

Andrew Hudson Partner

Hunt & Hunt Level 26, 360 Collins Street, Melbourne VIC 3000

T +61 3 8602 9200 **D** +61 3 8602 9231 **F** +61 3 8602 9299

E andrew_hudson@hunthunt.com.au

W www.hunthunt.com.au



Hunt & Hunt
LAWYERS

Customs, Trade and Transport Update

August 2006

The failure of the Doha Round and the consequences for Australia

The reported collapse of the World Trade Organisation's Doha Round on multilateral trade negotiations is a significant blow for the global multilateral free trade agenda. The real reasons for its failure continue to be shrouded in speculation and diplomatic intrigue, but it is fair to say that national self-interest and local political pressure were significant factors.

The collapse (technically a "suspension") is a particular blow for Australian exporters as Australian companies stood to gain significantly from a successful conclusion of the Doha negotiations.

With the relatively minor levels of protection for local producers, many producers around the world are seeking liberalisation of access to overseas markets for their exports of goods and services. As a result, there will be a natural inclination for countries including Australia, to continue to pursue bilateral free trade negotiations to increase access to markets for exporters. While these negotiations are not an ideal arrangement, they represent the only practical response while the multilateral agenda remains suspended.

This is therefore an appropriate time to reflect on the progress of Australia's free trade agenda.

Australia has concluded free trade agreements with New Zealand, the United States and Thailand. These are subject to regular assessment and review, and in the case of our Closer Economic Relations Agreement with New Zealand, changes are to be made from 1 January 2007 to the rules of origin. Expressions of Interest have also been sought to include an investment chapter in that agreement.

Furthermore, Australia is still negotiating with China and Malaysia on proposed free trade agreements, although progress has been slow.

In conjunction with New Zealand, Australia is negotiating with the Association of Southeast Asian Nations (ASEAN) for a free trade agreement.

Although negotiations for a free trade agreement with the United Arab Emirates (UAE) have collapsed, there are reports that these negotiations may be replaced with larger negotiations with the Gulf Co-operation Council, of which the UAE is a member country.

Australia and Japan are undertaking a feasibility study into a prospective free trade agreement, while the Department of Foreign Affairs and Trade is also undertaking a study into the Australian and Mexican economic relationship, which will include the consideration of a proposed free trade agreement between the two countries.

There are also media reports on the commencement of negotiations with South Korea.

With all of these negotiations, the focus has been on the prospective free trade agreement with China, although the negotiating process has been quite slow. Australia has been reluctant to place a deadline on negotiations on the basis that it is seeking a substantial and considered free trade agreement rather than an agreement that may be compromised by an unnecessary deadline. Clearly for exporters, there is significant interest about whether China will further liberalise its market for the Australian export of primary produce, and remove some restrictions on the provision of services in the Chinese economy by Australian professionals.

With little prospect of the revival of the Doha Round at least in the short term, the Australian Government has announced its intentions to increase its efforts and resources to bring forward the conclusion of these yet-to-be concluded free trade agreements. Since the suspension of the Doha Round, the Foreign Minister has already suggested that the negotiations with ASEAN and Japan may be accelerated and that a feasibility study will commence with Indonesia as to a prospective free trade agreement.

It seems clear that many countries will now revert to a focus on bilateral and regional free trade agreements. At the same time, the WTO has announced that Vietnam and Russia are now very close to joining the WTO. The position of Vietnam has been of real interest to me since my work there last year. Vietnam has recently completed bilateral access agreements with Australia, Mexico and the US. Vietnam is now working to confirm laws, rules and regulations to comply with WTO Agreements. Although there is "much work to be done", Vietnam has expressed the desire to join the WTO by the time Hanoi hosts APEC in November this year.

Taking all matters into account, this will lead to a substantial increase in demand for cargo and associated service providers!

Customs ICS compensation - where to from here?

There have been significant recent developments on the claims for compensation for costs and losses related to the introduction of the ICS.

Based on the comments in the Booz Allen Hamilton Report, Customs' media release of 27 July 2006 and our recent work for a number of parties seeking compensation, a number of issues have become clear.

- It would appear that Customs is actually paying compensation, albeit within reasonably limited parameters and subject to detailed substantiation. The very existence of the compensation arrangements reflects the pressure brought to bear by many in the industry.
 - Customs payments will generally only be limited to:
 - storage and transport-related costs
 - staffing costs (overtime and additional personnel)which can be directly linked to the ICS difficulties. Customs is not paying for other business costs or losses.
 - Generally, Customs will only pay for costs and losses incurred until 30 November 2005.
 - If parties believe they have grounds to make claims against Customs, those claims should be made now. Ultimately, it is the responsibility of those seeking compensation to pursue that compensation.
- For those making claims in relation to storage and transport – related costs, Customs has indicated that they will pay those claims subject to verification of the link to the ICS problems. Clearly, there may be some difficulties in "proving" a direct link. The best approach may be to provide comparative figures for the equivalent periods in preceding years. These types of claims are largely being made by importers, although there are a number of brokers and forwarders trying to recover these amounts as their clients have declined to pay them. As stated before, we have been involved in making claims for a number of importers using spreadsheets and otherwise providing information required by Customs in a different format. This approach may be of assistance to various claimants.
 - For those parties claiming overtime and staff-related costs, significant additional detail will need to be provided. This will be a challenge for many customs brokers and freight forwarders. For comparative purposes, evidence of overtime payments made for the months of October/December 2004 and for August/September 2005 are required.
 - There are likely to be a number of claims where parties believe that their losses truly arise from the ICS but Customs will not pay those losses. As set out above, these compensation arrangements were never likely to be comprehensive. There are also other claims which may fall outside of the 30 November 'end' date. This leaves open the question of alternative means to pursue those claims against Customs and Government outside of the current compensation scheme. On the assumption that lobbying to Government does not deliver broader compensation, given that these claims will operate outside of the terms of the compensation scheme, recourse will need to be made to a legal and other avenues and each claim will need to be carefully assessed to determine the commercial value of pursuing a legal claim in the relevant circumstances. Again, we have been undertaking significant research on these topics and would be pleased to assist further.

As stated before the imperative now is for claimants to work on their claims (taking into account the requirement of Customs) and to submit those claims. As set out above, we would be pleased to assist.

The continuing saga of Customs compliance agenda

While the recent focus has been on the Booz Allen Hamilton Report, on an operational level cargo reporters are facing closer scrutiny by Customs audit teams. As Customs has commented in many public forums, Customs has been concerned with what is described as repeated late cargo reporting. Customs had identified 65 cargo reporters for close attention including 50 sea cargo reporters and 15 air cargo reporters. Many of these cargo reporters face difficulties in complying with the time prescribed for their reports (and indeed the accuracy requirements), due to the faults of those parties providing relevant information to them and due to ICS functionality issues. This debate has emphasised the need for attention to the revised guidelines for the operation of the infringement notice system which came into effect from 20 June 2006 as referred to in ACN 2006/34. A number of industry bodies such as the CBFCA, AFIF and the Law Council made submissions as to the revised guidelines, even though all requested amendments were not adopted.

The revised guidelines incorporate a number of additional considerations to be taken into account when exercising the discretion to issue infringement notices, or not to issue the notices. The guidelines include an expanded description of behaviour that will be taken into account in determining whether a party has made an effort to comply with Customs' requirements. The guidelines also provide for considerations as to ICS issues which may have an impact on errors in reports to Customs. It is in the interests of all parties who deal with Customs to review these revised guidelines which I have discussed at recent CBFCA member forums in Melbourne and Sydney and which we hope to deliver in other states of Australia in the near future.

In a related issue, Customs has responded to concerns raised as to their exercise of powers to require the production of documents and records of communication. The Customs Committee of the Law Council had identified a number of reservations as to the way in which officers were seeking the production of documents or records of communication, believing that the requests reflected some imprecision in the exercise of the relevant powers. Following a review of those concerns, Customs agreed that there did appear to be difficulties and has instructed its officers as to the correct exercise of those powers.

Issue of new guidelines for the Infringement Notice Scheme

Customs has now finalised the new guidelines for the Infringement Notice Scheme which have operation from 20 July 2006. The commencement of the new guidelines was confirmed in ACN 2006/34. The new guidelines and that ACN should also be read together with ACN 2006/17 which discussed Customs' attitude to some strict liability offences following the expiry of the relevant moratorium period.

Case updates

The majority of recent published cases have concerned various Customs prosecutions.

- A recent Western Australian case of *CEO of Customs –v– Sayed* [2006] WASC 119 referred to events where Customs had exercised a search warrant over certain warehouse premises at which time Customs were accompanied by AFP officers armed with sub-machine guns. At the time of the exercise of the search warrant, the parties the subject of the search warrant were advised that they were entitled to legal advice and were then recommended a lawyer by Customs. Subsequently, even though the persons the subject of the search warrant had sought legal advice and did not want to answer any questions, Customs continued to question them. The Court made the observation that it was inappropriate by Customs to continue to question the relevant people if they had said that they did not want to answer further questions. The prosecution alleged that the defendant had intentionally moved, altered or interfered with tobacco contrary to section 33 of the *Customs Act* and was in unlawful possession of tobacco contrary to section 233(1)(d) of the *Customs Act*. Ultimately, the prosecution failed as its evidence was largely circumstantial and 'admissions' by the defendant were deemed not to be voluntary in the circumstances. As a result, Customs could not satisfy the burden of proof "beyond reasonable doubt".
- *In Comptroller – General of Customs –v– Parker* [2006] NSWSC 390, the New South Wales Supreme Court considered orders sought for the conviction of the defendant for 13 offences against section 234(1)(a) and of one offence against section 33 of the Act. The prosecution related to alleged movement of liquor

from a warehouse without authority. The case includes some interesting discussion as to:

- the true effect of the 'time limit' for actions under Section 249 of the Act
- whether estoppel arose against Customs to stop their action following acceptance of some duty payments
- the significance of a defendant's failure to give evidence
- the significance of averments (when not challenged)
- whether section 33 can be breached by the person who causes or directs movement but does not physically move goods
- the meaning of 'evasion'.

Ultimately Customs established the offences that had been proven to a requisite standard and the Court ordered significant financial penalties against the defendant.

- In *Commission of Taxation –v– Price* [2006] QCA 108, the Court of Appeal of the Supreme Court of Queensland considered an appeal against convictions pursuant to the *Excise Act* relating to the illegal manufacture and conveyance of tobacco.

The appellant raised four grounds of appeal that:

- that the procedure at first instance was unfair
- the rules which regulated the procedure at trial were invalid by reason of their incompatibility with Ch III of the Commonwealth Constitution
- that the respondent had failed to prove beyond reasonable doubt the unlawfulness of the conveyance in respect of the contraventions of s 119 of the *Excise Act*
- that, contrary to s 4C of the *Crimes Act* 1914 (Cth), the quantum of penalties imposed reflect and double punishment for the same acts.

Those grounds included a review of the interaction between the Queensland's Uniform Rules of Civil Procedure and a Customs prosecution where the standard of proof is 'proof beyond reasonable doubt (effectively the criminal standard).

In the end, the appeal was unsuccessful. However, the case does point to tensions of a civil court procedure being applied to proceeding to which a criminal standard of proof applies. The application of the civil procedure can disadvantage a defendant when compared to a criminal procedure. It has been my position for some time that Customs prosecutions are essentially 'criminal' in nature and as a result, a criminal procedure should apply which averments play no part (or a more limited part).

Legislation update – two new Senate reports and duty recovery reform

- The findings of the Senate Legal and Constitutional Legislation Committee Inquiry into the provisions of the *Customs Legislation Amendment (Border Compliance and Other Measures) Bill* 2006 have issued. Both the Law Council and CBFA had made submissions and I appeared before hearings of the Committee on behalf of the Law Council. One of the main effects of the proposed legislation is to prohibit access of certain persons to Customs controlled areas who would otherwise be entitled to be there. The Bill also contains some amendments to the AUSFTA regarding what constitutes "US originating goods" and what work on those goods in transit from the US disqualified them from being US originating goods. Most significantly, the Bill included a revised version of the Accredited Client Program ("ACP"). Instead of providing for full duty deferral as had originally been intended, it applied a "half-way" approach in which duty was paid in arrears for two weeks and in advance for two weeks each month. There would be increased compliance costs associated with this arrangement by monthly reconciliations. It appeared from the hearings of the Committee that the ACP proposal had only been in subject to consultations with the small group of importers who had already qualified under the ACP. The Committee questioned why more extensive consultation had not taken place. There was a recommendation from the Committee that a cost – benefit analysis needed to be undertaken in relation to the changes to the ACP before proceeding.
- The findings of a subsequent Inquiry by the Senate Legal and Constitutional Legislation Committee into the *Customs Legislation Amendment (Modernising Import Controls and other Measures) Bill* 2006 have also issued. The Law Council made a written submission to the Inquiry. However, there were no public hearings only questions on notice to Customs. One of the reforms arising from the Bill is a new regime by which people who imported prohibited imports (but did not conceal them and were not aware they were prohibited) could surrender those prohibited imports without prosecution but with the prospect of an infringement notice. There is also a scheme for detention of prohibited imports which works in addition to the existing provisions. Finally, there is a further arrangement in which people who imported goods which were (yet to be disclosed) prohibited imports without realising that they were prohibited imports could then seek post-importation approval for the imports of the relevant goods. All of this is matched with a new infringement notice

scheme for those who have inadvertently imported prohibited items. These arrangements will only apply to certain prohibited goods prescribed by regulation. The Committee made further adverse comments as to the lack of prior consultation on the Bill with a broader category of interested parties. The Committee also came to the view that the provisions of the Bill affected a broader category of persons than may have been originally believed, including express courier and international mail centres. The Senate Committee has made a number of recommendations, including consultation on appropriate guidelines for the infringement notice scheme and guidance as to who could issue the infringement notice. Subsequently, it appears that this Bill will be given precedence over the Border Compliance Bill which suggests a delay in the introduction of the revised ACP.

- Customs has issued a consultation paper on a new duty recovery approach. This would remove the existing provisions of sections 153 and 165 Customs leaving only one basis to recover customs duty notwithstanding the circumstances under which there had been an underpayment. This would be limited to four years to be consistent with ATO practice and remove the inconsistency between the four year period under section 165 and the apparent unlimited period under section 153. The Law Council submitted that there should be a number of amendments to the proposal. Firstly, that any demands should be for a precise amount properly calculated at the time of demand, rather than estimates to “stop the clock”. Secondly, that refunds should be able to be made on a four year retrospective basis also (for equitable reasons). Thirdly, that there should be clarification as to the party who is liable – the reference to ‘owner’ in the Act could apply to a number of parties. Fourthly, there should also be clarification as to whether the underpaid duty should apply to the goods (leaving them capable of seizure and sale) or merely constitute a debt recoverable without recourse to the relevant goods. We are awaiting the introduction of legislation.

Government issues response on parliamentary inquiry into use of Averments

On 31 May 2004, the House of Representatives Committee on Legal and Constitutional Affairs tabled its report (“**Report**”) following its Inquiry entitled “*Modern Day Usage of Averments in Customs prosecutions*”.

The Report made a series of recommendations as to reform of the Customs prosecution provisions and the use of averments which were consistent to the recommendations of the Law Council and various reports on the Australian Law Reform Commission (“**ALRC**”). More controversially, the Report also recommended compensation to Mr Tomson arising from his prosecution by Customs on the basis that there had been ‘reprehensible conduct’ by Customs.

After a period of **almost 2 years**, the Government issued its response (“**Response**”) to the Report. The Response is fairly predictable. Government has only endorsed some reform to the averment provisions as part of its broader reform of the Customs prosecution provisions. The reform process for the Customs prosecution provisions was reportedly initiated after the ALRC issued its recommended reforms in December 2002. However, there has been little obvious movement on these reforms, other than reference in a number of reports to meetings of Government working groups which are ‘considering the matter’. Unsurprisingly, the Response rejects any compensation for Mr Tomson. Indeed the Response contains a number of additional adverse comments regarding Mr Tomson and his claims.

The lack of reform on Customs prosecutions and averments is a continuing source of frustration and concern especially given the recent decision in *Labrador Liquor* and other cases on these issues.

New ACN on commerce markings on imported goods

Customs has now issued new ACN 2006/39 setting out guidance on the requirements for commerce markings on imported goods. This area is becoming increasingly important as trade insurances. The ACN replaces ACN 2002/44 and refers to additional ACN 2006/10.

Customs take dumping action against imported pineapple

We have previously reported on the initiation of a complaint by Australian pineapple producers that certain imports of pineapple products from China and the Philippines had been “dumped” which sought the imposition of dumping duties on those imported pineapple products.

Customs has now issued their “Preliminary Affirmative Determination” (“PAD”) in which they conclude that there appears to be sufficient grounds for the publication of a dumping duty notice in respect of “consumer” pineapple exported from the Philippines and “FSI” (Food Service and Industrial pineapple prepared or preserved in containers exceeding one litre) from China and the Philippines. The goods affected are those classified according to tariff subheading 2008.20.00 in the tariff. At the same time, Customs has terminated the investigation into consumer pineapple exported from China due to ‘negligible’ levels of dumping.

According to Australian Customs Dumping Notice No. 2006/35 (“ACDN”), in making the PAD, Customs investigations found evidence of material injury to the Australian industry by way of loss of sales volumes, loss of market share, price undercutting and price suppression.

Based on these findings, Customs determined that securities are to be taken to prevent material injury to the Australian industry while the investigation continues.

The ACDN identifies exporters and anticipated dumping margins.

A Statement of Essential Facts (“SEF”) was placed on the public record on 28 July 2006 and forms the basis on which Customs is to recommend to the Minister in relation to the application. Submissions in response to the SEF are due to be made by 17 August 2006.

Customs is due to report to the Minister with recommendations on or before 12 September 2006 and the Minister will then decide whether to publish a dumping duty notice imposing measures and the level of those measures. Depending on the decision, any securities taken may be converted to interim dumping duty or refunded.

Many of you would be aware that we are acting for an importer of canned preserved mushrooms from China in a dumping investigation which has been proceeding for some time. Further, we have previously suggested that Australian producers will seek to use the dumping process as a means to redress what they believe to be unfair competition from Asia in relation to these foods stuffs. We would anticipate additional measures being sought in relation to other types of foodstuffs in the near future.