# 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 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).

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 tomato products under reference has suffered serious injury. However, the case for provisional safeguard measures failed several other critical tests.   * The volume of imports had not increased significantly in the previous five years. * There was only weak evidence that imports had increased relative to domestic production. * The injury to the domestic industry was not caused by a recent surge in imports. * Other factors that caused the injury included long‑term competitive pressure from imports, increased promotion of supermarket private label brands, the appreciation of the Australian dollar, decreased exports and floods in the tomato growing region of Victoria. * 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 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 against imports of certain processed tomato products.

The Australian Government directed the Commission to inquire into imports of processed tomato products falling within tariff subheading 2002.10.00.60 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 products that come under the subheading are ‘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.

Processed tomatoes falling within the relevant tariff subheading are imported mostly from Italy. Over the five years to September 2013, Italy supplied about 87 per cent of all imports. The United States supplied 8 per cent and Argentina 3 per cent over the same period. All other countries supplied around 2 per cent of imports, collectively.

### 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 tomato products exported from Italy. 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 1.2).

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| Box 1.2 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. To date, the Anti‑Dumping Commission has found evidence of dumping by some but not all Italian exporters. It has imposed interim dumping ‘securities’ of less than 10 per cent on those exporters. |
| *Sources*: Anti‑Dumping Commission (2013a); Australian Customs Service (2003b). |
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#### 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.

#### The Anti‑Dumping Commission investigation found some products were being dumped

An investigation was initiated by the Anti‑Dumping Commission on 10 July 2013. On 1 November the Anti‑Dumping Commission (2013b) released a ‘Preliminary Affirmative Determination’. It found that some processed tomato products were being sold in Australia at ‘dumped’ prices. Formal anti‑dumping duties can be applied by the Minister if the Anti‑Dumping Commission recommends duties (its final recommendations are due by 30 January 2014). In the interim, from 1 November 2013, the Australian Customs and Border Protection Service will require importers to lodge ‘dumping security undertakings’ in respect of any interim dumping duty that may become payable following the completion of the investigation. The securities were set at different rates for each exporter, with the rate being equal to the ‘dumping margin’.

The Anti‑Dumping Commission calculated dumping margins for a sample of Italian exporters — the difference between the weighted average export price of each manufacturer and the ‘normal value’ calculated by the Anti‑Dumping Commission. It found that the dumping margin for two Italian producers was negligible, and interim dumping securities were set at zero. (At least one of these producers — La Doria — is a major supplier of private label products to Australian supermarket chains.) For other exporters, dumping margins were calculated to be between 6.5 per cent and 9.1 per cent. For exporters that were not included in the sample (and therefore did not have a dumping margin calculated for them), the securities will be levied at a rate of 8.6 per cent.

## 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 (1998) 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, 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. Other parties provided the Commission with information on an informal basis, including the retailers Woolworths and ALDI. Appendix A contains the full list of those consulted.

### Submissions

Thirty‑seven submissions were received prior to the release of the accelerated report and another 11 prior to the completion of the final report. Interested parties were notified on 7 November that six 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 5 further submissions.

Submissions were received from a range of interested parties, including Australian and overseas participants, and reflected a range of views (box 1.3). 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 1.3 An overview of participants’ views |
| Of the 37 initial 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 MLA, 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). * Coles (sub. 20) provided evidence on its sales of Australian and imported canned tomatoes, without arguing for or against safeguard measures.   Fifteen initial 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 safeguards 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.  A further 11 submissions were received following publication of the accelerated report. SPC Ardmona (sub. AR38) 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. AR40) and Sharman Stone MP (sub. AR41), 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. AR43 and AR44) 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 safeguards 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 (WTO 2012). 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. AR40; Sharman Stone MP, sub. AR41; SPC Ardmona, sub. AR38). 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.