



AUSTRALIAN CUSTOMS DUMPING NOTICE NO. 2013/44

Streamlining Policy Amendments to *Customs Act 1901* - Tranche 4

Purpose

The purpose of this Australian Customs Dumping Notice (ACDN) is to notify the general public that the *Customs Amendment (Anti-dumping Improvements) Act (No. 3) 2012* (Customs Improvements Act No. 3) amends the *Customs Act 1901* (the Act). This legislation commences on **11 June 2013**.

The amendments implement the fourth tranche of measures from the Australian Government's '*Streamlining Australia's anti-dumping system – An effective anti-dumping and countervailing system for Australia*' June 2011 Policy (the Streamlining Policy).

Key amendments

The tranche 4 amendments implement the Streamlining Policy by:

- a) amending the provisions dealing with countervailable subsidies to more accurately reflect definitions and operative provisions of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM);
- b) introducing provisions under which the Australian Customs and Border Protection Service (ACBPS) will, if required, conduct inquiries to address the circumvention of trade measures by exporters or importers of goods which are subject to anti-dumping measures;
- c) strengthening the provisions that deal with non-cooperation in anti-dumping investigations, reviews or continuation inquiries; and
- d) other minor amendments to legislative provisions, including extending the definition of interested parties.

The Customs Improvements Act No. 3 and the associated Explanatory Memorandum are available on ComLaw's website at <http://www.comlaw.gov.au>. An updated version of the Act incorporating the amendment will be available on ComLaw's website shortly.

This ACDN should be read in conjunction with ACDN No. 2013/42 and ACDN No. 2013/43 which relate to tranche two and three respectively of Streamlining legislative amendments. ACDNs are available on ACBPS's website at www.customs.gov.au (following the "anti-dumping" hyperlinks).

Dumping and Subsidy Manual

The Dumping and Subsidy Manual (the Manual) will not be updated to incorporate the tranche 4 amendments by the commencement date of these amendments. This reflects:

- the scope of the Manual changes required;
- the complexity of the Streamlining Policy and linkages to the on-going broader reforms to the anti-dumping system (that either are due to be implemented or are currently being considered by the Parliament);
- the commencement of the Anti-Dumping Commission (Commission) from 1 July 2013; and
- the need to undertake an extensive external stakeholder consultation process regarding Manual changes.

The International Trade Remedies Branch (ITRB) has developed a program for Manual updates to incorporate Streamlining Policy and other broader anti-dumping reform amendments (ACDN No. 2013/45 provides further detail). Tranche 4 amendments will be included in the first stage of the Manual amendments, which will be delivered in the second half of 2013.

Tranche 4 amendments

Further details regarding the tranche 4 amendments are provided below.

a) Better align the countervailable subsidy provisions of the Act with the WTO ASCM

This amendment relates to the provisions dealing with countervailable subsidies to more accurately reflect the ASCM. This amendment amends the definition of subsidy in subsection 269T(1), to more accurately reflect the language of Article 1 of the ASCM, and clarify that:

“A subsidy is a financial contribution or income or price support that confers a benefit, whether directly or indirectly, in relation to the goods exported to Australia”.

This amendment also;

- repeals section 269TACC and replaces it with a simplified section which deals with whether a financial contribution or income or price support confers a benefit;
- introduces a new section 269TACD to provide that, where a countervailable subsidy has been received in respect of goods, the amount of the countervailable subsidy is an amount determined by the Minister in writing and that the amount of countervailable subsidy should be worked out by reference to the units of those goods;
- amends section 269TAE to more effectively reflect the ASCM, in particular, amending subsections 269TAE(2A) and (2C) to reflect Articles 15.7 and 15.3 respectively;
- amends section 269TC to enable the Chief Executive Officer (CEO) of ACBPS to include in an investigation a possible countervailable subsidy which was not included in the application for the investigation, if the CEO become aware of the countervailable subsidy during the investigation; and.
- amends subsection 269TDA(14) to allow for the immediate termination of a countervailing duty investigation where the authorities determine that injury is negligible.

This amendment ensures greater consistency of Australia’s subsidy provisions with the WTO ASCM and other international anti-dumping administrations. This amendment also increases the transparency and effectiveness of the anti-dumping system (by facilitating consistent decision making).

Commencement date

These amendments will be effective from the commencement date of the Customs Improvements Act No. 3 (i.e. 11 June 2013). The amendments (excluding those in relation to expanding the scope of the CEO to investigate countervailable subsidies not included in the application) will apply to countervailing investigations, review inquiries and continuation inquiries that are initiated on or after 11 June 2013. The amendments that relate to expanding the CEO’s scope to investigate possible countervailable subsidies not included in the application will apply to countervailing investigations, review inquiries and continuation inquiries:

- that are initiated on or after 11 June 2013; and
- that were initiated before 11 June 2013 but were not complete.

b) Anti-circumvention inquiries

This amendment provides for a new anti-circumvention inquiry process to address prescribed circumvention activities by exporters of goods subject to dumping and / or countervailing notices.

Circumvention is a trade strategy used by the exporters and importers of products to avoid the full payment of dumping and / or countervailing duties. Circumvention behaviours take various forms and exploit different aspects of the anti-dumping system, but they all aim to ensure that the relevant goods do not attract the intended dumping or countervailing duty.

This amendment allows the Minister to amend the original notice imposing dumping or countervailing duty, including by extending the notice so that it applies to different goods, exporters and countries which were not specified in the original notice. The Minister will exercise these powers after considering a report by the CEO regarding alleged circumvention activity that provides reasons as to why the original notice should be altered or remain the same.

ACDN No. 2013/46 provides further details in relation to the new anti-circumvention inquiry process, including details on how to apply for an anti-circumvention inquiry.

This amendment strengthens compliance mechanisms by introducing a framework to specifically prevent the circumvention of dumping and / or countervailing duties. This increases the effectiveness of the anti-dumping system.

Commencement date

These amendments will be effective from the commencement date of the Customs Improvements Act No. 3 (i.e. 11 June 2013). These amendments will apply to subsections 269TG(2) and 269TJ(2) notices published before, on or after the commencement of the new provisions. The conduct that constitutes circumvention activity may have occurred before, during or after the commencement of the new provisions. An application for an anti-circumvention inquiry can be lodged on and from 11 June 2013.

c) Stronger provisions to address non-cooperative parties

This amendment strengthens legislative provisions that deal with non-cooperation of parties in relation to investigations, reviews or continuation inquiries. This amendment also consolidates and clarifies the provisions that deal with sampling in relation to dumping and / or countervailing investigations and inquiries.

Categories of exporters

This amendment introduces three categories of exporters: “cooperative”, “residual” and “uncooperative”, as defined below. The previous “selected” exporter category has been repealed.

Cooperative exporter

A “cooperative” exporter is an exporter of goods that are the subject of an investigation, a review or a continuation inquiry where those goods were examined as part of that process and the exporter was not an “uncooperative” exporter.

Uncooperative exporter

An “uncooperative” exporter is an exporter of:

- goods, that are the subject of an investigation, a review or a continuation inquiry (the relevant process), or
- like goods to those subject to the relevant process,

where the exporter has not cooperated within that process such that the CEO was satisfied that the exporter:

- did not give the CEO information the CEO considered to be relevant to the process within a period the CEO considered to be reasonable; or
- significantly impeded the relevant process.

Residual exporter

A “residual” exporter is an exporter of goods that are the subject of an investigation, a review or a continuation inquiry, where:

- the exporter's exports were not examined as part of the investigation, review or inquiry; and
- the exporter was not an "uncooperative" exporter in relation to the investigation, review or inquiry.

This would typically mean when sampling has been undertaken and the exporter was willing to cooperate in the investigation but was not chosen to be examined.

Setting anti-dumping measures for different categories of exporters

This amendment includes a new section 269TACAB which provides for the Minister in publishing a dumping duty notice to set export prices and normal values for different categories of exporters, namely uncooperative exporters and residual exporters.

This will mean that the Minister will be able to determine:

- individual rates of duty for all cooperative exporters and any uncooperative exporters for whom an individual export price and normal value were calculated (these exporters will be named in the notice);
- a single rate of duty for all residual exporters (these exporters will be named in the notice); and
- a single rate of duty for all other exporters not named in the notice — this will include non-cooperating exporters not covered by an individual rate and new exporters.

This amendment and the categorisation of exporters clarifies the treatment of exporters during an investigation or inquiry and clarifies the Minister's powers to determine different measures for the different categories of exporter. This increases the transparency and effectiveness of the anti-dumping system (through consistency decision making).

Sampling

This amendment includes a new sampling provision, section 269TACAA that consolidates and clarifies the operation of the sampling provisions of the Act. Currently, sampling provisions are located for dumping in subsections 269TACB(7) to 269TACB(9) and for subsidies in subsections 269TACC(8) to 269TACB(9). The new section provides for sampling in relation to both dumping and countervailing notices, and for investigations, reviews and continuation inquiries.

Greater clarity around what constitutes non-cooperation, and the consequences of that, will lead to greater business certainty for all interested parties in dumping and countervailing investigations.

This amendment strengthens the treatment of non-cooperative parties (including exporters of the goods) and will prevent the possible manipulation of the level of cooperation (which previously occurred).

Commencement date

These amendments will be effective from the commencement date of the Customs Improvements Act No. 3 (i.e. 11 June 2013). The amendments will apply to investigations and inquiries that are initiated on or after the commencement of the new provisions (i.e. 11 June 2013).

d) Other amendments

Tranche 4 also makes other minor technical amendments to the Act to clarify and correct existing legislative provisions. In addition, the definition of an "interested party" in respect of an investigation has been extended to include trade unions (representing one or more employees of the Australian industry producing like goods) and downstream manufacturers / users of the goods the subject of an investigation or inquiry and respective like goods.

These amendments clarify existing ACBPS processes and provide increased access to the anti-dumping system to stakeholders that are directly and indirectly impacted on by investigations and imposition of anti-dumping measures.

Anti-Dumping Commission and Anti-Dumping Commissioner

From 1 July 2013, the Commission will commence operations and will be responsible for the administration of Australia's anti-dumping system. This function is currently undertaken by the International Trade Remedies Branch within the ACBPS. The Commission will be a separate Division within the ACBPS.

The Commission will be headed by a statutory Anti-Dumping Commissioner (Commissioner) who will report to the Minister on anti-dumping decisions and to the CEO in relation to financial, recruitment and other administrative matters.

The *Customs Amendment (Anti-Dumping Commission) Act 2013*, which was passed by the Parliament on 14 March 2013, amends the Act to create the Commissioner's role and establishes that the Commissioner will be responsible for the decision-making and anti-dumping related matters that currently reside with the CEO. Any references to the CEO in tranche 4 legislative amendments will be replaced with the Commissioner from 1 July 2013.

ACBPS contact

Enquiries concerning this notice may be directed to the Anti-Dumping Implementation Reform team on telephone number (02) 6275 5965, fax number (02) 6275 6990 or email at itr@customs.gov.au.

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