

29 November 2005

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## Customs, Cargo Management And Compensation– Show Me The Money!

**The issues associated with the adoption of Customs and Cargo Management Re-engineering Program (“CMR”) for import transactions has now entered the mainstream media. There are reports of stacks of containers building up at ports, lines of trucks waiting to collect the containers and importers concerned about delays in receipt of products.**

### Context – History of CMR

This issue needs to be placed in context. Current events have been foreshadowed for many years. CMR was originally intended as an IT project to replace Customs ageing IT systems with the new Integrated Cargo System (“ICS”). At the same time, Customs were granted extensive new powers to search and audit. New obligations were imposed on parties in the supply chain to retain commercial documents and new strict liability penalties were adopted by Customs together with an infringement notice system in lieu of prosecution for strict liability penalties. Customs adopted a new regulatory regime focused on compliance and also introduced new reporting obligations. The new framework was intended to improve border security, revenue collection and the quality of information provided to Government. The Australian Customs Service (“Customs”) promoted CMR as Australia’s largest Government IT project and representing world’s best practice.

The original plan as to the adoption of the ICS and CMR were not met. The majority of the legislative changes were introduced in July 2002. The ICS was finally adopted for reporting export transactions in October 2004 and adopted for reporting import transactions in October 2005. The final adoption was several years late and at least \$150 million over the original budget. Clearly, implementation has not been easy.

### Reasons for current problems

There are many reasons for the current problems. There are new forms of reporting which are much more specific and challenging. The ICS has not worked as hoped and the software which is used by industry to report into the ICS was not fully tested and may not have produced the results intended by all parties. As a result, there has been significant “blamestorming” with the Government trying to reassure everyone that all will be well and that problems are not as claimed. The relevant Minister has said that it is not his fault. However, a significant portion of industry believe that the determination to go to the ICS for imports on 12 October 2005 was premature and a further delay was warranted. This decision is the focus of potential action against Customs. Recent press reports suggest that Customs was aware of some problems with the ICS before 12 October 2005.

### Losses to Industry

Current problems have led to a number of “work-arounds” regarding use of manual reporting, changes to new procedures and significant additional work by Customs officers, customs brokers, freight forwarders, stevedores and transport companies. The real question is whether these work-arounds can hold until the ICS works in the intended fashion. During this difficult time, there are increases in delays and fees associated with such issues as storage charges, container detention charges and fees for “no shows” to collect cargo. Different parties in the supply chain are assessing their losses.

These losses can be characterised as follows.

- Importers cannot get stock, potentially causing loss of business and loss of sales.
- Customs brokers and forwarders are suffering from slow clearances, business interruption, push-out of overdrafts, no show fees and stress claims.
- Transport operators are suffering from a slow down in business as containers are not cleared.
- Everyone is facing container storage charges and container detention fees.

### Available compensation

So, what can be done to accommodate or compensate for these losses?

- There are statutory and administrative schemes available to Customs and the broader Government to pay compensation. That funding should come from general government revenue not just from Customs.
- Customs has already invited parties to register their “interest” in seeking compensation. However, recent publicity suggests compensation may be limited to storage charges only. The other problem is that there is no clear procedure for claims.
- Litigation may be available based on breach of Customs’ statutory duty or negligence. However, this is potentially a very lengthy and expensive process.

### Conclusion – what to do

In the face of all this, our preliminary view is to invite the Federal Government to provide a more comprehensive compensation scheme. Those affected should register their interest in compensation, carefully record their losses (keeping in mind that more costs will arise over time) and then forward them to Customs and to the relevant Minister and copy their claim to their local MP.

If there is an inadequate response, it is appropriate to look at alternative means to persuade Government to pay through the legal process. We would be delighted to assist.

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## Recent Customs Prosecutions

There have been two reported judgements in Customs prosecutions.

In the first (*CEO of Customs v Ozzy Tyres & Tubes Pty Ltd* and another), an importer of tyres and its director were found guilty of a number of offences relating to the deliberate undervaluation of imported goods over 18 shipments. The offences included smuggling, deliberately making false statements and evasion.

Orders were made in the NSW Supreme Court against the two defendants. Penalties of \$1,725,000 and \$1,512,000 were ordered against the corporate defendant and the director respectively. A further order was made as to require the repayment of underpaid duty (\$225,805.34) and costs of \$50,000.

However, Customs had entered into an agreement by which, if the duty was repaid, then it would not pursue the defendants for any of the relevant penalties which had been ordered against them. The agreement was based on an assessment of the financial capacity of the defendants to repay those penalties and an assessment of the "criminality" of the activities of the defendant who was a director of the company. Customs was entitled to pursue the penalties if the financial status of the defendants was better than represented. While not wishing to reflect on the particular agreement entered into between the parties, the judge expressed some frustration that some other form of punishment could not be imposed to reflect the improper conduct such as a community service order. As the judge pointed out, in many of these cases, parties deliberately set out to evade duty because they were in difficult financial circumstances. Accordingly, it seemed to defeat the purpose of the relevant provisions for those parties to be entitled to preferential treatment merely due to their financial circumstances. The case also represents an interesting contrast to other cases where significant orders for penalties had been made against individual defendants for smuggling tobacco, despite there being little prospect of success in recovering those amounts.

In the second case, (*the CEO of Customs v Coulton*), the NSW Supreme Court made a number of "agreed orders" regarding convictions against the defendant for smuggling tobacco. Again, these involved orders regarding convictions for smuggling, evasion and deliberate making of false statements. Those agreed orders were only entered into at the last moment before trial, which had already been set down to commence. The issue before the judge was the quantum of penalties. Customs had sought the maximum penalty for smuggling, the minimum penalty for evasion, and the maximum for each false statement offence. The judge rejected the approach, saying that such an assessment of the relative seriousness of the offences was inappropriate. The judge was not convinced that smuggling was the "worst" of the offences or that evasion should only be punished by a minimum offence. The judge then assessed separate penalties for the offences subject to a 10% discount based on the willingness of the defendant not to submit to an extensive court case (even though that decision had been reached at a late stage).

Both cases provide additional insight as to the complex issues before judges in Customs prosecutions and the willingness of Customs to enter into arrangements, given the circumstances of the particular defendants.

## ACCC and part X of the TPA – More Issues For Shipping Companies

The ACCC has recently been involved in some significant issues regarding the application of Part X of the TPA which permits shipping companies to enter into "conferences" to manage their operations. In brief:

- The Productivity Commission has recommended that the Federal Government scrap Part X of the TPA to give the ACCC power to approve carrier agreements on a case by case basis. The ACCC believes that the wholesale immunity of Part X, allowing ocean carriers to make agreements for joint supply and pricing for shipping services, was too broad and that they should be reviewed on an individual basis by way of "authorisation" under Part VII of the TPA. The Productivity Commission also recommended some alternative arrangements if Part X was not scrapped in its entirety.
- The ACCC is also investigating an alleged breach of Part X by the "Australia to Europe Liner Association" caused by its alleged refusal to provide information in contravention of Part X of the Act. The Liner Association could lose its registration as a liner conference and the benefit of Part X if it is found guilty.

## Removal Of 3% Customs Duty On Item 47 To Schedule 4

ACN 2005/58 identifies that the Government has agreed to remove 3% customs duty applying to goods the subject of Item 47 in Part 3 of Schedule 4 to the *Customs Tariff Act 1995*. The amendment is to apply to goods entered for home consumption on or after 11 May 2005.

The ACN confirms that importers who have used Item 47 since 11 May 2005 are entitled to refunds and to that purpose a new treatment code 547 has been allocated to Item 47 to provide a free rate of duty from 11 May 2005. The ACN encourages affected parties to apply at the earliest opportunity and if COMPILE access is not available, documentary refund applications will be required.

## International Update

There are a number of updates on international trade issues, which are summarised below.

- DFAT has issued "A Report on the Australia-United Arab Emirates Free Trade Agreement". This identifies that a third round of negotiations is scheduled for 5-9 December 2005. According to the DFAT documentation, there is to be more detailed negotiations on draft chapters of the FTA on services and investment and the first in-depth consideration of market access for goods. The DFAT material suggests that it may be possible to finalise the agreement by mid 2006 but that timing is a secondary issue.
- By way of media release dated 29 September 2005, the Minister for Trade indicated that Australia and Indonesia have entered into a "Trade and Investment Framework". However, to date, the terms of the Framework have not been released for general consideration.
- The EU and China have reached a deal regarding difficulties over Chinese textile exports which had left more than 75 million Chinese garments piled up in European ports. Under the deal, half of the blocked goods were to be released unconditionally and the rest were to count against quotas for 2006.



- The US and China have entered into an agreement regarding quotas on exports of textiles and clothing from China to the US. Under the agreement, annual growth in Chinese textile imports is to be capped at 10% to 15% through to 2008. More than 30 items are covered by the agreement including cotton pants, socks, shirts and underwear. However, the US textile industry has signalled that it will still press for stricter restrictions on the imports of textiles.

## Introduction Of New Chain Of Responsibility Legislation In Victoria And New South Wales

Earlier updates have included information regarding the implementation of State legislation in response to the National Road Transport Reform (Compliance and Enforcement) Bill 2003.

The intention is to expand the chain of responsibility to mass and dimension limits and to also oblige consignors to provide container weight declarations.

The “extended” chain of responsibility legislation was introduced in Victoria late in September 2005 and in New South Wales one week later. Queensland, South Australia and Western Australia will follow in 2006.

Of particular interest is that the VTA and the CBFCA have secured a form of amnesty for industry against enforcement of the obligations to provide container weight declarations until 1 January 2006. The intention is to provide industry with time to determine what is required to satisfy the obligations under the legislation in Victoria. To date, such an amnesty has not been secured in New South Wales. However, as with all amnesties or moratoria, parties should be taking all steps to comply with the obligations under the legislation as compliance during this period will be monitored.

## Pork Case Not To Reach High Court

Australian pork producers have objected to AQIS permits allowing the import of pork products from the US and other countries. Those permits had been granted based on “risk assessments” undertaken by AQIS according to its own procedures. The Australian pork producers had expressed concerns that the risk assessment approach was inappropriate. A judge of the Federal Court agreed with the complaints by the Australian pork producers. However, that judgement was overturned by the Full Federal Court which found in favour of the approach taken by AQIS and ordered that the permits be reinstated. The Australian pork producers subsequently sought leave to appeal the matter in the High Court. That application has been unsuccessful and accordingly, the judgement of the Full Federal Court stands and the relevant permits have been endorsed as being issued on an appropriate basis.

## AUSFTA Update

There have been a few developments on the issue of the implementation of the AUSFTA.

- It appears Customs will appeal to the Federal Court against the decision of the AAT regarding the entitlement of importers to claim the benefit of preferential rates of duty under the AUSFTA.
- Customs has issued another ACN (ACN 2005/54) regarding claims of preferential duty under the AUSFTA. Essentially, this ACN only reflects earlier commentary by Customs regarding the claims of preference under the AUSFTA. However, there are ongoing concerns that Customs’ practice is slightly different to that as set out in the ACN - especially as to the requirements for parties to claim preference under the AUSFTA and the mandatory use of Customs “statements”. That issue, and the issue of administrative penalties for incorrect claims of preference, were the subject of correspondence from the Law Council of Australia to DFAT and Austrade which have been copied to a number of interested parties. Our understanding is that Customs is preparing a response which will, in part, address some of the concerns which have been expressed to date.