



AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE PRACTICE STATEMENT

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Title: Administration of Australia's Anti-Dumping and Countervailing System.

Purpose: To outline the framework within which the Australian Customs and Border Protection Service (Customs and Border Protection) administers Australia's anti-dumping and countervailing system.

Owner: National Director Trade and Compliance.

Category: Operational procedures.

Contact: Trade Measures Branch (TMB) Executive Assistant.

Summary of main points

Customs and Border Protection Practice Statements are endorsed policy and must be followed by all employees. This Practice Statement outlines:

- the legislative and policy framework under which Customs and Border Protection, through TMB, administers Australia's anti-dumping and countervailing system;
- the functions and powers of the Minister for Home Affairs (Minister) and the Chief Executive Officer (CEO);
- rights of review;
- public notification of decisions, the public record and confidentiality framework; and
- the Quality Assurance framework followed by TMB in conducting its investigations.

The electronic version published on the intranet is the current Practice Statement.

Introduction Statement

1. Customs and Border Protection is responsible for the effective administration of Australia's anti-dumping and countervailing system that provides internationally consistent remedies against injurious pricing of dumped goods.
2. This practice statement outlines the framework within which Customs and Border Protection administers Australia's anti-dumping and countervailing system.

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Scope

3. It is Customs and Border Protection role to provide access to the anti-dumping and countervailing system for both applicants and respondents. Customs and Border Protection, through the TMB, has sole responsibility for investigating and reporting to the Minister on dumping and countervailing matters.
4. TMB provides assistance to companies and other interested parties accessing the system by:
 - providing liaison services and advice to interested parties of their rights and obligations in accessing the anti-dumping system;
 - conducting investigations into the claims made to justify the imposition, variation or continuation of measures;
 - making recommendations to the Minister for the imposition, variation or continuation of the measures; and
 - providing advice on entering goods affected by anti-dumping and countervailing measures and, through monitoring exercises, ensure compliance with the measures.
5. This Practice Statement includes a policy statement that provides the policy framework that guides TMB's operations. The procedural statement focuses on some of the procedures in place to ensure that TMB is able to effectively and efficiently fulfil its role within the established policy framework.
6. Detailed information on all aspects of anti-dumping and countervailing inquiries undertaken by TMB is not provided in this Practice Statement. Please refer to the related Instructions and Guidelines – Dumping and Subsidy Manual for this information.
7. This Practice Statement applies to all officers in TMB.

Policy Statement

8. Dumping occurs when an exporter sells goods to Australia at a price less than the normal value prevailing in the country of export. The margin of dumping is the amount by which that normal value exceeds the export price of the goods.
9. A subsidy is deemed to be a countervailable subsidy when the following three distinct elements are present:
 - there must either be a financial contribution by a government, or income or price support; and
 - this must confer a benefit; and
 - the subsidy must be specific to an enterprise or industry or group of enterprises or industries.
10. Where it is established that dumped and/or subsidised goods have caused material injury to an Australian industry producing like goods to the exported goods, anti-dumping and/or countervailing measures may be applied.

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Legislative framework

11. The main legislation under which Customs and Border Protection administers Australia's anti dumping and countervailing system are:
- *Customs Act 1901* (the Act), particularly Part XVB, and associated regulations;
 - *Customs Tariff (Anti Dumping) Act 1975* (the Dumping Duty Act); and
 - *Customs Administration Act 1985* (CAA).
12. Australia's dumping and subsidy legislation reflects the World Trade Organization (WTO) Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures (the Subsidy Agreement) to which Australia is a signatory.

The Minister for Home Affairs

13. The principal functions vested in the Minister are generally in areas of significant government policy, which appropriately reside with the Minister. The functions are powers for which the Minister has direct responsibility under the Act including powers conferred by the anti-dumping and countervailing system. These include the following powers to:
- issue dumping and countervailing duty notices;
 - following a review, decide to leave measures unaltered, revoke or modify them as appropriate under Division 5 of the Act;
 - decide that measures should expire or take steps to ensure the continuation of the measures under Division 6A of the Act;
 - issue dumping duty and countervailing duty notices at the request of a third country;
 - give notice not to impose duty;
 - issue a retrospective notice; and
 - require that the CEO reinvestigate a finding or findings following a recommendation by the Trade Measures Review Officer (TMRO).
14. The Minister has delegated certain functions of the Act to Customs and Border Protection officers. The delegations refer to the power to re-ascertain normal values applying to measures imposed before 1 January 1993 and powers to ascertain the variable factors relevant to the determination of duty payable under the Dumping Duty Act and order that the total interim duty overpaid is repaid.

The Chief Executive Officer of Customs and Border Protection

15. While there are certain functions and powers vested in the Minister responsible for Customs and Border Protection, many decisions are expressed as being the responsibility of the CEO of Customs and Border Protection. The CEO delegates many powers and functions to officers of Customs and Border Protection.
16. In an investigation, the CEO has legislative responsibility for:
- the decision whether to reject an application
 - the making of a preliminary affirmative determination and imposition of securities
 - the decision to terminate an investigation
 - placing the statement of essential facts on the public record

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- giving a report and recommendation to the Minister; and
- recommending whether the Minister accept a price undertaking from an exporter.

17. The CEO is also responsible for reporting to the Minister following a review of the variable factors relevant to taking the measures; accelerated reviews for new exporters; continuation inquiries and reinvestigations.

Right of review

18. Parties may seek a review of decisions made under the Act by the Minister or CEO in respect of dumping or countervailing by way of the *Administrative Decisions (Judicial Review) Act 1977* or the *Ombudsman Act 1976*.

19. The TMRO may review a Ministerial decision:

- to publish a dumping duty notice;
- to publish a countervailing duty notice;
- not to publish a dumping or countervailing notice following a recommendation from the CEO.

20. The TMRO only has the power to make certain recommendations to the Minister following a review of a decision. The TMRO may not revoke the Minister's decision or substitute another decision.

21. The TMRO may also review the following decisions by the CEO:

- rejection of an application;
- termination an investigation;
- rejection of an application in respect of a duty assessment.
- negative preliminary decision in respect to a duty assessment;

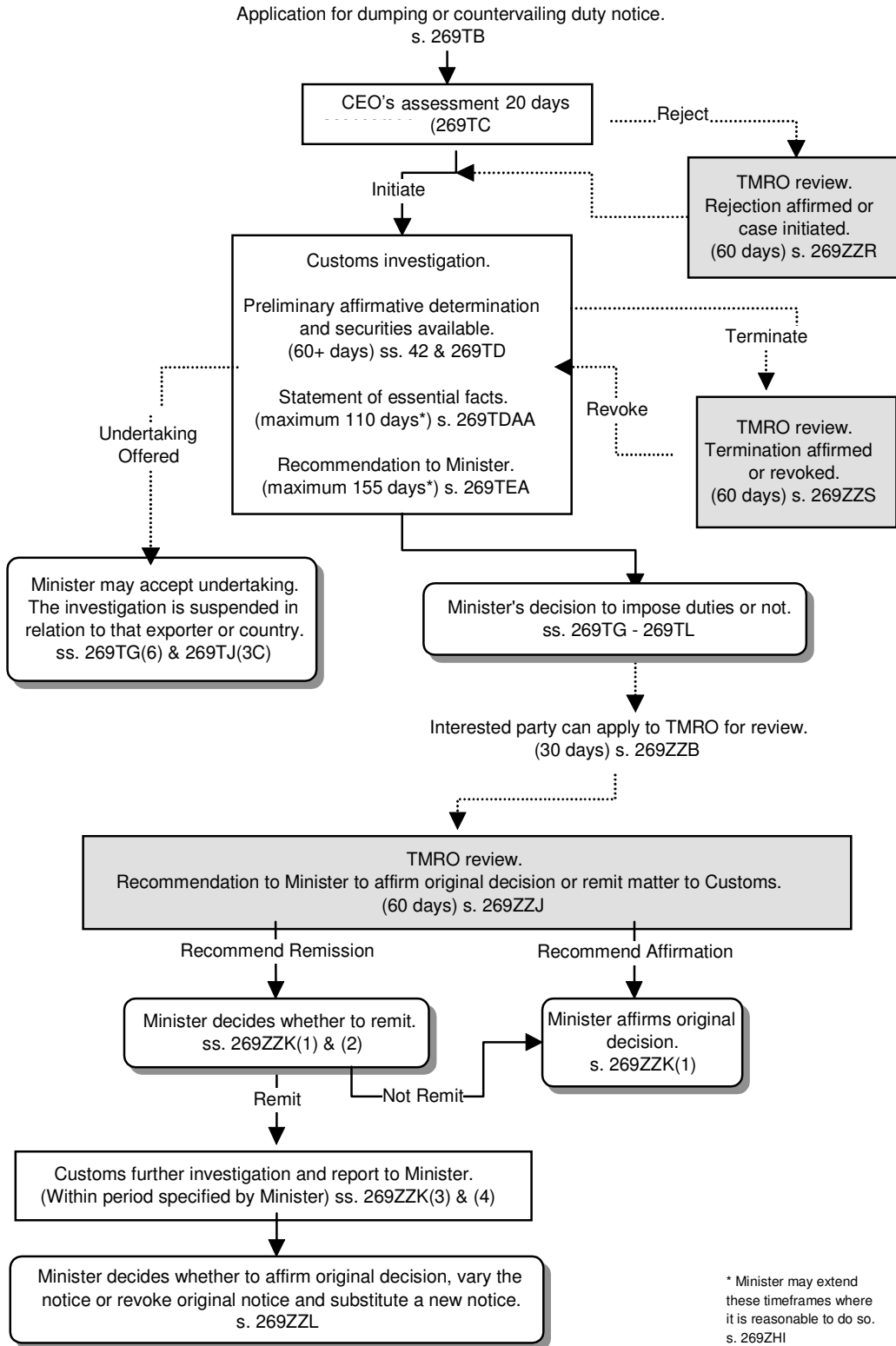
22. The TMRO may affirm the CEO's reviewable decision or revoke the reviewable decision and substitute a new decision.

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Flowchart of anti-dumping and countervailing investigations



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Obligations and responsibilities

23. As noted previously, the CEO of Customs and Border Protection has delegated his/her powers and functions under certain parts of the Act (mainly the dumping and subsidy provisions) to certain officers of TMB. Therefore the references below to “Customs and Border Protection” may also mean a function or power that the CEO has delegated.

Notifications

24. Customs and Border Protection is obligated to notify the government of the country (or countries) whose exporters are nominated in the application that an application has been received. Additionally, if an application seeks action in relation to countervailing, Customs and Border Protection advice to the government of the country (or countries) that the application has been received is required to include an invitation for consultation.

25. Customs and Border Protection provides the Department of Foreign Affairs & Trade (DFAT) with a copy of all correspondence to the government of the country (or countries) whose exporters are nominated in an application, prior to initiation of an investigation.

26. All decisions made by Customs and Border Protection and the Minister are publicly notified. This includes initiations, terminations, withdrawal of applications after initiation, changes to original notices (e.g. extension of time frames), and findings.

27. Public notice generally means an advertisement in a nationally circulated newspaper (*The Australian*) and issuing an Australian Customs Dumping Notice (ACDN) (available on the Customs and Border Protection Internet site). Minister's decisions also appear in the Gazette.

Public record

28. Division 7 of Part XVB of the Act relates to the obligations of the CEO in relation to procedural and evidentiary matters. Among other things, the CEO must:

- maintain a public record;
- give public notice of certain decisions;
- maintain confidentiality in some situations.

29. The CEO is required to maintain a public record of each investigation, review or inquiry initiated. The public record must contain (subject to confidentiality or other considerations):

- a copy of all submissions from interested parties (including letters and emails);
- the statement of essential facts;
- a copy of all relevant correspondence between the CEO and other persons.

30. The CEO must draw the attention of all interested parties to the existence of the public record, their entitlement to inspect that record and how to access the public record. As soon as practicable after the CEO decides not to reject an application, the public record version of an application must be provided to all persons known to be exporters of the goods the subject of the application and to the government of

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each country of export. If the number of persons known to be exporters of goods is so large that it is not practicable to provide a copy of the application to each of them then a copy of the application will be provided to the government of each country of export and to each relevant trade association.

31. If the applicant claims that information given to the CEO is confidential, the applicant must ensure that a summary of that information is provided to Customs and Border Protection for inclusion in the public record.
32. The public record must contain copies of all submissions from interested parties. Submissions to the investigation must be provided in “confidential” and “public record versions” and be received by the relevant dates nominated in the public notice to allow interested parties a reasonable period to respond (confidential versions are placed on working files). The specified period for the lodgement of submissions concerning the publication of the notice sought in the application is usually not more than 40 days after the date of initiation of the investigation.
33. Oral information given to the CEO is not taken into account unless it is subsequently put in writing by the provider of the information or by Customs and Border Protection, and thereby becomes available, subject to considerations of confidentiality and to the need to protect business and commercial interests, as part of the public record.
34. The public record must also contain copies of all relevant correspondence between the CEO and other persons. “All relevant correspondence” includes reports compiled by Customs and Border Protection in relation to Australian industry, exporter, importer and any other interested party’s visits.
35. Following discussion with the party in question, the reports are rendered “public record versions” by the removal of information that is agreed by Customs and Border Protection to be confidential or to be information whose publication would adversely affect a person’s business or commercial interests and form the public record version of the report. The public record version of a report must allow a reasonable understanding of the substance of the information. The public record versions of reports are then ready to be placed on the public record.
36. The official public record may be examined at the office address below during business hours by contacting TMB on telephone number (02) 6275 6547.

Trade Measures Branch
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

As a service to facilitate interested parties access to the record, documents are also available electronically from the Electronic Public Record at <http://adpr.customs.gov.au/Customs/>.

Requests for extensions of time

37. Whilst the period for the lodgement of submissions is usually not more than 40 days after the date of initiation of the investigation, this date may be extended where an interested party petitions the CEO in writing to allow for a longer period.

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38. The CEO, in deciding whether to allow a longer period for the lodgement of submissions, will take account of some or all of the following elements:
- the time available for the conduct of the investigation and making the necessary determinations, including the time periods established in the legislation governing the conduct of the investigation, and whether the information can be considered in a subsequent phase of the investigation;
 - previous extension(s) of time granted to the same party in the same investigation;
 - the ability of the party from whom information is sought to respond to the request, in light of the nature and extent of the information requested, including the party's available resources, personnel, and technological capability;
 - any unusual burdens that will be incurred by the party being asked for information in searching for, identifying and/or compiling the information requested;
 - whether the party requesting the extension has provided a partial response to the request, or has previously provided information requested in the same investigation, although the absence of a partial response alone is not an appropriate basis for denial of a request;
 - any unforeseen circumstances affecting the ability of the party to provide information requested within the time limit established;
 - whether other parties have been granted extensions of time for similar reasons during the same phase of the same investigation.
39. The CEO is not obliged to have regard to a submission in response to the statement of essential facts that is received by Customs and Border Protection after the end of the nominated period if to do so would prevent the timely preparation of the report to the Minister.

Treatment of confidential information

40. The CEO is required to make all the decisions under s. 269ZJ of the Act in relation to the question of accepting claims of confidentiality and of the public record summaries.
41. If the CEO disagrees with a party's claim of confidentiality and the person refuses either to include the information in the public record or to prepare a summary, the CEO may disregard the information, unless the information is demonstrated to be correct. There are no specific tests in the legislation as to what constitutes "correct".
42. The Act requires that non-confidential summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. It is only in exceptional circumstances that a party is not required to submit such a summary.
43. Customs and Border Protection prepares public record and confidential versions of reports compiled in relation to Australian industry, exporter, importer and any other interested party's visits. Customs and Border Protection does this as a matter of administrative convenience, and provides those reports to the party visited for their comment and clearance. The obligation is on the visited party to accept the public record version prepared on its behalf by Customs and Border Protection or to provide an alternate public record version. The confidential version of a report

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prepared by Customs and Border Protection in relation to verification visits remains a Customs and Border Protection document and the other party may only identify errors of fact or calculation contained in that report.

44. Parties submitting information are required to give an explanation of deleted or blacked out information. Merely deleting references to confidential information without any consideration being given to providing that information in a non-confidential manner is not acceptable and Customs and Border Protection may disregard that information in the submission if the explanation is not provided. As noted above the CEO can only have regard to confidential information, even though a non-confidential summary is not provided, if it can be demonstrated to be correct.
45. The same considerations also apply when a party is submitting to, or responding to, more general issues arising within an investigation. The basis of a claim or rebuttal of a claim in a written submission should be in a form that enables the other parties to be aware of the particular areas of dispute.

What is deemed confidential and non-confidential?

46. Generally speaking, confidential information is information that is not available in the public domain. For example, information contained in Customs and Border Protection's own records, including the names of importers and exporters, is confidential, and is therefore not available in the public domain. It is not Customs and Border Protection's practice to reveal the names of interested parties.
47. In order for the authorities to treat information as confidential by its nature, it must be facts or knowledge not in the public domain. This relates to where the information or documents are not part of public knowledge or are not accessible to the public, such as internal company information and information that has been purchased. Documents or information with this status must have some particular value that sets them apart from commonly available material. The latter is not rendered confidential by the mere presence of a "secret" or "confidential" stamp.
48. All information submitted by parties to an investigation is treated as publicly available (and hence, non-confidential) unless it is marked confidential or accompanied by a request to be treated as confidential. For example, where a party questions the process (i.e the conduct of the case by Customs and Border Protection) such comments are not of themselves confidential either under the Act or the Agreements. Therefore those submissions are placed on the public record.
49. The types of information Customs and Border Protection treats as non-confidential as a standard practice are:
 - factual information of a type that has been published or otherwise made available to the public by the person submitting it;
 - factual information that is not designated as business proprietary by the person submitting it;
 - factual information which, although designated as business proprietary by the person submitting it, is in a form which cannot be associated with or otherwise used to identify activities of a particular business or person;
 - publicly available laws, regulations, etc;
 - written argument relating to the proceeding that is not designated as business proprietary.

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50. Business propriety information that may be treated as confidential is:

- business or trade secrets;
- production costs;
- distribution costs;
- terms of sale;
- prices of individual sales, likely sales, or other offers;
- names of particular customers, distributors, or suppliers;
- the exact amount of the dumping margin on individual sales;
- the exact amount of the benefit in respect of countervailing investigations;
- the names of particular persons from whom business proprietary information was obtained;
- information relevant to the industry that has been purchased from a third party;
- any other specific business information the release of which would cause substantial harm to the competitive position of the submitter.

Disclosure of information

51. There are criminal sanctions on Customs and Border Protection officers for disclosing protected information. Section 16(2) of the CAA provides that a person who is or has been an authorised person must not directly or indirectly:

- make a record of any protected information; or
- disclose to any person any protected information:
- Except:
 - as authorised by this section;
 - as required or authorised by any other law;
 - in the course of performing the person's duties.

52. Protected information means information that directly or indirectly comes to the knowledge of, or into the possession of, a Customs and Border Protection officer while that Customs and Border Protection officer is performing his or her duties (whether the information is related to those duties or not). Hence, protected information includes confidential information and non-confidential information.

53. The penalty for such a breach of confidence is imprisonment for two years. Section 70 of the Crimes Act 1914 provides similar sanctions on Commonwealth officers, again with a penalty of two years imprisonment.

Approach to confidentiality undertakings

54. It is essential that the confidentiality of information supplied to Customs and Border Protection is observed and maintained. As officers may visit several companies, Customs and Border Protection takes particular care to ensure that documents and information received from one company are properly safeguarded during the visit to another.

55. It is not unusual for confidentiality concerns to be a particular impediment to obtaining information during visits to exporters. Should this issue arise, Customs and Border Protection informs company personnel of the criminal sanctions on officers for disclosing confidential information.

56. If a company requests a confidentiality undertaking, Customs and Border Protection will explain the operation of section 16 of the CAA, pointing out that this

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provision offers the company greater protection than civil remedies offered by a separate contractual undertaking.

57. In the event that the company still requests an undertaking, the existence of s. 16 of CAA does not mean that an officer cannot sign the undertaking. As the undertaking is a contract it is considered to be part of the general power of the executive arm of government, exercised through departments – there is no question of the need for a delegation as it is not dependent upon any statutory provision. No undertaking should be signed which imposes an obligation greater than that already imposed under s. 16 of CAA.

TMB Quality Assurance Framework

58. TMB has developed and implemented a Quality Assurance (QA) framework aimed at enhancing the quality of its investigation findings, reports and recommendations.
59. The objectives of the QA framework will be achieved by focusing on the following outcomes:
- Defensibility – the outcomes of TMB’s core activities withstand the scrutiny of its Minister, interested parties, merits review (TMRO) and judicial review;
 - Consistency – TMB is consistent in the performance of its business;
 - Confidence – the Minister, TMB and interested parties have confidence in the work processes and outcomes of TMB;
 - Knowledge Exchange – the exchange of technical knowledge, skills and information between Branch members is facilitated;
 - Training and Development – the QA process to provide officers with opportunities to identify areas of improvement, which may form the basis of further training and development initiatives;
 - Best Practice – TMB maintain its reputation as a leader in international anti-dumping and countervailing administration, in accordance with world best practice;
 - Accountability – subject to confidentiality considerations, TMB’s work processes are open and transparent; and
 - Efficiency – a focus on efficient management, planning and processes to achieve excellence and ensure continuous improvement.

Related Instructions and Guidelines

60. Related Instructions and Guidelines include:
- a) Dumping and Subsidy Manual (June 2009) contains the legislative framework, principles and practices followed by the TMB as they normally apply to anti-dumping and countervailing investigations;
 - b) TMB Quality Assurance Policy.

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Related policies and references

61. Related policies and references include:

- *Customs Act 1901*, particularly Part XVB, and associated regulations;
- *Customs Tariff (Anti Dumping) Act 1975*; and
- *Customs Administration Act 1985*.

Key roles and responsibilities

62. National Manager, TMB.

Consultation

63. The following stakeholders have been consulted in the development of these Instructions and Guidelines:

Internal:

- Relevant government agencies.

External:

- Relevant external stakeholders directly; and
- All other interested parties, by placing a draft of the contents of this Practice Statement on the Customs and Border Protection website for general comment.

Approval

Approved on	15 JULY 2009	
By	SUE PITMAN NATIONAL DIRECTOR TRADE AND COMPLIANCE DIVISION	
Endorsed on	15 JULY 2009	
By	NEIL MANN DEPUTY CEO PASSENGER AND TRADE FACILITATION	

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