

Explanatory Statement

Customs (Preliminary Affirmative Determinations) Direction 2015

Made by the Minister for Industry, Innovation and Science

Purpose and Operation

The *Customs (Preliminary Affirmative Determinations) 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 as to the general principles for carrying out or giving effect to the Commissioner's powers relating to the making of a preliminary affirmative determination under section 269TD of the Act.

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

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, including the Senate Economic Legislation Committee inquiry on the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1)* 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.

The announcement indicated that the Anti-Dumping Commissioner would be directed to, wherever possible, impose provisional measures at day 60 of an investigation. Under the Act, provisional measures can only be imposed once a preliminary affirmative determination has

been made by the Commissioner and a preliminary affirmative determination cannot be made earlier than the 60th day of the investigation.

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 improve the provision of timely relief to an injured Australian industry; and that these reforms will encourage parties, especially overseas exporters, to provide prompt and full responses to the Commissioner.

It is the Government's intention that, when provisional measures are not imposed, the Commissioner will publish a Status Report outlining why a preliminary affirmative determination was not made at that time. This will assist parties to identify information which is relevant to the investigation. This does not preclude a determination being made later.

Detailed explanation of the Direction

1. Name of Instrument

This section outlines 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. Application

This section outlines the investigations to which the Direction applies.

5. Definitions

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

6. Provision of preliminary affirmative determination or Status Report

Section 6 requires that on a date that is 60 days after the initiation of an anti-dumping or countervailing duty investigation, the Commissioner must either make a preliminary affirmative determination or publish a Status Report.

In order to meet the standard required to make a preliminary affirmative determination, in line with subsection 269TD(1) of the Act, there must be more than the mere existence of grounds. The Act requires the Commissioner to be satisfied that the grounds appear to be

‘sufficient’. However, the standard is not so high that it requires the Commissioner to be unequivocally satisfied that there are sufficient grounds for publishing a dumping or countervailing duty notice.

As part of a Status Report, the Commissioner must indicate any further information the Commissioner requires to make a preliminary affirmative determination, where relevant.

The report shall be published on the public record, available through the Anti-Dumping Commission’s website.

If the Commissioner publishes a report, it does not preclude the Commissioner from subsequently making a preliminary affirmative determination, providing the Commissioner has reached the requisite level of satisfaction required by subsection 269TD(1).

7. Relevant matters – paragraph 269TC(2)(b)

Section 7 stipulates that, while always operating according to the legislative requirements in the Act, the Commissioner should consider, as a relevant matter, a key objective of the Government’s reforms, namely, the desirability of providing relief to an injured Australian industry, where warranted, as quickly as possible.

8. Considering late responses – section 269TD(3)

While always operating according to the legislative requirements in the Act, this Direction ensures that when having regard to a late submission, the Commissioner’s consideration of a preliminary affirmative determination is treated as a priority during the investigation process.

9. Reconsideration of making a preliminary affirmative determination – section 269TDAA

Section 269TD precludes the Commissioner from making a preliminary affirmative determination earlier than 60 days after the date of initiation of an investigation. However, the Commissioner is not limited to making a determination at or around that point. The Act envisages that the Commissioner can make a determination at some later point in the investigation. At a practical level, there may be more or better information available to the Commissioner later in the investigation. This Direction instructs the Commissioner to reconsider making a preliminary affirmative determination at some later point in the investigation, taking into account any further information received by the Commissioner, prior to the publication of the Statement of Essential Facts. The Commissioner must apply the test in subsection 269TD(1), namely, the Commissioner must be satisfied that there either appear to be sufficient grounds for the publication of a dumping or countervailing duty notice in respect of the goods described in the Australian industry’s application, or it appears there will be sufficient grounds after the importation of those goods into Australia.

Statement of Compatibility with Human Rights

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

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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 as to the general principles for carrying out or giving effect to the Commissioner's powers relating to the making of a preliminary affirmative determination under section 269TD 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.

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Minister for Industry, Innovation and Science