Australian Government
Anti-Dumping Commission

ANTI-DUMPING NOTICE NO. 2015/129

Reforms to the anti-dumping system

On 2 November 2015, a range of reforms to the anti-dumping system commenced.

The reforms strengthen and modernise Australia's anti-dumping laws to ensure that Australia's manufacturers and producers are competing on a level playing field and that our laws are consistent with Australia's obligations under the World Trade Organization's Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures (WTO agreements).

These reforms were first announced by the Australian Government on 15 December 2014. As many of the reforms required amendment to the anti-dumping provisions of the *Customs Act 1901* (the Customs Act) and the *Customs Tariff (Anti-Dumping) Act 1975*, legislation to amend those provisions and give effect to the reforms was passed by the Australian Parliament on 13 May 2015.[1]

This notice explains the purpose and effect of the legislated and non-legislated reforms on Australia's anti-dumping system.

Single electronic lodgement

To rationalise and modernise processes for dumping and countervailing applications, I may approve the manner of lodging applications made under Part XVB of the Customs Act, and the manner of withdrawing applications made under subsections 269TB(1) or (2). In an instrument published on the Commission's website, www.adcommission.gov.au, I have approved lodgement of applications and withdrawal of subsection 269TB(1) or (2) applications via email, pre-paid post and facsimile only.

An application will be deemed to be lodged when it is first received by a member of the Commission's staff undertaking a role in relation to Part XVB of the Customs Act.

Reforms to anti-dumping investigations and inquiries

Deadline for submissions amended from 40 days to 37 days

To ensure consistency with the WTO agreements, the Customs Act is amended to standardise the submission provisions so that the deadline for submissions following

[1] Part XVB of the *Customs Act 1901* (the Customs Act) was amended by the *Customs Amendment (Anti-Dumping Measures) Act (No. 1) 2015*. The *Customs Tariff (Anti-Dumping) Act 1975* was amended by the *Customs Tariff (Anti-Dumping) Amendment Act 2015*.

the initiation of investigations and inquiries with a standard investigation or inquiry period of 155 days is 37 days rather than 40 days.

Ministerial Directions

The Minister for Industry, Innovation and Science[2] has made two directions to me, the *Customs (Extensions of Time and Non-cooperation) Direction 2015* (Customs Direction) and the *Customs (Preliminary Affirmative Determinations) Direction 2015* (PAD Direction). The Customs Direction and PAD Direction are available on the Comlaw website, www.comlaw.gov.au.

Greater onus on exporters

In the PAD Direction, the Minister directs me to, 60 days after the initiation of a dumping or countervailing investigation, either make a preliminary affirmative determination (in accordance with section 269TD of the Customs Act) or to publish a status report providing reasons why a preliminary affirmative determination was not made.

Enforcement of deadlines for submissions

The Government announced that the relevant Minister would direct me to take a more rigorous approach to enforcing deadlines for submissions and to only agree to extensions when necessary and reasonable. This complements other reforms which reduce the overall timeframe available for providing submissions to 37 days (from the current 40 days), consistent with the World Trade Organization agreements.

The objective of these directions is to ensure that deadlines for submissions are more broadly adhered to so that cases are conducted in a timely and efficient manner, and unnecessary delays are minimised. When considering whether to grant an extension to a deadline for a submission, I must have regard to the matters set out in the Customs Direction.

Extensions of time

I must reject a request from an interested party for a longer period to provide a submission if the request has not been made before the legislated period has ended. When considering a request for an extension of time to lodge a submission, I must have regard to an interested party's reasons for their extension request.

[2] The Minister for Industry, Innovation and Science has delegated responsibility with respect to operational anti-dumping matters to the Parliamentary Secretary to the Minister for Industry, Innovation and Science (Parliamentary Secretary). Although the legislation refers to the 'Minister', while those anti-dumping matters are delegated to the Parliamentary Secretary, the Parliamentary Secretary is the relevant decision-maker.

Insufficient responses

If I receive an insufficient response from an interested party within the legislated period for that response and it has only minor deficiencies, I should notify that party of the deficiencies and request that they be addressed in a further response within a timeframe specified by me.

Considering late responses

If a response is received outside the legislated period, I am directed, when determining whether to have regard to that response, to consider if taking the response into account would delay a key aspect of the case. If it would delay a key aspect of the case, there are a range of factors that I am directed to consider before accepting that response.

Priority is given to my consideration of a preliminary affirmative determination

In accordance with the PAD Direction, in considering whether to have regard to a late submission, I am directed to give priority to the consideration of a preliminary affirmative determination.

Non-cooperative entity/uncooperative exporters

When considering if an entity is non-cooperative or an exporter is uncooperative, I will have reference to the additional matters and clarifications set out in the Customs Direction.

Definition of a “reasonable period”

Specifically, I am directed to consider the legislated period to make submissions to be a reasonable period, for the purposes of the definition of uncooperative exporter in subsection 269T(1), and subsection 269TAACA(1)(b)(i) of the Customs Act.

Uncooperative exporter

I must determine an exporter to be an uncooperative exporter if that exporter fails to provide a response within either the legislated period for a response, or within a longer period allowed by me.

Definition of “significantly impeded”

In determining whether or not an exporter or entity has significantly impeded a case, there are several considerations that I am directed to take into account, such as the acts or omissions of the exporter during the conduct of the relevant case and in other

cases, and any evidence that demonstrates an intention to significantly obstruct or delay the case.

Interpretation of the actions, omissions or responses of interested parties

In undertaking any assessment or consideration of the actions, omissions, or responses of any interested parties in relation to a case, before making any determination, I am directed to take into account:

i. ordinary business practices;
ii. ordinary commercial principles; and
iii. the relevant industry and the way it operates both in Australia and overseas.

Reforms to anti-dumping investigations and inquiries – legislative amendments

Investigation period cannot be changed

To clarify that the length of the investigation period of a dumping and countervailing investigation cannot be varied, provisions in the Customs Act related to the consideration of an application are amended.

This new subsection 269TC(5A) of the Customs Act provides that I cannot vary the length of the time for the investigation period once the investigation period has been specified in a notice under subsection 269TC(4) of the Customs Act. This amendment affects dumping and countervailing investigations that are current as at 2 November 2015, and those that are initiated on or after that date.

Should an investigation commence on the basis of a particular investigation period, it must continue on that basis. This clarification is consistent with the Commission's practice, reduces risks to the timeliness of investigations and improves stakeholder certainty.

Cumulative injury can be considered in termination decisions

This reform provides for the cumulative assessment of injury to the Australian industry (in certain circumstances) when considering whether to terminate an investigation because of negligible injury.

The "cumulative assessment" of injury means to consider the cumulative injurious effect of exports to Australia from two or more countries that are subject to an investigation. That is, an investigation into exports that cumulatively cause injury is

not to be terminated in relation to individual countries, even if the injury from that specific country is negligible. The new legislative provisions will provide that:

- an investigation should continue if I am not satisfied that the cumulative effect of the specified exportations is negligible;
- an investigation is to be terminated if I am satisfied that the cumulative effect of the specified exportations causes negligible injury.

New subsection 269TDA(14B) of the Customs Act sets out the circumstances that I must be satisfied of in order to conduct a cumulative assessment of injury for the purpose of subsection 269TDA(13A) or (14A). To be included in the cumulative effect, the exports must:

- each be the subject of an investigation, with a substantially overlapping or identical investigation period;
- have a dumping margin of at least two per cent and non-negligible volumes (for dumped goods); and/or
- have a non-negligible countervailable subsidy and non-negligible volumes (for countervailable subsidies).

These reforms apply to applications for dumping duty or countervailing duty notices made after 2 November 2015.

Confirming that there is no requirement to consider third country sales before constructing normal values

This reform inserts a new provision into the Customs Act to confirm that the Minister is not required to consider third country sales in subsection 269TAC(2)(d) before constructing normal value under subsection 269TAC(2)(c) of the Customs Act. These provisions are invoked where sales in the export market are not appropriate bases for determining normal values.

This clarification takes advantage of flexibility permitted under the WTO agreements and thereby improves the alignment of Australia's provisions with those of the WTO agreements and is consistent with the Commission's current practice. This amendment will apply to investigations that are initiated and to reviews and inquiries that begin and to applications for duty assessment that are made on or after 2 November 2015.

Amendments relevant to accelerated reviews

<u>Amendment to definition of "new exporter"</u>

To ensure consistency with the WTO agreements, the amendment to the definition of "new exporter" in the accelerated review provisions provides for exporters who did not export relevant goods during the investigation period but who can show they have since exported or will export, to apply for accelerated reviews. This aligns with the purpose of the accelerated review, which is to enable those who did not export during the investigation period and who are not related to the exporters or foreign producers subject to measures to access an individual dumping margin.

The definition of a new exporter is now broader than it was previously was, and includes all exporters who did not export during the investigation period.

Amendment to subsections 269ZE(1), 269ZG(1)(b) and 269ZG(3)(b) of the Act

This reform amends the Customs Act to remove my ability to recommend, and the Minister's ability to declare, that a dumping duty notice or countervailing duty notice not apply to the applicant. The range of outcomes available following the completion of an accelerated review have been limited to the measures as they apply to the new exporter remaining unaltered, or being altered so as to apply to the applicant as if different variable factors had been fixed. Accelerated reviews can no longer provide an outcome whereby a new exporter would no longer be subject to measures.

Amendment to subsection 269ZH(a):

This amendment clarifies that if an application for the specified accelerated review has been lodged then interim dumping and countervailing duty cannot be collected in respect of consignments of goods to which such applications relate.

These amendments apply to applications for accelerated review made on or after 2 November 2015.

Clarify investigation period for calculating dumping margin

Subsection 269TACB(2A)(a) of the Customs Act is amended by omitting '2 months' and substituting '1 month'.

This amendment means that parts of the investigation period of a dumping investigation, considered for the purposes of working out whether dumping has occurred and the levels of dumping, are not less than one month. The amendment clarifies that in calculating a single dumping margin for the good over the entire investigation period, the normal values and export prices of different models or types of that good can be compared over separate one month periods prior to aggregation.

This amendment is intended to enable a more flexible approach when working out whether or not dumping has occurred and the level of dumping, where a comparison of part of an investigation period is considered appropriate. This amendment applies to applications for a dumping duty or countervailing duty notice made on or after 2 November 2015.

Determination of injury for investigation period

A new provision is added to the Customs Act to clarify that although periods prior to the investigation period can be examined for the purpose of determining whether material injury has been caused, a finding of dumping cannot be made in relation to goods exported prior to the investigation period. This new provision applies to investigations that are initiated, or to reviews or inquiries that begin, on or after 2 November 2015.

Five year measures period

To ensure consistency with the WTO agreements, the Customs Act is amended to ensure that a measure expires five years after the date of the original notice for that measure, irrespective of whether the form of the measure had changed within that five-year period.

This ensures the total period that anti-dumping or countervailing measures apply (unless a continuation inquiry is completed) is five years. This reform will prevent a country or exporter from being subjected to measures for longer than five years without being subject to a continuation inquiry. This amendment applies to an undertaking that is accepted on or after 2 November 2015.

Change to publication requirements

To modernise and simplify the publication of notices, they will now be published electronically on the Commission's website, www.adcommission.gov.au. This reform is consistent with the Commission's practice of maintaining an electronic public record and will allow interested parties to view all relevant information, including public notices, in one place.

Similar changes have been made to the manner of publication of the Anti-Dumping Review Panel's (ADRP) public notices. Instead of being published in a newspaper, the ADRP's notices will be published on the ADRP website, www.adreviewpanel.gov.au.

After the ADRP completes a review and submits a report to the Minister, the Minister's decision to affirm the original decision or to revoke that decision and substitute a new decision will be notified on the ADRP's website. These amendments apply to notices made on or after 2 November 2015.

Exemptions from duty

The *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) will be amended to clarify that the Minister may grant exemptions with limited retrospective effect.

If the Minister decides to exempt certain goods from duty under section 8 or 10 of the Dumping Duty Act on or after 2 November 2015, the exemption from duty must not commence earlier than the day that the applicant submitted an application for exemption.

The reform will confirm the ability of the Minister to retrospectively refund duties paid on imported goods if the exemption commences earlier than the date it is made. This reform will apply to exemptions from duty that are made on or after 2 November 2015.

Reforms to the ADRP

All of the reforms to the ADRP described below apply to reviewable decisions made on or after 2 November 2015, except for the amendment relating to withdrawal of applications, which applies to applications made to the ADRP on or after 2 November 2015.

Revised criteria for review applications

Grounds for review

Applications for review must now include:

(a) a statement setting out the grounds on which the applicant believes the reviewable decision is not the correct or preferable decision;
(b) the decision that the applicant considers the Minister should have made (the proposed decision);
(c) an explanation of how the grounds referred to in paragraph (a) above support the making of the proposed decision; and
(d) for certain decisions, a statement setting out how the proposed decision is materially different from the reviewable decision.

This is to ensure that applicants for review carefully consider the grounds they put forward, and that those grounds support making of the applicant's proposed decision

and that the differences between the proposed decision and the reviewable decision are clear. If the ADRP is not satisfied that this information has been provided, the ADRP may request further information from the applicant.

The ADRP will consider whether the differences between the proposed decision and the reviewable decision are important, essential and relevant. The ADRP will only make recommendations to the Minister in relation to reviewable decisions if the new decision is materially different to the reviewable decision.

Rejection of applications

The ADRP may reject applications for review for a broader range of reasons following the reforms. The ADRP may reject individual grounds for review if the ADRP does not believe that they are reasonable grounds for the reviewable decision not being the correct or preferable decision, and the ADRP may reject applications that do not provide all of the required information. This is to ensure that the ADRP is only considering serious and meritorious reviews.

Withdrawal of applications

An applicant for review may also withdraw that application, if the withdrawal is in writing and is lodged in the manner prescribed by a Senior Member of the ADRP.

Introduction of fees

The Customs Act has been amended to introduce a fee to apply for a review by the ADRP. The amount of the fee will be prescribed by legislative instrument. The fee may be partially refunded or waived in certain circumstances, such as when an application is withdrawn before the ADRP begins to conduct the review.

The Minister has prescribed a fee of $10,000 for applications brought by a large business or Government of a country, and $1,000 for all other applicants. Small and medium-sized businesses will be eligible for the lower application fee. The Minister's legislative instrument is available on the Comlaw website at www.comlaw.gov.au.

Commissioner may participate in reviews

When reviewing decisions of the Commissioner, the ADRP may request, and have regard to, information that was before the Commissioner when the Commissioner made that decision. In addition, the Commissioner is now permitted to make submissions to the ADRP in relation to a review. The purpose of these amendments is to allow the ADRP to access the expertise of the Commission in a transparent manner, and to assist the ADRP to conduct an efficient and robust review.

Introduction of a preliminary conferencing stage

At any time after receiving an application for review, the ADRP may hold a conference for the purpose of obtaining further information in relation to the application for review. This will assist the ADRP to conduct an efficient and robust review.

If the ADRP decides to hold a conference after receiving an application and before beginning the review, the ADRP must invite the applicant. If the applicant does not attend the conference and does not have a reasonable excuse for not attending, the ADRP may reject the application.

If a conference is held in relation to an application for review of the Minister's decision, or a decision by the Commissioner to terminate an investigation, a non-confidential summary of the further information obtained in the conference must be placed on the ADRP's public record.

The ADRP may have regard to information obtained in the conference when making its decision, as well as conclusions reached at the conference based on information that was before the Commissioner when the Commissioner made the reviewable decision.

Enquiries

Enquiries about this notice may be directed to the Commission's client support team on telephone number 13 28 46, fax number 03 8539 2499 or email on clientsupport@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

02 November 2015