

Dear Ric,

As we discussed by phone last Wednesday, my colleague Rowena Mueller found the briefing session which you conducted on 12 July very interesting and informative.

As you will know, Tanda has prepared submissions for a number of clients in respect to the Australia-Thailand, Australia-China and Australia-Malaysia FTAs. We have an ongoing interest in the negotiation of the latter two FTAs on behalf of several clients. One aspect of FTAs of particular concern is the applicable Rules of Origin (ROOS). Clearly, there have been many variations on the theme developed since Australia's first FTA with New Zealand and we note that even the ROOS under that Agreement (ANZCERTA) are about to be changed. The most recent and most complex iteration has come under the Australia-US FTA.

We thought that some observations on the effect of those ROOS may be of interest to you in the context of Australia-China FTA negotiations. The observations are derived from our close study of the AUSFTA ROOS for the purpose of advising an importer of a wide range of products (covering 118 different tariff classifications) and from discussions with a number of experienced customs brokers, freight forwarders and trade consultants about the feedback from their importer clients. The observations are:

- * the AUSFTA ROOS are complex, opaque, difficult for importers to access and difficult to understand
- * an importer of goods covering a range of Harmonised System chapters may have numerous different rules to apply to assess eligibility for the preferential duty rates
- * most importers do not have the internal resources necessary to identify the applicable ROOS and obtain the necessary evidence to support eligibility from their US supplier. Buying in that expertise (in the form of external advisers) is expensive
- * there is insufficient clarity and certainty about the evidence required to satisfy the eligibility tests
- * advice from Australian Customs about the level of evidence required suggests an unrealistic, uncommercial interpretation of the rules
- * there are instances of inconsistent interpretations being adopted by Customs in different ports
- * many American suppliers are intolerant of the requests made by Australian importers for evidence to support eligibility claims, resulting in them either refusing to supply the requested information or blithely agreeing to sign any documentation put before them, safe in the knowledge that the importer is the party most exposed to sanctions by Customs
- * the sanctions on importers for wrongly claiming the preferential duty rates are substantial
- * on balance, the difficulty of understanding the ROOS, the difficulty of obtaining evidence from US suppliers, the costs of compliance and the risks of sanctions for incorrect claims together conspire to convince many importers to ignore the available preferential rates and to continue to pay the general rate of duty - thereby undermining one of the main claimed benefits of the FTA

As a result, while we understand that the decision to not require Certificates of Origin under the AUSFTA was motivated by the laudable motive of reducing transaction costs, there is at least some anecdotal evidence to suggest that the ROOS which were written into that FTA may incur the same (or greater) costs as the C/O option and, worse, may be significantly compromising the efficacy of the Agreement.

After only six months of operation, there is little objective or statistical data available on the operation of the ROOS under the AUSFTA but early indications suggest there may be good cause for the two Governments to commission a wide-ranging survey of importers to gather that data. This will be important in order to ensure that the ROOS are operating to support the objectives of the FTA, not to undermine them. It will be doubly important if the ROOS under the AUSFTA were to be viewed as any kind of model for adoption under the Australia-China FTA.

Thank you for your consideration of these observations. Naturally, I would be pleased to expand on them if it were of interest to you.

Best regards

Geoff Short

Managing Director

Tanda International Pty Ltd

"Optimising International Trade"
