



Australian Customs and Border Protection Service Practice Statement

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SUBJECT: Tariff Concession System (TCS)
PURPOSE: To explain the purpose of the Tariff Concession System, and to provide a summary of the legislation and key features of the TCS

APPROVING OFFICER: National Director Trade and Compliance
CATEGORY: Operational Procedures
CONTACT: Tariff Concessions – (02) 6275 6041

SUMMARY OF MAIN POINTS

This Practice Statement outlines:

- The objectives of the Tariff Concession System (TCS);
- The processes used by Customs and Border Protection Service for decisions relating to Tariff Concessions Orders (TCOs);
- The requirements of Customs and Border Protection Service and the applicant's obligations; and
- The review processes available.

The electronic version published on Customs and Border Protection's website is the current Practice Statement.

STATEMENT

Introduction Statement:

The purpose of this Practice Statement is to ensure that Customs and Border Protection Service staff, importers, brokers and Australian manufacturers are aware of the policy objective, legislative basis and operational procedures for the TCS.

CONTEXT AND SCOPE

This Practice Statement summarises the processes that enable Customs and Border Protection Service to assess a TCO application under the *Customs Act 1901* (Customs Act) and the *Customs Regulations 1926* (Customs Regulations). These include:

- applying for a TCO;
- objecting to a TCO;
- making a TCO;
- reviewing a TCO; and
- revoking a TCO.

Policy Objectives

The TCS exists to assist industry to become more internationally competitive, and to reduce costs to the community by the removal of customs duty where there is no local industry producing substitutable goods.

The TCS is also used to assist Australian industry participation requirements for private sector investment projects that access the Enhanced Project By-law Scheme.

Customs and Border Protection Service Role

Customs and Border Protection Service's objective with respect to the TCS is to:

- achieve the Government's policy objective by administering the TCS in an efficient and effective manner, and
- make well reasoned and documented decisions.

Procedural Statement

Who makes decisions under the TCS?

The Chief Executive Officer of Customs and Border Protection Service (CEO) has the power to make decisions under the TCS. The CEO has delegated certain Customs and Border Protection Service officers to make decisions in respect of the TCS. Therefore, references to the CEO in this practice statement should be understood as also being references to Customs and Border Protection Service officers to whom the CEO has delegated his powers.

Where are the statutory provisions establishing the TCS?

The CEO administers the TCS under Part XVA of the Customs Act and r.185 and Schedule 2 of the Customs Regulations. This Practice Statement and any associated *Instructions and Guidelines* will also provide guidance to applicants and delegated TCO officers in the processing of TCO applications.

What is a TCO?

A TCO is a written order made by the CEO declaring that the goods the subject of the TCO application are goods to which a 'prescribed item' specified in the order applies (s.269P(3)). A 'prescribed item' means an item in Schedule 4 to the Customs Tariff Act 1995 which can apply to goods the subject of a TCO (s.269B).

When may a TCO be granted?

A TCO may be granted if the CEO is satisfied that the TCO application meets the 'core criteria' (s.269F(1)).

What are the 'core criteria'?

A TCO application will meet the core criteria if no 'substitutable goods' (s.269B) are 'produced in Australia' (s.269D) in the 'ordinary course of business' (s.269E) on the day on which the TCO application is lodged (s.269C).

What are 'substitutable goods'?

Substitutable goods are goods 'produced in Australia' which are capable of being put to a use corresponding to a use (including a design use) to which the imported goods can be put (s.269B). Whether or not the goods produced in Australia compete with the imported goods in any market is an irrelevant consideration ((ss.269B(3)).

When are goods 'produced in Australia'?

Goods are produced in Australia if the goods are wholly or partly manufactured in Australia, and not less than 25% of the factory or works costs of the goods is represented by the sum of the value of Australian labour, the value of Australian materials, and the factory overhead expenses incurred in Australia in respect of the goods.

In addition, goods are taken to have been wholly or partly manufactured in Australia if at least one substantial process in the manufacture of the goods was carried out in Australia.

When are goods produced in the ordinary course of business?

Goods (other than made to order capital equipment) are taken to be produced in Australia if they have been produced in the 2 years before the application is lodged; or they have been produced in Australia and are held in stock; or they are produced in Australia on an intermittent basis and have been produced in the previous 5 years; and a producer in Australia is prepared to accept an order to supply them.

Goods that are made-to-order capital equipment are taken to be produced in Australia if the producer in Australia has made goods requiring the same labour skills, technology and design expertise as the substitutable goods in the two years before the application was lodged; and could produce substitutable goods using existing facilities; and are prepared to accept an order to supply the substitutable goods.

When must the CEO refuse an application regardless of whether it meets the core criteria?

The CEO must refuse an application for a TCO if the TCO would be contrary to an international agreement (s.269SK).

The CEO must not make a TCO for goods that are listed on the Excluded Goods Schedule (see r.185 and Schedule 2 to the *Customs Regulations 1926*). The CEO also must not make a TCO where the goods are described in non-generic terms, or are described in terms of their intended end use (s.269SJ(1)).

What are the requirements for a valid TCO application?

An application for a TCO must be submitted on an approved form (Application for a Tariff Concession Order (TCO) - B443). The application must contain the information required by the approved form. It must be dated, and must be signed in the manner indicated in the form (s.269F(1)).

The application must contain a full description of the goods to which the application relates (s.269F(3)(a)). Therefore, the CEO will not process an application for a TCO where there is no Illustrative Descriptive Material (IDM) or the IDM is illegible or irrelevant.

The application must also contain a statement of the tariff classification that, in the opinion of the applicant, applies to the goods (s.269F(3)(b)). The goods covered by an application must fall within a single tariff classification.

The application must disclose all information that an applicant has, or can reasonably be expected to have, about Australian manufacturers of substitutable goods, or potentially substitutable goods. The applicant must also provide details of the nature of all inquiries made by the applicant to establish that there are reasonable grounds for asserting that there are no producers in Australia of substitutable goods. (s.269FA). The CEO will not process an application for a TCO where the applicant has not provided evidence of a search for local manufacturers of substitutable goods.

The following prescribed organisations, listed in r.179A of the *Customs Regulations 1926*, can assist with TCS inquiries (fees may be charged):

- *Industry Capability Network Limited;*
- *Industry Capability Network (NSW) Ltd;*
- *Industry Capability Network (Victoria) Limited;*
- *Industry Capability Network (Queensland);*
- *Industry Capability Network Western Australia (ICNWA);*
- *Industry Capability Network South Australia (ICNSA);*
- *Industry Capability Network Tasmania (ICNTAS);*
- *Industry Capability Network (ACT);*
- *Northern Territory Industry Capability Network (NTICN).*

Further information is available from www.icn.org.au.

An application that does not provide the information required by the application form must be rejected (s.269H(1)). An applicant may withdraw a TCO application at any time up until the TCO is made (s.269G).

What are the responsibilities of TCO applicants?

The TCO applicant has a responsibility to establish, that on the basis of all available information held, or that could be expected to be held and all enquiries made, or that could be expected to be made, by the applicant, there are reasonable grounds for asserting that there are no substitutable goods produced in Australia (s.269FA).

In complying with s.269FA, the applicant is expected to consider all available information on the presence of substitutable goods, including information obtained by the applicant through procurement activities, membership of industry associations, attendance at industry events or other industry experience.

The applicant is also expected to undertake inquiries to identify potential Australian producers of substitutable goods in addition to those already known. Where the applicant does not contact prescribed organisations or relevant industry associations representing the bulk of potential Australian producers of substitutable goods, the applicant is expected to provide reasons for not doing so, and to use at least three other independent sources likely to reveal substitutable goods. These sources may be,

- A trade directory search, such as Kompass;
- Internet search engine, such as Google;
- Relevant industry association webpage search;
- Yellow Pages

The applicant is also expected to write to all potential Australian producers of substitutable goods providing advice that the applicant intends to apply for a TCO and seeking advice on whether the producer manufactures substitutable goods in Australia. Enquiries to potential local producers of substitutable goods must allow adequate time for the manufacturer to consider the inquiry and respond. A period of 10 working days for response by potential local manufacturers is considered an adequate period by Customs and Border Protection Service. All inquiries must be completed prior to application lodgement.

Where an applicant identifies potential Australian producers, the applicant must provide reasonable grounds for asserting that there are no substitutable goods produced in Australia in the ordinary course of business, and evidence supporting those grounds.

Where a TCO application is accepted but further information is requested by Customs and Border Protection Service during the processing phase, applicants will have five calendar days to respond.

What may the CEO do during the screening period if an application does not meet the statutory requirements?

The screening period for a TCO application commences on the day after the TCO is lodged and ceases at the end of the period of 28 calendar days (including that day - see s.269H and s.36 of the *Acts Interpretation Act 1901*).

Where an application as lodged does not satisfy the requirements of s.269F, the CEO may seek further information if the provision of the information would mean that the application would comply with s.269F. Because the CEO must decide by the end of the screening period whether the application complies with s.269F, the CEO will request any further information quickly and seek responses within 5 calendar days of the receipt of the request.

If the CEO is satisfied that a TCO application is accepted, the CEO must notify the applicant in writing that the application has been accepted as a valid application. If at that time the CEO is not satisfied that the application is a valid application the CEO must notify the applicant that the application has been rejected.

Where the CEO rejects an application under the provisions of s.269H, or the applicant withdraws an application, and the applicant subsequently re-lodges it, the operative date of any TCO will be the date on which the subsequent application was lodged, not the date on which the initial, invalid application was lodged.

How does the CEO notify the public of the application?

Where the CEO has accepted an application he/she must publish a notice in the *Commonwealth of Australia Tariff Concessions Gazette (Gazette)* (s.269K). The *Gazette* notice date will mark the commencement of the 150 day period allowed for determining an application (s.269P(2)).

The notice must state that the application has been lodged, identify the applicant, the operative date, and provide a description of the goods to which the application relates which has been accepted by the CEO. It must also include a reference to the tariff classification that, in the opinion of the CEO, applies to the goods. (In some cases this may be a different classification to that nominated in the application.)

The notice also invites the public to make any submissions in relation to the application within 50 days of the gazettal date.

The tariff classification of the goods can be amended at any time after initial publication of the notice in the *Gazette* and before the TCO is made. These amendments occur, where the Customs Tariff has been amended, or in response to a court or AAT decision, or because of the written advice of a Customs officer (s.269N).

Objecting to a TCO

Which local manufacturers may oppose the granting of a TCO?

Any local manufacturer which considers that it produces substitutable goods in the ordinary course of business may make a submission to the CEO to that effect.

How do local manufacturers oppose the granting of a TCO?

A local manufacturer which wishes to object to the granting of a TCO must lodge a submission, in writing, to the CEO within 50 days after the notification of the application in the *Gazette* (s.269L(1)). Manufacturers must lodge a formal submission of objection in an approved form (s.269K(2)). The submission must contain the information as the form requires. The approved form is “Submission Objecting to the Making of a Tariff Concession Order (TCO) (Form B444)”.

How does the CEO process an objection to a TCO?

Within 14 days after the last day for lodging submissions opposing the application the CEO will inform the applicant, in writing (s.269L(1)), of any local manufacturer's objection including a short statement of the grounds on which each objection is based (s.269L). The applicant has the opportunity to propose an amendment to the application which narrows the description of goods (within the gazetted tariff classification) within 28 days after the CEO provides notification of the objections (s.269L(2)).

The CEO must, within 7 days of receipt of the applicant's proposed amendment, consider the amendment and inform the applicant whether he/she is satisfied with the proposed wording (s.269L(4)). If the CEO considers that the proposed amendment does not narrow the description of the goods; or is of the opinion that the proposed amended description will cause the goods to be covered by a different tariff classification to that which was originally gazetted, the CEO must continue to consider the application as it was originally made (s.269L (4A)).

If the CEO is satisfied with the proposed amended description, he/she must, within 14 days after becoming satisfied, notify each objector of the proposed amended description. The CEO must invite each objector to respond to the proposed amendment within 14 days and publish the proposed amended description in the *Gazette* and invite any person to make a submission in response to the proposed amendment within 14 days of publication (s.269L(4B)). The objector may accept the amended wording and withdraw the objection. Otherwise if there is no response from the objector, the objection will stand.

If, at any time after consideration of objections and proposed amended description, the CEO is satisfied that a TCO should not be made, Customs and Border Protection Service will notify the applicant in writing of the reason(s) for the decision.

What inquiries can the CEO make?

The CEO may seek relevant information from any person, not just the applicant, by notice in writing, to be provided within the period determined by the CEO (provided it is within 150 days of the gazettal of the application) (s.269M). For example, the CEO may contact local manufacturers whom the CEO believes may manufacture substitutable goods and invite those firms to lodge a written submission objecting to the making of the TCO. The CEO may also write to industry associations or provide the application to a prescribed organisation with a view to obtaining advice on the availability of substitutable goods.

Making a TCO

When can the CEO grant a TCO?

Where, based on all relevant information, the CEO is satisfied that the core criteria have been met, a TCO must be made (s.269P(3)). If the CEO is not satisfied that the core criteria have been met, the CEO will not make the TCO. In either case, the applicant must be notified in writing of the CEO's decision, and a gazette notice of the decision must be published (s.269R). If the CEO fails to make a decision in respect of an application within 150 days after the gazettal day, the CEO is taken to have made a decision that he/she is not satisfied that the application meets the core criteria (s.269P(2)).

What if the CEO does not grant the TCO?

Where a TCO application is refused, the applicant will be advised in writing, outlining the reason for the decision (e.g. details of Australian manufacturers who are considered to produce substitutable goods).

What is the commencement date of a TCO?

TCOs will operate with effect from the day on which an application which led to the making of the TCO was lodged. There is no provision to backdate a TCO.

Revoking a TCO

How does the CEO revoke a Commercial Tariff Concession Order?

Prior to November 1992, the Tariff Concessions system operated under a different legislative regime generally referred to as "Commercial Tariff Concession Orders" (CTCO). CTCO's involved a different test for acceptance than that which currently exists. The test included a consideration of the level of competition between the CTCO goods and the locally manufactured goods, known as a "market test".

In November 1992, the TCS was introduced with different criteria containing a new market test. However, the previous regime continued to apply to CTCO's made or applied for before November 1992. In July 1996, legislation came into force which removed the market test from the criteria for granting TCOs, and required revocation of all TCOs and CTCOs to be considered in accordance with the revised legislation (s.38 of the *Customs Amendment Act 1996*).

When can a TCO be revoked at the request of a local manufacturer?

If a person claiming to be a producer of substitutable goods is of the view that if a particular TCO were not in force on a particular day, and if on that day the application for the TCO was lodged it would not have been granted, the manufacturer may apply for the revocation of a TCO. The basis of the revocation application is that on the day of lodgement of the revocation request the manufacturer was a producer of substitutable goods in Australia in the ordinary course of business (s.269SB).

The revocation application must be lodged on the approved form "Request for Revocation of a Tariff Concession Order (TCO) or Commercial Tariff Concession Order (CTCO)" (Form B441). Requests not lodged on the approved form will not be accepted. The form must be accompanied by all of the material required by the form. The CEO, not later than 60 days after lodgement, must make a decision on the revocation request (s.269SC(1)). If the CEO does not make a decision within 60 days the application for revocation is taken to be rejected (s.269SC(2)).

As soon as possible after receiving an application for revocation of a TCO the CEO must publish a notice in the *Gazette* stating that the application has been lodged, the date that the application was lodged, and the particulars of the TCO (s.269SC(1A)).

Before deciding whether a TCO should be revoked the CEO will need to be satisfied that the claims of a local manufacturer are legitimate. The CEO may see a need to visit the manufacturer's premises before making a decision. Should the CEO require any further information the CEO will invite, in writing, the local manufacturer or any other party to submit the information in writing. Before revoking the TCO the CEO must be satisfied that the goods being produced by the objector are in fact "substitutable goods", "produced in Australia" in "the ordinary course of business" as defined by sections 269B, 269D and 269E of the Customs Act.

The CEO may, rather than revoke the TCO, substitute a narrower TCO in respect of the goods covered by the TCO which are not produced in Australia (s.269SC(4)).

When can a TCO be revoked at Customs and Border Protection Service's initiative?

Customs and Border Protection Service may initiate revocation of an existing TCO where the CEO is of the view that he or she would not have made that TCO if the application for the TCO was to be lodged on that day (ss.269SD(1AA)). The CEO may publish a notice in the *Gazette* declaring his intention to revoke the TCO with effect from a nominated day, and inviting submissions within 28 days of the date of the gazettal notice of the proposed revocation.

The CEO must consider any submissions and, within 60 days of publication of the *Gazette* notice, decide whether he/she is satisfied that, if the TCO were not in force, and an application for that TCO were to be made, the TCO would not be granted. If the CEO is so satisfied he/she must revoke the TCO with effect from the nominated revocation day (s.269(1AB)).

The CEO also has power to revoke a TCO which applies to particular goods where he/she is satisfied that:

- the tariff rate for the goods covered by the TCO has been reduced to a free rate of duty (s.269SD(1)); or
- the TCO has not been used for two years (s.269SD(1A)); or
- the tariff classification stated in the TCO to apply to the goods no longer applies to the goods (s.269SD(2A)); or
- a transcription error has occurred in the description of goods the subject of the TCO including the tariff classification (s.269(3)); or
- the description of the goods is written in terms of the goods intended end use (s.269SD(5))

The CEO also has the power to revoke a TCO:

- when an amendment to the Customs tariff (s.269SD(2)(a)) occurs; or
- as a result of a decision of a court or the AAT (s.269SD(2)(b)); or
- after having regard to the written advice on the matter given by an officer of Customs(s.269SD(2)(c)),

the tariff classification that is stated in a TCO to apply to the goods the subject of the TCO has not, with effect from a particular day, applied to those goods. Under these circumstances the CEO must revoke the TCO and make a new TCO replacing the revoked TCO.

What happens if a TCO exists for goods that have been added to the EGS?

Where goods are added to the EGS, and a TCO which covers or partly covers those goods already exists, that TCO is taken to have been revoked to the extent that it covers those goods as soon as the changes to the EGS come into effect (ss.269SJ(2)).

When does a revocation of a TCO take effect?

A revocation at the request of a local manufacturer comes into force on the day on which the request to revoke the TCO was lodged (s.269SC(6)). This means that the CEO's decision to revoke a TCO takes effect retrospectively, and there could be duty adjustments in relation to any goods covered by the TCO imported between the making of the application and any decision to revoke. As soon as practicable after a decision is made, the CEO must notify the decision in writing to the applicant who sought the revocation. The CEO must also inform all interested persons of the decision by publishing the decision in the *Gazette*.

Revocations made under s.269SD are subject to appeal to the Administrative Appeals Tribunal (AAT).

When can a revoked TCO be used after revocation?

When the CEO revokes a TCO under s.269SC(3) or (4) (at the request of a local manufacturer) or under s.269SD(1AB) (at the initiative of the CEO) or s.269SD(1A) (where the TCO has not been used in the previous 2 years) the TCO ceases to apply to goods entered for home consumption after the day on which the revocation comes into effect.

However, it may continue to be used:

- in respect of goods which were imported on or before the date of revocation, and which were entered for home consumption within 28 days of the date on which the revocation came into effect; or
- in respect of goods that were in transit to Australia on the day on which the revocation came into effect and which were entered for home consumption within 28 days of importation into Australia. "In transit" means that the goods have left for direct shipment to Australia from a place of manufacture, or a warehouse, in the country from which they are being exported.

Additionally, a revoked TCO may also be used in relation to the importation of made-to-order capital equipment where the CEO is satisfied that a firm order for goods was placed after the TCO came into force and before its revocation. The time period for entry of goods is not necessarily limited to 28 days in this case s.269SG(4).

In transit provisions do not apply to TCO's revoked under any other provisions.

Internal Review

An applicant for a TCO, or a person who made a submission in relation to an application for a TCO (or a person who was reasonably unable to lodge a submission in time) may apply to the CEO for a reconsideration of the decision (s.269SH). In relation to a decision on request for revocation of a TCO, the person requesting the revocation, or any person whose interests are affected by the decision may apply to the CEO for review. In both cases the request for review must be made within 28 calendar days of the gazettal of the primary decision.

A request for reconsideration must be in writing and include the grounds on which the objection is being raised (s.269SH(2)). The request for reconsideration must be publicised by a gazette notice as soon as practicable after it is made (s.269SH(3A)).

The applicant for review of the primary decision has 28 calendar days from the date of notification of that decision to provide new material to the CEO. The CEO cannot take into account any material produced after this time when reviewing the primary decision (s.269SH(7)).

Where the review officer reconsiders a decision made on a TCO application, he/she must decide, not later than 90 days after the last day for lodgement of the application for reconsideration, whether to affirm the original decision or to substitute another decision in its place (s.269SH(4)). In the case of a review of a decision on a request for revocation, the decision must be made within 60 days of the last day for lodgement of the application (s.269SH(5)).

In undertaking a review of a decision, the review officer may only have regard to the application or request for revocation, and any submissions, information, documents and materials which the decision maker was entitled to take into account in considering the initial TCO application or revocation request, and any new matter the applicant for reconsideration produces to the review officer within 28 days after notification of the original decision in the *Gazette* (s.269SH(4) and (5)).

If the review officer fails to make a decision on a review within the time allowed, he/she is taken to have made a decision to affirm the original decision (s.269SH(6)).

As soon as practicable after a decision is made, the review officer must notify the applicant for reconsideration, in writing, of the decision and publish a notice in the *Gazette* to inform other interested parties (s.269SH(10)).

Administrative Appeals Tribunal Review

Persons that are affected by decisions to reject, refuse, make, revoke or refuse to revoke a TCO may apply to the AAT to have the decision reviewed (s.269SHA).

In most instances an internal review is a mandatory precondition to AAT review. Exceptions to the internal review precondition are:

- A decision to reject a TCO application under s.269H or s.269HA of the Customs Act; and
- decisions on Customs and Border Protection Service initiated revocations under s.269SD (other than ss.269SD(3)) of the Customs Act.

Persons who wish to seek recourse before the AAT should apply directly to the AAT registry in the capital city of their State or Territory

Legislation

This Practice Statement summarises key points from legislation for the TCS. It is recommended that all users of the TCS make themselves aware of Part XVA of the Customs Act which contains legislation passed by the Parliament.

RELATED INSTRUCTIONS AND GUIDELINES

Description of Goods
Requirements for TCO Applications
Role of Tariff Classification in TCO Applications

RELATED POLICIES AND REFERENCES

Customs Act 1901
Customs Regulations 1926
Customs Amendment Act 1996
Customs Tariff Act 1995
Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act 1992
Australian Customs Notice 98/19 'Tariff Concession Order (TCO) Applications'
Australian Customs Notice 2008/33 'Changes to Tariff Advice and Tariff Concession Order Applications'

KEY ROLES AND RESPONSIBILITIES

Tariff Concessions Section, Trade Services Branch, Trade and Compliance Division.

CONSULTATION

INDUSTRY CONSULTATION

This Practice Statement reflects existing legislation which previously has been available to external stakeholders. This document was placed on the Customs and Border

Protection Service website for public comment in September 2009. If you have any feedback on this document's accessibility, clarity, presentation or content, please contact:

Director, Tariff Concessions
Trade Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra ACT 2601

INTERNAL AGENCIES

The following stakeholders have been consulted during the development of this Practice Statement:

Customs and Border Protection Service Legal Unit
Tariff Concessions Section
Tariff Policy Section

PARTNER AGENCIES

The following stakeholders have been consulted in the development of this Practice Statement:

Department of Innovation, Industry, Science and Research

EXTERNAL AGENCIES

The following external stakeholders have been consulted during the development of this Practice Statement:

A range of government agencies, private sector companies and industry organisations attended public forums held in Melbourne, Hobart, Sydney, Perth, Adelaide and Brisbane during September 2009 where the practice statement was available for comment. In addition, the practice statement was placed on the Customs and Border Protection website in September 2009 for comment.

Approval

Approved on 23 March 2010 by:

Sue Pitman
ND TRADE AND COMPLIANCE

ENDORSED

Endorsed on 31 March 2010 by:

Neil Mann
DCEO PASSENGER AND TRADE FACILITATION