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Customs, Trade & Transport Ealert

Alcopops dispute fizzles out in the Federal Court

The Federal Government has been taking a variety of measures intended to reduce "binge drinking". One of those measures has been to increase rates of duty and excise on "ready to drink" mixed drinks known as Alcopops. Many of you have been following the fate of measures intended to raise customs duty on imported products and to raise excise duty on such products distilled here.

The Federal Government raised the rate of duty and excise by "Tariff Proposal" last year without legislation, allegedly as a measure to stop binge drinking by young people using the products. This was effected by the use of "Tariff Proposals" which were introduced into Federal Parliament prescribing increased rates of customs duty (by Customs) and excise duty (by the ATO). These measures are used to quickly introduce the new measures while awaiting the passage of legislation to formally implement the increased tariffs.

Generally the process is reasonably non controversial with the legislation being passed to validate the collection of duties according to the Tariff Proposals. However, this should not be construed as meaning that the process is actually legal. A number of High Court cases have held that the collection of increased duty in these circumstances is illegal. Many commentators have made observations to the same effect. Indeed, Cooper's classic text on Customs and Excise describes the process as being tantamount to "extortion". The ability for Customs and the ATO to undertake the collections is however, protected by provisions in the *Customs Act* and the *Excise Act* which state that even in the absence of validating legislation, no action can be brought against the illegal collection for a period of 12 months (or until the session of Parliament finishes if that is earlier). The issue has rarely been contentious in recent times as the validating legislation has generally been passed.

If the validating legislation is not passed in the 12 month time period that leaves a number of interesting questions, not the least the process of claiming back the overpayments, the refunding of the amounts which had been overpaid, the correct recipients of the refunds and whether the parties who made the overpayments are entitled to interest. We have formed some views on these issues which may or may not yet need to be tested

In the case of the Alcopops duties and excise, as many would be aware, the legislation to support the increases was defeated by a sole Senator in the Senate (holding the balance of power) who wanted TV advertising of alcohol banned during family viewing hours on TV which was not forthcoming. The measures seemed defeated which raised issues of refunds. However, the distillers are now taking a voluntary ban on TV advertising as requested. The Senator has said that if that can be legislated he will support the measure which will allow the legislation to pass just before the 12 month deadline (13 May 2009), allowing the Government to keep the revenue collected and continue to impose the higher rates of duty and excise.

In the meantime, the Government has not withdrawn the Tariff Proposal meaning that Customs and the ATO continue to collect the higher rates of duty and excise as directed by Government.

Against this politics, the legal position has become even more controversial by a very recent application brought by one company (Suntory) against the ATO in the Federal Court with the support of the Distillers Industry association. The thrust of the action is seeking an interlocutory injunction against the ATO (not Customs) to stop the collection of the increased excise as the measure was apparently defeated during the last sitting of Parliament. Some novel arguments have been raised that the protections against collection of excise without legislative support only apply to past and not future action so that future collections should not be permitted – a version of the argument that there can be "no collection without legislation". The Federal Government opposed the proceedings and in doing so, sought a stay on the hearing of the application until 14 May 2009 – being the date 12 months after the introduction of the Tariff Proposal and also the beginning of the next sitting of Parliament at which time the fate of the measures will probably have been resolved through the political agenda and the continued collection of the measures will either have been confirmed or rejected so that refunds will then be payable.

The judge of the Federal Court has today (15 April 2009) ordered that Suntory's application be stayed until after midnight on 13 May 2009, reflecting the 12 month protection granted in the *Excise Act*. The application in respect of the substantive claim, being the refund of the duty, still has to be heard and a decision made on the application. Although if the measures are not passed and the Government voluntarily refunds the duty, the parties may agree that the application be dismissed.

As you would expect, there were a lot of people watching the proceedings closely even if they potentially only would have had an impact for a month in this case. The fact that the Court would not hear Suntory's application prior to the 12 month period passing certainly clarifies the position in respect of the future use of the Tariff Proposal approach. Still some law and politics here but I will keep you informed.