Regulating for Globalization

Trade, Labor and EU Law Perspectives

The case for a new Australian Customs Act plus comments about what we have now

Andrew Hudson (Rigby Cooke Lawyers) · Monday, December 10th, 2018

One of the essential elements of good regulation is the need for clear contemporary supporting legislation and associated regulation.

That need has underscored new legislation in Australia (the *Biosecurity Act 2015*) and in New Zealand (the *Customs and Excise Act 2018*).

In the former case, the Biosecurity legislation succeeded the *Quarantine Act 1908* and in the latter case, it was the third iteration of the original New Zealand legislation.

In both cases, the new legislation also included changes to practice and were the subject of a process involving the affected industry co-developing the concepts behind the legislation. I was fortunate enough to assist the Customs Brokers and Forwarders Association of New Zealand

(**CBAFF**) which was part of the Stakeholder Reference Group for the New Zealand Act. The concept of co-development is also alive and well in Australia, evidenced by the creation of the Australian Trusted Trader Programme (**ATTP**) where the aims of the ATTP, its legislation and governing rule were all the product of extensive work between government and industry.

However, at the same time that government is pressing ahead with its trade modernisation and trade facilitation agenda, it is doing so relying in part on the terms of the *Customs Act 1901* (**Act**), one of the original pieces of Commonwealth legislation which has been substantially amended more than 150 times and is now quite literally bursting at the seams as new provisions are included. For example, the legislation implementing TPP-11 (or the CPTPP) includes a new Division 1 GB to the Act being sections 153ZKT to 153ZKZB. In addition there are changes to the *Customs Tariff Act* and to the Regulations made pursuant to both Acts.

By way of other example, the dumping and countervailing provisions also include an extensive number of complicated section numbers. Knowing these provisions in detail is a challenging task and compliance is also difficult, especially where liability is often imposed on a strict basis and the regulator has the option of issuing infringement notices in lieu of prosecution. That can cause more immediate liability to financial penalties. It certainly brings into question the maxim that 'ignorance of law is no excuse' when the law is so complex and industry practice requires a lot of precise information to be provided at short notice from parties here and overseas.

Not only is the Act (and related legislation) complex, but it also contains provisions which should be considered at a conceptual level to determine if they deliver proper outcomes in terms of certainty, fairness or modern trade and logistics practices. For example:

- Is it reasonable for government to persist with the idea that any one person in the supply chain can be liable for underpaid customs duty as owner, even where that liability is determined years later?
- Is it reasonable to impose that liability for duty on parties merely arranging for the carriage, reporting and clearance of goods such as licensed customs brokers, express carriers and freight forwarders when they are not part of the contract for the supply and purchase of the goods and who only have constructive as opposed to actual physical possession of the goods?
- Is it still reasonable for all individuals working in licensed premises to potentially be liable to amounts equivalent to customs or excise duty should the goods be stolen through no fault of theirs?
- Government created broad categories of penalties for failures to report properly where liability was imposed on a strict liability basis to encourage compliance. Has that actually secured improvements in compliance to justify the imposition of liability on such a basis with the associated large numbers of Infringement notices?
- There have long been concerns as to the practices and standard of proof used in customs prosecutions. There is also associated uncertainty on which matters are dealt with under the Act or are referred for prosecution by the DPP under the *Commonwealth Crimes Act*.
- Should disputes on dumping and countervailing duties still be excluded by direct review by the Administrative Appeals Tribunal?
- What type of regime will be required in the Act in the future to enable the adoption of new technologies to govern how trade is undertaken such as single-window or blockchain?

The need to review the Act and perhaps replace it is hardly a new concept. Report 60 of the Australian Law Reform Commission (**ALRC**) from September 1992 included a new draft Bill to

replace the Act. Report 61 of the ALRC (also from September 1992) then proposed amendments to the way that customs imposed penalties. Report 95 of the Australian Law Reform Commission (released in January 2003) found no reason, other than historical practice, why the area of customs and excise should not be brought into line with other federal legislation governing civil and administrative penalties. A report by a House of Representatives Standing Committee on Legal and Constitutional Affairs from May 2004 recommended reform into the usage of averments in customs prosecutions.

The former commissioner of the Australian Border Force (and comptroller-general of customs) invited industry to advise what would be required to assist with trade and compliance, including a rewrite of the Act. As recently as the Department of Home Affairs National Summit on 30 October 2018, industry again called for reform of the Act at which time assistant minister for Home Affairs, Senator Linda Reynolds invited industry to do the work creating a new Act. Based on my subsequent research with industry it seems clear that industry does want a new Act and is prepared to work with government to co-develop that new Act, accepting that government remains the only party able to effect legislative change.

Based on recent experiences in the co-development of programs and regulation here and overseas and taking into account the obvious need for reform of the Act, I would invite government to work with industry to determine the underlying principles and needs in reform of the Act. That work could be undertaken through the 'Legislative Reform Working Group' at the National Committee of Trade Facilitation with the aim of developing an outline of what manner of reform is needed and how it could be best effected. A model for the program can be found in the recent New Zealand experience creating its new *Customs and Excise Act 2018*. This has been proposed already and we hope that the idea is actively pursued.

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