# 1 About the inquiry

## 1.1 What the Commission has been asked to do

On 21 June 2013, the Australian Government asked the Commission to inquire into whether safeguard action under World Trade Organization (WTO) rules is justified against imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff. The terms of reference are reprinted at the beginning of this report.

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

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

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

The terms of reference require the Commission to conduct the safeguards inquiry in line with the criteria set out in the Commonwealth of Australia Special Gazette No. S 297, as amended by No. GN 39 (reprinted in appendix B). These criteria largely mirror the terms of the WTO Agreement on Safeguards. They stipulate that before recommending any safeguard measures, the Commission must:

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

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

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

## 1.2 Background

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

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

Anti‑dumping measures are distinct from safeguard measures. Anti‑dumping duties can be applied in circumstances where products are sold into the domestic market at ‘dumped’ prices and this is causing or threatening to cause *material* injury to the domestic industry. Safeguard measures can be applied if imports have increased rapidly, and this increase is causing or threatening to cause *serious* injury to the domestic industry. For safeguard measures, there is no requirement that the increased imports are being ‘dumped’. Although the WTO Agreement on Safeguards provides no clear guidance on what constitutes serious injury, it is consistently interpreted as being a more demanding test than the material injury test applying in anti‑dumping.

Following investigations, anti‑dumping duties and countervailing duties (which can be applied to offset the trade effects of subsidies paid by foreign governments) have been applied to processed tomato products in the past (box 1.1).

This safeguards inquiry relates only to imports of processed tomato products falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff. This subheading is defined as ‘Tomatoes, whole or in pieces, prepared or preserved otherwise than by vinegar or acetic acid, in packs not exceeding 1.14 L’. These imports enter at a 5 per cent rate of duty, except for imports from New Zealand, Singapore, the United States, Thailand, Chile, Forum Island Countries (including Papua New Guinea) and ASEAN countries, which enter free of duty. Imports from countries defined as ‘Developing Countries’ or ‘Least Developed Countries’ in Schedule 1 of the Australian Customs Tariff also enter free of duty under certain conditions.

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| Box 1.1 Anti‑dumping measures applied to processed tomato imports |
| * **April 1992:** Anti‑dumping duties were applied to imports of canned tomatoes from Italy and China, and countervailing duties were applied to imports of canned tomatoes from Italy, Spain and Thailand. Both sets of duties were imposed for a five‑year period. * **April 1997:** Anti‑dumping duties and countervailing duties on imports of canned tomatoes from Italy were extended for a further five years until April 2002. * In 2001, SPC Limited and Ardmona Foods Limited applied to have the countervailing duties on imports of canned tomatoes from Italy extended for a further five years. The Australian Customs Service ultimately found that such duties would not be warranted. * **June 2013:** SPC Ardmona applied for anti‑dumping duties on prepared or preserved tomato products exported from Italy, and the Anti‑Dumping Commission subsequently initiated an investigation on 10 July 2013. |
| *Sources*: Anti‑Dumping Commission (2013); Australian Customs Service (2003b). |
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Processed tomatoes falling within the relevant tariff subheading are imported mostly from Italy. Over the five years to June 2013, Italy supplied about 86 per cent of all imports. The United States supplied 8 per cent and Argentina 4 per cent over the same period. All other countries supplied less than 2 per cent of imports, collectively.

## 1.3 Inquiry procedures and consultation

The WTO Agreement on Safeguards requires safeguard inquiries to be conducted in an open and transparent manner, with opportunities for interested parties to present their views and to respond to the views of others. Reflecting these requirements, Commonwealth of Australia Special Gazette No. S 297 states that:

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

These requirements accord with Productivity Commission public inquiry procedures.

### Public notification

The Australian Government commissioned the inquiry on 21 June 2013 and formally notified the WTO of the safeguards investigation on 27 June 2013. Countries that account for large shares of Australian imports were formally notified by the Department of Foreign Affairs and Trade.

The inquiry was advertised in the *Age*, *Australian*, *Shepparton* *News* and *Weekly* *Times* newspapers following receipt of the terms of reference. In early July 2013, an email circular was sent to individuals and organisations that had registered their interest or were considered likely to have an interest in the inquiry. The advertisements and circular outlined the nature of the inquiry and invited parties to register their interest. An issues paper setting out matters about which the Commission was seeking comment and information was released on 4 July 2013. The issues paper was sent to interested parties and was placed on the Commission’s website.

### Informal consultation

Informal meetings and visits were conducted in the early stages of the inquiry with SPC Ardmona, Coles Supermarkets, Kagome Australia (a tomato processing company in Echuca, Victoria) and Australian Government departments. The Commission also held an informal roundtable in Shepparton on 12 July 2013, with representatives from the processing industry, tomato growers and others. Appendix A contains the full list of those consulted.

### Data provision

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

### Submissions

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

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| Box 1.2 An overview of participants’ views |
| Normally in its inquiry reports, the Commission extensively cites views put to it in submissions and at public hearings. For this accelerated report, although all submissions have been read and taken into account, the ordinary level of citation has not been possible. To date, 37 submissions have been received from a variety of stakeholders and interested parties. This material is vital in helping the Commission understand key issues and concerns, as well as providing the evidence base that informs conclusions.  Of the 37 submissions received, 11 were from industry participants and suppliers to SPC Ardmona (including grower organisations). Virtually all argued that increased imports were the principal cause of reduced profitability and losses, and most supported safeguard measures to reduce imports.   * Local governments and members of parliament generally supported the case for safeguard action, submitting that the closure of SPC Ardmona’s facilities would have significant flow‑on impacts on the region (Moira Shire Council, sub. 1, Paul Weller MP, sub. 8, Senator Bridget McKenzie, subs. 18 and 19, Sharman Stone MP, sub. 35, Shire of Campaspe, sub. 11). * SPC Ardmona’s suppliers submitted that the injury to SPC Ardmona was affecting their businesses and that they were concerned about the closure of facilities (Bean Growers Australia Limited, sub. 14; Drives for Industry, sub. 23; Gouge Linen and Garment Services, sub. 25; Kagome Australia, sub. 12). * The Australian Manufacturers Workers’ Union (sub. 7) submitted that safeguard measures are needed to ensure manufacturing capacity and jobs in the food processing industry are not lost. * Coles (sub. 20) provided evidence on its sales of Australian and imported canned tomatoes, without arguing for or against safeguard measures.   Fifteen submissions were received from representatives of industries in countries that export to Australia and their governments. Most argued that the circumstances of the Australian industry did not satisfy the safeguard criteria. Some governments (including Chile, Egypt, Mexico, Thailand and Turkey) submitted that under the terms of the Agreement on Safeguards exports from their countries were eligible to be excluded from the application of any safeguard measures. |
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A number of foreign governments stated in their submissions and at the initial public hearing that they did not have adequate information to make a submission to the inquiry by the due date. In particular, they stated that the decision by SPC Ardmona not to provide a non‑confidential summary of its application for safeguard measures limited the ability of interested parties to respond to the specifics of the claim.

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

### Initial public hearing and transcripts

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

### Release of report

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

### Next steps

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

## 1.4 What are the requirements for provisional measures?

As set out in the terms of reference, provisional measures can be recommended only where it is found that ‘critical circumstances’ exist such that delay in applying measures would cause damage that would be difficult to repair (box 1.3). Although this is a necessary condition, it is not a sufficient condition for the imposition of provisional measures. A recommendation for provisional measures also requires a preliminary determination that there is *clear evidence* that increased imports have *caused* or are threatening to cause *serious* injury to the domestic industry.

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| Box 1.3 Requirements for provisional measures |
| In undertaking the inquiry, the Commission is to consider and provide an accelerated report on whether critical circumstances exist where delay in applying measures would cause damage which it would be difficult to repair. If such circumstances exist, and pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury, the Commission is to recommend what provisional safeguard measures (to apply for no more than 200 days) would be appropriate. |
| *Sources*: Terms of Reference; Commonwealth of Australia Special Gazette No. S 297 (1998). |
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A high standard of evidence and analysis is required to determine the case for provisional safeguard measures. Determinations that are not based on a high standard of evidence and analysis could be vulnerable to challenge by other nations under WTO dispute resolution procedures (see, for example, *EC – Provisional Steel Safeguards* (DS 260)). If provisional safeguard measures are revoked following a successful challenge or because the findings in the final report on definitive safeguards do not support ongoing safeguards, the value of the measures (tariff revenue) must be refunded to importers.

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

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

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

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

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

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

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

To assess the case for provisional safeguard measures, the Commission has partitioned the WTO criteria into five distinct and sequential steps.

1. Define the domestic industry that produces ‘like’ or ‘directly competitive’ products.
2. Assess whether there has been an increase in imports of the product under reference in absolute terms, or relative to domestic production.
3. Establish whether the increase in imports was due to unforeseen developments.
4. Establish whether the relevant industry is suffering serious injury, or serious injury is being threatened.
5. Establish whether the increased imports *caused* or are *threatening to cause* serious injury.

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

The determination must be in accordance with the *Productivity Commission Act 1998* (Cwlth), which requires that the Commission be guided by the interests of the community as a whole, not just those of any particular industry or group. In addition, before safeguard measures can be implemented in Australia, the terms of reference require that regard must be given to the Government’s requirements for assessing the impact of regulation which affects business.