

20 August 2009

Customs, Trade and Transport Law e-alert

Alcopops legislation finally bubbles through Australian Parliament

Tariff Proposals – Taxation without legislation

Readers would be aware of the long-standing methods adopted by successive Australian Federal Governments to effect changes to rates of excise and customs duties before implementing legislation is introduced and passed. This is carried out first by notices of intention to alter the rates in the Government Gazette pursuant to section 160B of the *Excise Act 1901* and section 273EA of the *Customs Act 1901*. Secondly, the new rates are then collected by "Tariff Proposals" introduced in Parliament. The provisions allow a period of time for the Parliament to pass the legislation to formally implement the Tariff Proposals during which period excise and customs duties are collected at the rates announced in the Tariff Proposals. Although these provisions have been subject to consideration by the High Court many years ago, the methods described above have traditionally worked without contention. However, past practices were challenged when the current Australian Federal Government announced in 2008 significant increases to rates of excise and customs duty on beverages known as "Alcopops" or "Ready to Drink" beverages defined as "other excisable beverages not exceeding 10% by volume of alcohol" not being beer or wine. There was significant Parliamentary opposition to the 2008 proposals which threatened the continued collection of the higher levies.

Background to the current issue

Our E-alerts of 14 April 2009 and 5 May 2009 refer to successive judgments of the Federal Court which effectively endorsed the approach by the Australian Federal Government to collect (and continue to collect) increased levels of excise and customs duty on "Alcopops" based on the 2008 "Tariff and Excise Proposals" ("**Past Measures**") referred to above.

The Parliament subsequently passed "validating" legislation to validate collections of excise duty and customs duty according to those Past Measures even though the original associated legislation did not pass.

However, by virtue of new measures (described below), the Australian Federal Government is now formalising its approach to the collection of increased levels of excise and customs duty on "Alcopops" and other products manufactured to be similar to "Alcopops".

New Measures introduced by new legislation

As discussed above, the Australian Federal Government has subsequently introduced new measures ("**New Measures**") being the *Excise Tariff Amendment (2009 Measures No. 1) Bill 2009* and the *Customs Tariff Amendment (2009 Measures No. 1) Bill 2009*. The New Measures were introduced to legislate the effect of earlier *Excise Tariff Proposal (No. 1) 2009* and the *Customs Tariff Proposal (No. 3) 2009*. The relevant Explanatory Material refers to the New Measures forming part of the Australian Federal Government's strategy to discourage binge drinking by increasing the prices of "Alcopops" and "Ready to Drink" beverages. As readers would also be aware, there is also a significant increase in revenue to Government from these New Measures.

Intent of the New Measures

The New Measures seek to effect the following main outcomes.

Legislate increased rates of excise and duty

Increase the excise and duty rates applying to "other excisable beverages not exceeding 10% by volume of alcohol and the excise-equivalent rates of customs duty applying to their imported equivalents" to \$69.16 per litre of alcohol content on and from 14 May 2009. This would be subject to review at the expiry of six month periods.

Change the definition of beer and wine

To change the definition of "beer" and "wine" which are manufactured to mimic the effect of "Alcopops" or "Ready to Drink" beverages but would otherwise have been excluded from the effect of the New Measures as being "classified" as "beer" and "wine". For these purposes, "malternatives" made from beer mimics spirit-based "Alcopops" in terms of their taste and marketing. Similarly, grape wine products based on wine can mimic the spirit-grape content of "Alcopops" by addition of other flavours.

For these purposes, the definition of "beer" will set a combination of minimum limits of bitterness (based on minimum international bitterness units) and maximum levels on sugar content (4% by weight of sugar or equivalent in artificial sweetener) to be present in the final beverage otherwise they will be considered not to be beer and subject to the higher rates of excise and duty. Further, the definition of "grape wine" will preclude the addition of flavouring of any other alcohol or flavour (other than wine) whether or not that flavour includes alcohol.

Warning, these new definitions are complex

Please note that the commentary above is only a brief summary of the relevant provisions. The new definitions of "beer" and "wine" are extremely complex and will require close attention to determine whether particular beverages are, indeed, "beer" and "wine" or are other types of beverages which will attract the higher rates of duty and excise.

We would be happy to assist with any such review. However, readers should be aware that some assistance may be required from experts with experience in the distilling and production of such beverages to ensure that they are properly characterised.

Status of legislation of the New Measures

The relevant legislation has now passed through both Houses of Parliament. The legislation will only commence once the Acts have received Royal Assent. We will keep you informed of developments in this context. However, in the meantime, current arrangements for payment of the higher rates of excise and customs duty based on the prevailing Tariff Proposals should be observed.

Need to review and act!

Readers would be well advised to carefully review the relevant legislation to determine whether relevant products being imported or produced in Australia are subject to these New Measures.

For further information please contact Andrew Hudson

Disclaimer: The information contained in this e-alert is not advice and should not be relied upon as legal advice. Hunt & Hunt recommends that if you have a matter that is legal, or has legal implications, you consult with your legal adviser. If you no longer wish to receive this e-alert or any other publication from Hunt & Hunt, please email us at unsubscribe@hunthunt.com.au.