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NEWS

FEBRUARY 2010 NEWSLETTER**ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AGREEMENT**

The Agreement establishing the ASEAN–Australia–New Zealand Free Trade Area (AANZFTA) also entered into force on 1 January 2010 for Malaysia. The AANZFTA did not enter into force on 1 January 2010 for the ASEAN Member States of Cambodia, Indonesia, Laos, the Philippines and Thailand. Imported goods from these countries are not originating goods until the AANZFTA enters into force for them. It is therefore not possible to apply the AANZFTA to goods imported from these countries until this occurs.

A further Australian Customs Notice will be issued when the entry into force date for those countries is known. At a Stakeholders' Consultation held at DFAT on 16 June 2009, the Government decided to establish a FTA Certificate Of Origin Accreditation Scheme, and the Joint Accreditation System of Australia and New Zealand (JAS-ANZ) will undertake the accreditation process. The draft rules for the Scheme are still being developed but DFAT expect to be able to circulate a draft of the rules for public comment in the near future. DFAT expect that the Scheme will be finalised and commence operation in early 2010. Industry stakeholders will be notified of the commencement date of the Scheme, and this will also be notified on the DFAT Website. Once the Scheme has commenced operation, any interested body will be able to apply to JAS-ANZ for accreditation. It is JAS-ANZ's expectation that the accreditation process will take at least three months. When a body has been successful in obtaining accreditation, JAS-ANZ will notify DFAT, who will undertake any necessary approval or notification requirements under relevant FTAs and advise the body when it can begin issuing COOs for particular FTAs. Pending the establishment of the Scheme, the Minister for Trade has decided to designate the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (AiG) as Australia's Issuing Authorities/Bodies under the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) for an interim period of twelve months following the Agreement's entry into force on 1 January 2010.

These two organisations already have responsibility for issuing COO under the Singapore Australia Free Trade Agreement and the Thailand-Australia Free Trade Agreement and are therefore experienced with procedures for issuing COO under FTAs. If ACCI and AiG wish to continue as Issuing Authorities/Bodies under AANZFTA beyond the twelve month interim arrangements, they will need to obtain accreditation under the FTA COO Accreditation Scheme during this period.

MINISTER OPENS CUSTOMS AND BORDER PROTECTION HOUSE

Minister for Home Affairs, Brendan O'Connor, officially opened the new Customs and Border Protection House in Brisbane in December. The purpose-built facility at Brisbane Airport houses around 270 Customs and Border Protection staff, including enforcement operations, investigation, intelligence, compliance and trade, cargo operations, and client services. Mr O'Connor said the move to the new building was the culmination of many years of planning. "This new building is well situated in the airport precinct to allow Customs and Border Protection staff to do their jobs more effectively and efficiently," he said. "It co-locates Customs and Border Protection staff from three locations – Terrica Place in the city and two other buildings at the airport – into 20-22 The Circuit."

"As well, it places them among the many businesses at Brisbane Airport that are Frontline partners – organisations or businesses Customs and Border Protection relies on to help identify suspicious behaviour or activities. Working out of the new location, which is also close to the Port of Brisbane and the Cruise Ship Terminal, will allow them to develop closer relationships particularly with Frontline partners, which will in turn increase industry awareness." The building took 15 months to construct and a further three months for fit out and approval. Customs and Border Protection staff moved in at the end of November. The organisation has a 15-year lease on the building, with an option of two further five-year terms.

ONLINE TRACKING

Power Customs now offers a freight communication system that enables all parties to have simple, one-window access to all the information regarding each shipment.

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NEW ROUND OF GST ADMINISTRATION REFORM

The Government has taken another step in the reform of the administration of the Good and Services Tax (GST), with the Assistant Treasurer, Senator Nick Sherry, releasing for public comment a second tranche of draft reform legislation.

"The Government is forging ahead with its plans to reform GST administration to make it simpler and less costly for business owners to meet their obligations," the Assistant Treasurer said. "This draft legislation clarifies the GST law and ensures that it applies appropriately." The draft legislation implements two further recommendations made by the Board of Taxation in its review of GST administration, namely:

- clarifying that input tax credits can be taken into account in later tax periods; and
- allowing GST adjustments for third party payments.

An earlier tranche of legislation was introduced to Parliament on 25 November 2009, following consultation on exposure draft legislation and exposure drafts for further measures will be released for consultation in coming months.

AIRLINES TO LOSE BILLIONS AS CARGO RETURNS

IATA says its member airlines have lost a total of \$49.1 billion since the beginning of the decade and are set to lose a further \$5.6 billion in 2010. The association is forecasting a seven percent growth in cargo in 2010 to 37.7 million tonnes carried, up from a five percent forecast last September, following an overall 13 percent decline in 2009. Cargo yields are expected to improve by 0.9 percent in 2010. IATA says North American carriers will reduce their collective losses by \$900 million to \$2.0 billion in 2010. In Europe, airlines will continue to make the largest losses in any region at \$2.5 billion. This is an improvement over the \$3.5 billion loss expected in 2009. Asia-Pacific carriers are forecast to lose just \$700 million in 2010 compared to minus \$3.4 billion in 2009. IATA cites the region's economic recovery for the turnaround as China's GDP is set to grow 9.0 percent in 2010. Middle East carriers are forecast to see their losses shrink from \$1.2 billion overall in 2009 to \$300 million in 2010.

U.S. REPORT SLAMS AIR CARGO SECURITY

A recent U.S. government report says the Transportation Security Administration is failing to ensure the security of cargo in passenger planes. "Air cargo is vulnerable," says the report released in November by the Homeland Security Department. The TSA "has not been effective" in making airlines and freight-handling companies comply with security rules for cargo according to the report. It cites instances where investigators were able to slip into "secure" warehouses where cargo is stored before being loaded onto airplanes and walk around unchallenged. It also found some workers who handle the cargo had not received required background checks or training.

In a response attached to the report, the TSA said agency officials "are in agreement" that the problems must be addressed. The report's six recommendations, including improved employee training, "will provide additional benefit to TSA". The report comes as the TSA and air cargo industry gear up for stricter rules for screening cargo carried on passenger planes that will take effect in August 2010. TSA is tasked with overseeing the airlines, freight handlers and manufacturers who pack and transport cargo and ensure its security. But the oversight process "has not effectively ensured" that those companies comply with TSA regulations. Indeed, the report noted that the TSA's own inspectors had found repeated violations of agency rules. And the report noted that "there are repeat patterns of violations" that the agency has been unable to resolve.

LOCAL COUNCILS OVERTAKE ATO IN RED TAPE BURDEN ON BUSINESS

Local Councils have become the most disliked administrator of red tape on NSW businesses, overtaking the ATO, according to a survey by NSW's largest business organisation, NSW Business Chamber. The Chamber undertook its annual **Red Tape Survey** of over 400 businesses during December 2009. Of significant concern is that nearly a quarter (24%) of businesses surveyed said that the burden of red tape from all levels of government was preventing their businesses from growing and creating more job opportunities, with a further one-third (33%) of businesses expressing concern about future growth. The Red Tape survey demonstrates that the real laggards in terms of working with business are, in fact, local government. NSW is governed by over 150 Local Councils with 41 local government areas in the Sydney metropolitan area alone. Local government has become a refuge for inefficiency and it is being felt in shops, factories and offices across NSW. According to the Red Tape Survey, the three agencies which rate the highest in terms of red tape are:

1. Local Councils
2. Australian Taxation Office (ATO)
3. Office of Industrial Relations (NSW)

Local Councils also led as the poorest communicators compared to the NSW and

Federal Governments with nearly two out of five (39.4%) businesses saying they rarely know about new developments and reviews. Only one in every twenty businesses (4.4%) describes local government as good communicators. When it comes to the ongoing cost and time burden of operating a business, employing staff and paying taxes are the heaviest burden on business operators.

TOURISM DOWN BUT NOT OUT

The Tourism Forecasting Committee (TFC) has released its new forecasts of tourism demand in Australia. The TFC forecast that following an estimated contraction of 3.5% in 2009, the value of tourism to the Australian economy will rise 3% to \$92 billion in 2010. In 2009, despite an estimated fall in arrivals of 0.5%, the value of inbound tourism rose 1.8% to reach \$25.5 billion because those who came, on average, stayed longer and spent more. The number of arrivals declined mainly due to large falls in the Japanese and South Korean markets and much smaller reductions in arrivals from Europe. In contrast, arrivals grew robustly from Malaysia, Taiwan, Indonesia and Hong Kong, largely because of sharp falls in airfares associated with increases in aviation capacity, including expansions in low cost carrier services. The modest fall in arrivals in 2009 was a better outcome than expected earlier in the year because economic conditions were more buoyant than anticipated and significant increases in Australia's competitiveness generated by airfare discounting. Many airlines switched capacity to Australian routes and then competed heavily to fill seats. This price discounting offset much of the negative effect on arrival numbers of the global financial crises. The Chair of the TFC, Mr Bernard Salt said, "Stronger growth in the world economy in 2010 will be more supportive of arrival numbers and aviation capacity serving Australia is expected to again rise. As a result, the economic contribution of inbound tourism is forecast to rise 3.3% and arrivals are forecast to increase 4.3% in 2010."

The largest increases in arrivals in 2010 are forecast to come from China and the United States. While India was the strongest growing market in the five years to 2008, growth slowed markedly in 2009 because of falls in business and holiday travel. In 2010 education arrivals from India are expected to fall by 4000 (or 21%, compared with growth of 35% the previous year) because of the attacks against students in mid 2009. The resultant loss in economic value to Australia could be as high as \$78 million in 2010 if these enrolments are not filled by other international students. The domestic tourism sector didn't fare as well as inbound in 2009, with a fall in economic value of 5.4% to \$63.5 billion and a decline in domestic visitor nights of 6.3%. However, "The prospects for 2010 are brighter with a stronger Australian economy supporting better job security and higher discretionary spending", said Mr Salt. The economic contribution of domestic tourism is forecast to rise 2.9% and domestic visitor nights are forecast to rise 2.3%.

Despite the slowing of the Australian economy, growth in outbound travel actually increased from 6.8% in 2008 to 7.6% in 2009. The availability of sharply discounted airfares along with the strength of the Australian dollar provided a strong incentive for Australians to travel overseas.

AIR CONDITIONER IMPORTS

In September 2009, the Department of the Environment, Water, Heritage and the Arts consulted on a proposal to restrict the import of air conditioning equipment pre-charged with hydrochlorofluorocarbon (HCFC) refrigerants by way of a condition on pre-charged equipment licences. The following condition will be applied to all Pre-charged Equipment Licences issued for the 2010-2011 and subsequent licensing periods:

The importation of equipment which is pre-charged with hydrochlorofluorocarbon (HCFC) and which is for the purpose of air conditioning is prohibited from 1 July 2010 unless it can be demonstrated that:

1. *The equipment is a chiller charged with HCGC123; or*
2. *The equipment is a replacement part for existing HCFC equipment (a replacement part does not include a complete, or substantially complete, indoor or outdoor unit of a split system air conditioner); or*
3. *The equipment comprises high static ducted split system components*

Therefore, as of 1 July 2010, any imports of air conditioning equipment pre-charged with HCFC will be denied entry, or seized by Customs, unless the equipment is specifically exempted by the condition. This restriction does not affect refrigeration equipment.

ATO TRANSFER PRICING STRATEGIC COMPLIANCE PROGRAM ANNOUNCED

The ATO announced that it has commenced its new Strategic Transfer Pricing Compliance Program involving transfer pricing audits, transfer pricing risk reviews and general risk reviews. The ATO expected to issue 140 letters in January to taxpayers with profiles relating to the ATO's focus areas of business restructuring,

related party financing, foreign bank issues, the impact of the global financial crisis on financial performance, and services to the mining industry. The area of intra-group funding has become one of the most problematic areas of uncertainty for taxpayers over the last 18 months. Two of the key issues relate to the interaction between the transfer pricing and thin capitalisation regimes, and whether passive affiliation with a larger corporate group should impact the pricing of debt arrangements within the group.

The ATO has announced its intention to release a draft tax ruling on 16 December 2009, re stating its position that despite the fact that a taxpayer may be within the limits of a debt level for thin capitalisation purposes, in pricing the debt the company is required to have regard to an arm's length debt level. The ATO will withdraw both the previous draft tax determination (TD 2007/D20) regarding the interaction between the transfer pricing and thin capitalisation regimes, and its discussion paper on intra-group financing.

The ATO's discussion paper on intra-group financing currently provides indicative guidance on TD 2007/D20 as well as, importantly, on how passive affiliation and financial independence might be applied. Once this discussion paper has been withdrawn, it seems likely that taxpayers will then be without any substantive guidance on the application of passive affiliation and financial independence until a further draft tax ruling on intra-group financing is released. However, the ATO has not committed to any time frame for this further draft tax ruling.

The ATO will also formalise its so called "rule of thumb" that only allows a group company certainty where it is borrowing at its parent's cost of debt in a draft practice statement to be released on 16 December 2009. This approach may be unworkable for many companies.

It is recommended companies consider the impact on their risk profile of these developments and the resulting uncertainty.

CHANGE OF PRACTICE IN TCO INTERPRETATION BY AAT

The recent decision in STI Tyres and CEO of Customs (13th of November 2009) has provided another dimension in terms of the methods available for the interpretation of a TCO to see what goods qualify under the terms of that TCO. The TCO in question in this case read as follows:

TYRES, OFF-ROAD, MOTOR CAR CIRCUIT OR DRAG RACING, pneumatic, with tyre marking having reference to the following features:

- (a) section width;*
- (b) outside diameter;*
- (c) type of tyre;*
- (d) rim diameter.*

As it will be appreciated this TCO on its reading is clearly ambiguous with at least three possible interpretations namely:

- (a) the TCO applies to three different kinds of tyres, that is, off-road tyres, motorcar circuit racing tyres and drag racing tyres;
- (b) the TCO applies to three different kinds of racing tyres, that is, off-road racing tyres, motorcar circuit tyres and drag racing tyres; and
- (c) the TCO applies to two different kinds of *off-road* racing tyres, that is, motorcar circuit racing tyres and drag racing tyres.

The problem arose because it was originally a TCO designed for racing tyres, but Customs decided to add the word "off-road". This then led to the situation where there was an interpretation possible that the TCO extended to off-road tyres ie the type of tyres that are used on four wheel drive vehicles. This interpretation was not accepted by the Tribunal. They found that the TCO was ambiguous and on that basis said that they were entitled to have reference to extrinsic materials. In this instance, the Tribunal considered the "stated use" as set out in the original TCO application. It is to be noted that this course of conduct taken by the Tribunal was in fact done with the encouragement of Customs. It could be observed that Customs are often inconsistent with their use of extrinsic materials seeming to be more influenced by what is advantageous to them on the day rather than abiding by any set principle. In the past it has been accepted practice that a TCO must be interpreted simply based on its actual words and no reference can be made to the intentions of the original applicant. There are a number of cases that support that proposition. The Tribunal, however, made no reference to those earlier cases and simply accepted the Customs proposition that it can have reference to the stated use. In addition, the Tribunal further noted that at the time of original TCO application there was a local manufacturer of off-road tyres. The Tribunal therefore concluded that a TCO could not have been made at that time for off-road tyres as there were substitutable goods manufactured in Australia at that time.

Again, this is a novel approach that has not occurred previously. This case appears to open the door to both Customs and importers to make reference to the original TCO application if it is going to assist their interpretation of whether goods do or do not meet the terms of an existing TCO.

Other recent AAT decisions include:

- Australian Frozen Foods Pty Ltd - the tribunal overturned a Customs decision that gherkins imported in brine were fit for human consumption at the time they were imported. The decision might have implications for other products imported in a provisionally preserved state;
- General Merchandise and Apparel Group Pty Ltd - the tribunal overturned several Customs decisions to revoke TCO's for various items of bed linen;
- Howard Australia Pty Ltd - the tribunal confirmed a Customs decision on the tariff classification of loader arms for agricultural tractors.

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