

## INSTRUCTIONS AND GUIDELINES

### ANTI-DUMPING COMMISSION

**Application for an anti-circumvention inquiry into avoidance of the intended effect of duty:**

**Guidelines for applicants**

**January 2014**

**These Instructions and Guidelines refer to Practice Statement:  
PS2009/25: Administration of Australia's Anti-Dumping and  
Countervailing System**

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**Subject:** Application for an anti-circumvention inquiry into avoidance of the intended effect of duty: Guidelines for applicants

**Purpose:** To provide guidance to applicants preparing the application form for an anti-circumvention inquiry into avoidance of the intended effect of duty

**Owner:** Commissioner Anti-Dumping Commission

**Category:** Operational Procedures (OP)

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***The electronic version published on the intranet is the current Guidelines.***

**Summary of main points**

These Instructions and Guidelines provide guidance to assist applicants with completing the application form for an anti-circumvention inquiry alleging avoidance of the intended effect of duty – pursuant to section 269ZDBC of the *Customs Act 1901*.

**These Instructions and Guidelines apply to staff in:**

Anti-Dumping Commission

**Introduction**

These *Instructions and Guidelines – Application for an anti-circumvention inquiry into avoidance of the intended effect of duty: Guidelines for applicants* (Guidelines) are available to assist applicants prepare an application for an anti-circumvention inquiry into the alleged avoidance of the intended effect of duty.

Applicants should read these Guidelines in conjunction with other publicly available documents on the Anti-Dumping Commission (Commission) website at [www.adcommission.gov.au](http://www.adcommission.gov.au).

**Instructions and Guidelines**

The Guidelines cover the following topics:

- background and scope of an anti-circumvention inquiry into avoidance of the intended effect of duty;
- assistance with the application;
- the inquiry process;
- provision of non-confidential information; and
- information required by the application form.

**Related Policies and References****Practice Statements:**

- PS2009/25: Administration of Australia's Anti-Dumping and Countervailing System.

**Other Instructions and Guidelines:**

- Dumping and Subsidy Manual.

**Key Roles and Responsibilities**

- The National Manager – Policy and Assistance Branch has responsibility for ensuring the implementation and maintenance of these Guidelines.
- These Guidelines apply to all staff in the Commission.

**Approval**

<b>Approved on</b>	20 December 2013	
<b>By</b>	Dale Seymour Commissioner Anti-Dumping Commission	
<b>Review Period</b>	Annually	



# **Guidelines for preparing an application for an anti-circumvention inquiry into avoidance of the intended effect of duty**

## 1. BACKGROUND AND SCOPE OF ANTI-CIRCUMVENTION INQUIRY INTO AVOIDANCE OF THE INTENDED EFFECT OF DUTY

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An application for an anti-circumvention inquiry into the alleged avoidance of the intended effect of duty can be made by a person representing, or representing a portion of, the Australian industry producing like goods. The Minister<sup>1</sup> may also request the Commissioner of the Anti-Dumping Commission (Commissioner) to conduct an inquiry.

Circumvention is a trade strategy that can be used by exporters and/or importers of products to either:

- (a) avoid the full payment of dumping and/or countervailing duties; or
- (b) avoid the price effect of the dumping and/or countervailing duties in the Australian market.

Circumvention activities take various forms and seek to exploit different aspects of the anti-dumping system, but the outcome of these activities is that either:

- (a) the relevant goods do not attract the intended dumping and/or countervailing duty; or
- (b) the relevant goods attract the duty, which is paid, but the payment of the duty does not have the intended price effect in the market (and therefore does not have the effect of removing the injury caused by dumped and/or subsidised prices).

A circumvention activity in the form of avoidance of the intended effect of duty may take place where goods which incur dumping or countervailing duties are exported to Australia and the importer sells those goods in Australia without increasing the price commensurate with the total amount of duty payable on the goods.

### What is circumvention activity that “avoids the intended effect of duty”?

Subsection 269ZDBB(5A) of the *Customs Act 1901* (the Act) sets out when a circumvention activity avoiding the intended effect of duty occurs (in relation to a notice published under subsections 269TG(2) or 269TJ(2) of the Act<sup>2</sup>). The legislation provides:

Circumvention activity, in relation to the notice, occurs if the following apply:

- a) *goods (the **circumvention goods**) are exported to Australia;*
- b) *those goods are manufactured in a foreign country in respect of which the notice applies;*
- c) *the exporter is an exporter in respect of which the notice applies;*
- d) *the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount payable on the circumvention goods under the Dumping Duty Act;*
- e) *either or both of sections 8 or 10 of the Dumping Duty Act, as the case requires, apply to the export of the circumvention goods to Australia; and*
- f) *the above circumstances occur over a reasonable period.*

This activity is described in more detail later in these Guidelines (page 8 refers).

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<sup>1</sup> Referring to the Minister responsible for administering Part XVB of the Act.

<sup>2</sup> This notice refers to an original notice under subsections 269TG(2) or 269TJ(2) of the Act following an investigation.

### **What is not circumvention activity?**

Avoidance of the intended effect of duty prescribed by the Act relates only to the circumvention activity and is not indicative of illegal behaviour.

It is not a circumvention activity if external factors (such as currency fluctuation or reduction in other selling and general expenses) have caused the circumstance where the selling price of the goods by the importer has not increased in accordance with the imposition of duties.

Further, recognising that profit reduction can be a legitimate business practice, it is not a circumvention activity if an importer, who is truly independent of the exporter from whom it purchases its goods, is absorbing the payment of the dumping and/or countervailing duty through a partial reduction in profit.

It is recognised that an applicant may not be aware of the circumstances which result in the commercial effect of the imposition of duties not being reflected in the Australian market for the goods the subject of measures. An applicant may therefore bring an application, supported by evidence to support a prima facie case, that the selling prices of goods subject to measures have failed to increase in line with the anticipated effect of duties payable, as a basis for the Commission to initiate an inquiry into the circumstances to determine whether a circumvention activity has in fact occurred.

## **2. ASSISTANCE WITH THE APPLICATION**

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The Commission's Client Engagement and Business Support Section can provide information about the anti-circumvention inquiry process and the information required to complete an application for conduct of an anti-circumvention inquiry into avoidance of the intended effect of duty.

Contact the Section on:

**Phone:** 1300 884 159

**Fax:** 1300 882 506

**Email:** [clientsupport@adcommission.gov.au](mailto:clientsupport@adcommission.gov.au)

Further information about Australia's anti-dumping system is also available on the Commission website at [www.adcommission.gov.au](http://www.adcommission.gov.au).

Small and medium enterprises (ie those with up to 200 employees) may obtain assistance, at no charge, from the International Trade Remedies Advisor, employed by Australian Industry Group and funded by the Australian Government. To access this service, visit [www.aigroup.com.au/traderemedies](http://www.aigroup.com.au/traderemedies) or telephone (03) 9867 0267.

### **3. THE ANTI-CIRCUMVENTION INQUIRY PROCESS**

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A summary of the anti-circumvention inquiry process is provided below.

#### **The Act**

The anti-circumvention inquiry process is prescribed in Division 5A, Part XVB of the Act.

#### **Consideration of applications and requests**

An application for an anti-circumvention inquiry into avoidance of the intended effect of duty may be made by a person representing, or representing a portion of, the Australian industry producing like goods. Also, the Minister responsible for anti-dumping may request the Commissioner to conduct an anti-circumvention inquiry into the avoidance of the intended effect of duty.

The Commissioner must decide whether or not to reject the application within 20 days of lodgement of an application. The Commissioner must reject the application if not satisfied of either (or both) of the following:

- (i) that the requirements of the application form have been met; and
- (ii) that there appear to be reasonable grounds for asserting that the circumvention activity in relation to the original notice has occurred.

In accordance with section 269ZDBD, an application must include:

- a) a description of the kind of goods that are the subject of the original notice; and
- b) a description of the original notice the subject of the application; and
- c) a description of the circumvention activity/ies\* in relation to the original notice that the applicant considers have occurred; and
- d) a description of the alterations to the original notice that the applicant considers should be made.

\* It is important for applicants to note that, pursuant to subsection 269ZDBD(2A), an application alleging the avoidance of the intended effect of duty must not include any other kind of circumvention activity. The other circumvention activities prescribed in the Act all involve conduct by exporters that seek to avoid or minimise the payment of duty, whereas avoidance of the intended effect of the duty is conduct by exporters and/or importers where interim dumping (and/or countervailing) duties have been paid in respect of the goods.

A separate application form (Commission Form B1236) and related guidelines exist for the other circumvention activities prescribed in the Act.

The circumvention activity of avoiding the intended effect of duty is described later in these Guidelines (page 8 refers).

If the Commissioner does not reject the application, or if the Minister requests an inquiry, a notice must be published in a nationally circulating newspaper, indicating that an inquiry is to be conducted. The applicant will also be notified of the Commissioner's decision.

It is the Commission's practice to also publish, on the Commission's website, an Anti-Dumping Notice detailing the inquiry process, including deadlines for submissions and the legislative timeframe in which to report to the Minister.

## Submissions

The Commission will contact known interested parties inviting them to participate, and to lodge a submission to the inquiry. The deadline for submissions is 40 days after publication of the notice. Interested parties can make submissions beyond this date, for example in relation to verification reports placed on the public record, however interested parties should be aware that the Commissioner is not obliged to have regard to a submission received after 40 days if to do so would prevent the timely preparation of the final report to the Minister.

Interested parties must prepare non-confidential versions of submissions for placement on the public record. Please see 'provision of non-confidential information' section (page 8 refers).

Unlike the inquiry process relating to other forms of circumvention activities, an inquiry concerning the alleged avoidance of the intended effect of duty does not require the Commissioner to publish a statement of essential facts during the inquiry process.

## Verification of information

On-site visits may be conducted to verify information submitted by interested parties. Where on-site visits do not occur, "desk audits" (i.e. an examination of records and documents not at the interested parties' premises) may also be completed.

Verification visit and desk audit reports will be prepared by the Commission and non-confidential versions of these reports will be placed on the public record.

## Report on anti-circumvention inquiry

The Commissioner must give the Minister a report within **100 days** recommending whether the original notice should be altered, and if so, the alterations to be made. The Minister may, upon written request from the Commissioner, extend the report deadline.

The report must include a statement of the Commissioner's reasons that sets out the material findings of fact on which the recommendation is based and provides particulars of the evidence relied on to support those findings.

In deciding on the recommendations to be made to the Minister in the report, the Commissioner must have regard to:

- (i) the application or request for the inquiry; and
- (ii) any submission concerning the inquiry that is received within 40 days after the publication of the notice announcing initiation of the inquiry.

The Commissioner may also have regard to any other matter that the Commissioner considers to be relevant to the inquiry.

## Minister's powers

The Minister must, within 30 days of receiving the report, declare by notice in the *Gazette* and in a nationally circulated newspaper, whether the original notice should be altered, and if so, the alterations to be made.

If the Minister considers special circumstances exist, a longer period may be taken to make the declaration. The Minister must give public notice of the longer period.

Details of the kinds of alterations that may be made to the original notice are discussed later in these Guidelines (page 11 refers).

If the Minister's declaration affects an exporter, that exporter must be informed of the declaration and alterations. Where relevant, the Minister's declaration may cover more than one exporter.

### **Review of the Minister's decision**

The Minister's decision to alter or not to alter the original notice is reviewable by the Anti-Dumping Review Panel. An interested party, as defined by the Act, can apply for a review within 30 days from the publication of the Minister's decision.

## **4. PROVISION OF NON-CONFIDENTIAL INFORMATION**

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Section 269ZJ of the Act requires that a public record is maintained for anti-circumvention inquiries. Australian Customs Dumping Notice (ACDN) No. 2012/42 details the procedures for providing information for the public record, including non-confidential summaries. ACDN 2013/17 also provides information in relation to making submissions. These ACDNs are available on the Commission website at [www.adcommission.gov.au/notices-reports/acdn/default.asp](http://www.adcommission.gov.au/notices-reports/acdn/default.asp).

Applicants are encouraged to refer to these ACDNs when preparing the required non-confidential version of the application. These ACDNs should also be referred to when preparing submissions to an anti-circumvention inquiry.

## **5. INFORMATION REQUIRED BY THE APPLICATION FORM**

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Questions 6 and 7 of the application form require information about the circumvention activity and proposed alterations to the original notice. Supporting evidence must be provided with the application to substantiate your claim. Please see 'supporting evidence' section (page 11 refers). The following guidance may assist in preparing your responses.

### **Guidance to Question 6 – Provide a detailed statement regarding the circumvention activity in relation to the original notice that you consider has occurred**

Subsection 269ZDBB(5A) of the Act sets out when a circumvention activity avoiding the intended effect of duty, in relation to a notice published under subsections 269TG(2) or 269TJ(2) of the Act<sup>3</sup>, occurs:

#### **Avoidance of the intended effect of duty**

Circumvention activity in the form of 'avoidance of the intended effect of duty' occurs if the following apply:

- a) *goods (the **circumvention goods**) are exported to Australia;*

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<sup>3</sup> This notice refers to an original notice under subsections 269TG(2) or 269TJ(2) of the Act following an investigation.

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- b) *those goods are manufactured in a foreign country in respect of which the notice applies;*
- c) *the exporter is an exporter in respect of which the notice applies;*
- d) *the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount payable on the circumvention goods under the Dumping Duty Act;*
- e) *either or both of sections 8 or 10 of the Dumping Duty Act, as the case requires, apply to the export of the circumvention goods to Australia; and*
- f) *the above circumstances occur over a reasonable period.*

In the usual course of trade, the price of dumped goods increases in the Australian marketplace when anti-dumping duty is collected at the border. The additional dumping or countervailing duty paid by the importer for the goods is generally passed on to the client or consumer in the form of increased prices in the Australian market.

The circumvention activity captures circumstances where dumping and/or countervailing duty has been imposed (and is being paid by the importer upon entry of the goods) but there is little or no effect, over a reasonable period, on the price at which the goods are sold in the Australian market, for example the price of the goods has not increased in line with the duty payable.

Example 1 below illustrates this type of circumvention activity.

### Example 1 – Goods sold at a loss



In Example 1, there is a dumping and/or countervailing duty notice in relation to widgets exported from Country A to Australia. An exporter in Country A is undertaking the circumvention activity. The Australian importer – or their associate – is likely to be aware of the circumvention activity as it is benefitting from financial compensation offered by the exporter for continuing to sell the circumvention goods at a price which would not recover the cost of the payment of dumping duty. This type of activity would be considered ‘sales at a loss’ (and fall within the description of the circumvention activity). In these circumstances, the Minister may consider it is reasonable to alter the notice as it applies to that exporter to adjust the export price to reflect the compensation arrangement between the exporter and importer.

In contrast to Example 1, if there was no compensatory arrangement between the exporter and the importer, and instead the importer had simply reduced its profit margin on the sale of widgets from 30% to 10% to cover the payment of 20% dumping duties (i.e. the sales were not made at a loss), this type of conduct would generally not be considered as avoidance of the intended effect of duty, as this may be a legitimate business decision on behalf of the importer.

A further example of the circumvention activity might be where an importer is selling the goods subject to measures at a loss, without any compensation from the exporter, because it is selling those goods in conjunction (i.e. bundled with) other goods in the transaction which are sold at a profit. This may be considered as avoidance of the intended effect of duty.

### **Reasonable period**

A key aspect of the circumvention activity is that it must occur over “a reasonable period”. This reflects that there will likely be a period of adjustment in the market to account for the imposition of duties (which, in practical terms, represents an additional cost to the importer). In the period following the imposition of measures, an importer may continue to sell at a price not reflective of the payment of duties as the importer may be drawing down on stocks purchased and entered prior to the imposition of duties, or the importer may be locked into contractual obligations preventing the importer from increasing its prices for a certain period. What is a “reasonable period” will vary depending on the type of goods subject to measures and the selling arrangements in respect of those goods.

An application should address this element of “reasonable period” to explain why the selling prices of goods should be expected to have adjusted to account for the duties paid. Relevant assertions would generally detail the structure and operation of the market and the selling arrangements under which the goods are commonly sold. Generally the Commission will not consider a period of less than three months to be a reasonable period.

### **Guidance to Question 7 – Provide a description of the alterations to the original notice that you consider should be made**

Subsection 269ZDBH(2) of the Act outlines the kinds of alterations that may be made to the original notice by the Minister including:

- the specification of different goods that are to be the subject of the original notice;
- the specification of different foreign countries that are to be the subject of the original notice;
- the specification of different exporters that are to be the subject of the original notice;

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- the specification of different variable factors in respect of existing exporters subject of the original notice; and/or
- the specification of variable factors in relation to the different exporters that are to be the subject of the original notice.

The most relevant alteration in respect of the circumvention activity relating to the avoidance of the intended effect of the duty is the specification of variable factors different to those which form the basis for the original notice. Variable factors are export price, normal value, non-injurious price and the countervailable subsidy in respect of the goods (where relevant).

In relation to Example 1 above, a possible outcome would be to specify a different variable factor (export price) in respect of the exporter to account for the fact that a compensatory arrangement was in operation which affected the export price otherwise shown on the commercial documentation relating to the importation of the goods.

An application must provide a description of the alterations to the original notice that an applicant considers should be made in order to address the circumvention activity. The Commission will recommend to the Minister the most appropriate alteration, in the opinion of the Commissioner, to be made to the notice, and will have regard to the application in making that decision.

## **6. SUPPORTING EVIDENCE**

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The application form requires you to provide a statement setting out the reasons for alleging the circumvention activity is occurring, supported by relevant evidence. Your responses should be made as accurately and as comprehensively as possible, and supporting evidence attached. It will not be sufficient to simply assert that circumvention activity has occurred. Your application may be rejected if it is not adequately supported by evidence.

For the “avoidance of the intended effect of duty” circumvention activity, examples of the types of information to support such a claim may include quotes/prices lists to customers of importers that, over a reasonable period, show that prices have not increased commensurate with the imposition of duties.

Relevant evidence may include market intelligence (again not mere assertions), commercial documentation (including sales negotiation evidence, quotes, invoices, manufacturing certificates, Bills of Lading) obtained from exporters and importers (and assemblers).

You should be aware that if the Commission is not satisfied that there appears to be reasonable grounds for your assertions, or that the claims are insufficiently supported, then the application must be rejected.

Please contact the Commission on the contact details provided in this form for further assistance regarding the evidence necessary to support your application.