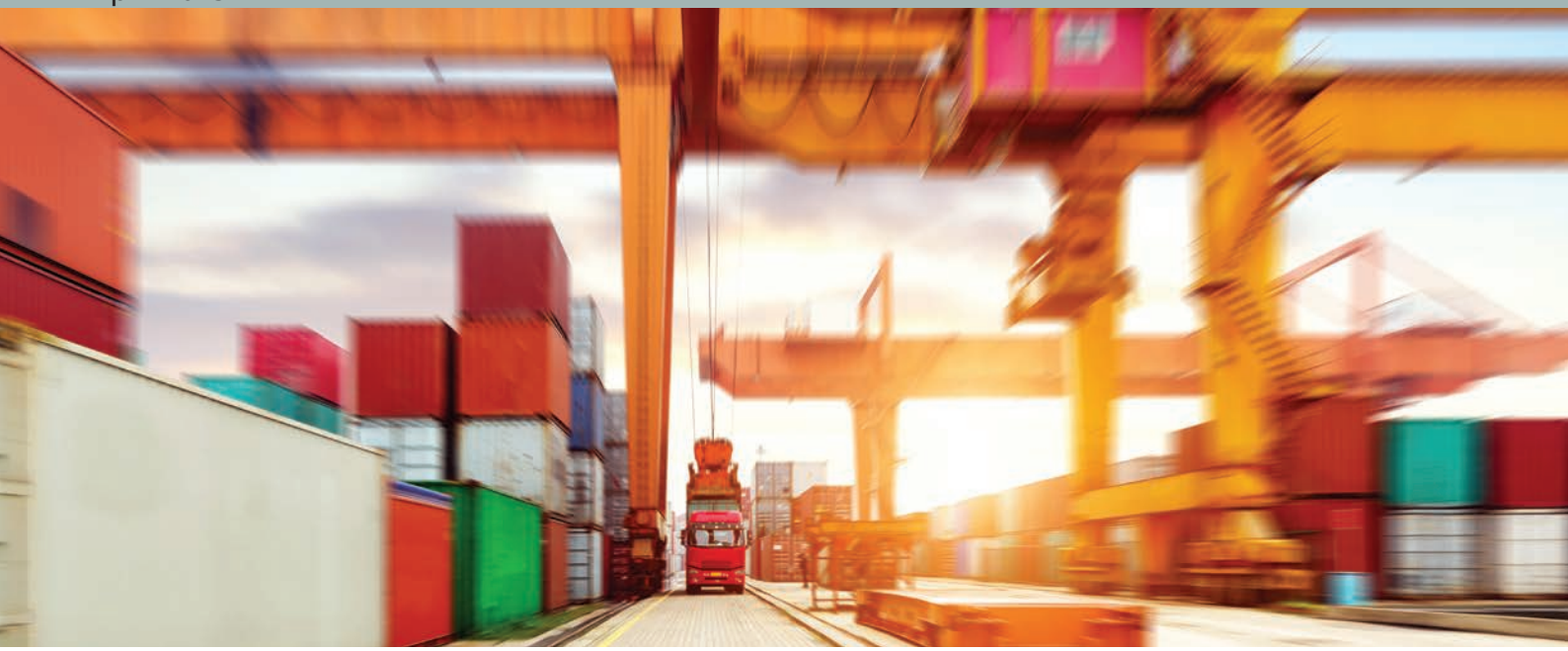
hunt & hunt lawyers

Customs and Global Trade Update

April 2015



Tariff Concessions – when you can and cannot claim a tariff concession order

At a time when there is a lot of talk about liberalising trade through new free trade agreements and adopting trade facilitation measures, it may come as a surprise to learn that the use of tariff concession orders (TCOs) is becoming increasingly difficult or at best, unpredictable.

A TCO is a concession that acts to reduce the duty payable on certain goods to zero. A TCO is made where the applicant can show that there is no local manufacturers making substitutable goods. Once made, any importer can use the TCO, provided their goods are classified under the same tariff heading as the TCO and that their goods fit within the terms of the TCO.

The use of TCOs was once relatively simple. In fact the Australian Customs and Border Protection Service (Customs) went through a phase of making TCOs as broad as possible, enabling ease of use. However, two recent cases demonstrate the current difficulty of applying TCOs.

BRAND DEVELOPERS AUST PTY LTD AND CEO OF CUSTOMS

Accessories not listed in the TCO wording

This case concerned whether a food processor that came with additional items such as an instruction book, vegetable peeler, attachable bowl and a "fresh-keeping" lid took the good outside of the TCO wording which essentially just described a food processor without accessories.

The case addressed an issue that has regularly come up in the context of TCO interpretation – whether goods must do no more or no less than meet the TCO wording precisely, or whether the goods can do more than what is described in the TCO.

It is a crucial issue as unless the importer was the original TCO applicant, the TCO will not have been made with their particular goods in mind. In these circumstances, the importer's goods may have an additional feature or accessory that is not described in the TCO. The extent to which additional features or accessories result in the TCO not applying is a fundamental issue.

Tribunal findings

The Administrative Appeals Tribunal (AAT) considered each of the 4 items in dispute and made the following findings:

- Instruction book – it is a necessary accompaniment to the goods to enable them to be effectively and safely used. Similar to packaging, the inclusion of an instruction booklet should not impact on the application of the TCO.
- Attachable container – Clearly intended to be an integral part of the good and clearly makes up part of the goods described in the TCO.
- Vegetable peeler – Not part of the goods and not covered by the TCO.
- Fresh keeping lid – Not part of the goods – it has no role to play in the operation of the food processor. Not covered by the TCO.

As the import included two accessories not listed in the TCO, the entire import fell outside the terms of the TCO.

Impact for importers

The different treatment of the instruction book and the peeler/lid might provide the best guidance for importers. The instruction book was not described in the TCO but was necessary for the effective and safe use of the good described in the TCO. The same could not be said about the peeler and lid which only had functions before and after the use of the TCO good.

In reviewing imports against the terms of a TCO, ask whether all elements of the imported good are listed and if not, are they otherwise essential to the operation of the principal good?

Unless the inclusion of the object is so obvious that it goes without saying (packaging, a manual), obtaining a ruling or new TCO is recommended.

Close attention should be paid where imported goods have changed over time or where additional items are included for promotional purposes.

It must be assumed that Customs will take a strict approach. Remember that in this case, Customs argued that the instruction book and the attachable container took the goods outside of the terms of the TCO. While ultimately unsuccessful on these points, the fact they were argued demonstrates that Customs will try all possible arguments to prevent the use of a TCO.

BRACKLEY INDUSTRIES PTY LTD V CEO OF CUSTOMS

Is it a Blu-ray case or a case for a compact disc?

This case concerned whether a TCO with the wording "Cases or tray, compact disk" should apply to cases commonly used for Blu-ray Discs.

Customs argued that the TCO only covered CD cases and not the larger rectangular cases commonly used to hold Blu-ray Discs. The importer argued that Blu-ray Discs were a form of compact discs and that the relevant cases could be used to hold CDs, DVDs and Blu-ray Discs.

The importer argued that it was not relevant that the covers contained the Blu-ray logo or that the covers would in fact only be used for Blu-ray discs. The importer submitted that the legislation relating to TCOs specifically required that issues of end use and trademarks be excluded from TCO wording.

Tribunal finding

The AAT interpreted the TCO as meaning a case or tray that could hold a compact disc. This left the only issue as whether the Blu-ray covers could hold a compact disc. Given the similar dimensions or CDs, DVDs and Blu-rays discs it was unsurprising that the AAT found that the imported goods fit within the terms of the TCO.

Some interesting points from the judgment were:

- Whether the goods fit within the terms of the TCO could not be determined by the importers intended use of the goods, as this would offend the requirement that a TCO should not be drafted by reference to end use.
- The Blu-ray trademark on the goods should be ignored as to consider it would limit the TCO by reference to a trademark.
- What was most relevant was the essential character of the goods, not how they would be used.

Inconsistency with the approach in previous cases

A key issue that was not discussed in the judgment was whether the TCO wording applied only to an object commonly known as a compact disc case/tray (which I think of as the hard plastic CD cases) or to any case that can hold any form of compact disc. Often in cases where there is uncertainty as to the meaning of the TCO wording, reference is made to the trade usage of the relevant term. Unfortunately, no evidence was given as to the trade usage of the terms CD case, DVD case and Blu-ray case.

Further, the idea that intended use is irrelevant may be true in respect of the importer's intended use of the goods. However, there have been a number of cases over recent years that looked at the stated use in the TCO application to help shed light on what was meant by TCO wording.

Another factor was that the TCO in question was made in 1998, two years before the first prototype of a Blu-ray was released. Even DVD videos didn't go on sale in Australia until 1999. An argument could be made that this fact must be relevant when determining what goods were intended to be covered by the TCO.

Impact for importers

Ultimately this case did not adopt the same process of interpreting the TCO wording or identifying the imported goods that has been adopted in previous cases. While this approach assisted the importer on this occasion, in the end it creates more uncertainty when applying TCOs – for both importers and Customs. This uncertainty may lead to Customs appealing the decision.

Even with new free trade agreements, TCOs will continue to be used due to their administrative ease. It is important that importers review how much duty is saved via the use of TCOs. This is the number Customs will focus on.

Where the duty saving is material, regular review of the imported goods against the terms of the TCO is necessary. In undertaking this review, attention must be paid to the entirety of the imported good. One minor accessory can take the import outside of the terms of the TCO.

Where there is doubt about the application of a TCO, consideration should be given to obtaining a ruling or a new TCO or to the use of alternative concessions, such as a free trade agreement.

Authors: Russell Wiese, Partner | Lynne Grant, Special Counsel | Fran Smyth, Lawyer