

Andrew Hudson Partner

Hunt & Hunt Level 26, 360 Collins Street, Melbourne VIC 3000

T+61 3 8602 9200 **D** +61 3 8602 9231 **F** +61 3 8602 9299

E andrew_hudson@hunthunt.com.au

W www.hunthunt.com.au



Hunt & Hunt
LAWYERS

Customs, Trade and Transport Articles

August 2005

More Movements on the Australian Free Trade Agenda

- As reported in our earlier 'e-alert', Australia and New Zealand are considering changes to the Rules of Origin operating under ANZCERTA to determine whether a good qualifies for preferential treatment under that Agreement. The intention is that the 'change to tariff classification' approach will replace the current 'ex-factory' approach where goods are not entirely 'wholly originating' from one country.
- As also reported in earlier updates, Australia and Japan have agreed to commence a study into the feasibility of a free trade agreement between the two countries. DFAT have now called for submissions to the feasibility study which are to be made by 26 August 2005.

In both cases, please let me know if you would like further information or to make submissions and we would be pleased to assist.

Australian Anti-Dumping Developments

A few developments of interest

- The decision on 27 July 2005 of the Trade Measures Review Officer (TMRO) in relation to the alleged dumping of certain hollow steel sections from the People's Republic of China, the Republic of Korea, Malaysia and Thailand means that the investigation into the alleged dumping will now commence for the third time.

Late in 2004, the Australian industry complained against the alleged dumping. Customs rejected the initial application and declined to initiate an investigation. The Australian industry sought review of the matter before the TMRO who resolved that the application satisfied the criteria for the initiation of the investigation and Customs were directed to commence the investigation.

Subsequently, Customs commenced the investigation. However, after some preliminary inquiries, Customs formed the view that there had not been proof of adequate levels of material injury in the Australian market place due to the alleged dumping. Customs concluded that losses of market share were due to problems created by the industry itself. On that basis, Customs elected to terminate the investigation at a relatively early stage. That decision by Customs was reported in an earlier update. However, the Australian industry appealed, once again, to the TMRO who formed the view that Customs had incorrectly terminated the investigation into the alleged dumping as they had not undertaken sufficient investigations into the existence of dumped prices for the goods and the cause of injury to the Australian market. Accordingly, the TMRO directed Customs, once again, to continue the inquiry.

It has now been widely reported that Customs have agreed to continue the inquiry and will not seek judicial review of the decision of the TMRO.

- Customs ACDN No. 2005/35 reported a finding by Customs on its review of anti-dumping measures applying to exports of certain automatic washing machines from the Republic of Korea which have commenced on 6 September 2004. The ACDN reported that the Ministry for Justice and Customs had accepted Customs recommendations and as a result, measures had changed in relation to certain automatic washing machines exported from Korea.
- ACDN 2005/39 constituted notice that the Minister for Justice and Customs had approved Customs recommendations in relation to the alleged dumping of grey back carton board exported to Australia from the Republic of Korea. Customs had recommended that anti-dumping action be taken against the goods exported from Korea and the Minister has endorsed that decision, applying anti-dumping duties to the relevant goods exported from Korea except to the extent that they were exported by one Korean company which provided an undertaking not to export at dumped prices.

Danger! Danger! Problems Arise in the Use of the Thai Free Trade Agreement

Readers should be aware of a number of issues associated with the use of 'Certificates of Compliance' from Thailand to establish preferential treatment for goods under the Australia and Thailand Free Trade Agreement 'TAFTA).

- A number of importers are producing Certificates of Origin issued by the 'Thai Chamber of Commerce' which appear to be in the format prescribed by the TAFTA. However, as previously advised to readers, Certificates of Origin from Thailand may only be issued by the Bureau of Import-Export Certification which is part of the Department of Foreign Trade within the Ministry of Commerce in Thailand. Accordingly, importers and their service providers need to be careful to ensure that they have a Certificate of Origin issued by the correct authorities. If they have been claiming preferential status for goods based on a Certificate of Origin issued by the Thai Chamber of Commerce, then they should review past entries, disclose any errors in claiming preferential status in accordance with the voluntary disclosure provisions in the *Customs Act* (requiring payment of underpaid duty) and seek correct Certificates of Origin to allow for a refund of the customs duty which needed to be repaid under the voluntary disclosure provisions. This process should be undertaken carefully and explained to Customs in a way which clarifies that there was no intent to evade duty but merely an innocent administrative error, the penalty for which has been managed by making an appropriate form of voluntary disclosure. Readers should be exercising significant care of this issue as Customs are now undertaking compliance audits and enforcement action regarding proper claims of preferential status for goods.
- Exporters from Thailand are experiencing difficulties in securing Certificates of Origin from the Bureau of Import-Export Certification. Anecdotal evidence suggests that when Thai exporters seek a Certificate of Origin they are facing increasing amounts of paper work and procedural requirements which are regularly changing. Clearly, this is contrary to the spirit of the TAFTA with Thailand and is creating significant frustrations.

In both cases, DFAT are aware of the difficulties and are making inquiries as to what steps can be taken to eliminate these difficulties. If you are experiencing difficulties with either of these issues, then we would recommend that you also report the nature of the difficulties to DFAT in order that it can take up the matter in on-going negotiations with the Thai Government.

China Trade Issues

Since the date of the last update, there have been a number of new developments regarding trade between China and the rest of the world. A summary of some of those developments is set out below.

- China has, yet again, altered the rates of export duty applicable to exports of certain textiles and clothing with effect from 26 July 2005.
- The EU and China entered into a 'textile agreement' on 10 June 2005. This is a deal to manage the growth of Chinese imports into the EU until 2008 and will apply to 10 product categories of concern with growth of import of those categories to be limited until the end of 2007. In exchange for the commitments, the EU agreed to end ongoing investigations concerning the possible use of safeguards measures against imports of these products. This approach contrasts strongly with the more aggressive approach taken by the US in imposing safeguard measures as a first recourse.
- On 11 July 2005, the US and China Joint Commission on Commerce and Trade announced outcomes of negotiations regarding a number of major US trade concerns including the improvement of enforcement of intellectual property rights.

As readers would be aware, one of the main concerns of the US is that the intellectual property of its exports to China is being violated on a regular basis without any protection from the Chinese Government. The Chinese Government has now agreed to take further steps to protect the intellectual property of US products as well as taking other steps to assist access to Chinese markets for US exports.

As always, I would be pleased to provide further details if requested.

CBFCA Member Forums – Don't Forget the Melbourne CBD Session

Readers would be aware that I am proposing to conduct a number of member forums in conjunction with the CBFCA during this month. Details can be found on the CBFCA and Hunt & Hunt websites. It may have escaped the notice of some readers in and around the Melbourne CBD, but one of the sessions is being conducted at our offices at Level 26, 360 Collins Street, Melbourne. The intention of this seminar is to allow those CBFCA members and other interested parties in and around the Melbourne CBD to attend a member forum without the need to travel out to the Tullamarine area. Accordingly, we would welcome further registrations to all of the CBFCA Member Forums which are soon to take place and especially from those in the Melbourne CBD area.

Other International Trade Developments

In addition to Australia's busy free trade agenda, other countries are equally busy on the international trade agenda. Some examples are as follows:

- Lloyd's List DCN reported on 27 July 2005 that New Zealand had signed a multi-party free trade agreement spanning the Pacific and Asia. According to the report, the 'Trans-Pacific Strategic Economic Partnership' links New Zealand with Chile, Singapore and Brunei, liberalising trade in goods and services between the four countries and providing for the elimination of all tariffs among those four countries.
- Press reports on 1 August 2005 indicated that Japan was to impose retaliatory trade sanctions against the US on 15 goods including steel as a result of the US 'Byrd Amendment'. The Japanese tariffs, set at 15% from 1 September 2005 accord with similar actions by Canada and the European Union against the 'Byrd Amendment'. That US law enacted in 2000 redistributes US levies on dumping to US companies that complained, Japan and six other countries as well as the EU and previously taken the issue to the WTO which last year authorised sanctions amounting to 72% of the sums reaped by the US law. To date, the US has yet to take positive action to remove the Byrd Amendment and stop its offending practice.
- On 24 June 2005, the US submitted a 'Declaration of Intent' to adopt the World Customs Organisation (WCO) 'Framework of Standards to Secure and Facilitate Global Trade'. According to reports (and previous updates), the Framework represents the WCO's effort to secure supply chains throughout the world, while allowing trade to move faster, smoother and more predictably. The intention is that a common set of standards would be implemented to secure cargo moving into and through all ports in the world. As a supporter of these types of efforts through the C-TPAT, the 24 hour rule and the Container Security Initiative, the US believed that the WCO framework was consistent with its objectives to facilitate its secure international trade. At the same time, Customs authorities from the EU, Japan, Australia, Canada also announced their commitment to provide aid to developing nations wishing to implement the security framework but without the financial means to do so. For these purposes, there would be established a capacity building division within the US CBP office to assist developing nations to implement the WCO framework.

Customs Succeed in High Court Appeal in Excise Prosecution – Matter Returned to Victorian Supreme Court For Further Hearing

Readers may recall earlier reference to the case of CEO of Customs v Nazihl El Hajje in the Court of Appeal of the Supreme Court of Victoria. In that case, the Court overturned a conviction against the defendant where proof of elements of the offence was partly based on the use of averments. The Court of Appeal held that the averments had been incorrectly used to prove the fact of manufacture of tobacco products which was an element to the legal aspect of the offence when averments should not be used as to matters of law.

Customs appealed the decision to the High Court of Australia. The decision of the High Court was released on 3 August 2005 in which the High Court unanimously allowed the appeal by Customs.

In a press release issued by the High Court, it commented:

'The Act provides that what is averred is prima facie evidence of the matter averred. It remained for the trial judge and the Court of Appeal to say whether the facts averred were established to the requisite degree of proof. However, the Court of Appeal did not consider whether the necessary facts were established to the requisite degree and Mr El Hajje's contention, that the trial judge erred in finding that the tobacco in his possession, custody or control was manufactured or partly manufactured, remained undetermined. The Court remitted the matter to the Court of Appeal for further hearing and determination.'

Accordingly, the matter will now be heard once again by the Victorian Supreme Court of Appeal taking into account the comments of the High Court. Again, this represents further evidence of the complexities of the use of the averments both in Customs and in excise prosecutions.

New Chain of Responsibility Laws About to Commence

For those readers who have attended various CBFCA Conventions in recent years would be aware of the extension of the Chain of Responsibility' laws to mass and dimension limits and load restraint requirements.

As readers would be aware, under the auspices of the National Transport Commission, state Governments have been working together to adopt a uniform code Chain of Responsibility' laws so that anybody who is involved in road transport and can be held responsible for breaches of road laws. Clearly, this includes parties who arrange for the consignment of goods by road transport such as importers or exporters, customs brokers, freight forwarders as well as transport companies and their employees.

The Chain of Responsibility laws currently apply under driving hours and dangerous goods regulations. New provisions in the *Victorian Road Safety Act 1986* mean from that 30 September 2005, the Chain of Responsibility also applies to mass and dimension limits and load restraint requirements.

As set out in the information sheet issued by VicRoads:

'If you are involved in any of the following road transport activities you may be held responsible for breaches of road laws:

- **consigning** – a person or company commissioning the carrying of goods
- **packing** – placing goods in packages, containers or pallets
- **loading** – placing or restraining the load on a vehicle
- **driving** – the physical act of driving a heavy vehicle
- **operating** – operating a business which controls the use of heavy vehicles
- **receiving** – paying for the goods/taking possession of the load.

You also have obligations not to coerce, induce or encourage a breach of road transport laws.

In addition to ensuring compliance with road laws, you have to take reasonable steps to make sure that you do not pass on to any other parties any false or misleading information about a vehicle or its load.'

These provisions place new and significant obligations on all parties in the supply chain. Similar provisions will be introduced in other states including provisions to commence in New South Wales early in October 2005. Readers should acquaint themselves with the terms of the new regulations, review their insurances to ensure that they are protected (to the full extent possible) against financial liability, keeping in mind that no amount of insurance will cover for the record of a conviction. Readers should also ensure that any transport companies with whom they contract have adopted an appropriate industry code of practice which may provide a defence to strict liability penalties.

Further information can be secured from ourselves or through the CBFCA.

New CMR Offences and Other Provisions Commence on 19 July 2005 Together With Changes to Moratorium Periods

Background – ICS now open for import business

Hopefully, all readers will now be aware of the Government announcement that the Integrated Cargo System (ICS) will be available for reporting of relevant transactions from 19 July 2005 with a final cut-over from the legacy systems to occur on 12 October 2005. Until that cut-over date, both the legacy and ICS systems will be available for use which will be dictated by Customs transitional arrangements. Readers should acquaint themselves with those arrangements as set out on the CMR part of the Customs website. As a general proposition however, reporting for transactions to occur before the cut-over date should be made to the legacy systems and reporting for transactions to occur after the cut-over date must be made to the ICS. Readers should also keep in mind that when undertaking pre-arrival reporting, that report cannot be made more than 10 days before the proposed arrival of the vessel. As a result, the crucial time for reporting into the ICS will not commence until 2 October 2005.

Commencement of the remaining TML provisions and other amendments!

On 7 July 2005, the Government also proclaimed announced that 19 July 2005 was to be the date for commencement of the remaining 'import' provisions of the Trade Modernisation Legislation (TML) which had yet to commence. The TML provides the legal framework for the use of the ICS and the entire CMR program although the new provisions apply to any reporting whether to legacy systems or the ICS. This raises the following relevant issues.

1. The majority of the changes contained in the TML which have now been implemented are those which enable the use of the ICS to report import transactions or dictate the form of reports.
2. The import provisions of the TML include a variety of new offences in Section 64, 64AA, 64AAA, 64AB, 64AC, 64AB, 71G and 74 of the *Customs Act 1901* (Act). These are predominantly 'cargo reporting' provisions imposing new obligations on cargo operators (such as airlines, shipping lines, depot operators, stevedores and warehouse operators) to report at different stages in new forms for new purposes. For example, there are the new obligation on parties to lodge 'outturn' reports identifying the unloading of cargo.
3. A number of the new offences impose liability on a strict liability basis. For these offences, Customs will have the option of issuing Infringement Notices. The issue of Infringement Notices (after the expiration of any moratorium periods discussed below) is governed by the Guidelines issued by Customs.

Commencement of other provisions – extending some duty recovery

The comments of the remainder of the TML was not all about the ICS and import reporting. There are other provisions which are also of relevance.

1. The commencement of the remaining provisions of the TML **also** had the effect of initiating an amendment to Section 165 of the Act. This is the section which allows Customs to recover customs duty which has been 'underlevied'. Customs current interpretation is that Section 165 allows recovery of customs duty underpaid due to their error. The TML incorporates an amendment extending the period to recover such underpayment for 12 months to 4 years. This amendment will operate on a prospective basis. It is intended to be matched with a change to the Customs Regulations to allow four years to make a refund application. Again, this will operate prospectively.
2. The announcement of 7 July 2005 **also** had the effect of commencing provisions in other legislation which awaited the commencement of the remaining provisions of the TML. This included the commencement of the remaining provisions of the *Customs Legislation Amendment Act (No.2) 2003*, the *Customs Legislation Amendment Act (No.1) 2002* and provisions of the Import Processing Charges Legislation. Readers should be aware that some of these provisions amend TML provisions which, themselves, only commenced on 19 July 2005. For example, these provisions make amendments to the new cargo and outturn reporting requirements in the TML. **Accordingly, when considering new reporting requirements, readers need to look at the TML and the amendments affected by this other legislation. Make sure that you are using a copy of the Act which is entirely up to date!**
3. Changes to the cut-over arrangements have also had an impact on proposed changes to 'Impending Arrival Reporting'. In April 2005, Customs had announced that from July 2005, vessel pre-arrival and passenger and crew reporting would be required 96 hours in advance of a vessel's arrival, with shorter periods depending on the length of the voyage. However, by ACN 2005/31, Customs indicated their view that requiring 96 hours pre-arrival reporting from July 2005 would require amendments to the Customs

Regulation. Accordingly, Customs advised that 96 hours pre-arrival reporting would only become effective from 12 October 2005.

Commencement of liability and moratorium periods

As with the other stages of the TML associated with CMR, it had been intended to provide some 'moratorium' periods precluding Customs enforcement action. These were intended to allow industry to manage and accommodate the new requirements. Accordingly, while certain offences commenced, either the TML (through a statutory moratorium) or Customs (by way of administrative moratorium) provided that no infringement notices could be issued or no prosecutions could be commenced during those moratorium periods. The moratorium only applied for some offences. Generally, the moratorium provisions for their TML import offences were to be for six months commencing at the time of the commencement of the TML provisions on 19 July 2005. The moratorium arrangements were predicated on the 40 day cut-over period in Customs original transitional arrangements. However, the extended cut-over period meant that almost half of the proposed moratorium periods would have expired by the cut-over date, effectively reducing by one-half the moratorium period once a full cut-over to the ICS had occurred with the mandatory use of the ICS.

Accordingly, Customs have announced **changes to moratorium arrangements** as set out in ACN 2005/34. While this article does not provide adequate room to detail all of these new moratorium arrangements, the following are relevant issues as identified in the ACN.

1. The administrative moratorium against the issue of infringement notices for offences under Section 64(13), 64AA(10) and 71G(1) began on 19 July 2005 and will run for six months after the cut-over period until and including 12 April 2006.
2. There will be a moratorium against **both** the issue of infringement notices and prosecutions for offences under Section 64AAB(7), 64AAC(6), 64ABAA(9) and 71AAAQ. Again, this will commence on 19 July 2005 and will run until 12 April 2006.
3. There is a **statutory** moratorium for late cargo reporting which provides a six month moratorium against liability under Section 64AB of the Act (failure to report cargo). The statutory period will remain in place and will not be extended. However, a cargo reporter who is currently lodging documentary cargo reports and requires additional time to report electronically can apply for an extended moratorium provision under Section 64AB. For those cargo

reporters who report electronically, in addition to the statutory moratorium on infringement notices and prosecutions for offences against Section 64, an additional administrative moratorium will apply until six months after the import cut-over time. As set out in the ACN, for these purposes:

- (a) infringement notices will not be served and prosecutions will not be brought where the offence relates to the report of goods that are intended to be unloaded in Australia; and
- (b) infringement notices will not be served but prosecutions can still be brought if the offence relates to the report of in-transit goods.

Readers should be aware that these changes to the moratorium arrangements have not been incorporated in the 'Import Penalties' document on the CMR section of the Customs website. Accordingly, that document should be treated with caution.

However, as reported earlier, a moratorium should not be construed as reason not to comply. Customs will still be closely monitoring the compliance record of parties during the moratorium period and if there has been a failure to comply or a low-level of compliance then once the moratorium period has expired, Customs will have the option of immediately taking proceedings or issuing infringement notices.

Other provisions are now of more relevance!

Due to the way in which the TML was structured, a number of other provisions of the TML have already commenced but have had little effect as the import reporting obligations had not commenced. These include.

1. The obligation under Section 126E to report electronically through the ICS within 24 hours after an official Customs outage.
2. The obligation under Section 126F to pay customs duty to Customs within 24 hours of an official Customs outage undertaking had been provided to allow cargo to be imported during the Customs outage when duty could not be paid.
3. Offences for errors or omissions or misstatements in cargo reports or outturn reports under Section 243V.

Look out for these relevant offences!

Sections 126E and 126F are not strict liability provisions and accordingly, failure to comply with those provisions leaves Customs with the sole option of instituting proceedings for breach of those obligations. The Business Continuity Plan of any customs broker must include provisions ensuring that obligations under

Section 126E and 126F are observed following an official Customs outage.

Section 243V is a strict liability provision and allows Customs to either prosecute or issue an infringement notice. Any moratorium provision associated with Section 243V expired some time ago and accordingly, Customs would now be in a position to issue proceedings or issue an infringement notice in relation to errors in the cargo reports or outturn reports. This provision will be of particular concern given that parties may focus on the need for reporting on time and forget about accuracy of the statements!

Conclusion – get busy!

It is important for all parties, whether importers, exporters, cargo reporters or service providers to ensure that they are aware of the new offences. They should be aware that a moratorium period does not allow for non-compliance. They should also be careful of those provisions which had already commenced but which only now have come into sharp focus with the commencement of the import provisions of the TML and related legislation.

Readers need to review their operations and their dealing with clients to ensure that they comply with these new obligations. Anecdotal evidence suggests that Customs will further increase enforcement action.

Get to the member forums!

There will be discussion on these and related topics during the CBFCFA member forums in August.