability, reductions in workforce and difficulty meeting financial obligations (subs. 14, 16, 19, 41). According to a survey by the ACFA of 65 growers in the region, nearly half are failing to pay their trade creditors on time; less than one quarter expect to make a profit in 2013-14; and of the 80 per cent that have some level of debt, half have debt greater than 50 per cent of their equity value (sub. 41).

Greater Shepparton City Council (sub. 10, AR.62) submitted that SPC Ardmona's withdrawal of production from the region would increase the local unemployment rate from 8.6 per cent to 11 per cent. Growers also face the critical decision of whether to remove unprofitable trees before they begin to bud (late winter to early spring). Some expressed concern about being unable to afford tree removal costs, potentially putting other fruit growers and horticultural producers in the region at risk of pests and diseases, such as fruit fly (subs. 34, 41, 44).

SPC Ardmona has remarked that it has cut back to about 50 growers chosen for their superior financial capacity, growing techniques and scale; and that in the case of an industry recovery, the company would increase its intake 'through those 50 growers that we have kept' (trans., pp. 50–51).

However, the Agreement on Safeguards sets a different threshold for being considered a domestic producer. The WTO appellate body in *US – Lamb*

(DS 177, 178), in looking at whether producers of live lambs are part of the lamb meat industry, determined that a ‘substantial coincidence of economic interests’ is not sufficient to be considered a domestic producer.

Nevertheless, any factors impacting upon growers can have indirect effects on fruit processing businesses. Growers supply a key input into the production of processed fruit products and factors leading to a termination or severe reduction in fresh fruit supply would have adverse effects on the processor. Those effects are exacerbated by the fact that once an orchard is removed, there is a long lead time and high cost involved in re-establishing production.

The Commission has considered the impact on fruit growers in the context of the flow-on effects for domestic producers of processed fruit in section 2.4.

2.2 Have imports increased?

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

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

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

In its analysis, the Commission has used data on import volumes from the Australian Bureau of Statistics (ABS). These data are available on the Commission’s website. The Commission has also drawn on confidential data

provided by SPC Ardmona on its production volumes, and on previously published data.

In reporting the confidential evidence presented by SPC Ardmona, the Commission has taken care to respect its confidentiality. The Commission did not publish any of the confidential numbers provided by SPC Ardmona and reported the data in ways that preserved their confidentiality, including by removing values and units of measurement from the vertical axes of charts, and reporting data in percentage changes or indexes.

The Commission has analysed the changes in import volumes, and in import volumes relative to production, separately for processed pears, apricots, peaches and mixtures.

Pears

Import volumes

To account for the potential effects of monthly and seasonal fluctuations in import volumes, the data are presented in several time formats, including import volumes by:

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

The import volumes of processed pears are volatile over time, and annual figures and inferences about recent trends are sensitive to the time format of the analysis. Taken by calendar year, annual volumes have increased by about 1 per cent between 2008 and 2012 (figure 2.1).

The volume of imports for the year to 30 June 2013 was about 23 per cent above the volume for the year to 30 June 2009. The average annual compound growth rate for the period was 5.2 per cent. However, the annual volume of imports has decreased by about 34 per cent over the past financial year.

The Commission notes that the trend growth in imports of processed pears has been somewhat steeper in recent years (figure 2.1). However, it does not appear as a sharp difference, and is driven mostly by relatively low import volumes in 2008-09.

The factors listed by SPC Ardmona are not in Article 2.1 of the Agreement on Safeguards. However, the Commission has constructed trends of the ratio of imports to domestic production to take account of the effect of timing differences and stock carryover on production. The Commission has also considered stock write-offs in section 2.4, which examines the injury suffered by the domestic industry.

Box 2.2 The ratio of imports to domestic production — some issues with the indicator

It can be difficult to draw strong conclusions based on an analysis of the ratio of imports to domestic production. The ratio has a range of zero to infinity and can change sharply from year to year. A cautious approach is required for a number of reasons.

First, import volumes are highly variable from month to month and across seasons, and as such, are sensitive to the period chosen (for example, the ratio calculated for financial years might be substantially different from that for calendar years).

Second, there may be a high degree of natural variability in the production of raw fruit. This reflects variability in growing conditions in particular years and locations. Production levels can also reflect past decisions by growers to expand or shrink the size of their orchards, or adjust yields.

Third, 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.

SPC Ardmona provided confidential data on annual production volumes for products under all relevant tariff subheadings for calendar years 2009 to 2012 and the first half of calendar year 2013. The Commission requested data for 2008, but SPC Ardmona did not provide it.

Production data for a longer timeframe have been obtained from presentations by SPC Ardmona representatives at several world Deciduous Canned Fruit Conferences (CANCON) (CFICA 2009, 2010, 2012). The two datasets are not identical because of timing and product allocation differences. However, they can be reconciled in terms of total production over time across the tariff subheadings (box 2.3), and so the trends indicated by each source are broadly consistent.

Box 2.3 Domestic production — data sources

The Commission used two sets of production data in its analysis of imports relative to domestic production:

- confidential data on annual production volumes for calendar years 2009 to 2012 across the relevant tariff subheadings, supplied by SPC Ardmona (SPC Ardmona)
- publicly reported data on annual production volumes for financial years 2004-05 to 2011-12 across the relevant tariff subheadings, obtained from presentations by SPC Ardmona representatives to world Deciduous Canned Fruit Conferences (CANCON) in 2009, 2010 and 2012.

In its submission on the accelerated report (sub. AR63), and at the public hearing following the release of the accelerated report, SPC Ardmona criticised the Commission's use of CANCON data for the purposes of measuring domestic production, describing these data as a 'rough estimate at best' (trans., p. 142). As acknowledged by the Commission in its accelerated report, the two sets of data are not identical, with the differences explained by two factors:

- discrepancies between financial-year and calendar-year figures — most deciduous processed fruit production occurs in the first half of each calendar year (January to June), but production might occasionally run into the second half of the year
- in a given period, discrepancies between volumes under certain tariff subheadings — specifically, SPC Ardmona figures for peach production are consistently much lower than CANCON figures, but SPC Ardmona figures for production of mixtures are consistently higher than in the CANCON data.

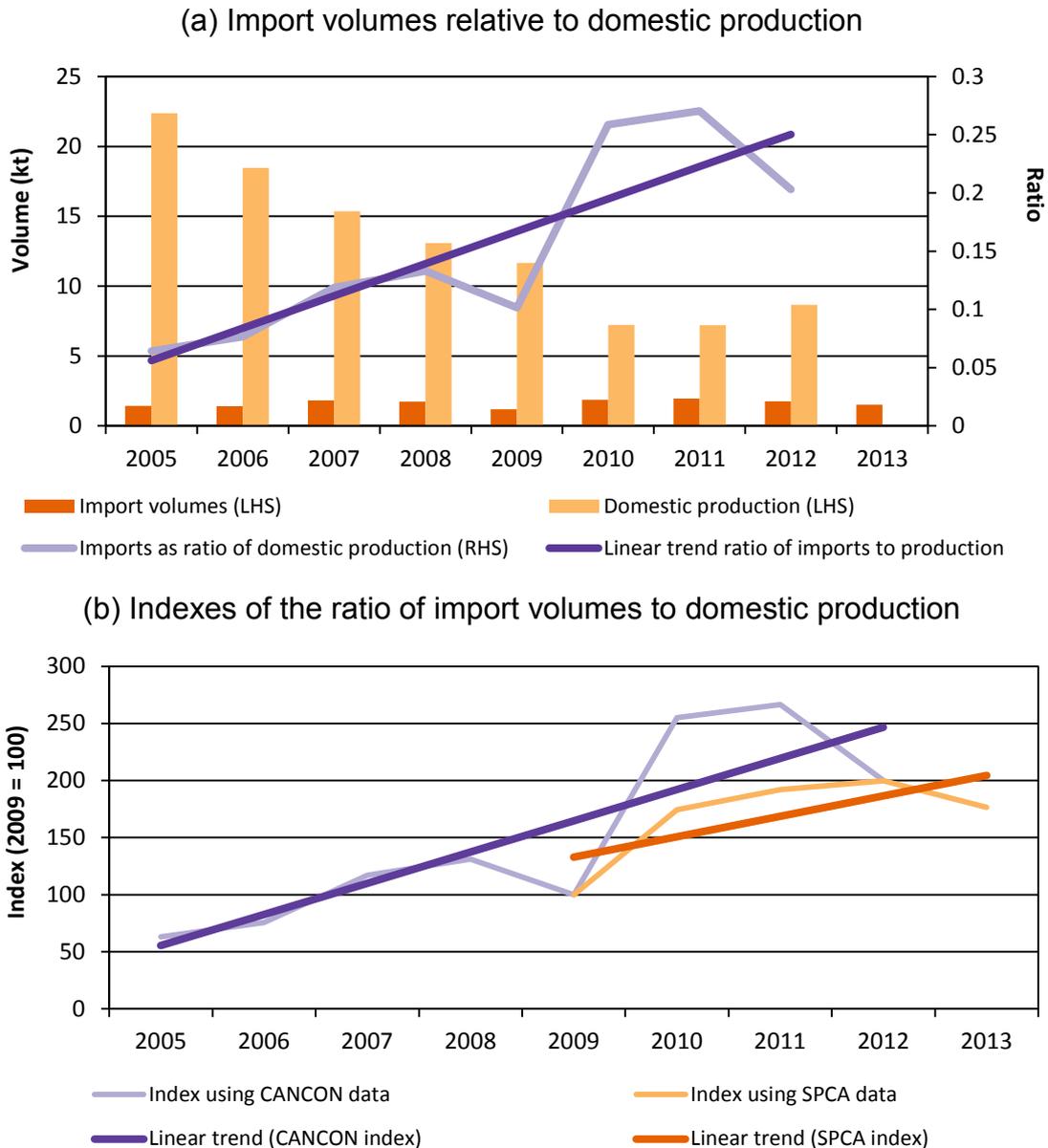
Given that SPC Ardmona supplied the Commission with production data for 2009 to the first half of 2013, CANCON data has been used to establish an indication of longer term trends in domestic production. Notwithstanding the difference between the two sources, they show comparable trends and were able to be reconciled in aggregate, over time. Both data sources are presented in this report, with care being taken to preserve the confidentiality of the data supplied by SPC Ardmona.

Sources: CFICA (2009, 2010, 2012); Commission estimates; SPC Ardmona (unpublished).

To assess imports relative to domestic production, both sets of production figures have been used. The CANCON data have been used to present actual domestic production volumes and ratios of imports to domestic production. To preserve the confidentiality of SPC Ardmona's data, indices of the ratio have been used.

The ratio of imports to domestic production has altered over time, albeit from a low base, and its current value is still about 0.2 (panel (a), figure 2.2). In recent years, for example from 2010, the ratio has not moved significantly. Nevertheless, the average annual rate of growth of the trendline over the past five years was substantial — in the range of 10.8 per cent (according to SPC Ardmona data) to 15.9 per cent (CANCON data) (panel (b), figure 2.2).

Figure 2.2 Import volumes relative to domestic production — Pears^{a,b,c}



^a Domestic production data used in panel (a) are CANCON data, and refer to marketing years. SPC Ardmona production data used for computations in panel (b) are for calendar years. Imports for the period 2005 to 2012 are for the respective calendar years. Imports for 2013 are for the year ended 30 June 2013. ^b Trend lines were constructed by regressing index ratios on a constant and the time period. ^c Ratios of imports to production were converted into indexes, using 2009 as the base year. Trend lines were fitted through the index values.

Sources: ABS (unpublished); CFICA (2012); Commission estimates; SPC Ardmona (unpublished).

In sum, while the increase in the volume of imports is insufficient to meet the requirement under Article 2.1 of the Agreement on Safeguards, the change in the ratio of imports to domestic production meets the test.

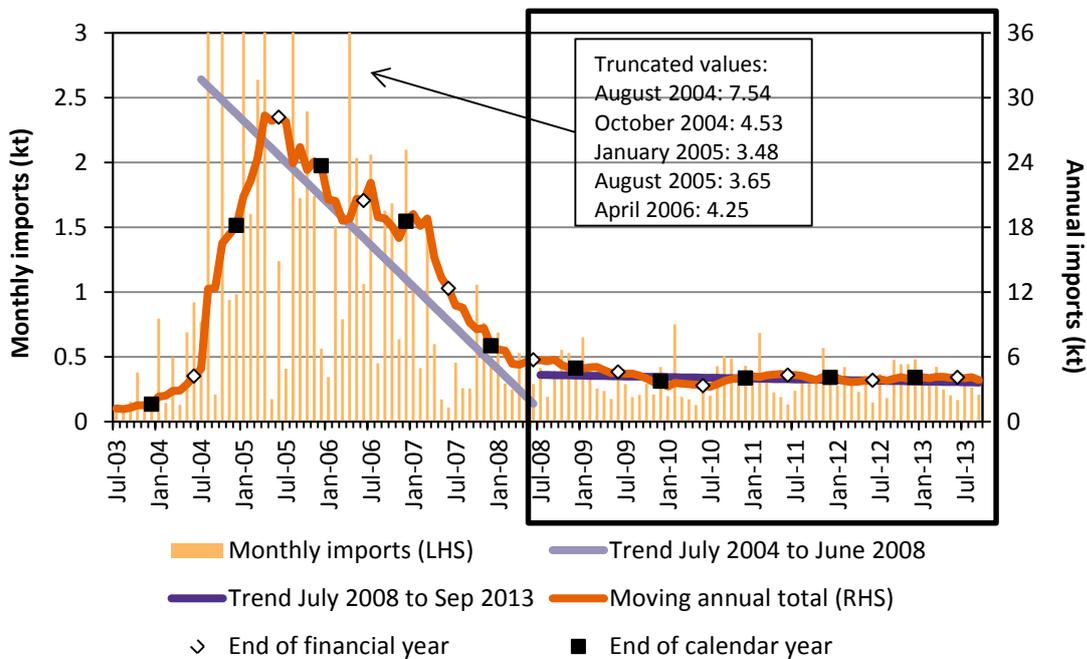
The Commission's assessment — Apricots

Import volumes

The volume of imports of processed apricot products decreased over the relevant period and in the longer term.

- The annual volume of imports decreased by 17 per cent between calendar years 2008 and 2012.
- The volume of imports for the year to 30 June 2013 was about 11 per cent below the volume for the year to 30 June 2009, and the average annual compound growth rate for the period was -2.9 per cent (figure 2.3).

Figure 2.3 Import volumes — Apricots, 2003 – 2013^{a,b}



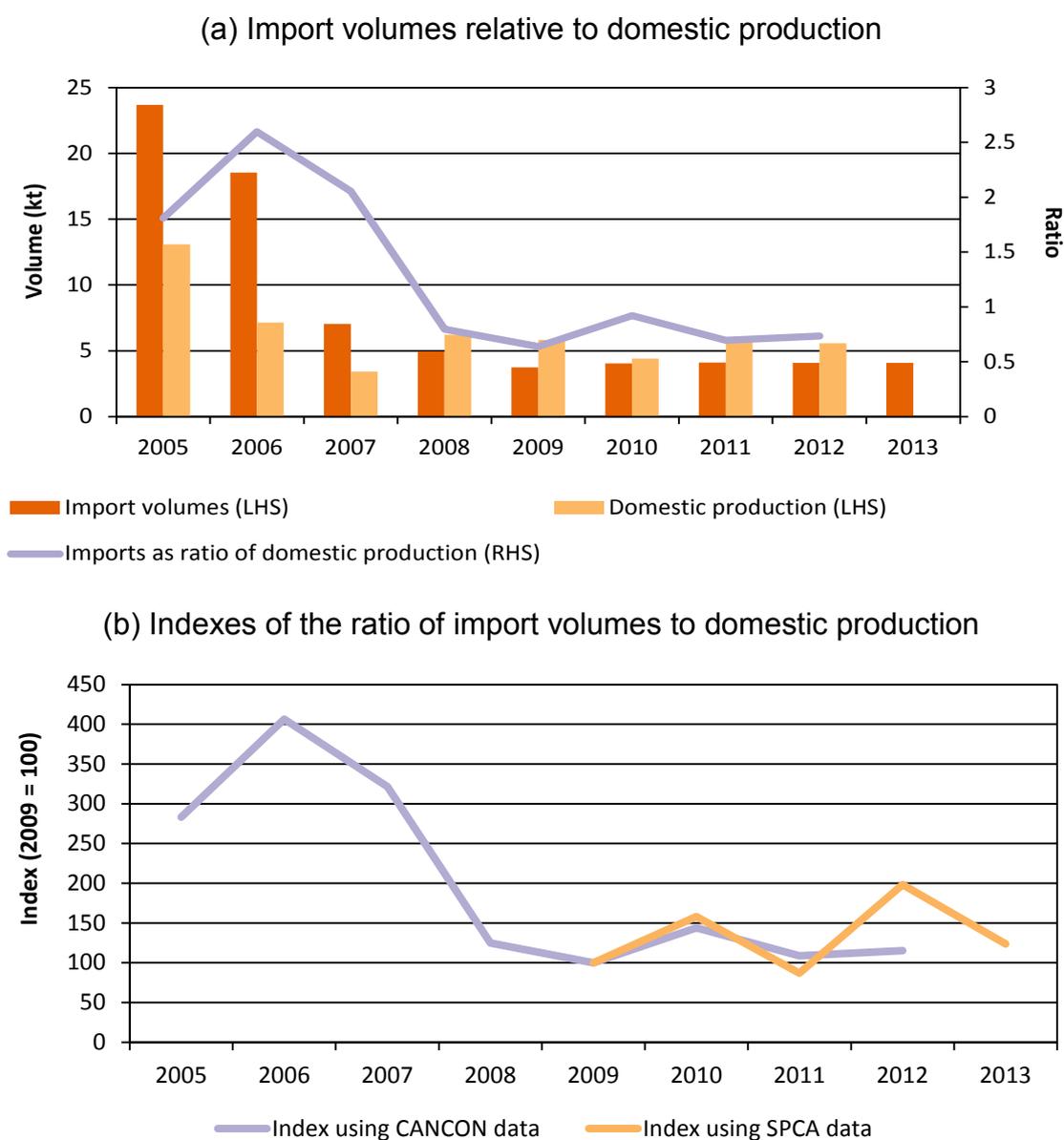
^a Import volumes for apricots comprise tariff subheadings 2008.50.00.33, 2008.50.00.34 and 2008.50.00.30 (which replaced subheading 2008.50.00.33). Quantities of 2008.50.00.33 were converted into kilograms on the basis that one tonne is equivalent to 50 basic cartons. ^b Trend lines were constructed by regressing monthly import volumes on a constant and the time period.

Sources: ABS (unpublished); Commission estimates.

Imports relative to domestic production

The ratio of imports to domestic production increased by about 24 per cent between 2009 and 2013 (figure 2.4). However, the ratio has not increased consistently between 2009 and 2013, but has fluctuated, driven by significant variability in annual domestic production levels.

Figure 2.4 Import volumes relative to domestic production — Apricots^{a,b}



^a Domestic production data used in panel (a) are CANCON data, and refer to marketing years. SPC Ardmora production data used for computations in panel (b) are for calendar years. Imports for the period 2005 to 2012 are for the respective calendar years. Imports for 2013 are for the year ended 30 June 2013. ^b Ratios of imports to production were converted into indexes, using 2009 as the base year.

Sources: ABS (unpublished); CFICA (2009, 2010, 2012); Commission estimates; SPC Ardmora (unpublished).

On balance, imports of processed apricots have not increased sufficiently in either absolute or relative terms, and the test under the Agreement on Safeguards has not been satisfied for this product category.

Commission's assessment — Peaches

Import volumes

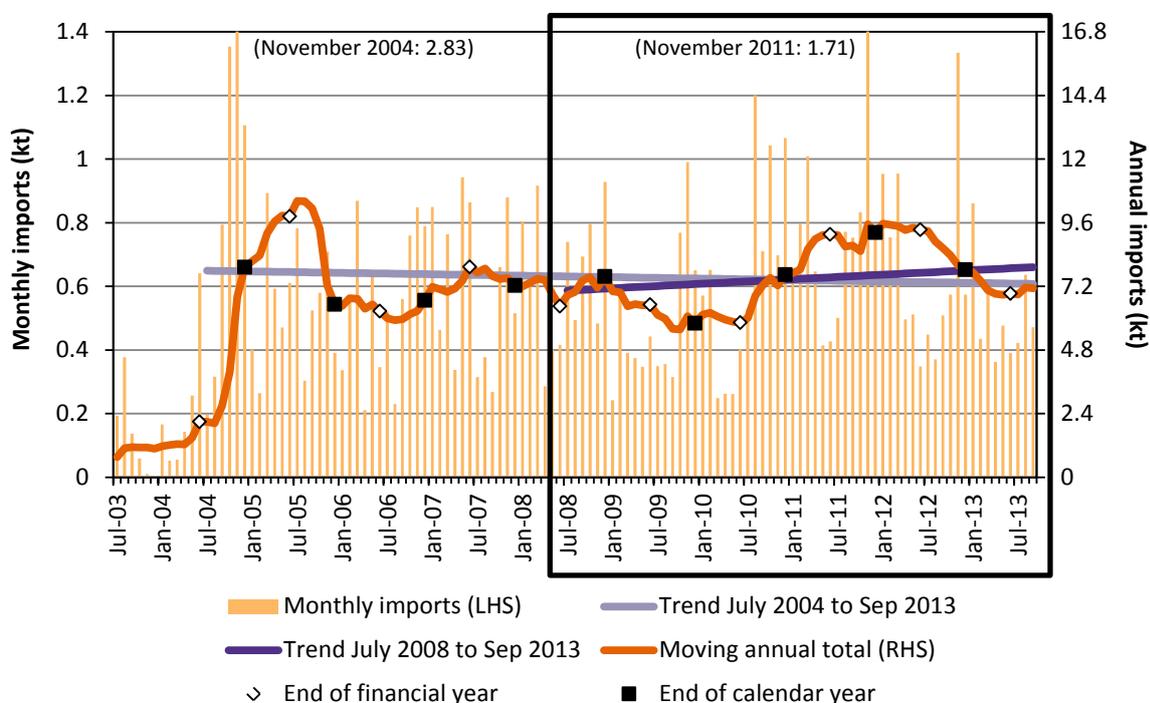
Aggregating the volume of imports of processed peaches for the three most recent years shows a volume increase. However, over the past year, import volumes have reverted to levels that prevailed immediately before the investigation period.

Taken by calendar year, the volume of imports for 2012 was about 3 per cent higher than in 2008 (figure 2.5). The volume of imports for the year to 30 June 2013 was about 6 per cent higher than the volume for the year to 30 June 2009. The average annual compound growth rate over that period was 1.6 per cent.

The annual volume of imports in the year to 30 June 2012 was the highest in the past five financial years, but it was about 5 per cent below the annual volume of imports in the year ended 30 June 2005.

On balance, imports of processed peaches have not increased sufficiently in absolute terms to meet the test under the Agreement on Safeguards.

Figure 2.5 Import volumes — Peaches, 2003 – 2013^a



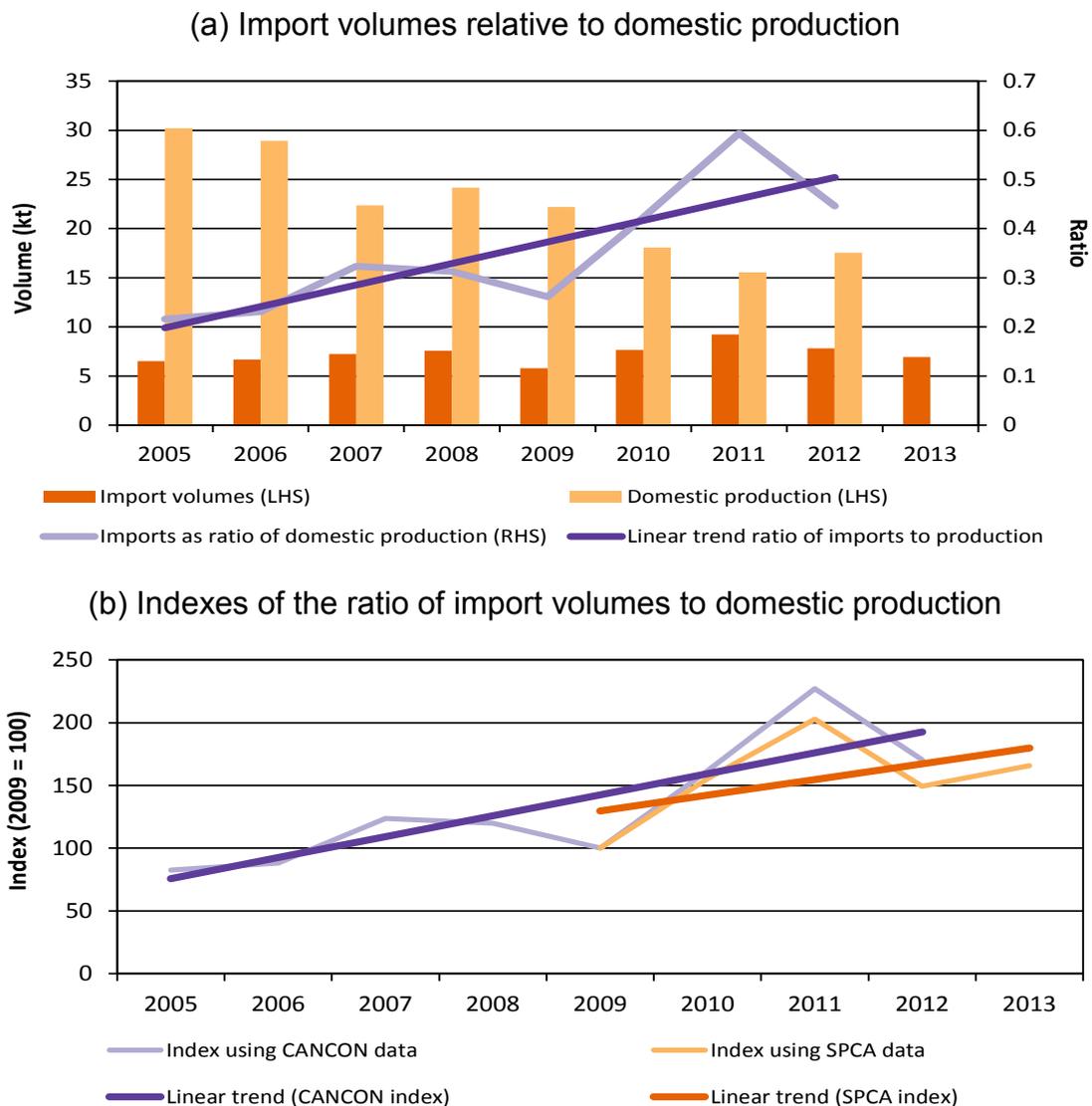
^a Trend lines were constructed by regressing monthly import volumes on a constant and the time period.

Sources: ABS (unpublished); Commission estimates.

Imports relative to domestic production

The index of the ratio of imports to domestic production has increased by about 65 per cent between 2009 and 2013 (panel (b), figure 2.6). The average annual rate of growth of the trendline over the past five years was in the range of 7.7 per cent (according to SPC Ardmona data) to 10.6 per cent (CANCON data).

Figure 2.6 **Import volumes relative to domestic production — Peaches^{a,b,c}**



^a Domestic production data used in panel (a) are CANCON data, and refer to marketing years. SPC Ardmona production data used for computations in panel (b) are for calendar years. Imports for the period 2005 to 2012 are for the respective calendar years. Imports for 2013 are for the year ended 30 June 2013. ^b Trend lines were constructed by regressing index ratios on a constant and the time period. ^c Ratios of imports to production were converted into indexes, using 2009 as the base year. Trend lines were then fitted on the index values.

Sources: ABS (unpublished); CFICA (2009, 2010, 2012); Commission estimates; SPC Ardmona (unpublished).

In sum, while the increase in the volume of imports is insufficient to meet the requirement under Article 2.1 of the Agreement on Safeguards, the change in the ratio of imports to domestic production meets the test.

Commission’s assessment — Mixtures

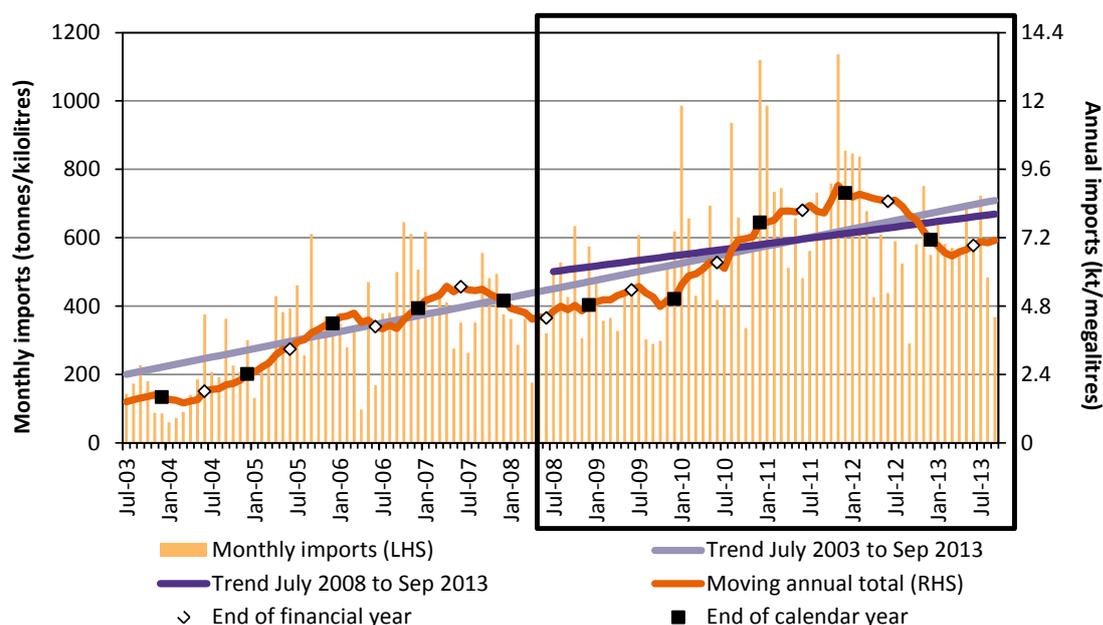
Import volumes

Annual import volumes of processed mixtures have increased by:

- 47 per cent between calendar years 2008 and 2012
- 29 per cent between the years ended 30 June 2009 and 30 June 2013 (figure 2.7).

However, at their peak, annual import volumes in 2011 were about 21 per cent higher than in the year ended 30 June 2013.

Figure 2.7 Import volumes — Mixtures, 2003 – 2013^{a,b}



^a Import volumes prior to January 2012 were measured in litres (and correspond to tariff subheading 2008.92.00.40). In constructing the moving annual total, it has been assumed that one litre of mixtures is equivalent to one kilogram of mixtures. ^b Trend lines were constructed by regressing monthly import volumes on a constant and the time period.

Sources: ABS (unpublished); Commission estimates.

The Commission also notes that recent trends in volumes are less steep than the longer term trend (table 2.1).

Table 2.1 **Growth in import volumes — Mixtures**
2003-04 to 2012-13

<i>Period</i>	<i>Compound annual growth rate</i>	<i>Average annual increase in import volumes</i>
	Per cent	Kilotonnes
2003-04 to 2008-09	24	0.71
2008-09 to 2012-13	7	0.39
2003-04 to 2012-13	16	0.57

Sources: ABS (unpublished); Commission estimates.

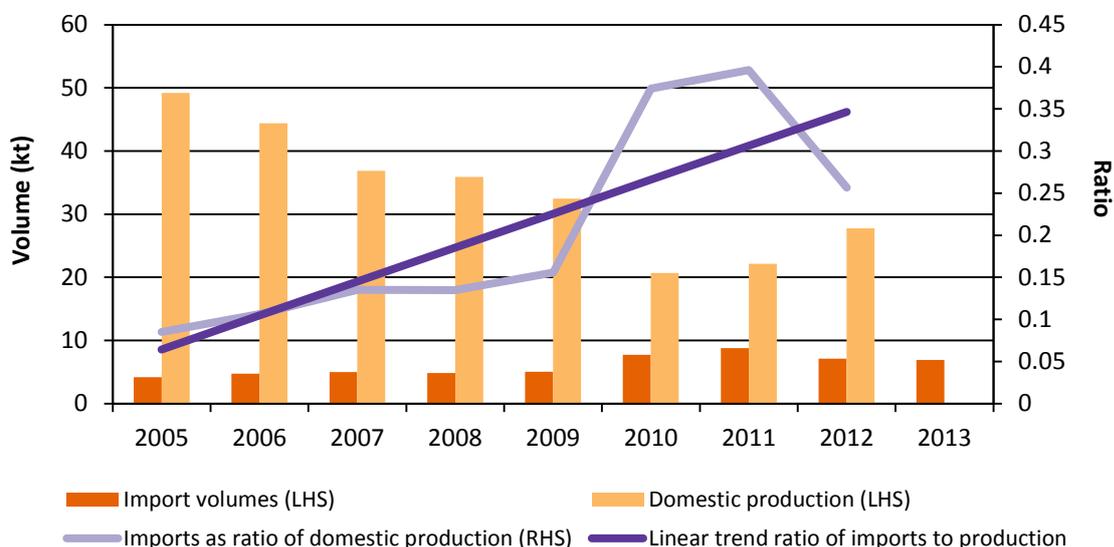
This suggests that the increase has not been ‘sudden’ in the context of past trends. Nevertheless, the Commission considers that the increase in import volumes over the relevant period in this category has been significant and is sufficient to satisfy the test under the Agreement on Safeguards.

Imports relative to domestic production

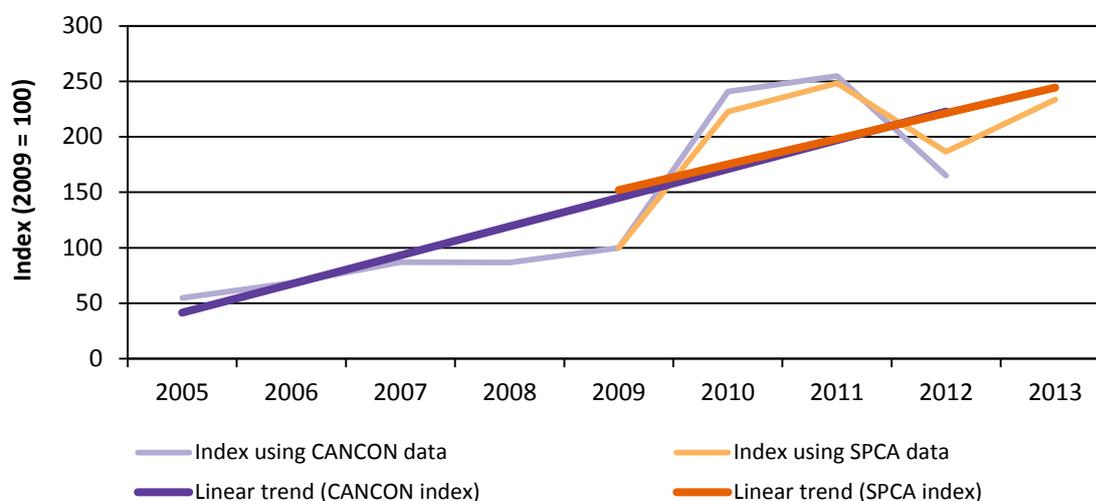
The ratio of imports to domestic production increased between 2009 and 2013 (figure 2.8). The rate of growth of the ratio was slightly lower in the past five years than in the preceding five years. The average annual rate of growth of the trendline over the past five years was in the range of 12.2 per cent (according to SPC Armona data) to 17.4 per cent (CANCON data) (Panel (b), figure 2.8).

Figure 2.8 Import volumes relative to domestic production — Mixtures^{a,b,c}

(a) Import volumes relative to domestic production



(b) Indexes of the ratio of import volumes to domestic production



^a Domestic production data used in panel (a) are CANCON data, and refer to marketing years. SPC Ardmona production data used for computations in panel (b) are for calendar years. Imports for the period 2005 to 2012 are for the respective calendar years. Imports for 2013 are for the year ended 30 June 2013. ^b Trend lines were constructed by regressing index ratios on a constant and the time period. ^c Ratios of imports to production were converted into indexes, using 2009 as the base year. Trend lines were then fitted through the index values.

Sources: ABS (unpublished); CFICA (2009, 2010, 2012); Commission estimates; SPC Ardmona (unpublished).

On balance, imports of processed fruit mixtures have increased sufficiently to satisfy the test under the Agreement on Safeguards in both absolute and relative terms.

FINDING 2.3

The requirement for an increase in imports over the investigation period under Article 2.1 of the Agreement on Safeguards has:

- been satisfied for processed mixtures on the basis of both an absolute and a relative increase in imports*
- been satisfied for processed peaches and pears, but only on the basis of an increase in imports relative to domestic production*
- not been satisfied for processed apricots either on the basis of an absolute or a relative increase in imports.*

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 2.4).

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

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

Other stakeholders (for example, the Australian Canning Fruit Growers Association, sub. 41) have also argued that the Global Financial Crisis led to a contraction of world demand for processed fruit and excess stocks of processed peaches.

Box 2.4 GATT Article XIX — critique of the clause's meaningfulness

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.

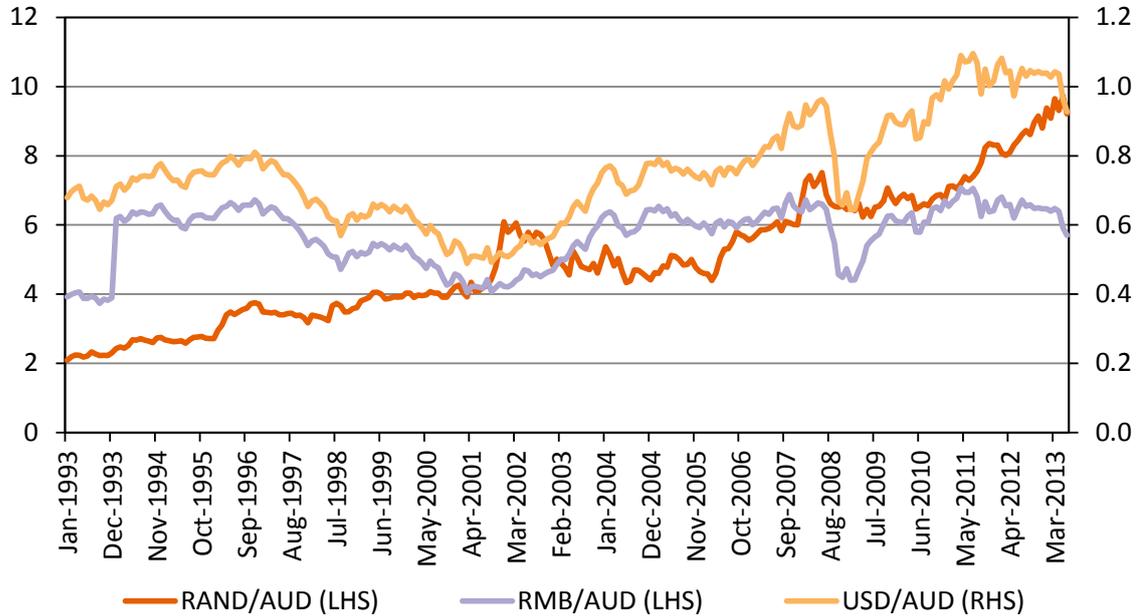
Source: Sykes (2003, pp. 277–8).

Appreciation of the Australian dollar

All else equal, an appreciation of the Australian dollar against another currency can reduce the price (in Australian dollars) of imports from the other country.

On an annual average basis, the Australian dollar appreciated by about 40 per cent against the South African rand between 2008-09 and 2012-13 (figure 2.9). During that period, it also appreciated by 38 per cent against the US dollar and 26 per cent against the Chinese renminbi. In 2011, the Australian dollar also reached its highest level against the US dollar since being floated.

Figure 2.9 Australian dollar exchange rate
Units of foreign currency per Australian dollar^a



^a The RAND/AUD exchange rate prior to January 2010 was computed with a cross rate using the British Pound.

Sources: Bank of England (2013); RBA (2013); Commission estimates.

The Australian dollar was floated in 1983 and fluctuation of the currency would have been foreseeable in 1994. Moreover, the appreciation of the Australian dollar commenced several years before the relevant period for this investigation.

There is also some evidence that the industry could foresee that a possible future appreciation of the Australian dollar would have an adverse effect on domestic operations. In its 2004–2009 strategic plan, the Canned Fruits Industry Council of Australia (2004) identified several threats to the industry. These included: imports from the United States replacing the Ardmona brand; potential imports from China; and unfavourable currency movements.

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

Dumping

SPC Ardmona submitted that the dumping of processed peaches by South African suppliers was one of the unforeseen events that contributed to the rise of imports. An application for anti-dumping duties for those products was made by SPC Ardmona to the Anti-Dumping Commission, which delivered a Statement of

Essential Facts in October 2013. The Commission’s preliminary findings were that, although goods exported from South Africa during the period of investigation were dumped, the dumping margins were negligible (1.8 per cent and 1.2 per cent for the two South African manufacturers). As such, the Commission concluded that the Australian industry had not suffered material injury as a result of dumped imports and proposed to terminate its investigation, subject to any evidence to the contrary (Anti-Dumping Commission 2013b).

Supermarket private label strategies

SPC Ardmona argued:

The major supermarket chains, which traditionally claimed publicly that they supported Australian produce, moved strongly from 2010 to import products cheapened by the exchange rate appreciation and, unknowingly to them cheapened also by dumping, for their strategy of developing private label products. (sub. 39, p. 35)

Private label products have been sold in Australian supermarkets since the 1960s, although sales volumes were historically low and have grown in the past decade (ACCC 2008).

The Commission has obtained supermarket data from a commercial data provider (box 2.5).

Box 2.5 Supermarket sales data

The Commission purchased data on supermarket sales of processed fruit from Aztec Australia, a commercial data provider. These data, drawn from grocery sales across Woolworths, Coles and Metcash supermarkets, represent aggregated retail quantities and values, by month and brand, for the period January 2008 to April 2013. The data do not include the sales of ALDI supermarkets, because ALDI does not participate in supermarket arrangements to provide scanned groceries sales data.

Prior to providing the data to the Commission, Aztec Australia aggregated the seasonal data in a way that individual product lines, pack sizes and the retailer of private label products could not be identified (‘private label’ is classified as a single category). The Commission was able to advise Aztec Australia on how to restrict the dataset of stock keeping units to product lines that would fall within the particular tariff subheadings under reference, drawing on advice provided by the Australian Customs and Border Protection Service.

Analysis of supermarket sales data indicates that over the past five years, the share of private label products in aggregate sales of products within the relevant tariff subheadings has increased by about 20 per cent (table 2.2).

Table 2.2 Shares of private label products in supermarket sales volumes
Per cent

<i>Tariff subheading</i>	<i>2008-09</i>	<i>2012-13</i>
Pears	40	49
Peaches	35	42
Mixtures	24	29

Sources: Aztec Australia (unpublished); Commission estimates.

These data do not include the ALDI supermarket sales of processed fruit, which comprise entirely of private label products. Thus the above figures underestimate the share of private label products in the retail market.

Although private label products can be imported, there is no automatic link between the sales of private label products and import volumes. Supermarkets also stock domestically made private label products, if these are more profitable and can be supplied reliably.

Supermarkets also have various corporate policies to buy Australian-sourced private label products where possible. One example is the recent Woolworths agreement with SPC Ardmona to use SPC Ardmona sourced fruit in a range of ‘Woolworths Select’ products (Woolworths Limited, sub. 31). In September 2013, the company announced an extension of this arrangement such that by September 2014, ‘all of [its] own brand canned deciduous fruit [would be] Australian sourced’ (Woolworths Limited 2013). Another is the Coles Group’s ‘Australian First’ buying policy. In its submission, Coles Group stated that 90 per cent of Coles branded products are Australian made and that several of its private label product lines are currently sourced from SPC Ardmona (sub. 45). In addition, Coles has recently announced a new contract with SPC Ardmona, in which it will source all of its private label peaches, pears and apricots from the company, to commence from early 2014 (Coles 2013). Similarly, ALDI has informed the Commission that SPC Ardmona is the major supplier to ALDI of its private label processed fruit (pers. comm., 24 July 2013). It also announced a move to exclusive domestic sourcing of all 825g canned fruit under a deal to take effect from early next year (ALDI 2013).

Nonetheless, access to imported private label products places competitive pressure on the price at which SPC Ardmona might supply private label products using Australian fruit. Furthermore, SPC Ardmona submitted confidential evidence for the period 2009 to 2012 that showed that the share of imported private label products in total private label sales of the relevant products has increased by 10–20 percentage points. A number of factors are likely to have contributed to this, including supermarkets seeking to capture some of the margin accruing to SPC

Ardmona as the dominant producer in the Australian market. This is discussed further in section 2.5.

The Global Financial Crisis and oversupply of processed fruit

The Australian Canning Fruit Growers Association submitted:

The World Deciduous Canned Fruits Conferences are the primary source of information exchange for the World Group, with each country presenting a formal country report ... The October 2008 Paris meeting was attended by representatives from Greece, Spain, USA, China, Argentina, Chile, South Africa and Australia. These representatives compared production and demand. They agreed on an estimate that the world supply and demand was in balance.

Six months later in March 2009, Cancon09 was held in Shepparton Australia and the same exercise was repeated. It revealed that there had been a dramatic change in circumstances with approximately one million cartons of peaches available on the world market surplus to demand. (sub. 41, p. 2)

The above estimate of global oversupply of processed peaches equates to about 1.5 per cent of global production in that year. An oversupply of this magnitude is unlikely to have significantly influenced world prices; an assessment supported by the import unit values presented in section 2.5.

Other factors

The Commission has also looked at other factors that could influence import volumes, including recent changes to domestic regulatory settings and changes in the trade policies of Australia's trading partners. Its analysis did not reveal any factors that would be likely to directly lead to a surge in imports of the relevant products.

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

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

broader implications for the Australian economy and because the test itself is inherently ineffective.

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 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.¹

SPC Ardmora (sub. 39) submitted evidence relating to its claims of serious injury. The Commission was unable to draw on some of that evidence because it was presented with reference to ‘multi-serve processed fruit products’, rather than the tariff subheadings under the terms of reference. SPC Ardmora subsequently provided confidential evidence that aligned with the tariff subheadings under reference. The evidence was provided in reference to calendar years 2009 to 2012

¹ 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.

and 2013 to date. Consequently, some of the analysis in this section is based on the period 2009 to 2012.

The confidential information has been drawn upon in the analysis, supplemented with data from official sources and other evidence provided by industry organisations as well as supermarket sales data obtained from a commercial provider.

Domestic sales

SPC Ardmona submitted confidential evidence of its domestic sales for calendar years 2009 to 2012. The evidence indicates that its aggregate sales of products under the relevant subheadings decreased between 2009 and 2012, primarily due to decreases in retail sales (table 2.3).

Table 2.3 **Change in SPC Ardmona's sales volumes, 2009–2012**
Per cent

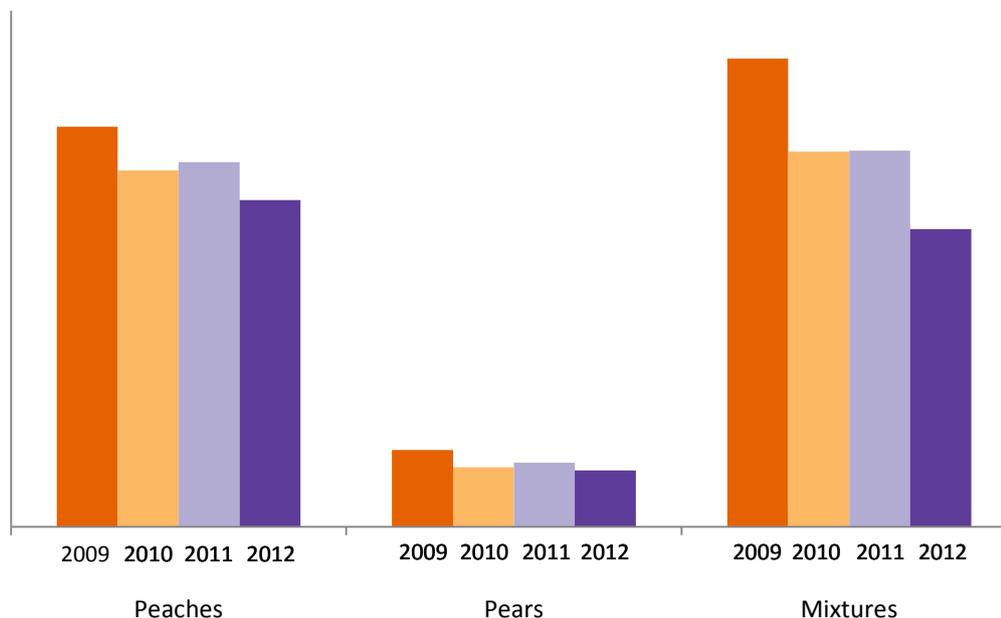
<i>Sales channel</i>	<i>Peaches</i>	<i>Pears</i>	<i>Mixtures</i>
Retail	-22	-31	-37
Food services	-15	7	-8
Total	-18	-10	-32

Source: SPC Ardmona (unpublished).

The Commission has not been able to verify the data independently. However, the retail sales data generally accord with the supermarket sales data the Commission has acquired independently (figure 2.10).

Figure 2.10 **Supermarket sales of domestically produced processed fruit, selected tariff subheadings**

Annual sales volumes



Sources: Aztec Australia (unpublished); SPC Ardmona (unpublished).

Changes in market share

Coca-Cola Amatil (SPC Ardmona's parent company) factbooks published between 2006 and 2011 reported market shares for SPC Ardmona branded products, which indicate that the reductions are part of a longer term trend (table 2.4).

Table 2.4 **SPC Ardmona branded products — market share in selected product categories**

Year	Packaged fruit	Fruit snacks	Spreads
2006	66	90	29
2007	62	88	26
2008	57	74	25
2009	59	79	29
2010	50	75	21
2011	57	79	27

Sources: CCA (various years).

The Commission has also analysed Coles, Woolworths and Metcash sales data over the period 2008 to 2013. The market share of SPC Ardmona branded products has remained relatively constant in that period (table 2.5).

Table 2.5 Market shares by fruit type
Percentage share of market volume and market revenue^a

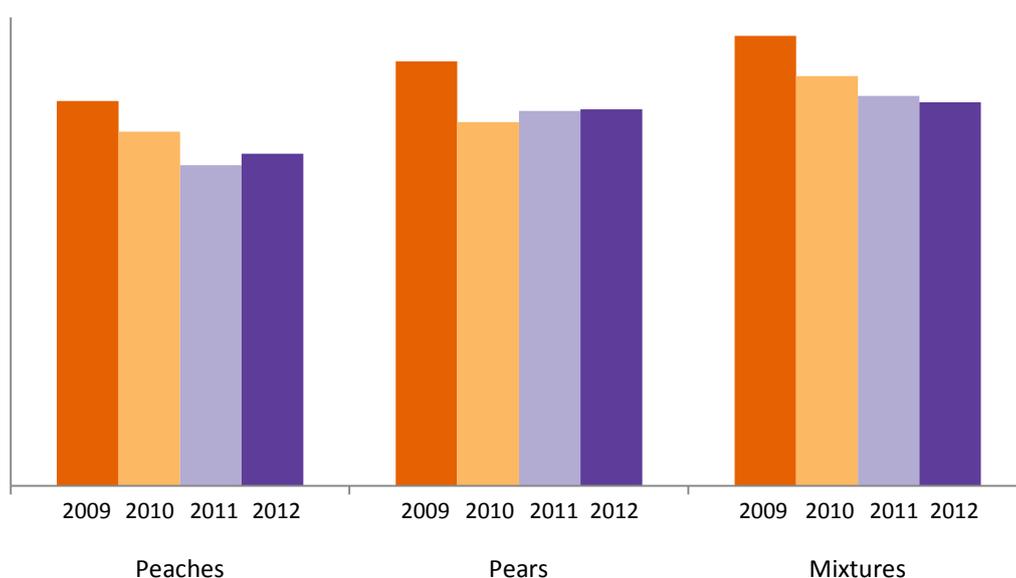
	<i>Peaches</i>		<i>Pears</i>		<i>Mixtures</i>	
	2008	2013	2008	2013	2008	2013
By volume						
SPC Ardmona	61	54	55	50	49	49
Private label	36	45	42	50	31	398
Other	3	1	2	0	20	11
By revenue						
SPC Ardmona	69	66	67	65	59	61
Private label	27	33	31	35	22	27
Other	5	1	2	0	19	12

^a Figures for 2013 are based on monthly data for January to June 2013 only.

Sources: Aztec Australia (unpublished); Commission estimates.

With regard to SPC Ardmona’s aggregate market share, incorporating its contribution to the private label categories, the Commission is unable to disclose specific figures for confidentiality reasons. However, the evidence indicates that its market share decreased slightly, driven largely by a shift away from domestic sourcing of private label products (figure 2.11).

Figure 2.11 Domestic shares of supermarket sales volumes, selected tariff subheadings



Sources: Aztec Australia (unpublished); SPC Ardmona (unpublished).

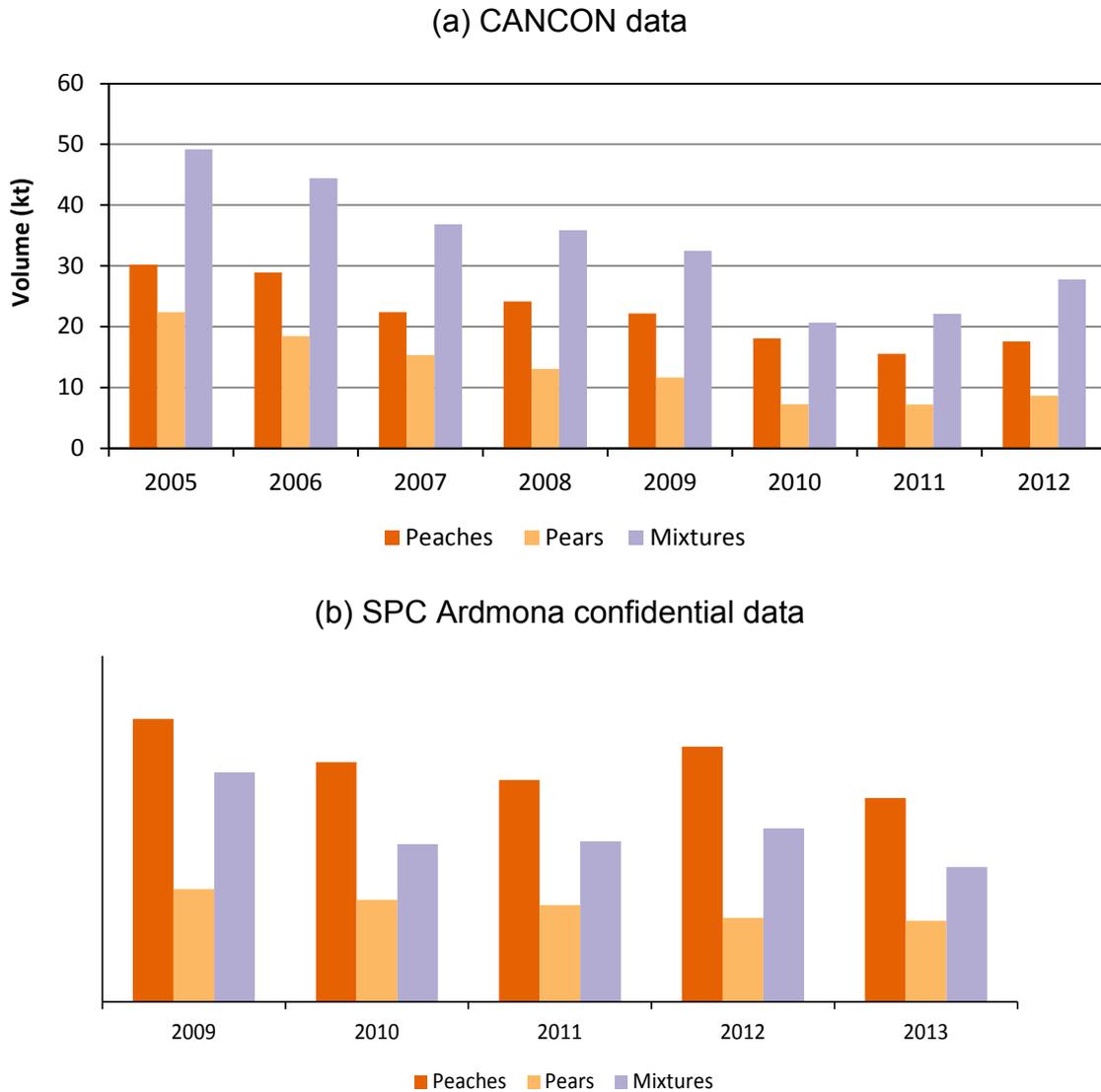
Even so, domestic producers continue to have a market share in the order of 70 to 80 per cent of supermarket sales of the relevant products, by volume and value.

SPC Ardmona (sub. AR63) disputed the Commission's conclusions in the accelerated report on the domestic industry's retail market share, because the above sales data do not include ALDI supermarkets. Verifiable processed fruit sales data for ALDI supermarkets are not available. However, the evidence examined by the Commission indicates that ALDI accounts for a relatively small share of the retail market — around 7 per cent according to a Deloitte Access Economics (2012) estimate. Furthermore, ALDI has indicated to this inquiry that SPC Ardmona was its major supplier of processed fruit (pers. comm., 24 July 2013). SPC Ardmona's sales data show that its sales to ALDI have substantially outperformed its private label sales to the major supermarket chains. The Commission has concluded that including ALDI sales data would not have a material effect on its original finding that SPC Ardmona accounts for a majority of the retail market for processed fruit.

Production levels

The Commission has used evidence on production levels from two sources — figures previously reported by the Canned Fruits Industry Council of Australia and the confidential data provided by SPC Ardmona to this inquiry. Although there are some differences between the two sets of data (as described earlier in box 2.3), they reconcile in aggregate over time. Both data sets indicate a decrease in production volumes for the three fruit categories (figure 2.12).

Figure 2.12 Changes in domestic production volumes



Sources: CFICA (2009, 2010, 2012); SPC Ardmona (unpublished).

Capacity utilisation and productivity

The Commission received ambiguous evidence on changes in capacity utilisation over the relevant period.

In August 2011, Coca-Cola Amatil announced the closure of SPC Ardmona's Mooroopna manufacturing plant and the consolidation of the production at its two remaining sites in Shepparton and Kyabram. Closures of such plants could improve the efficiency of processing and lower the overall avoidable costs of production. Coca-Cola Amatil's managing director stated that the review which prompted the

decision was undertaken ‘in order to right-size the SPC Ardmona business’ and that ‘by proactively restructuring the SPC Ardmona business we believe we can lower its cost base to help regain its competitive position in the market place’ (CCA 2011, p. 1). The consolidation was to have taken place on a staged basis over 12 months. Such plant closures could be injurious to SPC Ardmona in the sense that they might lead to the write-down of asset values (discussed below).

In 2012, the Chairman of the Canned Fruits Industry Council of Australia reported production capacity and production figures indicating that capacity utilisation had increased between 2008-09 and 2011-12 (table 2.6). This was driven primarily by reductions in production capacity between 2010 and 2011.

Table 2.6 Changes in production capacity, volumes and utilisation^a

	<i>Processed pears</i>		<i>Processed peaches</i>		<i>Processed mixtures</i>	
	<i>2009</i>	<i>2012</i>	<i>2009</i>	<i>2012</i>	<i>2009</i>	<i>2012</i>
Production capacity (tonnes)	28 000	18 000	32 000	20 000	52 000	40 000
Production volume (tonnes)	11 659	8 661	22 195	17 559	32 483	27 757
Capacity utilisation (per cent)	41.6	48.1	69.4	87.8	62.5	69.4

^a Year ended June.

Source: CFICA (2012).

On the other hand, SPC Ardmona made a confidential submission to this inquiry showing constant production capacity over the period 2010 to 2013 and decreases in capacity utilisation of 25 percentage points for pears and 30 percentage points for peaches. However, those data only related to capacity utilisation at its Shepparton plant and did not take into account the closure of the processing facility in Mooroopna.

While the issue was raised in the first public hearing for this inquiry (trans., p. 56), SPC Ardmona has not provided information that would enable the Commission to reconcile or explain the differences between the data in table 2.6 and its confidential submission. On balance, the Commission is unable to make a finding on changes to capacity utilisation.

SPC Ardmona has also provided confidential data on changes in labour productivity across product lines. The data did not show a consistent pattern — labour productivity improved for some products and declined for others.

Asset write-downs

In 2011, Coca-Cola Amatil reported a restructuring cost of \$110 million associated with the closure of SPC Ardmona's Mooroopna processing plant (CCA 2011). In 2013, it also reported a non-cash write-down of goodwill in the SPC Ardmona business of \$48 million, as well as \$98 million of expenses relating to business restructuring and inventory and other asset write-downs (CCA 2013).

Profits and losses

SPC Ardmona has provided the Commission with confidential evidence on profit margins for the period 2010 to 2013 for its products under each of the relevant tariff subheadings. For self-evident reasons, these data could not be corroborated with information from an independent source. For confidentiality reasons, the data are reported in percentage change form.

The data indicate that for each type of fruit, profit margins² were negative from 2011 and have fallen over the period.

- For processed pears, profitability decreased by 24 percentage points.
- For processed peaches, profitability decreased by 26 percentage points.
- For processed mixtures, profitability decreased by 23 percentage points.

The data provided by SPC Ardmona indicate that the reduction in profit margins between 2010 and 2013 was driven largely by increasing costs of production.

- Sales revenue (net of discounts) per unit of product sold decreased by 1–2 per cent.
- The unit cost of goods sold increased by 16–22 per cent.

Employment

SPC Ardmona submitted that it currently employs 840 staff on a full-time equivalence basis. It also provided the Commission with confidential data on changes in employment levels across all production sites for the period 2008 to 2013. The data show that the number of casual workers employed on a weekly basis has decreased by about 30 per cent, while the number of salaried employees has decreased by about 19 per cent. Independent sources of information to fully corroborate that data have again not been found. Attributing decreases in

² Calculated as earnings before interest and tax divided by sales revenue (net of discounts).

employment across reduced production of the products within the relevant tariff subheadings is likely to be impractical.

Overall, the Commission accepts that there has been a substantial loss of employment. In sum, there is compelling evidence that SPC Ardmona’s fruit processing operations have suffered serious injury in recent years.

Decrease in fruit intakes — impact on growers and the domestic processed fruit industry

The Australian Canning Fruit Growers Association has submitted evidence of SPC Ardmona’s decreasing fruit intakes from domestic growers. The intake of peaches and pears proposed for 2014 is 50 per cent below this year’s level (table 2.7).

Table 2.7 SPC Ardmona peach and pear intakes

	<i>Peaches</i>		<i>Pears</i>		<i>Total</i>	
	tonnes	percentage change	tonnes	percentage change	tonnes	percentage change
2008	40 227		31 242		71 519	
2009	39 160	-3	28 499	-9	67 659	-5
2010	31 843	-19	19 152	-33	50 995	-25
2011	27 851	-13	19 046	-1	46 987	-8
2012	30 751	10	24 251	27	55 002	17
2013	25 852	-16	16 947	-30	42 799	-22
2014 (forecast)	13 000	-50	9 000	-47	22 000	-49

Source: Australian Canning Fruit Growers Association (sub. 41).

Although these decreases may indicate a temporary rebalancing of production levels to account for past over-production (relative to sales), they may also signal a more lasting impact on the domestic fruit processing industry. Specifically, the sharp reduction in proposed fruit intakes for 2014 could imply an anticipated permanent adjustment in future production levels by SPC Ardmona.

A number of fruit growers making submissions to this inquiry have argued that the reduction in fruit intakes would make their businesses unviable and would force them to destroy their trees. This could lead to reductions in production capacity that would be irreversible in the short term. Some growers (and SPC Ardmona) also argued that the financial stress on some growers could lead to them being unable to meet their biosecurity obligations, which could, in turn, lead to broader damage on horticultural production in the region (box 2.1).

However, the Commission's assessment is that SPC Ardmona's future production capacity will not be compromised by the reductions in fruit intakes, and that imposing safeguard measures is unlikely to directly assist growers, particularly those under most financial pressure.

At the Commission's initial public hearing, SPC Ardmona observed that it has negotiated contracts for the 2013-14 production year, retaining about 50 peach growers, and that it selected growers based on their financial and operational capacity to expand if the industry recovered. SPC Ardmona commented that if future circumstances were to favour increased production, it would be able to 'recover that growth again through those 50 growers that we have kept' (trans., p. 51). It also observed that 'we could have taken our entire peach requirement for next year from six growers but instead we're taking it from 50 growers' (trans., p. 50).

These comments indicate substantial excess capacity in the production of fresh fruit for processing among the growers that have kept their contracts. They also suggest that growers who have lost their contracts would not have them reinstated.

For the growers who retained their contracts, there also is no certainty that an increase in domestic processed fruit prices in supermarkets (arising from a tariff on imports) would lead to across-the-board increases in fruit intakes by SPC Ardmona. Price rises might be absorbed through lower margins by supermarkets and other suppliers or higher margins by SPC Ardmona. The strength of the increase in sales of domestically processed fruit is something that would result from the interplay of consumers and suppliers in the marketplace.

Consequently, safeguard measures for processed fruit are likely to be an ineffective way of assisting growers. The Commission notes that other, more direct measures are available, and some have already been implemented (box 2.6).

Box 2.6 Current assistance available to fruit growers

There are several government programs currently in operation that provide assistance to the processing fruit industry and fruit growers.

In July 2013, the Victorian Government announced the Goulburn Valley Industry and Employment Plan, underpinned by the Goulburn Valley Industry and Infrastructure Fund. Five million dollars has initially been allocated to the fund, the purpose of which is to provide support to a long-term plan for the Goulburn Valley Region. The Victorian Government has also introduced the Fruit Industry Employment Program, a \$2 million, 12-month program which will provide paid work for fruit growers and orchard workers for projects such as weed and pest management and fencing work. Further, in 2012, the Victorian Government promised a contribution of \$4.4 million towards capital investments undertaken by SPC Ardmona to its Shepparton and Mooroopna facilities.

The Australian Government, in July 2013, committed to provide \$60 million over two years to farmers for debt assistance. Under the Farm Finance scheme, eligible farm businesses will be able to access conditional loans of up to \$650 000. Also, in November 2012, the Australian Government announced the Murray-Darling Basin Regional Economic Diversification Program. This program, which has been allocated \$100 million, will fund community-driven projects to assist Murray-Darling Basin communities adjust to the Basin Plan.

Sources: DRALGAS (2012); Export Victoria (2013); Naphthine (2013a, 2013b); SPC Ardmona (2012b).

2.5 Have imports caused the injury?

Requirements for evaluating the causes of injury

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

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

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

Second, the Agreement on Safeguards stipulates that imports must be entering ‘*under such conditions* as to cause or threaten to cause serious injury to the domestic industry’ (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. As the Australian Manufacturing Workers’ Union (sub. AR68) submitted, case law suggests that increased imports, together with other factors, can be found to cause serious injury (*US – Wheat Gluten* (DS 166), *US – Lamb* (DS 177, 178)). It is sufficient for the increased imports to be a contributor to the injury after other factors have been netted out, provided that ‘there is a genuine and substantial relationship of cause and effect’ between increased imports and the injury (*US – Wheat Gluten* (DS 166)).

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

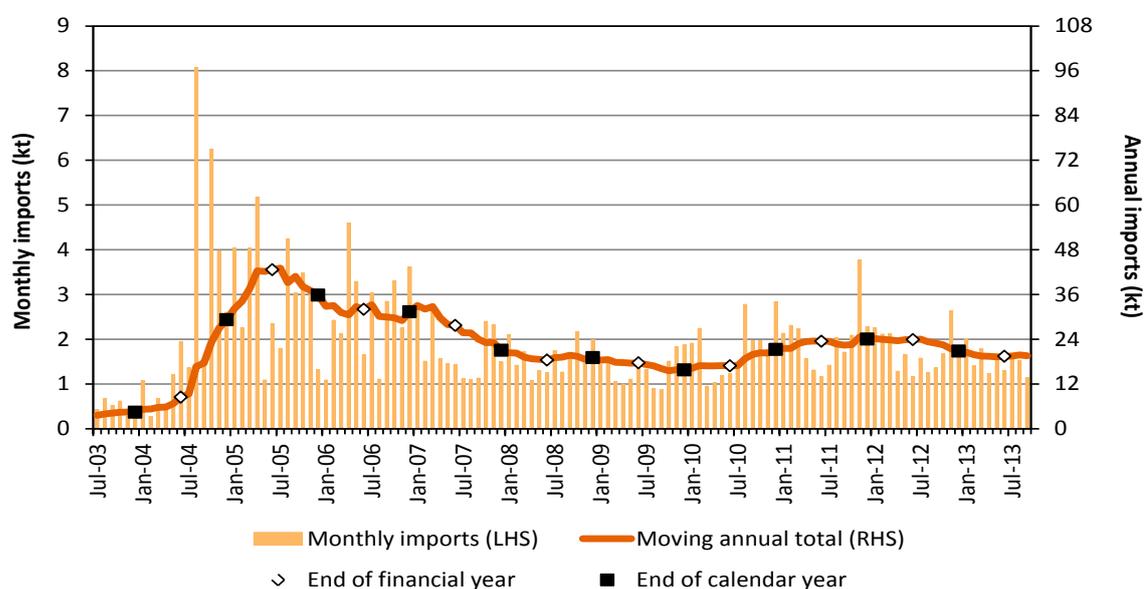
Evidence on the overall increase in import volumes

As the Commission concluded in section 2.2, two of the three fruit categories that satisfied the test for an increase in imports — processed peaches and pears — did so only on the basis of the change of the ratio of imports to domestic production. As discussed earlier the ratio is affected by non-import related factors, and is not a robust indicator of changes in import competition, nor of injury being caused by increased imports.

One category — fruit mixtures — demonstrated a sufficient increase in imports in both absolute and relative terms.

Overall, the total *volume* of the imports of relevant processed fruit categories has not increased substantially during the investigation period (figure 2.13).

Figure 2.13 Total import volumes — apricots, pears, peaches and mixtures^a



^a Import volumes for mixtures prior to January 2012 were measured in litres (and correspond to tariff subheading 2008.92.00.40). In constructing the total import volumes, it has been assumed that one litre of mixtures is equivalent to one kilogram of mixtures.

Source: ABS (unpublished).

Key mechanisms through which imports can cause injury

There are two key inter-related mechanisms through which an increase in imports could cause injury to the domestic industry.

First, a reduction in the international price of imports could drive down market prices in Australia. Initially, this could reduce profitability in the domestic industry, inducing a decrease in production until — and if — profitability can be restored at the lower price. In short, lower import prices expand the domestic market, but also crowd out higher-cost domestic production.

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

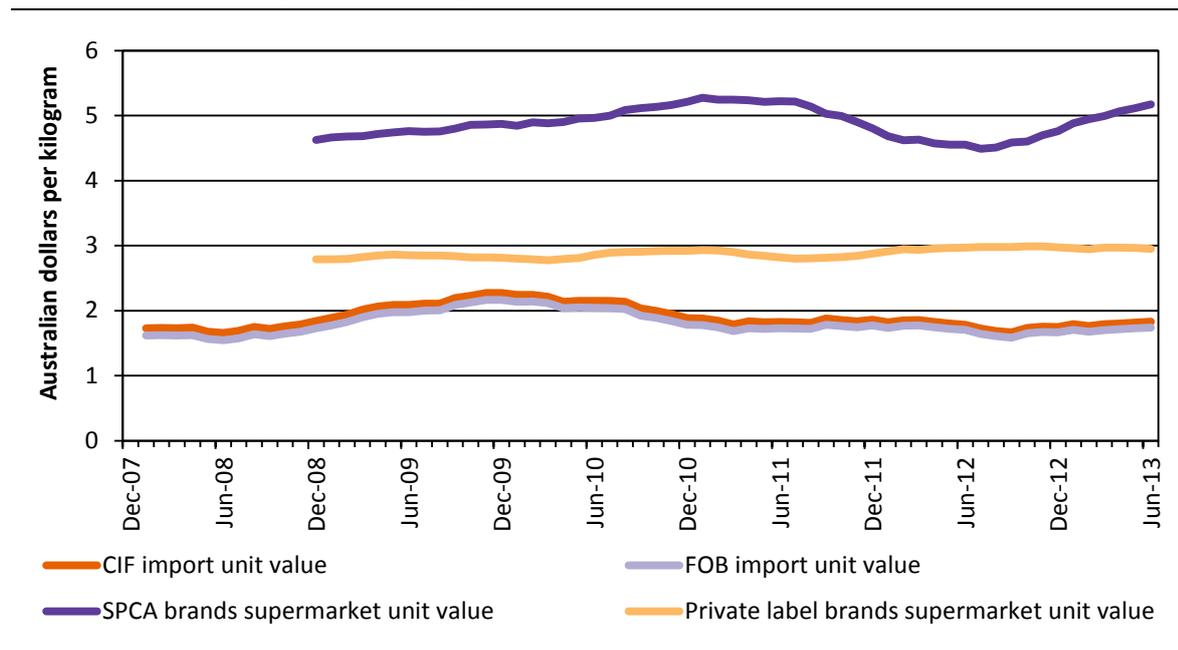
Throughout this section, data on prices and values are reported in nominal terms.

Unit values of imports and domestic retail prices

The unit values of imports under each tariff subheading, expressed in Australian dollars, have generally remained stable and there is no evidence of a material decrease over the past five years (figures 2.14–2.16).³ Taking into account the appreciation of the Australian dollar, the foreign currency unit values of the imports have *increased*. The supermarket unit values of private label products (the retail channel for the majority of imports) have remained relatively steady.

The unit values of SPC Ardmona branded products have fluctuated slightly around a constant trend. Consequently, the persistent unit value gaps between SPC Ardmona’s own branded products and both imports and private label products have fluctuated largely due to the changes in the retail prices for SPC Ardmona’s products, not prices of imports.

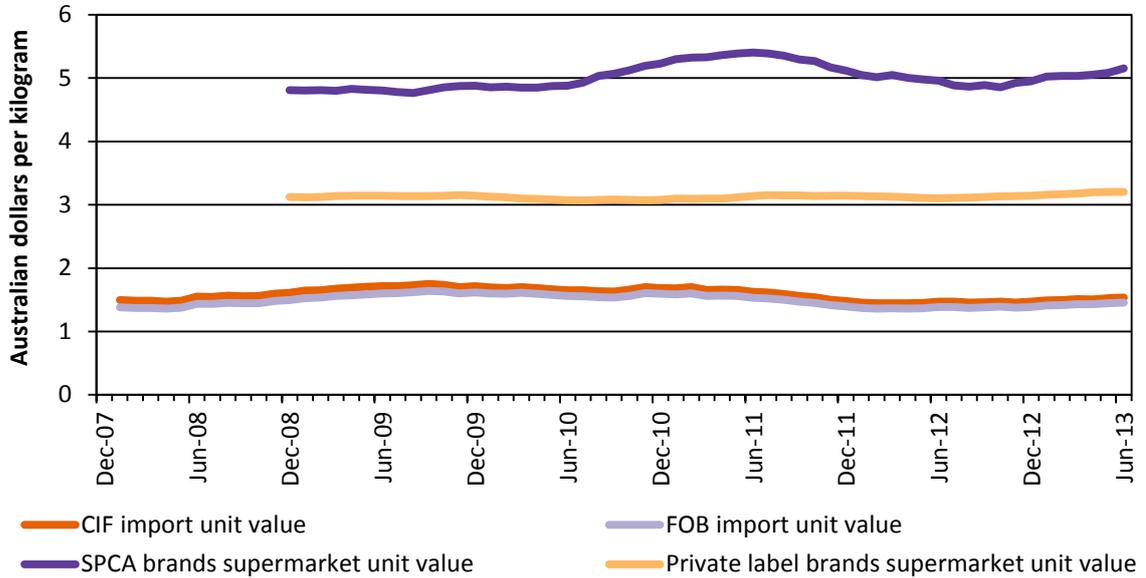
Figure 2.14 **Unit values of pears**
Moving annual averages



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

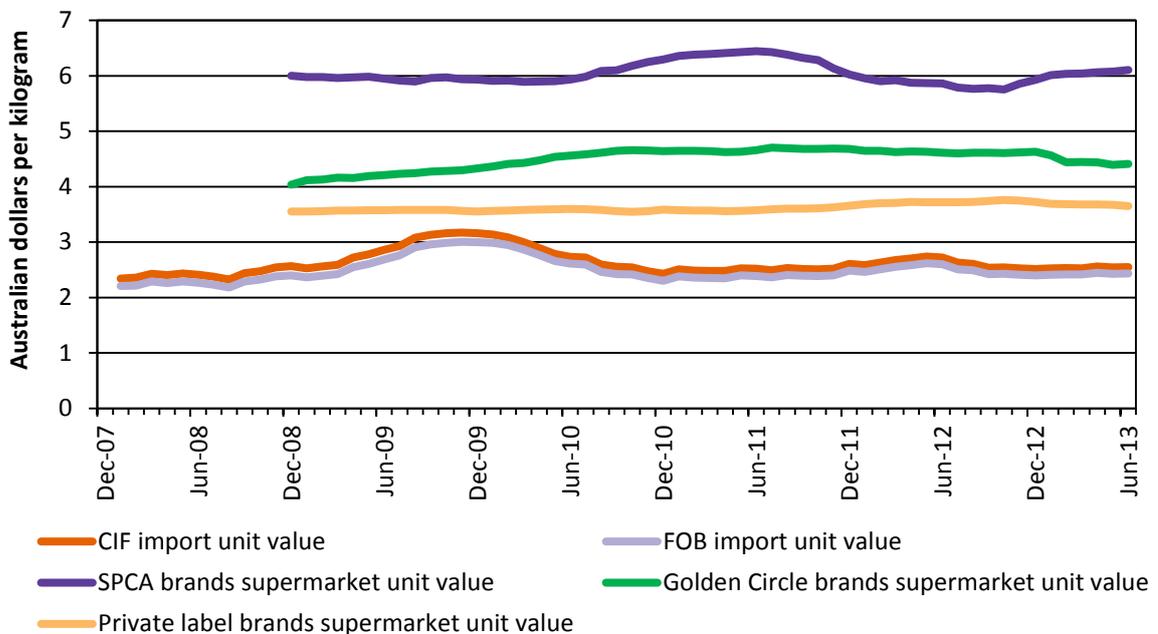
³ Unit values represent an ‘average’ price of the products, which is derived by dividing the sum of the value of all products sold by the total weight (in kilograms) of the products.

Figure 2.15 Unit values of peaches
Moving annual averages



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

Figure 2.16 Unit values of mixtures
Moving annual averages



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

The average unit values presented above are aggregated at tariff subheading level and include the effects of any changes in the composition of the products. SPC

Ardmona (sub. AR63) disputed the Commission’s approach of analysing unit values at the aggregate tariff subheading level, arguing that it masked significant variability (and injury) at individual product level.

As noted in chapter 1, the Commission is required under the notice in the Commonwealth of Australia Gazette and its terms of reference to examine the tariff subheadings in their entirety. Furthermore, import data at individual product level are not available from the ABS. ABS data are the only source of objective information on import volumes and unit values at the tariff subheading level.

SPC Ardmona provided the Commission with confidential sales data for nine product lines, which it argued demonstrated decreasing unit values of imported products. However, the data provided by SPC Ardmona conflate import unit values with retail private label unit values, whereas a large proportion of private label products are sourced from SPC Ardmona. Furthermore, what happens to prices at the retail level is ultimately a domestic decision for the retailer and not a reliable indicator of import unit values at any particular time.

Nevertheless, the Commission examined the data and found that for five of the nine products, the private label unit values remained *stable* or *increased* between 2008 and 2012; unit values decreased by about 10 per cent for two products and by 15-20 per cent for the remaining two products. This did not provide a basis to conclude that an increase in price pressure from imported products was causing injury to the domestic industry.

The conclusion that there has been little increase in price pressure on SPC Ardmona from decreasing world prices of imported products is also consistent with the evidence provided to the Commission for the period between 2010 and 2013. Specifically, SPC Ardmona’s sales revenue (net of discounts) per unit of the relevant products has remained virtually stable, decreasing by between 1 and 2 per cent.

On the other hand, cost pressures have increased for SPC Ardmona (discussed below).

Decrease in SPC Ardmona’s profit margin — production volumes and costs

As discussed in section 2.4, SPC Ardmona submitted evidence of falling profit margins for the relevant products. The decreases appear to have been driven mostly by costs of production, which increased by between 16–22 per cent across the three tariff subheadings.

In its accelerated report, the Commission cited a past representation by the processor that its labour costs had been rising, reaching approximately \$33 per hour in 2012 (CFICA 2012). SPC Ardmona disputed this evidence and argued:

However, average increases given to the Food Preservers (the key labour force for production) Enterprise Bargaining Agreement (EBA) by SPC Ardmona during 2010–2013 was 2.4% pa, which is much lower than the food industry average of 4% pa and the national average of 3.4% pa.

The conclusion is also flawed as the same report (page 46) highlights that: ‘The data shows that the number of casual workers employed on a weekly basis has decreased by about 30%, while the number of salaried employees has decreased by about 19%.’ (sub. AR63, p. 6)

The relevant indicator of labour cost is cost per unit of output, rather than aggregate labour costs. The Commission has reviewed the confidential data on labour productivity previously provided by the processor together with new evidence on nominal wage increases between 2010 and 2013. The evidence shows that labour costs per unit of output had increased for two fruit categories and decreased for one. Nevertheless, labour costs appear to be a relatively minor contributor to total costs, and the Commission accepts that other cost components may have made a larger contribution to the overall increase.

SPC Ardmona submitted that costs have risen due to declining economies of scale:

The decline in sales volumes caused by the imported canned Multi serve fruit has resulted in SPC Ardmona experiencing higher costs to make and sell during the period from 2010 to 2013 with average cost to make and sell increasing by 19%. This was due to loss of critical economies of scale which in turn lead to poor overhead recovery. (sub. 39, p. 18)

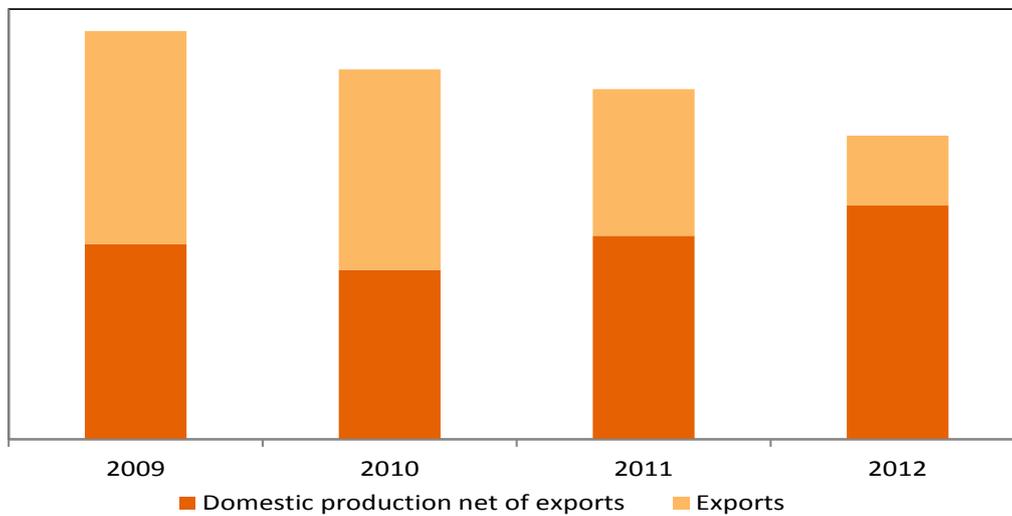
As discussed in section 2.4, the Commission has not been able to verify SPC Ardmona’s evidence of a decrease in capacity utilisation, and the evidence is somewhat ambiguous, given past presentations by the company at canned fruit conferences.

However, if the increase in production costs is largely attributable to decreasing economies of scale, the proposition that the decreases in production levels have been caused by increased imports is not supported by the evidence.

First, as indicated earlier in this section, there is no apparent downward trend in import unit values putting pressure on prices.

Second, there is evidence that the decreases in domestic production have been driven in part by other factors outside of the domestic market, specifically a reduction in export volumes (figures 2.17–2.19).

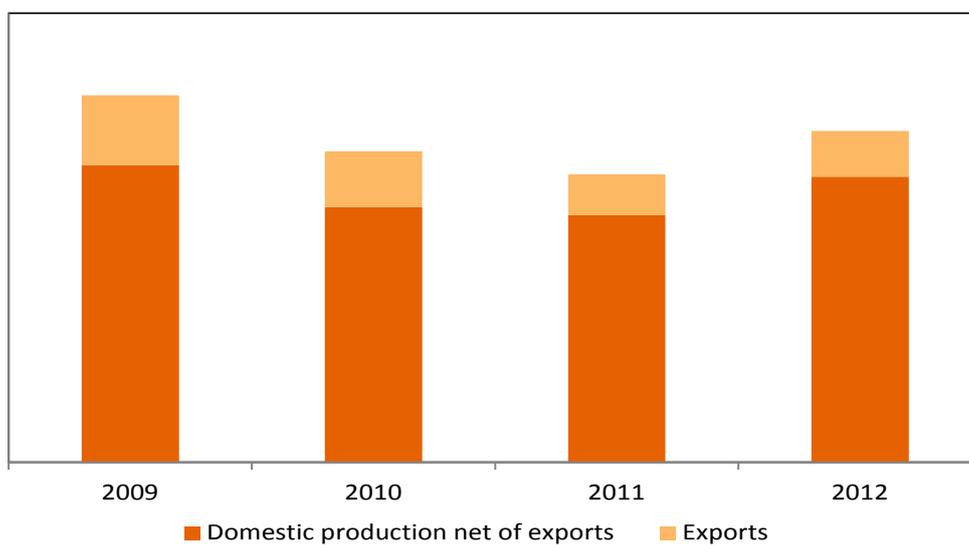
Figure 2.17 Domestic production and export volumes — Pears^a



^a Domestic production is domestic production of processed pears by SPC Ardmona. Exports are aggregate exports of processed pears.

Sources: ABS (unpublished); SPC Ardmona (unpublished).

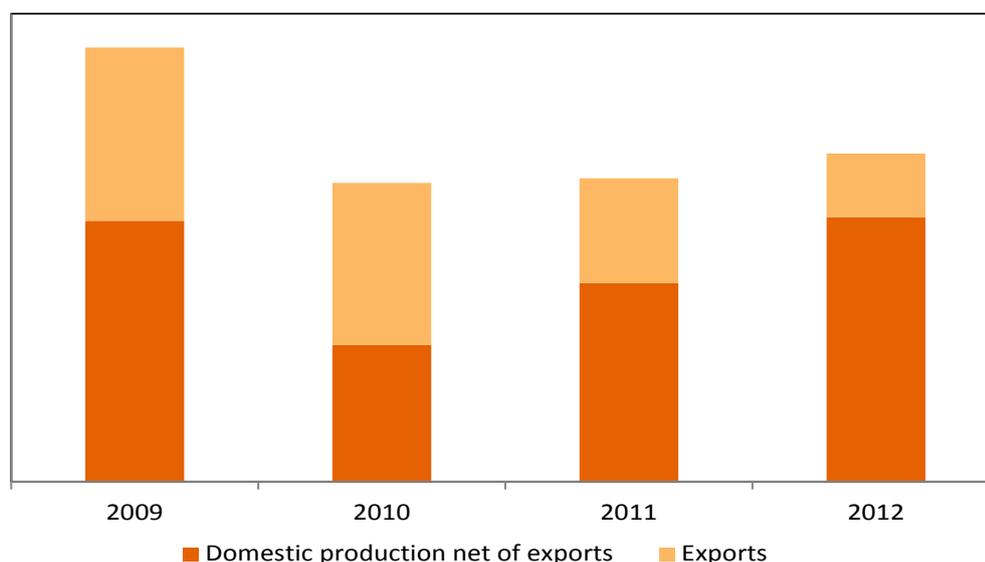
Figure 2.18 Domestic production and export volumes — Peaches^a



^a Domestic production is domestic production of processed peaches by SPC Ardmona. Exports are aggregate exports of processed peaches.

Sources: ABS (unpublished); SPC Ardmona (unpublished).

Figure 2.19 Domestic production and export volumes — Mixtures^a



^a Domestic production is domestic production of processed mixtures by SPC Ardmona. Exports are aggregate exports of processed mixtures.

Sources: ABS (unpublished); SPC Ardmona (unpublished).

Finally, an important contributing factor to the decreases in domestic production is reduced domestic demand for the relevant products (discussed below).

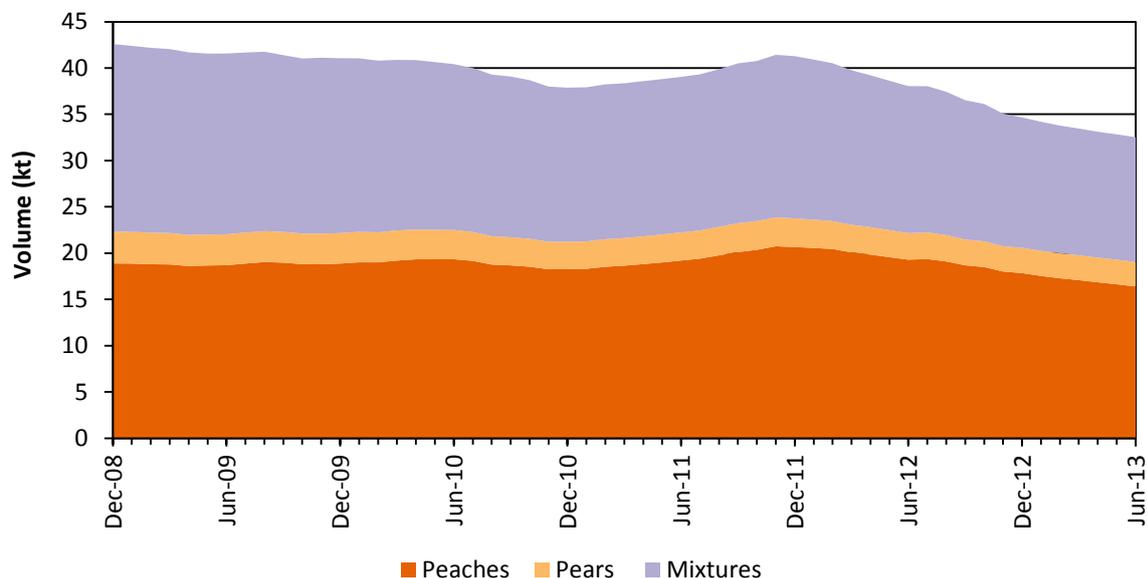
Decrease in demand for processed fruit

There is evidence of a long-term reduction in overall consumer demand for processed fruit, whether imported or domestically produced.

In 1986, the Bureau of Agricultural Economics reported that Australian per capita consumption of processed deciduous fruit fell by 45 per cent between 1970 and 1986. It noted that Australia shared the trend with other developed countries and attributed the decrease to several factors, including changing consumer tastes and improvements in the availability of fresh fruit. The report predicted that the trend would continue in the future (BAE 1986).

In the most recent five years, retail quantities sold of the processed fruits under consideration (in aggregate) fell from about 43 000 tonnes to 33 000 tonnes (on a moving annual total basis) (figure 2.20). The decrease is greater on a per-capita basis: as a point of reference, Australia's population grew by 1.4 million, or 6.7 per cent, between December 2008 and December 2012 (ABS 2013).

Figure 2.20 Supermarket sales of processed pears, peaches and mixtures
Moving annual total



Source: Aztec Australia (unpublished).

While it was determined not to be a relevant element of the analysis in section 2.1 related to directly competitive products, substitutability of the fresh product for the processed product is part of a plausible market trend over time (box 2.7).

Coles (sub. 45) also argued that there may have been reduced demand for packaged foods among some consumers, due to environmental concerns. It pointed to some schools implementing ‘no packaging’ lunchbox rules that have contributed to increased preference for fresh foods.

There is also some evidence of changes in consumer preferences across processed fruit products. IBISWorld (2013) and Coles (sub. 45) observed that consumers have been switching toward other forms of processed products that have health and/or convenience advantages, including:

- ‘snack packs’
- ‘breakfast’ or ‘health-food’ bars with some fruit content and minimally-processed fruit products such as frozen fruit and cut or diced fresh fruit in packages.

Box 2.7 Are consumers shifting away from processed and toward fresh fruit?

Based on data from several sources, the Commission has estimated that between 2002 and 2012, apparent per capita domestic consumption of processed deciduous fruit decreased by about 37 per cent. Over the same period, per capita consumption of fresh fruit for which data are available — apples, cherries, peaches, nectarines, grapes, oranges and pears — increased by about 14 per cent.

IBISWorld (2013) observed that increased demand for fresh fruit has been driven by increased consumer health concerns as well as by greater availability and improved quality of fresh fruit. The study noted improvements in storage and transportation methods, and the expansion of seasonal availability due to the introduction of new varieties of fruit.

Coles submitted that consumers perceive the relative per-kilogram value of fresh fruit as more attractive than processed equivalents. It further observed:

... fresh fruit is mostly available all year round in good volumes and quality at prices consumers can afford. There are a small number of seasonal windows where Australian fruit is unavailable and substituted by imports. This increased year round availability and improved quality has seen, over time, consumer preferences switch to fresh produce at the expense of preserved fruit products, particularly in cans. (sub. 45, p. 2)

Sources: ABS (2013; unpublished); CFICA (2009, 2010, 2012); IBISWorld (2013); USDA (2013); USITC (2007).

In its post-accelerated report submission, SPC Ardmona disputed the Commission's finding of a long-term reduction in consumer demand for processed fruit:

Evidence provided by the PC to support the above argument is incomplete as it does not include the sales of products through the 'food service channel'.

The food service market is a very significant part of the total processed fruit domestic market. This channel covers the sales of products through restaurants, canteens, schools, industries (i.e. mining), and Government departments including Health and Aged Care facilities, Corrective Services, Defence Force and Immigration.

Confidential evidence was submitted by SPC Ardmona on 8 August 2013 to the PC highlighting examples of import penetration in this market, yet this has not been taken into consideration to draw conclusions on market dynamics. (sub. AR63, p. 7)

Comprehensive data on changes in the demand for processed fruit in the food service channel are not available, and the confidential submission referred to above did not discuss this issue. Moreover, during the public hearing prior to the accelerated report, SPC Ardmona stated:

We typically split our market into supply to supermarket retailers who sell to the final consumer or to ... catering companies or larger food preparation people who might make meals for other people in the catering environment. I think of our business mainly

on a profitability basis and it's almost entirely a retail profitability. We don't make very much money at all out of supplying caterers; it hardly has any impact. (trans., p. 42)

In its December 2012 update on the 2013 season, SPC Ardmona (2012a) observed:

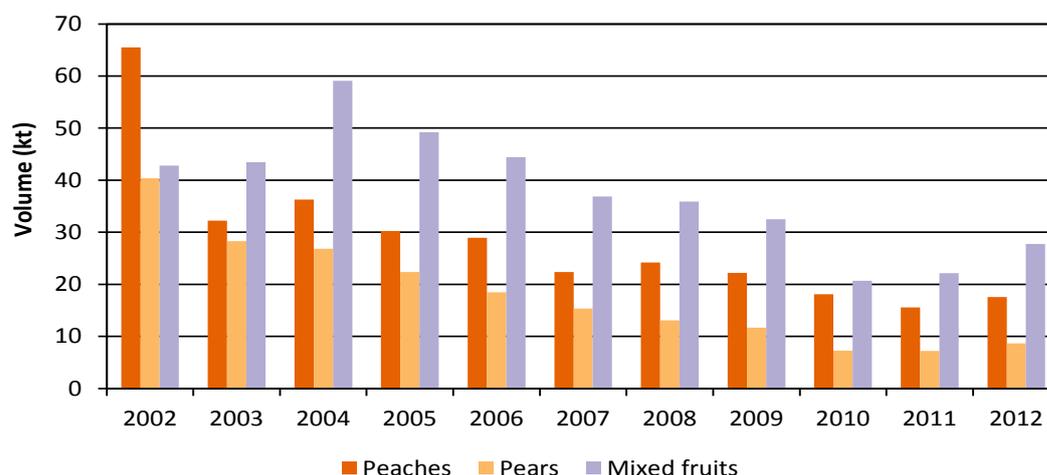
While we have grown our market share the reality is that demand for packaged fruit has been declining and our fruit intake for the 2013 season reflects this ... The reality is that Australians are not consuming our canned fruit products in the same quantities that they have in the past ... The company is working with their key customers to reverse declining trends and deliver products that consumers want ... The simple truth is that consumer tastes have changed and if we are to survive we must adapt and transform the way we do business ...

Accordingly, the Commission stands by its original finding in the accelerated report.

Long-term decrease in domestic production

There is clear evidence that the decrease in domestic production of processed fruit over the past five years is part of a longer-term trend and that the largest reductions appear to have occurred before 2009 (figures 2.21 and 2.22).

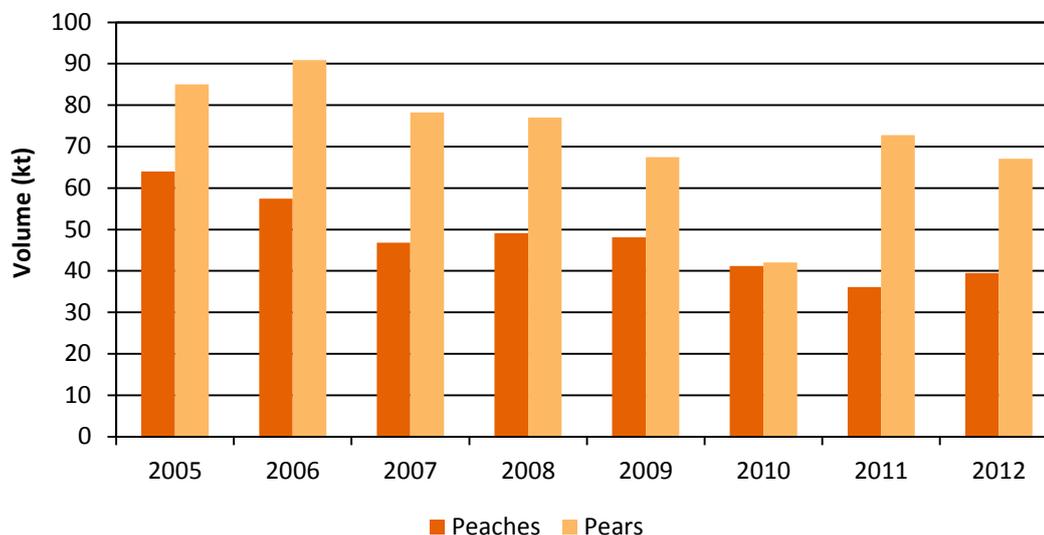
Figure 2.21 Domestic production of processed fruit
2002 to 2012^{a,b}



^a Years ended June. ^b Data from 2005 onwards are taken from the Canned Fruits Industry Council of Australia's presentations to the world Canned Deciduous Fruit Conferences in 2009, 2010 and 2012. This allows a longer time period to be represented in this chart (2005 to 2012, compared with 2009 to 2012 for the SPC Ardmona-supplied data); it also avoids splicing incompatible data series, as the SPC Ardmona-supplied data are by calendar year whereas the CFICA data are by marketing year.

Sources: CFICA (2009, 2010, 2012); USITC (2007).

Figure 2.22 Domestic agricultural production of processing peaches and pears^a



^a Years ended June. Total production of processing varieties only.

Sources: CFICA (2009, 2010, 2012).

Part of the decrease is attributable to decreasing domestic demand for processed fruit discussed above. The industry was also affected by several adverse climatic events over the past decade (box 2.8).

Box 2.8 Weather-related events affecting processed fruit production

Over the past decade, a number of weather-related factors have affected growers' ability to produce processing fruits and supply these to SPC Ardmona.

- **2004** — processing fruit intakes, particularly peaches and apricots, were affected by frost damage.
- **2006 and 2007** — processing fruit intakes were again affected by frost damage, resulting in a reduction in processing intakes for apricots and peaches.
- **2008 and 2009** — a continuation of drought conditions across the Murray Darling Basin led to high water costs and a reduction in tree numbers, affecting cannery intakes.
- **2010** — hot conditions at about the time of the 'Black Saturday' bushfires in 2009 resulted in low pear yields.
- **2011** — In its annual report, Horticulture Australia (HAL 2011, p. 1) reported: 'Prolonged drought throughout 2010, followed by the wettest season on record, caused significant damage and crop losses to stone fruit in particular'.

Sources: CFICA (2009); HAL (2009, 2010, 2011).

Supermarket strategies — private label products

SPC Ardmona (sub. 39) submitted that one of the causes for the decreases in its production, sales volumes and market share was supermarkets promoting their private label product lines.

Supermarkets using countervailing power in the market for processed fruit

As discussed earlier, growth in private label product sales is not equivalent to growth in imports, because private label products are often sourced domestically. However, the availability of private label imports can affect supermarket and domestic manufacturers' pricing strategies (box 2.9).

Box 2.9 The link between imports and private label prices

Import competition inevitably constrains domestic prices of substitutable products.

The availability of imported processed fruit 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 linked to the import price. The potential for a retail chain to switch their supply of private label products to imports can assist it in negotiating lower prices for SPC Ardmona's private label products.

Nevertheless, the evidence indicates that import unit values have remained relatively stable over the past five years, as have retail unit values of private label brands. In this context, any *changes* in the wholesale prices offered to SPC Ardmona for its private label products are influenced by domestic costs of production, consumer demand for the local product and the decisions made by the retailers with respect to their own margins and marketing strategies.

Supermarkets rely on both domestic and imported sources for their private label brands and are motivated by a range of factors in their choice of suppliers and product mix (ALDI, pers. comm., 24 July 2013; Coles, sub. 45; Woolworths Limited, sub. 31).

In its inquiry into the Competitiveness of Retail Prices for Standard Groceries, the ACCC (2008, p. 371) observed:

... one of the reasons that retailers sell private label products is an attempt to reduce the influence of suppliers of proprietary brands. If successful, this would increase the bargaining power of the retailer and thus may increase their buyer power.

Following the merger of SPC and Ardmona in 2002, SPC Ardmona became the sole domestic producer of most processed fruit. The import volumes of the relevant

products in 2002-03 were less than 15 per cent of their levels in 2012-13. In 2009, SPC Ardmona's share of supermarket sales volumes of peaches, pears and mixtures was still of the order of 80–90 per cent. This dominant market position and the perceived ability to raise market prices would typically create an environment that encourages the entry of competitors into the market. The promotion of private labels by supermarkets is one manifestation of increased competition in the market.

In 2011, 'industry sources' were quoted in the Foodnews information service stating that the increase in imported private label products was a response to the effects of reduced competition in the domestic processing sector:

The fact is that when you create a monopoly someone is always going to do something about competing with you ... Prior to the merger of Ardmona and SPC ten years ago, we never saw imported deciduous fruit. Now we have South African, Greek, Chilean and Chinese. ... In the four years immediately after the merger, prices of canned/preserved (jars & snacks) fruit rose in excess of 45% ... This coincided with [a] marked increase in private label brands. (Murray 2011)

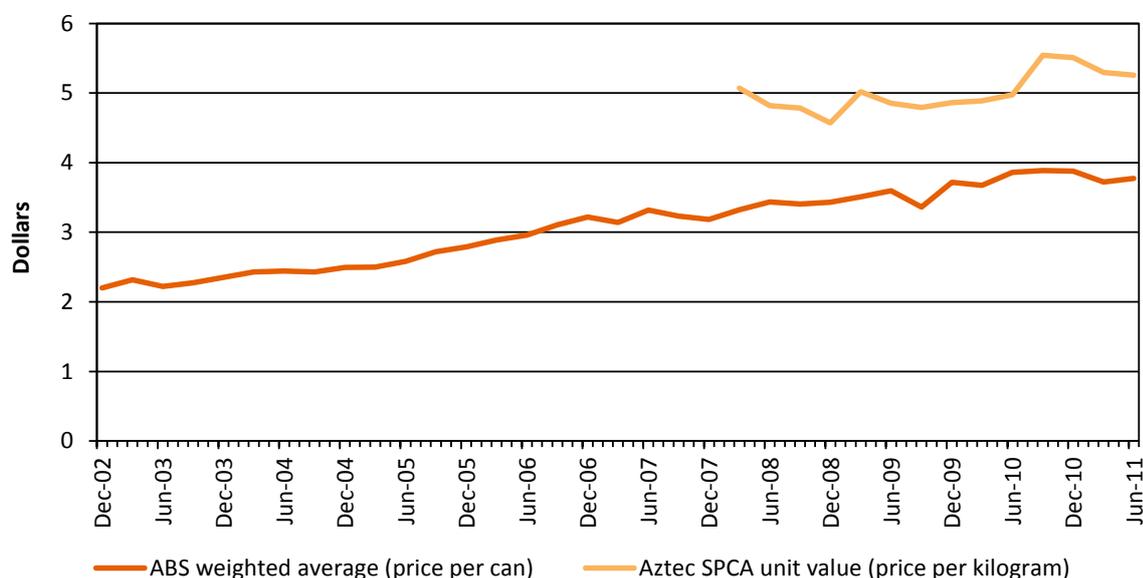
SPC Ardmona disputed this claim:

Aztec Australia scan sales data over the period will highlight that the above statement is erroneous. Prices did not go up by 40% post the merger of the SPC and Ardmona businesses. (sub. AR63, p. 8)

The claim by industry sources that domestic prices of processed fruit increased significantly immediately following the merger of SPC and Ardmona, may have been based on historical ABS data on average retail prices of 825 gram cans of peaches, collected for the purpose of consumer price index calculations. The ABS data indicate a price increase of 47 per cent between 2002 and 2006 (figure 2.23). While the catalogue was discontinued by the ABS in 2011 and the Commission has not been able to verify the methodology used in data collection⁴, the data show a highly comparable trend to that derived from available Aztec Australia data on SPC Ardmona branded peach products.

⁴ For example, the data may reflect changes in the recommended retail price rather than the actual prices achieved in store.

Figure 2.23 Retail processed peach prices, December 2002 to June 2011^a



^a The 'ABS weighted average' series calculates a weighted average price for an 825g can of peaches across the eight capital cities. The 'Aztec Australia SPC Ardmona unit value' series calculates a unit value for all SPC Ardmona processed peach products included in Aztec Australia retail data over the relevant timeframe.

Sources: ABS (Cat. no. 6403.0, 6403.0.55.001); Commission estimates.

Confidential evidence from SPC Ardmona lends weight to the assessment that the promotion of private label products by supermarkets is primarily an issue of competition between a domestic producer and domestic retailers, rather than between domestic and foreign producers. The evidence indicates that in 2009, SPC Ardmona held a majority share of private label sales of processed pears, peaches and mixtures. While that share fell over the next four years, in 2012 SPC Ardmona still had a majority share for two of the three categories.

Furthermore, as discussed earlier, there is no clear evidence of decreasing prices of imports in the past five years. In this context, the decrease in SPC Ardmona's share of private label sales is more likely to be due to rising costs of production and the prices it is seeking for the supply of private label products.

Ross Turnbull (a past chairman of Ardmona Foods Limited and the Canned Fruit Industry Council of Australia) argued that it was the domestic strategies of the Australian retailers, aided by the *availability* of, and the *threat* of turning to, the imported alternative that caused the damage to SPC Ardmona:

Up until the recent surge in private labels and imports, the Australian processed fruit market had been dominated by Canners brands, unlike most other world markets ... SPC Ardmona's 'Achilles heel' is private brands at low prices. Private brands tend to 'milk' the goodwill generated by the manufacturers brands, re-investing little or nothing towards innovation, product development and longer term promotion. The

reality has been, due to the cheapness and availability of imported product, the Australian supermarkets simply have taken the market away from SPC Ardmona. (sub. AR78, pp. 1–2)

Supermarkets using private labels in response to competitive pressures within the retail sector

Supermarket private label strategies are likely to have also been driven by competitive pressures within the retail sector. Several developments have occurred in recent years, including the entry of new competitors, in particular ALDI, and the implementation by Coles of a five-year ‘Turnaround’ strategy in 2008 that focused on promoting the private label range (among other things) (Best 2012).

The ACCC (2008, pp. 360–61) noted the implications of the entry of ALDI for the strategies of the existing retailers:

The inquiry was told by a number of parties that ALDI’s entry into the Australian market in 2001 fundamentally altered the role of private labels in Australian grocery retailing and the private label strategies that the MSCs [major supermarket chains] had adopted. This was because ALDI predominantly supplied its own private label products that were pitched directly at the branded products offered by the existing retailers. ALDI’s entry prompted the MSCs to reconsider their private label strategies, with Coles and Woolworths increasing their focus on private labels and introducing ‘tiered’ private label ranges to compete with ALDI’s everyday low price ... strategy.

The introduction of tiered private label ranges is notable, as it signalled a changing role for private label products. What was previously a lower price and quality alternative to branded products, became — at the premium end of the range — a direct competitor to SPC Ardmona’s branded offering.

Supermarkets using imports to supplement shortfalls in domestic production and increase reliability of supply

There is some evidence that the decision by supermarkets to source imported private label products is also motivated by the objective of improving the reliability of supply through diversification of suppliers, as well as by the need to address shortfalls in domestic production.

As discussed earlier (box 2.8), Australian production of processed fruit is geographically concentrated and susceptible to adverse weather events. Hattersley, Isaacs and Burch (2013) reported a shift by supermarkets to international suppliers for their private label products to ensure the reliability of supply after severe frost in the Goulburn Valley destroyed most of the 2004 harvest. The Commission was also

presented with evidence at its public hearing that SPC Ardmona was at various times an importer of processed fruit products.

In this context, an increase in imports is not a cause of the injury to the domestic industry, but a response to the injury to the domestic producer that was caused by domestic factors.

To sum up, the evidence suggests that any injury suffered by SPC Ardmona from supermarket private label strategies has not been caused by increased imports in the context of a safeguard assessment. Instead, the injury has resulted from the interplay of three factors:

- increased competition between the domestic retailers, as well as between the domestic private brand products and SPC Ardmona branded products
- rising costs of domestic production that made it more difficult for SPC Ardmona to supply products in the private label segment at previous price levels
- issues with the reliability of domestic supply, which drove supermarkets to substitute and diversify their supply sources.

The Commission's assessment

Overall, the Commission has concluded that the injury to SPC Ardmona has not been caused by an increase in imports of processed pears, peaches and fruit mixtures.

FINDING 2.4

The evidence does not support the conclusion that the injury to the domestic industry has been caused by an increase in imports of processed pears, peaches and fruit mixtures. The injury has resulted from a combination of the following factors:

- *long-term reductions in the domestic demand for processed fruit products*
- *reduced export volumes*
- *rising unit costs of domestic production, driven substantially by declining economies of scale due to lower domestic demand and reduced export volumes*
- *domestic retailers promoting private label brand products to compete with the sole domestic producer and with each other, as well as to improve reliability of supply.*

A Conduct of the inquiry

This appendix lists parties the Commission consulted with through:

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

The Commission received the terms of reference for this inquiry on 25 June 2013. Following receipt of the terms of reference, the Commission placed notices in the press and on its website inviting public participation in the inquiry. Information about the inquiry was also circulated to people and organisations likely to have an interest in it. The Commission released an issues paper in July 2013 to assist inquiry participants with preparing their submissions. The Commission received 61 initial submissions. The accelerated report was released on 26 September 2013. A further 17 submissions were received.

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

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

Table A.1 Submissions received^a

<i>Individual or organisation</i>	<i>Submission number</i>
Amtcor Packaging (Australia) Pty Ltd	36
Apple and Pear Australia Limited	44
Australian Canning Fruitgrowers' Association	41
Australian Manufacturing Workers' Union	32, AR68
Bean Growers Australia	38
Brown, Doug	9
BuyAustralianMade	54, AR64
Calimna Orchard	16
Chilealimentos Asociacion Gremial	20
Coles	45
Consulate General of Egypt	56
Croci, Patrick	49
Department of Foreign Trade — Thailand	30
Department of Trade and Industry — South Africa	23
Drives for Industry Pty Ltd	48
Embassy of the Republic of Chile	51
European Commission	28, AR77
G & M Parris & Sons Pty Ltd	3
Gouge Linen and Garment Services	57
Government of Argentina	27
Government of Brazil	53
Government of Mexico	22, AR71
Grasso, J & D	11
Greater Shepparton City Council	10, 62
HW Pogue & Co	15
K Besim & Co	AR72
Limbrick, Wayne	6
McKenzie, Bridget (Senator)	40
Mete, M & E	8
Ministry of Economy — Republic of Turkey	24, 60, AR67
Ministry of Foreign Affairs — Chile	29, AR70
Ministry of Industry and Foreign Trade — Egypt	50
MJ Hall & Sons Pty Ltd	34
Moira Shire Council	55
Morey, Robert	4
National Farmers' Federation	47
NSW Farmers	58
Orrvale Orchards Pty Ltd	14
Petrovski & Sons Pty Ltd	33
Profel — European Organisation of Fruit and Vegetable Processors #	18, AR66
Puckey. IR & YA	19
RJ Cornish & Co Pty Ltd	13

(Continued next page)

Table A.1 (continued)

<i>Individual or organisation</i>	<i>Submission number</i>
Routley, Ivan	1
Scarcella, M & R	42
South African Fruit and Vegetable Canners' Association	21, 59, 61*, AR73, AR75
South African Government	AR74
SPC Ardmona	39, 52*, AR63, AR76
Stephens, DP & HL	5
Stone, Sharman (MP)	26, AR69
Sugar Australia	37
Summer, Fern	17
Taipei Economic and Cultural Office in Australia	35
Trevaskis Engineering Pty Ltd	46
Turnbull Bros Orchards Pty Ltd	43, AR65, AR78
V & D Zurcas Holdings Pty Ltd	12
Victorian Peach and Apricot Growers Association	25
VJS Orchards Pty Ltd	7
Woolworths Limited	31
Yosifofski & Sons Pty Ltd	2

^a An asterisk (*) indicates that the submission contains confidential material NOT available to the public. A hash (#) indicates that the submission includes attachments.

Table A.2 Visits

Organisation

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

SPC Ardmona

Table A.3 Roundtable participants, Shepparton 12 July 2013

<i>Name of participant</i>	<i>Organisation</i>
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	

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 Canners' Association and Jamieson Trading	72–78
Delegation of the European Union to Australia	79–87
Italian National Industry Association of Conserved Vegetables	88–97
Embassy of the Republic of Chile	98–101

Public hearing, Melbourne 28 October 2013

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

B Commonwealth Gazettes and GATT Article XIX

This appendix consists of:

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



Commonwealth
of Australia

Gazette

No. S 297, Thursday, 25 June 1998

Published by AusInfo, Canberra

SPECIAL

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

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

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

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

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

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Conditions

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

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

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

Inquiry

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

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

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

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

Determination of Serious Injury or Threat Thereof

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

Application of Safeguard Measures

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

Provisional Safeguard Measures

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

Duration and Review of Safeguard Measures

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

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

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



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

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**.

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

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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