Importers and exporters facing increased risk of prosecution

By RUSSELL WIESE, Principal – Hunt & Hunt Lawyers

When you read of prosecutions relating to illegal importations, it's usually for importation of tobacco and illicit drugs. For a long time, most other breaches of the Customs Act have been dealt with by way of warnings, demands for underpaid duty and the issuing of infringement notices. However, over the past 12 months, we have seen more reporting of prosecutions for trade related breaches of import and export laws. When successful, these prosecutions are resulting in massive fines and in some cases, jail sentences.

This trend means that the consequences of non-compliance have greatly increased. It is crucial that importers, exporters and their customs brokers pay attention. Specific features of international trade make the threat of prosecution uniquely unappealing. These include:

- there are usually multiple occurrences of the same behaviour. The same prohibited import will be imported multiple times or the same concession consistently incorrectly applied. This means that prosecutions are not dealing with only one charge, but rather 15 – 30 charges. Maximum penalties are calculated on a per charge basis, so this can become significant.
- a lot is based on trust. Customs brokers and forwarders will never open a container and see what is really inside. Naturally, prosecutors will often claim that it was a lack of due diligence that resulted in failure to detect a breach
- general error rates on import and export declarations range from 15% to 50% of lines containing at least one error. Courts simply will not tolerate this and will see such errors as a sign of carelessness that inevitably results in breaches of the law, even if unintentional;

- the difficulty authorities have detecting breaches means that when non-compliance is found, the Courts want to make an example of the offender. This means that sentences often involve a significant general deterrence element.

So far in 2019 we have seen these trends in international trade related prosecutions:

Importation of asbestos

For many years asbestos has been classified as a prohibited import. There would be few customs brokers who would not be aware of a client that has received a warning or infringement notice regarding this issue in recent years and those importers now should consider themselves lucky.

A Western Australian importer was prosecuted and fined $175,000 for inadvertently importing asbestos in 2012 and 2013. This company was prosecuted and fined despite detecting the asbestos itself and voluntarily reporting the importations to the Australian Border Force (ABF).

Non-compliance with an Export Control Order

In October, a Brisbane company and its innocent director received large fines for not complying with the export controls regarding the export of timber to China, Hong Kong and Taiwan. While the company had a license to export the timber, it did not undertake the required fumigation and inspection processes and did not obtain export certificates.

One of the directors admitted to deliberate non-compliance, however, was not prosecuted due to poor health. The prosecutors went after a second director that had no knowledge of the non-compliance and was not involved in the export of the goods.

The offences were strict liability offences, so the Commonwealth did not need to prove that the director intentionally breached the legislative requirements. Despite there being no proof that the second director was involved in the breaches, the Commonwealth put to the Court that the only appropriate penalty was a prison sentence. The prosecutors argued that there was no excuse for the director not making relevant inquiries into the operation of the business.

The behaviour occurred over a number of years and the company faced 33 charges, while the director faced 23 charges. Ultimately the company was fined $335,000 and the director $25,000.

In sentencing, the Court took into account the risk that non-compliance with export controls posed to the credibility of Australia's export system. It was felt that the offences posed a direct threat to Australia's export market for timber to China. It was important that the penalty represented a strong deterrent to other exporters considering a breach of the law.

Illegal importation of garlic

Biosecurity risks were the driver behind another trade related prosecution in September 2019.

An importer was jailed for 11 months for illegally importing over 2,000 garlic bulbs that were a prohibited import.

The behaviour of the importer in this case was particularly egregious. The importer had told suppliers to describe the goods as office supplies and even chastised some suppliers that failed to follow this instruction.

In handing down the 11-month prison sentence, the Court again emphasised the strong need for deterrence given the size of the biosecurity risk and the difficulty with detecting breaches.

Fun facts about a customs prosecution:

- **No need to prove a guilty mind –** For many customs offences it is only necessary for the prosecution to prove certain facts, for instance, that prohibited exports were exported without a permit. It is not necessary to prove that the exporter knew that the goods were prohibited exports or was aware that a permit had not been obtained. These offences are strict liability offences meaning that it is not necessary to prove a guilty mind.
- **Prove it** – Customs allege that the goods you imported 3 years ago contained asbestos – prove it you think. One problem, in a customs prosecution, if Customs allege a factual matter, it is prima facie evidence of the fact alleged. You can disprove that alleged fact if you can obtain the evidence, but that's not how our legal system normally works. Most accused will think that they have the benefit of the principle "innocent until proven guilty".

- **No right to silence –** It's a standard principle of our legal system that the defendant has the right to silence, except if it's a customs prosecution. For offences that are not indictable offence, the Customs Act specially provides that the defendant can be compelled to give evidence.
- **Cost orders –** If Customs is successful it can obtain an order from the Court that the defendant pay its legal costs. That's right, the defendant has to pay for the privilege to be prosecuted. This can have a big impact on the outcome. In a recent prosecution the fine imposed by the Court was $4,000 while the cost order was $40,000!
- **Loss of goods plus penalties** – With prohibited imports and exports it is likely that the prohibited goods will be seized. If the seizure is valid, the goods become the property of the Commonwealth. However, the legislation specifically provides that loss of the goods is in addition to penalties. This means that the defendant is hit with both – loss of business assets plus having to pay penalties.

What can you do?

It's time to take trade compliance seriously. This does not simply mean having a zero tolerance attitude to deliberate non-compliance, it means putting in place systems to prevent inadvertent non-compliance. Importers and exporters need to assess what training, procedures and quality assurance programs they have in place to try to prevent and/or detect non-compliance.

Customs brokers need to appreciate that they are liable to be prosecuted if they provide false information to the Government in an import or export declaration. Our office has recently seen threats by senior Australian Border Force officers to seek the prosecution of customs brokers. Customs brokers will have little excuse if they are involved in breaches due to ignorance of the law. It is expected that customs brokers know the legal requirements concerning the import and export of goods. The biggest risk for customs brokers is making a false statement as a consequence of being provided false information by the customer.

While it is understood that there has to be reasonable limits around the due diligence expected to be performed by customs brokers, particular care should be taken with:

1. new clients where there is not a good reason for switching from their previous customs broker;

2. transactions that do not make commercial sense. For instance, are the freight costs more than the value of goods or are the goods of a type which the importer does not advertise as selling;

3. any unexplained or unexpected resistance by the customer to provide certain documents or information.

There are many customs brokers to choose from. Importers deliberately breaching the law are not looking for your high quality customer service. They are looking for a customs broker that will not ask too many questions and will stop asking for information when it seems too hard. If something smells and you pursue, 9 times out of 10 the client will change customs brokers. You will lose a client, but this loss will not be as significant as the cost of dealing with search warrants, subpoenas to give evidence at trial and any fines the customs broker would have faced.

When it comes to avoiding prosecution, prevention is the best strategy. If it is too late for prevention, seek legal advice as soon as possible as, even if you are guilty, outcomes can be significantly improved by cooperation, demonstrated improved compliance and were appropriate, the voluntary disclosure of information and/or consideration of an early guilty plea.

Please contact Russell Wiese of Hunt & Hunt Lawyers to discuss on (03) 8602 9231 or at rwiese@huntvic.com.au

hunt & hunt lawyers