# Importing Goods: Overview (Australia)

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A Practice Note providing a general overview of key substantive issues to consider when importing goods into Australia, including requirements enforced by the Australian Border Force (ABF) under the Customs Act 1901 (Cth) and related legislation and by the Department of Agriculture, Fisheries, and Forestry (DAFF) under the Biosecurity Act 2015 (Cth) and related legislation. This Note covers, among other topics, requirements regarding the tariff classification, valuation (appraisement), and country of origin marking of imported merchandise, rules of origin, duty minimisation and deferral mechanisms to consider, record keeping obligations, penalties for noncompliance, and the framework for challenging decisions of the ABF, DAFF, and other agencies operating at the Australian border.

Countries around the world, including Australia require parties importing goods to comply with laws and regulations and provide documentation regarding their import transactions. Countries often also impose customs duties on imported goods. Bilateral and multilateral agreements can make compliance with import laws even more complex. A detailed understanding of the laws applicable to imports is important to ensure smooth importation of goods, minimise applicable customs duties, and avoid the costs that can arise from delays in clearing goods through customs.

This Note outlines the key requirements and considerations for importing goods into Australia, and the legislation and regulations which govern this. It also highlights opportunities for importers to eliminate, minimise, defer, or recover customs duties. The Note explains the government entities responsible for enforcement and the procedures for challenging decisions by the customs authority.

## Governing Legislation and Regulations

A recent review of government controls at the Australian border by the *Simplified Trade System Implementation Taskforce* found that there are 29 agencies with an interest in the import and export of goods and 200 pieces of associated legislation and regulations. The main laws are those administered by:

- The *Australian Border Force* (ABF), described as Australia's customs service and part of the *Department of Home Affairs*.
- The *Department of Agriculture, Fisheries and Forestry* (DAFF), which deals with biosecurity and quarantine matters.

For the ABF, the main legislation includes the Customs Act 1901 (Cth) (Customs Act), the *Customs Tariff Act 1995 (Cth)* (Customs Tariff Act), and a variety of regulations and directions, including the *Customs (Prohibited Exports) Regulations 1958 (Cth)* and *Customs (Prohibited Imports) Regulations 1956 (Cth)* (Customs (Prohibited Imports) Regulations). The ABF also has responsibility for implementing country of origin marking requirements for imported goods contained under the *Commerce (Trade Descriptions) Act 1905 (Cth)* (Commerce (Trade Descriptions) Act). There is also an extensive set of notices setting out ABF practices in certain areas (see *ABF: Notices*) and various other guidance material on the ABF website (see *ABF: Home*).

 

For DAFF, the main legislation is the Biosecurity Act 2015 (Cth) (Biosecurity Act) and various associated regulations and directions. For example, there is a set of offshore fumigation and treatment practices regarding treatment of imported goods during the "Brown Marmorated Stink Bug Season" (see *DAFF: Seasonal measures for Brown marmorated stink bug (BMSB)*).

To ensure smooth importation of goods, importers must be alert to potential border clearance issues so they can determine and become familiar with the legislation, regulations, practices, and agencies that are relevant to their importations.

## Enforcement Entities and Responsibilities

The two main regulatory agencies dealing with imported goods are the ABF and DAFF.

Under the relevant governing legislation (see Governing Legislation and Regulations), the ABF controls the import of goods by requiring various reports relating to goods moving through the supply chain. These include:

- A report of cargo on a vessel or aircraft (a cargo report).
- An impending arrival report.
- A full import declaration (FID), which is required in the majority of cases and sets out details regarding the goods, including:
    - the supplier or exporter;
    - the owner. Under section 4 of the Customs Act, owner means "any person who is or holds themself out to be the owner, importer, exporter, consignee, agent, or person with any control or power of disposition over the goods." Therefore, most parties in an import supply chain, including licensed customs brokers (LCBs), can be considered the owner of goods for purposes of the Customs Act (see *Australian Government: Department of Immigration and Border Protection Notice No. 2017/16*);
    - the tariff classification and customs value;
    - the country of origin; and
    - answers to a series of "community protection questions" about the goods (for example, whether the goods are the product of illegal logging or contain any asbestos).

The customs value of the goods is the value on which customs duty (if any) is payable. It also dictates the amount of goods and services tax (GST) payable on the imported goods, which the ABF collects on behalf of the *Australian Taxation Office* (ATO). Typically, both customs duty and GST are paid as the FID is processed through the ABF's electronic *Integrated Cargo System* (ICS). However, if the importer has an Australian business number, is registered for GST, and lodges its business activity statement (BAS) monthly rather than quarterly, it may be approved by the ATO to defer payment of GST via the monthly BAS, rather than to the ABF at the time of import. This deferral applies only to imports entered for home consumption and generally does not affect the obligation to pay customs duty at the time of import (see *ABF: Cost of Importing Goods: Deferral of GST* and *ATO: Deferred GST scheme*). However, if the importer is a member of the *Australian Trusted Trader* Programme (ATTP) and defers payment of GST under the ATO's GST deferral scheme, it can also defer payment of customs duty to the monthly BAS (see *ABF: Duty Deferral Plus*).

Generally, an FID is prepared and lodged by an LCB. LCBs are licensed by the ABF to transact FIDs through the ICS on behalf of importers. An FID can also be submitted by importers themselves, who can secure access to the ICS to lodge reports.

 

In most cases, FIDs are prepared on a self-assessment basis, but the ABF reserves the right to "redline" or "hold" the processing of an FID, whether for random review of importing documents or in accordance with ABF "profiles" that are programmed into the ICS to identify certain imports for review. These profiles may relate to the ABF's interest in the parties involved with the goods, the manner of shipment of the goods, or the goods themselves. Sometimes, other agencies also have an interest in the goods, in which case the goods are held pending compliance with the requirements of the relevant agency. For example, DAFF may want confirmation that a required permit has been obtained for the goods. In these cases, the ABF may forward containers of interest to either a container examination facility or Australia Post for review by X-ray and other methods.

Shipments below a certain value threshold are excepted from the FID requirement. A self-assessed clearance declaration (SAC), rather than an FID, can be completed and lodged by any party if the customs value of the relevant goods in the consignment is below AUD1,000. In that case, no customs duty is payable. GST may be payable, but by the overseas electronic distribution platform through which the sales were made. That obligation arises when GST on sales in a year exceeds a threshold, which is currently AUD70,000. A long-form version of a SAC is used if the import must comply with requirements of another agency (for example, if a permit from DAFF is required for the import of the goods).

Reporting to the ABF is generally done through the ICS. Several parties in the supply chain have access to the ICS for making reports (such as cargo reports, impending arrival reports, and outturn reports on variations between the reported cargo and the cargo actually unloaded), but only LCBs have access for the purposes of lodging an FID.

In addition to the documents required to be held for inspection by the ABF under the Customs Act, DAFF has requirements for documents set out in its "Minimum documentary and import declaration requirements policy." This sets out DAFF's requirements for production of documents to support a risk assessment of goods and other biosecurity requirements. For a summary of these documentary requirements, see *DAFF: Minimum documentary and import declaration requirements policy*.

DAFF also has access to the ICS to conduct its role of ensuring that Australia's biosecurity requirements for export and import are observed (for more information, *see DAFF: What we do*).

Notwithstanding the general self-assessment nature of the regime, the ABF, DAFF, and other agencies can undertake post-importation review of the import transactions or act against those involved in the import of the goods who may have breached their obligations. For more information, see Enforcement of Requirements.

The process of importing goods into Australia can be complex, and while most transactions will be processed based on self-assessment, the agencies at the border have extensive powers to pursue a variety of remedies against an offending party. Additionally, many penalties are imposed on a strict liability basis for which there are few defences. Given the risks, prudent importers and their service providers would be well-served by undertaking proper due diligence on relevant legal issues before importing goods.

## Key Requirements for Importing Goods into Australia

### Reasonable Care

Generally, the Australian regime does not impose an express obligation on parties to exercise reasonable care. However, the need to exercise reasonable care is implicit in the types of penalties that the ABF and other agencies can impose for the failure to take care, let alone for deliberate or reckless misstatements or omissions that may occur in statements to agencies. The reporting obligations of the reporting parties are onerous. For example, parties can be penalised for material errors or omissions in an FID even if the error does not result in an underpayment of customs duty or incorrect payment of a refund or duty drawback. Exercising reasonable care can reduce or eliminate these penalties or other adverse action taken by the ABF or other agencies working at the border.

 

An obligation to exercise reasonable care can also be inferred from other consequences that parties involved in the import supply chain may face in certain situations. For example, LCBs and persons responsible for premises licensed by the ABF or other agencies, such as certain depots and warehouses (see Liability Related to Licensed Premises), must meet standards of professionalism. A continued failure to exercise reasonable care could lead to suspension or revocation of a licence. Further, for those importers and their service providers who are members of the ATTP, a failure to take reasonable care could be grounds to lose that accreditation.

## Tariff Classification, Valuation, and Marking

### Tariff Classification

Australia's tariff classification and customs valuation regimes derive from international agreements and conventions which are implemented in Australian legislation. However, this does not guarantee total consistency with how those international instruments are implemented by other countries.

Tariff classification of goods is based on the Harmonized Commodity Description and Coding System, otherwise known as the "Harmonized System," of the World Customs Organization (WCO) (see *WCO: What is the Harmonized System (HS)?*). It is implemented in large part in Schedule 3 of the Customs Tariff Act. The ABF is responsible for negotiating and implementing successive versions of the HS.

Schedule 3 of the Customs Tariff Act is divided into 21 sections and 97 chapters. These sections and chapters also contain legal notes, including Australian Additional Notes, that provide legal direction about the classification of some goods and must be used where relevant. Schedule 2 of the Customs Tariff Act sets out the interpretive rules for classifying goods in Schedule 3.

Importers and their service providers can secure confirmation of the tariff classification of goods imported into Australia by seeking a tariff advice from the ABF. A tariff advice is specific to the applicant and is not made public. If the result of the tariff advice is disputed, there is a mechanism for internal review by the ABF and then recourse to external review. Recourse is often by way of merits review in the Administrative Review Tribunal (ART) and appeals from decisions of the ART can be undertaken in the Australian courts. However, parties can seek judicial review of decisions of the ABF directly to the courts without reference to the ART. On occasion, the ABF also issues "tariff precedents" which represent its views on the classification of certain goods. Tariff precedents are opinions issued by the ABF on goods on its own account. Unlike tariff advices, tariff precedents are published by the ABF.

The ABF posts additional classification information on its website (see *ABF: Tariff Public Advice Products*).

### Customs Valuation

The valuation code for imported goods is contained in the Customs Act. It represents Australia's implementation of the "Valuation Agreement" of the World Trade Organization (WTO) (see *WTO: Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*). Like tariff classification arrangements, the WTO's Valuation Agreement is not implemented with total consistency across jurisdictions. Importers and their service providers can secure confirmation from the ABF on the valuation of goods imported into Australia by seeking a valuation advice. If the result of a valuation advice is disputed, there is a mechanism for internal review by the ABF and recourse to external review in the ART and the Australian courts. The ABF also issues guidance on valuation in notices and on its website.

### Country of Origin Marking

The ABF also has responsibility for enforcing country of origin marking of certain goods at the Australian border. This marking is only required for certain types of goods as set out in the Commerce (Trade Descriptions) Act and associated regulations.

 

The ABF can seize goods that do not comply with these marking requirements and penalise importers trying to import goods without the appropriate labelling. An importer can approach the ABF to seek guidance on the requirements. Further, Australian domestic legislation requires country of origin and content labelling on food.

## Prohibited and Restricted Merchandise

The importation of certain goods is prohibited or restricted. These include goods:

- Identified in the Customs (Prohibited Imports) Regulations made under the Customs Act. This covers a wide variety of goods including different types of drugs, firearms, and otherwise objectionable material.
- For which holders of intellectual property rights (IPR) have lodged notices of objection against the use of their intellectual property. Those claims are then subject to a review process.
- Subject to sanctions or increased duties due to their nature or country of origin, whether under United Nations Security Council sanctions, autonomous Australian sanctions, or Australian thematic sanctions. For example, consistent with action taken by other countries, the federal government has imposed an additional 35% customs duty on goods from Russia or Belarus.
- Identified in the Biosecurity Act, regulations made under that Act, and directions issued by DAFF. For information on the nature of the regulations and the interaction with related instruments, see *Commonwealth Numbered Regulations - Explanatory Statements: BIOSECURITY REGULATION 2016*.

For a summary of the goods that can and cannot be imported and declared, see *ABF: Can You Bring it In?*.

The federal government has yet to impose any restrictions on goods believed to have been produced in part, or in whole, from forced labour or modern slavery. However, a current statutory review of the Modern Slavery Act 2018 (Cth) may change the existing regime. Recommendations are contained in the report of the statutory review handed down on 23 May 2023 (see *Australian Government: Report of the statutory review of the Modern Slavery Act 2018 (Cth)*). The federal government has yet to respond fully to the report, but has established a Modern Slavery Expert Advisory Group to provide further advice (see *ABF: Modern Slavery Expert Advisory Group: Nomination Form*). Further, a Bill prohibiting the import of goods produced in part, or in whole, from forced labour has been reintroduced into the Upper House of Parliament (Senate) by an independent member of the Federal Parliament. However, the Bill has yet to be fully considered for adoption by Parliament.

## Rules of Origin

Issues around the rules of origin of goods are largely dealt with under Australia's many free trade agreements (FTA), whether bilateral, plurilateral, or regional. Each has extensive provisions that govern whether goods are "originating goods" of one of the parties to the FTA, entitling the goods to preferential treatment by the other party (or parties) to the FTA through the reduction or elimination of customs duties, except those imposed as trade remedies. For a summary of Australian FTAs and other preferential agreements, see *ABF: Free Trade Agreements*.

Generally, under Australia's FTAs, goods are originating goods if:

- They are the product of a country that is a party to the FTA (for example, minerals, coal, fish in Australian waters caught on an Australian vessel, cattle).
- They are the product of combined originating goods of a country that is a party to the FTA (for example, a table made in a country solely with materials originating from that country).

 

- They include "non-originating" goods that have been subject to a transformation on inclusion in the finalised product in a party to the FTA. For example, the rules may require a certain change in the tariff classification of the non-originating goods during the transformation.
- They satisfy "product specific rules," which often apply to textiles (that is, the "yarn forward" rules) and automotive equipment (which require a specified percentage of local content).

Depending on the FTA, an importer may need to hold a certificate of origin or declaration of origin to verify the originating status of the goods and their entitlement to preferential treatment. The customs provisions of the FTAs and the enabling Australian legislation also contain specific requirements regarding allowed cumulation (for example, making goods by way of processes of manufacture in the countries that are party to the FTA) and dictating the manner in which goods may move through countries which are not party to the relevant FTA without compromising the originating status of the goods.

The ABF provides an origin advice service that allows importers and their service providers to secure confirmation of the ABF's position on the origin of goods and whether they are entitled to preferential treatment under an FTA or another preferential agreement. An origin advice can be subject to internal review by the ABF or external review by the ART or a court.

### Recordkeeping Obligations

Since most imports occur by way of self-assessment and are not immediately subject to review by the border agencies as they cross the border, the border agencies' legislation and regulations impose significant obligations on importers and service providers to secure and retain relevant documents for the relevant agency's later review.

For the ABF, the main obligations in relation to the retention of commercial documents are contained in section 240 of the Customs Act. Under this section, owners of imported goods must retain, for five years after goods are entered for consumption, documents necessary to enable the ABF to determine the correctness of the particulars in the entry. The term owner covers any person having a beneficial interest in the goods. Recordkeeping obligations extend from the importer to those who facilitate the import of the goods, such as the freight forwarder or the LCB. These persons must retain, for five years after the goods are imported, documents necessary to enable the ABF to determine these persons' compliance with customs-related laws. These documents can be kept in electronic form and held outside Australia's boundaries. The ABF may require that these documents be produced for inspection, in which case the documents must be produced within the time prescribed by the ABF, which cannot be less than 14 days (section 240AA, Customs Act). Failure to produce commercial documents as required by a notice to produce or another request from an officer of the ABF is a strict liability offence under section 243SB of the Customs Act.

Parties making a "communication" to the ABF as required by the Customs Act (or providing information to be included in that communication) must keep records of that communication for a period of five years from the date the information is provided or the communication is made (section 240AB, Customs Act). Those records can be kept in any form anywhere in the world but must be produced when demanded by the ABF. Failure to do so is also a strict liability offence.

Typically, original documents must be held by an owner, importer, or service provider to verify declarations or communications to the border agencies regarding aspects of the imported goods, such as their tariff classification or valuation, use of a tariff concession order (TCO) (see Deferring or Minimising Customs Duties), or eligibility for preferential tariff treatment under an FTA.

## Key Considerations for Importing Goods into Australia

### Enforcement of Requirements

 

According to research conducted by the *Simplified Trade System Implementation Taskforce* (STS), there are 29 government agencies with an interest in goods being imported into Australia (see Governing Legislation and Regulations). The ABF shares most of the information contained in FIDs and SACs (see Enforcement Entities and Responsibilities) with other agencies, who conduct their own information gathering and investigatory activities and may require certain importers of goods to register their businesses or products with the agencies before import. For example:

- The ABF collects customs duty payable on imported goods for the Commonwealth and collects GST payable on the goods on behalf of the ATO.
- The ABF is generally responsible for stopping goods at the border that it believes to be prohibited imports, and it then refers them to the appropriate government agency for further action. For example, the import of products containing asbestos is prohibited under section 4C of the *Customs (Prohibited Imports) Regulations* unless a permission is obtained from the Asbestos Safety and Eradication Agency acting on behalf of the Work Health and Safety Minister or a lawful exception is in place.
- The ABF seizes goods that are the subject of a Notice of Objection lodged by an IPR holder if it believes that the importation breaches protected IPR in Australia. The importer can relinquish the goods or claim that they are entitled to use the IPR associated with the goods according to the relevant copyright or trade mark legislation. For example, section 122A of the Trade Marks Act 1995 allows for the import of grey market goods (that is, goods legitimately purchased overseas where the importer had a reasonable belief that the trade mark had been included with the consent of the IPR holder).
- The ABF collects applicable anti-dumping and countervailing duties payable on imported goods. However, it is the *Anti-Dumping Commission* (ADC) (as part of the *Department of Industry, Science and Resources* (DISR)) which undertakes the relevant investigations and makes recommendations to the Minister for Industry, Science and Resources. The Minister imposes the anti-dumping and countervailing duties on goods that are the subject of the ADC's investigation.
- The ABF is responsible for ensuring that certain goods are labelled with a prescribed trade description, including the goods' country of origin.
- DAFF is responsible for biosecurity measures regarding certain imported products, which are assessed based on information in the FID. DAFF can grant permits or approved arrangements, the latter of which allow operators to manage biosecurity risks or perform the documentary assessment of goods using their own facilities, equipment, and personnel, subject to DAFF requirements and periodic compliance monitoring. DAFF is also responsible for Australia's regime aimed at preventing the products of illegal logging from entering Australia.
- The *Department of Health and Aged Care* is responsible for the *Australian Industrial Chemicals Introduction Scheme* (AICIS), which approves importers to import goods that are the subject of the AICIS. This includes items such as cosmetics.
- The *Therapeutic Goods Administration* (TGA) is responsible for evaluating, assessing, and monitoring products defined as therapeutic goods. The TGA regulates medicines, medical devices, and biologicals. Permits must be obtained from the TGA to import therapeutic goods.
- The *Australian Competition and Consumer Commission* is responsible for ensuring that the country of origin is properly noted on food labelling for food sold in a retail environment.
- *Food Standards Australia and New Zealand* is responsible for the *Food Standards Code*, which identifies general and specific food labelling requirements.

Many of these agencies draw relevant information on imported goods from the information in an FID or SAC.

 

In addition to these federal or Commonwealth issues, there are state and local government requirements regarding the sale and distribution of goods once they are imported into Australia.

### Deferring or Minimising Customs Duties

There are several circumstances under which customs duty is not payable or can be deferred, for example:

An importer which is a member of the ATTP and defers the payment of GST under the ATO's GST deferral scheme can also defer the payment of customs duty to a consolidated monthly payment.

An importer can import goods at preferential rates of customs duty as provided for in Australia's FTAs, subject to meeting the requirements of those FTAs, including the rules of origin.

An importer can apply for a TCO which removes customs duty from imported goods for which there are no substitutable Australian goods, or no such substitutable goods are capable of being made in Australia. This is a complex and often lengthy process. The TCO must also be in place before the goods arrive in Australia.

Schedule 4 of the Customs Tariff Act sets out several by-laws and other concessional instruments allowing for certain goods to be imported without the payment of customs duty.

The Duty Drawback Scheme allows the repayment of import duty on goods that are subsequently exported from Australia.

The Tradex Scheme (administered by the DISR) provides an upfront exemption from customs duty and GST on imported goods intended for re-export or to be used as inputs for exported goods. This is subject to a series of conditions.

The adoption of certain transfer pricing arrangements approved by the ATO and the ABF can lead to less duties payable.

Intra-group payments can often be structured so that payments of royalties, licence fees, commissions, and research and development fees are not included in the customs value of goods and therefore not subject to customs duties.

Goods can be stored under customs control in a warehouse licensed by the ABF without payment of customs duty. Duty is paid when the goods are later entered for home consumption (see Liability Related to Licensed Premises).

## Consequences for Failure to Comply

### Delays in Release of Goods

The release of imported goods from customs custody may be delayed in various circumstances, including where:

- The ABF or DAFF redlines an FID or SAC (that is, requests additional documents verifying the goods and their value). The ABF or DAFF can delay processing the FID or SAC unless these agencies are provided with the requested documents. Redline processing can result in a direction that goods are, in fact, subject to anti-dumping, countervailing, or other duties, requiring a reclassification of the goods and payment of applicable duties.
- The ABF seizes goods it believes have been misdescribed, are prohibited, or are otherwise imported in violation of law.

 

- The ABF seizes goods from a premises licensed by the ABF for the holding of goods pending payment of customs duty and release into home consumption. This can happen if the ABF or ATO believes there have been breaches of the legislation governing the holding of goods in these premises.
- The ABF seizes goods from the owner of the goods (broadly defined in section 4 of the Customs Act; see Recordkeeping Obligations). This can happen if the ABF believes that the correct customs duty has not been paid.

If goods are seized, several remedies are available to the importer, owner, or other parties having an interest in the goods (for example, purchasers of the goods from the importer or owner or those who have financed the purchase of the goods). For instance, a judicial challenge to the order to seize goods can be made on the basis that grounds for the seizure had not, in fact, been established. Alternatively, release by administrative arrangements can be obtained if the agency or department seizing the goods is persuaded that the seizure was unwarranted. A number of agencies in addition to the ABF have seizure powers, including DAFF and the Office of the Arts (for cultural heritage objects).

## Civil and Criminal Liability

While there is no general anti-avoidance provision to levy penalties for failure to pay the correct amount of customs duty as there is in tax legislation, there are many provisions in the relevant legislation that heavily penalise those making deliberate, reckless, or inadvertent incorrect statements or omissions in reporting to the ABF.

Penalties can be sought on the following four main grounds under the Customs Act or related provisions:

- Actions for penalties or imprisonment (or both) under the Crimes Act 1914 (Cth) (Crimes Act) or the Criminal Code Act 1995 (Cth). These apply to criminal acts against the Commonwealth (for example, deliberate misstatements to government agencies).
- Fault-based offences including customs prosecutions under section 234 of the Customs Act, which are available for:
    - the evasion of the payment of customs duty;
    - obtaining a drawback, refund, rebate, or remission which is not payable; or
    - making intentional false or misleading statements or omissions to an ABF officer.

    Penalties under section 234 of the Customs Act are based on multiples of duty underpaid or refunds, drawbacks, or remissions paid, or on a specified number of penalty units (whichever amount is larger). The current value of a penalty unit is AUD275 (section 4AA, Crimes Act). Violations must be proved beyond reasonable doubt in the relevant state supreme court. Imprisonment can follow the failure to pay these penalties according to state laws. The Customs Act sets out a variety of other fault-based offences where offending actions are believed to be intentional and deliberate (for example, under section 33 and section 233(1)(a) relating to the prohibition against smuggling, which is defined in section 4 of the Customs Act as "any importation, introduction or exportation or attempted importation, introduction or exportation of goods with intent to defraud the revenue").
- Administrative penalties under the Customs Act. Typically, these penalties are imposed on a strict liability basis and do not require proof of intent. The amount of the penalty depends on the customs duty underpaid or the prescribed number of penalty units (whichever amount is larger). There is also a corporate multiplier for offences by companies.
- Infringement notices, which the ABF can issue in lieu of prosecution for certain strict liability offences (as identified in section 243X of the Customs Act). An infringement notice specifies a percentage of the penalty otherwise payable (not to exceed 25%) where the ABF officer believes it to be a more appropriate enforcement response to the conduct under

 

the circumstances. Infringement notices are imposed according to the *Infringement Notice Scheme Guide*. For more information on the infringement notice scheme, see *ABF: Understanding the Customs Act Infringement Notice Scheme*.

For the first three categories above, proceedings can be brought in a court of competent jurisdiction. For example, customs prosecutions must be brought in state Supreme Courts. The forum for other proceedings depends on the amount of the penalties being sought. A party can seek to have infringement notices withdrawn by way of ABF internal review. If that is not successful and the infringement notice penalty is not paid, the ABF will pursue administrative penalties on a strict liability basis.

The ABF can also suspend or revoke licences it grants under the Customs Act.

Depending on the alleged offence, other agencies with enforcement responsibility for the legislation allegedly breached may decide to act. For example, decisions to proceed under the Biosecurity Act are made by DAFF. DAFF can pursue a series of remedies, including:

- The issue of infringement notices.
- The suspension or revocation of permits (or both).
- The suspension or revocation of an approved arrangement.

**Liability Related to Licensed Premises**

The ABF licenses the following premises:

- Customs depots and warehouses (also known as customs bonds or bonded warehouses).
- Duty-free stores.

Importers can store goods in licensed warehouses and depots without the payment of customs duty, subject to compliance with strict rules governing the grant of the licences and operation of the licensed premises. In both cases, customs duty is paid when the goods are later entered for home consumption. However, if the goods are lost, stolen, or destroyed before duties or excise are paid then those associated with the licensed premises can be liable for the amount of duty or excise that would have been payable on the goods and penalties for failing to account for the goods under their control.

Depots are used by importers to store goods that must be moved from the wharf or airport but have not yet been cleared for home consumption. Goods can be held at a depot only for a short period (that is, until the end of the month, after the month in which the goods arrive at the depot or, on application, for one additional month). Warehouses are used for longer-term storage. Goods can be held in a warehouse for an indefinite period. However, operators of the relevant premises will often apply to the ABF to have the goods declared as abandoned and either destroyed or sold.

Duty-free stores are a type of warehouse, often located in airports, where goods are offered for sale to departing or arriving travellers.

Goods in warehouses, depots, and duty-free stores are deemed to be under customs control under the Customs Act. For general information on warehouses and duty-free stores, see *ABF: Licensing: For Warehouses*. For general information on depots, see *ABF: Licensing: For Depots*.

Non-compliance with the conditions of a licence and related offences can result in one or more of the following consequences:

 

- Suspension or cancellation of the licence.
- Issuance of an infringement notice.
- Prosecution for an offence under the Customs Act.

For example, it is a strict liability offence (subject to a penalty of up to 60 penalty units or suspension or revocation of a licence, or both) if:

- A person or their employee moves, alters, or interferes with goods that are subject to customs control if the action was not authorised under the Customs Act (section 33(2) and (3), Customs Act).
- A person directs or permits another person to move, alter, or interfere with goods subject to customs control, where that action was not authorised under the Customs Act (section 33(6), Customs Act).
- A person fails to keep safe goods that are subject to customs control and for which custody, control, or possession has been entrusted to that person (section 36(2), Customs Act).
- A person granted movement authority under section 71E of the Customs Act removes goods from an establishment but fails to deliver and account for them as authorised (section 36(7), Customs Act).

In addition, as discussed above, if persons operating licensed premises (including directors and employees) do not keep goods safe or account for them, they can be held liable for the customs duty or excise which would have been paid on the goods if they had been entered for home consumption, even if the goods are stolen or destroyed (section 35A, Customs Act). Further, the ABF has the right to suspend or revoke licences for these licensed premises under these circumstances.

The ABF provides a useful summary of these and other offences at *ABF: Understanding Offences in the Supply Chain*. The summary from the ABF identifies who may be liable for the offences, including those holding the licences and those involved in the movement of the goods (for example, a transport company, a container terminal operator, or an LCB).

The penalties and offences relate to licensed warehoused goods on which customs duty has been deferred. Similar considerations can apply to imported goods with respect to excise duty. Excise duty is assessed on domestically produced alcohol, tobacco, fuel, and petroleum. Imports that would have been subject to excise duty had they been produced domestically (excise equivalent goods (EEGs)) are subject to customs duty at a rate equivalent to the relevant excise duty. EEGs can be held under bond, with duty deferred, in warehouses licensed and administered by the ATO. Liabilities similar to those outlined above apply to EEGs under sections 60 and 61 of the Excise Act 1901 (Cth). For more information on EEGs, see *ATO: Excise equivalent goods (imports)*.

## Challenging Decisions of the Customs Authority

Importers have several options for challenging ABF decisions.

An ABF advice or decision on tariff classification, valuation, the grant of a TCO, or origin of the goods can be subject to a request for internal administrative review by the ABF. If the internal review is not favourable, then external review can be sought, first in the ART (which undertakes a merits review), and from there to the Federal Court of Australia (Federal Court), and from there to the High Court of Australia (High Court). Alternatively, a party can appeal directly to the Federal Court, in which case the ABF decision is judicially reviewed as opposed to a *de novo* process in the ART where the presiding tribunal member (or members) makes the decision afresh.

 

Section 273GA of the Customs Act sets out those decisions which are subject to review by the ART. They include decisions to suspend or revoke the licence of a licensed premises or an LCB. The ART reviews ABF decisions on the merits (that is, it examines the relevant facts, law, and policy anew to arrive at its own decision). A decision of the ART can be reviewed by the Federal Court (usually by a single judge of the Court) to determine if there is an error of law or the decision is entirely unreasonable. A first hearing in the Federal Court can be appealed to a Full Bench of the Federal Court.

Parties can seek leave to appeal decisions of the Federal Court to the High Court, which is Australia's highest level of review. An appeal is not automatic, and the High Court presides over "special leave" applications to determine if they have prospects of success or raise issues of enough significance.

The Customs Act also sets out processes for review of decisions to seize goods for various reasons (for example, if the goods are declared as forfeited to the Crown under section 229 of the Customs Act as being prohibited imports under section 229(1)(b) of the Customs Act). This process is largely conducted in state magistrates' or other courts.

Decisions of the ABF or its officers can also be subject to judicial review in the Federal Court either:

- Under federal administrative review provisions in the Administrative Decisions (Judicial Review) Act 1977 (ADJR).
- By way of issue of constitutional writs of mandamus, prohibition, or certiorari (writs) under section 75(v) of the Constitution. Recourse is made to the writs if the ADJR has excluded decisions of certain types from the ADJR (for example, decisions on calculations of customs duty) or if the timeframe for recourse to the ADJR has expired.

Federal Court actions are often pleaded both according to the ADJR and the writs.

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