Customs and global trade update

hunt & hunt lawyers

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The customs tariff concession case that could be the last of its kind

5 April 2017

The Administrative Appeals Tribunal **(AAT)** recently handed down a decision as to whether a local manufacturer satisfied the 25% local content test in respect of an application to revoke a tariff concession order **(TCO)**. A case of this nature is unlikely to be heard again as on 27 March 2017 legislation was passed removing the 25% local content requirement. The removal of this requirement has implications for local importers and exporters.

The 25% local content requirement

Before a TCO can be made the applicant needs to show that substitutable goods were not produced in Australia in the ordinary course of business. Previously it has been a requirement that before a good will be taken to have been produced in Australia at least 25% of the factory or works costs in respect of the goods could be attributed to the value of Australian labour, materials or factory overhead expenses. The other requirement was there must be at least one substantial process in the manufacture of the goods carried out in Australia.

It was always difficult to challenge whether a local manufacturer met the 25% local content test as the information provided to Customs to satisfy the test would be kept confidential. The position of Customs is that the 25% local content test is unnecessary as any time a substantial process in the manufacture of the goods is carried out in Australia, the 25% local content test will be easily met.

The parliament has agreed and has now passed legislation removing the 25% local content test. The approach seems unusual for a number of reasons, including:

1. We have been involved in cases where the 25% local content test was an issue;
2. There is at least one published decision where the AAT held that the 25% local content test had not been met;
3. Australia's Free Trade Agreements often require 35% or more local content before a good will be taken to qualify as an Australian originating good;
4. The guidelines relating to making claims of "Australian made" require greater than 25% local content.

The 25% test was said to be an unnecessary burden on local manufacturers. It is fair to question why protection in the form of tariffs should be afforded to any local manufacturer that has difficulty proving that 25% of their production costs relate to Australian sources.

The case

The recent AAT decision concerned an existing TCO that was subject to an application for its revocation by an Australian manufacturer. Customs had considered the application and revoked the TCO. The importer sought review of the decision claiming that the 25% local content test had not been satisfied. The AAT held that the information provided by the local manufacturer showed that the 25% local content test was easily met. The importer argued that the information was too vague and that some of it was unreliable, incomplete and inconsistent.

The AAT noted that the two witnesses for the local manufacturer had produced different percentages of local content. However, it considered that the differences could be explained and that the information presented was satisfactory. There was no requirement that the information be subject to any accounting standards. Customs' decision to revoke the TCO was upheld.

Given the 25% local content test is not held to any accounting standards and the information is not provided to the importer for review, it is not surprising that importers rarely successfully challenge whether the test was met.

Implications for traders

The removal of the 25% local content test will make it easier for local manufacturers to oppose TCO applications and seek the revocation of existing TCOs. It may be the case that the administrative burden of the 25% local content test prevented some manufacturers from opposing TCOs. With this burden removed, local manufacturers should revisit any TCOs applying to products they manufacture.

For importers the removal of the 25% local content test is another example of creeping protectionist measures such as strict interpretation of the requirement of free trade agreements and TCOs, new country of origin food labelling laws and the administration of Australia's anti-dumping legislation.

It is a more difficult regulatory environment now than it was 5 years ago. If you need assistance managing the risks of trade in the 2017 environment, please feel free to contact us.

Why the wheelie bin tariff classification case is not a load of rubbish

2 April 2017

A recent Federal Court case held that wheels for a wheelie bin should not be classified as part of a vehicle. The layman will say that this was stating the obvious, a wheelie bin is clearly not a vehicle. Customs brokers will see this as another case in a long line of odd classification arguments. In recent years we have seen Customs try to argue that wontons are pasta and that celling fans should be classified as lights. Many of these cases seem to have little relevance beyond the goods the subject of the decision. However, the wheelie bin case has valuable lessons for all involved in classifying goods.

The case

The original decision by Customs

The case concerned the classified of plastic wheels (fitted with a tyre) for plastic wheelie bins. The importer was advocating for classification under heading 8716.90.00 which applies to parts for "other vehicles". The classification was important as a concession would apply only if the goods were classified to that heading.

For the goods to be classified to that heading the wheelie bin had to be classified as an "other vehicle".

Customs original decision was that the wheels should be classified under heading 4012.90.00 (applying to certain rubber tyres) as the wheelie bins were not vehicles.

The appeal to the AAT

The importer appealed to the Administrative Appeals Tribunal **(AAT)** which found that the goods should be classified as vehicle parts. The finding flowed from a decision that the wheelie bins was correctly classified as an "other vehicle". In making this unusual finding the AAT was heavily influenced by the harmonised system notes **(HS Notes)**. The HS Notes made clear that the "other vehicles" heading was intended to cover items that might not ordinarily be considered "vehicles". An example from the notes was a buffet trolley.

The Federal Court appeal

The Federal Court found that the wheels could not be classified as part of a vehicle. In a decision that will shock few laymen, the Court held that a wheelie bin was not a vehicle. The Court held that the AAT had not fully considered alternative headings and sent the matter back to the AAT for further review.

Importance beyond wheelie bin wheels

Most people are not involved in the importation of wheels for wheelie bins, so why does this case matter? The case is important as there were 2 principles applied which should be kept in mind when classifying any product.

Principle 1 – The importance and application of the HS Notes The original AAT decision was almost exclusively based on the HS Notes describing which goods fit within the heading "other vehicles". These notes showed that the word "vehicles" was intended to include goods that are not normally considered vehicles.

In the AAT, Customs argued that the HS Notes should not be treated with much importance in this case. While the Federal Court overturned the finding regarding whether a wheelie bind was a vehicle, the Court did not dismiss the HS Notes. On the contrary, the Federal Court paid very close attention to the HS Notes. The difference in opinion lay in the interpretation of the HS Notes, not the extent to which the HS Notes applied.

All customs brokers and importers need to pay careful to the HS Notes, especially where the wording of the headings is not 100% clear.

Principle 2 – Consider the whole HS Code When considering the scope of the wording in a particular heading, you need to consider the HS Code as a whole, including other headings that were potentially available. In the wheelie bin case, the Court reviewed the HS Notes for a number of alternative headings and considered it important that "dustbins" were specifically mentioned in the HS Notes applying to certain plastics and steel headings. The specific mention of "dustbins" in other headings led to the Court interpreting chapter 87 as not applying to wheelie bins. Effectively, chapter 87 was interpreted not by the wording the chapter 87 HS Notes, but by what the notes to other chapter included.

While customs brokers are expected to consider all potential headings, this case shows a slightly different approach. Under the traditional approach, you consider all applicable heading and then use the interpretation rules to decide which of the competing headings apply. In this case, the Court considered all potential headings and argued that the HS Notes to those headings led to a more restrictive interpretation of chapter 87. Chapter 87 was not excluded under the interpretation rules, but rather because the mentioning of dustbins in other headings meant chapter 87 should be interpreted as not covering wheelie bins.

The decision shows the very real difficulties of classifying goods. Where there is a dispute, this case demonstrates that a very technical approach may be taken to classification. We recommend reducing risk by obtaining binding tariff advices from Customs and/or seeking legal advice. This is of particular importance where the use of a concession is linked to classification of goods.

Why you need both a tariff advice and a tariff concession order

22 March 2017

When you apply for a tariff concession order **(TCO)** you have to nominate the appropriate tariff classification. Customs may not dispute the nominated classification at the time of application, but this doesn't mean that many years after the TCO is made you can assume that your nominated tariff classification is correct. A recent case shows how disastrous a change in view as to classification can be for the TCO applicant. It also highlights the protection that can be afforded by proactively obtaining a tariff advice.

What happens if the initial tariff classification is wrong?

When a TCO is made it is attached to a particular tariff classification. For a good to receive duty free entry under the TCO, the good must first be classified to the tariff classification to which the TCO is keyed. The good must then also come within the description of goods contained within that TCO. It can happen that a TCO is attached to particular tariff classification, and then at a later point in time it is determined that the TCO should have been classified to another tariff classification. This can occur in a number of ways, for example, if a party seeks a refund from Customs based on the application of TCO and the refund department denies the refund as it believes that the goods are not classified to the same classification as the TCO – despite being the very goods described in the TCO.

In such circumstances, Customs has the power under the Customs Act to revoke the original TCO and issue a new TCO under the alternative, correct tariff classification. While this may seem to fix the problem, usually Customs only re-issues the TCO with a prospective operation. The old TCO remains attached to the incorrect tariff classification.

Why is this a problem? Because goods entered prior to the re-issue of the new TCO must be correctly classified and the old TCO is still attached to the incorrect classification.

The case

In *National Oilwell Pty Ltd and Comptroller-General of Customs* [2017] the Administrative Appeals Tribunal (AAT) had to consider a scenario where both the importer and Customs realised a TCO was originally keyed to the wrong tariff classification. Customs corrected the error by revoking the original TCO and reissuing a new TCO to the correct classification.

The original TCO had an operative date of 17 April 2009. It was revoked on 14 April 2014. The new TCO was given an operative date of 15 April 2014. The importer sought to use the old TCO for goods imported prior to 14 April 2014 (when the old TCO was in force). Customs denied the use of the TCO as the relevant goods were not correctly classified to the heading which contained the old TCO. While there was a new TCO with the correct classification, this was only operative from 15 April 2014.

The importer claimed that the old imports should be classified to the same tariff heading as the old TCO to reflect the "classification practice at the time of entry". The AAT took little time in dismissing this argument. It found that there was no dispute that the correct classification of the goods was the classification belonging to the new TCO. Once this was established there was no way that the goods could fit within the terms of the old TCO, despite the previous approach by Customs.

What is the solution?

Two options can be considered to address this problem. The first is to always obtain a tariff advice when relying on a TCO (and renewing that TA when it expires). This will mean that even if Customs changes its mind as to classification, it will be bound by the old classification when looking back over the past entries. It can insist on a new classification for future imports, but equally the importer can have the TCO classification prospectively updated.

Another alternative is to seek that the old TCO be revoked and reissued against the correct classification, but that the new TCO apply from the date the original TCO was made. The result of this is that there will be no mismatch between the correct classification of the goods and the classification to which the new TCO is attached. However, Customs is inconsistent in its approach to the operative date of reissued TCOs.

There are methods to dispute an approach by Customs under which it only applies the new TCO prospectively. We are happy to assist importers with such problems. However, our advice remains that the best approach is to be proactive and avoid the problem by obtaining a tariff advice with your TCO.

Undoubtedly, for many importers, obtaining a tariff advice will seem unnecessary at the time of applying for the TCO. You will, at that time, very likely be in agreement with Customs as to the tariff classification of the proposed TCO goods. However, the view of the Customs team making a TCO and the Customs team (maybe many years later) reviewing refund applications or conducting an audit can differ greatly. The only way to protect yourself again those differing views is to hold a tariff advice that binds Customs.

Director and manager liability for customs duty on stolen cigarettes

26 February 2017

It is well established law that if cigarettes are stolen from a licensed warehouse, the company that operates the warehouse will be liable for the duty on those cigarettes. However, in a decision that will worry many who work in licensed warehouses, Customs was successful in claiming the duty from a director and a manager of the company that held the license.

The case

In *Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia* [2017] AATA 202 the Administrative Appeals Tribunal (AAT) had to consider who should be liable for duty on cigarettes stolen from a bonded warehouse. Claims had been made against the company that held the warehouse license, a director of the company, and the director's son, a manager who dealt with the day-to-day operations of the warehouse.

Section 35A(1) of the Customs Act 1901 provides that

"(1) Where a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control:

(a) fails to keep those goods safely; or

(b) when so requested by a Collector, does not account for those goods to the satisfaction of a Collector in accordance with section 37;

that person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on those goods if they had been entered for home consumption on the day on which the demand was made."

This is a strict test and liability will be imposed regardless of the adequacy of the security measures taken. The key questions was, had the company, the director or manager been "entrusted with, the possession, custody or control" of the cigarettes.

The company (warehouse license holder) - The company was held to have been entrusted with the possession, custody or control of the cigarettes. This is the expected outcome.

The director – The director was held to be in overall command of the business and had overall direction over what happened to the goods. This was enough for the AAT to hold that he too should be liable for the duty.

The manager – The manager was also held to be liable. The AAT found that the manager was in possession, custody or control of the goods as he:

1. directed what happened to the goods on a day-to-day basis;
2. exercised delegated authority under which he could accept and release the goods; and
3. employees followed his orders in respect of the goods.

Very harsh decision

Normally directors and managers are protected by the corporate veil and will not be held personally liable for the companies they are associated with. There are justifiable exceptions where the director or manager has procured a breach or acted negligently or dishonestly.

However, in this case there was no suggestion the cigarettes were stolen due to acts of the company, the director or the manager. It is very much a strict liability offence.

Additionally, the legislation imposes liability on the person that has been "entrusted" which the possession, custody or control of the goods. It was the company that operated the warehouse, contracted for the storage of the goods and was entitled to be paid a fee for their storage. The company may have acted through its directors and employees, but that does not mean those directors and employees became the company.

Considerations

Companies need to ensure that their terms and conditions and insurance provide as much protection as possible for not only the company but also its officers and employees.

Directors and employees who have the authority to direct the day-to-day activities of the warehouse need to make sure that they have put in place asset protection measures. It sounds alarmist, but this case shows that your house is on the line if you are a manager in a licensed warehouse and that warehouse cannot account for goods it has received.

Hunt & Hunt has recently drafted warehouse terms and conditions that address these issues. Hunt & Hunt also has an asset protection team to assist businesses and individuals protect their assets from the risks associated with running a business.

Implementation of the WTO Trade Facilitation Agreement – What does it mean for Australian traders

22 February 2017

We have all attended meetings where there are 10 agenda items, but its five minutes to go and you realize you are only up to item 4. Not so with the first meeting I attended in 2015 regarding the implementation of the WTO Trade Facilitation Agreement. People had flown into Canberra from across Australia to discuss the agreement with various areas of Government, but with half an hour left to go, people had run out of things to say.

This reflects the reality of the WTO Trade Facilitation Agreement for Australia. It was basically an agreement under which Australia agreed to do what it was already doing. The agreement sets a minimum level of trade facilitation measures, but its a minimum level most developed economies have already achieved. Not because they were bound to, but because it made economic sense to have efficient borders.

That is not to say the agreement is without merit. If it is implemented fully there will be benefits for our exporters. For example, in some foreign ports you cannot submit import documentation until arrival of the goods. If your goods are perishable and there is a documentation problem, you may have to watch them rot while the problem is resolved. Under the WTO agreement those developing countries will work towards allowing documents to be lodged prior to the arrival of the goods, providing an opportunity for issues to be resolved in advance.

There will be greater certainty as countries commit to doing simple things like publishing their customs procedures online and providing binding rulings regarding customs issues.

The benefits were most optimistically summarized by former Trade Minister Andrew Robb when he said:

"As the agreement targets regulatory barriers and border bottlenecks often overlooked in international trade negotiations, the benefits to Australia will be significant. With its focus on harmonising and streamlining global customs procedures the agreement will markedly reduce the length of time and the number of documents it takes Australian exporters to get their goods across borders. By requiring more transparent and predictable regulations, the agreement will also assist Australian businesses, large and small, in making international business decisions.

For Australian exporters, implementation of the agreement will mean marked improvements in the manner in which their goods are treated in offshore markets. In fact it has been estimated that full implementation of the agreement could reduce the costs of trading across borders by up to 10 per cent for Australian traders."

Of course, the benefits will not be unique to Australia exporters. However, it will make Australian products more competitive against domestic goods and reduce the costs and difficulties associated with exporting, particularly to developing countries. This will benefit the world's most needy people by reducing the cost of goods their country needs to import.

Lowering customs and import costs for Australian clothing companies

7 February 2017

So often over the last few months we have heard stories of failing retailers operating in Australia, particularly some well-known clothing brands. Increased competition from large internationals and online retailers, unfavourable leases and falling prices are common themes in each case.

These are all significant issues that retailers generally are grappling with. But there might be a hidden and fairly easily accessible cost saving available to clothing retailers in Australia, which will immediately impact the bottom line in a positive way. Clothing and apparel is one of the last areas to consistently attract customs duty. However, there are a number of ways Australian importers can decrease this cost.

China Australia Free Trade Agreement

When the China Australia FTA first commenced, a lot of clothing imports did not enjoy a reduced duty rate. However, we are now in year 3 of the agreement and duty rates are beginning to fall. So while using the FTA might not have made sense on day one, it is likely to offer savings now. Don't worry if your experience with other FTAs is that it is difficult for clothing to qualify. Under the China FTA clothing can qualify even if the underlying materials are imported into China.

Reducing the customs value

As a general rule, you only need to pay customs duty on the amounts you pay for the goods. If your purchase price includes other payments such as royalties, marketing costs, finance or head office support you may be able to restructure your transactions and reduce the duty you pay. This is a complex area but Australia is more generous than most countries and if you are importing significant volumes, it's worth looking into this.

Tariff concession orders

Australia has thousands of concessions applying to individual goods which any importer can use. Unfortunately, almost none of these concessions apply to clothing and footwear. What you might find though are concessions for all the accessories you import. The great news is that if the concession was in place at the time of import but you missed it, there is the potential to obtain 4 years' worth of duty refunds.

Drawback

Not every fashion trend works out and no doubt there will be imports that sit in your warehouse and are later exported to another unsuspecting market. In many cases there is a good chance you are entitled to a refund of the duty on export.

Transfer Pricing

Tough times often mean low profits. And for international businesses operating in many countries, low profits can mean transfer pricing adjustments. A transfer pricing adjustment to increase Australian income tax, reduces the customs value of goods. A decreasing customs value creates customs duty refund opportunities. Sounds simple. It's not, but if the dollars add up the refunds make it worth the effort.

The good news

Unlike some areas of the business where it is hard to determine whether there is a cost saving opportunity, all the data regarding your imports and payment of duty is sitting with Australian Customs. By making a simple application, they will happily provide it to you for less than $100. There is no risk or disadvantage in asking Australian Customs to give you this data. We can help you get this information, if you're not sure where to start. Once you have it, we or your customs broker or trade professional will be able to tell you within a short time how much duty you have paid, where the opportunities lie and how to take advantage of those opportunities.

Hunt & Hunt has a dedicated Customs & Global Trade group that works with large and small businesses, customs brokers and freight forwarders around customs duty management and trade compliance issues.

President Trump - What could it mean for Australian customs brokers

8 November 2016

"I wish he would tear up the US Australia FTA" said a Mildura citrus farmer I was talking to after the news of Trump's victory was announced. Usually the promotion of international trade is a bipartisan issue and elections do not have a large impact for brokers. As we know, Trump is different from any other political figure in recent memory.

Australia US Free Trade Agreement

Trump claims he makes the best deals. Well he would be hard pressed to get a better deal for the US than what was negotiated in 2005. The Australia US FTA has largely been seen as favouring the US and it is the case that the trade deficit with the US has increased over the past 10 years.

Trump has made no comments on abandoning up or renegotiating this FTA and I expect it would be a low priority. However, any Australia agriculture exporters hoping for better market access, particularly for sugar, should turn their attention to other markets.

Trans Pacific Partnership

Its stupid trade, not free trade, says the President elect. Trump has never been accused of rigidly standing by (or even acknowledging) what he has previously said, but it would be extraordinary for him to back the Trans Pacific Partnership other than in the most amended form. I also consider it near impossible for Obama to have the US implement the TPP before Trump moves into the White House. The clear will of the US people is that they do not want this agreement.

The TPP cannot be implemented without the support of the US. From a trade in goods perspective, my view was that in many ways the TPP was not good for Australia. If it went ahead, we should be part of it. But if it doesn't go ahead we have a competitive advantage over most of our potential TPP partners. For instance, Australian beef will continue to enjoyed lower tariffs into Japan than Canadian or US beef. Australian wine and lamb would have better access to the US than our New Zealand competitors.

Given we already had hard won FTAs with Japan and US, I felt there was a risk that the TPP was giving up that advantage and putting us back on a level playing field with other TPP members.

Australia, the new Switzerland in any global trade war

The ultimate economic fear with a Trump presidency is that he will set off a global trade war. He has promised increased tariffs on Chinese goods, which will no doubt set off a response from China. It will also give other WTO members a license to act outside the bounds of the various WTO agreements that limit when increased tariffs can be imposed.

This will be a hard position for Australia as the US and China are both such key trading partners. However, Australia will have the benefit of having negotiated FTAs with each of the US and China and can use these FTAs to buffer it against any broad-brush responses by either country. It can use these FTAs as a reason to remain neutral.

If US exports to China are subject to higher tariffs, this can only help the Australian competing exporters. Further, if demand from the US for Chinese goods falls, this can only help Australian importers negotiating prices.

However, there is no doubt that what is bad for the Chinese economy is bad for Australian resource exporters. Even if we do not get caught in a trade war, Chinese demand for iron ore is likely to fall.

Canada, Mexico the EU - we will trade with you

Just because America wants to pursue isolationist policies, does not mean Australia has to follow. If the US turns its back on trade deals with the EU and its NAFTA partners, there is no reason why Australia cannot aggressively liberalise trade with these countries and Europe. Feasibility studies and talks are already planned. These countries may see negotiating modern FTAs with Australia as a way to send a clear message to the US.

Dumping policy to get even more aggressive

When he's not building hotels out of Chinese steel, Trump wants to do everything he can to stop this dumped product reaching the US. The US already takes a liberal view of what anti-dumping measures are permitted under WTO regulations. President Trump is likely to care even less about what Geneva has to say about his policies.

The WTO system only works if the leading economies respect it. If the US adopts measure that flaunt WTO dumping and countervailing regulations we can expect to see other countries follow. This will continue a trend of increasing protectionist policies amongst G20 countries.

Blaming cheap Chinese imports for the problems experienced by Australian manufacturers is a popular Australian pastime. Expect Australia to follow the US in respect of any harsher measures to prevent "dumped" Chinese goods.

We cannot predict what Trump will do over the 4 years he now has control of the US trade policy. However, there will be both risks and opportunities for Australian traders and their advisors. The challenge will be in identifying those opportunities in a political and economic environment where there is a lot of partisan noise and unpredictability.

A clothing or an orthopedic appliance – the tariff classification of mastectomy bras

5 June 2016

Around the world clothing and textiles often attract duty while orthopedic appliances are more likely to be duty free. This means that there can often be a debate as whether a product for customs classification purposes is an item of clothing or an orthopedic appliance. Hunt & Hunt recently successfully represented an importer of mastectomy bras in an appeal to the Administrative Appeals Tribunal (AAT) concerning this issue.

In Amoena Australia Pty Ltd and Comptroller-General of Customs [2016], the AAT held that a specially design mastectomy bra was to be classified as an accessory to an orthopedic appliance. This had the effect that the entry of the mastectomy bra was duty free.

The importer was an Australian distributor of artificial breast forms and mastectomy bras. The products are designed specifically for breast cancer survivors who have had a single, bilateral or partial mastectomy. While designed to look like a fashion bra, the Amoena bra had a combination of features (including a pocket to hold the breast form) that were not present in fashion bras.

The first step of the Tribunal was to identify the goods. Importantly, the Tribunal went beyond a simple wharf side test and said that evidence could be considered as to the purpose of the goods. Taking into account evidence that the goods were specifically designed for use with the breast form, the Tribunal identified the goods as bras suitable for use by women who have had breast surgery and those who have not.

The Tribunal then considered whether the goods should be identified as an orthopaedic appliance. It was found that on their own, the mastectomy bras did not fit within the definition of an orthopaedic appliance. They were not an artificial body part, did not perform the function of holding a body part or correcting a bodily deformity.

However, this was not the end of the matter. The goods could still be classified to the duty free heading if they were considered an accessory to an artificial body part. In this case there was no doubt that the breast form was an artificial body part. It was held that the mastectomy bra was an accessory to the breast form as:

- It contributes to the working of the breast form;
- It is suitable principally with the breast form;
- The primary function of the mastectomy bra is to make the wearing of the breast form more comfortable; and
- It allows a woman to comfortably and securely use the breast form.

This was despite the fact that the mastectomy bra could be used without a breast form.

The decision provides guidance to all classifications that are dependent on whether a good should be considered an accessory to some primary object, especially those which may have a dual use. Importers of health related textiles products should consider this decision when deciding the correct classification of their product.

Please contact Russell Wiese or Lynne Grant at Hunt & Hunt Lawyers to discuss further.

Australian customs broker liability for false statements

3 October 2016

Australian customs brokers are worried about the recent focus on importations potentially containing asbestos. The concern highlights the difficult position of customs brokers. With every piece of information provided to the Department of Immigration and Border Protection (Department/Customs), there is potential broker liability if that information is false and that liability does not depend on whether the false information is deliberately given.

Below we set out what steps will provide the customs broker a defence to an alleged breach of the law.

The law against false statements

The Customs Act is relatively simple – if you make a false statement to Customs you breach the Act. When a customs broker lodges an import declaration it is making a statement. The relevant sections of the Customs Act do not require that the giving of false information was deliberate, negligent or even reckless – the offence is committed by the mere giving of incorrect information. Just to underscore the seriousness of this, infringement notices of $8,100 (corporations) and $2,700 (individuals) can be issued for each breach. Infringement notices are no longer a mere theoretical penalty. Between July 2015 and October 2015 there were 54 infringement notices issued for making false statements to Customs.

Reasonable mistake of fact

Strict liability can lead to unfair results, so there are defences provided. A key defence is reasonable mistake of fact. Generally, for an individual, a defence of mistake of fact exists if at the time of, or before, making the false statement, the person considered the relevant facts and was under a mistaken, but reasonable belief, as to those facts. Crucially, you must actually consider the relevant facts – ignorance of, or a mere assumption about, the relevant facts is not sufficient. In the asbestos context, if you simply assumed that the goods did not contain asbestos without asking the question of the importer, it would be hard to maintain the mistake of fact defence. If there are positive facts on which you have relied (such as statements from the supplier/importer), the next question is whether that mistaken belief was reasonable. Again in the asbestos context, if you have a long relationship with your importer, have informed them of Australia's asbestos requirements and the products are low risk, your belief in an importer/manufacturer declaration that the goods do not contain asbestos will be more likely to be reasonable.

Reasonable mistake of fact – corporations

The rules for corporations are more onerous. Firstly, it must be shown that the relevant employee who made the statement was under a mistaken but reasonable belief about the relevant facts. Secondly, the company must prove that it exercised due diligence to prevent the making of the false statement. In the asbestos context, corporate customs brokers need to ask themselves:

- What systems are in place to ensure staff are aware of Australia's asbestos legislation?
- What steps are staff taking to form a reasonable belief that the goods do not contain asbestos?
- How is the corporation supervising that the relevant systems are being carried out?

The term 'due diligence' is incapable of a fixed meaning. 'Due diligence' requires more than good intentions, you must also take all reasonable steps to prevent the false statement being made.

Do I have to ask the question about every single import?

No client likes being asked the same question repetitively, especially if the answer is always the same. As a general rule, the legislation does not require repetitious examination of the same facts. If you have considered the facts on one occasion, and the circumstances of each subsequent import are the same, the legislation does not require reconsideration of the

facts. However, at a minimum, the subsequent consignment would need to be the same goods with the same importer, manufacturer and exporter.

Don't just aim for the bare minimum

The above guidance is about qualifying for the defence of reasonable mistake of fact. Your goal might not be to simply avoid personal liability, but rather, having the information demanded by the Department on hand if the goods are selected for inspection. This may require a certificate from an accredited laboratory, even if this is not a requirement to satisfy the reasonable mistake of fact defence.

Have you received an infringement notice

The Department should only issue an infringement notice if it believes that an offence was committed. Assuming the infringement notice relates to the giving of false information, it should be withdrawn if:

- the false information was given due to a reasonable mistake of fact
- if the fine is against a corporation, the corporation had exercised due diligence.

If you require further clarity around your obligations as a customs broker relating to asbestos or have received an infringement notice in circumstances where you believe you have acted appropriately, please contact us.

Contact us

Please click here for further information regarding our experience on similar matters.

Please contact us if you wish to receive advice personal to your circumstances.

Russell Wiese, Partner

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