# 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.

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| 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. |
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## 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.

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| 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). |
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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.

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| 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). |
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#### 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.

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

### Data provision

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

## 1.4 What are the requirements for safeguard measures?

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

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

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

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