Australian Government
Australian Customs and Border Protection Service

AUSTRALIAN CUSTOMS NOTICE NO. 2010/03

Applicant's obligations when applying for a Tariff Concession Order (TCO)

DISCLAIMER

The information provided in this Australian Customs Notice is no longer current and has been replaced by Department of Home Affairs Notice No. 2019/21.

Customs and Border Protection has introduced a new application form (B443) for Tariff Concession Orders (TCOs) to take effect 29 March 2010.

The new form reinforces obligations for TCO applicants to provide evidence that satisfies the CEO (Chief Executive Officer) that there are reasonable grounds for asserting that the TCO application meets core criteria. Specifically, the legislation requires provision of all information that an applicant has, or can reasonably be expected to have, and all inquiries that an applicant has made or can reasonably be expected to make. (Section 269FA of the *Customs Act 1901*).

This notice provides advice for applicants for TCOs on how to complete the new Approved Form (B443) when making an application.

An application meets the core criteria if, on the day of lodgement of the application, no substitutable goods were produced in Australia in the ordinary course of business.

The legislation and relevant policy guidelines require that Customs and Border Protection be rigorous in ensuring applicants meet their obligations when lodging an application.
This is because some applicants for TCOs are providing less than reasonable information and conducting less than reasonable inquiries to determine whether Australian manufacturers of substitutable goods exist.

Customs and Border Protection has noted that, in some instances, the level of information provided in applications has been superficial and has, accordingly, rejected those applications. Customs and Border Protection is aware of occasions when TCOs have been applied for when it is clear, from subsequent investigation and/or legal challenge, that the applicant must have known that substitutable goods were produced, or potentially produced, yet failed to provide this information on the form. It is not the intent of the Tariff Concession System that an applicant should apply for a concession in the hope that a potential producer of substitutable goods will not object.

As a result of these concerns, Customs and Border Protection has amended the approved form for TCO applications which now requests more specific responses from applicants. This form replaces the old Form B443, which should not be used after 29 March 2010. The new form can be downloaded from Customs' website – www.customs.gov.au

The form has been amended to reflect a practice where the applicant is not always the importer of the goods, but may be an agent, consultant or broker who does not always have first-hand knowledge of the particular goods or industry involved. It is important, where the importer is not the applicant, that information is provided by the intended importer of the goods to the applicant and included in the form.

For an applicant to establish that there are reasonable grounds for asserting that there are no local manufacturers of goods the subject of a TCO application, the applicant will provide evidence that inquiries have been made to determine whether local manufacturers exist who can supply substitutable goods in the ordinary course of business. These inquiries are designed to locate manufacturers who are producers, or may potentially be producers, of substitutable goods.

A search conducted by the Industry Capability Network (ICN) or any other prescribed organisation will be considered sufficient evidence of a search. A suggested format for the wording of the request to the ICN is attached.

The following prescribed organisations, listed in r.179A of the Customs Regulations, 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 on the Industry Capability Network is available from www.icn.org.au.

Where an applicant chooses not to use a prescribed organisation to conduct a search for manufacturers, or potential manufacturers, of substitutable goods, Customs and Border Protection will require evidence of searches of at least three types of database:

- A trade directory search, such as Kompass;
- A website listing Australian products such as www.australianmade.com
- A public search engine, such as Google;
- Relevant industry association webpage search.

Applicants are required to provide information from their personal knowledge, such as through participation in procurement activity, trade fairs, or membership of industry associations. This must include information gained from inquiries of the importer they are representing.

What is reasonable? The legislation requires the CEO (Chief Executive Officer of Customs and Border Protection) to consider information and inquiries that an applicant could reasonably be expected to have or to make s.269FA. Examples of what constitutes reasonable information and reasonable inquiries are:

- It is reasonable to expect that an applicant (and importer where the importer is a different party to the applicant) will have information or industry knowledge about Australian businesses that produce, or potentially produce, substitutable goods.

- It is reasonable to expect that this industry knowledge may have been obtained through trade fairs, membership of industry associations or normal business operations. This information should be disclosed to the CEO at question five of the application form.

- Where a data base search for local manufacturers is used, it is reasonable to expect that the key word or key words should not be so narrow as to preclude a result. This is because the aim of the search is to identify manufacturers of substitutable goods with a corresponding use, not necessarily an identical use, and therefore should not be confined only to potential manufacturers of identical goods to the TCO application goods. For example, a search by a proprietary or trade-marked name will not be acceptable.

- Searches are to be comprehensive and multiple searches using different key words would normally be expected. The terms “Australian”, “manufacturer” and “[goods]”, not as a single phrase, would be expected in any search of an internet search engine such as Google. Searches of proprietary data bases, such as Kompass, should follow advice provided by the database operators to determine the existence of potential manufacturers of substitutable goods.

Where a potential Australian manufacturer of substitutable goods is identified in the search, it must be contacted by the applicant in writing with details of the goods that will be the subject of the TCO application. The applicant will allow a minimum of ten working days for any responses before lodging the application. Any responses received after ten working days will be forwarded to Tariff Concessions section of Customs and Border Protection. A suggested format of the letter to the potential Australian manufacturer is attached to this ACN.

If a local manufacturer responds that it considers that it does make substitutable goods, then the applicant must substantiate at question eight why it considers the locally manufactured goods are not substitutable for the imported goods. Otherwise, the application may not be accepted as valid.

If the applicant, (or importer where different to the applicant) is aware of substitutable goods being produced in Australia in the ordinary course of business, then no TCO application should be lodged. The relevant legislation does not intend that duty concessions be available in these circumstances. This includes situations where the applicant is also an Australian manufacturer of substitutable goods. The legislation has specific provisions allowing local manufacturers to be granted TCOs for periods in which they may have ceased production of the substitutable goods.

The operative date for an application will be from the day the application was received by Customs and Border Protection. If an application is rejected the operative date does not apply.

All applications must be accompanied by clear illustrative descriptive material (IDM). Such IDM may be in the form of brochures, technical drawings, photographs, samples, industry standards or schematics. The IDM must enable a full and accurate identification of the goods to be made. The application will be rejected if the IDM does not allow an accurate tariff classification to be made for the goods. Note that applicants making PARTS concession applications must include fully indexed Illustrative Descriptive Material (IDM) linked to their preferred concession wording terms. Each part described on the index will be linked to IDM to enable a full identification of a part’s characteristics, constituent material and its relationship to the parent goods. This in turn enables a correct tariff classification to occur and an assessment of the preferred terms used to describe the respective parts for concession wording purposes. Further information concerning IDM is contained in ACN 2008/33.

Inquiries concerning this notice may be directed to Manager Tariff Concessions on telephone number (02) 6275 6041 or fax number (02) 6275 6376 or by email to tarcon@customs.gov.au.

JENNIFER REIMITZ
Acting National Manager
Trade Services Branch
CANBERRA ACT
1 March 2010

ATTACHMENT A

SUGGESTED FORMAT OF THE LETTER TO A POTENTIAL LOCAL MAKER/PRODUCER OF AUSTRALIAN GOODS

Company Letterhead

Name of local manufacturer's business today's date
Title
ADDRESS

Dear

Our business/client is seeking a Tariff Concession Order (TCO) for goods with the following description:

GOODS, EXAMPLE, containing ALL of the following:
(a)
(b)
(c)
[The description will vary depending on the nature of the goods.]

In accordance with s.269FA of the *Customs Act 1901*, we are required to make inquiries as to whether there exists a potential local manufacturer of goods that meet the above description.

To decide whether or not to proceed with the TCO application, we would appreciate your advice as to whether you believe you are a producer of goods which are substitutable for the goods described above and whether you, or any producer known to you, makes these goods in Australia in the ordinary course of business. Could you please forward your response to [email address] by [10 working days after the date of the letter]. Any information you provide will be forwarded to the Chief Executive Officer of Customs and Border Protection to assist in the decision-making process.

A TCO may be granted if, on the day of lodgement of an application, no **substitutable goods** are **produced in Australia** in the **ordinary course of business.** All parties should ensure they are aware of the definitions of substitutable goods, produced in Australia, and ordinary course of business. These definitions are attached to this letter.

Please visit the Australian Customs and Border Protection's website at www.customs.gov.au for details of the TCO process and legislation.

Yours sincerely/faithfully

TCO applicant

Information attached

INFORMATION FOR APPLICANTS - EXTRACTS DEFINITIONS FROM CUSTOMS ACT 1901

Section 269B Interpretation

(1) ***substitutable goods***, in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put, or are capable of being put, to a use that corresponds with a use (including a design use) to which the goods the subject of the application or of the TCO can be put.

(3) In determining whether goods produced in Australia are put, or are capable of being put, to a use corresponding to a use to which goods the subject of a TCO, or of an application for a TCO, can be put, it is irrelevant whether or not the first-mentioned goods compete with the second-mentioned goods in any market.

Section 269C Interpretation—core criteria

For the purposes of this Part, a TCO application is taken to meet the core criteria if, on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business.

Section 269D Interpretation—goods produced in Australia

(1) For the purposes of this Part, goods, other than unmanufactured raw products, are taken to be produced in Australia if:
- (a) the goods are wholly or partly manufactured in Australia; and
- (b) not less than ¼ of the factory or works costs of the goods is represented by the sum of:
  - (i) the value of Australian labour; and
  - (ii) the value of Australian materials; and
  - (iii) the factory overhead expenses incurred in Australia in respect of the goods.

(2) For the purposes of this Part, goods are to be taken to have been partly manufactured in Australia if at least one substantial process in the manufacture of the goods was carried out in Australia.

(3) Without limiting the meaning of the expression ***substantial process in the manufacture of the goods,*** any of the following operations or any combination of those operations does not constitute such a process:
- (a) operations to preserve goods during transportation or storage;
- (b) operations to improve the packing or labelling or marketable quality of goods;
- (c) operations to prepare goods for shipment;
- (d) simple assembly operations;
- (e) operations to mix goods where the resulting product does not have different properties from those of the goods that have been mixed.

(4) For the purposes of this section, the CEO may, by instrument in writing published in the *Gazette*:
- (a) direct that the factory or works cost of goods is to be determined in a specified manner; and
- (b) direct that the value of Australian labour, the value of Australian materials or the factory overhead expenses incurred in Australia in respect of goods is to be determined in a specified manner;

and those directions have effect accordingly.

(5) The provisions of sections 48 (other than paragraphs (1)(a) and (b) and subsection (2)), 48A, 48B, 49A and 50 of the *Acts Interpretation Act 1901* apply in relation to directions given under subsection (4) as if:
- (a) references in those provisions to regulations were references to directions; and
- (b) references in those provisions to the repeal of a regulation were references to the revocation of a direction.

Section 269E Interpretation—the ordinary course of business

(1) For the purposes of this Part, other than section 269Q, goods (other than made-to-order capital equipment) that are substitutable goods in relation to goods the subject of a TCO application are taken to be produced in Australia in the ordinary course of business if:

(a) they have been produced in Australia in the 2 years before the application was lodged; or

(b) they have been produced, and are held in stock, in Australia; or

(c) they are produced in Australia on an intermittent basis and have been so produced in the 5 years before the application was lodged;

and a producer in Australia is prepared to accept an order to supply them.

(2) For the purposes of this Part, goods that:

(a) are substitutable goods in relation to goods the subject of a TCO application; and

(b) are made-to-order capital equipment;

are taken to be produced in Australia in the ordinary course of business if:

(c) a producer in Australia:

(i) has made goods requiring the same labour skills, technology and design expertise as the substitutable goods in the 2 years before the application was lodged; and

(ii) could produce the substitutable goods with existing facilities; and

(d) the producer is prepared to accept an order to supply the substitutable goods.

(3) In this section:

made-to-order capital equipment means a particular item of capital equipment:

(a) that is made in Australia on a one-off basis to meet a specific order rather than being the subject of regular or intermittent production; and

(b) that is not produced in quantities indicative of a production run.

ATTACHMENT B

SUGGESTED FORMAT OF A LETTER TO THE INDUSTRY CAPABILITY NETWORK

Company Letterhead

Name [if known] or The Manager
Industry Capability Network [State]
ADDRESS

today's date

Dear

Our business/client is seeking a Tariff Concession Order (TCO) for goods with the following description:

GOODS, EXAMPLE, containing ANY of the following:
(a)
(b)
(c)
[The description will vary depending on the nature of the goods.]

In accordance with s.269FA of the *Customs Act 1901*, we are required to make inquiries as to whether there exists a potential local manufacturer of goods that meet the above description.

To decide whether or not to proceed with the TCO application, I would appreciate your advice as to whether there is an Australian producer of goods substitutable for those described above, and whether that producer makes those goods in Australia the ordinary course of business. By substitutable goods, we are inquiring as to whether there is a manufacturer of goods that may fall into the same general category of goods that we are considering, including goods that may not meet the exact terms of the description above, but could be put to at least one of the uses of the goods as described. Specifically, A TCO may be granted if, on the day of lodgement of an application, no **substitutable goods** are **produced in Australia** in the **ordinary course of business**. I have attached illustrative descriptive material [or a sample] to further identify the goods I/our client wish(es) to import.

Any information you provide will be forwarded by us to the Chief Executive Officer of Customs and Border Protection to assist in the decision-making process.

Thank you for your assistance with this matter

Yours sincerely/faithfully

Information attached

INFORMATION FOR APPLICANTS - USEFUL DEFINITIONS FROM CUSTOMS ACT 1901

Section 269B Interpretation

substitutable goods, in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put, or are capable of being put, to a use that corresponds with a use (including a design use) to which the goods the subject of the application or of the TCO can be put.

(3) In determining whether goods produced in Australia are put, or are capable of being put, to a use corresponding to a use to which goods the subject of a TCO, or of an application for a TCO, can be put, it is irrelevant whether or not the first-mentioned goods compete with the second-mentioned goods in any market.

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Section 269D Interpretation—goods produced in Australia

(1) For the purposes of this Part, goods, other than unmanufactured raw products, are taken to be produced in Australia if:
   (a) the goods are wholly or partly manufactured in Australia; and
   (b) not less than ¼ of the factory or works costs of the goods is represented by the sum of:
      (i) the value of Australian labour; and
      (ii) the value of Australian materials; and
      (iii) the factory overhead expenses incurred in Australia in respect of the goods.

(2) For the purposes of this Part, goods are to be taken to have been partly manufactured in Australia if at least one substantial process in the manufacture of the goods was carried out in Australia.

(3) Without limiting the meaning of the expression ***substantial process in the manufacture of the goods***, any of the following operations or any combination of those operations does not constitute such a process:
   (a) operations to preserve goods during transportation or storage;
   (b) operations to improve the packing or labelling or marketable quality of goods;
   (c) operations to prepare goods for shipment;
   (d) simple assembly operations;
   (e) operations to mix goods where the resulting product does not have different properties from those of the goods that have been mixed.

(4) For the purposes of this section, the CEO may, by instrument in writing published in the *Gazette*:
   (a) direct that the factory or works cost of goods is to be determined in a specified manner; and
   (b) direct that the value of Australian labour, the value of Australian materials or the factory overhead expenses incurred in Australia in respect of goods is to be determined in a specified manner;

   and those directions have effect accordingly.

(5) The provisions of sections 48 (other than paragraphs (1)(a) and (b) and subsection (2)), 48A, 48B, 49A and 50 of the *Acts Interpretation Act 1901* apply in relation to directions given under subsection (4) as if:
   (a) references in those provisions to regulations were references to directions; and
   (b) references in those provisions to the repeal of a regulation were references to the revocation of a direction.

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(1) For the purposes of this Part, other than section 269Q, goods (other than made-to-order capital equipment) that are substitutable goods in relation to goods the subject of a TCO application are taken to be produced in Australia in the ordinary course of business if:

(a) they have been produced in Australia in the 2 years before the application was lodged; or

(b) they have been produced, and are held in stock, in Australia; or

(c) they are produced in Australia on an intermittent basis and have been so produced in the 5 years before the application was lodged;

and a producer in Australia is prepared to accept an order to supply them.

(2) For the purposes of this Part, goods that:

(a) are substitutable goods in relation to goods the subject of a TCO application; and (b) are made-to-order capital equipment;

are taken to be produced in Australia in the ordinary course of business if:

(c) a producer in Australia:

(i) has made goods requiring the same labour skills, technology and design expertise as the substitutable goods in the 2 years before the application was lodged; and

(ii) could produce the substitutable goods with existing facilities; and

(d) the producer is prepared to accept an order to supply the substitutable goods.

(3) In this section:

made-to-order capital equipment means a particular item of capital equipment:

(a) that is made in Australia on a one-off basis to meet a specific order rather than being the subject of regular or intermittent production; and

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