

Customs Trade and Transport Update

December 2010

Christmas – New Year Update 2010

In accordance with seasonal tradition, we thought we would bring you an update as to current developments as we reach the end of 2010.

International Developments

Australia has been involved with a number of recent international developments.

Anti-Counterfeiting Trade Agreement

Australia has announced the completion of negotiations for the Anti-Counterfeiting Trade Agreement (“ACTA”) affecting 37 other countries. Although the form of the ACTA is still subject to formal legal review, Parliamentary review by the Joint Standing Committee on Treaties and approval by the Federal Parliament, it seems clear that it will be adopted by Australia. Although the Australian Government officials have made it clear that adoption of the ACTA will not require changes to Australian law and

regulation (on the basis that our current regime is “world’s best practice”), we should expect to see increased review and focus on export and transshipment goods to identify those which may breach intellectual property rights. This is consistent with the rationale to stop intellectual property goods entering the intended market. However, given that the provisions of the ACTA do exceed obligations under the WTO TRIPS Agreement, there are likely to be changes in law and practice in other trading parties including New Zealand and Canada. This will probably change other practices overseas and those involved in the import or export of goods need to be aware of those changes.

Australia loses WTO appeal on apple import restrictions

Australia’s appeal from the WTO finding against Australian quarantine measures against New Zealand apples (see our earlier update) has largely been unsuccessful. While the first decision and the appeal are lengthy, the general thrust of the appeal decision is that Australian measures restricting the import of New Zealand apples due to concern as to fire blight were unscientific and contrary to WTO rules.

As a result, Australia has agreed to conduct a new biosecurity assessment of the risks associated with New Zealand apples and the measures it will impose to restrict the import of those apples (if any). In those circumstances, we should still expect some continued measures but possibly in a different and less restrictive form. The larger issue is that the decisions in the WTO will probably encourage other countries to continue to pursue Australia for quarantine restrictions which they believe to be unduly restrictive and counter to

international trade, rather than being in place for proper scientific reasons. At the moment, a number of other countries have signalled their intention to take steps to seek WTO review of Australian measures against other products. It seems clear that those parties are now likely to push those actions.

Export controls on Defence equipment

The Australian Government has announced proposals to implement the Australia-US Defence Trade Co-operation Treaty (“Treaty”) and to otherwise strengthen Australian export controls.

According to current releases by the Australian Government, the aim of the Treaty is to “create a comprehensive framework for the trade in defence equipment, spare parts, services and technical data between Australia and the US”. Further, the intent of the legislation will be to augment existing controls of Defence items and the intangible transfer of defence technology (which has not been formerly restricted).

A consequence of the Treaty would be to create a “trusted export community” which will allow Australia and US members to conduct two-way trade without the need for export licenses. The community will include the Australian and US Governments and companies accepted for membership. The Australian Department of Defence is holding information sessions. We will provide you with details of the legislation when it is introduced.



hunt & hunt

New entrants to the ASEAN-Australia and New Zealand Free Trade Agreement

By way of ACN 2010/52, the Australian Government has announced that the Agreement establishing the ASEAN-Australia and New Zealand Free Trade Agreement will enter into force on 1 January 2011 for Laos and from 4 January 2011 for Cambodia.

Those parties interested in importing or exporting in relation to those countries may wish to refresh their memory of the operation of the Free Trade Agreement to ensure that they take advantage of the benefits conferred by the Free Trade Agreement. Those handling shipments on behalf of such importers and exporters will also need to refresh their memory of the border and clearance requirements for such goods including reporting of claims of preference.

Recent Cases

There have been a number of recent cases which can be summarised as follows.

- **“Greg Norman”** Federal Court case on the use of TM provisions to successfully stop parallel importation
- **Halliburton v Customs** - AAT case on Tariff Classification
- **Dow v Customs** (Nufarm as party joined). AAT TCO case where local producer (Nufarm) did not properly establish 25% local content of its product. Accordingly, the TCO could be granted
- **Downer EDI v Customs** (United Group Rail Services as party joined). AAT TCO case on substitutability confirming revocation of a TCO based on local manufacture.

These cases all have significant consequences for those in industry. We will provide more details during CBFA Member Forums and State Conferences. I would be happy to provide more details if required before then.

Competition issues

Anti-Cartel Action

There continues to be significant anti-cartel actions being brought by competition regulators here and overseas. While the class of parties subject to action by the ACCC continues to expand in Australia, the nature of the actions continue to spread overseas including actions against freight forwarders and executives of airlines and freight forwarding companies. Those involved in international freight would ignore these actions and messages for such actions at their peril.

Price signalling legislation

Many of you would be aware of the proposals by both parties in Federal Parliament to introduce legislation which would prohibit “price signalling”. The intent of such legislation is to stop parties making public announcements which could be deemed to have the effect of directing or encouraging other competing parties in their industry to increase prices or otherwise reduce competition. Recent comments by the Federal Government has referred to the prohibition only applying to the banking industry. However, those comments have also left open the possibility for the prohibition to apply to all industries in the future. This means that it could affect those in industry who make public pronouncements regarding possible increases in pricing for air or sea freight or related charges. Again, this will need to be reviewed closely.

New legislation

We refer to our updates of March 2010 and November 2010 regarding new legislation to replace the Trade Practices Act with new Australian competition legislation. Parties will need to review its effect.

Terms and Conditions of Trade

Given a number of recent developments in such areas as:

- The new Incoterms
- The new Personal Properties Securities legislation
- The new ACCC legislation
- The new international air and sea freight conventions
- The new ACTA.

Parties should be seriously considering an extensive review of their terms and conditions of trade. We are undertaking such a review on behalf of the CBFA which will lead to a new set of terms and conditions becoming available to members for use.

Thanks for 2010 and we look forward to 2011.

Once again, I must thank you all for your continued support, encouragement and friendship during 2010. I wish you all festive greetings for 2011 and look forward to catching up with you in 2011 at various forums and functions including delivery of presentations at the State and National CBFA conferences and Member Forums. Keep in mind that the Federal Government has already announced a fresh focus on trade in 2011 including attempts to finalise the Korean, Japanese and Chinese FTA. Interesting times for all!

Kind regards

Andrew Hudson

Contact us

For further information, please contact:

Andrew Hudson, Partner
T +61 3 8602 9231
F +61 3 8602 9299
E ahudson@hunthunt.com.au

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.