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LAWYERS

Customs, Trade and Transport Update

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Labrador Liquor – the sequel and the penalties

The preliminary stages of the Labrador Liquor case before the High Court of Australia in 2003 set a number of important legal precedents including a conclusive ruling from the High Court on the standard of proof in “Customs prosecutions” and the procedure to be observed in such prosecutions.

However, the substantive case has now been heard before the Queensland Supreme Court and findings made against the defendant company and its directors.

Customs alleged that on a number of occasions, the defendants evaded customs and excise duties on goods delivered into home consumption by falsely pretending that the goods had been exported to Fiji and the Solomon Islands. Customs also alleged that in reporting false exports, the defendants knowingly or recklessly made false statements and that the defendants had moved goods subject to Customs control without authority.

Ultimately, the defendant company and its directors were found guilty of 45 offences against the Customs Act and the Excise Act in the fraud case which began in 1997. On 15 March 2006, the defendant company and the two directors were ordered in the Queensland Supreme Court to pay \$1.01 million in duty evaded and pay fines of \$5.06 million for each of the three defendants (a total of \$15.18 million). Additionally, in accordance with specific Queensland legislation, the Court determined that if the directors did not pay the penalties immediately, they should each be imprisoned for a total of 4 years and 345 days. The imprisonment order has been stayed for 28 days to allow the defendants time to make a formal Court application for a stay of imprisonment pending the outcome of an appeal application.

The judgement raises a number of significant issues.

- Queensland is one of the few jurisdictions in which parties can be jailed for failing to pay debts of this type. Regardless of the outcome of any appeal, the order of imprisonment will cause many defendants facing Customs prosecutions in Queensland to seriously consider negotiating “manageable” penalties rather than facing significant penalties if they were successfully prosecuted with the prospect of jail for failure to pay those penalties. It may cause even those defendants with excellent potential defences to negotiate a commercial settlement due to the fear of the potential adverse outcomes of a successful prosecution and failure to pay penalties awarded.
- It seems unfair that a case which proceeds originally as a claim for civil penalties could ultimately lead to jail for a defendant. If a jail sentence was always the aim of Customs, then, arguably, the case should have been bought pursuant to the Commonwealth Crimes Act 1914. An increasing number of Customs prosecutions are now bought as criminal actions pursuant to the Crimes Act in other jurisdictions. However, Customs seem very pleased with the result in this case as is evidenced by their media release of 15 March 2006.
- If Customs had proceeded pursuant to the Crimes Act, then criminal procedure would have been observed during the trial. This could have had an impact on the requirements of the defendants and the evidence which was allowed at trial. For example, the Customs Act provides that averments cannot be used in a matter which is an indictable offence or one that leads to an offence directly punishable by imprisonment. In this case, imprisonment was an indirect consequence of the proceedings and averments were used as part of the evidence against the defendants together with direct evidence taken from prosecution witnesses. Those averments helped secure the conviction of the defendants. This seems a fine distinction.

- The case points to unacceptable levels of inconsistency between states in their management of Customs prosecutions. In other states, Customs have proceeded with prosecutions and have secured orders for significant penalties against defendants where there was no realistic prospect of payment by those defendants but with no potential consequences of imprisonment for those defendants. For example, in a recent decision of the New South Wales Supreme Court in *Ozzy Tyres* the defendants agreed with Customs for orders recording convictions against the defendants together with further agreed orders for significant financial penalties. However, Customs agreed that the financial penalties did not need to be paid by the defendants because it was determined and accepted that the defendants had no financial capacity to make those payments. Customs reserved the right to enforce the penalties if it become clear that the defendants did, in fact, have financial resources available to pay any penalties. This result bears comparison to the result in *Labrador Liquor*.

The Australian Law Reform Commission ("ALRC") has been calling for a reform to Customs prosecutions since its report in 1992. The ALRC called for that reform again in its report in 2002 and made specific comment as to the possibility of jail terms for parties who fail to pay penalties ordered in Queensland. Subsequently, the House of Representatives Standing Committee of Legal and Constitutional Affairs also recommended that Customs prosecutions be reformed as recommend by the ALRC as part of its Inquiry into the modern day usage of averment powers by Customs (from May 2004). However, Customs most recent Annual Report only refers to internal consultation having been established to discuss possible reform in the legislation. Putting to one side any views as to the merits (or otherwise) of the defendants in the *Labrador Liquor* case, the consequences of the judgement underline, yet again, the need for urgent reform in relation to Customs prosecutions.

Administrative review of the anti dumping regime

A joint study to examine Customs current administration of the anti dumping regime and ways to improve that regime is being undertaken by Customs, the Department of Industry, Tourism and Resources, DFAT and the Trade Measures Review Officer.

The review is only focused on administrative matters and should not lead to legislative changes. Instead it is to focus on the administrative process. This has lead to significant interest from associations representing many interested parties such as Australian producers

and manufacturers and bodies representing importers. According to associated media reports, Australian producers and manufacturers feel that the current system is too difficult and expensive. Importers are concerned that changes to assist local manufacturers may disadvantage them unfairly and may move the Australian system away from its strict compliance with WTO obligations.

Submissions are to close on 31 March 2006 and I would be pleased to assist with any interested parties making a submission.

INCB reports increase in smuggling of drugs by mail

The International Narcotics Control Board ("INCB") Annual Report was issued on 1 March 2006. The associated media release reported that the INCB has urged Governments to strengthen national legislation and to screen all routes for incoming and outgoing international mail. The INCB recommends that the increased screening should include the physical premises of international mail courier companies. The INCB also recommends the limitation on numbers of entry points for parcels to allow more effective control of consignments. It will be of interest as to whether the Australian Government responds with any increase in action against international mail courier companies or their premises especially as the INCB reported that Australia was among countries with the largest interception of illegal substances by mail.

Vietnam – good news and bad news

Vietnam's international trade regime continues to experience some uneven outcomes in international trade.

- On 2 March 2006, media reports recounted that Australia had completed bilateral market access negotiations with Vietnam. As part of Vietnam's efforts to accede to the WTO, Vietnam has been negotiating bilateral market access arrangements with other WTO members as well as negotiating the overall terms of its WTO membership. The Australian deal (which will come into effect once Vietnam joins the WTO) will reportedly enhance access for dairy, sugar, wheat flour, confectionary and fruit as well as delivering increased access to markets for banking, education, environmental and mining services. Media reports pointed to an increase in merchandise trade of 50% between Australia and Vietnam in the last year to just under \$4 billion.

- According to other recent press reports, EU member countries are divided over whether to impose trade remedies against increasing imports of footwear from China and Vietnam which some European manufacturers claim are destroying their industry. The European Commission (the investigating body of the EU) has said that while it will act against dumped imports, it will not protect inefficient European manufacturers. EU investigators have reported that the Governments for China and Vietnam are providing cheap finance, subsidies rents and other support which allow them to “dump” footwear into the EU markets. The EU Trade Commissioner has suggested provisional dumping duties to be imposed on Chinese and Vietnamese footwear products but a decision has yet to be made their imposition.

These developments underline my previous observations that Vietnam will be the next big trade partner for Australia in Asia (after China) and those in the trade and transport industry would be well served in considering ways to facilitate and assist that trade.

Developments in trade in the pacific islands

Press reports in the last week have identified some developments in relation to trade and investment in the Pacific Islands.

- A joint media release from the Minister for Foreign Affairs and the Minister for Trade on 15 March 2006 identifies a new initiative to increase investment in the Pacific Islands by the appointment of a “Pacific Investment Commissioner”. This position is a joint initiative of AusAid and Austrade which is intended to help Australian companies identify opportunities for joint ventures and commercial partnerships in Pacific Island countries such as Fiji, the PNG, the Solomon Island and the Cook Islands.
- A report in the Australian Financial Review on 20 March 2006 indicates that Australia’s textile industry is fighting proposed changes to the SPARTECA deal which they claim would allow cheap Chinese cloth and garments to enter into the country duty free. Australian industry is concerned by a Fijian proposal to change SPARTECA by loosening its country of origin rules and adding wool to the deal. While the Agreement was reviewed in 2004 and is not technically due for review until 2007, Fiji has claimed that increasing unemployment and textile manufacturing as the grounds for changing the package. The local industry is concerned that easing local content rules will open the door to Chinese product and have a significant effect on the local industry.

Australia’s recent trade agenda has focused heavily on the United States and Asia. It is interesting to see that our Pacific Island neighbours are still securing attention from Australia.

Impending end to customs administrative moratorium and ICS cascade reporting

At the same time as attempts continue to negotiate appropriate compensation payments and the ANAO and Booz Allen Hamilton undertake independent reviews of the CMR project and the ICS, other issues of interest are as follows.

- Parties should remember that the moratorium against the issue of infringement notices (and some prosecutions) for import offences related to the adoption of the ICS will expire on 12 April 2006. Given what appears to be Customs compliance agenda, it would appear reasonable to assume that following the expiry of the moratorium, Customs will be more active in enforcing its compliance requirements including the increased use of infringement notices. In relation to the compliance arrangements, Customs have issued a draft Australian Customs Notice giving some insight to Customs approach to compliance enforcement. Customs are seeking input from industry associations and interested parties regarding the terms of the draft Australian Customs Notice. The draft ACN suggests that when determining whether to issue an infringement notice, Delegates who are able to issue infringement notices will be required to take into account whether the alleged offence arose due to difficulties experienced with the introduction of the ICS in October 2005 and sets out relevant considerations. Presumably, this will also be included in the Guidelines associated with the issue of infringement notices and not merely left in the ACN.
- According to media reports on 20 March 2006, Customs have now resolved that the “cascade reporting system” at the heart of the troubles of the ICS was likely to be dismantled. Reporters (including shipping lines, airlines, customs brokers and freight forwarders) will still have to provide the same information on ships and aircraft, origin and destination of cargo but the making of the reports be undertaken by Customs. As many of you are aware, the automated data matching “cascade” system relies on a significant degree of accuracy in bills of lading but which accuracy is extremely rare in commercial practice.

WTO report – overview of developments in the international trading environment

This annual report of the Director General of the WTO contains some extremely valuable summaries as to developments in international trade. This includes projections as to future levels and anticipated increases in trade in GDP of various countries. It also includes a review and commentary on issues such as levels of tariffs, levels of anti dumping activity in WTO countries, the huge increase in regional FTAs and the levels of activity before the WTO dispute resolution bodies. This is worth review as it shows where trade is likely to increase and where parties will need to be ready to take advantage of those increases in trade. The report can be viewed at the WTO site, www.wto.org.

Brief case update

There have been a number of recent cases and a summary of those cases are set out below.

Monza Imports –v– the CEO of Customs (31 January 2006)

This case related to a review of a Customs Tariff Advice regarding the classification of protective suits for motor cycle races. As a result of the AAT decision, the Tariff Advice issued by Customs was remitted back to Customs for reconsideration in accordance with the Tribunals finding as to the relevant classification of the equipment. The judgement includes a useful summary of the principles used in classifying goods.

CEO of Customs –v– Bio Control Limited (16 February 2006)

This is a decision of the Federal Court by way of an appeal from a decision of the AAT as to the classification of a type of insecticide. According to the judgment, the parties agreed that the AAT erred in law and had entered into consent orders regarding the classification of the relevant goods. The Court made a determination as to whether the orders were appropriate and made commentary regarding whether the products were insecticide or otherwise.

HJ Heinz Company Limited –v– CEO of Customs (15 February 2006)

This is a decision of the Full Federal Court regarding the classification of tinned tuna as either “in pieces” or “mince”. This was an appeal from a single judge of the Federal Court of Australia and followed a finding by the

AAT that the product was fish “in pieces”. Ultimately, the Full Federal Court dismissed the appeal on the basis that it was reasonably open to the AAT to conclude the relevant products were “fish in pieces” but not “mince”. Accordingly, there was no error of law in the decision of the AAT and the single judge of the Federal Court was correct in making a similar finding in relation to the decision of the AAT.

CEO of Customs –v– Hajjed (9 February 2006)

This is a judgement of the New South Wales Supreme Court. Customs had sought conviction of the defendant for offences of smuggling, evading payment of the duty and intentionally omitting a material matter from a statement made to Customs. This is the traditional “trilogy” of accusations made in most Customs prosecutions. The offences arose out of a single transaction in which the defendant was found to have smuggled tobacco in a consignment described as containing blankets, foodstuffs and other trade goods. Customs determined that there were nearly 400,000 sticks of cigarettes in the container which, if properly entered would have attracted duty of \$89,175.06. The case includes some consideration by the judge as to the basis on which penalties should be imposed and ultimately the judge ordered a single penalty of \$250,000 on the basis of a single the same facts supported one conviction for one offence. In this case, the judge believed that given the “proximity” of the three offences, this was an appropriate case for a single penalty which could not be less than the minimum prescribed and applicable for the offence of evasion. Some comments of the judge in making his findings are of interest.

“It is clear that, on the information before the Court, there is little real prospect of the defendant significantly meeting monetary penalties. Nevertheless it is to be borne in mind that I am obliged to impose at least twice the amount of duty payable as a financial penalty in accordance with the prescribed minimum attaching to the offence of evasion.

Although I have taken the defendants means into account, it remains a relevant factor in the assessment of sentence to reflect the deterrence of others as well as himself from similar misconduct. It is often noted that the Customs system must to a large degree depend on the honesty of shippers and importers and it should be made abundantly clear that defences such as the present will attract substantial penalties.”