

Australian Government Productivity Commission

By E-mail: fruit.safeguards@pc.gov.au

Attention: Carole Gardner / Alex Maevsky
Your Ref:
Our Ref: M187/20131024
Date: 24 October 2013



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Dear Productivity Commission,

**SAFEGUARD INQUIRY INTO THE IMPORTS OF PROCESSED FRUIT PRODUCTS –
SOUTH AFRICAN FRUIT AND VEGETABLE CANNERS' ASSOCIATION:
SUBMISSION ON ACCELERATED REPORT**

We refer to the abovementioned safeguard investigation and the Productivity Commission's Accelerated Report No. 64 of 18 September 2013 (the "Accelerated Report"). We hereby submit our comments, on behalf of the South African Fruit and Vegetable Canners' Association, on the Accelerated Report as per requirements of the Productivity Commission.

1. Provisional measures

We have noted the Productivity Commission's finding and also recommend that the imposition of provisional safeguard measures would be unwarranted in the circumstances.

2. Productivity Commission Requirements

We agree with the application of the five general requirements which the Productivity Commission sets out on page 10 of the Accelerated Report. It is noted that some of these requirements require specific application which we have raised in previous submissions. We however do not agree that the Productivity Commission in its determination in this safeguards investigation, as indicated in the Accelerated Report, should be guided by the public interest in accordance with the Productivity Commission Act. We take note that safeguard investigation processes

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are conducted according to national legislation which must be in agreement with the WTO Agreements, in this instance the WTO Agreement on Safeguards.

The WTO Agreement on Safeguards is clear in so far as to the requirements that may be relied upon in safeguard investigations and determinations. Specifically in the context of this investigation which has to do with whether or not the alleged increased imports are attributed to the alleged serious injury suffered by the domestic industry, SPC Ardmona (hereinafter "SPCA"), in this case. It is thus the domestic industry in this investigation which is relevant as per the WTO legal framework, and not the interests of the public as a whole. In this regard, we refer the Productivity Commission to the WTO Appellate Body Report in US – Lamb (DS 177, 178) as referenced on the top of page 20 of the Accelerated Report.

3. Domestic industry – processed citrus fruit

We agree with the Productivity Commission's findings that there is no domestic industry producing this product and that there has been no submissions on injury in respect of this particular product. As per our previous submissions we also submit that imports of this particular product has not increased or has not increased sufficiently as required by the WTO Agreement on Safeguards and WTO jurisprudence on the matter. Accordingly we submit that no safeguard measures should be imposed on this particular product.

4. Domestic industry – processed pears, apricots as well as peaches and nectarines

We note that in determining the domestic industry for the above-mentioned products, reference is made to the types and sizes of packaging as submitted by SPCA as well as Aztec data. We understand this data to refer only to multiserve processed fruit product sold at the retail level. The data does not include the sales of processed pears, apricots as well as peaches and nectarines to the food service industry, as an example. We seek clarity hereon as such a narrow definition is not supported by the terms of reference with regard to the conduct of this investigation and further, the tariff subheadings do not differentiate between the packaging sizes. This compromises the scope of the products subject to this investigation as well as injury determination. In this regard kindly also refer to our comments under paragraph 8 below.

5. Domestic industry – processed mixtures

We note that in determining the domestic industry for processed mixtures, reference is made to supermarket sales data. In this regard it seems that the Productivity Commission is narrowly defining the domestic industry to accord with the submission made by SPCA that only multiserve processed products are to be

considered in this safeguards investigation. The domestic industry determination was made and serious injury determination was established on the information of the sole producer of the subject products. We therefore do not understand the relevance of including the supermarket sales data. Furthermore, this is contrary to the terms of reference and the tariff subheadings as they do not differentiate between the packaging sizes. In this regard kindly also refer to our comments under paragraph 8 below.

6. Domestic industry – other processed fruit

We agree with the Productivity Commission's finding that only some of the imported products under this tariff subheading are also produced domestically. The imported products that are not produced domestically should thus be excluded from any safeguard measures. We note that in determining the domestic industry for other processed fruit, reference is again made to the retail data. This is contrary to the terms of reference and the tariff subheadings do not differentiate between the packaging sizes. In this regard kindly also refer to our comments under paragraph 8 below.

7. Domestic Industry – SPCA accounts for major proportion

- 7.1. We note that the Productivity Commission determined that SPCA accounts for a major proportion of the total domestic production of processed pear, apricot, peach, fruit mixture and other processed fruit products.
- 7.2. We question whether this is indeed the case as all references in determining the domestic industry has been to retail sales and the multiserve processed fruit and not all of the subject products as per the terms of reference or the actual tariff subheadings. As such it does not seem to include the entire scope of the subject products of this investigation and as such may not account for the entire domestic industry. In this regard please refer to our comments under paragraph 8 below.
- 7.3. We agree with the Productivity Commission's determination that safeguard measures for other processed fruit products (tariff subheading 2008.99.00) is not warranted as imports of this subject product cannot be attributed to any alleged serious injury suffered by the domestic industry.

8. Injury and domestic industry

- 8.1. This safeguard investigation relates only to imports of processed fruits within the tariff subheadings determined in the terms of reference of conducting this investigation. The Productivity Commission indicated that it noted that the tariff classifications with regard to products subject to this investigation do not

specify the size or type of packaging of the subject products. As such we are of the opinion that the investigation process must align with the tariff classifications and encompass all corresponding subject processed fruit products irrespective of the nature or size of packaging and should not only include retail sales.

- 8.2. Throughout the determination of the domestic industry as well as the injury and causation analysis the Productivity Commission refers exclusively¹ to the domestic industry in relation to what occurs at the supermarket or retail level. The processed fruit products sold at this level typically includes only the 'multiserve fruit' which in SPCA's opinion should be the limited scope of the subject of this investigation. It is unclear from the Accelerated Report whether the Productivity Commission in its determination considered the entire domestic market for processed fruit and not only 'multiserve fruit'. On page 18 of the Accelerated Report the Productivity Commission stated that "preliminary analysis has not identified any domestic producers that sell their product entirely through non-retail channels". The Accelerated Report further indicates that as no submissions have been received to validate their existence, the domestic industry will therefore comprise of producers selling only at the retail level through supermarkets. It is our submission that since SPCA does not exclusively sell its products through the non-retail channels, this does not imply that that portion of SPCA's business should be excluded from the definition of the domestic industry for the investigation's purposes. We further recommend that the Productivity Commission take into account the total domestic market for the subject product as defined in the terms of reference for initiation purposes which will also include processed fruit products sold to the food service industry. It should be noted that the food service industry is a large part of the domestic market that is dominated by SPCA, the applicant in this investigation.

9. Increase in imports

9.1. Pears

- 9.1.1. We agree with the Productivity Commission's determination that there has been a substantial decrease in imports over the most recent financial year. The same decrease can be seen when comparing the most recent financial year with the base year referred to in Australia's Safeguard Notification to the WTO². As such there is no increase. In determining the trend of imports there is an expectation of an increase, however such increase is insufficient

¹ Reference is made to the fact that SPCA submitted additional information on the entire domestic industry, i.e. all tariff subheadings, on page 41 of the Accelerated Report. There are also some further references to the food services industry. However most other references refer to the multiserve processed fruit and retail sales. It is thus not clear that the entire domestic market has been taken into account.

² G/SG/N/6/AUS/4

to allow for the imposition of safeguard measures since it does not meet the requirements of Article 2.1 of the WTO Agreement on Safeguards.

- 9.1.2. We agree with the Productivity Commission's cautious approach in examining the ratio of total imports to domestic production. We further agree that the slowdown in the ratio of import volumes to domestic production makes it highly doubtful whether or not the requirements of Article 2.1 of the WTO Agreement on Safeguards are in fact met.
- 9.1.3. Given the reliance placed on multiserve processed fruit and retail sales by the Productivity Commission³ we express doubt as to whether or not the ratio of total imports have been compared to the domestic production of multiserve processed fruit only which is sold through retail channels. As previously stated, we are of the opinion that the ratio of total imports to domestic production should include processed fruit sold to the food service sector.

9.2. **Apricots**

- 9.2.1. We agree with the Productivity Commission's determination that there has been a substantial decrease in total imports between the calendar years 2008 and 2012. We further agree with the determination that the volume of total imports for the year 30 June 2013 was 11 per cent below the volume for the year 30 June 2009 and that there is a negative annual compound growth rate over this period. As such the requirements of Article 2.1 of the WTO Agreement on Safeguards are not met and safeguard measure may not be imposed.
- 9.2.2. We agree that any determination of the ratio of total imports to domestic production is driven by significant variability in annual production levels, especially climatic conditions and SPCA's own imports of apricots. Due to these factors and the fact that an increase in ratio is inconsistent, the requirements of Article 2.1 of the WTO Agreement on Safeguards are not met⁴ and safeguard measure may not be imposed.
- 9.2.3. Given the reliance seemingly placed on multiserve processed fruit and retail sales by the Productivity Commission⁵ we express our doubt as to whether or not the ratio of total imports has been compared to the domestic production of only multiserve processed fruit sold through retail channels. As previously stated, it is recommended that the ratio of total imports to domestic production should include processed fruit sold to the food service sector.

³ As elaborated on above in paragraphs 4, 5, 6, 7 and 8.

⁴ In accordance with Appellate Body Report, Argentina Footwear (EC), para 129.

⁵ As elaborated on above in paragraphs 4, 5, 6, 7 and 8.

9.3. Peaches and nectarines

- 9.3.1. We agree with the Productivity Commission's determination that there has been a slight increase of total imports over the calendar years 2008 to 2012 as well as a slight increase of total imports for the year to 30 June 2013 when compared to the total imports for the year to 30 June 2009. In our opinion such a slight increase does not adhere to the standard of a "significant enough" or "sharp enough" increase as required under Article 2.1 of the WTO Agreement on Safeguards.
- 9.3.2. We further agree that the Productivity Commission cannot aggregate the volume of total imports for the three most recent years as this will not meet the test of Article 2.1 of the WTO Agreement on Safeguards. In our opinion if an increase in total imports is present, this should be evident in an end-point-to-end-point comparison as well as in an analysis of intervening trends over the investigating period. If the results diverge, such divergence raises doubts as to whether or not the imports have increased as required under Article 2.1 of the WTO Agreement on Safeguards.⁶
- 9.3.3. The determination that most recently imports have in fact fallen is in fact a further consideration that the Productivity Commission is required to take into account in determining whether or not the total imports were in fact "recent enough", "sudden enough" and in such "increased quantities" as to comply with the requirements of Article 2.1 of the WTO Agreement on Safeguards.
- 9.3.4. Given the reliance on the multiserve processed fruit and retail sales by the Productivity Commission⁷ in its recent determination, we express doubts as to whether or not the ratio of total imports has been compared to the domestic production of only multiserve processed fruit sold through retail channels. As previously stated, it is recommended that the ratio of total imports to domestic production should include processed fruit sold to the food service sector.
- 9.3.5. We support the Productivity Commission's assessment that there is not strong enough evidence to meet the requirements under Article 2.1 of the WTO Agreement on Safeguards.

9.4. Mixtures

- 9.4.1. We support the Productivity Commission's determination that the recent increase in total import volumes does not meet the standard of "sudden

⁶ Appellate Body Report, Argentina Footwear (EC), para 129.

⁷ As elaborated on above in paragraphs 4, 5, 6, 7 and 8.

enough" to satisfy the requirements under Article 2.1 of the WTO Agreement on Safeguards.

- 9.4.2. Given the reliance placed on multiserve processed fruit and retail sales by the Productivity Commission⁸ we are doubtful as to whether or not the ratio of total imports has been compared to the domestic production of solely multiserve processed fruit sold through retail channels. As previously stated, it is recommended that the ratio of total imports to domestic production should include processed fruit sold to the food service sector.

10. Unforeseen developments?

- 10.1. We refer to our submission of 20 August 2013. In this context we reiterate that the allegation of dumping should not be a relevant consideration in determining unforeseen developments in a safeguard investigation. We also reiterate that the supermarkets' private label strategy is not unforeseen and SPCA chose, as submitted earlier, not to supply the domestic retailers with a private label product. We also reiterate that the appreciation of the Australian dollar was one of the developments that was foreseen.
- 10.2. We support the Productivity Commission's determination that the estimated oversupply of processed peaches and nectarines is unlikely to have a significant impact on world prices.
- 10.3. We note that the Accelerated Report does not seem to consider the severe adverse climatic conditions in the domestic market that might have contributed to the challenges faced by SPCA. Although such developments may be unforeseen, it has to be taken into account in assessing whether injury is in fact being caused by imports as well as assessing whether safeguards are needed if imports are necessitated as a result of a domestic shortage. It should not be taken into account in respect to whether any increase in imports has been unforeseen.
- 10.4. In our opinion, the developments have not been unforeseen and its combined effect cannot be used to determine whether its combined effect was in fact foreseeable or not.

11. Serious injury?

11.1. Changes in domestic sales and market share

- 11.1.1. It seems the only reference is with regard to retail sales and does not include an analysis of the entire domestic industry.

⁸ As elaborated on above in paragraphs 4, 5, 6, 7 and 8.

11.1.2. It is recommended that these changes in the domestic sales be compared to the changes occurring in the world market.

11.2. Capacity utilisation and productivity

We support the Productivity Commission's cautious approach in the determination with regard to the ambiguous evidence received on changes in capacity utilisation.

11.3. Profit and losses

We note that the determination by the Productivity Commission with regards to the data provided by SPCA indicated that reductions in profit margins between 2010 and 2013 were largely driven by increasing costs of production. This correlates with our previous submission made.

11.4. Decrease in fruit intakes and impact on fruit growers

11.4.1. We support the findings of the Productivity Commission. We refer to our previous submission of 20 August 2013 and recommend that the Productivity Commission should investigate what impact SPCA's foreign operations have had on its exports from Australia to foreign markets where SPCA does have operations. In our opinion SPCA's foreign operations would have had an impact on the decrease in the fruit intake from Australian growers.

11.4.2. We note that although the fruit growers do not influence the outcome of this safeguard investigation, the WTO Agreement on Safeguards requires that any injury determination should relate to the domestic industry. Since the Productivity Commission already determined that the domestic industry is essentially SPCA⁹, it is recommended that injury determinations should exclude the Australian fruit growers.

12. Injury conclusion

Given our comments above, we recommend that that the Productivity Commission should reconsider whether the domestic industry (SPCA) has in fact suffered injury and if such injury is determined to be suffered by the Applicant in this investigation, whether such injury is in fact serious.

13. Have the imports caused the injury?

⁹ Selling all products as per the tariff subheadings under the terms of reference through all channels.

We support the determinations made by the Productivity Commission in this regard. We also note that there has already been a move by the Australian retailers to procure their needs from the Australian domestic industry as previously submitted by us and as alluded to in the Accelerated Report. Further, we attach hereto evidence of another retailer which is currently procuring all of its supplies from SPCA¹⁰. As such imports will either cease or decrease dramatically. This fact needs to be taken into account and considered by the Productivity Commission in assessing the need as well as the motivation for the imposition of safeguard measures.

14. Concluding remarks

- 14.1. We support the Productivity Commission's finding that the total imports of processed citrus, pears, peaches and apricots as well as "other fruits" is not sufficient to meet the requirements of Article 2.1 of the WTO Agreement on Safeguards. As such it is recommended that safeguard measures should not be imposed against these subject products.
- 14.2. In our opinion the increase in total imports of "mixtures" does not satisfy the standard of "sudden enough" to meet the requirements of Article 2.1 of the WTO Agreement on Safeguards. It is therefore questionable as to whether or not the ratio of total imports has been compared with the total domestic production. As such our recommendation is that safeguard measures should not be imposed against these subject products.
- 14.3. The slight increase in total imports of processed peach and nectarines products according to our opinion does not adhere to the standard of increase that is "significant enough" or "sharp enough" as required under Article 2.1 of the WTO Agreement on Safeguards. This issue combined with the fact that recently there has been a decrease in total imports should be sufficient motivation to oppose the imposition of safeguard measures. We further express our doubts with regard to whether or not the ratio of total imports was compared to the total domestic production. In addition the Productivity Commission should note and consider that anti-dumping duties may be imposed on imports of canned peaches from South Africa. Should there be a positive finding on the anti-dumping investigations, the measures implemented would be sufficient to remedy the material injury suffered by the domestic industry.
- 14.4. As stated above we question whether an increase in total imports was in fact unforeseen. We also question whether the domestic industry has indeed suffered injury and if so whether the injury is in fact serious. We agree and support the fact that the alleged serious injury to the domestic industry has not been caused by any imports to the domestic market including any slight

¹⁰ Please refer to attachment A.

increase in total imports in the domestic market. As such we are of the opinion that no safeguard measures should be imposed against the total imports of the subject products of this investigation.

- 14.5. We recommend and advise that the Productivity Commission should investigate the effects that SPCA's foreign operations have had its domestic operations as well as the fact the Australian retailers have now moved away from preferring imports in favour of domestically produced/sourced products.

We thank the Government of Australia, the Productivity Commission in this regard for the opportunity to allow interested parties to submit comments on the Accelerated Report and we look forward to receiving your determination(s) in due course.

Yours faithfully

Rian Geldenhuys

Director

ALDI supports AUSSIE businesses

Proudly supporting Aussie growers

SPC Ardmona is an iconic Australian manufacturer, known and loved for their canned fruit and vegetable products. The exceptional partnership between ALDI and SPC stretches back more than a decade, to the first day ALDI opened its doors in Australia.

After SPC Ardmona experienced difficult times recently, ALDI has increased our support by moving our entire 825g canned fruit range to Australian Made. We are glad to pledge our support to SPC Ardmona and the local processed fruit industry.

You too can get on board, by purchasing locally grown and canned Australian products at ALDI, and further supporting Aussie fruit growers.

SPC Ardmona



We're proud to support Aussie fruit growers, like John Dimitropoulos from Shepparton East in VIC.



\$1⁹⁹
ea



Sweet Valley Australian Peach Slices, Two Fruits, Pear Slices or Fruit Salad in Juice 825g
\$2.41 per kg



\$3²⁹
ea

Sweet Valley Australian Fruit Salad, Two Fruits or Peaches in Juice Fridge Pack 1kg
\$3.29 per kg



99^c
ea



Remano Australian Crushed Tomatoes 410g
\$2.41 per kg

"We commend ALDI for their commitment to buying quality Australian made produce and investing in the future of food processing in our country!"

Peter Kelly,
Managing Director, SPC Ardmona