

**NOTIFICATION OF LAWS AND REGULATIONS
UNDER ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS**

AUSTRALIA

Supplement

The following communication, dated 12 July 2012, is being circulated at the request of the Delegation of Australia.

Pursuant to Article 32.6 of the Agreement on Subsidies and Countervailing Measures and Article 18.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Australia hereby notifies a new Ministerial Direction on Material Injury which was attached to Australian Customs Dumping Notice No. 2012/24 of 1 June 2012 (available online at www.customs.gov.au).

Australian Customs Dumping Notice no. 2012/24

New Ministerial Direction on Material Injury

On 22 June 2011, the Australian Government announced its '*Streamlining Australia's anti-dumping system*' policy. This announcement included a commitment to revise the current Ministerial Direction on Material Injury to confirm that profits foregone and loss of market share in an expanding market are relevant injury considerations.

The previous guidance on material injury was based on a Ministerial Direction from former Minister Beddall in 1990 and two letters from then Minister Button and Minister Vanstone in 1991 and 2000 respectively. In an effort to consolidate the previous guidance, and deliver on the Government's commitment to streamlining the anti-dumping system, the Minister for Home Affairs has issued a new Ministerial Direction under section 269TA of the *Customs Act 1901* (the Act).

The new Ministerial Direction includes the following key points from the previous guidance:

- material injury is injury which is not immaterial, insubstantial or insignificant;
- the injury must be greater than that likely to occur in the normal ebb and flow of business;
- identifying material injury will depend on the circumstances of each case;

- injury caused by other factors must not be attributed to dumping or subsidisation, however dumping or subsidisation need not be the sole cause of injury to the industry; and
- it is important to consider regional dumping, the greater impact of injury during periods of economic downturn and reduced rates of growth as an element of injury.

The new Ministerial Direction also recognises that there may be circumstances where dumping or subsidisation may still result in injury where it has caused the rate of an industry's growth to slow, without causing it to contract, or where an industry suffers a loss of market share in a growing market, without a decline in profits.

Under the terms of subsection 269TA(1) of the Act, the Chief Executive Officer of the Australian Customs and Border Protection Service is bound to comply with the new Ministerial Direction, a copy of which is attached for reference.

Further information

Enquiries concerning this notice may be directed to the Customs liaison hotline on telephone number (02) 6275 6066, fax number (02) 6275 6888 or email tmliaison@customs.gov.au.

Kim Farrant
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CANBERRA ACT

1 June 2012

MINISTERIAL DIRECTION ON MATERIAL INJURY 2012
SUBSECTION 269TA(1) OF THE *CUSTOMS ACT 1901*
COMMONWEALTH OF AUSTRALIA

I, JASON CLARE, Minister for Home Affairs, under subsection 269TA(1) of the *Customs Act 1901*, give the following directions to the Chief Executive Officer of Customs relating to the determination of material injury to an Australian industry under section 269TAE of the *Customs Act 1901*.

On 22 June 2011 the Australian Government announced its '*Streamlining Australia's anti-dumping system*' policy. This included a commitment to revise the current Ministerial Direction on material injury to confirm that profits foregone and loss of market share in an expanding market are relevant injury considerations.

The previous guidance on material injury is contained within former Minister Beddall's direction under section 269TA of the Customs Act dated 4 September 1990, a letter from the then Minister Button to the Comptroller-General of Customs dated 16 December 1991 and a letter from the then Minister Vanstone to the CEO of Customs sent in December 2000 ('the previous guidance'). It is timely to clarify certain aspects of, and to consolidate, the previous guidance. This direction is intended to replace the previous guidance so far as it relates to material injury.

I now direct you as follows in connection with carrying out or giving effect to your powers and duties under Part XVB of the Act.

My direction is to be construed as subject always to the law, including Part XVB. Consistently with section 269TA(2) my direction does not deal with the carrying out or the giving effect to your powers or duties in relation to a particular consignment of goods or to like goods to goods in a particular consignment but deals instead with the general principles for carrying out or giving effect to your powers. You must still have regard to the facts of the individual case. It is not enough to assert that because there is dumping or subsidisation injury automatically follows.

I direct that identification of material injury be based on facts and not on assertions unsupported by facts.

Consistent with Australia's international trade obligations under the World Trade Organization's *Anti-Dumping Agreement* and *Agreement on Subsidies and Countervailing Measures*, I would expect it to be shown that the industry is suffering injury, and that the injury caused by dumping or subsidisation is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business.

Subject always to the law, I direct you to consider material injury to be injury that is not immaterial, insubstantial or insignificant. I direct that there is no threshold amount that is capable of general application. Rather, identifying material injury will depend upon the circumstances of each case and will differ from industry to industry and from time to time. A material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance.

In the past some uncertainty has arisen over establishing the requirements for material injury where other factors may be contributing to injury suffered by the industry. Injury caused by other factors must not be attributed to dumping or subsidisation. However, I direct that dumping or subsidisation need not be the sole cause of injury to the industry.

Whether dumping or subsidisation is the sole cause of injury or whether there are other contributing factors, I direct that the injury caused by dumping or subsidisation must be material in degree. This is

consistent with Australia's international trade obligations under the World Trade Organization's *Anti-Dumping Agreement* and *Agreement on Subsidies and Countervailing Measures*.

I note that relevant economic factors to be considered when assessing material injury are referenced at subsection 269TAE(3) of the Customs Act. These include, but are not limited to the quantity of goods of the kind in question, or like goods, produced or manufactured in the industry; the value of sales of, or forward orders for, goods of that kind or like goods, produced or manufactured in the industry; the level of profits earned in the industry, that are attributable to the production or manufacture of goods of the kind in question, or like goods; the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of the goods in question, or like goods; the terms and conditions of employment (including the number of hours worked) of persons employed in the industry; and investment in the industry.

I understand that the law does not prevent judging the materiality of injury caused by a given degree of dumping or subsidisation differently, depending on the current economic condition of the Australian industry suffering the injury. In considering the circumstances of each case I direct (that you consider that an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped or subsidised products in the market, could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping or subsidisation.

I note that anti-dumping or countervailing action is possible in cases where an industry has been expanding its market rapidly, and dumping or subsidisation has merely slowed the rate of the industry's growth, without causing it to contract. In cases where it is asserted that an Australian industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in an industry's rate of growth may be just as relevant as the movement of an industry from growth to decline. I direct that it is possible to find material injury where an industry suffers a loss of market share in a growing market without a decline in profits. As in all cases, a loss of market share cannot alone be decisive. I direct that a loss of market share should be considered with a range of relevant injury indicators before material injury may be established.

I note that in cases where the dumped or subsidised imports hold a small share of the Australian market, it may be difficult to demonstrate material injury. I direct that no minimum standard should be used to determine whether dumped or subsidised imports have a sufficient share of the Australian market to cause material injury.

In considering cases with regional implications I direct that you bear in mind that an industry's vulnerability to dumped or subsidised imports may be confined to a specific region of Australia. Injury may be occurring in the part of the industry located in that region, without directly affecting the rest of the Australian industry. In this circumstance it is still possible to take account of regional injury of this kind and, in appropriate circumstances, to judge such injury to be material to the industry as a whole.

I direct that the above directions be adapted and applied by you to consideration of claims of threatened material injury or hindrance to the establishment of an industry.

The Ministerial Direction on Material Injury dated 4 September 1990, is revoked.

This instrument takes effect on the day after it is signed.

Dated: 27 April 2012

JASON CLARE
Minister for Home Affairs
