Customs Brokers and Forwarders Council of Australia Inc.

COMMENTARY

Review of Customs licensing regimes
Licensed customs brokers

23 December 2015

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1. EXECUTIVE SUMMARY

1.1 The Customs Brokers and Forwarders Council of Australia Inc. (CBFCA) supports the need for regulatory oversight of all entities who communicate or interface with the Department of Immigration and Border Protection (DIBP) and as to all places that receive or handle goods subject to customs control. In relation to this regulatory oversight and compliance management, particularly as it relates to the *Review of Customs licensing regimes (DIBP Review)*, the CBFCA notes individual customs brokers, corporate customs brokerages, cargo depots (Section 77G) and warehouses (Section 79) are covered by current licensing arrangements. The CBFCA notes that these arrangements have served both the regulator and industry in delivering an appropriate process as to compliance management. This is not to say that the existing arrangements could not be undertaken in a more cost efficient and/or cost-effective manner, nor is the administrative process at a point where improvement should, or could, not be made.

1.2 As to process improvement, all regulatory arrangements require a cyclical review to determine the efficacy of the arrangement in meeting public and private sector policy and needs. Licensing brings regulatory oversight as well as constraints to both the individual and corporate entity. The CBFCA supports a wider review of methodologies as to regulatory oversight of all who communicate or interface with the DIBP as to information exchange and cargo control. Such methodologies may be by way of licensing, accreditation, registration, contract or other approved arrangements. The base line for such issues should be co-regulation rather than regulation.

1.3 In relation to existing application processes for either individual customs broker licenses, corporate customs brokerage licenses or depot or warehouse licences, a need exists to move that process from a paper or documentary base to a more intuitive software/information technology deliverable. The existing arrangements inhibit real time data maintenance, oversight of persons within the purview of the licensing approval/renewals and timely information exchange for regulatory requirements.

1.4 As to the National Customs Brokers Licensing Advisory Committee (NCBLAC), a need exists to reassess that entities' oversight of licensing arrangements. The NCBLAC position on *"acquired experience"* for individual licensed customs brokers needs reassessment and realignment to meet the requirements of both regulator and business as to long term human resource requirements.

1.5 A review of licensing conditions as they relate to individual licensed customs brokers and licensed customs brokerages which was foreshadowed by the DIBP for mid 2015 (and which has not occurred) needs to be a part of the *DIBP Review.*

1.6 The impact of an aging workforce as to individual licensed customs brokers in the next five (5) to seven (7) years requires early notation and review as to meeting human resource shortfalls. This perceived shortfall will have a dramatic impact on business capacity to meet the regulatory compliance challenge.

1.7 The DIBP position as to 'offshore' service delivery of border clearance and compliance needs to be determined as the impact of the issue noted in 1.6 will exacerbate any trend in this area.

1.8 The minimum standards of skills and knowledge for a newly licensed nominee customs broker need to be determined. Such standards are to reflect the commercial reality of the role as it is currently performed and will assist NCBLAC by providing baseline criteria against to which an applicant should be measured in determining their acquired experience.

1.9 The process of an application for a nominee customs brokers licence should be streamlined to ensure that all parties to the application, including employers, referees and the applicant themselves, are clear as to their expectations in completing the application. NCBLAC should have an expectation that applications brought before them will meet the required standard for them to be assessed in the first instance.

1.10 Where a licensed customs broker has provided a reference in support of an application for a nominee customs broker licence and that reference proves to be materially fraudulent, the referee shall be deemed to have made a false statement to an officer under oath and should be subject to disciplinary action by NCBLAC.

1.11 As a result of greater clarity in the application process, including insistence on applications being completed correctly, NCBLAC will be able to move from a default position of conducting a hearing in the first instance to one of an administrative review of the application and the need for a hearing only when doubts exist as to the bona fides of the application.

1.12 To ensure that there is a more effective range of experience on NCBLAC of current commercial practice relating to customs broking, the Committee's

industry representation should be expanded from one to three members. Each industry member to be selected based on their ability to contribute across the range of NCBLAC deliberations including corporate licensing and education.

1.13 As a result of the approved course of study now being a Diploma level qualification that includes scenario-based learning and competency-based assessment, there is no longer any need to give weight to a result in any National Examination for the purposes of deeming acquired experience. In future all experience surely acquired in the workplace and documented accordingly.

1.14 To ensure uniformity and consistency in the determination of acquired experience, graduates of the approved course will be required to undertake a "Professional Year" during which time they must be working as a classifier/compiler and under the direct supervision of a licensed customs broker. A logbook attesting to that experience must be provided as part of the nominee licence application process.

For example, a referee who states that the applicant has conducted TCO applications and yet this is found to be untrue, has lied under oath and should be called before NCBLAC to explain their actions with a view to some form of penalty or sanction being imposed. Such a penalty or sanction should be on top of any penalty imposed for a breach of the Criminal Code Act 1995 which applies to false or misleading statements made by applicants or referees as part of the application process and which allows for periods of imprisonment of up to 12 months.

Will this make references harder to get if there is a responsibility on behalf of the referee to give a truthful statement of the applicant skills and abilities? It's hard to imagine this would be the case however the threat of such penalties and sanctions being applied to referees should give NCBLAC a greater level of certainty that they can rely upon the data from referees in the application process.

1.15 To ensure that new graduates remain current in their skills and knowledge, such persons will need to undertake the 30 points of CPD during the "Professional Year". Proof of such completion must be provided as part of the nominee licence application process.

2. INDUSTRY REPRESENTATION

2.1 Customs Brokers and Forwarders Council of Australia Inc.

The Customs Brokers and Forwarders Council of Australia Inc. (CBFCA) is the peak national not-for-profit industry Association representing over 274 licensed corporate customs brokerages and 1594 individual licensed customs brokers (operating in the capacity of a nominee or sole trader) engaged in the provision of integrated service to international trade logistics and supply chain management, in the main, to Australian and other international traders. The CBFCA and its predecessor associations have acted in this representative and advocacy capacity since 1904 and the CBFCA is the only industry entity that has as its key reference (within its Constitution) advocacy of its members who are either licensed individual customs brokers or licensed corporate brokerages. This position is stated unequivocally to the DIBP as regards the CBFCA position in representation of the industry sector covering these individual and corporate entities licensed by the DIBP. In addition, from a business perspective, many CBFCA members (licensed corporate brokerages) operate premises licensed by the DIBP under Section 77G (depots) and/or Section 79 (warehouses).

Members of the CBFCA provide the critical interface at the border between their respective clients with the DIBP, and a significant number of other regulatory agencies including but not limited to the Department of Agriculture and Water Resources, Australian Taxation Office and the Office of Transport Security.

The CBFCA and its predecessor associations have been actively involved in the evolution, implementation and administration of Government public policy, i.e. customs law and regulatory process, as it relates to these licensing provisions and welcomes the DIBP *Review of Customs licensing regimes (DIBP Review)*.

2.2 Response

The CBFCA's response has been structured to address the Scope of the Review, in particular, the objectives referenced in the Scope. It also notes the July 2014 *Review of licensing provisions*, Centre for Customs and Excise Studies *(the CCES Review).*

2.3 Contact Details

All enquiries and responses may be directed as follows:

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3. RATIONALE FOR LICENSING

As a start point in the discussion on licensing, a need exists to determine what may be the rationale for such a process in contemporary regulatory and business operations. Such a determination requires a reference to the past and the perceived, and actual, need for representation of owners in border clearance of goods.

The provision for the owner of goods to authorise an agent (under the context of the law of agency) has been part of the Customs Act (the Act) since 1901 where it was acknowledged that:
"Any owner of goods may comply with the provisions of this Act by an agent lawfully authorised and in all places to which this limitation is declared by proclamation to extend such agent shall be either person exclusively in the employment of the owner or shall be a Customs agents duly licensed in manner prescribed."[1]

It was clear at that time in order to transact business with Customs that an owner of goods may not necessarily have the business acumen, time or resources to undertake such activity and an opportunity to employ the services of an agent to undertake such activity was available. In addition, it was clear that a need existed to, in today's parlance, *"protect the revenue of the Commonwealth"* as in the main, at that time, considerable Commonwealth revenue was raised by way of customs duty.

In moving into the 21st Century, it is noted that licensing referenced by the DIBP in public licensing commentary is as to:

- Protecting the revenue of the Commonwealth,
- Ensuring compliance with the legislation, and
- Protecting the interests of importers, exporters and the community generally.

As to these key elements, the question is posed – is it the licensing of an individual

[1] Customs Law of Australia with notes, 1904, Wollaston, J, p121

or a corporate customs brokerages that ensures compliance or should the position be as to regulatory compliance, that any individual or entity which communicates, or undertakes border cargo clearance activity with the DIBP needs to comply not only with the provisions of the Act but also with a variety of other Commonwealth and state legislation?

Should an importer of record who has the ability to undertake customs clearance be required to meet the standard or criteria of that required of a licensed entity in that the key elements of compliance should apply in all circumstances?

As noted in *the CCES Review*:
"To test this it is necessary to consider the objectives of regulation of customs brokers in Australia i.e. the public policy outcomes and dictate the need for such regulation."[2], and

"...it is debatable and whether these two imperatives are, or should be, the only or even the dominant public policy drivers justifying the licensing of a customs broker." [3]

These are relevant considerations in determining the licensing or other accreditation/standard needed for the future and as to what that format or provision may look like or encompass. *The CCES Review* also addressed the concept of Commonwealth revenue which may be at risk and noted the significantly higher level(s) of Commonwealth revenue collected by way of the Goods and Services Tax and other tax arrangement which requires no licensing requirement or in relation to advice provided to businesses by way of tax practitioners no licence requirement.

The CCES Review challenged how licensing of customs brokers increases compliance with the Act or conversely reduces the instances of breaches of the Act or other statutes. It noted:
"Regardless of the conclusion reached about the validity of the traditionally espoused rationale for the licensing scheme, it is undeniable that Government priorities and, consequentially, the role of customs brokers, have changed in recent years."[4]
Clearly it is this aspect that must be at the centre of the *DIBP Review* and while a reflection on the past as to what has been achieved in relation to professional standards and a level of certainty by the DIBP on revenue collection and regulatory compliance for the future, particularly on the basis of bilateral and multilateral trade agreements (which in the main have a common purpose of a phase down of customs duty rates in the respective economies to zero) and the philosophy of the World Trade Organisation as to elimination of barriers to trade particularly as customs duty, any licensing needs to be considered in the context of what is that level of

[2] Review of Licensing Provisions, July 2014, Centre for Customs and Excise Studies, p73

[3] Ibid, p74

[4] Ibid, p75

protection of revenue and has the tenet for licensing changed.

If the current DIBP philosophy is to ensure that those who are licensed (or are in some other way accredited), deliver more as to the safety and security of the Australian community (as these issues will not diminish with any write down of customs duty), then clearly, the application of conditions on individual or corporate customs broker licenses, may be out of alignment with where the future lies.

Regulatory intent and Government public policy on community safety and security in relation to cargo control at the border is now clearly the key driver from the report and outcomes of the National Waterfront Organised Crime Taskforce 2012. What should be noted is notwithstanding, the position of Government (or regulators) on such border control there is a significant divergence in regulatory need and business process for the movement of goods across the border for business and Australia's economic performance. Regulatory controls are a small part of that supply chain process and in meeting the pressure of client needs (as to Australia's competitiveness in international trade) and the development of cost-efficient and cost-effective deliverables the *DIBP Review* needs to be mindful of that.

While it is noted that cost recovery implications are not part of this *DIBP Review* this aspect needs to be clearly understood in the ongoing discussion on cost recovery as Government charges are now inhibitors to trade and the outcomes of the DIBP Trusted Trader initiatives will, on the basis of information available as to process, exacerbate these cost drivers and recoverables.

As a principle, whether it be in relation to licensing or other DIBP interface arrangements, the CBFCA's position is,

"Any individual or entity which communicates with the DIBP, either as the importer or exporter in their own right or by way of the use of an agent (whether that be for the clearance, storage or carriage of cargo), must meet specified benchmark/standards as to interface technology, communication protocols, operator skills and knowledge."

The application of benchmark/standards should apply in a corporate and individual capacity, noting that, in the main, business is transacted through corporate interface(s) and the aspect of *vicarious liability* applies as to employees. This aspect is addressed in Section 5.

4. COMPLIANCE IN THE LICENSING CONTEXT

4.1 How we got to where we are and why

In relation to the need for importers of record to use the services of a licensed customs agent (broker), the CBFCA is mindful of commentary of the World Customs Organisation International Convention on the Simplification and Harmonisation of Customs Procedures Chapter 8 and the recent World Trade Organisation Agreement on Trade Facilitation Article 10(6) as to flexible approaches as to the use of customs brokers. The WCO also addressed these issues at its Permanent Technical Committee meeting 14 – 16 October 2015.

In the Australian context, a provision exists for importer(s) of record to communicate with the DIBP (and any other regulatory agencies) in relation to the border clearance of their goods or the use the services of an agent (in this context a licensed individual customs broker or licensed customs brokerage). The CBFCA (and its predecessor association) is aware of this legislative option and has participated actively in the development of public policy and legislation which oversights border clearance and customs agents' licences.

One of the issues for the CBFCA in licensing is justice and rights for those licensed. From industry's perspective and in particular for the CBFCA, the change in 2012 in individual licence conditions to meet a perceived social harm has overshadowed the rights of the individual, with this position being the result of strident political rhetoric and public policy to meet criminality in the supply chain. While evidence showed existence of such activity, DIBP intelligence led risk assessment should have led the discussion as not all in the supply chain are (were) criminal and therefore in the case of licensed customs brokers the need to continue to prove their *"fit and proper person"* status. The failure to understand or have insight into the industry it regulates resulted in what the CBFCA saw (and sees) as a poor public policy on changes to licensing.

The CBFCA is of the opinion that in a contemporary context the more appropriate response as to compliance and control was (is) a balanced approach in terms of risk assessment, regulatory management and compliance. The acceptance of this approach by the DIBP for the future, at least with some recognition of past mistakes, requires a new thought process as to regulatory compliance as to those in industry who have been determined as *"fit and proper person(s)"*.

Introduction of increased strict liability offences and changes to the Infringement Notice Scheme in 2012 (and further enhancement in 2015 again with poor policy development) was not, in the opinion of the CBFCA, an appropriate reflection on what was the social harm that drove the policy and legislation. It was, in the opinion of the CBFCA, more political justification and a regulator under pressure to deliver at whatever cost. While it is clear that compliance fits within Government's national border management strategy (with the issue having its genesis in the National Illicit Drug Strategy and subsequently the Waterfront Organisation Crime Taskforce), most commentators in regulatory and compliance management are of the opinion that existing strict liability offence regimes significantly diminish the rights of the licence holder in terms of due process, a defence of due care, and the ability to seek appropriate administrative review.

What is agreed is that with an ever-increasing regulatory burden and reduced resources, the DIBP and other regulatory authorities, do require (appropriate) mechanisms to deal with compliance. However, enhanced strict liability offence process (as noted by many mature regulators in other economies) fail to deliver what is anticipated from such implementation. It is suggested that resorting to such regulatory outcomes should raise in the mind of Government, as to public policy, the administration's ability to effectively manage change and to meet the requirements of rapidly evolving trade and business requirements.

The CBFCA has for over twenty (20) years advocated that a co-regulatory approach is seen as offering the better balance as to achieving behavioural change rather than applying inappropriate commercial sanctions for breaches or non-compliance. The CBFCA sees monetary penalties as a last option as to behavioural change (unless of course such are seen as purely revenue raising rather than supporting behavioural change).[5]

4.2 Strict Liability Offences

Strict liability offences in a customs context began in 1986 from what the then Australian Customs Service (ACS) and the Attorney General's (AG) Department saw as to fraud in a motor vehicle imports scheme. However, determinations by the Administrative Appeals Tribunal (the Tribunal) and subsequent Federal Court decision(s) did not give support to the ACS or the AG's position. Around the same time a report was provided by the AG alleging significant revenue avoidance and evasion. This report, together with a decision in the *Farmer case*, created problems for the then Australian

[5] Australian National Audit Office, *Risk Management in Processing of Sea and Air Cargo*, Imports Audit Report No. 15, 2011-12

Customs Service (ACS) as regards Section 234 into 229 of the Act. These outcomes gave birth to strict liability offences.

As referenced above importers and licensed customs brokers responsible for the creation of entries for home consumption (import declarations) have worked under a strict liability regime (Section 243T of the Act) since 1989. As such, the CBFCA and its members understand the implications of such arrangements. However, the need to have a balance between the issue of the penalty, an appropriate appeal mechanisms and/or remedies is also clearly appropriate.

The history of the ACS in relation to the Section 243T strict liability offences and the emasculation of the then existing administrative penalties process was created as a result of the case of *Robert Nagle*, where the ACS used the provision of Section 243T rather the more appropriate prosecution remedy under Section 234. In essence, the Tribunal's decision in *Nagle*, was a precedent decision that severely undermined the effectiveness of the then ACS Administrative Penalties Regime. The demise in the arrangement was created by the regulator itself and industry has suffered the ramifications of that poor policy decision since.

4.3 Merit of Making Certain Offences Absolute or Strict Liability

Within Federal jurisdiction administrative penalty regimes are ostensibly to enable regulators to enforce compliance so as to achieve effective regulation. In essence, the principle of strict liability offence(s) is to ensure compliance by way of deterrence, with the penalty applied being, in the main, a pecuniary amount. In the Australian context, these amounts have risen substantially since 2012.

Over recent years, there has been a burgeoning use of administrative penalties imposed by regulatory bodies without the need for court intervention. While most sanctions carry a right of review on the merits or through judicial review such as the Tribunal, there are now significant numbers of penalties where no external right of review exists and mitigation of the penalty is by way of a criminal defence. These penalties, imposed within the shadow of the formal legal system, are increasingly used to foster compliance and cooperation from a regulated community. There is an assumption that these are less onerous (particularly on the regulators administrative and skills application) when compared with punishments under criminal law.

While it is perceived by regulators that punishment can effect human behavior (short term at least) to control it is another matter. Punishment does promote an unconscious tendency to reinforce conformist sentiments of law-abiding citizenry (it does not for those who do not wish to comply). As to the strict liability offences as far as the deterrence theory is concerned it is at best marginal in effecting any significant change to the level of occurring offences in the area of commercial accuracy.

What it does is cause additional administrative burden to an industry which make honest endeavours to comply in a regulatory environment which has become incredibly complex and which involves ongoing regulatory change. There is an increasing divide between regulator and the regulated where little of this complexity is understood by the entity which applies the penalty.

While such arrangements may be seen by Government and regulators as the best of inappropriate available methodologies, it is suggested that it reveals an inability of the regulator, in terms of administration of resources, to work towards appropriate outcomes to provide benefits to all parties in terms of compliance. They are in fact self serving outcomes rather than serving the needs of the economy or community.

4.3.1 Control

As a result of the inability of legal systems to deal with ever increasing workloads administrative penalties, by way of their greater procedural flexibility and range of civil / administrative sanctions, have been adopted by Government's as one of the preferred modes of control. As to the difference between civil and criminal penalties, the major identifiable distinction is the practical consequence of the penalty and the hope for remedial compliance or rehabilitation. Therefore procedures, privileges and standard of proof are affected by the characterisation of such a penalty. It should be noted however that there are social consequences from both an individual and corporate perspective of such administrative penalties. These aspects have, in the main, been overlooked or where identified, ignored by regulatory authorities. These are significant concerns as to the future of the relationship between the public and private sector.

4.3.2 Due Process

As regards DIBP strict liability offence the legislation denies the defence of due diligence and in such cases the position of the offender is dramatically altered. As referenced to deny a defence of due care is to

deny, either as a legal enterprise or an individual, due process and review on merits. In terms of individuals the aspect of *vicarious liability* as to certain customs offences has been compromised and the rights of the individual in their employment aspects have been altered.

The regulatory perception is that administrative penalties are purely monetary and carry little stigma. This is however far from reality as those who have suffered the stigma of a penalty or the loss of employment opportunity will attest. It also impacts on business opportunity and activity.

4.4 Effectiveness and Outcomes

In addressing the use of administrative penalties whether they be discretionary or automatic, it is suggested that they **may** have an advantage of providing for effective deterrent especially for minor offences. They **may** also ensure consistency as to the penalties imposed on violators while at the same time being much more flexible. However, this position is not universally supported as it is seen as having the risk of placing discretion in the hands of administrators whose consistency in the application of the process will be compromised or diminished. The administrator becomes prosecutor, judge (on determination of the level of offence and any mitigation) and administrator. Notwithstanding the development of Guidelines or at this time the Infringement Notice Guide Workplace instructions to delegated staff are not subject to public oversight and as such discretion remains with that person who initiates the action.

As to this process, it should be noted that justice and fairness do not exist in a vacuum and involve the weighing of competitive interests as to societal needs as against corporate or individual interests. In essence, what is the social harm to be assessed and addressed by such a process?

4.5 Final Word on Compliance

Perhaps the final word on this issue should come from the regulator itself when the Commissioner, Australian Border Force stated:

"Our officers need to be cognisant of changing environments, and the complexity that is currently coming in to an already complex environment, with the very nascence free trade agreement coming into play. I am absolutely certain that there will be a significant degree of non-compliance over the next few years as the dust settles on this architecture, and we need to have tolerance for that. I think an approach where we just take the stick every single time there's non-compliance would be counter-productive to

the partnership philosophy I was just spousing in my comments. But over the long term to your point this is where I want to finish because it's an excellent point. What are the objectives? The objective is to ensure that we get behaviour change that is enduring and that is lifted up from its current base, and you don't do that by just applying just a carrot or a stick, you do it by engagement, by partnership, by having a mutual understanding of the environment that you currently work in, of the rules, and absolutely if there are breaches, and people demonstrate their recidivist in terms of offending, I have no compunction in applying the maximum penalty. But, there is a continuum, and my inclination, my starting point, is to start at the other end of the continuum."[6]

5. LICENSING OF CUSTOMS BROKERS

5.1 Individuals

Licensing of individual customs broker(s) either acting in the capacity of a nominee for a licensed corporate customs brokerage, as a sole trader or in partnership, has been a long established practice. In the main, most individual licensed customs brokers operate in that capacity as a nominee within a corporate customs brokerage licence and have an employee/employer relationship in the transaction of business for the clients of that corporate entity. As such, these individuals operate within the capacity of the *vicarious liability* and are subject to direction and guidance in the business arrangements of the entity from their employer, i.e. as long as the employee operates within that capacity, they remain covered by the provisions of that contract of employment and are bound by that contract with the employer.

There is a significant dichotomy now being occasioned by the DIBP Additional Conditions on individual customs broker licences and these conditions, in many instances, put persons in conflict with their contract of employment. This dichotomy is further exacerbated by the requirement of an individual licensed customs broker to, in real terms, act outside the scope of their contract of employment, particularly in relation to DIBP Additional Condition as to:

"If a holder of the customs brokers licence becomes aware that information that has been provided to the DIBP on behalf of a client of the broker is false, misleading or incomplete, the broker must, as soon as practicable after becoming aware of the error or omission, provide written particulars of the incident to the CEO."

[6] CBFCA National Conference, Sydney, Session *Department of Immigration and Border Protection*, October 2015

This requirement has, is and will continue, to exacerbate the employer/employee divide.

5.2 Deemed owner

There are also specific aspects within the Act which have particular consequence to individual licensed customs brokers and licensed corporate customs brokerages. This relates in the main to the definition of *owner* under Section 4 and *authority to act* under Section 181.

The lack of clear DIBP public policy on the former aspect in recent times has created significant alarm in the customs broker industry. The DIBP definition of *owner* is wider than the commercial understanding of *owner* and the precedent(s) of the DIBP seeking recovery of a debt from other than the *owner* (as referenced in the import declaration) remains at issue for the CBFCA and its members.

The CBFCA understands that DIBP acknowledges that recovery of customs duty should be from the person who has the legal obligation to pay such customs duty. The CBFCA does not see that service providers, such as licensed customs brokers or brokerages, as the party which has that legal obligation (notwithstanding the provisions of Division 2, Part XI of the Act as to authorisation). The provisions of the United Nations Convention on Contracts for the International Sale of Goods clearly define the parties to the contact of sale and the International Chamber of Commerce Incoterms are reflected in such international contracts of sale.

There is precedent of the DIBP moving outside of the conventional or commercial definition of *owner*, and the DIBP have used the definition within the Act to seek recovery of a debt from other than the *owner* as referenced on the import declaration.[7] As to such a definitive DIBP public policy on *owner* within the Act is needed to clarify recent DIBP actions.

In the early iterations of the Act where an importer employed an agent to enter goods through the customs system, if a mistake was afterwards discovered by which the goods were deemed to be subject to customs duty, it was noted by Wollaston that the agent should not be liable for the sum due but the *owner.*

"While the Act allows licensed customs agents to do an act for the importer, it is understood to not be a permission to state matters of fact about which the agent knows nothing. An absolute statement about the genuineness of an invoice, the non-receipt

[7] Clark v The Chief Executive Officer of Customs 2005, SASC 165

or expectation of other invoices, imports an acquaintance with the importers' business and such a statement as to the value and market price, trade allowance and imports, knowledge of the trade, especially affecting those goods… This Section does not allow an agent to state matters of fact about which the agent personally knows nothing."[8]

The CBFCA notes from Cooper that in *R v Tarrant (1912) 15 CLR 172 at 180* that a duty of care and due diligence as to *owner* representation has limitations and is finite. It is clear that such a legal situation stems from a rule that a person cannot admit something for which he knows nothing nor does a statement which was true at the time it was made become under by subsequent events.[9]

It is clear there is a lack of appropriate DIBP public policy on the position of a service provider representing a client under the law of agency and this needs clarification as also the linking of the definition of *owner* with the requirements of an *authority to act*.

5.3 Authority to Act

The position in relation to authority to act has, as result of recent commentaries by the DIBP, created uncertainty in industry as to issues relating to legal requirements and the expectations of the DIBP. The current position of the DIBP is contrary to all long-standing precedent, and what the CBFCA sees as a clear obligation under Section 181 of the Act. The position espoused by the DIBP in ACBPN 2013/64 is not, in the opinion of the CBFCA, a correct interpretation of the legislation and this particular aspect was communicated to the DIBP as to its comments in the ACBPN to the effect that: *"Section 181(1) appears to* ***contemplate (CBFCA emphasis)*** *that the owner of goods would authorise a licensed customs broker in writing to act on their behalf."*

It is interesting to note that legal commentators clearly do not share that view. The CBFCA is of understanding that the requirements of Section 181(1) is to provide a mechanism by which an *owner* has the option of using an agent for the purposes of the Act or as to attending to those particular matters himself/herself. Section 181(1) sets out the methodology by which an *owner* can use an agent to the purposes of the Act and if the *owner* wishes to use an agent, then compliance with the provisions of Section 181(1) is required, naming in writing and authorising a person to be an agent for the purposes of the Act at a place, or places, specified by the *owner. T*herefore if anyone is to attend on behalf of an *owner* to the entry of goods on behalf of that *owner,* that

[8] Customs and Excise Law, Cooper 1984, p125

[9] Ibid 125

person must be authorised pursuant to Section 181(1).

This understanding by the CBFCA has been supported by precedent of regulatory comment from the ACS as far back as 1989[10] where it was stated that the ACS required a person to be authorised in writing by an owner of goods to act as an agent of the *owner* for the purposes of the Act. Authority cannot be implied and must be in writing as the ACS can (and did) refuse to recognise a person to be authorised to act as an agent on behalf of the owner of goods if the agent was unable to produce a written authority from the *owner*.

This position was reinforced over 25 years in a variety of public policy positions and correspondence with the CBFCA predecessor associations and save for the change in ACBPN 2013/64 the practice of authority goes as far back as 1901 where it was stated by Wollaston:

"any officer may require from an agent the production of his written authority from the principal for whom he claims to act."[11]

As stated earlier, a clear public policy on authority to act is now needed as industry lacks direction on what is required in relation to an authority to act on behalf of the *owner*. It was noted by the CBFCA in Freedom of Information (FOI) documentation that the response to the then National Manager Compliance from the Australian Government Solicitor on this issue was less than instructive with words such as:

"contemplate that an importer may authorise a person... appears to require."

This contemplation and appearance led to the following comment from the National Manager Compliance:

"...it would be prudent for any licensed customs broker purporting to act on behalf of the owner of goods to have written authority to do so to protect themselves from civil litigation."

It is interesting to note that this position was skewed from legislative requirement to a commercial consideration and was not based upon what business processes encompass. In addition to this interesting statement, it was revealed in the FOI documents the position of the DIBP that a consignment note of particular service providers (a contract of carriage document) was

[10] ACN 89/9, ACN 93/151, ACN 95/56, ACN 2000/30, ACN 2007/56

[11] Customs Law of Australia with notes, 1904, Wollaston, J, p123

determined as being an authority within the provisions of Section 181(1) of the Act. How such a document is (or was) a letter of authority is an interesting extrapolation.

The CBFCA also notes the position adopted by the DIBP in the Tribunal decision in *Studio Fashion (Australia) Pty Ltd (Studio Fashion)* as to certain Self Assessed Clearances (SAC) issues where, based upon FOI documents, the service provider(s) was clearly the agent of the *owner* (having an *authority to act*) for the delivered duty paid (INCOTERMS) transactions. As such, to the CBFCA's understanding, those entities should have been the party responsible for any underpaid customs duty and not *Studio Fashion*[12]. Such lack of consistency creates significant problem(s) and liability(ies) for service providers.

As an aside to this issue (as at 17 December 2015) it is difficult to comprehend how an express service provider in its interface with importers could, with any legal basis, make the following assertion/commentary:

"Payment of these customs entry charges authorises... to act as your customs broker as per s.181 Customs Act."

The linking of an *authority to act* is now clearly an issue which needs resolution, particularly as to the interpretation of the DIBP on the aspect of *owner* under Section 4 of the Act.

5.4 Licensing Requirements

The variation to the requirements of licensed individual customs brokers which were referenced in ACN 2012/29 created significant additional obligations on licensed customs brokers (individual and corporate) however, as previously commented, the change in legislation did not provide any additional obligation on other persons who communicate information or were involved in issues related to handling of cargo, reporting the movements of goods in customs systems including international freight forwarders, depot operators, or those lodging Self Assessed Clearances (SAC). This lack of consistency in obligation(s) does not, in the CBFCA's opinion, provide what was the championed position by the regulator as an outcome to meet criminality in the supply chain. It is suggested that licensed customs brokers are now placed at a competitive business cost and regulatory disadvantage to others who interface with the DIBP and are not subject to similar obligations or the additional conditions.

[12] *Studio Fashion (Australia) Pty Ltd and Chief Executive Officer of Customs [2015] AATA 366 (28 May 2015) p6*

While the CBFCA acknowledges that the Chief Executive Officer (CEO) Australian Customs and Border Protection Service (at that time) had particular powers to place conditions on licences, the question asked but not answered was what was the delegated authority of the CEO (to the then National Manager Compliance Assurance) in relation to licensing conditions?

The question in context being: *"What was the extent of those powers and to what extent could those additional conditions be applied without them falling outside the scope of the delegation or authority."*

This issue was never finalised (even after additional requests) and now needs clarification as to legality of conditioning of an individual licensing. As to the Condition for false, misleading or incomplete statements be notified to the DIBP it to be noted that this requires a licensed individual customs broker to incriminate his employer, the business entity's client as well as potentially incriminating himself/herself. An interesting legal minefield at best which the DIBP has created!

In relation to these Conditions, the CBFCA (suggested first in 2012 and now reaffirmed) suggests that the DIBP should:

- Amend the Additional Condition (or other guidelines be issued) to set out the threshold for reporting or these types of false, misleading or incomplete particular which must be raised with the DIBP.
- Clarify whether licensed customs brokers will be required to incriminate their clients as part of this obligation. This will assist in ensuring licensed customs brokers and their clients are clear on the obligations.
- Clarify whether the Additional Conditions are intended to remove the privilege of licensed customs broker against self-incrimination which would normally apply to all persons.
- Clarify the use to which the information provided will be put and the consequences likely to follow from the mandatory provision fo information (for example, whether the provision of information pursuant to this provision will constitute voluntary disclosure to limit potential liability for penalties).
- Clarify the extent to which it will expect further co-operation or provision of documents or information from the party providing the relevant information in the first instance.
- Specify whether the DIBP will indemnify licensed customs brokers who provide information in accordance with the Additional Condition when that has the effect of exposing the licensed customs broker or brokerage to liability from clients.

- Note the types of assistance which the DIBP (and other Commonwealth prosecuting agencies) will provide to licensed customs brokers who provide information pursuant to Additional Condition (2) or in any subsequent proceedings.

As to licence conditions, the CBFCA also notes that the DIBP stated:

"we will review all licence conditions towards the conclusion of the current three-year broker license period, which ends on 30 June 2015."

The CBFCA is not aware that this review has been undertaken and as such it should now be part of the *DIBP Review*.

5.5 Fit and Proper Person Test

An applicant for a corporate customs broker licence must be a company or partnership whose director(s) and employees are *"fit and proper"* under s.183CC(1)(b) and (c) of the Act. Additionally, the company must be a *"fit and proper"* company under s.183CC(1)(b)(iii) of the Act.

The criterion of *"fit and proper person"* is both an initial requirement as part of the risk assessment of the application to grant a customs broker licence and an ongoing requirement of maintaining the customs broker licence (individual or corporate). While the initial *"fit and proper person"* test can be determined by the regulator, it is clearly a more difficult aspect as to ongoing oversight. How this process operates in a regulatory and business environment is an interesting aspect which needs, in the CBFCA's opinion, a co-regulatory relationship.

5.6 Current Application Process and Requirements

While the existing application process is seen as rigorous (with industry accepting the level of scrutiny and security involved in the application process), the manual lodgement of application documentation is not only cumbersome, but does not meet contemporary business needs.

In noting the DIBP *Blueprint for Reform 2013 – 2018* and in meeting shifts in technology/focus on trade modernisation along with consideration, for both individual and corporate licence applications, in electronic form would:

- reduce regulatory burden.
- reduce processing timeframes from receipt of a 'complete application' (which is currently noted at eight weeks and requires the applicant to

lodge by mail hard copy to DIBP Licensing Section as well as to any additional request for documents) to finalisation.
- enable documents linked to the application process to be submitted and uploaded online. Originals and/or certified copies (if required) could then be mailed upon final acceptance of a 'complete application' if necessary.

As to corporate licences a reference to an *'adequate level of working'* capital is part of the requirements. As to what constitutes adequacy needs clear commentary as for new business entities, working capital may vary depending on start up status.

5.7 Public Notification

As part of the licensing process, the DIBP, by way of public notification in a DIBP Notice, references all applications for customs broker licenses, whether they be for individual or corporate entity. Therefore, application information is in the public domain however, after any review by NCBLAC with any recommendation to the Comptroller General DIBP that a licence be granted no further public commentary or notification is provided, the DIBP rationale for this being as to privacy principles. The CBFCA however, finds it difficult to reconcile a position where prospective applicants' details are publicly provided, particularly in relation to corporate applications (these in the main being the entities which importers or other persons seeking advice in relation to border clearance of commodities undertake commercial arrangements) and after grant of a licence, details are not generally available for public view.

It would appear appropriate that all corporate licensed customs brokers (in a manner similar to the public notification as on application) be listed for public view in that many new and/or established international traders are seeking to verify the legal position of those service providers with whom they may wish to commence a commercial relationship. In this regard, they are seeking to verify the *bona fides* of any particular licensing arrangement and the CBFCA sees this aspect linked to that of providing an *authority to act*.

The DIBP, in the CBFCA's opinion, has a responsibility to ensure that who are seeking information to determine that a service provider is licensed by the DIBP that such information is current and readily available. As will be noted in corporate licence applications, nominee brokers are listed and as to a listing of all individual customs brokers for those who participate as a nominee within a corporate customs brokers licence, this could be referenced accordingly.

The CBFCA strongly recommends, so as to provide open and transparent information in relation to those who are licensed by the DIBP, a portal or listing on the DIBP website as a necessary business requirement.

5.8 Place of Operation of Licensed Customs Brokers

In addressing the key DIBP public position in relation to licensing of individual and/or corporate customs brokerages under Part XI of *the Act*, one of the specifics under Section 183C(2) is that the Comptroller-General of Customs may grant a licence for a person to act as a customs broker at place, or places, specified in the licence. In the main, these places being within the Commonwealth of Australia.

In terms of operational issues, *the Act* is silent as to where such a customs broker must reside to undertake such an act(s). In today's communication and information technology options, such a licensed customs broker or licensed customs brokerage is clearly able to operate either in Australia, or offshore, and transmit data to the DIBP by way of an onshore server using any necessary digital certification. The corporate licensed brokerage may also be onshore with the preparatory information being undertaken offshore for a similar transmission through an onshore server to the DIBP.

This of course raises some interesting questions for the DIBP in relation to any Conditions which it may place on an individual customs broker's licence or on a corporate customs brokerage licence as to compliance oversight by the DIBP, particularly as to the *"fit and proper person(s)"* initial and ongoing requirements as referenced in paragraph 5.5.

It is also interesting in relation to determining how some of the key issues of Division 4, Part XI of *the Act*, from a compliance perspective, would be undertaken.

The CBFCA is mindful as to the changes to strict liability offences and the licence Conditions in 2012 and 2015 which were referenced by the DIBP to strengthen the supply chain as to criminal intent. In a manner similar to the *authority to act* issue, the CBFCA would see that the words of the then National Manager Compliance in 2013 would have a similar position in relation to Part X1 of *the Act* in that Part XI would *contemplate* that a person or entity that is licensed to be in the purview and oversight of the DIBP would not only be a resident of, but situated in, the Commonwealth of Australia.

As to this issue it was noted in the outcomes to the meeting between the CBFCA and the DIBP on 7 October 2015, Agenda Item 10, that "*Licensing*

Review will look at the issue of brokers working offshore".

The CBFCA commends this issue to *the DIBP Review* for its close examination, noting not only the regulatory requirement of the DIBP but also those of the DAWR, Office of Transport and Security and Australian Federal Police as to supply chain oversight.

6. NATIONAL CUSTOMS BROKERS LICENSING ADVISORY COMMITTEE LICENSING PROCESS

6.1 Rationale

The current process for persons to become licensed as a nominee customs broker in Australia is a robust one and one which, at the heart of it, sees the National Customs Brokers Licensing Advisory Committee (NCBLAC) playing a role as the "guardian" of customs broking standards for industry. Whilst not disputing that NCBLAC has a vital role to play in the licensing process – and this role is indeed attributed to it under Part XI of the Customs Act – it has become increasingly clear to the CBFCA that the growing role played by NCBLAC in the application process in recent years may not necessarily be leading to optimum outcomes for all stakeholders, including industry and regulators.

In this submission we will be referencing the specific objectives of the *DIBP Review*, which *inter alia* are to:

1. assess the efficiency and effectiveness of the current licensing regimes; and
2. to identify opportunities to reduce the regulatory burden.

The CBFCA as to these aspects provides recommendations for improvement of the licensing process that will hopefully see qualified applicants gaining a licence with minimal delay and without unnecessary bureaucratic interference.

6.2 Expectations of Newly Licensed Nominee Customs Brokers

6.2.1 Principles of Vicarious Liability

In determining whether an applicant for a nominee customs broker licence has acquired experience that would deem him or her fit to be a licensed customs broker, it is relevant to ask "What is the role of a newly licensed nominee customs broker working in a customs brokerage

today?" It is worth restating that this is a licence for a nominee customs broker who will be working in a customs brokerage and not as a sole trader or a corporate licence holder where perhaps a different - and higher - standard should apply. While it may be true that the newly licensed nominee does not need to be supervised by another licensed customs broker, the commercial reality is this will rarely happen in the vast majority of entities. In actuality, most newly licensed nominees work under very strict supervision and are still deemed to be learning their profession on-the-job. Any employer will surely recognise their responsibilities under the principles of vicarious liability to ensure that the newly licensed nominee is well supported in their learning and to ensure they don't step outside of their designated responsibilities. This situation simply reflects good business practice and sensible industrial relations management that avoids imposition of penalties and additional costs to the business. Where supervising employers do not exercise such care and support in the development of the newly licensed nominee, then this should be at their own peril. However it is not reasonable to adopt an unrealistically high standard for newly licensed customs brokers as a means of compensating for those minority situations where poor supervision occurs.

6.2.2 Minimum Standards to Meet the Job Role

The CBFCA maintains the view that there are unrealistic expectations from some in the broking community as to the commercial reality of the role of a newly licensed customs broker. It is fair to say that the applicants presenting for a licence today are different in both their skills and experience to those applicants from 20 or 30 years ago. Quite simply, in a previous era where there was a focus on runners as the entry-level role and where their interaction with customs brokers and with Customs itself was far greater, persons who finally decided they wished to become a broker after say 3, 5 or even 10 years in a subordinate role, clearly brought with them a vast level of experience gained in these previous roles. For some that era predated electronic transfer of data and so young people entering the industry back then had a far greater knowledge of the paperwork and the cargo movement processes then the applicants of today. There is simply no way to replicate that level of experience gained on the wharf and in Customs House by those entry-level clerks of yesteryear. Young people entering the industry now have no such exposure to these processes that gave veteran customs brokers of today such a great start. Despite that fact that with today's young customs brokers may not even see the cargo for which they are processing the barrier clearance formalities one should question whether this makes

them any less worthy of the customs brokers licence in the 21st Century. In the view of the CBFCA there is a need consider the commercial reality of the role of the customs broker today and not attempt to compare that to the role of the customs broker in decades past. Expectations that a newly licensed broker will possess all of the commercial skills of licence brokers with five, 10 or even 20 years or experience is naive and cannot be supported in a modern world. These unrealistic expectations need to be challenged so that the licensing of nominee customs brokers reflects the actual requirements of the role as it is now and not as it used to be. In creating a set of minimum standards that specify the skills and knowledge for newly licensed nominee customs brokers, one need look no further than the required study units for the Diploma of Customs Broking which after all was designed with industry and regulatory input to reflect the role of a customs broker in daily practice. Note that skills and knowledge developed by experienced customs brokers over time in terms of the often unstated "rules of the game" could not be readily taught in a course and must be developed through extensive on-job experience. **Applicants for a nominee customs brokers licence should only be assessed against what they need to know and not the knowledge that they will inevitably gather over time through experience.**

6.3 A Change from the Hearing being the "Default" Requirement

Under the current process, a person seeking to be licensed as a nominee customs broker must meet the following criteria:

- be a fit and proper person
- have completed (or been exempted from completing) an approved course of study
- have acquired experience that fits them to be a customs broker

If the person believes that they meet the above criteria, they are then required to commence the application process. This includes:

1. completing and signing form *B738 application for customs broker licence – nominee*
2. submitting certified copies of:
   (a) academic transcripts and/or exemptions from the approved course of study
   (b) certificates of qualifications or Statements of Attainment from educational institutions (if applicable)
3. supplying three original references including
   (a) two commercial (work) related references from senior managers which provide details of the applicant's acquired work experience with reference to the *Guidelines for Acquired Experience*

(b) one personal (character) reference from a person outside the industry and not a family member. This is to address the claim to be a person of integrity

4. completing and signing form *B195 Consent to Obtain Personal Information* which also requires the applicant to prove their identity

Note: it is not the intent of this submission to focus on the personal integrity and identity checks of the applicants. These are agreed to be a necessary given for the role and the application process.

The focus of the CBFCA's submission is on the efficiency and effectiveness of the licensing process as outlined above. On face value this would appear to be quite a straightforward application process: a person either can provide these documents, or they can't. If they provide the appropriate documents, suitably certified and in sufficient detail, the processing of an application should be effectively an administrative one requiring a simple checklist to tick off that the required documents have been presented and that the documents are sufficiently in-depth and to the standard required. In reality this is far from the case as it would appear that the NCBLAC process often does not accept the documents presented on face value and therefore requires the applicant to be called to attend a hearing almost as a matter of course. In figures provided by the Chair of NCBLAC, [redacted] in an address to the CBFCA's National Conference in October 2015, details were provided that 53 applications for a nominee licence were referred to NCBLAC in 2014 with only two being granted a licence without the need for an interview. In the view of the CBFCA this need to hold a hearing for the other 96% of applicants would appear to be an inefficient and ineffective use of Government resources particularly given that around half the applicants who were asked to present at the hearing were granted a licence as a result of the first hearing anyway.

The CBFCA's view is that this administrative process of licensing needs to be enhanced to the point that a hearing is only necessary when NCBLAC has misgivings or reservations about the data that has been put before it in the application.

In other words, there needs to be a reversal of the current assumption of distrust of the veracity of the application process so that well-prepared, certified, solidly documented applications should not require a hearing. This would streamline and improve the licensing process without any decline in standards. This of course is predicated on the fact that all applications need to meet all the technical requirements such that they provide NCBLAC with all the information they need to make an informed decision about the granting of a licence. Poor applications or applications with insufficient data should

always be returned to the applicant along with a statement that the application will not be considered in its current form and a licence will not be granted unless the application meets these required standards. In effect this is placing the onus exactly where it belongs which is on the applicant themselves to provide a well-prepared and satisfactory application.

Again, it should not be the default position for NCBLAC to call applicants for a hearing. If, as quoted by [redacted] two applicants were able to prepare their applications with sufficient depth and dexterity to satisfy NCBLAC that they did not need to interview these applicants, then why can't more applicants reach the same standard? What is the standard that is required by NCBLAC? What was it about those two applications that made them so convincing to NCBLAC? Was it the way they were presented or was it their contents (or was it both)? [redacted] talks of a "well-presented application" that could "induce" NCBLAC to recommend the grant of a licence without requiring interview. But what does "well-presented" mean? This situation begs the question, if given the opportunity of knowing the standard expected by NCBLAC in an application, would not many more of those other 51 applicants have also had the opportunity to have their application approved without the need for a hearing? The CBFCA understands that there is no specific information provided as to what constitutes an application that NCBLAC will find satisfactory in the first instance. There is of course the published *Guidelines for Acquired Experience for Nominee Customs Broker Licence Application* available from the DIBP website however these guidelines are more quantitative than qualitative in their descriptions. The CBFCA would recommend that NCBLAC provide a pro forma guideline, along with qualitative suggestions, that can be used by applicants in the preparation of the licensing application. This is not to suggest that all applications will look the same as the contents will inevitably be different depending on the experience of the applicant, but at least applicants will be given the best opportunity to present themselves and their experience in a way that will assist NCBLAC to assess their applications and which may mean that attendance at the hearing may not be necessary.

The challenge with having a hearing as a default position, is that the hearing itself is quite an unnatural situation for the applicant. It has been described by the industry member as being "full of emotion" despite the belief by the Committee members that they put applicants at ease during the process. Regardless of the best intentions by the Committee to relax the applicant, anecdotal evidence presented to the CBFCA by previous applicants makes it clear that this is anything but the case. As a result, the hearing makes the applicant insecure in their own abilities with one applicant describing the hearing as a "bombardment of questions". By its very nature such an

environment has the potential to mislead the Committee because it discriminates in favour of those applicants who are confident in such a high pressure situation. While some applicants who attend a hearing are well-prepared and current in the knowledge, many others are not such that a lack of knowledge and skills by the applicant can clearly be exposed in hearing, as it rightly should be. The risk however is that good applicants who have both the requisite skills and the required knowledge plus the demonstrated acquired experience behind them, may simply fail to demonstrate what they know under pressure in a hearing. In this regard the CBFCA believes that such applicants would be better served through the evidence provided in a well-prepared and strongly supported application, without the need for a hearing thereby avoiding any skewing of outcomes through the hearing process.

6.4 Uniformity and Consistency in the Application Process

The CBFCA is concerned that there is a lack of uniformity and consistency in applications received by NCBLAC. This expanding role of NCBLAC from one of "checking" an application (an administrative function) to one of "investigating" applications to determine why there are gaps and chasing up applicants to provide this information or, worse still, bringing the candidate to a hearing to fill in those gaps with all the additional costs of time and resources that a hearing requires (let alone the potential for unintentionally biased and unrepresentative decisions as outlined above).

Again, the CBFCA's position is not that hearings should be eliminated completely but that they should only be required where the application or the experience of the applicant may be deficient and/or needs further investigation. A hearing should not be the norm. In this regard it is critical that all stakeholders: applicants, supervising licensed customs brokers, customs managers and persons in authority fully understand what is required, and their role in providing, a successful application. The CBFCA would recommend that NCBLAC provides resources that support the provision of successful licence applications including:

- a road-show by NCBLAC for the major capital cities explaining the application process and outlining the expectations of a successful application
- information placed on the DIBP website explaining this process
- the provision of sample documents and/or pro forma documents that simplify the application process

The CBFCA would also recommend that the application process be conducted via electronic means to both simplify the process and standardise the submission format. In this arrangement applicants would be able to complete an online form that requires all fields to be successfully completed before the application can be submitted as well as the ability to attach, via file upload, the relevant documents in support of the application. This avoids any perception of opinions of NCBLAC being swayed by a 'well presented application".

6.5 Reliance on Referee Reports

The CBFCA acknowledges the difficulty for NCBLAC of relying upon referee reports. There can well be reasons why an employer so desperately wants one of his or her staff to become a licensed customs broker that they perhaps, even inadvertently, "gild the lily" when it comes to providing a reference for that employee. In other cases, a reference is no more than an opinion about the likability, or otherwise, of the employee amongst his or her workmates. In other words, a character reference when NCBLAC are clearly seeking a reference that relates to the ability of that person to demonstrate the skills and knowledge required of them in practice as a licensed customs broker. In yet other cases, the reference could be deemed to be fraudulent, and deliberately so. If, as CBFCA has recommended, that the granting of a licence – all things being equal – could and should be an administrative process, then NCBLAC must be able to rely on these referee reports.

While NCBLAC can and do run checks on references through phone calls to referees, the CBFCA would argue that it behoves NCBLAC to insist upon a certain standard of referee reports – and perhaps even provide a pro forma for these or an online form – such that a failure to produce the correct information in a referee report makes the application invalid and it is returned to the applicant noted accordingly for rectification. Again, this places the onus on the applicant to produce the information required so that NCBLAC do not need to hold a hearing to further explore any gaps in the references provided. Furthermore, under a system of intelligence-led risk assessment, if licensed customs brokers are meant to be "fit and proper persons" as a condition of their licence, then a reference that is proven to be fraudulent should be considered as a breach of those licence conditions given that the referee has made a false statement to an officer under oath. For example, a referee who states that the applicant has conducted TCO applications and yet this is found to be untrue, has lied under oath and should be called before NCBLAC to explain their actions with a view to some form of penalty being imposed. Will this make references harder to get if there is a responsibility on behalf of the referee to give a truthful statement of the

applicant skills and abilities? It's hard to imagine this would be the case but it should give NCBLAC a greater level of certainty that they can rely upon the data from referees in the application process

In the case of opinion, while this is harder to determine as to the veracity of the statement, the CBFCA believe that ultimately a reference provided by the supervising licensed customs broker should contain a statement to the effect "I believe this applicant has the minimum requisite skills and knowledge to perform the role of a licensed customs broker". As a further failsafe check, NCBLAC may also wish to see the CV of the applicant's supervising licensed customs broker to confirm the level of experience of the person making the declaration. **The objective is to put the onus on the referee to make a clear and unambiguous statement, based on their own experience, about the person making the application for a licence.** Again, this is putting the responsibility back to where it belongs and therefore making the role of NCBLAC in the licensing process far more streamlined.

6.6 A Change to the Makeup of NCBLAC

NCBLAC currently has a panel of three members: the Chair, a Commonwealth member (someone from DIBP) and an industry member. The industry member is nominated by the CBFCA and has the role of bringing to NCBLAC an industry perspective which it is assumed will assist NCBLAC in its deliberations over licensing issues that come before it. In reality, given that neither the Chair nor the Commonwealth member have any experience in the practicalities and commercial realities of the role of a customs broker in daily practice, the opinion of the industry member on NCBLAC provides a far greater proportion of input into areas of acquired experience than just a one third view of the Committee. **The concern of the CBFCA – and this implies no disrespect to current or past industry members – is that the industry member as a single person with their own experiences, opinions and expectations, could in fact unduly influence the outcome of deliberations by NCBLAC, in terms of issues relating to acquired experience.** It is simple logic that no one person can be expected to know everything and no one person can be expected to have had all of the experience across the range of the profession so the industry member relies heavily upon the limitations of their own experience. In the view of the CBFCA, a change to the makeup of NCBLAC will provide far greater scope to bring a wider level of experience to the deliberations over acquired experience. The CBFCA would recommend increasing the panel to five by adding two additional industry members for a total of three industry members on the panel. The ideal profile of these three industry members could be:

- one member who is a licensed customs broker and is either an owner of the customs brokerage or has been an owner of a firm
- one member with at least ten years' experience as a licensed customs broker and who is still currently in practice as a licensed customs broker
- one member who is a licensed customs broker with at least 10 years' experience who has either taught in the customs brokers course or has been actively involved in some way in the education of customs brokers

This blend of personnel on the panel enables the Chair of NCBLAC to draw upon a much greater pool of experience and expertise to assist in deliberations over issues relating to corporate licenses, nominee licences and matters relating to the approved course of study. It should also overcome any issues, based on feedback received by the CBFCA, as to questions on operational issues not being asked at the hearing and allow for more operational questions that are commercially realistic to the current role of a licensed customs broker. These questions need not necessarily be more technical but should be more operationally related and commercially phrased. This broader panel of licensed customs brokers should have the role of making sure the questions are relevant and reflect the reasons for licensing i.e. protection of revenue and protection of the community.

Whilst Government may be concerned about the additional costs that arise from the addition of two additional panellists, it would be hoped, based on suggestions made elsewhere in this submission regarding the need for less hearings by the Committee, that there would be much less need for the panel to meet, or to meet as regularly, or to travel as frequently as has previously been the case. As a result there may actually be cost savings to this process whilst actually substantially improving the outcomes.

6.7 Removal of the Weight Given to a National Examination

The current course of study required under s183CC of the Act is the Diploma of Customs Broking. This course is a nationally recognised course of study delivered by Registered Training Organisations (RT0s) registered by the Australian Skills Quality Authority (ASQA). RTOs are recognised by ASQA as "providers of quality-assured and nationally recognised training and qualifications" (as quoted by ASQA on their website) and are also audited by ASQA to ensure all RTOs are adhering to the very strict set of *Standards for RTOs.*

The CBFCA believes that the rigour of the Diploma-level qualification should now allow NCBLAC to recognise the approved course of study on its own merits without the need to use a post-qualification examination of any sort as a *de facto* means of determining acquired experience. It is the experience of the CBFCA over a number of years of running the National Examination that success in such an examination is not a determinant of the acquired experience of the applicant. In fact, exam candidates with very little industry experience have been able to do exceptionally well in this exam. This demonstrates that such an exam is in fact a measure of the ability of the well-organised examination candidate to complete an examination under time pressure. **There is simply no demonstrable link between a successful result in the national exam and the ability of that candidate to prove they have acquired experience that be fits them to be a customs broker.**

Ironically, despite NCBLAC stating to applicants that it doesn't see the sitting of a national exam, or the passing of one, as being determinative as to whether the applicant does or does not possess the necessary acquired experience, as part of the application process applicants are being asked to state if they have sat a national exam. Given that a national exam is not, and has never been, mandatory this would appear to be a most unusual request on behalf of NCBLAC. Of even greater concern is the fact that applicants who state they have not sat a national exam are being asked to provide a reason why not. With applicants being advised that NCBLAC has the power to compel the applicant to respond to this question, it appears that NCBLAC has yet to recognise the shortcomings of a national examination as a means of determining acquired experience.

In support of the proposition that the more highly structured requirements of the Diploma qualification can now put paid to the need for any further examination post-qualification, it is worth providing detail on the rigour with which Diploma level qualifications are provided under the national training system.

6.7.1 RTOs and Competency-Based Assessment (CBA)

Registration as an RTO is not given lightly and the *Standards for RTOs* are strongly focused on RTOs delivering nationally recognised training to a standard that meets the requirements of all stakeholders in industry including the regulators. A key focus by ASQA beyond the skills, quality and experience of the teaching staff in an RTO, is that the assessment of competencies related to the specific job role are conducted with the highest levels of probity and in line with the expectations of *competency-based assessment* (CBA). In practice, CBA is the highest possible standard

of assessment as it requires a candidate for assessment to demonstrate they possess all of the skills and knowledge relating to that specific job task as assessed within a module of the Diploma. This is a key strength of the vocational education system and differs markedly from the higher education system where a student can pass the test with a grade of 50%. Under CBA in contrast, students are not graded by percentage but are required to meet all of the specified criteria such that one could make the comparison that meeting all of the skills and knowledge criteria under assessment is equivalent to achieving a 100% passing grade. RTOs are audited against their ability to provide CBA effectively and any RTO that was found under audit to have assessed their students using anything less and the criterion-based CBA would be in breach of the requirements and would be subject to a non-compliant rating.

6.7.2 Involvement of DIBP and NCBLAC in Diploma Development

It is worth noting that in the development of the Diploma of Customs Broking representatives from the (then) Department of Customs and Border Protection (Customs) were an integral part of the Steering Committee that created the Diploma under the guidance of the Transport and Logistics Industry Skills Council (TLISC). The CBFCA was also a member of that Steering Committee and was witness to the many robust discussions led by representatives from Customs to ensure that the course of study met the needs of the regulator in terms of both content and standard. It is also worth noting that the industry representative on NCBLAC also either attended these Steering Committee meetings or was kept actively engaged as to the contents of the discussions by the TLISC. In this regard then both the DIBP and NCBLAC should be of no doubt of the validity and reliability of the Diploma of Customs Broking in terms of its reflection of industry standards.

In the opinion of the CBFCA, NCBLAC should be able to have a very strong level of confidence that persons who have completed the Diploma of Customs Broking have already had significant exposure to the key skills and knowledge and have been assessed to an extremely high standard. **The Diploma of Customs Broking is not a theoretical course alone.** It is instead a workplace-focused, highly structured, scenario-based course of study that relates directly to the role of a licensed customs broker. It is does not purport to demonstrate acquired experience although most successful students in the course are currently employed in a customs broking firm.

The CBFCA believes that the rigour of the delivery and assessment of the Diploma of Customs Broking should provide NCBLAC with the comfort of knowing that graduates have the minimum skills and the knowledge that fits them to undertake the role of a licensed customs broker. As a result, further examination post-qualification is completely unnecessary and any reference to a National Exam as a form of evidence of acquired experience should be considered totally obsolete in the modern setting. Quite simply, acquired experience cannot be determined by an examination and needs to instead be attained on the job. The use of an examination result as evidence in the application process potentially skews outcomes towards those who sat an examination and especially those who are skilled at examinations. The CBFCA believes exams no longer serve any useful purpose and that the focus should be on actual experience acquired in the workplace.

6.8 Acquired Experience Through a "Professional Year"

The CBFCA recognises that the definition of what comprises "sufficient" acquired experience is a difficult one and one that rightly occupies the time of NCBLAC in the application process. Experience needs to be defined in both qualitative and quantitative terms and cannot simply be a case of "time served "without some expectation of tasks being complete and experience being gained. There is a role for employers in terms of the level of support they provide to their intending customs brokers but in some cases, applicants may have been working for a number of years in a customs brokerage but have had little or no experience as classifiers/compilers. Instead they have been performing other tasks within the brokerage that have not added to their acquired experience as required under the Act. Conversely, other applicants – often those in smaller firms – have been exposed to a range of experience as "all-rounders" from day one.

6.8.1 Logbook

While well-structured references from employers (especially Customs managers) may be able to detail the breadth and depth of experience of the applicant, often other applicants may not be so readily able to quantify their experience. With this in mind, the CBFCA proposes that there be a standardised 12-month period after the intending customs broker has graduated the approved course of study before that person can be eligible for a customs brokers licence. **During this period the intending applicant must be working as a classifier/and under the direct supervision of a licensed customs broker**. We recommend they must also complete a logbook attesting to experience acquired across a

range of duties of a customs broker as provided in the *Guidelines for Acquired Experience.* Ideally the intending applicant should have had sufficient experience that they can effectively perform all the core tasks of a licensed customs broker, except lodge the declaration.

6.8.2 Mentoring

Where the intending applicant cannot provide evidence of a particular task within the *Guidelines* due, for example, to the fact that their employer may not have exposure or clients in this area, any intending applicant may need to seek out a recognised mentoring program. The form and structure of such a mentoring program will need to be explored in detail with input from a number of industry stakeholders including employers, educators as well as regulators.

6.9 CPD in the Professional Year

To ensure that all intending applicants can demonstrate currency in the skills and knowledge, the CBFCA proposes that all such persons undertaking professional year should complete 30 points of continuing professional development in line with the expectations of licensed customs brokers. Entities who provide CPD to licensed customs brokers would hopefully provide this CPD free of charge to intending licence applicants in their professional year thereby removing any barrier by the applicant for completing CPD.