



# Customs Compliance Update

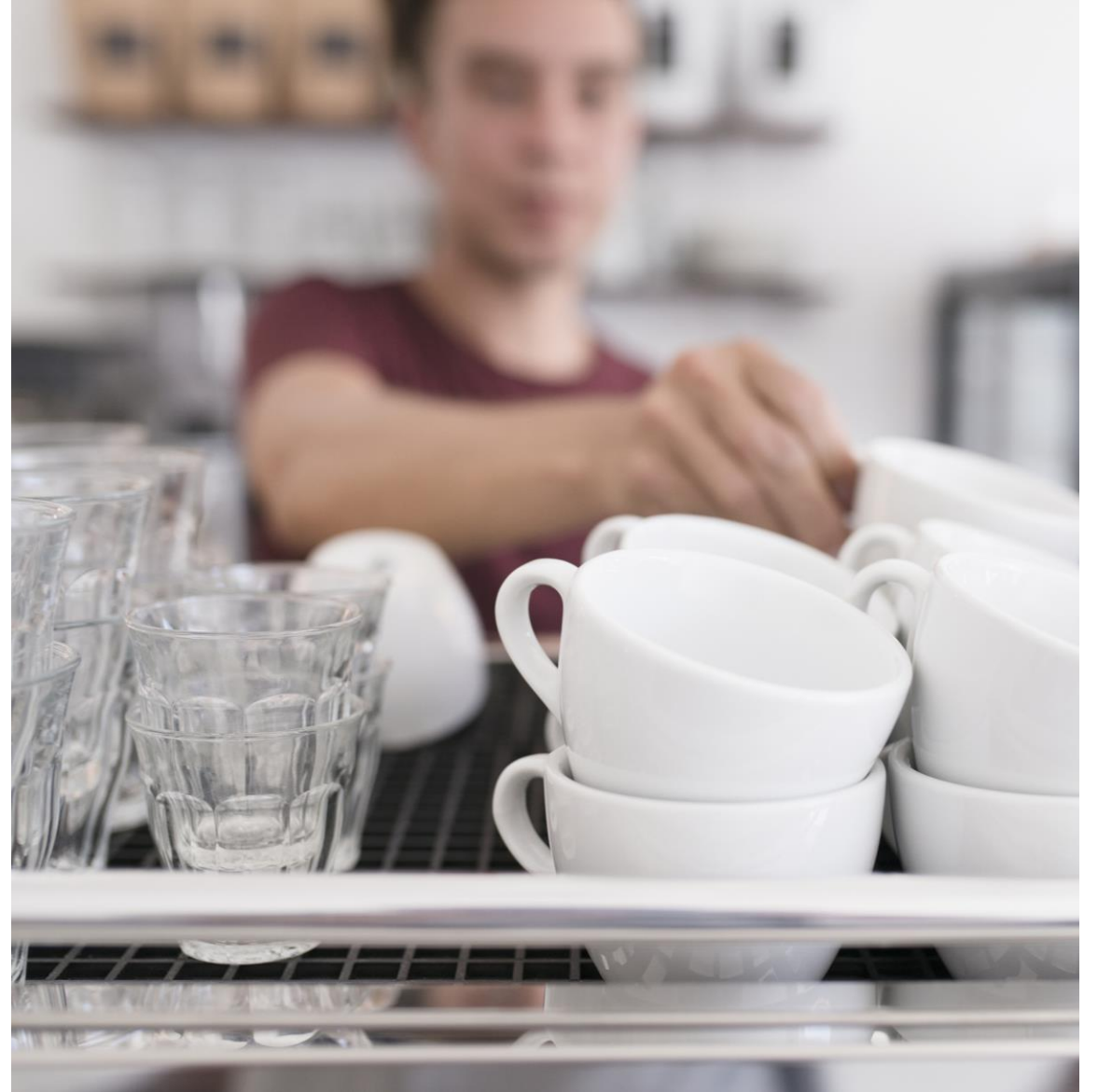
# Outline

TCO Caselaw

Goods Compliance Update

Prohibited Imports/Exports

# TCO caselaw



# Winterhalter (Australia) v CG of Customs

- November 2021 AAT case
- Concerns a dispute over whether goods fit within the terms of a TCO

Relevant TCO:

“KITCHENWARE AND OR TABLEWARE WASHING MACHINES, under counter OR pass through OR front loading OR rack conveying, **one OR two OR four cycle**, having ALL of the following:...”

The case was primarily concerned with what was meant by the term “cycle”

# Positions of the parties

- Importer – Cycles meant a stage of washing, such as cleaning, rinsing, drying
- Customs – Cycles meant a wash program such as light, heavy normal

The imported goods had 3 wash programs so would not fit within the TCO if cycle meant “wash program”

# How to interpret the TCO

ABF said:

- “cycle” had a specific trade meaning in the context of washing machines which meant program
- The importer’s position did not accord with logic or common sense
- Customs’ position is natural, ordinary and logical
- Because the wording was unclear, reference could be had to extrinsic material

Tribunal:

- It is appropriate to have reference to a trade meaning of a term
- However, a trade meaning will not be adopted where the result is unworkable, impracticable, inconvenient, illogical, futile, pointless or artificial

# Reference to the original TCO application

- Can usually obtain this via an FOI application
- This application provides the context to the TCO application
- Stated use in the original gazettal application will be relevant
- The original TCO application included the machines that were intended to be the subject of the TCO and none of those applications referenced separate “wash cycles” or “rinse cycles”

# Outcome

- The TCO did not apply because the washer did not fit precisely within the terms of the TCO
- Shows the difficulty with the TCO system – it is hard to believe that a 3 cycle dishwasher is less deserving of duty free entry than a 1, 2 or 4 cycle dishwasher
- Query whether a TCO that specifies the number of cycles is describing the goods in a generic manner



# Highlights of the Goods Compliance Update



# Pallet Racking

- Concerned steel pallet racking from China
- Securities taken in June 2018
- Industry informed ABF of an importer pressuring brokers to claim an exemption from dumping duties

“steel pallet racking or parts thereof assembled or unassembled **of dimensions that can be adjusted as required** with or without locking tabs and or slots and or bolted or clamped connections including any of the following – beans, uprights (up to 12m) and brace with or without nuts or bolts”

Argument as to whether standard pallet racking had “dimensions that can be adjusted as required”

# Pallet racking

- ABF investigated importer, demanded duty which importer then paid and then sought a refund
- Sought AAT review of the decision to reject the refund
- Importer claimed that the dimensions could not be adjusted as required. The dimensions of the components were fixed.
- Customs argued that it was sufficient that the height of the beams could be adjusted.
- The importer's arguments would mean that the dumping notice would not apply to any goods
- The dumping notice must be interpreted to give it some purpose
- AAT held that normal pallet racking could be "adjusted as required"
- In interpreting a dumping notice you must seek to give harmonious effect to all of the words used and give effect to the purpose of the instrument
- An interpretation that leads to an absurd result should be avoided

# Border Watch – indicators of suspicious behaviours

## Suspicious behaviours

- Clients who are anxious, nervous, evasive or being unreasonably demanding.
- Clients making enquiries about Australian Border Force examinations.
- A client collecting their own shipment or organising a third party to collect the goods on their behalf.
- Clients settling accounts earlier than is normal practice, using cash, bank cheque or prepaid credit cards.

## Suspicious delivery details

- A client has requested changes to the consignee name or delivery address at the last minute.
- A delivery address is for sale or rent abandoned, a hotel/motel, public place or vacant land.
- The delivery address does not relate to the legitimate company.
- A delivery address or goods description is inappropriate for the nature of the consignee's business.

# Cancellation of depot licence

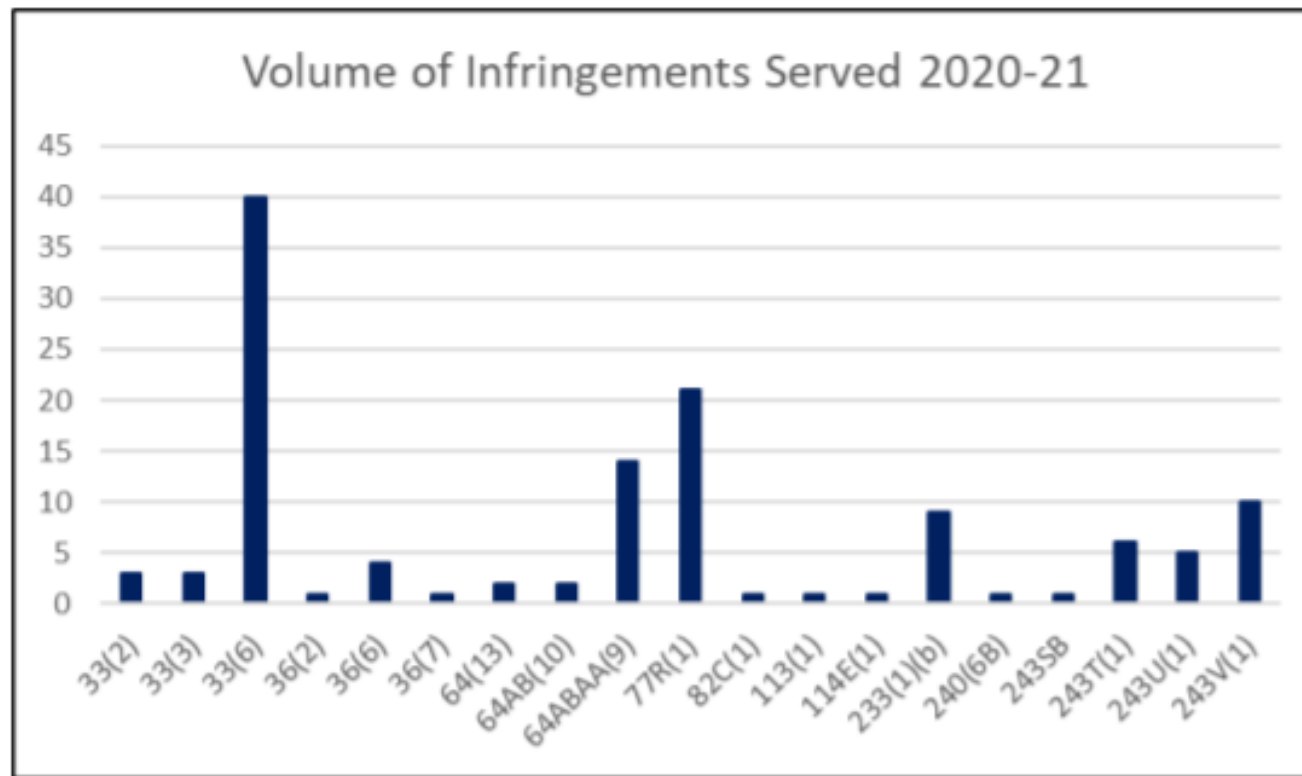
- Depot licence cancelled after concerns the depot's processes could be vulnerable to infiltration by organised crime syndicates
- ABF identified third parties operating in the controlled area
- The controlled area had been subleased compromising the security of the supply chain

# Issues we see with warehouses and depots

- Not properly maintaining an entry log book
- Individuals on site without visitor passes
- Physical security issues
- CCTV not being maintained for the required period
- Timing of outturn reports
- Unpacking goods outside of the controlled area
- Accounting for controlled goods
- Updating staff lists / persons in position of control

# Compliance program results – 2020/21

**Figure 1 - Number of Infringement Notice Scheme offences 1 July 2020 – 30 June 2021**



# Dumping duty

**Table 3 - Value of revenue understatements identified from trade remedy investigations and compliance activities (Australian Dollars)**

<b>Trade remedy understatements identified</b>	<b>Financial year 2019 – 2020</b>	<b>Financial year 2020-2021</b>
Customs duty	\$347,317.72	\$41,655.55
Dumping duty	\$6,948,130.03	\$2,358,115.58
Countervailing duty	\$2,018,723.47	\$352,737.55
GST	\$1,077,336.56	\$471,312.37



Table 8 - Most common errors on import declaration lines (CMP)

Description	Financial year 2019 – 2020	Financial year 2020 – 2021
Incorrect Delivery Address	347	171
Tariff Classification	274	125
Val - Price (Invoice Total)	195	111
Val - Invoice Terms	177	182
Gross Weight	115	74
Origin	81	60
Val - Related Transaction	80	106
Tariff Concession	64	61

Table 7 - CMP import declaration results

Description	Financial year 2019 – 2020	1 April 2020 – 30 June 2020	1 April 2021 – 30 June 2021	Financial year 2020 – 2021
No. of Lines Checked	6,175	2,349	1,895	6,190
No. of Lines Detected to Have Error/s	1,689	543	398	1,252
Error Rate	27%	23%	21%	20%
No. of Detections	2,453	750	526	1600

# Import declarations

# Export declarations

## Export declarations

**Table 9 - CMP export declaration results**

Description	Financial year 2019 – 2020	1 April 2020 – 30 June 2020	1 April 2021 – 30 June 2021	Financial year 2020 – 2021
No. of Lines Checked	481	332	158	774
No. of Lines Detected to Have Error/s	235	146	43	260
Error Rate	49%	44%	27%	34%
No. of Detections	467	297	80	472

**Table 10 - Most common errors on export declarations (CMP)**

Description	Financial year 2019 – 2020	Financial year 2020 – 2021
FOB Value	136	151
FOB Currency	11	32
Gross Weight	92	72
AHECC - Misclassification	48	33
Consignee City	36	8
Net Quantity	31	56
AHECC - Multi-Lines	24	13
Origin	26	36
Consignee Name	24	11
Other Export Data Inaccuracy	16	36



TERMINAL BURCHARDKAI

# PROHIBITED IMPORTS AND EXPORTS

Hapag-Lloyd

HOUSTON EXPRESS  
HAMBURG  
IMO 9294598

Sydney Today 🌤️ 13 ° / 24 °



[National](#) [World](#) [Lifestyle](#) [Travel](#) [Entertainment](#) [Technology](#) [Finance](#) [Sport](#) [More](#)

[Finance](#) > [Work](#) > [At Work](#)

## Sydney asbestos scare prompts union call for increased border screening

An asbestos scare has triggered union claims that Australian homeowners and builders could be at risk if the toxic material isn't being stopped at customs.

**Catie McLeod**

🕒 2 min read October 20, 2021 - 10:50PM [NCA NewsWire](#)

# Why is this important

- ABF priority
- Reallocation of ABF resources
- Low levels of importer / export knowledge
- Innocent mistake
- Massive consequences
- Broker liability
- New categories
- Hard to fix

# Type of restriction

- Prohibited absolutely
- Permit/license required
- Restricted from certain countries
- Restricted based on source of material

This session focuses on commercial goods and not the deliberate import of controlled goods such as drugs, weapons and objectionable material



## ISSUES WITH COMMERCIAL IMPORTS

- Asbestos
- Cultural property
- Border controlled precursor chemical
- Imitation hand guns
- Weapons
- TGA goods
- Foods etc requiring a permit
- Goods containing greenhouse gases
- AICIS chemicals
- Illegally logged timber
- Goods with non-compliant trade markings
- Goods bearing an image of the Australian flag
- Sanctioned countries
- Tobacco
- Toys containing certain toxic materials

## ISSUES WITH COMMERCIAL EXPORTS

- Cultural property
- Defence and strategic goods list
- Waste
- Products containing greenhouse gases
- Sanctioned countries
- Wine and brandy over 100 litres
- TGA goods
- Trade markings

# DECO PARTICULAR ISSUES

- Australia is stricter than the US – no exemption for allies
- Widely marketed IT goods:
  - DEC is very strict on this exemption
  - Made to order goods will not be covered
  - All the pricing and information about the goods must be available without the need to consult the supplier



# Examples of Dual-use goods

Thermal cameras

Unmanned Aerial Vehicles (UAVs) and Drones

Corrosion-resistant valves

Vacuum pumps

Chemical/biological/radiation detection and decontamination equipment

Aerospace and marine navigation equipment

Fibre optic equipment

Carbon fibre and composite materials

Specialty alloys

# DEC – ISSUES WITH PERMITS

Permit was for a single export and has been used

Permit has expired

Permit not for the goods being exported

Additional restricted items on the commercial invoice

Different consignee

Permit not quoted in the ICS

Quantity limits exceeded



# SEIZURE AND FORFEITURE OF GOODS

# Search and Seizure basics

- Always a right to inspect goods under customs control
- Can obtain a warrant to seize goods on a particular premises where there are reasonable grounds for suspecting that prohibited imports are, or will be, in the premises
- Warrants will permit a search of premises and may permit a search of a person
- ABF will usually be permitted to search for relevant evidential material relating to an offence involving the prohibited import
- Occupier entitled to be present during search
- Warrant must be produced
- You must provide your name and address if requested
- ABF can take photos or a video recording of the premises
- ABF must provide a receipt of all items seized

# Forfeiture

- Section 205G – when goods are forfeited to the Crown, the title in the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question – in short, the goods belong to the Government
- For prohibited imports this is not discretionary
- In most cases, the Government will dispose of the goods
- Extremely harsh
- S239 – Penalties apply in addition to forfeiture

# Process

- Forfeiture extends to the packages in which the goods are contained and all goods packed or contained in the package
- Package includes - every means by which goods for carriage may be cased, covered, enclosed, contained or packed – Does not include all goods within the container
- Seizure notice must be served within 7 days – notice must identify the goods and include the grounds on which they were seized
- Can make a claim for the return of the goods – there is an approved form – need to specify the grounds on which they should be returned

# To claim or not to claim

If no claim – after 30 days after service of the notice the goods are condemned as forfeited to the Crown

If there is a claim the ABF have two choices:

1. Return the goods; or
  2. Within 120 days of the claim being made, commence proceedings in respect of an offence involving the goods – the ABF can apply for extensions
- By lodging a claim you are forcing the ABF to commence legal proceedings
  - A claim can be withdrawn
  - If you pay an infringement notice in respect of a prohibited goods the goods are automatically forfeited to the Crown

# Post importation permission

For some prohibited imports, permission to import can be obtained post importation

- Objectionable material
- Fish
- Asbestos
- Firearms and certain weapons
- Tablet presses
- Cat or dog fur
- Australian flag goods
- Various chemicals
- Chewing tobacco
- Lighters
- ANZAC Goods



# Post importation permission

- Goods must be detained instead of seized – you will know they are detained because you will receive a detention, rather than a seizure, notice
- Only applies where the goods have not been concealed and where no application for permission has been refused
- If permission is obtained and goods released, no proceedings can be brought for an offence against the Customs Act
- If permission is not obtained, the goods will be seized

# Trade Descriptions

- The provisions relating to goods without mandatory trade descriptions, or false trade descriptions, are less strict
- While goods are forfeited to the Crown, you can be given the option to apply the prescribed trade description or export the goods (imports) / withdraw the goods from export (exports)
- ABF must be satisfied that the breach was not intentional or reckless
- Penalties for trade description breaches usually require proof of deliberate misconduct



# Country of origin labelling



Currently a particular issue with gel blasters  
Labelling must be correct on both the packaging  
and the good  
As the embossed labelling could not be removed  
the goods could not be returned



# Penalties

# Offences – import or export

- Section 233 – A person shall not import any prohibited imports or export any prohibited exports
- Strict liability offence
- Penalties:
  - Individuals - greater of 3 x the value of the goods or 1,000 penalty units
  - Companies – greater of 15 x the value of the goods or 5,000 penalty units
- A person shall not have in their possession any prohibited exports with intent to export them or knowing that they are intended to be unlawfully exported

# False statements

Section 234 prohibits false statements being made to the ABF

Prohibited imports or exports will usually contain a false statement about the nature of the goods or the existence of a permit

Penalty:

- Individuals 250 penalty units
- Companies 1250 penalty units
- Section 243U – false statements – strict liability offence

# Broker obligations

A photograph of a shipping yard. In the foreground, a red forklift is lifting a yellow shipping container onto a blue truck. The truck is parked on a concrete surface. In the background, there is a large stack of colorful shipping containers (yellow, red, blue, green) stacked high. The sky is a mix of blue and orange, suggesting a sunset or sunrise. The text "Broker obligations" is overlaid in white on the image.

# Key concern – false statement

- Prohibited imports or exports usually are associated with the making of a false statement to the ABF
- Often a community protection question regarding the good will have been answered incorrectly
- Infringement notice for making a false statement
- Key issue – is the reasonable mistake of fact defence available



# Liability to clients

- Expectation – what would a reasonable customs broker know
- Implications are massive – lost profits, forfeiture, fines
- If you agree to handle a product it will be expected that you are competent to advise on import and export restrictions unless you specifically exclude this service
- Keep records of what warnings / advice you have given
- Provide advice regarding potential penalties - forfeiture

# Key concerns

- Supplier invoice with limited detail / pro forma invoices
- Certifications that are only provided by the supplier and not a third party
- General reluctance to provide details about the goods or evidence of a permit/license
- Willingness of supplier to change documentation
- Relaxed attitude to prohibited goods might be a sign of other customs non-compliance

# Key messages

- Regularly refresh your knowledge of prohibited imports and exports
- Ensure client's understand your role – clearance of goods or wider advice on importations
- Make sure your clients understand the risk of seizure
- Be careful relying on supplier declarations
- Do not be hesitant to recommend specialist advice be obtained – especially chemicals / medical devices



# Questions

[rwiese@cgtlaw.com.au](mailto:rwiese@cgtlaw.com.au)

03 9844 4238