

Explanatory Statement

Customs Act 1901

Customs (Extensions of Time and Non-cooperation) Direction 2015

Made by the Minister for Industry, Innovation and Science

Purpose and Operation

The *Customs (Extensions of Time and Non-cooperation) Direction 2015* ('the Direction') is made under subsection 269TA(1) of the *Customs Act 1901* ('the Act').

The Direction is a disallowable instrument for the purposes of the *Legislative Instruments Act 2003*.

The purpose of the Direction is to direct the Commissioner of the Anti-Dumping Commission ('the Commissioner') as to the general principles for carrying out or giving effect to the Commissioner's powers relating to:

- granting extensions of time for responses from interested parties (in relation to sections 269TC and 269SMG of the Act); and
- determining whether certain parties are not cooperating (in relation to sections 269T, 269TAACA and 269SMG of the Act).

Unless otherwise noted, the terms used in this Explanatory Statement are the same as those defined in the Direction.

The objective of the directions in sections 5-7 is to ensure that deadlines for submissions more broadly are adhered to and do not prevent the investigation proceeding expeditiously. The objective of the directions in sections 8-10 is to provide the Commissioner with clearer guidance on the matters which should be considered when determining whether a party is 'uncooperative' under the Act and to ensure that non-cooperation does not unnecessarily impact the timely and efficient conduct of a case.

In making this Direction, the Government acknowledges the value of a system that operates transparently and one in which parties have opportunities to defend their interests throughout the various stages of a case, by providing relevant information within a reasonable timeframe. The Government acknowledges that extensions will sometimes be necessary in order for a party's interests to be appropriately accounted for and that each request for an extension should be fully considered. The Government also acknowledges that there will be occasions where parties, acting in good faith, will provide information which is not wholly relevant or not fully supported, and that opportunities should be provided to address these deficiencies, if that is consistent with the timely and efficient conduct of the case.

Authority

Under subsection 269TA(1) of the Act, the Minister may give the Commissioner directions in

connection with carrying out or giving effect to the Commissioner's powers and duties.

Consultation

These reforms address concerns expressed to the Government by a number of Australian businesses which have been involved in the anti-dumping system. These concerns have been raised in a number of consultative processes, such as the recent Senate Economics Legislation Committee inquiry on the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015* and the *Customs Tariff (Anti-Dumping) Amendment Bill 2015*.

Regulatory Impact

This Direction has a negligible regulatory impact (see the Explanatory Memorandum to Customs Amendment (Anti-Dumping Measures) Bill (no. 1) 2015).

Background

On 15 December 2014, the Government announced a package of reforms to implement its remaining anti-dumping election commitments from 2013 and other changes to improve Australia's anti-dumping and countervailing duty system.

Under the Act, parties have various opportunities to provide the Commissioner with responses providing information or representing their interests. The Government's announcement indicated that the Commissioner would be directed to take a more rigorous approach to enforcing deadlines for submissions and to only agree to extensions when necessary and reasonable. This complements other Government reforms which seek to reduce the overall timeframe available for providing submissions to 37 days, consistent with the World Trade Organization (WTO) agreements, including the *Customs Amendment (Anti-dumping Measures) Act (No. 1) 2015*.

Additionally, various provisions of the Act relate to 'non-cooperation' by certain parties in certain circumstances. For example, under subsection 269T(1) of the Act, an exporter is uncooperative if the Commissioner is satisfied that the exporter failed to provide relevant information in a reasonable period; or if the Commissioner is satisfied that the exporter significantly impeded the conduct of the case. The consequences of such a determination can be significant. For example, if an exporter is considered uncooperative, the Act prescribes certain methods for calculating that exporter's normal value and export price, which may result in a higher duty rate than other exporters. The Government's announcement also indicated that the Commissioner would be directed on the circumstances in which the relevant Minister would be satisfied that an exporter is uncooperative.

These reforms address concerns expressed by a number of Australian businesses which have been involved in the anti-dumping system. The Government believes that these reforms will encourage all parties to provide prompt and full responses to the Commissioner and cooperate more fully in anti-dumping and countervailing duty cases to improve the efficiency of Australia's anti-dumping system. These reforms are consistent with the principles of transparency which underpin Australia's anti-dumping system. The Government believes

they strike a balance between providing practical guidance to the Commissioner on the exercise of relevant powers and obligations under the Act, while ensuring that the Commissioner continues to consider each decision on its merits and take into account considerations which are relevant to the particular case.

Detailed explanation of the Direction

1. Name of instrument

This section sets out the title of the Direction

2. Authority

This section provides that the Direction is made under subsection 269TA(1) of the *Customs Act 1901*.

3. Commencement

This section provides that the Direction commences on commencement of Schedule 1 of the *Customs Amendment (Anti-Dumping Measures) Act (No.1) 2015*.

4. Definitions

This section sets out the definitions for key terms used in the Direction.

5. Extensions of time – sections 269TC and 269SMG

Section 5 stipulates issues the Commissioner must take into account when considering extension of time requests.

The Commissioner has the power to extend the period within which parties can lodge their responses and must consider all requests for extensions on their merits. The Commissioner must take into account all relevant considerations and evidence, the specific decision-making and other criteria set out in the Act, and the broad obligation to conduct cases in a timely and efficient way.

Subparagraph 5(b)(iii)(1) requires that a party should provide the reasons it could not lodge within the original timeframe set by the Commissioner or under the Act, rather than providing only the reasons it cannot lodge a response in the time which remains. For example, a party might request an extension two days before the deadline noting that it is not able to draft a sufficient response in two days. However, to satisfy the Commissioner, the party should also explain why it was unable to draft a response in the preceding weeks.

Subparagraph 5(b)(iii)(2) requires that when considering the reasons provided by parties, especially businesses, the Commissioner must consider ordinary business practices and commercial principles. For example, if the reason provided by a party was simply that it had

poor administrative practices that may not constitute a sufficient reason. The Commissioner will critically evaluate and consider the reasons provided by the party, including taking account any difficulties experienced by the party, especially small businesses with limited resources.

Subparagraph 5(b)(iii)(3) requires that when considering the reasons provided by a party, the Commissioner must take into account the relevant industry and the way it operates both in Australia and overseas. The Commissioner may form this understanding through the conduct of the investigation, experiences dealing with local or overseas businesses and experts in that industry, or through other legitimate avenues. For example, if the reason provided by one business is inconsistent with the information provided by other businesses in the same country and industry, it may not constitute a sufficient reason. In contrast, if the reason was a recent natural disaster which disrupted the industry at a national level, then this may constitute a sufficient reason.

Subparagraph 5(b)(iii)(4) requires that when considering the reasons provided by a party, the Commissioner must take into account any information provided in previous correspondence from the party, previous dealings with the party, or information provided by other parties. For example, if a letter from a party to one of its customers sets out a position or facts which are different to the position or facts in its request to the Commissioner, this may mitigate the Commissioner's capacity to be satisfied that a longer period is reasonably required.

6. Insufficient responses – section 296SMG

There may be cases where a party's response to the Commissioner is on time, but does not contain all the relevant information required by the Commissioner. For example, a party which has not been involved before in an investigation process may not fully understand the requirements of the investigation or relevant questionnaires.

Subsection 6(a) relates to minor deficiencies (being deficiencies which the Commissioner believes could be addressed quickly and easily by the party). The Commissioner will provide the party with an opportunity to address them. For example, if a business provides answers to a questionnaire which contains financial information but the evidence supporting the information is insufficient or incomplete, the Commissioner may request that the party provide the additional evidence if it can be easily produced from the business' records.

The Commissioner will set a reasonable timeframe for providing the additional response, which will take into account any explanation given by the party and the time already provided to the party to respond.

Providing a further opportunity to provide supplementary material does not preclude the Commissioner from being satisfied that an exporter or other party has significantly impeded an investigation under subsection 269T(1) or section 269TAACA of the Act.

The Commissioner is not required to provide the party with a further extension of time. In fact, in the ordinary course of an investigation, a request for an extension will only be considered if it is made in writing by the party (as set out earlier).

In some cases, the Commissioner may form the view that a response contains a minor deficiency, but an additional response is not necessary to the proper conduct of the case. For example, the additional information may be readily available to the Commissioner from other sources. In that case, the Commissioner may choose not to invite a further response from the party.

Subsection 6(b) relates to major deficiencies (being deficiencies which the Commissioner believes could not be addressed quickly and easily by the party). The Commissioner will notify the party of this view as soon as practicable. For example, in investigations covering both allegedly dumped and subsidised goods, a party's response would have a major deficiency if it only addresses questions relating to one of these matters rather than both.

The Commissioner may provide the party with an opportunity to provide a supplementary response to address a major deficiency, although the party is able to provide an additional response in any case if it chooses. In determining whether or not to provide further time for a party to provide a response, the Commissioner may consider – among other things – the nature and scope of the deficiency, the obligation to conduct cases in a timely and efficient manner and to avoid unnecessary delays, and the specific obligations imposed under the Act in relation to considering parties' responses.

If the Commissioner does allow the party an opportunity to provide a supplementary response, it does not preclude the Commissioner from being satisfied that the party has significantly impeded an investigation under subsection 269T(1) or section 269TAACA of the Act.

7. Considering late responses

In line with relevant provisions in the Act, the Commissioner is not obliged to consider late responses if that would delay a key aspect of the case. This is consistent with the obligation to conduct cases in a timely and efficient manner and to avoid unnecessary delays. For example, subsection 269TD(3) says that the Commissioner is not obliged to have regard to submissions received after a specified deadline if to do so would, in the Commissioner's opinion, prevent the timely consideration of a preliminary affirmative determination.

Paragraph 7(b)(i) requires that when making a decision whether to consider a late response or not, the Commissioner must consider the period remaining before the next key aspect of the case and the resources required to consider and address the response before that key aspect.

Paragraph 7(b)(ii) recognises that the information provided in parties' responses is variable and can range from clearly articulated data which is easy to use and understand to ambiguous or incomplete data which can be difficult to interpret. Additionally, the size of the data provided in responses is variable and depends on the party, the goods under consideration, the

timeframe covered in the response and other factors. Conventionally, large amounts of ambiguous data will require greater resources and could lead to significant delays.

Paragraph 7(b)(iii) similarly recognises that responses may include parties' views, assertions or proposals. To verify them requires varying degrees of additional questioning, research, information from third parties or specific expertise. This can be resource intensive and time consuming and could lead to delays.

Paragraph 7(b)(iv) anticipates that when responses are provided outside the timeframe set by the Commissioner or under the Act, a party will usually provide reasons which explain why the response is late. When considering the reasons provided by a party, the Commissioner must consider the matters referred to in the above directions, such as ordinary business practices and commercial principles, the Commissioner's understanding of the industry and the way it operates, and previous responses or information provided by the party.

8. Relevant information– subsection 269T(1)

It is a matter for the Commissioner as to whether the Commissioner is satisfied that the period within which the party provided a response is reasonable. However, the Act itself often regulates, in some way, the period for providing responses to the Commissioner. For example, paragraph 269TC(4)(c) provides a maximum period for interested parties to provide their initial submissions in a case, and paragraph 269TC(4)(e) provides a different maximum period for responses to a statement of essential facts.

Subsection 8(a) makes it clear that the Commissioner has provided a reasonable period for providing a response if that period complies with the various periods set out in the Act.

Subsection 8(b) requires that a party's response must not only be received within a reasonable period, but must also contain relevant information. Some parties may choose not to respond, in which case it is clear that the party has not provided any relevant information.

While the majority of responses which are received by the Commissioner contain relevant information, sometimes there will not be a sufficient degree of relevant information. The specific test for these responses, as set out in the Act, is whether the Commissioner is satisfied that the party did not give the Commissioner information which the Commissioner considers relevant to the case. Consequently, if in the Commissioner's opinion, information which is relevant to the case is missing, then the Commissioner could be satisfied that the party is uncooperative (noting earlier directions relating to deficiencies in parties' responses). The Commissioner must consider each decision on its merits, especially given the potential outcomes for exporters. In particular, the Commissioner must consider not simply whether the information was relevant but whether the information was 'relevant to the case', which includes taking into account the degree to which information has or has not been provided as well as the nature of the information. For example, if a party has failed to provide an answer to a question in a questionnaire which is central to the case, then this may, of itself, be enough for the Commissioner to be satisfied that the party did not provide information which was relevant to the case. In contrast, if the party failed to provide an answer to a simple

question, and the answer is readily available to the Commissioner from another source, then this may not, of itself, be enough to satisfy the Commissioner that the party did not provide information which was relevant to the case.

9. Relevant information – subsection 269TAACA

The details provided above in relation to section 8 of the Directions also apply to section 9 and the Directions provided regarding the provision of relevant information under subsection 269TAACA of the Act.

10. Significantly impeded – subsection 269T(1) and section 269TAACA

‘Significantly impeded’ is not specifically defined by the Act. However, the term ‘significantly’ requires there to be a serious degree of impediment, whether that takes the form of actions which have or would have the effect of creating delays, misinformation or ambiguous information, actions or inaction, or some other form.

Subsection 10(a) requires the Commissioner to consider, as a starting point, any responses which have been provided by the party. The Commissioner should consider not only the information which has been provided but information which has been omitted. For example, if a party provides falsified commercial information that might, of itself, be sufficient reason for the Commissioner to be satisfied that the party significantly impeded the investigation.

Subsection 10(b) requires the Commissioner to consider the available material holistically. The Commissioner is not required to establish the intention of the party, but can draw conclusions from all the available material. In some cases, the Commissioner may discern a pattern of behaviour which has or would have the effect of significantly impeding a case. Conversely, a single response or action may be ameliorated when placed in the context of all the available material. For example, a party may significantly impede an investigation by routinely providing incomplete information which requires amendment or follow-up by the Commissioner.

Subsection 10(c) requires the Commissioner to take into account material which evinces an intention to significantly obstruct or delay a case, even though the Commissioner is not required to establish an intention. The material may not be conclusive of itself, but should be considered as part of a broader range of matters. The Commissioner is required to take into account material which is relevant to the case, even if it is not provided directly by the party. For example, if a party has sent correspondence to an importer or other party which expresses an intention to impede a case, then the Commissioner may consider this when determining whether or not the exporter has significantly impeded a case.

11. General powers – section 269SMG

In some instances, the legislative source of the Commissioner’s power may be section 269SMG, which provides that the Commissioner has the power to do all things necessary or convenient to be done in connection with the performance of the Commissioner’s functions.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Customs (Extensions of Time and Non-cooperation) Direction 2015

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Direction is to direct the Commissioner of the Anti-Dumping Commission ('the Commissioner') as to the general principles for carrying out or giving effect to the Commissioner's powers relating to:

- granting extensions of time for responses from interested parties (in relation to sections 269TC and 269SMG of the Act); and
- determining whether certain parties are not cooperating (in relation to sections 269T, 269TAACA and 269SMG of the Act).

Human rights implications

This Direction does not engage any of the applicable rights or freedoms.

Conclusion

This Direction is compatible with human rights as it does not raise any human rights issues.

The Hon Christopher Pyne MP
Minister for Industry, Innovation and Science