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Risks of transporting goods by sea: loss of containers in transit & the Brown Marmorated Stink Bug

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While there has recently been significant commentary on Chain of Responsibility under the Heavy Vehicle National Law and transport of goods by road the most common manner of importing and exporting goods to and from Australia is by sea.

While carriage by sea meets practical requirements of importing and exporting it does carry inherent risk. For example, those involved in the import and export of goods by sea (and those whose businesses rely on imports and exports by sea) should be aware of their obligations under the International Convention for the Safety of Life at Sea (SOLAS) as well as current biosecurity issues particularly in relation to Brown Marmorated Stink Bug (BMSB) and should ensure appropriate safeguards are in place.

SOLAS and loss of containers at sea

SOLAS is an international convention to which Australia is party. SOLAS is managed by the United Nations International Maritime Organisation globally and by the Australian Maritime Safety Authority (AMSA) nationally. SOLAS is designed to ensure safety at sea in shipping. Specifically, Chapter VI of SOLAS deals with carriage of cargoes and Chapter VII of SOLAS deals with the carriage of dangerous goods.

There have also recently been a number of issues in relation to the accurate weighing of containers with containers being rejected as they did not comply with container weight requirements as also set out in SOLAS and required by the AMSA.

Cargo ships are subject to requirements and arrangements in relation to the proper stowage and carriage of cargo which are set out both in SOLAS and the Cargo Securing Manual relevant to each vessel. In Australia those requirements are implemented under Marine Order 42 (Carriage stowage and securing cargoes and containers) 2013. Clearly, proper stowage of cargo containers is vital and failure to properly stow cargo can be disastrous.

By way of example on 1 June 2018 there was an incident involving a cargo ship, YM Efficiency, travelling between Australia and Taiwan. The YM Efficiency lost 18 cargo containers overboard off the coast of New South Wales with a number of other containers on the deck damaged. The YM Efficiency encountered rough seas and suffered 'heavy rolling' for a period of time before the containers were lost.

In response to the incident the AMSA issued Marine Notice 2018/3 'Proper Stowage of Cargo' (Notice). The Notice states that it was published in response to recent incidences of:

loaded containers carried in slots only intended for empty containers;
the weight of some loaded containers exceeding the maximum weight for containers permitted to be stowed in a particular slot; and
fixed and portable securing equipment not being properly maintained.

The Notice requires that cargo be stowed and carried in accordance with the requirements of the vessel's Cargo Securing Manual and SOLAS. The Notice also states that owners and operators of cargo vessels should be aware the AMSA will be placing additional emphasis on the stowage and carriage of cargo containers in the wake of recent incidents particularly during inspections. If a vessel is found to be non-compliant AMSA will take steps to ensure compliance.

AMSA was still undertaking search and recovery of the containers lost overboard as of its latest update on 12 December 2018. There have also been ongoing issues including cargo from the containers washing up along the New South Wales coast and impacting fishing in the area.

The breaches of safety and SOLAS requirements in the YM Efficiency case and the expensive and drawn out clean up and recovery effort that has since been undertaken only emphasise the need for those involved in the import and export of goods by sea to be aware of:

the actual contents of containers and the weight of those containers;
the safety, stowage and carriage requirements in place under SOLAS and the vessel's Cargo Securing Manual; and
the risks involved and precautions that should be taken, including ensuring appropriate insurance is in place and that any terms and conditions address liability for loss as a result of incidents at sea.
BMSB – a stinky problem and now a review

Another serious issue confronting import by sea at present is the presence of BMSB on vessels attempting to enter Australian waters. The Department of Agriculture and Water Resources (DAWR) updated its fumigation and treatment requirements for BMSB before the beginning of the current season (1 September 2018 to 30 April 2019) excluding certain methods that were acceptable in the preceding season. DAWR has also recently removed certain fumigators from its list of approved fumigators.

BMSB are present in over 30 countries including America and Europe and present a significant threat to Australian ecology and agriculture with serious economic consequences if the BMSB does manage to enter Australia. Currently DAWR's focus is on preventing BMSB entering Australia in order to avoid the need for expensive containment and control exercises that would be required in order to manage the BMSB in the event it did enter the country.

Since the beginning of the BMSB season there have been multiple instances of vessels being turned around or required to berth at alternative ports in order to undergo treatment for BMSB. These vessels have either contained cargo that had not been fumigated at all during the BMSB season or had been fumigated by a provider which DAWR no longer considers acceptable.

Until recently vessels had been rejected entry and turned around due to insufficient treatment rather than the actual presence of BMSB on the vessel. However, in December 2018 BMSB was found on a ship off the coast of Western Australia. The vessel was not permitted to dock and was directed to leave Australian waters.

In some instances closed containers which were not treated prior to departure were able to be treated offshore when they arrived in Australian waters as it was possible to secure and seal the container. Instances of open top containers or break bulk present additional issues as it is unlikely the containers could be sufficiently sealed in order to be treated on arrival in Australia.

The return of cargo to its original destination as well as the need to redirect vessels to alternative ports outside Australia for treatment to occur causes significant delays in the delivery of cargo resulting in time and money lost. The recent incidences of vessels being directed out of Australian waters and in particular the detection of BMSB on a vessel off the coast of Western Australia demonstrate both the risk to Australian agriculture from BMSB and the costly consequences of failure to comply with DAWR's treatment requirements.

The significant concern surrounding the BMSB issue has now been reflected in the announcement on 24 January 2019 by the Inspector-General of Biosecurity of a review into DAWR's performance of biosecurity programs in relation to the BMSB. DAWR is inviting submissions to this review from interested parties to be made by 22 February 2019. We encourage interested parties to participate in the review and would be pleased to assist with any submissions that may be made.

Going forward

We have provided two examples of the risks associated with importing by sea however there are of course other risks involved. These examples emphasise the need for importers and exporters as well as shipping lines, freight forwarders and Licensed Customs Brokers (LCB) to be aware of safety, storage, carriage and biosecurity requirements with which they must comply as well as the need to have sufficient procedures, agreements and insurance in place to reduce risk and loss when importing and exporting by sea. Further, those involved in shipping cargo should ensure insurance

policies cover not only loss or damage to goods at sea but also the cost of and losses caused by any government directions to return vessels to the port of departure.

The scenarios above discuss areas which can significantly affect import and export by sea but are also examples of areas that are subject to frequent and fast changes. DAWR monitors and reviews the effectiveness of the BMSB provisions throughout the season and reserves the right to change those provisions and procedures during the season if they are found to be ineffective. SOLAS requirements and stowage and carriage requirements and processes (including container inspections) are also subject to ongoing change particularly when new safety issues arise. This only furthers the need for importers, exporters, freight forwarders, LCB's and shipping lines to be aware of and up to date as to their obligations especially as the associated regime is only likely to become more complex and prescriptive.

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