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Productivity Commission – Compliance Costs of 'Nuisance Tariffs'

Freight & Trade Alliance (FTA)

Freight & Trade Alliance (FTA) is the peak body for the international trade sector with a vision to establish a global benchmark of efficiency in Australian biosecurity, border related security, compliance and logistics activities. FTA currently represents 446 businesses including Australia's largest logistics service providers (licensed customs brokers and freight forwarders) and major importers.

On 1 January 2017, FTA was appointed the Secretariat role for the Australian Peak Shippers Association (APSA). APSA is the peak body for Australia's containerised exporters and importers under Part X of the *Competition and Consumer Act 2010* as designated by the Federal Minister of Infrastructure and Transport.

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FTA position to the Productivity Commission

FTA recommends retaining the WCO Harmonised System (HS) whatever the duty rate that attaches to each tariff classification.

Aside from the ongoing significant duty (general revenue) collected, the accurate tariff classification of goods is imperative for many other contemporary regulatory purposes, such as identification of import (and export) prohibitions and restrictions, key to biosecurity risk assessment and is fundamental for accurate trade statistics collation.

Nuisance tariffs

The Productivity Commission has defined a nuisance tariff as "…*tariffs that raise little revenue for the Australian Government, have negligible benefits for Australian producers, but impose compliance burdens on businesses." For the purpose of this submission, FTA considers a nuisance tariff to be one where the general rate is 5% or less* ***and*** *there are no Australian producers of equivalent goods.*

For the purpose of this submission, FTA does not consider a tariff to be a nuisance tariff where the general duty rate will be reduced to zero under a free trade agreement.

A nuisance tariff is generally payable when a tariff concession order cannot be obtained or applied to reduce the duty rate to zero.

The principal method of duty reduction is through the application of a tariff concession order (**TCO**), which reduces the duty otherwise payable to zero. A TCO may be obtained where substitutable goods are not produced in Australia in the ordinary course of business. Substitutability is defined as capable of being put to a use, including a design use, to which the imported goods can be put. Any goods that strictly comply with the provisions of a TCO are entitled to duty free entry.

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The TCO System

The TCO system is designed to assist importers, whether or not they are also manufacturers, to import products duty-free where substitutable goods are not manufactured in Australia in the ordinary course of business. It is an industry assistance measure (refer to Explanatory Memorandum to the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992 Appendix 8.7 when these changes were introduced). The objective of the Tariff Concession System was described in Vestas - Australian Wind Technology Pty Limited and Chief Executive Officer of Customs [2015] AATA 348 (21 May 2015) as "*It is now more accurate to say ….. the object of the systems is to ensure that industry is not taxed by a tariff where it is serving no protective function. It is clear from s. 269C and its place in the scheme of Part XVA, that Parliament has decided that a tariff serves no protective function where there are no goods serving similar functions, and so no substitutable goods, made by Australian industry in the normal course of business*."

Relevant features of a TCO

Relevant features of a TCO are:

- a TCO is made on application by an importer or their customs broker;
- the ABF confirms the tariff classification of the goods the subject of the proposed TCO nominated on the application;
- the proposed TCO wording suggested by the importer / customs broker is agreed by the ABF;
- once made, a TCO can be used for any goods which meet the terms of that tariff classification and strictly comply with the wording of the TCO;
- a good cannot be more than what is described in the TCO as imported. For instance, if a substantive good is packed with a minor accessory, and that accessory is not described in the TCO, the goods will not qualify for that TCO. The ABF place a heavy reliance on *Toro Australia Group Sales Pty Ltd v Chief Executive Officer of Customs [2014] AATA 187,* in which the Tribunal reasoned (at [31]) that *"a full description" in this context necessarily means a precise description, the goods in question satisfying every element of the description without any additional features.*
- The interpretation of TCO wording is proving challenging for industry given TCO information published in the Commonwealth Gazettes and case law.

In terms of the test for making a TCO, the following features are relevant:

- the test of whether the goods described in the TCO and the locally made goods are substitutable is based on whether the goods can be put to a corresponding use;
- in considering corresponding use the following is generally established by case law and reflects how the TCO system is administered by the Department of Home Affairs:
    - it is irrelevant whether the TCO goods and locally produced goods compete in any way or in any market or are commercially substitutable;
    - issues of cost are irrelevant;
    - issues of appearance and quality are irrelevant;
    - Issues of fitness for the importer's purpose are irrelevant;
    - physical similarities or differences between the goods are irrelevant;
    - while it is subject to a current Court proceeding, the issue of how the goods perform a particular use is irrelevant;

- if goods have multiple uses, there need only be correspondence in respect of one of the uses. There is no requirement that the corresponding use be the main, predominant or expected use of the goods;
- there is no minimum level of Australian content specified for goods to be deemed to be produced in Australia. Although "*simple assembly operations*" are excluded from grounds for objecting to/revoking a TCO vide s.269D (3)(d), it is industry's experience that some companies who appear to only assemble imported components leverage this piece of the legislation for competitive and commercial advantage over other industry sections and competitors;
- there is no requirement for the Australian producer to be prepared to supply the TCO applicant or supply within what would be a reasonable commercial time frame.

Problems that result from the above features

The above features lead to the following issues:

- imported goods can be subject to duty even where those goods are largely covered by a TCO. This can occur due to the inclusion of a minor additional item not listed in the TCO or even a minor discrepancy in specifications;
- a good may appear to be covered by a TCO but if that TCO is keyed to a different tariff classification than the imported goods, then the TCO does not apply. This can occur where there is one view as to the tariff classification at the time the TCO is made, and a different view is taken at the time of the relevant importation or a later monitoring audit by ABF;
- a local manufacturer can prevent a TCO from being made even if it is not:
  - commercially realistic that the TCO goods would be used in substitution of the locally made goods;
  - the predominant use of the TCO goods and the manufacturer's goods is very different;
  - the duty-free importation of the TCO goods would cause no detriment to the Australian manufacturer or the market for like goods;
  - the Australian manufacturer uses no Australian materials in the production of the goods;
  - the Australian manufacturer is not prepared to supply the Australian produced goods to the importer seeking the TCO or is unable to supply the goods within a time frame that is commercially realistic.

Each of the above issues can result in the following:

- TCOs not being made where the tariff serves no genuine protectionist purpose;
- a more drawn out and expensive process for applying for TCOs as objections from Australian producers are more likely;
- increased disputes with the Australian Border Force and compliance costs regarding the application of TCOs, both regarding tariff classification and whether the imported goods fit within the terms of the TCO.

It is common knowledge that many TCO disputes do not proceed to legal review because of the costs involved.

Additional problems caused by changes in approach by the ABF

The Australian Border Force (ABF) interpretation of TCOs and the wording or expressions changes too frequently for those in the industry to be certain of coverage or clarity. ABF staff changes and rotation mean that the history of the matter is lost within the Department. An example is that for some time the words “machines” and “plant” were not accepted as suitable descriptors. They are now accepted again. For a long time, the words “capable of” were accepted as describing a good but are now regarded as end-use.

Many existing TCOs contain the word “comprising”, which was at that time taken to mean that the inclusion of these goods was mandatory, but it was not an exhaustive list of components. When made these TCOs were phrased this way at the direction of an officer of Customs and/or the then TCO guidelines. Such changes of practice expose importers and their brokers to post or penalty action resulting from the change in practice by the regulator.

In Becker Vale Pty Ltd v Chief Executive Officer of Customs [2015] FCA 525, Yates J cited Toro and proposed that this reasoning supported a construction of “comprising” that exhaustively states the essential components”. In reading the decision in Becker Vale it appears that TCOs must include a full description and that this full description includes the “essential components”. There is no guidance on what are considered to be “essential components” by the regulator.

Further, Customs monitoring officers audit companies using TCOs if they consider that the TCO does not fully describe the goods. A full description of the goods is of course a requirement of the application under s.269H Customs Act, but the interpretation of what is a “full description” changes. Examples include a glass candlestick with a small decorative brass band around it not being eligible for a TCO for glass candlesticks because the candlestick was both glass and brass. Another example is brake motors. These are motors with brakes. They are still a motor, but current TCOs do not in general also specify the “brake” and so they are not considered eligible. Does it then follow that a motor with a gearbox is also not eligible for TCOs for motors?

A further example is the action taken against companies importing hand held torches under TCO 9902711that include their power supply (batteries): “*TORCHES, hand held, battery operated, but NOT including underwater OR scuba divers torches*”

Until *Toro*, TCOs that properly described goods that were “more than” as described were accepted as being covered provided that the essential nature of the subject goods was as described and did not change the tariff classification of those goods. This is no longer the case, and our opinion is that it exposes many companies, including the original applicants for concessions.

FTA believes that these problems in the current TCO system add significantly to both the existence of nuisance tariffs and the costs of managing those tariffs by ABF and the importing community. It can be expected that those costs would then be passed to end-users by affected parties such as Australian manufacturers who use imported machinery and components in their manufacturing processes, and other importers who supply consumer items.

Options to address these issues:

1. Look at amending the TCO system so that TCOs can be more easily obtained where there are no commercially realistic substitutable goods (rather than theoretical substitutability). Compare for example, how the Anti-Dumping Commission administers the “like goods” criteria (this takes into account end-use, physical qualities, competition in the marketplace and the production process);
2. Introduce a rule that a TCO will apply for an imported good and also its commissioning parts where such parts are included in the consignment with the subject good.
3. Introduce a rule that a TCO will apply for an imported good that is covered by the TCO regardless of whether the goods are “more than” the goods described in the TCO application. For example, a machine subject to a TCO is imported with an accessory. This would avoid the situation where the good falls within the TCO but is excluded because of the inclusion of a minor additional item not listed in the TCO.
4. Consider reintroducing a TCO such as 8734172, which provided duty-free entry of parts where the complete good was covered by an existing TCO. It is not uncommon that, for example, goods such as mining machinery use parts over the life of the good amounting to 20% of its value. The unit costs may be insignificant, but the quantity used over time may be significant. Where goods are a dedicated part for a machine acknowledged as having no substitutable goods produced in Australia, why do we impose tariffs on the parts for which the same reasoning would apply?
5. Extend the coverage of Item 45 of the 4th Schedule to the Customs Tariff so that it covers all goods across all chapters the tariff. Items 45 is referred to as the “split consignment” bylaw and provides that goods classified only in Chapters 84, 85, 87, 89 and 90 of the tariff, which are ordered from the same supplier and shipped from the supplier at the same time and place may be entered as the complete machine or equipment was imported. It should be sufficient that the goods are from a single supplier and shipped at the same time and place and, if not otherwise split, would have fallen under one TCO.
6. Consider a further extension to Item 45 to include components intended to arrive in Australia at or about the same time for installation in a complete line that have been sourced from multiple suppliers.
7. Identify any tariff classification that is entirely covered by existing TCOs, and change the general rate to 0%;
8. Identify any broad tariff classification with limited local manufacturing and consider creating sub-headings to cover the locally produced goods (subject to duty) and have the balance of the tariff heading duty-free;
9. Identify any tariff classification where there is no local manufacturing and reduce the general rate to 0%.