Australian Chamber of Commerce and Industry

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Proving origin in international trade: a review of civil and criminal liabilities

This is an internal policy document that reviews the available information on the liability framework for rules of origin: who is liable for proving origin and paying unpaid duty, the civil and criminal penalties, as well as proving origin in anti-dumping cases.

This is a legal research and analysis document for use in developing policy. It is not legal advice.

Contents

I Executive Summary

This report provides an analysis and evaluation of the liabilities surrounding the making of a statement about the origin of goods, whether through the provision to Customs of a certificate of origin (CoO) fulfilling the relevant rules of origin (RoO) or through other means. This report outlines the civil and criminal liabilities attaching to the proving of origin at all stages of the process, and for both preferential and non-preferential rules of origin. It finds that, at all stages of the process, persons can be liable for a range of civil offences with significant financial penalties, and in some cases even criminal liabilities with custodial penalties. These persons are usually importers in Australia, although they must rely on exporters to provide origin information. The scope of these liabilities remains unclear – their emergence is governed more by judicial interpretation than policy or good regulatory frameworks. Thus, persons engaging in trade face a significant and growing set of risks associated with proving origin but have little chance to prepare or mitigate their risk. Such a situation has an obvious chilling effect on trade. This report recommends several key areas where Government action could reduce uncertainty and reduce non-tariff barriers to trade. This analysis and its recommendations address liabilities within Australia, however: they do not go to the broader issue of the "noodle bowl" created by overlapping RoO frameworks. The bigger issue can only be effectively addressed by unilateral trade liberalisation.

II Summary of key findings

Proving origin

- Importers are expected to handle the process of proving origin, and thus are vulnerable to associated liabilities
- This is because importers are easier to pursue than overseas exporters
- Customs has significant powers to investigate origin beyond certificates of origin that are largely undirected by internal policy or oversight
- This significantly increases the risk for importers

Unpaid duty

- Liability for unpaid duty under s 165 *Customs Act* attaches to goods, not individuals
- Liability is thus not extinguished or left behind when goods pass to a new "owner"
- "Owner" is defined broadly in s 4, and can include almost any actor but warehousers
- Recovery of duty is the overarching aim, and courts take this into account when interpreting legislation. For this reason development of this area of law will continue broadening liability
- Warehousers can hold secondary liability for unpaid duty under s 35A

Civil liability

- A range of civil penalties exist, hinging on either evading payment or making false or misleading statements relating to imports
- Penalties are always fines, ranging from $10,800 to double the amount of duty avoided to $18,000. Judges have some (limited) discretion on the amount.
- As in unpaid duty this liability attaches to persons, not owners – any person who engages in the prohibited conduct is liable. This is broadening to include natural persons and corporations (and often the natural persons behind corporations)

Criminal liability

- Relevant criminal offence is dishonestly obtaining a financial advantage by deception from a Commonwealth entity
- Penalty is a significant term of imprisonment, meaning only individuals can be penalised – if this is to be pursued piercing the corporate veil is mandatory
- A lack of case law and unclear Customs and AFP policy make the development of this offence difficult to predict, as such presents a significant source of uncertainty and risk for importers

Anti-dumping

- Though anti-dumping is the most significant source of non-preferential RoO, origin is not often at issue in anti-dumping cases. Where it is at issue, it is most often litigated by exporters attempting to remove anti-dumping notices that are particular to their company

III Recommendations

Recommendation 1

Customs should develop clear and consistent internal policy restricting investigations that could be harmful to corporations, particularly where they cause financial and reputational damage.

Recommendation 2

The Government should consider clarifying in legislation the way in which persons can be pursued for unpaid duty, including a "hierarchy" of who to pursue when, in order to grant traders some certainty.

Recommendation 3

The Government should consider providing more direction on who exactly can be pursued for unpaid duty, as reliance of judicial interpretation is not an effective way of creating policy and law. This could be in the form of an explanatory memorandum.

Recommendation 4

The Government should amend the Acts to overturn the courts' interpretation of civil liabilities as extending to the natural persons behind corporations. The large size of the penalties and the nature of these offences mean that directors should not be held liable outside their capacity as agents of a corporation.

Recommendation 5

The Government should consider implementing "safe harbour" defences for false and misleading origin statements in the Customs Act, similar to those in Australian Consumer Law.

Recommendation 6

The Border Force should follow the ANAO's recommendation of creating a complete, consistent internal policy portal and training for staff undertaking investigations into duty evasion. This policy must clarify the process of escalation of investigations between Customs and AFP.

Recommendation 7

The offence in s 132.4 *Criminal Code (Cth)* should not be prosecuted in situations of false or misleading origin statements. The civil offences in the *Customs Act* are more than sufficient, and do not carry a penalty of imprisonment.

Recommendation 8

The Border Force needs to be transparent in its investigations. The Border Force should not publicise seizures or other investigations until after court proceedings have concluded in the Border Force's favour. If the Border Force does publicise matters prematurely and the corporation is found not to have engaged in dumping, it should publicly post a full retraction promptly.

Recommendation 9

In the United States the *Fair Claims Act* empowers persons to bring lawsuits to the Government alleging others have underpaid or evaded duty payment; where any money is recovered as damages or from settlement, the originating person receives a large chunk as a reward. These are called qui tam lawsuits. Qui tam lawsuits should not be introduced in Australia as they present too large a risk for importers and others.

IV Table of origin requirements

Table of Origin Offences				
Act and Provision	**Offence/Liability**	**Body liable**	**Penalty**	**Case law**
s 165 *Customs Act* 1901	Recovery of unpaid duty	"Owner" under s 4 *Customs Act* Usually importers	N/A	*Studio Fashion (Australia) Pty Ltd and CEO of Customs* [2015] AATA 366
s 35A *Customs Act* 1901	Failure to keep goods safely	A person, including personal liability for natural persons Usually warehousers	s 35A(1) Pay the Commonwealth the amount which would have been payable had the goods been entered for home consumption	*Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia (Taxation)* [2017] AATA 202
s 234(1)(a) *Customs Act* 1901	Evading duty and intentional provision of false information	A person per s 2c *Acts Interpretation Act* Usually importers	s 234(2)(a)(i) maximum 5 times the duty, twice the duty s 234(2)(a)(ii) maximum 500 penalty units	*CEO of Customs v Labrador Liquor Wholesale Pty Ltd & Others* [2006] QCA 558
s 234(1)(d)(i)-(iv) *Customs Act* 1901	Intentional provision of false or misleading information by inclusion or omission of information	A person per s 2c Acts Interpretation Act Usually importers	s 234(1)(d) Maximum 250 penalty units	*CEO of Customs v Hui Min JING* [2007] NSWSC 1354;
s 243T *Customs Act* 1901	False and misleading statements resulting in loss of duty Strict liability offence per s 243T(2)	A person defined in s 2c *Acts Interpretation Act* Aiders and abettors under s 236 Customs Act Usually importers	s 243T(2)(3) Maximum the greater of (a) 60 penalty units; and (b) the amount of the excess	*Re Gaganis Bros Imported Food Wholesalers Pty Ltd v Comptroller-General of Customs* [1991] FCA 509

s 243U *Customs Act* 1901	False and misleading statements not resulting in loss of duty Strict liability offence per s 243U(2)	A person defined in s 2c *Acts Interpretation Act* Aiders and abettors under s 236 *Customs Act* Usually importers	s 243U(3) Maximum 60 penalty units for each false or misleading statement	
s 9 *Commerce (Trade Descriptions) Act*	Importation of falsely marked goods	A person defined in s 2c *Acts Interpretation Act* Importers	100 penalty units ($18,000)	*CEO of Customs v CHS Enterprises Pty Ltd & 3 Ors* [2007] NSWSC 1133
s 12 *Commerce (Trade Descriptions) Act* 1905	Applying false trade descriptions to exports	A person defined in s 2c *Acts Interpretation Act* Exporters	s 12(2) Maximum 100 penalty units ($18,000)	*CEO of Customs v CHS Enterprises Pty Ltd& 3 Ors* [2007] NSWSC 1133
ss 183CQ(7) and 183CS *Customs Act* 1901	Powers of Comptroller-General of Customs in relation to broker's licences for various reasons	Customs brokers	ss 183CS(c) cancellation of licence, (d) order that an expiring licence not be renewed, (e) reprimand the customs broker	*BR Williams Customs and Freight Forwarding Pty Ltd and Chief Executive Officer of Customs* [2013] AATA 100
s 134.2 *Criminal Code Act* 1995	Obtaining a financial advantage by deception	A person, per s 12.1 including individuals and corporations Usually importers	s 134.2 maximum penalty of imprisonment for 10 years	*R (Cth) v Rapolti; R (Cth) v Russell; R (Cth) v Speedy Corporation Pty Ltd* [2016] NSWCCA 264

V Introduction

Proving the origin of goods to be traded across borders is important for a range of legislative and international law purposes. Rules of origin (RoO) are the criteria that need to be satisfied to prove that goods originate in a certain country, whether wholly or in part. Preferential RoO are those rules contained within a free trade agreement that must be satisfied for a product to qualify for preferential tariff rates, while non-preferential RoO exist for other purposes such as anti-dumping and countervailing duty measures.

Despite efforts on the part of the World Trade Organisation (WTO) harmonisation programme, trade deal negotiators have failed to harmonise preferential RoO schemes between FTAs, creating several rulesets for proving origin that can be contradictory. While the World Customs Organisation has set a Harmonized System of tariff classifications, poorly drafted trade agreements specify headings and other minutiae in the text of the agreement, effectively preventing them from reflecting updates to tariff headings. Non-preferential RoO differ also under anti-dumping and countervailing measures schemes, despite further WTO efforts to harmonise definitions.

This result is a "noodle bowl" or overlapping and contradictory sets of rules. The complexity of RoO and the difficulty exporters and importers face in navigating the noodle bowl effectively creates barriers to trade that undo much of the positive impact of preferential trade agreements (PTAs). The Productivity Commission has found that this results in a reduction of trade creation effects of up to two-thirds.[1] Despite this, Government policy has been to create new RoO for each PTA, based largely on previous PTAs but still replicating RoO and adding to the complexity.

Good policy in this area is hampered by a myriad of other causes. One significant cause is the disjoint between the practical realities of trade and the way regulators approach proving origin, to be explored in the first part of this paper. Further influences include:

- The complexity of supply chain and trade relationships,
- Conflicting advice and public notices produced by the Australian Border Force (ABF),
- A lack of parliamentary direction leading to reliance on judicial interpretation,
- A lack of training and internal policy direction for Border Force and Customs agents, and
- Inconsistent approaches to certificate of origin (CoO) verification.

As a result, the legal obligations and liabilities of proving origin in the course of engaging in trade are not well understood by those engaging in trade. Importers and exporters must understand that legal obligations and risk is much broader than what is contained in their contractual arrangements. It is important to also understand that not only the trading entity but also individuals may be personally liable. Individuals struggle to get insurance because the risk and level of penalty for false and misleading statements aren't certain and the costs of insurance may be high. Developing case law and complex legislative arrangements result in a set of liabilities that affects not just importers and exporters in Australia and overseas but also freight forwarders, warehousers, customs agents and natural persons working in trading corporations. These liabilities can be for paying duty and for civil and criminal penalties, with penalties ranging from nominal fines to significant custodial sentences.

This paper consists of the legalities and obligations around proving origin generally, and liability for unpaid penalties. It then goes on to explore the various civil offences for false and misleading statements under the *Customs Act 1901*, and the criminal offence for false and misleading statements

[1] Productivity Commission, "Rules of Origin: can the noodle bowl of trade agreements be untangled?", Productivity Commission Staff Research Note, May 2017, Wayne Crook and Jenny Gordon.

at s 134.2 of the *Criminal Code 1900* (Cth). Finally, it looks at two slightly different issues in origin– non-preferential RoO in anti-dumping and countervailing duties and dispute resolution under FTAs.

VI Proving origin– obligations and requirements

An understanding of the process of proving origin is fundamental to policymaking. Policymakers and trade actors alike misunderstand how proving origin works. The trade actor who is often described as liable for proving origin is the exporter, who is most able to trace the origin of the goods. Despite this, the actor actually expected to provide documentary proof of the origin to authorities is the importer. Policymakers fail to take this mismatch into account and assume that rules of origin and associated issues largely affect exporters.

While exporters do provide origin information to importers, importers are expected to carry out the rest of the process of providing of import documentation to officials. This act of providing the documents to officials is what is addressed by legislation. Since that act is carried out by importers, importers are the actors who carry legal responsibility for the proving of origin. Simplification or removal of RoO requirements would certainly have benefits for exporters in that importers may ask less of them when organising trade transactions. An analysis of the process of proving origin, outlined below, shows that the benefits for importers would be much greater.

Process of proving origin for preferential treatment

- Exporter and importer agree to a trade and create a contract for the sale, including Incoterms or shorthand or acronym commercial trade terms describing agreed aspects of the trade covering shipping and duty payment
- Importer requests certain import documentation from the exporter, including (if requested) a valid certificate of origin in order to apply for reduced tariff rates under an FTA, avoid increased tariff rates under anti-circumvention legislation, or for some other reason.
- Exporter provides the importer with a statement of origin, often provided by some authority of the exporting country. The exporter's involvement in the process of proving origin ends here.
- The importer may apply for a tariff concession order (TCO) locking in a correct tariff classification for their goods to reduce future liability, though TCOs are not binding on Customs and decisions can be reversed without notice.[2]
- Importer or its customs agent provides Customs with import documentation, including CoO
    - The veracity of the statements made in these documents, including tariff classification and origin statements, are self-assessed by the submitter.
    - If any doubts are held as to the correct tariff classification of goods imported into Australia they can be submitted through the "amber line" facility under ss 243T(5) and (6) *Customs Act* (Cth).

Self-assessment

Importers or their agents are required to self-assess their goods, including the tariff classification and origin of their goods, in a set of import documentation provided to Customs. These documents include

[2] Australian Government Department of Immigration and Border Protection, "Current Tariff Concession Orders", <https://www.border.gov.au/Busi/domestic-manufacturers-and-importers/list-of-tariff-concession-orders>

an import declaration and documentary proof of origin. Importers have a legal obligation to correctly assess their goods, and penalties may apply for incorrect or misleading information provided to the Department.[3]

By submitting import documentation through the amber line facility under ss 243T(5) and (6) of the *Customs Act* 1901, importers can avoid the strict liability application of the offence of providing a false or misleading statement resulting in a loss of duty under the *Customs Act*. Amber line goods are checked by Customs, and by doing this the submitter releases itself from liability for any false or misleading statements on import documentation. Other goods are put through the green line, where importers submit that the classification assessment is correct, and the red line for controlled goods.

Questioning the origin of goods

What happens when Customs agents do not accept a valid certificate of origin? At times Customs agents are not satisfied by the provision of a certificate of origin, even when that certificate is found to be valid. In these situations Customs agents undertake an investigation into the goods. While a report by the Australian National Audit Office (ANAO) identifies 25 Acts that grant Customs agents "coercive" powers to question or search persons or premises,[4] the two used to investigate origin are the *Customs Act* and the *Criminal Code*.

Where Customs agents suspect an offence under the *Customs Act* has been committed, they can undertake an investigation under a search warrant issued under s 198 of the *Customs Act 1901*.[5] Warrants to search premises and offices can be issued by departmental officers,[6] a quicker process with less oversight than the judicially-issued warrants available for criminal offences. Customs can contact the authorities in the originating country and have been known to investigate overseas premises, though there is little legislative direction or internal policy regulating this.[7] Some customs in different countries can undertake similar physical investigations of exporters in Australia.[8]

Where a criminal offence is suspected, origin can also be investigated via a search warrant under s 3E *Crimes Act* – an explanation of how this is undertaken is under criminal offences below. Under this provision evidence can be seized, including computers containing emails and other communications.[9] Note that *Rapolti* has determined that, despite the legislative overlap between civil and criminal offences related to origin, any evidence resulting from a search under a Customs Act warrant can be used for Customs Act and other civil offences only.[10] Evidence to be used in prosecuting criminal offences must be seized under a Criminal Code search warrant.[11]

While the legislative mechanism by which Customs can investigate origin is clear, the internal policy and decision-making process is not. The ANAO has found that the Department of Immigration and Border Protection (DIBP) is developing a framework to ensure oversight of departmental use of coercive powers, but this has been ongoing for several years with no outcome and ANAO identified key

[3] Goods Compliance Update October 2016 – Australian Border Force "Misuse of Self-Assessed Clearance (SAC) declarations"

[4] Auditor-General, 'The Australian Border Force's Use of Statutory Powers' (ANAO Report No. 39, Australian National Audit Office, 27 February 2017), 7.

[5] *R (Cth) v Rapolti; R (Cth) v Russell; R (Cth) v Speedy Corporation Pty Ltd* [2016] NSWCCA 264

[6] Above n 4.

[7] Above n 4.

[8] Ibid.

[9] Above n 3.

[10] Ibid.

[11] Ibid.

areas that remain unexamined.[12] The report found that the department does not provide adequate and up-to-date instructions and guidance material to officers.[13]

The power to investigate under s 198 warrants is also identified as a power that does not require significant authorisation under the Department's policy guidelines, despite its potential to disrupt businesses and damage their reputations.[14] The Department agreed to improve its guidelines to reduce the unlawful or inappropriate use of coercive powers, but little has been done thus far.[15]

Courts, also, do not necessarily use valid certificates of origin as definitive proof of origin. In many cases where origin was at issue judges looked to a swathe of import documentation, particularly the bill of lading, rather than the certificate of origin. In *Expo-Trade*, for example, the courts looked to the bill of lading and sale confirmations with the importers.[16] There is no information available to determine how judges decide what documentary evidence is suitable to show origin, but the available case law shows that when determining origin as a question of fact, judges rarely use certificates of origin.

Compelling to pay and recovering duty

When Customs disagrees with a self-assessment or otherwise finds that more duty needs to be paid,[17] the importer or other agent that is liable for duty payment can choose to pay under protest under s 167. Choosing to pay duty under protest allows the payer to seek review later under s 273GA(2).[18] Note that, where the discrepancy is caused by a customs agent's mistake, the importer must still pay the duty under protest – any recourse taken against the customs agent would likely be through contract.

What happens if too much duty is paid, or a tariff is misapplied? In some case law importers apply for refunds where duty is overpaid because of, for example, an improper construction of legislation and free trade agreements,[19] or because of a mistake on import declaration forms.[20]

Key findings

- Importers are invariably expected to handle the process of proving origin, and thus are vulnerable to risks stemming from associated liabilities
- This is because importers are easier to pursue than overseas exporters
- Customs has significant powers to investigate origin beyond certificates of origin that are largely undirected by internal policy or oversight, and thus can be carried out despite valid origin documentation
- This significantly increases the risk for importers

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[12] Above n 2, 5.
[13] Above n 2, 7.
[14] Above n 2, 25.
[15] Above n 2, 23.
[16] *Expo-Trade Pty Ltd v Minister of State for Justice & Customs* [2003] FCA 14217, 13.
[17] Post Warrant Amendment entries issued by ACS.
[18] *Re Gaganis Bros Imported Food Wholesalers Pty Ltd v Comptroller-General of Customs* [1991] FCA 509 – the customs agent made the mistake but the importer paid the duty under protest.
[19] *Re Gaylor Jewellery Sales Pty Limited and Collector of Customs* [1990] AATA 134 - receiving discount due under ANZCERTA because of improper construction of origin under s 151 customs act and s 22 customs tariff act, ss6, 7 and 10 customs act, and article 3 of ANZCERTA
[20] *Re Simplott Australia Pty Ltd and CEO of Customs* [2008] AATA 566

Recommendation 1

Customs should develop clear and consistent internal policy restricting investigations that could be harmful to corporations, particularly where they cause financial and reputational damage.

Recommendation 2

The Government should consider clarifying in legislation the way in which persons can be pursued for unpaid duty, including a "hierarchy" of who to pursue when, in order to grant traders some certainty.

VII Liability for unpaid duty

Where Customs determines that too little duty has been paid on an import, a liability for payment of that duty is created. This can be because of a mistake made by the importer or their customs broker, a mistake by Customs, or for a range of other reasons. This liability can overlap with liability for other civil offences, including liability for false or misleading statements resulting in a loss of duty.

***Customs Act 1901* - s 165**
Recovery of unpaid duty etc.
(1) An amount of duty that is due and payable in respect of goods:

(a) is a debt due to the Commonwealth; and

(b) is payable by the owner of the goods.

(2) An amount of drawback, refund or rebate of duty that is overpaid to a person:

(a) is a debt due to the Commonwealth; and

(b) is payable by the person.

Demand for payment

(3) The Comptroller-General of Customs may make, in writing, a demand for payment of an amount that is a debt due to the Commonwealth under subsection (1) or (2).

(4) A demand, under subsection (3), for payment of an amount must specify the amount and include an explanation of how it has been calculated.

(5) A demand, under subsection (3), for payment of an amount must be made within 4 years from:

(a) if the amount is a debt due to the Commonwealth under subsection (1)—the time the amount was to be paid by under this Act; or

(b) if the amount is a debt due to the Commonwealth under subsection (2)--the time the amount was paid;

unless the Comptroller-General of Customs is satisfied that the debt arose as the result of fraud or evasion.

Recovery in court

(6) An amount that is a debt due to the Commonwealth under subsection (1) or (2) may be sued for and recovered in a court of competent jurisdiction by proceedings in the name of the Collector if:

(a) the Comptroller-General of Customs has made a demand for payment of the amount in accordance with this section; or

(b) the Comptroller-General of Customs is satisfied that the debt arose as the result of fraud or evasion.

Construction of payment of unpaid duty

Where Customs determines that an amount of duty is unpaid, that amount is considered a debt due to the Commonwealth under s 165(1)(a). Per s 165(1)(b) the debt is payable by the owner of the goods, defined broadly in s 4:

> ***Customs Act* 1901 – s 4**
> **Definitions**
> "Owner " in respect of goods includes any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.

This definition is very broad and includes the majority of actors involved in a trade transaction. In practice the party who pays duty is established in the sale contract, often through the use of Incoterms, but the legislation does not require Customs to take commercial arrangements into account when choosing which actor to pursue for unpaid duty.

In *Studio Fashion* Customs agents pursued an importer for unpaid duty resulting for the exporter's misleading statements on import documentation.[21] In this transaction, the Incoterm "delivered duty paid" (DDP) was used, signifying that the exporter is responsible for all duty payments. Customs did not pursue the overseas exporter, preferring to pursue the importer in Australia.[22] The importer challenged this, arguing that Customs ought to pursue the exporter since it had undertaken to pay all duties in the sale contract.

The case confirmed that the use and definition of the word "owner" means that the debt attaches to the goods, not to any one individual, and is thus payable by any person fulfilling the role of an "owner" including the importer.[23]

It was also found that the commercial terms used in the sale contract was not relevant to the considerations of either Customs or the courts, and merely offered the importer a means by which to pursue the exporter for breach of contract.

The broad definition of "owner" has created uncertainty and possible liability for Australian importers. The Freight and Trade Alliance and Hunt & Hunt Lawyers have acknowledged that practical considerations mean that Customs will likely choose to pursue importers for unpaid duty rather than overseas exporters. As demonstrated in *Studio Fashion*, this will occur no matter the business arrangements. This opens up importers to huge risk when engaging in DDP trade transactions, possibly affecting and increasing importers' administrative burdens.

Actors liable

In *Studio Fashion* it was found that the owner is not limited to the owner at the moment of importation, but "all persons who have goods in their possession, control or disposition charged with customs duties which have not been paid."[24] Thus the debt "follows the goods until the duties are paid, and the liability of the owner to pay, if he becomes liable to pay at all, until the duties are paid."[25]

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[21] *Studio Fashion (Australia) Pty Ltd and Chief Executive Officer of Customs* [2015] AATA 366.
[22] *Studio Fashion*, 33.
[23] *Studio Fashion*, 62.
[24] *Studio Fashion*, 33.
[25] *Studio Fashion*, 33.

Note also that owners include natural persons. The *Customs Act* definition of owner in s 4 specifies that owners include "any person… being or holding himself or herself out to be the… person possessed of… the goods," while *Studio Fashions* confirms that "a personal liability arises in the case of any person who becomes owner of the goods before the duties are paid."[26]

So actors who can be liable for unpaid duty and thus pursued by Customs for that duty include importers, exporters, consignees, customs brokers, freight forwarders,[27] and aiders and abettors under s 236. For the purposes of a Customs prosecution (within the meaning of section 244), whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly concerned in the commission of any offence against this Act shall be deemed to have committed such offence and shall be punishable accordingly.[28]

While the definition is inclusive and thus could be expanded, warehousers are expressly excluded in case law: "under the current statutory regime, [warehouse licensees] are not primarily liable to pay duty as owners, but rather, are only liable to pay under s 35A."[29]

Failure to keep goods safely – s 35A

> **Customs Act 1901 – s 35A**
> **Amount payable for failure to keep dutiable goods safely etc.**
> (1) Where a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control:
>
> (a) fails to keep those goods safely; or
>
> (b) when so requested by a Collector, does not account for those goods to the satisfaction of a Collector in accordance with section 37;
>
> that person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on those goods if they had been entered for home consumption on the day on which the demand was made.

Under s 35A a secondary liability for unpaid duty exists for warehousers who are found not to have safely stored goods later lost or stolen. As a secondary liability, this cannot be held by "owners" who attract primary liability under s 165 of the Act.[30]

This offence was explored in *Zaps Transport*, where it was confirmed as a strict liability offence in that it is punishable even where the warehouser was not reckless or negligent or the offence was inadvertent.[31] In *Zaps*, the warehouser was waiting for permission to move the goods to another location when they were stolen. The warehouser was found liable through s 35A for the unpaid duty on the goods as if they had entered the market for home consumption.

[26] *Studio Fashion* 106.
[27] *CEO of Customs v Hui Min JING* [2007] NSWSC 1354, 15.
[28] *Studio Fashion*, 33.
[29] *Pearce v Coynes Freight Management Group Pty Ltd* [2010] FCA 320.
[30] *Studio Fashion* 61.
[31] *Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia (Taxation)* [2017] AATA 202, 33.

It is not just the warehousing corporation that is liable under s 35A: directors of corporations engaging in importation have been held personally liable for the unpaid duty.[32] In *Zaps*, two directors behind the warehousing corporation were found personally liable for the payment of the unpaid duty. Piercing the corporate veil in this manner is a significant act that was only undertaken by the courts in acknowledgement of the broad drafting of the provision in s 35A – the intention of the drafters is plainly that revenue is protected as a first priority.

Key findings

- Liability for unpaid duty under s 165 attaches to goods, not individuals
- Liability is thus not extinguished or left behind when goods pass to a new "owner"
- "Owner" is defined broadly in s 4, and can include almost any actor but warehousers
- Recovery of duty is the overarching aim, and courts take this into account when interpreting legislation. For this reason development of this area of law will continue broadening liability
- Warehousers can hold secondary liability for unpaid duty under s 35A

Recommendation 3

The Government should clarify who exactly can be pursued for unpaid duty. This could be in the form of an explanatory memorandum.

VIII Civil penalties for false or misleading statements on origin

Quite apart from liability for unpaid duty, there are several civil penalties for making false or misleading statements that apply to origin statements. The *Customs Act* contains three civil penalties for false or misleading statements on origin.

These penalties are separate to liability for payment of unpaid duty, but are not secondary to it – actors who are not liable for unpaid duty may be liable for these penalties and vice versa. This is because these penalties attach only to persons who have made the statement that is considered false or misleading, while liability for paid duty attaches to owners under the Act. This can be the same person, and the liability can coincide.

There are three sets of civil penalties under the *Customs Act* that this document will outline:

- Evading duty and intentional provision of false information under s 234(1)
- False and misleading statements resulting in loss of duty under s 243U
- False and misleading statements not resulting in loss of duty under s 243T

There is also an offence under the *Commerce (Trade Descriptions) Act* s 9 for importing falsely marked goods that has been applied in conjunction with the *Customs Act*, and a similar offence for exporting falsely marked goods under s 12.

[32] *Zaps Transport*, 33.

These offences apply slightly differently than the *Customs Act* offences, but the initial construction of some elements is the same.

General construction

Actors liable for all civil penalty offences

Though civil liability for unpaid duty attached to "owners", the construction for these civil penalties attach to a "person".

The term "person" is not defined in either the *Customs Act* or *Commerce (Trade Descriptions) Act*, but where a term in legislation is undefined, the relevant meaning is found in the *Acts Interpretation Act* 1901.

In the *Acts Interpretation Act,* person is defined in s 2C:

> ***Acts Interpretation Act* 1901 – s 2C**
> **References to persons**
> (1) In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.

> ***Acts Interpretation Act* 1901 – s 2B**
> **Definitions**
> ***"individual"*** means a natural person.

This definition explicitly includes both natural persons and corporations, so both types of person can face liability for these civil offences.

Note that case law has taken an extended reading of some of these provisions to include the natural persons behind corporations, i.e. directors and other senior executives.[33] This piercing of the corporate veil is an extreme step, to hold individuals accountable for actions taken in a corporate capacity. The broad drafting of the offence provisions has been taken to indicate that they should apply as broadly as possible, within the bounds of the provision's wording.

Liability for any of the Customs Act offences can be extended to persons aiding others to mislead on origin under s 236 of the *Customs Act*.

> ***Customs Act* 1901 – s 236**
> **Aiders and abettors**
> For the purposes of a Customs prosecution (within the meaning of section 244), whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly concerned in the commission of any offence against this Act shall be deemed to have committed such offence and shall be punishable accordingly.

Other legislation also allows for this extended liability – see the section on criminal liability, where the Criminal Code extends liability to others not directly engaged in the offence.

The meaning of, and limits to, the terms "aids abets counsels or procures" and "indirectly concerned in the commission" are not present in the Act. An example of this provision being used to secure

[33] *Hui Min Jing,* 33.

conviction for civil offences relating to origin is *CEO of Customs v CHS Enterprises Pty Ltd*[34], where several of the following civil offences were made out through this provision.

On a plain reading it may be contemplated to apply to persons providing or sourcing false origin documents for another person's use, or an importer who directs a customs agent to provide false origin documentation to Customs, but this has yet to be tested in court.

Strict liability

Most of the civil penalties in this section are strict liability offences, meaning that a person is shown to have completed the specified action is liable whether or not their offending was inadvertent. The applicant must only show that the respondent carried out the action within the offence as defined in case law. There is no requirement to show that the respondent intended to, or was reckless or negligent about, the commission of the offence in order for a respondent to be found in breach.

The exception is the range of offences in ss 234(1)(d), that all explicitly contain references to intention and recklessness. To make out these offences, applicants must show that the respondent had both intention and recklessness when committing the offences. This is explored further on.

Standard of proof - beyond reasonable doubt

A final significant note is that, for the *Customs Act* offences, the standard of proof (or extent to which elements of the offence must be proven) is set at "beyond reasonable doubt".[35] This is a more difficult standard to fulfil than the standard usually expected of civil offences. In other civil offences, the standard of proof is "the balance of probabilities" – on balance, is it more likely than not?

Defences – safe harbour?

In the Australian Consumer Law (ACL) there are defences for proceedings against false and misleading statements relating to origin called "safe harbour" defences. Where a person charged with such an offence can show that the product in question meets the threshold for safe harbour defences outlined in the ACL, they automatically have recourse to that defence. Such defences do not exist in civil law offences relating to the same subject matter.

Evading payment and misleading information – s 234 *Customs Act*

Within s 234 there are two sets of offences that may apply to origin statements – evading payment of duty under s 234(1)(a) and a range of offences relating to making misleading statements under ss 234(1)(d)(i)-(iv).

Both sets of offences have been used in situations where origin was at issue, though the offence of evading duty payment under s 234(1)(a) is much broader and can be used to prosecute offences not relating to any kind of importation statements.

[34] *& 3 Ors* [2007] NSWSC 1133

[35] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Others* [2006] QCA 558, 33.

Evading payment

> ***Customs Act* 1901 – s 234**
> **Customs offences**
> (1) A person shall not:
>
> (a) Evade payment of any duty which is payable
>
> …
> (2) A person who contravenes subsection (1) commits an offence punishable upon conviction:
>
> (a) in the case of an offence against paragraph (1)(a), by:
>
> (i) where the Court can determine the amount of the duty on goods the payment of which would have been evaded by the commission of the offence if the goods had been entered for home consumption on:
>
> (A) where the date on which the offence was committed is known to the Court--that date; or
>
> (B) where that date is not known to the Court--the date on which prosecution for the offence was instituted;
>
> a penalty not exceeding 5 times the amount of that duty and not less than 2 times that amount; or
>
> (ii) where the Court cannot determine the amount of that duty, a penalty not exceeding 500 penalty units;

Under s 234(1)(a), persons who evade payment of duties are liable for penalties.

Behaviour that constitutes evasion of duty is not defined, but guidance can be taken from *Labrador Liquor*, where a business represented to Australian customs that liquor imported into the country was exported on to Fiji, not attracting duty, whereas a large portion of the liquor was actually sold in Australia for home consumption and should have had duty applied.[36] This offence has not been applied to situations involving origin, but the subsection is worded in a way that may happen.

The penalty varies depending on whether the Court can determine the amount of duty evaded. If the amount of evaded duty can be calculated, the penalty is between 2 and 5 times that amount. If the amount of evaded duty cannot be calculated, under s 234(2)(a)(ii) the Court must apply a penalty of up to 500 penalty units or $90,000.

As noted above, this offence is one of strict liability: no intention, recklessness or negligence needs to be shown in order for the same judgement and penalty to be handed down. The physical element of the offence (i.e. the evasion of duty) need only be proved beyond reasonable doubt, a high bar usually

[36] *Labrador Liquor*, 13.

reserved for criminal proceedings but also extended to *Customs Act* offences.[37] Further, once the judge has decided that a penalty ought to be applied he or she has no discretion as to the type of penalty, only the quantum. Factors judges take into account when deciding the quantum of the penalty, as well as possible remittance, include the seriousness of the offence and the likelihood of future offence.[38]

Case law is not clear on when, or if, a respondent may be pursued for a charge under this offence when there are several offences that may be better suited as they are more specifically related to import documentation, and thus statements on origin.

Intentional provision or omission of misleading information

> ***Customs Act* 1901 – s 234**
> **Customs offences**
> (1) A person shall not:
> …
> (d) do any of the following:
>
> (i) intentionally make or cause to be made a statement to an officer, reckless as to the fact that the statement is false or misleading in a material particular;
>
> (ii) intentionally omit or cause to be omitted from a statement made to an officer any matter or thing, reckless as to the fact that without the matter or thing the statement is misleading in a material particular;
>
> (iii) intentionally give information to another person, knowing that the information is false or misleading in a material particular and that the other person or someone else will include the information in a statement to an officer;
>
> (iv) intentionally give information to another person, knowing that the information is misleading in a material particular because of the omission of other information that the person has and that the other person or someone else will include the information in a statement to an officer;
>
> …
> (2) A person who contravenes subsection (1) commits an offence punishable upon conviction:
>
> (c) subject to subsection (3), in the case of an offence against paragraph (1)(d), by a penalty not exceeding 250 penalty units;
>
> (3) Where a person is convicted of an offence against paragraph (1)(d) in relation to a statement made, or an omission from a statement made, in respect of the amount of duty payable on particular goods, a Court may, in relation to that offence, impose a penalty not exceeding the sum of 100 penalty units and twice the amount of the duty payable on those

A various set of offences is encapsulated in s 234(1)(d)(i)-(iv), relating to intentional provision of false or misleading information to an officer or a person who will then pass the information on to an officer.

The offences in ss 234(1)(d)(i) and 234(1)(d)(ii) cover supplying a false or misleading statement to a Commonwealth officer, whether it is misleading because of the inclusion or omission of information.

[37] *Labrador Liquor,* 33.
[38] *Hui Min Jing,* 23.

Applicants must show that the respondent intentionally submitted a statement (or omitted information from a statement), and that they were reckless to the fact that the statement was misleading whether from the inclusion or omission of information. While the intentional provision of the information is simple to prove – did the respondent intend to submit the information? - but showing that the respondent intentionally omitted information is a more difficult hurdle. The recklessness element is not defined in the Act, and has not been explored in case law, but borrowing from the definition in s 5.4(1) of the *Criminal Code (Commonwealth)* may be defined as being aware of the risk that the statement is false or misleading, and it being unjustifiable to take that risk by submitting the statement. This is a lower bar, though it can be difficult to prove that a respondent was aware of a risk of dishonesty. Evidence of similar information has previously been found through searches carried out under s 198.[39]

The offences in ss 234(1)(d)(iii) and 234(1)(d)(iv) is similar, but the statement made is to another person who then makes a statement to an officer. The intention and recklessness elements are also comparable. The difference is that the respondent is one step removed, providing information to a third party who then provides that information to a Customs official.

It is not clear when or why Customs would pursue an actor so removed from the actual provision of information, and whether they would also pursue the third party under ss 234(1)(d)(i) and (ii). Case law has not illuminated this.

Under ss 234(2) and (3), the penalty for any of these offences is either 250 penalty units ($45,000) or 100 penalty units ($18,000) and twice the duty payable on the goods. Note that if no duty is owed none of this latter sum is payable.[40]

As the offences under ss 234(1)(d)(i)-(iv) are not strict liability, judges have discretion as to the penalty handed down. In some cases, the decision of what kind of penalty to hand down was influenced by factors including deterrence, Australia's reputation, effects on revenue, the amount of goods at question, the duration of the "scheme" and the remorse and contrition of the respondents.[41]

[39] *Rapolti,* 33.
[40] *Hui Min Jing,* 3.
[41] *Hui Min Jing,* 23.

False or misleading statements resulting in loss of duty – s 243T *Customs Act*

> ***Customs Act* 1901 – s 243T**
> **False or misleading statements resulting in loss of duty**
> (1) A person commits an offence if:
>
> (a) the person:
>
> (i) makes, or causes to be made, to an officer a statement (other than a statement in a cargo report or an outturn report) that is false or misleading in a material particular; or
>
> (ii) omits, or causes to be omitted, from a statement (other than a statement in a cargo report or an outturn report) made to an officer any matter or thing without which the statement is false or misleading in a material particular; and
>
> (b) either of the following applies:
>
> (i) the amount of duty properly payable on the goods exceeds the amount of duty that would have been payable if the amount of duty were determined on the basis that the statement was not false or misleading;
>
> (ii) the amount that would have been payable as a refund or drawback of duty on the goods if that amount had been determined on the basis that the statement was not false or misleading exceeds the amount of refund or drawback properly payable (which may be nil).
>
> (2) An offence against subsection (1) is an offence of strict liability.
>
> (3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of:
>
> (a) 60 penalty units; and
>
> (b) the amount of the excess.

The offence in s 243T is difficult to untangle – it is certainly not worded for simplicity. Essentially, a person is liable if they make a statement with a false or misleading material particular (or omitting the same), that if taken at face value would result either in the avoidance of an amount of duty or the refund of a larger amount of duty than what should rightly be refunded. Material particular is, again, not defined in the Act, but as duty payment is often contingent on origin it is clear that it can be considered a material particular.

This offence is strict liability per s 243T(2), and despite its complex wording and the high standard of proof[42] it is broad enough to be easily fulfilled by statements about origin that are found to be false. Considering the complexity of global supply chains and rules of origin, and the resulting difficulty of determining origin, this offence could potentially be used very broadly against importers.

There are, however, two means by which persons can dissolve liability under ss 243T(4), 243T(5) and 243T(6). Under s 243T(4) liability can be dissolved by voluntarily notifying customs officers of an error

[42] *Labrador Liquor,* 33.

of the sort otherwise punishable under this subsection. This is not a broad exception: the definition of "voluntarily" in s 243T(4A) is strict, and includes only self-instigated notification before Customs discovers the error. Liability can also be dissolved in s 243T(5) if the original statement specifies the person is uncertain about specific information, and the same goes for omitting something in statements under s 243T(6).

The penalty for this offence is a fine not exceeding the greater of $10,800 (60 penalty points) or the amount of the excess duty. Unlike the offences in s 234 above, once Customs decides that the offence has been committed the greater of the two sums will be payable.[43]

False/misleading statements not resulting in loss of duty – s 243U *Customs Act*

***Customs Act* 1901 – s 243U**
False or misleading statements not resulting in loss of duty

(1) A person commits an offence if:

(a) the person:

(i) makes, or causes to be made, to an officer a statement (other than a statement in a cargo report or an outturn report) that is false or misleading in a material particular; or

(ii) omits, or causes to be omitted, from a statement (other than a statement in a cargo report or an outturn report) made to an officer any matter or thing without which the statement is false or misleading in a material particular; and

(b) neither of the following applies:

(i) the amount of duty properly payable on particular goods exceeds the amount of duty that would have been payable if the amount of duty were determined on the basis that the statement was not false or misleading;

(ii) the amount that would have been payable as a refund or drawback of duty on the goods if that amount had been determined on the basis that the statement was not false or misleading exceeds the amount of refund or drawback properly payable (which may be nil).

(2) An offence against subsection (1) is an offence of strict liability.

(3) The penalty for a conviction for an offence against subsection (1) is an amount not exceeding 60 penalty units for each statement that is found by the court to be false or misleading.

The offence under s 243U is identical to that of s 243T, except that no duty is underpaid or refund overpaid. The policy argument behind this offence is clearly to discourage false or misleading statements, whether or not they intend to effect or even result in the claiming of preferential tariff rates. This kind of activity is covered by criminal penalties under the *Criminal Code*, though, so the real difference seems to be that having this civil penalty means that the fine is paid directly to Customs, not to the Commonwealth. The penalty for this offence is also $10,800 for each false or misleading statement, so every origin certification provided to Customs may be considered a new statement attracting a fine. This provision also has similar subsections dissolving liability.

[43] *Re Gaganis Bros Imported Food Wholesalers Pty Ltd v Comptroller-General of Customs* [1991] FCA 509, 8.

Note that s 243U previously did not contain an offence, but a provision empowering Customs to remit duty penalties[44] – this makes researching case law difficult, and no relevant cases were found.

Falsely marked goods - ss 9 and 12 *Commerce (Trade Descriptions) Act*

A final civil penalty, less used than those in the *Customs Act*, is the offence of importing falsely marked goods under s 9 of the *Commerce (Trade Descriptions) Act*.

Trade description as defined in the Act can mean "any description, statement, indication, or suggestion, direct or indirect: … (b) as to the country or place in or at which the goods were made or produced".

> ***Commerce (Trade Descriptions) Act* 1905 – s 9**
> **Importation of falsely marked goods**
> (1) A person shall not import any goods to which a false trade description is applied.
>
> Penalty: 100 penalty units.
>
> (2) In a prosecution for an offence against subsection (1) it is a defence if the defendant proves that he or she did not intentionally import the goods in contravention of that subsection.

This provision penalises the importation of goods to which a false trade description has been applied. Note that it is not necessary to show any effects on revenue for this provision to be made out. Note also that the provision applies where a person imports the goods – there is no need for that person to have applied the false trade description.

This offence is not one of strict liability: s 9(2) explicitly removes liability where a respondent can show that they did not intentionally contravene the subsection. This means that a respondent can claim that they did not know that the goods had had a false trade description applied to them.

Note that this reverses the usual onus of proof relating to intention in offences. Usually it is the applicant's burden to prove that intention was present in the respondent. In this case it may be a more simple matter than usual to prove that intention was not present, by presenting evidence that the respondent believed the trade description was correct. The penalty for this provision is not open to judicial discretion – it is $18,000 (100 penalty units).

Another penalty applies to exports in s 12.

> ***Commerce (Trade Descriptions) Act* 1905 – s 12**
> **Penalty for applying false trade description to exports**
> (1) No person shall:
>
> (a) intentionally apply any false trade description to any goods intended or entered for export or put on any ship or boat for export, or brought to any wharf or place for the purpose of export; or
>
> (b) intentionally export or enter for export or put on any ship or boat for export any goods to which a false trade description is applied.
>
> (2) A person who contravenes subsection (1) is guilty of an offence and is punishable on conviction by a fine not exceeding 100 penalty units.

[44] Customs Legislation Amendment Bill (No 2) 2003. <http://www.austlii.edu.au/au/legis/cth/bill/clab22003353/index.html>

This provision is quite different: it penalises both the intentional application of a false trade description to exports as well as the actual exportation of those goods. It also does not specify a defence as in s 9(2), though neither offence is strict liability and both requires intentionality (in this case, intentional applying the false trade description or intentionally exporting goods to which a false trade description applies). The penalty for contravention of this subsection is a fine not exceeding 100 penalty units or $18,000.

This offence was explored in *CEO of Customs v CHS Enterprises Pty Ltd*,[45] where honey from China was transhipped through Singapore to Australia, then through Australia on the way to the United States and relabelled as Australian honey to avoid United States anti-dumping duties. In this case, ss 9 and 12 were both alleged as well as an offence under s 234(1)(d)(i) and (ii).[46] Various defendants were convicted of offences under both Acts, indicating that the same set of facts can lead to prosecution under both sets of offences.

Liability of and penalties for customs brokers

The civil liability of customs brokers is an unexplored but significant means by which Customs pursues restitution for false or misleading statements relating to origin. Customs brokers are generally vulnerable to punitive action as they are one of the few actors in international trade that are licensed, giving authorities a unique power to mete out non-criminal punishment. Brokers are particularly vulnerable to liability under these particular provisions as they relate to a person, not an owner, and as customs brokers are often the actor that physically provides Customs with import documentation.

> ***Customs Act* 1901 – s 183CS**
> **Powers of Comptroller-General of Customs**
> (1) Where the Comptroller-General of Customs, after considering a report under subsection 183CQ(7) in relation to a broker's licence, is:
>
> (a) satisfied in relation to the licence as to any of the matters mentioned in paragraphs (a) to (j) (inclusive) of subsection 183CQ(1); or
>
> (b) satisfied on any other grounds that it is necessary to do so for the protection of the revenue or for the purpose of ensuring compliance with the Customs Acts;
>
> he or she may, by notice to the customs broker:
>
> (c) cancel the licence; or
>
> (d) if the licence is about to expire--order that the licence not be renewed; or
>
> (e) reprimand the customs broker; or
>
> (f) in a case where the licence is not already suspended--suspend the licence for a period specified in the notice; or
>
> (g) in a case where the licence is already suspended--further suspend the licence for a period specified in the notice.

Under s 183CS of the *Customs Act*, customs brokers can have their licence taken away under s 183CS after Customs officials investigate a complaint under 183CQ(7). S 183CS(b) also empowers officials to

[45] *& 3 Ors* [2007] NSWSC 1133.
[46] *CEO of Customs v CHS Enterprises*, 11.

remove brokers' licences if they are satisfied on "any other grounds that it is necessary to do so for the protection of the revenue or for the purpose of ensuring compliance with the Customs Acts".

This power is very broad, and leaves brokers open to removal of their licence for a range of issues. There is no specific power for officials to remove or otherwise alter broker licences because of misrepresentation on the origin of goods under s 183CQ(1). The broad wording of the power in s 183CS(1)(b) means that it very well could be triggered by a customs broker's repeated misrepresentation of origin, particularly where that results in the payment of lower duty rates. This is not proven, however, as the Act is silent on the factors Customs may take into account when deciding to remove licences under s 183CS.

This issue was explored in *BR Williams*[47] where, in considering whether Customs ought to have cancelled a customs broker's licence, the court examined the factors to be taken into account in making this decision. The court found that Customs ought to consider the number of breaches, their severity, the likelihood of future breaches, the potential for revenue loss, actual revenue adjustments in rectifying the breaches and the type of error.[48] Further factors can include the conduct of the applicant in managing its business, past breaches and internal management procedures of the applicant[49] and whether the breaches are likely to be repeated.[50]

While the legislation itself is broad, removal of a licence is considered a very serious measure;[51] accordingly, there are limiting factors. For Customs to revoke a licence there must be cogent evidence that there is a significant risk of a future breach.[52] Further, while the courts are firm that "some action should be taken to protect revenue or ensure compliance,"[53] there is a range of options open to them in terms of penalising customs brokers under s 183CS(1)(c)-(g), including lesser penalties like suspension of licences or official reprimands.

Key findings

- A range of civil penalties exist, hinging on either evading payment or making false or misleading statements relating to imports
- Penalties are always fines, ranging from $10,800 to double the amount of duty avoided to $18,000. Judges have some (limited) discretion on the amount.
- As in unpaid duty this liability attaches to persons, not owners – any person who engages in the prohibited conduct is liable. This is broadening to include natural persons and corporations (and often the natural persons behind corporations)

Recommendation 4

The Government should amend the Acts to overturn the courts' interpretation of these liabilities as extending to the natural persons behind corporations. The large size of the penalties and the nature of these offences mean that directors should not be held liable outside their capacity as agents of a corporation.

[47] *BR Williams Customs and Freight Forwarding Pty Ltd and Chief Executive Officer of Customs* [2013] AATA 100 (27 February 2013).
[48] *BR Williams,* 10.
[49] *BR Williams,* 36.
[50] *BR Williams,* 39.
[51] *BR Williams,* 29.
[52] *BR Williams,* 39.
[53] *BR Williams,* 34.

Recommendation 5

The Government should consider implementing "safe harbour" defences for false and misleading origin statements in the Customs Act, similar to those in Australian Consumer Law.

IX Criminal penalty for misleading or incorrect statements on origin

Beyond the liability for unpaid duty and civil penalties, persons suspected of providing false origin information to Customs may be pursued for criminal charges under the Commonwealth *Criminal Code*. As importation statements are made to Commonwealth agents, it follows that criminal charges for false statements would stem from Commonwealth legislation.

State criminal legislation provides for offences relating to false statements to state officials, and it is conceivable that this may apply to origin statements if they are made to State officials – but as this is not generally the case with imports, and there is no case law addressing it, it will not be explored in this analysis.

> ***Criminal Code Act* 1995 (Cth) – s 134.2**
> **Obtaining a financial advantage by deception**
> (1) A person commits an offence if:
>
> (a) the person, by a deception, dishonestly obtains a financial advantage from another person; and
>
> (b) the other person is a Commonwealth entity.
>
> Penalty: Imprisonment for 10 years.
>
> (2) Absolute liability applies to the paragraph (1)(b) element of the offence.

Under s 134.2 of the Commonwealth Criminal Code, persons are liable where they obtain a financial advantage from a Commonwealth entity "dishonestly" and "by deception". This may be applied to origin documentation supplied to Customs agents, where it is found by Customs that the goods did not originate in the stated country.

The application of this offence to origin statements was demonstrated in *Rapolti*, where Customs agents went past a valid certificate of origin on the suspicion that the goods originated in a third country, and ultimately pursued criminal charges under s 134.2.[54] Unfortunately for jurisprudence on this matter, the case hinged on the validity of using evidence gathered under a *Customs Act* s 198 warrant for criminal charges. For this reason the application of s 134.2 to origin statements was not fully explored.

In the *Criminal Code*, offences are divided into parts that must be shown to have occurred, and each part of an offence has two elements that must be shown for a defendant to be convicted: physical and fault elements.[55] Physical elements are acts, results or circumstances effected by the defendant. Fault elements are states of mind on the part of the defendant at the time of the offence: these are the requisite intention, recklessness, negligence or knowledge on the part of the defendant that must be proved. Physical and faulty elements for each part of an offence are paired unless a fault element is explicitly excluded.

[54] *Rapolti,* 33.
[55] *Criminal Code (Commonwealth)* S 3.1(1).

This offence can be constructed thus:

- a person (as defined above),
- creating or effecting a deception,
- obtaining a financial advantage,
- doing so dishonestly, and
- doing so at the expense of a Commonwealth agent.

Each of these parts has a physical element that is either conduct, a result or a circumstance, and each has an accompanying fault element except where explicitly excluded by the provision. These elements are questions of fact to be proven beyond reasonable doubt by the plaintiff.

Parts of the offence

Person

Personhood is not actually defined in the *Code*, but under s 12.1 can be taken to mean individuals and corporations. This part does not need to have corresponding physical and fault elements shown – it is the hurdle that must be overcome to begin to make out the offence.

Under a set of sections including ss 11.2(1), 11.2A(1), 11.3 and 11.6(1), extended liability applies here to persons inside and outside Australia who are involved in this offence through aiding and abetting, joint commission, commission by proxy and attempt, incitement and conspiracy. Thus, any person who engages in this set of extended liability actions is equally liable as the person who commits the offence. Again, this has not been applied and guidance is contained within the relevant sections.

In *Rapolti*, the defendants included two natural persons and a corporation. It is unclear how the penalty for this offence – ten year's imprisonment - could be meted out against a corporation.

Deception

A deception in this particular provision is defined in s 133.1 as "an intentional or reckless deception, whether by words or other conduct". Deception can include deception relating to intentions in s 133.1(a), meaning that a person deceives another as to their intentions. Notably, the definition explicitly includes causing a computer or other electronic device to "make a response that the person is not authorised to cause it to do so" (in s 133.1(b)). This is not clearly worded and its meaning has not been explored in case law. On its plain meaning, however, it may be interpreted to include altering validly issued origin certification. .

The use of the word "deception" in s 134.2(1)(a) brings two possible fault elements for plaintiffs to make out on the defendant's behalf in order to show an offence has occurred. For it to be shown that the defendant effected a deception, plaintiffs must show either intention or recklessness as to the deceptive conduct.

Intention is defined in the *Code* in s 5.2 differently depending on whether it is in relation to conduct, circumstance or results. As "intention" here attached to a deception – a state of mind in a third party that is the result of certain conduct – the relevant meaning of intention is in relation to a result. So, to make out an intentional deception under s 134.2(1)(a), the plaintiff must show under s 4.2(3) that the

defendant meant to bring about the deception or was aware that their actions would cause the Commonwealth entity to be deceived in the ordinary course of events.[56]

Plaintiffs may also choose to make out recklessness towards deception under s 134.5(1)(a). Recklessness to a circumstance (again, deception) is defined in as being aware of a substantial risk that the circumstance can or does exist under s 5.4(1)(a), and that, having regard to the circumstances known to the defendant, it is unjustifiable to take the risk per s 5.4(1)(b). Whether or not the risk of the deception is unjustifiable is unjustifiable is a question of fact under s 5.4(3), meaning that it must be shown through facts and evidence by the plaintiff.

Note that it is more difficult to show intention than recklessness, so if a plaintiff can show intention they are taken to have satisfied a recklessness fault element by default under s 5.4(4).

Dishonesty

Dishonesty is defined in s 130.3 to have two parts: the defendant's behaviour being dishonest according to the standards of ordinary people under s 130.3(a), and the defendant knowing this at the time of the offence under s 130.3(b).

The physical element here is in s 130.3(a) and is an element of circumstance – the circumstance that the gaining of a financial advantage is conduct that is dishonest.

The fault element for this circumstance is knowledge per s 130.3(b), which is defined under s 5.3 as being aware that the circumstance exists or will exist in the ordinary course of events.

Plaintiffs must thus show that, according to the standards of an ordinary person, the defendant acted dishonestly and knew that the conduct is or will be dishonest.

Obtaining financial advantage

Obtaining a financial advantage is conduct – an act, omission to perform an act or a state of affairs under s 4.1(2).

Where conduct is the physical element, the plaintiff must show that it was carried out voluntarily under s 4.2, in that it was under the defendant's control and was not the result of a spasm or sleepwalking or some other physically or mentally involuntary action. Of course, it is highly unlikely that this would be at issue, but it must be shown for the offence to be made out.

This element does not have an explicit fault element attached, so under s 5.6 and as a physical element of conduct the relevant fault element is intention. As above, this is a high bar and would likely be at issue in any court proceedings – did the defendant intend to obtain a financial advantage? This is where a defence of mistake of fact may be used to great effect, though if the other elements of deception and dishonesty are made out it is unlikely a defendant could argue that there was no intention to gain a financial advantage.

Commonwealth entity

Subsection (b) of this offence, requiring that the financial advantage comes from a Commonwealth entity, carries absolute liability under s 134.2(2). Absolute liability is defined in s 6.2. This is an even more stringent form of liability than strict liability offences, as the defence of mistake of fact is not available – that is, a defendant cannot claim that they did not know that the giver of the financial

[56] *Criminal Code (Commonwealth)* s 5.2(3).

advantage was a Commonwealth entity. Further, absolute liability means that the plaintiff need not make out intention, recklessness, knowledge or negligence as was required for s 134.2(1)(a).[57]

While this seems strict, it is not the subsection of the offence that is likely to be in contention and thus does not significantly add to the strength of this offence.

Penalty

The penalty for this offence is a significant term of imprisonment, at a maximum of 10 years. In comparison to the civil penalties this is a very strong penalty indeed.

The nature of this penalty is that it cannot be paid by a corporate person, only an individual. Imprisonment is a penalty that cannot be paid by any person other than a natural person. Considering that statements to Customs officials on origin are likely to be made by corporate persons, i.e. individuals acting not in their own capacity but on behalf of a corporation, the use of this offence for origin statements effectively only holds individuals accountable.

This fact is likely to be taken into account by the courts, but where it is made out there is no discretion as to the penalty – no option to issue a fine to a corporate person. Thus, this offence is a significant risk for individuals engaging in trade whether or not they are acting on behalf of a corporation.

Jurisdiction

This offence carries extended geographical jurisdiction under s 134.3.

> ***Criminal Code Act 1995* (Cth) – s 15.4**
> **Extended geographical jurisdiction – category D**
> If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
>
> (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
>
> (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.
>
> Note: The expression offence is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(1).

This offence applies to any person, whether overseas or in Australia and whether the conduct occurred overseas or not, as long as they fulfil the elements of the offence outlined above.

While this means that foreign exporters providing origin documentation to Customs officials can be pursued, the practicalities of this are prohibitive, not least because the penalty requires the person to be physically imprisoned in Australia. In effect, this has not been used against persons not in Australia, and it is difficult to imagine it occurring.

Customs Investigations

Considering the severity of the penalty for this offence, particularly its application to individuals rather than corporations, it is important to understand when and why Customs and the Australian Federal Police (AFP) pursues it rather than a civil penalty under the *Customs Act,* punishable by a fine.

[57] *Criminal Code (Commonwealth)* s 6.2(1)(b).

When and how do Customs decide to escalate to criminal charges and an AFP investigation under a s 3E warrant in the *Criminal Code*? How is this investigated, beyond what is done for civil issues from the *Customs Act*? What are the internal processes, the checks and balances that ensure oversight and careful thought behind the pursuit of such a significant charge?

This question was partly addressed in *Rapolti*, where Customs investigated a corporation first under a s 198 warrant from the *Customs Act* and then attempted to use it to pursue criminal charges by handing the evidence over to AFP officials with a s 3E *Criminal Code* warrant.

The point in contention was whether this handover validated the use of evidence found under a civil warrant for a criminal charge. The Court found that evidence for a criminal trial must be found under a valid criminal warrant, and that coercive powers such as the power to exercise search and seizure under warrants must only be exercised for the purpose for which they were conferred.[58]

While this clarifies how evidence can be gathered by Customs and AFP to pursue criminal charges, it does not illuminate why and how they decide to do this. The ANAO report outlined above emphasised the lack of internal policy and oversight of the exercise of Customs' powers, but a criminal search warrant and investigation are carried out by the Australian Federal Police and there is zero available information on how escalation of investigations occurs between Customs and AFP.

This creates significant uncertainty for importers and others engaged in trade. Individuals may face a significant term of imprisonment, but do not understand when and how this liability is investigated and how they can expect it to be handled by authorities.

Further, it is highly questionable why this exceedingly punitive provision would be pursued when there are several civil offences created specifically for this type of offence.

Key findings

- Relevant criminal offence is dishonestly obtaining a financial advantage by deception from a Commonwealth entity
- Penalty is a significant term of imprisonment, meaning only individuals can be penalised – if this is to be pursued piercing the corporate veil is mandatory
- A lack of case law and unclear Customs and AFP policy make the development of this offence difficult to predict, as such presents a significant source of uncertainty and risk for importers

Recommendation 6

The Border Force should follow the ANAO's recommendation of creating a complete, consistent internal policy portal and training for staff undertaking investigations. This policy must clarify the process of escalation of investigations between Customs and AFP.

Recommendation 7

The offence in s 132.4 Criminal Code (Cth) should not be prosecuted in situations of false or misleading origin statements. The civil offences in the Customs Act are more than sufficient, and do not carry a penalty of imprisonment.

[58] *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229.

X Anti-dumping

Anti-dumping

The most significant use of non-preferential rules of origin from a liability perspective is for anti-circumvention of anti-dumping duties. An anti-dumping duty is a tariff used by governments to deter the importation of goods that it believes have been priced under market value. Anti-dumping duties are, then, essentially a protectionist measure to prevent foreign corporations from 'dumping' in domestic markets in order to protect local industry.

Anti-dumping notices are produced by the Anti-Dumping Commission, announcing that certain goods imported from specific countries now attract an anti-dumping duty. Anti-dumping is legislated within the *Customs Act* – Part XVB provides for the Anti-Dumping Commission, a Commissioner, and their powers over determining where anti-dumping measures should apply, while the *Customs Tariff (Anti-Dumping) Act* 1975 provides for dumping duty and its application to imports.

The Commission can put out anti-dumping notices, declare that certain imports attract duty, undertake inquiries into imports and pursue importers for duty and penalties under Part XVB. Note that inquiries into imports are often done at the request of domestic producers or sellers of the goods in question. This is provided for in the Act, since the policy reason behind anti-dumping is to protect local producers and sellers of goods from goods sourced overseas.

Anti-dumping duties apply based on both the classification of the goods and its origin. These duties are significantly greater than other tariffs, often several times the value of the goods. In order to determine when to apply anti-dumping tariffs to imports, the Commission must determine the origin of the goods through non-preferential rules of origin specific to anti-dumping.

Origin in anti-dumping

Despite the pivotal nature of origin in anti-dumping legislation, most anti-dumping inquiries and court cases do not hinge on origin. Though export through a third country is sometimes at issue, more often the issue is avoiding intended effect (i.e. not passing on the cost of the duty to customers), slight modification of goods or incorrect classification of goods.[59]

One case where origin was at issue is *Expo-Trade*, where ammonium nitrate was imported. Though the importer declared that the ammonium nitrate originated in Estonia, the Commission decided that it in fact originated in Russia and merely passed through Estonia on its way to Australia, so an anti-dumping levy was applied.

In this case, it was shown that origin is a question of fact to be shown by the parties through evidence and to be decided by the Court on the basis of that evidence.[60] Origin was determined with reference to bills of lading and other trade documentation.[61] The Commission's website indicates that, for the purposes of its own inquiries and determinations, it uses evidence including market intelligence (not just mere assertions), commercial documentation including sales negotiation evidence, quotes, invoices, manufacturing certificates, Bills of Lading, and other items obtained from exporters, importers and assemblers.[62]

Liability

[59] http://www.adcommission.gov.au/accessadsystem/anticircumventioninquiries/Pages/default.aspx
[60] *Expo-Trade Pty Ltd v Minister of State for Justice & Customs* [2003] FCA 1421, 7.
[61] *Expo-Trade,* 28.
[62] http://www.adcommission.gov.au/accessadsystem/anticircumventioninquiries/Pages/default.aspx

Liability for anti-dumping duties is, unfortunately, unclear under both relevant Acts. Anti-dumping notices are issued not just against specific goods from specific countries but also against specific foreign exporters. Further, the courts and the Commission ask both exporters and importers for evidence of origin: in *Expo-Trade*, both the bill of lading from the exporter[63] and sales confirmations from Australian importers[64] were used as evidence by the Commission and the defendants, who were the foreign exporters.

Review of anti-dumping decisions

Persons with standing can request that anti-dumping notices be reviewed under the *Judiciary Act* and *Administrative Decisions (Judicial Review) Act* 1977. Market conditions and prices change rapidly and the Commission generally does not decide to review notices unless requested to do so.

Under the *Administrative Decisions (Judicial Review) Act* 1977, a person aggrieved by a decision (such as the decision to issue an anti-dumping notice) can apply for review in the court system. Such a person is defined in s 3(a)(i) as a person whose interests are adversely affected by the decision. In practice, this is often the exporter, who hires a specialist anti-dumping lawyer in Australia to represent their interests.

The aggrieved person can apply to the Federal Court or Federal Circuit Court for an order of review of the relevant decision on any one of ten listed grounds under s 5(1). In the case of *Expo-Trade*, the applicant was not the Australian importer but the Eastern European exporter, and the burden of proof relating to origin was on the exporter.[65]

Customs investigation

Investigations into origin for anti-dumping purposes are done by the Border Force, which is empowered to seek a warrant on the grounds of public policy privilege under the *Customs Act* s 198. An issue with these investigations is the tendency of the Border Force to immediately publicise the initial results of the exercise of search warrants, before the case is heard in court, effectively branding corporations as guilty of dumping before they have been found so. This causes significant reputation damage that is not easily repaired, particularly since the Border Force does not publish corrections.[66]

Key findings

- Though anti-dumping is the most significant source of non-preferential RoO, origin is not often at issue in anti-dumping cases. Where it is at issue, it is most often litigated by exporters attempting to remove anti-dumping notices that are particular to their company

Recommendation 8

The Border Force needs to be transparent in its investigations. The Border Force should not publicise seizures or other investigations until after court proceedings have concluded in the Border Force's favour. If the Border Force does publicise matters prematurely and the corporation is found not to have engaged in dumping, it should publicly post a full retraction promptly.

[63] *Expo-Trade,* 7.
[64] *Expo-Trade,* 13.
[65] *Expo-Trade,* 33.
[66] Phone call with Andrew Hudson.

XI International experience

A final area to explore the liabilities of RoO is the international arena. PTAs generally have state-level dispute resolution provisions, but research has not uncovered any disputes over RoO involving Australia, or indeed any origin-based disputes at all. Though Australia has not been party to any state-level disputes about origin, it is useful to examine how other states have addressed RoO and the kinds of international issues that may arise.

One significant point of comparison is the United States' *False Claim Act* (FCA). Under this legislation corporations and private individuals can "dob in" others who have allegedly underpaid duty via a qui tam lawsuit. [67] For this suit to be successful, it must be shown that the importer "knowingly conceals or knowingly and improperly avoids or decreases an obligation" to pay customs duties.[68] This is supplemented by another provision covering "reverse false claims" that may also apply to origin issues, though this is less commonly used.

FCA claims are to be filed directly to the Department of Justice under seal, accompanied by a memorandum from the relator's counsel outlining the case and providing any evidence that the relator has been able to gather. Where the documentary requirements of such a lawsuit are fulfilled, and where unpaid customs is collected and penalties are levied (or a settlement is reached), the applicant of the lawsuit is entitled to collect up to 30% of the recovered funds. Penalties under the FCA are enormous, and include triple damages and possible statutory penalties. Considering that Customs in the United States has collected around $360 million annually over the last few years, and that this recovery can occur even when settlement is reached, this presents a huge risk for accused companies whether or not they have engaged in circumvention of anti-dumping duties.[69]

A recent case illustrating this is that of Toyo Ink. A competitor levied a qui tam lawsuit against the company alleging that the company misrepresented the origin of a dye in order to avoid anti-dumping duties that applied to dye originating in a particular country. The US Government alleged that Toyo Ink knowingly misrepresented, or caused to be misrepresented, the country of origin on documents presented to Customs to avoid paying anti-dumping duties over an eight-year period. The US government accepted a $45 million settlement from Toyo Ink, and the competitor received nearly 8m USD in recovery.[70]

Misrepresenting origin to avoid anti-dumping duty is the most common "evasion" targeted in this type of lawsuit under the FCA, but the power can also be used when origin is misrepresented for the evasion of other duties, and for cases where origin is not in question.

There has been some limited interest in establishing qui tam lawsuits in Australia, but this has focused on government action rather than imports, and has not resulted in major developments.

Recommendation 9

[67] American Association for Justice, BUSINESS TORTS NEWSLETTER, BUSINESS TORTS: SPRING 2015, Whistleblowers Can Help Fight Customs Fraud By Bringing Qui Tam Lawsuits Under The False Claims Act, JONATHAN K. TYCKO, ESQ., HTTPS://WWW.JUSTICE.ORG/SECTIONS/NEWSLETTERS/ARTICLES/WHISTLEBLOWERS-CAN-HELP-FIGHT-CUSTOMS-FRAUD-BRINGING-QUI-TAM-LAWSUITS

[68] False Claims Act.

[69] Ibid.

[70]

In the United States the *Fair Claims Act* empowers persons to bring lawsuits to the Government alleging others have underpaid or evaded duty payment; where any money is recovered as damages or from settlement, the originating person receives a large chunk as a reward. These are called qui tam lawsuits. Qui tam lawsuits should not be introduced in Australia as they present too large a risk for importers and others.

XII Conclusion

The liabilities importers and other international trade actors face in relation to origin are many and complex. The lack of jurisprudence and development of this area of law, taken in conjunction with the total opacity of internal decision-making and approval processes for Customs, makes understanding liability very difficult even for experts, let alone those engaging in international trade who wish to avoid surprise liabilities. This unnecessary and unhelpful complexity echoes the complexity of rules of origin themselves.

It is concerning that individuals can possibly face significant prison sentences for origin statements found to be false or misleading, not least because importers generally do not have control over the provision of origin certificates, but also because individuals face significant personal penalties for the actions of corporations.

While mapping these liabilities provides some clarity, the lack of case law and the unnecessary complexity of legislation continues. The courts' trend towards interpreting Customs' coercive powers progressively more broadly increases the stakes for importers and others without providing clarity on when these risks arise.

While the recommendations in this work are key areas where policymakers can improve some of the issues surrounding RoO and civil and criminal liability in Australia, broader problems will persist while the noodle bowl remains full. Addressing the lack of clarity around risk and liability for declaring origin is important, but it is only one small part of the picture. The overarching problems of complexity and overlapping regulation and the subsequent barriers to trade erected by RoO are only effectively addressed by unilateral tariff liberalisation.

XIII Bibliography

A Articles/Books/Reports

Armstrong, Shiro 'The economic impact of the Australia-United States free trade agreement' (2015) Australia-Japan Research Centre Working Paper 01/2015, 1-24

Auditor-General, 'The Australian Border Force's Use of Statutory Powers' (ANAO Report No. 39, Australian National Audit Office, 27 February 2017)

Brenton, Paul, 'Preferential Rules of Origin' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank Group, 2011)

Lewis, Craig A and Ruoweng Liu, 'Will the Real Country of Origin Please Stand Up?' (2013) *Tulane Journal of International and Comparative Law* 21, 391-422.

Parliament of the Commonwealth of Australia Joint Committee of Public Accounts, 'The Midford Paramount Case and Related Matters – Customs and Midford Shirts – The Paramount Case of a Failure of Customs' (Report 325, Parliament of the Commonwealth of Australia Joint Committee of Public Accounts, 1993)

Productivity Commission, *Rules of Origin under the Australia-New Zealand Closer Economic Relations Trade Agreement*, Productivity Commission Research Report, 28 May 2004

Productivity Commission, *Developments in Anti-Dumping Arrangements*, Productivity Commission Research Paper, February 2016

Productivity Commission, *Bilateral and Regional Trade Agreements*, Productivity Commission Research Report, November 2010

The Law Reform Commission, 'Administrative Penalties in Customs and Excise' (ALRC Report No. 61, The Law Reform Commission, 31 July 1992)

The Law Reform Commission, 'Customs and Excise: Volumes I, II and III' (ALRC Report No. 60, The Law Reform Commission, 1 April 1992)

Vermulst, Edwin A., 'Rules of Origin as Commercial Policy Instruments? – Revisited' (1992) Journal of World Trade 26(2), 61-102

Weiler, J.H.H., Sungjoon Cho and Isabel Feichtner, 'Unit III: Rules of Origin', in *International and regional Trade Law: The Law of the World Trade Organization*

Yi, Jisoo, 'Rules of Origin and the use of free trade agreements: a literature review' (2014) *World Customs Journal* 9(1), 43-58

B Cases

Australian Securities and Investments Commission v Rich [2009] NSWSC 1229.

BR Williams Customs and Freight Forwarding Pty Ltd and Chief Executive Officer of Customs [2013] AATA 100 (27 February 2013)

CEO of Customs v CHS Enterprises Pty Ltd & 3 Ors [2007] NSWSC 1133

CEO of Customs v Hui Min JING [2007] NSWSC 1354

CEO of Customs v Tony Longo Pty Ltd [2001] NSWCA 147

CEO of Customs v Labrador Liquor Wholesale Pty Ltd & Ors [2006] QCA 558 (22 December 2006)

Collector of Customs v Palmer Steel Trading (Aust) Pty Ltd [2003] QSC 434

Conga Foods Pty. Limited v Chief Executive Officer of Customs [1999] NSWCA 237

Expo-Trade Pty Ltd v Minister of State for Justice & Customs [2003] FCA 1421

In the matter of LIG Australia Pty Ltd; In the matter of Success Aluminium Pty Ltd [2015] NSWSC 892

Lumbers v W Cook Builders Pty Ltd (in liquidation) [2008] HCA 27

Mega-Top Cargo Pty Ltd v Moneytech Services Pty Ltd [2015] NSWCA 402 (16 December 2015)

Mega-Top Cargo Pty Ltd v Moneytech Services Pty Ltd [2016] NSWCA 3 (3 February 2016)

R (Cth) v Rapolti; R (Cth) v Russell; R (Cth) v Speedy Corporation Pty Ltd [2016] NSWCCA 264

Re Gaylor Jewellery Sales Pty Limited and Collector of Customs [1990] AATA 134 (5 June 1990)

Re Simplott Australia Pty Ltd and CEO of Customs [2008] AATA 566

Tech Pacific Australia Pty Limited v Air Pacific Limited and Ors [1999] NSWCA 71

Studio Fashion (Australia) Pty Ltd and Chief Executive Officer of Customs [2015] AATA 366 (28 May 2015)

Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia (Taxation) [2017] AATA 202 (17 February 2017)

C Legislation

Customs Act 1901 (Cth)

Customs Legislation Amendment Bill (No 2) 2003. <http://www.austlii.edu.au/au/legis/cth/bill/clab22003353/index.html>

Commerce (Trade Descriptions) Act 1905 (Cth)

Explanatory Memorandum, Customs Amendment (Anti-Dumping Measures) Bill 2013 (Cth)

Explanatory Memorandum, Customs Tariff (Anti-Dumping) Amendment Bill 2013 (Cth)

False Claims Act (31 U.S.C. §§ 3729–3733) (US)

D Treaties

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

ASEAN-Australia-New Zealand Free Trade Agreement, opened for signature December 2008 (entered into force January 2010)

First Protocol to Amend the Agreement Establishing the ASEAN Australia New Zealand Free Trade Area – Attachment 2 (Regulation Impact Statement) (Nay Pyi Taw, 26 August 2014) [2014] ATNIA 23.

General Agreement on Tariffs and Trade 1986

Trans-Pacific Partnership Agreement, signed 4 February 2016 (not yet in force)

E Other

Anti-Dumping Commission, *Understanding the Anti-Dumping Review Panel Process*, June 2013

Anti-Dumping Commission, *Instructions and Guidelines for Applicants on the Application for an anti-circumvention inquiry*, December 2015

Australian Chamber of Commerce and Industry, Submission No 71 to the Department of Foreign Affairs and Trade, *The Commonwealth's treaty-making process*, February 2015

Australian Chamber of Commerce and Industry, Submission No 16 to Senate Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *Inquiry into Proposed Trans-Pacific Partnership (TPP) Agreement*, 16 October 2016

Australian Customs Service, *Amendments to false and misleading statement provisions in the Customs Act*, Australian Customs Notice No. 2004/05, January 2004

Australian Customs Service, *Least-developed countries – rules of origin*, Australian Customs Notice No. 2003/48, July 2003

Australian Customs Service, *A guide to Determining the Origin of Goods Under TAFTA using the "Change in Tariff Classification Method"*, July 2004

Australian Customs and Border Protection Service, *A Guide to Customs and Border Protection Compliance Audits*, December 2011

Australian Customs and Border Protection Service, *Revocation of Australian Customs Notice No. 2000/30 – Free into Store Transactions (DDP/DDU)*, Australian Customs and Border Protection Notice No. 2014/36, 31 July 2014

Australian Customs and Border Protection Service, *Definition of import sales transaction*, Australian Customs and Border Protection Notice No. 2010/13, 15 March 2010.

Australian Customs Service, *The Amber Line Facility*, Australian Customs Notice No. 2003/40, 27 May 2003

Australian Customs Service, *Australia-United States Free Trade Agreement – HS2007 Rules of Origin*, Australian Customs Notice No. 2006/58, 14 December 2006

Australian Government Department of Immigration and Border Protection, "Current Tariff Concession Orders", <https://www.border.gov.au/Busi/domestic-manufacturers-and-importers/list-of-tariff-concession-orders>

Australian Government, *Australian Government response to the 2015 House of Representatives Standing Committee on Agriculture and Industry report on its inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures: Circumvention: closing the loopholes*, March 2016

Brenton, Paul 'Rules of Origin in Free Trade Agreements' (Trade Note 4, The World Bank Group, 29 May 2003)

Customs Brokers and Forwarders Council of Australia Inc., 'Commentary: Review of Customs licensing regimes Licensed customs brokers' (Commentary, CBFCA, 23 December 2015)

Department of Immigration and Border Protection, *Voluntary disclosures under Section 243T and Section 243U Customs Act 1901,* DIBP Notice No. 2016/35, 17 October 2016

Department of Immigration and Border Protection, *Free Trade Agreement Rules of Origin,* Practice Statement No. 2009/13, 4 March 2009

Department of Immigration and Border Protection, *Definition of 'owner' and the compliance approach for the purposes of revenue recovery and duty demands*, DIBP Notice No. 2016/13, April 2016

Department of Immigration and Border Protection, *Product Specific Rules of Origin for Free Trade Agreements*, DIBP Notice No. 2016/40, 14 December 2016

Department of Immigration and Border Protection, *Delivery Duty Paid (DDP) transactions and liability for customs duty*, DIBP Notice No. 2016/12, 2016

Department of Immigration and Border Protection, *Instructions and Guidelines: Preferential Rules of Origin*, File No. 2008/041986-01, July 2009

Department of Immigration and Border Protection, *Instructions and Guidelines: Australia-United States Free Trade Agreement*, File No. 2008/041987-01, April 2009

Donner Abreu, Maria, *Preferential Rules of Origin in Regional Trade Agreements*, Staff Working Paper ERSD-2013-05 (22 March 2013)

Estevadeordal, Antoni and Kati Suominen, 'Rules of Origin in FTAs in Europe and in the Americas: Issues and Implications for the EU-Mercosur Inter-Regional Association Agreement' (Discussion paper an 2 n 1, Chaire Mercosur de Sciences Po, January 2004)

Estevadeordal, Antoni and Kati Suominen, 'Rules of origin: A World Map and Trade Effects' (Paper presented at the Seventh Annual Conference on Global Economic Analysis: Trade, Poverty, and the Environment, The World Bank, Washington D.C., 17-19 June 2004)

Estevadeordal, Antoni, Jeremy Harris and Kati Suominen, 'Multilateralizing Preferential Rules of Origin around the World' (Paper presented at the WTO/HEI/NCCR Trade/CEPR Conference "Multilateralizing Regionalism", Geneva, Switzerland, 10-12 September 2007)

Estevadeordal, Antoni and Kati Suominen, 'Rules of Origin in the World Trading System' (Paper presented at the Seminar on Regional Trade Agreements & The WTO, World Trade Organisation, Geneva, 14 November 2003)

Freight & Trade Alliance and Hunt & Hunt Lawyers, Submission to the Australian Tax Office, *Re:think tax discussion paper – Tax white paper*

Gretton, Paul and Jyothi Gali, 'The Restrictiveness of Rules of Origin in Preferential Trade Agreements' (Paper presented at the 34th Conference of Economists, Melbourne, Australia, 26 to 28 September 2005)

House of Representatives Standing Committee on Agriculture and Industry, Parliament of Australia, *Inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures* (2015)

Hudson, Andrew (2 March 2017) 'Operators of warehouse found liable for amounts equal to duty on stolen cigarettes' Rigby Cooke Lawyers <http://www.afif.asn.au/industry-news/operators-of-warehouse-found-liable-for-amounts-equal-to-duty-on-stolen-cigarettes>

International Chamber of Commerce Commission on Customs and Trade Facilitation, 'Non-Preferential Rules of Origin for Commercial Policy Purposes' (Policy statement no. 104.80, International Chamber of Commerce, June 2015)

Joint Standing Committee on Treaties, Parliament of Australia, *Report 165: Trans-Pacific Partnership Agreement* (November 2016)

Keck, Alexander and Andreas Lendle, *New evidence on preference utilization*, WTO Staff Working Paper ERSD-2012-12 (16 August 2012)

Law Council of Australia, Submission to Department of Immigration and Border Protection, *Draft DIBP Notices 2016/12 and 2016/13*, 27 May 2016

OECD Observer, 'The Costs and Benefits of Trade Facilitation' (Policy Brief, Organisation for Economic Co-Operation and Development, October 2005)

Productivity Commission, *Trade & Assistance Review 2014-15*, Productivity Commission Annual Report Series

Productivity Commission, "Rules of Origin: can the noodle bowl of trade agreements be untangled?", Productivity Commission Staff Research Note, May 2017, Wayne Crook and Jenny Gordon.

Staples, Brian and Laura Dawson, 'Made in the world: Defragmenting rules of origin for more efficient global trade' (Paper, The Canadian Council of Chief Executives, June 2014)

Staples, Brian Rankin and Jeremy Harris, *Origin and Beyond: Trade Facilitation Disaster or Trade Facilitation Opportunity?*, Asian Development Bank Institute, report no. 171, December 2009

World Trade Organisation Panel Report, *United States – Rules of Origin for Textiles and Apparel Products*, WTO Doc WT/DS243/R (20 June 2003)

World Trade Organisation Panel Report, *United States – Certain Country of Origin Labelling (CoOL) Requirements*, WTO Doc WT/DS384/R (18 November 2011)