



Tariff concessions orders - is it now easier to obtain a TCO?

Why this topic

- For most of the past 30 years it has been hard to obtain a TCO if a local manufacturer produces a similar good
- October 2023 – Alstom was granted a TCO over driverless trains when a local manufacturer produced driver operated trains:
 - *Imported good and local good both electric passenger trains for urban mass public transport*
- Question – When will a TCO be made even where a local manufacturer produces the same category of good, which has the same general use as the TCO goods



Tariff Concession Orders

TCO basics

A TCO is a concession that permits duty free entry of the goods named in the concession. It is made on application by an importer, and once made, it is public and any importer can use it. There are approximately 15,000 TCOs in existence.

Core criteria

Are substitutable goods produced in Australia in the ordinary course of business

Substitutable goods

Goods that are put, or capable of being put, to a use that corresponds to a use (including a design use) to which the goods the subject of the TCO can be put

How a use is performed

Cases have traditionally held that how a use is performed is irrelevant

Are TCOs still relevant

Free trade agreements reduce duty to zero on many imports but consider:

- Goods from the EU - FTA unlikely for at least 18 months
- Ongoing compliance with FTAs – COOs
- Some conservative companies will not risk an FTA
- FTAs - Easier for broker / importer to assess TCO eligibility than whether goods meet FTA rules of origin
- TCOs - can obtain a binding tariff advice
- Other benefits – Dumping duty exemption (not automatic)

Comparison of TCO applications

Applications 2010

- 3 March 2010 – 27
- 14 April 2010 – 18
- 19 May 2010 - 8
- 7 July 2010 – 18
- 24 November 2010 - 10

Applications 2023/24

- 6 March 2024 – 13
- 17 April 2024 – 16
- 17 May 2023 - 15
- 5 July 2023 – 14
- 23 November 2023 - 14



Substitutable goods

(1) In this Part, unless the contrary intention appears:

‘substitutable goods’, in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put to a use that **corresponds** with a use (**including a design use**) to which the goods the subject of the application or of the TCO can be put:

...

(3) In determining whether goods produced in Australia are put, or **are capable of being put**, to a use corresponding to a use to which goods the subject of a TCO, or of an application for a TCO, can be put, it is irrelevant whether or not the first-mentioned goods **compete with the second-mentioned goods in any market.**



Traditional approach

- Vulcan – portable kerosene heaters and oil filled electric room heaters
- Thirco – Fabric hand towels with paper towels and hot air dryers
- Downer EDI Rail – Train carriages and complete trains
- Nufarm – Pre-emergent herbicide and post-emergent herbicide
- Toyota Material Handling - forklifts with different lifting capacities
- Lego Australia – Lego blocks and building blocks that were incompatible with Lego blocks
- Re Bag and Jute Co – sacks made for a specific fertilizer bagging system and bags that could hold fertilizer but not in that system
- Mattel – Barbie dolls and baby dolls

Traditional factors relevant to use

The key focus is the uses of the two goods and whether any use of the TCO goods overlaps with a use of the locally produced goods.

The following issues have traditional been considered irrelevant:

- Whether the two goods compete
- Issues of costs and quality
- Whether all uses of the two goods overlap.
- How the use is achieved

Which uses

- It is necessary to consider the uses of any goods that fit within the TCO application – not only the goods intended to be imported
- The comparison is between both actual and potential uses
- Only reasonable uses should be considered
- A use does not have to be a “sensible commercial use” to be a reasonable use
- Courts have not often held that a use was not a “sensible commercial use”
- The uses need only “correspond” - not be identical



Alstom decision |

Summary of decision

- AAT original didn't grant the TCO as both trains had the use of transporting passengers by rail and the only difference was the manner of performing the use
- Federal Court overruled this and held that the focus had to be on the specific driverless train described in the TCO not trains in general
- TCO granted for a very specific driverless train
- Local manufacturer produced driver operated trains
- In considering use of the two trains the AAT considered the passenger experience and the use of the driverless train within a specific railway network
- Held that the driverless train and the driver operated train were not substitutable

Impact of Alstom decision

At its widest

When determining use – primacy is to be given to the TCO wording as this was the wording accepted by Customs

Not what is the use of a train – what is the use of the specific train in the TCO wording

The job of the decision maker was not to identify some broad category of use

Impact of Alstom decision

At its narrowest

- The use of the TCO goods and the Australian produced goods is distinct from the identification of the goods
- This means that a driverless train does not necessarily only have a use as a driverless train
- You must first identify the goods and then as a second step identify the use
- The means by which a good performs a use may be relevant to the core criteria if, and to the extent to which, the means of use affects the use of the good
- Means of use is not relevant if it does not affect the actual use

“There may not always be a bright dividing line demarcating when, or the extent to which, the means by which goods operate affects use”

TRAINS, driverless, single deck, including ALL of the following:

(a) Six integrated AND interdependent AND electronically interfaced cars including ALL of the following:

- i. two trailer cars;*
- ii. two motor cars;*
- iii. two motor cars with pantograph;*

(b) maximum carrying capacity of NOT less than 1540 passengers;

(c) under-frame mounted driverless train control AND management systems interfaced with ALL of the following:

- i. traction AND braking system;*
- ii. door operation system;*
- iii. remote train control AND monitoring system;*

(d) closed circuit television;

(e) passenger announcement AND information display units with route maps;

(f) roof mounted heating AND ventilation AND air conditioning (HVAC) with a cooling capacity of NOT less than 35 kW per unit AND a heating capacity of NOT less than 10 kW per unit;

(g) maximum speed NOT less than 100 km/h

Limits to relying on Alstom

Very narrow and specific TCO wording

Limits to relying on Alstom

AAT limited the case to its facts

- Past cases are largely determined by their own facts
- Each case will turn on its own facts
- Contradictory approach:
 - It is not appropriate to take a highly technical approach to analysing the goods
 - Then took an extremely technical approach to analysing the use of the goods
- Case had 2 AAT hearings and 2 Full Federal Court hearings – not a strong example of clear caselaw



Post Alstom TCO
caselaw

Syngenta Australia v CG of Customs

- March 2023 AAT case
- Concerns a dispute about whether a tariff concession order should be made

Relevant TCO:

“HERBICIDES, Group G, having an active ingredient of fomesafen sodium.”

Issues:

- Generic description of goods – held to be sufficiently generic
- Produced in Australia – held to be produced in Australia
- Substitutable goods



Brief background

- Applicant imported a herbicide which could be used to control a range of broadleaf weeds when applied prior to sowing or post sowing pre-emergence in a variety of crops – it is absorbed via the roots rather than the foliage
- Local manufacturer claimed to produce a variety of herbicides that also worked on a variety of broadleaf weeds
- Customs rejected the TCO application as it found that the local products were effective in killing or controlling at least some of the same weeds as those controlled by the TCO goods
- It did not matter that the TCO goods and the local goods did not work on all the same weeds, in all the same ways in all the same crops

Substitutability

The Tribunal accepted evidence that at least one locally produced products had efficacy in relation to the same crop and the same weeds as approved for the proposed TCO goods. This finding was made despite the fact that the TCO goods:

- Were approved for use in some different crops to the locally produced goods;
- Were approved for controlling some different weeds to the locally produced goods;
- May be applied at different times of crop production than the locally produced goods;
- May have superior performance compared to the locally produced goods.

Some room to argue not substitutable

Two locally produced products were held not be substitutable:

- could not be used at the same stage of crop production as the TCO goods;
- could only be used in pre-emergent foliage and could not be used “in” crops.
- the TCO goods could be used in sown fields. Further the efficacy of the locally produced goods was limited to leaf absorption.

While the products could target some overlapping weeds, given the differences in use, this was not enough to establish substitutability. The Tribunal did not believe that there was a “real possibility” of corresponding use.

- substitutability was effectively denied based on how, and at what stage, the end task was performed. Both products killed weeds and there was an overlap in which weeds were killed. However, the products were not substitutable based on how, and in what circumstances, the products could kill the same weeds.

Vega Industries Australia Pty Ltd v Comptroller General of Customs - AAT

TCO wording:

“GRINDING BALLS, Cast Steel, having a chromium content of NOT less than 10%”

Stated use in application – For the grinding of rocks and minerals in a mining mill

Local industry – Molycop objected

Molycop produces forged grinding balls as opposed to high chrome grinding balls

High Chrome balls are newer technology and are argued to be superior in performance and more cost effective

Customs rejected the TCO on the basis that Molycop produced substitutable goods

Positions of the parties

Vega - Need to focus on the use of High chrome grinding balls – not grinding balls in general

Quoted Full Court in Alstom – the Tribunal should “*not to identify a genus of goods that is either wider or narrower than the actual goods described in the TCO*”

Customs – the additional features or performance advantages of high chrome balls is irrelevant if they can be put to the same use as forged balls

What was the use – the parties

Vega – ...to facilitate the processing of minerals by liberating the valuables from the gangue while simultaneously optimising the surface chemistry of the particles and the pulp chemistry in the ball mill and the flotation tank or the leaching vessel during the subsequent separation and recovery of the valuables.

- very specific description of use – Vega argues this is the approach to take if you are to focus on the actual grinding balls in the TCO application

- Vega argues that if the use is merely grinding mineral ore you are identifying the use of the board genius of grinding balls

Customs - The corresponding use is use as grinding media in ball mills operating at mines and mineral processing plants, grinding the same kinds of mineral ores prior to further processing

What was the use – the AAT

- Question is not what is the use of any grinding ball, but rather, what is the use of the grinding balls described in the TCO
- Looked at Vega's stated use in the TCO application – it reflected Vega's own view as to the use of the goods (for grinding of rocks and minerals in a mining mill) – also important as it forms part of what is in the Gazette
- Felt that Vega's approach is too narrow and not a reflection of the TCO goods or the evidence

Evidence of use

- Both types of grinding balls have the same ultimate end use

Generally

- Forged grinding balls used in SAG mills – High chrome balls unsuitable for use in SAG mills as they crack and break apart
- High chrome grinding balls well suited to use in ball mills – forged grinding balls perform poorly in ball mills

Molycop argued that larger forged balls are used in SAG mills and not ball mills but smaller forged balls are used in ball mills and not SAG mills and intermediate sized balls are used in both ball mills and SAG mills

AAT ultimately accepted that there is evidence that mines have been using forged balls for the same uses they are now using high chrome balls – it was also agreed by the parties that both types of balls can be used to grind sand

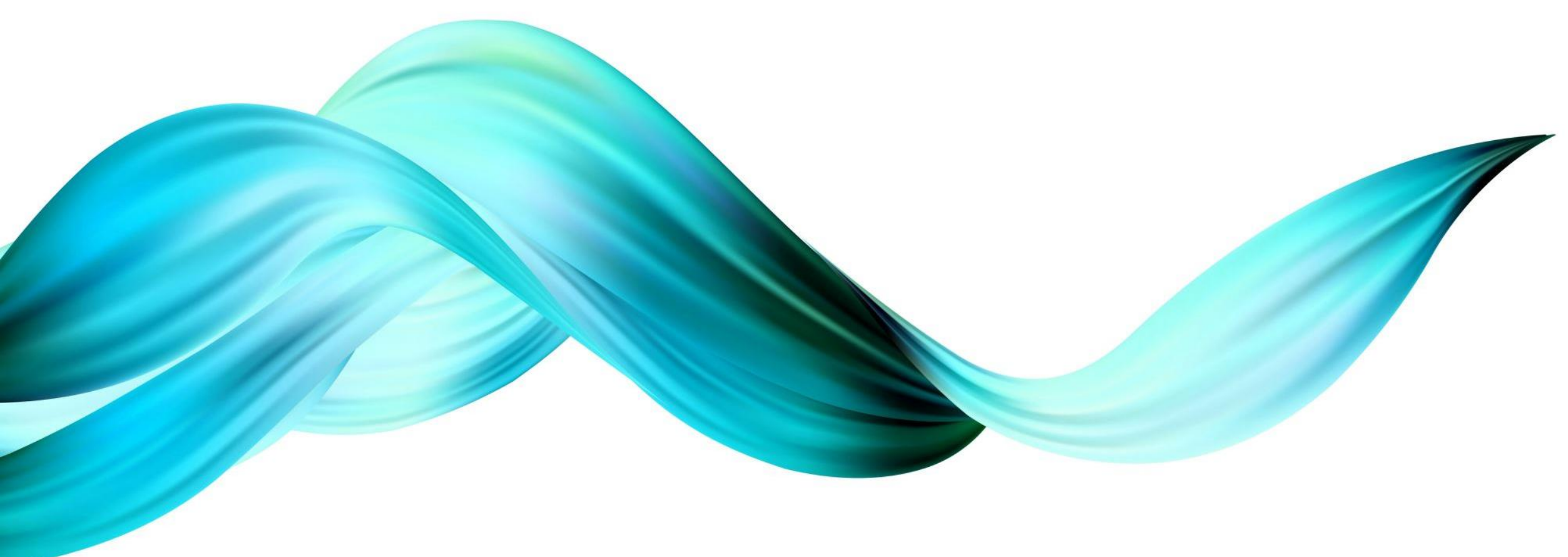
Relevant factors

Tribunal rejected that quality was a relevant factor – quality is an issue for the market place

The price or expense of the goods is not relevant – this is an issue for the market place

Put the focus on the ultimate end use and not how the use is achieved

Ultimate finding – if high chrome balls are now undertaking the same activities as forged balls were previously, they must be, despite any technological advancements, substitutable.



Where are we now

Alstom opportunities

Integrated network

- All aspects of the TCO description must be considered when determining the use of the TCO goods
- *“The TCO goods cannot be described as just a train, but instead is a component of an integrated network ... The TCO goods and the network on which they are to operate are entirely integrated and are of no reasonable functional use if they are separated.”*
- The TCO goods could only operate on an integrated network and can only reasonably operate in a driverless mode
- Can TCO goods be described by the network or system in which they operate and still be a generic description

Alstom opportunities

User experience

- Customs argued that automation was a means of performing the use and the passenger would not notice the difference between an automated and non-automated train
- It is not enough that two trains can get passengers from A to B – it ignores the reality of the passenger experience and ignores the ability of technological advances to substantially change the nature of transportation by rail
- Why was passenger experience different - timetabling, platform safety, opening of doors, reliability of service, the trains will accelerate and decelerate more quickly which allows quicker stopping and closer stations
- All of the above factors should be considered as a package
- Does the difference in use amount to a very different end user experience?
- Passenger experience – this is a qualitative factor – issue of quality / efficiency etc have rarely been considered in TCO cases

Same use is still same use

Where two goods can be used in the same way for the same use, a performance advantage of one product over the other will not be relevant

Alstom suggest - where the manner of performing the use is different (driver vs driverless trains, automated network), this may in some circumstances narrow the identification of the use

Alstom was unique as the two trains were not capable of running on the same rail network – compare to Vega – grinding balls used in the same equipment



Real possibility of corresponding use

Syngenta – goods were not substitutable as there was not a “real possibility” of corresponding use. This was based on the herbicides not targeting the same weed group and differences in how the herbicide performed

- is this another way of bringing in a “sensible commercial use” test?
- Cumulative impact – was it the combination of:
 - different weed spectrum; and
 - different method of operation

One factor on its own may not have been sufficient

What I expect in the future

- Tension between:

- ABF being stricter on the generic description requirement*
- Applicants providing very detailed TCO descriptions*

- TCOs describing goods forming part of a system or are integrated with other goods
- Less focus on the broad end use and more arguments around user experience – this will invite arguments as to quality, efficiency, output, durability – probably not cost
- ABF focus on “corresponding use” rather than identical use
- More focus on how a use is performed – any automation is likely to be emphasised
 - Automated vs fully human operated
 - Robot vacuum versus traditional vacuum
 - Bluetooth vs items connected by cords

Use of TCOs

- The more specific the TCO – the more difficulties raised by features not mentioned in the TCO wording
- A relatively standard feature will be assumed to be covered by broad TCO wording
- However, TCO wording that list many standard features, may not be interpreted as covering any features not expressly stated
- TCO may only work well for the TCO applicant and not for other parties seeking to use the TCO

Tips

- Consider the description of “use” carefully at the application stage:
 - *Tribunal / Court may hold you to the wording used in the TCO application*
 - *If contentious, consider getting the advice of a lawyer prior to lodging the application*
- Drafting TCO wording:
 - *It needs to be generic*
 - *Cannot describe goods directly by end use*
 - *But can the end use be included by implication*
 - *Can you list features that are consistent with a very limited use*
 - *Don't trap yourself into too narrow a wording*
- If not a complete overlap in uses, plus difference in method of use – consider cumulative impact
- If the goods can genuinely be put to the same use, clever wording will not get you across the line
- Practically, the most important factor is whether the local manufacturer objects – can you obtain consent to proposed wording



Questions

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