DEPARTMENT OF HOME AFFAIRS NOTICE No.2019/21

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

This Home Affairs Notice (notice) updates the Australian Customs and Border Protection Service (ACBPS) Australian Customs Notice (ACN) No. 2010/03 to reflect changes brought about by the establishment of the Department of Home Affairs (the Department) and its operational arm, the Australian Border Force (ABF).

ACN 2010/03 is hereby cancelled with effect from the date of publication of this notice.

The application form (Form B443) for Tariff Concession Orders (TCOs) is an Approved Form as required by s.269F(2)(b) of the *Customs Act 1901* (Customs Act) and is available on the ABF's website at www.abf.gov.au. The Approved Form must be used to apply for a TCO.

This notice provides advice to applicants for TCOs on how to complete the form when making an application.

The application form

The form reinforces obligations for TCO applicants to provide evidence that satisfies the Comptroller-General of Customs (Comptroller-General) (previously the Chief Executive Officer of Customs) that there are reasonable grounds for asserting that the application meets the core criteria as defined at s.269C of the Customs Act. 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 to determine whether Australian manufacturers of substitutable goods exist (s.269FA of the Customs Act).

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 delegates of the Comptroller-General be rigorous in ensuring applicants meet their obligations when lodging an application. Where a TCO applicant provides less than reasonable information or has not conducted reasonable and appropriate inquiries to determine whether Australian manufacturers of substitutable goods exist, delegates of the Comptroller-General may reject those applications.

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.

Form B443 was amended in 2010 to reflect the requirement for more specific responses from applicants. The latest version of the form is available from the Tariff Concession System pages on the ABF website – https://www.abf.gov.au/importing-exporting-and-manufacturing/tariff-concessions-system/tariff-concession-order.

The form reflects that the applicant may be the importer of the goods, or alternatively, 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.

Searches for local manufacturers of substitutable goods

To establish that there are reasonable grounds no local manufacturers of goods that are substitutable for the goods the subject of a TCO application, the applicant is to provide evidence that inquiries have been made to determine whether local manufacturers exist who can produce substitutable goods in the ordinary course of business. These inquiries are designed to locate manufacturers who are producers, or potential producers, of substitutable goods.

A search conducted by a prescribed organization, being members of the Industry Capability Network (ICN) as defined in Paragraph 144 in Part 16 of the *Customs Regulation 2015*, will be considered sufficient evidence of a search.

A suggested format for the wording of the request to the relevant ICN member is attached. Applicants for a TCO should be aware that a fee may be charged for a search conducted by ICN members. Further information on the ICN is available from its website – 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, the Comptroller-General will require evidence of searches using reasonable search terms of **at least three types** of database, such as:

- a trade directory search, such as Australian B2B
- a website listing Australian products, such as Australian Made
- a public search engine, such as Google
- a search of a relevant industry association webpage

Applicants are also required to provide information from their personal knowledge of potential local manufacturers of substitutable goods, 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 Comptroller-General to consider information and inquiries that an applicant could reasonably be expected to have, or to make, pursuant to s.269FA of the Customs Act. 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 Comptroller-General 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 Australian B2B, 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, the potential manufacturer **MUST** be contacted by the applicant in writing with details of the goods that will be the subject of the TCO application. The applicant **MUST** allow a minimum of ten working days for any responses before lodging the application. Any responses received after ten working days are to be forwarded to the Tariff Concessions Administration Section of the Department. A suggested format of the letter to the potential Australian manufacturer is attached to this notice.

If a local manufacturer responds and 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.

Inquiries made by Comptroller-General

TCO applicants should note that having an application accepted is not conclusive proof that there is no Australian manufacturer of substitutable goods. The acceptance of a TCO application is merely a recognition that the application is valid and, *prima facie*, meets the evidentiary requirements of the form.

Whether the TCO is made is a decision of a delegate of the Comptroller-General no earlier than 50 days after Gazettal of the acceptance of the TCO as a valid application. Subsections 269M(1) and (4) of the Customs Act allow the Comptroller-General to make further inquiries, notwithstanding the information supplied in the TCO application. These further inquiries may also include an invitation to a local manufacturer previously discounted by the TCO applicant or not identified by ICN.

Operative date

The operative date for an application will be the date on which a complete application containing **ALL** the information as required by the form is received by the Comptroller-General by one of the methods listed on Page 7 of the Approved Form. If an application is rejected the operative date does not apply.

Illustrative descriptive material

Question 2 of the form requires that all applications must be accompanied by clear illustrative descriptive material (IDM). Such IDM may be in the form of brochures, technical drawings, detailed coloured photographs, samples, industry standards or schematics. If an industry standard is referred to in the description of the goods, extracts from the relevant industry standard, details of the relevant industry organization that has approved the standard, the standards reference number and date of publication must be included at time of lodgement of the application.

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 enable full and accurate identification of the goods the subject of the application or allow an accurate tariff classification to be made. IDM relying simply on a reference to a supplier's website may also result in the application being rejected.

Applicants should also note that TCO applications for PARTS must include fully indexed IDM linked to their preferred concession wording terms. Each part described on the index is to be linked to, and identified in, the 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 HAN 2019/20 Tariff Advice and Tariff Concession Order (TCO) Applications.

Point of contact

ice may be directed to Director Tariff Concessions Administration by email to
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[signed]
Tim Fitzgerald
Assistant Secretary
Trusted Trader and Trade Services
31 May 2019

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.]

Stated Use:

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 which are substitutable for the goods described above. Please note that substitutable goods does not necessarily mean identical goods.

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 Comptroller-General of Customs 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 Department of Home Affair's website at www.abf.gov.au/importing-exporting-and-manufacturing/tariff-concessions-system for details of the TCO process and legislation.

Yours sincerely/faithfully

TCO applicant

Information attached

INFORMATION FOR APPLICANTS - EXTRACTS DEFINITIONS/FROM THE *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 the goods are wholly or partly manufactured in Australia.

(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.

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, substitutable goods, in respect of goods the subject of a TCO application are taken to be produced in Australia in the ordinary course of business if:

(a) a producer in Australia could produce substitutable goods, in respect of goods the subject of the TCO application, with existing facilities; and
(b) the substitutable goods the producer could produce would be made-to-order capital equipment; and
(c) in the 5 years before the application was lodged, the producer has made goods requiring the same labour skills, technology and design expertise as the substitutable goods the producer could produce; and
(d) the producer is prepared to accept an order to supply the substitutable goods in respect of goods the subject of the TCO application.

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

Stated Use:

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 which are substitutable for the goods described above. Please note that substitutable goods does not necessarily mean identical goods.

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 Comptroller-General of Customs to assist in the decision-making process.

Thank you for your assistance with this matter.

Yours sincerely/faithfully

TCO applicant

Information attached

INFORMATION FOR APPLICANTS – EXTRACTS/DEFINITIONS FROM THE *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 the goods are wholly or partly manufactured in Australia.

(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.

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, substitutable goods, in respect of goods the subject of a TCO application are taken to be produced in Australia in the ordinary course of business if:

(a) a producer in Australia could produce substitutable goods, in respect of goods the subject of the TCO application, with existing facilities; and
(b) the substitutable goods the producer could produce would be made-to-order capital equipment; and
(c) in the 5 years before the application was lodged, the producer has made goods requiring the same labour skills, technology and design expertise as the substitutable goods the producer could produce; and
(d) the producer is prepared to accept an order to supply the substitutable goods in respect of goods the subject of the TCO application.

(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.