



Law Council
OF AUSTRALIA

Ms Sue Pittman
National Director, Trade and Compliance
Australian Border and Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2600

Dear Ms Pittman

Re: Interpretation of Tariff Concession Orders

I am writing to you on behalf of the Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia (the Committee).

The Committee wishes to draw to your attention certain matters arising out of the recent AAT case of *STI Tyres v CEO of Customs* being a decision of the Tribunal of the 13th of November 2009.

As you will not doubt be aware it has long been the accepted practice in respect of the interpretation of a Tariff Concession Order (TCO), that whatever gave rise to the making of the TCO including the original TCO Applicant,s intention, is to be considered irrelevant in a consideration of what goods are covered by the wording of the TCO. The logic for this is clear in that TCOs stand as instruments available for all members of the public and should be interpreted as they stand. It is also noted that the information as to what was the intent of the original Applicant is not readily available.

It is understood that these principles were in fact confirmed in the case of *600 Machinery Pty Ltd v Collective Customs (NSW)*, AAT No. 85/484, 30th of April 1986 where the Tribunal stated

"Whatever gave rise to the making of a TCO is in our view irrelevant in determining whether goods of a similar kind are entitled to the benefit of that order. It is legitimate to look only at the terms of the order itself. An order made in exercise of power conferred by a section of an Act is delegated legislation. As such it forms, together with any regulations, rules or other order or statutory authorised determinations, a composite piece of the whole legislation. It is to be interpreted in the same way as any other segment of that legislation".

The Committee understands that this case has formed the basis of accepted principle up until the

present time.

It is accordingly with some surprise the Committee notes that in the recent case of STI Tyres Customs legal representative made submissions to the effect that consequent on the ambiguity of the particular TCO in question, it was appropriate to refer to extrinsic materials to assist to resolve that ambiguity. In particular, the extrinsic materials sought to be relied on included the original application and the reference to the stated use as specified on that application. That submission was ultimately accepted by the AAT, but the Committee notes that the Tribunal made no reference to any of the earlier case law on the subject.

The Committee does not wish to debate the correctness of the AAT decision. The issue is that there has been an apparent major change in Customs policy in respect of the manner in which TCOs are to be interpreted. This has been done without any notice to the public.

This is of concern to the Committee. The Committee notes that in recent times there has been a very welcome engagement with Customs on various policy matters and in particular the Committee notes that Customs has gone out of its way to engage with the Committee by providing drafts of Australian Customs notices and other relevant materials.

The Committee is concerned that there appears to have been a very major change in Customs policy that has not been communicated to the public and to this point still remains unpublished as Customs policy.

The Committee accordingly seeks clarification from Customs as to what its policy on the interpretation of TCOs is in respect of using the stated use on the original application as a tool in assisting the interpretation of a TCO to see whether it covers a current shipment. If it is to be the policy of Customs that the original stated use is to be regarded as a relevant criterion then the Committee enquires as to how that information is to be made available to the public at large.

The Committee obviously also requests that if this is to be the stated new policy of Customs then an Australian Customs Notice be issued at the soonest possible time setting out this new policy.

The Committee looks forward to receiving your advice. In the meantime, if you have any questions, please contact the Committee Chair, Andrew Percival, on [02] 9210 6228 or the Deputy Chair, Louis Gross, on [03] 9866 5666.

Yours sincerely,



Bill Grant
Secretary-General

21 December 2009