

Drugs: Commonwealth Drug Offences under the Criminal Code (Cth)¹

Background

Item 61 of Sch 1 to the *Law and Justice Legislation Amendment (Serious Drug offences and Other Measures) Act 2005* (Cth) No 129 of 2005 repealed the drug importation and exportation offences in s 233B of the *Customs Act 1901* (Cth). By item 1 of Sch 1 offences previously the subject of s 233B are dealt with in Division 307 of Part 9.1 of the *Criminal Code*.² Sch 1 of the Act commenced operation on 6 December 2005.³

Offences that are ancillary to the import-export offences in Subdivision A are covered through the application of Part 2.4 of Chapter 2 of the *Criminal Code*, which extends criminal responsibility to those who attempt, are complicit in, incite, or conspire to commit criminal offences.

Division 307 of Part 9.1 which is concerned with import-export offences is comprised of four subdivisions:

Subdivision A - Importing and exporting border controlled drugs or plants

Subdivision B - Possessing unlawfully imported border controlled drugs or plants

Subdivision C - Possessing border controlled drugs or plants reasonably suspected of having been unlawfully imported

Subdivision D - Importing and exporting border controlled precursors

Subdivision A - Importing and exporting border controlled drugs or plants

Subdivision A of 307 of the *Criminal Code* makes it an offence to import or export border controlled drugs or plants.

The expression a “border controlled drug” refers to a substance, other than a growing plant, that is covered by the offences relating to drug importation and exportation. Border controlled drugs are listed in s 314.4. Growing plants are excluded from the definition of border controlled drugs. A “border controlled plant” refers to a growing plant that is covered by the offences relating to drug importation and exportation. These are listed in s 314.5.

The offences in Subdivision A are approached on a tiered basis and have tiered penalties depending on the quantity of border controlled drug or plant involved. An offence involving a *commercial* quantity carries a maximum penalty of life imprisonment, an offence involving a *marketable* quantity carries a maximum penalty of 25 years imprisonment, and an offence with *no minimum quantity* carries a maximum penalty of 10 years. There is also a two-year offence with no minimum quantity and no defence of absence of commercial intention.

¹ As to drug offences under s 233B(1)(b) of the *Customs Act 1901* prior to its repeal, see Direction No 105A.

² Minister for Justice and Customs, Explanatory Statement – *Select Legislative Instrument 2005 No. 293*, p.1

³ *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*, s 2.

Section 307.1: Importing and exporting commercial quantities of border controlled drugs or border controlled plants

By s 307.1(1) it is an offence for a person to import or export a commercial quantity of a border controlled drug or border controlled plant. The offence is committed where:

- (a) a person imports or exports a substance; and
- (b) the substance is a border controlled drug or border controlled plant; and
- (c) the quantity imported or exported is a commercial quantity.

Imports/exports a substance: s 307.1(1)(a)

Section 307.1(1) (a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to import or export the substance. (see Benchbook No 89.3)

The substance is a border controlled drug/ plant: s 307.1(1)(b)

“Border controlled drug” and “border controlled plant” are defined in s 300.2 as substances that are listed or described as a border controlled drug or a border controlled plant in s 314.4 or s 314.5 or prescribed by interim regulations under s 301.3(1) or specified in an emergency determination under s 301.8(1).

The fault element for paragraph (1)(b) is recklessness (see s 307.1(2)). The prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or plant. Recklessness is defined in s 5.4 of the *Criminal Code* (but reckless may be shown by proof of intention, knowledge or recklessness s 5.4(4)). (see Benchbook No 89.3)⁴

The quantity imported or exported is a commercial quantity: s 307.1(1)(c)

A “commercial quantity” is defined in s 300.2 as a quantity not less than the prescribed quantity specified in Division 314, prescribed by interim regulations under s 301.5 or specified in an emergency determination under s 301.10.

Section 307.1(3) applies absolute liability to the circumstance that the quantity is a commercial quantity. (See the overview provided in the Explanatory Memorandum, *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005* (Cth), p 46 in respect of the reasons for applying absolute liability).

If it is provided that absolute liability applies to a particular physical element of the offence, then there are no fault elements for that physical element and the defence of mistake of fact under s 9.2 is unavailable in relation to that physical element. However, the existence of absolute liability does not make any other defence unavailable. (see s 6.2)

⁴ Where it is necessary to prove that a person knew or was reckless as to whether a substance was a border controlled drug, it is not necessary for the prosecution to prove that the person knew or was reckless as to the particular identity of the border controlled drug (see s 300.5, *R v Douglas* [2014] QCA 104 at [53], [110], [111]).

Section 307.2: Importing and exporting marketable quantities of border controlled drugs or border controlled plants

Section 307.2(1) makes it an offence for a person to import or export a marketable quantity of a border controlled drug or plant. The offence is committed where:

- (a) a person imports or exports a substance; and
- (b) the substance is a border controlled drug or border controlled plant; and
- (c) the quantity imported or exported is a marketable quantity.

Imports/exports a substance: s 307.2(1)(a)

Section 307.2(1) (a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to import or export the substance. (see Benchbook No 89.3)

The substance is a border controlled drug/ plant: s 307.2(1)(b)

“Border controlled drug” and “border controlled plant” are defined in s 300.2. The fault element for paragraph (1)(b) is recklessness (see s 307.1(2)). The prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or a border controlled plant. Recklessness is defined in s 5.4 of the *Criminal Code* (but reckless may be shown by proof of intention, knowledge or recklessness s 5.4(4)). (see Benchbook No 89.3)⁵

The quantity imported or exported is a marketable quantity: s 307.2(1)(c)

A “marketable quantity” is defined in s 300.2 as a quantity not less than the quantity prescribed as a marketable quantity of the drug, plant or precursor specified in Division 314, prescribed by interim regulations under s 301.5 or specified in an emergency determination under s 301.10. Marketable quantities will vary depending on the type of drug or plant involved. Section 307.1(3) applies absolute liability to the circumstance that the quantity is a marketable quantity. (See the overview provided in the Explanatory Memorandum, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 46 for the reasons for applying absolute liability).

Defence – lack of commercial intent: s 307.2(4)

Section 307.2(4) provides a complete defence where the defendant can prove, on the balance of probabilities, that he or she did not intend to sell any of the border controlled drug or plant and did not believe that another person intended to do so. As the Explanatory Memorandum, *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth)*, p 48 states, this reflects the purpose of this offence in targeting commercially motivated importation or exportation. Commercial intention does not form an element of this offence. Rather lack of commercial intent is framed as a defence, imposing a legal burden on the defendant in relation to it.

Section 307.3: Importing and exporting border controlled drugs or plants

Section 307.3(1) makes it an offence for a person to import or export a border controlled drug or border controlled plant. This offence differs from the more serious offences in s 307.1 and s 307.2 because there is no need for the prosecution to prove that a particular quantity of the

⁵ See fn 4.

border controlled drug or border controlled plant was involved. The offence is committed where:

- (a) a person imports or exports a substance; and
- (b) the substance is a border controlled drug or border controlled plant.

Imports/exports a substance: s 307.3(1)(a)

Section 307.3(1)(a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to import or export the substance. (see Benchbook No 89.3)

The substance is a border controlled drug/ plant: s 307.3(1)(b)

“Border controlled drug” and “border controlled plant” are defined in s 300.2. The fault element for paragraph (1)(b) is recklessness (see s 307.3(2)). The prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or a border controlled plant. Recklessness is defined in s 5.4 of the *Criminal Code* (but reckless may be shown by proof of intention, knowledge or recklessness s 5.4(4)). (see Benchbook No 89.3)⁶

Defence – no commercial purpose: s 307.3(3)

Section 307.3(3) provides a complete defence where the defendant can prove, on the balance of probabilities, that he or she did not intend to sell any of the border controlled drug or plant and did not believe that another person intended to do so. This reflects the purpose of this offence in targeting commercially motivated importation or exportation. The lesser offence in s 307.4 targets those who import or export border controlled drugs or border controlled plants without a commercial purpose.

Section 307.4: Importing and exporting border controlled drugs or border controlled plants—no defence relating to lack of commercial intent

Section 307.4(1) makes it an offence for a person to import or export a border controlled drug or border controlled plant. This offence differs from the more serious offence in s 307.3 because it does not contain a defence of lack of commercial intent. It is intended to target those who illegally import border controlled drugs or border controlled plants for their own personal use, or for other non-commercial purposes.

Suggested Direction - Importing commercial quantities of border controlled drugs:

It is an offence for a person to import a commercial quantity of a border controlled drug. The offence is committed where:

- (a) a person imports a substance; and**
- (b) the substance is a border controlled drug; and**
- (c) the quantity imported is a commercial quantity.**

The prosecution must prove each of these elements beyond reasonable doubt.

⁶ See fn 4.

As to the first element, the prosecution must prove that the defendant imported the substance and that he/she intended to import the substance.

[Meaning of “imports” for offences committed until 20 February 2010]:

The word “imports” requires conduct that brings something into Australia. Items are not imported until they are brought into Australia. The act of importing is not something that occurs or ceases at a single moment. The act of importing does not finish the moment that the items containing the substance are brought into the port or are landed. Delays in the port, or the intervention of the authorities, do not prevent the process of importing from continuing. The process may continue after the items containing the substance have been landed.⁷

[Meaning of “imports” for offences committed after 20 February 2010]:⁸

The word “imports” requires conduct that brings something into Australia or that involves dealing with the substance in connection with its importation. Items are not imported until they are brought into Australia. The act of importing is not something that occurs or ceases at a single moment. The act of importing does not finish the moment that the items containing the substance are brought into the port or are landed. Delays in the port, or the intervention of the authorities, do not prevent the process of importing from continuing. The process may continue after the items containing the substance have been landed.⁹

The latter definition requires both a “dealing” with something and that the dealing is “in connection with” the thing’s importation. Dealing with something in connection with its importation may include:¹⁰

- (a) packaging the thing for importation into Australia;
- (b) transporting the thing into Australia;
- (c) recovering the imported thing after landing in Australia;
- (d) making the imported thing available to another person;

⁷ See *Campbell v R* (2008) 73 NSWLR 272.

⁸ See extended definition of “import” inserted into *Criminal Code* (Cth) s 300.2 by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* sch 9 item 1.

⁹ See *Campbell v R* (2008) 73 NSWLR 272.

¹⁰ *R v Tranter* (2013) 116 SASR 452 at [12], citing the Explanatory Memorandum for the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth).

- (e) clearing the imported thing;
- (f) transferring the imported thing into storage;
- (g) unpacking the imported thing; or
- (h) arranging for payment of those involved in the importation process.

Intention is a state of mind. In ascertaining a defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning the defendant's state of mind. The prosecution invites you to draw an inference as to the defendant's state of mind from certain facts. You are entitled to infer such intent as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.¹¹

Knowledge or belief is often relevant to intention.¹² Actual knowledge or awareness is not an essential element in the intent to import that is required to be proved. The prosecution may establish intention by inference based on a belief. A belief falling short of actual knowledge that the thing being imported being contained the substance could sustain an inference of intention. In the absence of an admission, proof of a belief that the item being imported contained the substance will often be the way the prosecution proves that a defendant meant to import the substance.

If you are satisfied beyond reasonable doubt that the defendant believed that there were or were likely to be drugs in the container that was being imported, then you can infer the intention to import the substance. If you are satisfied beyond reasonable doubt that the substance was imported in circumstances where the defendant knew or believed the item being imported contained the substance and nevertheless persisted in that conduct, you would be entitled to infer that he intended to import the substance.

As to the second element, the prosecution must prove that the substance was a border controlled drug. The issue of whether the substance in question was a border controlled drug is [not] in dispute. The prosecution must also prove that the defendant was reckless as to whether the substance involved was a border

¹¹ It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of admission) the prosecution may establish intention by inferential reasoning in the same way as intention may be proved at common law: *R v Saengsai-Or* (2004) 61 NSWLR 135; [2004] NSWCCA 108 at [74]; *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89.

¹² *R v Tang* (2008) 82 ALJR 1334 at 1348. The jury may be directed in case where the prosecution are required to prove intention to import or take possession of narcotic goods that such an intention may be inferred from a finding that the defendant acted with a knowledge or belief that the thing being imported or to be possessed was likely to be narcotic goods: *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89 at [52], [53], [60]; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45].

controlled drug. In order to prove recklessness, it must be proved that the defendant was aware of a substantial risk that the substance was a border controlled drug; and having regard to the circumstances known to him / her, it was unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact.

The third element of the offence is the quantity. There is no issue that a commercial quantity of the drug was imported

Subdivision B – Possessing unlawfully imported border controlled drugs or border controlled plants

The offences in Subdivision B target possession of border controlled drugs and plants that have been illegally imported into Australia. As with the importation offences the possession offences are structured on a tiered basis and have tiered penalties depending on the quantity of border controlled drug or plant involved; ie whether a *commercial* quantity (s 307.5), a *marketable* quantity (s 307.6) or *lesser* quantity (s 307.7).

Section 307.5: Possession of commercial quantities

Section 307.5(1) makes it an offence for a person to possess a commercial quantity of an unlawfully imported border controlled drug or border controlled plant. It provides that the offence is committed where:

- (a) a person possesses a substance;
- (b) the substance was unlawfully imported;
- (c) the substance is a border controlled drug or border controlled plant;
- (d) the quantity possessed was a commercial quantity.

Section 307.5(1) (a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to possess the substance (see Bench book No 89.3).

As to (b) “border controlled drug” and “border controlled plant” are defined in s 300.2. Subsection 307.5(2) applies absolute liability to the elements in paragraph 307.5(1)(b). This means that the prosecution does not need to prove that the defendant knew, or was reckless as to whether, the substance was unlawfully imported.

As to (c), the prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or border controlled plant: see s 307.5(3). “Recklessness” is defined in s 5.4 of the *Criminal Code* (see Benchbook No 89.3).

As to (d), a “commercial quantity” is defined in s 300.2. Subsection 307.5(2) applies absolute liability to the circumstance that the quantity is a commercial quantity.

Section 307.5(4) provides a complete defence to this offence where the defendant can prove, on the balance of probabilities, that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Section 307.6: Possession of marketable quantities

Note that s 307.6(4) provides a complete defence to this offence where the defendant can prove, on the balance of probabilities, that he/ she did not intend to sell any of the border controlled drug or border controlled plant and did not believe that another person intended to do so. This provision reflects the purpose of this offence being the targeting of commercially motivated importation or exportation. Commercial intention does not form an element of this offence, rather a lack of commercial intent is a defence, with the legal burden being cast on the defendant in relation to that matter.

Section 307.7: Possession of unlawfully imported border controlled drugs or border controlled plants

The lesser offence in s 307.7 targets possession without a commercial purpose.

Suggested Direction - Possessing commercial quantities of border controlled drugs:

It is an offence for a person to possess a commercial quantity of a border controlled drug. The offence is committed where:

- (a) a person possesses a substance;**
- (b) the substance was unlawfully imported;**
- (c) the substance is a border controlled drug or border controlled plant;**
- (d) the quantity possessed was a commercial quantity.**

The prosecution must prove each of these elements beyond reasonable doubt.

As to the first element, the prosecution must prove that the defendant possessed the substance and that he/she intended¹³ to possess the substance.

A person can possess a thing if it is in his physical custody. Possession, however, does not require that the thing be in the actual physical custody of the person. A person can possess something when he has control over it, either alone or jointly with other persons.

As to the second element, the substance must have been brought into Australia. [There is no dispute about that.]

As to the third element, the prosecution must prove that the substance was a border controlled drug. [See definition s 300.2.]

The prosecution must also prove that the defendant was reckless as to whether the substance involved was a border controlled drug. In order to prove

¹³ As to intention see suggested direction at No 105B. 5/6; see also No 89.3 ff.

recklessness, it must be proved that the defendant was aware of a substantial risk that the substance was a border controlled drug; and having regard to the circumstances known to him / her, it was unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact.

The fourth element of the offence is the quantity. [There is no issue that a commercial quantity of the drug was imported.]

If you are satisfied of these matters, the defendant will nevertheless not be liable where the defendant can prove, on the balance of probabilities, that he or she did not know that the border controlled drug was unlawfully imported.

Subdivision C – Aiding the importation of a commercial quantity of border controlled drugs

Section 11.2(1) provides that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

For a person to be guilty their conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person (s 11.2(a)) and the offence must have been committed by the other person (s 11.2(2)(b)).

The person must have intended that his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed or that his or her conduct would aid, abet, counsel or procure the commission of an offence and has been reckless about the commission of the offence (including its fault elements) that the other person in fact committed (s 11.2(3)).

However, s 11.2(3) has effect subject to s 11.2(6): see 11.2(3A). Subsection (6) provides that any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

If the trier of fact is satisfied beyond reasonable doubt that that a person is either guilty of a particular offence otherwise than because of the operation of s 11.2(1) or is guilty of that offence because of the operation of s 11.2(1), but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

Suggested direction

The charge against the defendant is that [between ... and ...] the defendant imported a commercial quantity of the border controlled drugs, [namely ...]. It is an offence for a person to import a commercial quantity of a border controlled drug.

But it is not alleged that the defendant actually arranged the importation of the drugs to Australia. Rather the defendant is alleged to be criminally responsible because he [aided, abetted, counselled or procured] an importation which did

occur. If the defendant [aided abetted, counselled or procured] that importation, then he is by law taken to have himself imported the drugs. He is then guilty of importation.

Elements of aiding importation

For the defendant to be found guilty of the offence charged, the prosecution must prove beyond reasonable doubt the following elements:

- (a) The offence of importing a commercial quantity of border controlled drugs as committed [by the other person];
- (b) The defendant, by his conduct, in fact [aided, abetted, counselled or procured] the commission of the import offence [by the other person];
- (c) The defendant intended that his conduct would [aid, abet, counsel or procure] the commission of that offence.

1. *Importation by another person*

Firstly, you must be satisfied that an importation was committed [by the other person]. That element is proved beyond reasonable doubt if you are satisfied that:

- (a) [that person] imported a substance; and
- (b) [that person] intended to do so; and
- (c) the substance was a border controlled drug and intended to be such;
- (d) the quantity imported was a commercial quantity.¹⁴

2. *The defendant, by his conduct, in fact aided the commission of the import offence etc*

The prosecution must prove that the defendant did an act or acts and that he thereby in fact [aided, abetted, counselled or procured] the commission of the importation offence. Aiding here concerns conduct that in fact brings about or makes more likely the commission of an offence. Abet means encouraging. Procure means to bring about or cause to be done, prevail on or try to induce. Acts done by way of abetting or procuring or counselling include acts of encouragement, urging, advising, soliciting.

¹⁴ See direction at No 105B.4

The Crown case is that the defendant [aided, abetted, counselled or procured] the importation by the following acts: [outline the Crown case].

3. *The defendant intended that his conduct would [aid, abet, counsel or procure] the commission of the importation offence*

The prosecution must establish beyond reasonable doubt that the defendant acted intentionally by way of assisting or helping to accomplish the importation of drugs to Australia. As part of that, the prosecution must prove that the defendant was aware of at least the essential matters involved in the contemplated importation into Australia.

Here the essential matters that would need to be proved beyond reasonable doubt are that, when he did an act by way of assistance, the defendant did so:

- (a) knowing that border controlled drugs were involved in the importation and
- (b) knowing that the drugs were to be imported from [...] to Australia.

A mere suspicion as to those matters is not enough.

Intention is a state of mind. In ascertaining a defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning the defendant's state of mind. The prosecution invites you to draw an inference as to the defendant's state of mind from certain facts. [You are entitled to infer such intent as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.]

Thus, in the present case, before making a finding of guilt you would need to be satisfied beyond reasonable doubt that the only inference available on the evidence you accept is that, at the time the defendant did an act that in fact aided the importation of drugs to Australia, he knew:

- (a) that border controlled drugs were involved and also
- (b) that the drugs were to be imported into Australia.