

Customs Trade and Transport Update

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A new international regime for intellectual property protection as the ACTA negotiations are completed

In an earlier article, I had referred to negotiations regarding the proposed Anti-Counterfeiting Trade Agreement (“ACTA”). At that time, there were reported concerns that it would introduce additional reporting obligations on intermediaries such as freight forwarders, customs brokers and transport companies as well as additional costs for holding and destruction of goods alleged to be in breach of a party’s intellectual property. Another concern was a view that the negotiations had been conducted with some level of secrecy and that certain interest groups may have been manipulating the outcomes to preserve their interests at the expense of others.

Following an extensive series of negotiations involving 37 countries, it was announced on 16 November 2010 that negotiations had been concluded on the form of the ACTA. While Australia’s adoption of the ACTA is subject to final legal review, further review by the Joint Standing Committee on Treaties and final Parliamentary endorsement, it seems fair to assume that Australia will enter into and support the ACTA.

For current purposes, there are a number of items which warrant consideration arising out of the adoption of the ACTA.

- The ACTA represents a set of commitments to protect intellectual property which are in excess of those which arise under the WTO TRIPS Agreement and those contained in other international agreements.
- The Department of Foreign Affairs and Trade (“DFAT”) did actively seek submissions and conducted consultation with industry during the



course of ACTA negotiations. The CBFA made a variety of submissions to DFAT and attended consultations specifically addressing the concerns of the freight forwarding and customs broking industries and related transport providers to ensure that they did not face additional levels of regulation or cost. This gave grounds to DFAT to resist efforts by other countries to include additional provisions which would adversely affect the rights of intermediaries, whether in Australia or elsewhere.

- According to press releases by DFAT and the Australian Government, the ACTA will not require any changes to Australian law and regulation. However, representatives of the Australian Government have indicated that there will be increased attention to export and transshipment goods in relation to intellectual property protection. The aim is to stop infringing goods entering the intended import market.

- Even though the ACTA does not require any changes to Australian regulatory environment, Australia still pursued the adoption of the ACTA on the grounds that it would act as an “aspirational” benchmark for other contracting countries to provide additional levels of intellectual property protection. Such additional levels of protection would benefit Australian exporters and holders of intellectual property rights. As a result, there are likely to be changes to intellectual property regulation in other contracting parties (including such countries as New Zealand and Canada), which will include additional means to protect intellectual property on

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goods as they pass through borders. As a result, those involved in international air cargo need to pay careful attention to changes to intellectual property law elsewhere in the world.

- Knowledge of the changes elsewhere in the world will not, in itself, be enough. Those in industry need to ensure that they comply with those requirements in other countries. In addition, parties will need to review their terms and conditions to ensure that they impose obligations on customers to provide the information which will be required overseas for the reporting of the movement of goods. In addition, the terms and conditions will also need to augment existing indemnities to ensure that international air cargo operators

are adequately protected against costs and liabilities which arise from enhanced intellectual property enforcement here and overseas.

- One recent outcome has been confirmation by the Australian Customs and Border Protection Service ("Customs") that those parties handling the carriage of goods the subject to action by the holders of intellectual property rights can now seek to recover costs associated with their involvement. For these purposes, parties should consider forwarding an invoice to Customs who can then seek to recover those costs from the holders of the intellectual property rights who instigated the action in the first instance.

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