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Ms Yvette Goss
Productivity Commission
Level 8, Two Melbourne Quarter
697 Collins Street
Docklands Vic 3008, Australia

By Email: yvette.goss@pc.gov.au

Dear Productivity Commission,

Submission on behalf of IFCBAA to the PC review of "nuisance" tariffs

We are pleased to make the following submission (**Submission**) to the Productivity Commission in relation to its review of "nuisance tariffs" (**Review**).

This Submission is made on behalf of the International Forwarders and Customs Brokers Association of Australia (**IFCBAA**) and is also made in my own capacity as a lawyer who has represented freight forwarders, licensed customs brokers (**LCB**) and importers in matters regarding the calculation and payment of tariffs and the use of Tariff Concession Orders (**TCOs**).

IFCBAA (https://www.ifcbaa.com/) is a national association which represents both freight forwarders and LCB and was formed recently from the merger of the Customs Brokers and Forwarders Council of Australia (**CBFCA**) and the Australian Federation of International Forwarders (**AFIF**). Both the CBFCA and AFIF had a long history of representing freight forwarders and licensed customs brokers (summarised at https://www.ifcbaa.com/IFCBAA/About/History/IFCBAA/About/History.aspx?hkey=cb08866e-f3f4-4b81-b1a8-b77266ebd930). This representation had included provision of Continuing Professional Development (**CPD**) education to LCB as required by the conditions of their licences. This has also included submissions to the use and efficacy of the TCO system such as the Australian National Audit Office review of the administration of the tariff concession system in 2015 to be found at https://www.anao.gov.au/work/performance-audit/administration-tariff-concession-system. IFCBAA continues to provide CPD to LCB as well as engaging with the ABF and other border agencies in policy work through such bodies as the National Committee for Trade Facilitation (**NCTF**) (and its various advisory groups), the International Trade Remedies Forum (**ITRF**) (and its various advisory groups) and the Customs Advisory Board (**CAB**). IFCBAA is also engaged in the current de – regulation and trade modernisation agenda of the Federal Government and a number of its agencies including the Australian Border Force (**ABF**).

In all of these capacities, LCB members of IFCBAA are regularly engaged with the interpretation of the tariff and payment of duties together with the use of TCOs, whether applying for TCOs for clients, advising clients on the use of TCOs, responding to questions

from the ABF regarding the use of TCOs, defending allegations by the ABF of the misuse of TCOs and objections to revocations to TCOs. This also extends to opposing the issue of Infringement Notices or penalties by the ABF against LCBs and importers and defending prosecutions relating to the alleged misuse of TCOs or incorrect payment of duties. I have assisted with the provision of legal services in many of these matters including the conduct of relevant litigation in the Administrative Appeals Tribunal (**AAT**).

We would like to make the following comments regarding "nuisance tariffs" and the system regarding the imposition and maintenance of TCOs. For the purposes of these comments, we have adopted the position that "nuisance tariffs" are those at 3% or below.

1 We note that there has been significant reduction in tariffs imposed on imports into Australia, both through the general reduction in tariff levels and reduction in tariffs effected through Free Trade Agreements and other trade initiatives. To that effect, the majority of tariffs (excluding dumping and countervailing duties) could be seen to be relatively minor and whose ongoing rationale must be considered in the context of the costs of administering the continued imposition of general "nuisance" tariffs.

2 The costs of compliance with these tariffs is borne by the ABF, importers, LCB and others in the supply chain.

3 The costs of the ABF include the costs of providing Tariff Advices, Valuation Advices and Origin Advices, undertaking internal reviews of those Advices, reviewing TCO requests and monitoring the use of TCOs. In addition, significant resources are given over to the monitoring of compliance by LCBs and importers which also incorporates dispute resolution procedures, whether to enforce compliance or to defend actions by importers and LCB. The costs can also extend to issuing and reviewing Infringement Notices and penalties as well as undertaking prosecutions of those believed to have infringed relevant provisions. On many occasions, these costs are often taken over the reporting and recovery of nuisance tariffs.

4 Importers, LCB and others in the supply chain are also exposed to significant costs which range from the cost of securing TCOs, seeking advice on the correct tariff classifications, reviewing decisions (internally within the ABF or external through the AAT of court system) and the ongoing compliance costs including dealing with compliance assessments by the ABF.

5 In addition to the costs associated with maintaining the current system of nuisance tariffs, there is also the problem that the system can lead to significant uncertainties, in terms of ongoing potential liability for underpaid duty, infringement notices, penalties and prosecutions. Liability to such infringement notices, penalties and prosecutions is increased as liability can be imposed on a strict liability basis. That potential liability can exist for significant periods of time after the relevant goods are imported where there is no prospect of recovering underpaid duty from the persons to whom the goods have been sold. The liabilities apply to many in the supply chain including importers and LCB. Further, the exposure to infringement notices, penalties and prosecutions can arise even if the errors in the tariff classification of goods does not lead to an underpayment of duty or overpayment of a refund.

6 It needs to be understood that the basis for the imposition and recovery of nuisance tariffs arises from the complex international Harmonised Tariff for the tariff classification

of goods and the equally complex international basis under which goods are valued. This is made more difficult by the fact that these international agreements are not necessarily implemented in the same manner world – wide creating inconsistencies in decisions and practices in Australia compared to elsewhere in the world.

7 The duty concession relating from the existence of TCOs in contained in the Fourth Schedule to the *Customs Tariff Act 1995* (**Tariff Act**). The Fourth Schedule also contains other concessions allowing goods to be imported without the payment of customs duties. However, interpretations and use of the Fourth Schedule can often be complex. For example, Item 45 of the Fourth Schedule (relating to sending goods by "split consignments") has been the subject of very restrictive interpretation by the ABF so goods which should be entered duty – free but are not imported in one consignment according to the ABF's interpretation of Item 45 can be denied that duty - free status and must be classified by reference to the parts in each of the consignments.

8 There are examples where complexity in the use of the Third Schedule to the Tariff Act (which imposes the "nuisance tariffs) has led to expensive internal and external dispute resolution. For example, a recent dispute as to the term "medicament" passed through the AAT, the Federal Court and to a decision of the High Court. The High Court decision was that "vita gummies" and "garcinia drops" were medicaments and which were free from customs duty. In the High Court, the ABF resorted to arguments that the French version of the Harmonised Tariff would lead to customs duty being payable and should be preferred to the English version of the Harmonised Tariff in the Third Schedule to the Tariff Act. Subsequently, the ABF made amendments to the Third Schedule so that, in the future, the relevant goods were classified as the ABF believed to be correct and on which customs duty would be payable. Many importers who were planning to import relevant goods based on the decision of the High Court then were denied that opportunity.

9 All stages of the TCO process have been the subject of litigation and other forms of dispute resolution. The approach adopted by the ABF in some aspects of the regime has created complexity and uncertainty to the extent that questions have arisen as to whether the whole TCO system serves its intended purpose. One example includes the meaning of the term "substitutable goods" which, if existing in Australia, preclude the grant of a TCO to an importer. Indeed, the legislation only requires the Australian company to be "capable" of producing substitutable goods – it does not even require the Australian company to be producing substitutable goods. The importance of that term can be seen in the current dispute on a TCO sought for the import of "driverless" trains from India. That dispute has been to the AAT, then to the Federal Court and remitted back to the AAT which held that the Australian product is not "substitutable" so the TCO should be granted. We now understand that the AAT decision is subject to another appeal to the Federal Court, presumably on the issue of "substitutability". A similar problem follows from the requirement of the ABF that goods seeking to use a TCO must be precisely the same as the words in the TCO. In one case before the AAT, it was held that the imported garden hoses were not entitled to use a TCO for garden hoses because those imported garden hoses also had nozzles. Even though the nozzles improved the use of the hoses, the imported goods were held not to exactly meet the words of the TCO. This means that even if imported goods serve the same use as intended by the TCO, the use of the TCO would be denied by any small inconsistency between the goods and the exact words of the TCO.

10 It should be noted that in many cases, the disputes, uncertainty and costs in the current system (including the operation of the TCO system and the use of the Third and Fourth Schedules of the Tariff Act) would be significantly reduced if "nuisance" tariffs were to be removed.

11 The actual costs incurred by the ABF or those in the private supply chain are difficult for us to calculate as we have no clarity on the numbers of officers employed in the compliance and enforcement regime. Further, we are unaware of the amount expended on external providers of services, specifically those providing legal services. No doubt the Productivity Commission can request the ABF to provide details on its costs to maintain the regime associated with nuisance tariffs.

12 Similarly, it would be difficult (if not impossible) to provide details of the costs incurred by those in the private supply chain. Significant costs are incurred from the duties imposed on the members of the private supply chain, including ongoing CPD training, due diligence on goods and suppliers, ongoing compliance reviews, dealing with the ABF and other border agencies. There are also costs in disputing decisions and actions of the ABF whether by way of internal or external review including legal costs of AAT and Federal Court proceedings utilising the services of legal service providers.

13 It should also be noted that the burdens imposed on members of the private supply chain, including potential personal liability for underpaid customs duty, infringement notices, penalties or prosecutions as well as the ongoing compliance costs and licence obligations can act as a disincentive to remain in the private supply chain. Of those in the private supply chain, LCB are subjected to significant burdens and costs to the point that it may be difficult to attract people to become LCBs.

14 As the exposure to liability (of all types) has increased for the members of the private supply chain this had led to the need to create new types of insurances and increases in the premiums payable by those members.

15 We would also suggest that the maintenance of the nuisance tariffs may not be consistent to the aims of facilitation and simplification of trade. This includes Australia's commitments to facilitate trade pursuant to the WTO Trade Facilitation Agreement and the current reform agenda in Australia. That current agenda in Australia includes the work of the NCTF and ITRF, de – regulation work of the Department of Prime Minister and Cabinet, the Simplified Trade System work being conducted by the Simplified Trade System Taskforce administered by the Department of Trade and Investment and the many initiatives being undertaken by the ABF, the Department of Foreign Affairs and Trade and other agencies operating at the border. In light of these commitments both domestic, national or international it would hardly be consistent to be maintaining nuisance tariffs with their associated compliance burden, costs and liabilities.

16 Ultimately, the presumption is that revenue law be transparent, relatively simple to understand and serves the national and international policies supporting the legislation. We believe that the continued imposition of nuisance tariffs does not necessarily serve those outcomes and that the administrative, compliance and legal burdens could be significantly reduced by the elimination of nuisance tariffs as the costs of their ongoing imposition is likely to exceed the revenue recovered from the tariffs and any policy aims supporting the maintenance of those tariffs.

We would be pleased to provide further information as may be requested.

Yours faithfully

Andrew Hudson
Partner