Review of customs licensing regimes –

Customs Brokers

This submission is made by the Chair, Industry Member and Deputy Industry Member of the National Customs Brokers Licensing Advisory Committee (NCBLAC). The Commonwealth Member of NCBLAC is not a signatory to this submission solely to avoid any possibility of an apparent conflict of interest with that person's concurrent duty as an officer of the Department of Immigration and Border Protection (the Department).

This submission deals only with the licensing of customs brokers. As NCBLAC has no direct role in the licensing of depots and warehouses, the NCBLAC members will be making no submissions in relation to those aspects of the review of customs licensing regimes.

Please note that, in this submission, we have used the term "entry" in a generic sense to cover all formal interactions between a customs broker and the Comptroller-General of Customs or the Department – that is, the term covers not only a Full Import Declaration but also other matters such as applications for refund or drawback of duty, request for tariff advice or valuation advice, applications for new Tariff Concession Orders, etc.

Introduction

Ensuring that a customs entry for goods is legally and factually correct in all respects is a complex task and the potential consequences that may flow from an incorrect entry can be grave.

While rates of duty have greatly declined over the years and the increasing availability of free trade agreements has meant that higher proportions of goods may be imported free of duty with the consequence that the proportional contribution of customs duty to overall Commonwealth revenue is now much lower that at earlier times, import controls are increasingly used for community, environmental protection and similar purposes – for example, recent legislation affecting the importation of asbestos or goods containing asbestos, and requiring that timber and timber products be sourced sustainably.

Even where there is no potential detriment to the revenue, community or other common interests in an incorrect entry, an importer may be significantly disadvantaged in the conduct of their business if an incorrect entry means that they pay more duty than is legally necessary or that they import under less advantageous conditions than they might otherwise do.

Preparing an entry that complies with all import-related applicable laws requires a high level of skill – both in the knowledge of those laws and in their practical application – and it requires constant updating of those skills to accommodate ongoing changes to import-related law and practice. For example, while reducing or eliminating the duty burden, it could be said that the current preponderance of FTAs has increased the complexity of compliance for licensed customs brokers and their importer clients, rather than relieving it.

Few owners of goods possess those skills, or can afford to maintain their own expert staff. For this reason, most importers engage the services of a customs broker to prepare and process their customs entries and related transactions.

The Department does not have, and realistically will never have, the vast resources that would be required to examine all importations to the degree necessary to ensure that their importation was in full compliance with all relevant laws. Accordingly, the Department is inherently dependent upon the honesty and expertise of customs brokers to assist it in meeting its obligations for the protection of all the interests that Australian import regulation is designed to protect.

It is the view of this submission that abandoning the regulation of customs brokers would be not only a retrograde but also an indefensible step.

That is not to say, however, that the present licensing regime for customs brokers is necessarily optimal and cannot be improved. The balance of this submission therefor e considers what changes should desirably be made to the present regime.

Key qualities of a customs broker

Under the present regime, a broker licence may only be issued where the applicant meets (either themselves or through their employees) three essential preconditions:

- They must be a fit and proper person;
- They must have completed (or been exempted from the requirement to complete) a prescribed course of study; and
- They must have the acquired experience that fits them to be a customs broker.

It is the view of this submission that these criteria are precisely apposite and should be retained:

- The potential for fraud and other criminality is so great that a broker's honesty and credibility is essential for the proper administration of the law. To delete that requirement would be incomprehensible.
- The complexity of relevant law is so great that a high degree of knowledge is essential. Formal educational requirements offer some assurance that a licence applicant has the requisite degree of knowledge, the possibility of an exemption being granted where that degree of knowledge has been otherwise obtained (e.g., through on-the-job training or through attainment of other academic qualifications) is sensible.
- Mere knowledge of the law is however not sufficient to ensure that a broker can effectively and efficiently work within the law and the administrative regimes that exist for its implementation. NCBLAC frequently encounters licence applicants who have sound academic knowledge but no demonstrable capacity to apply that knowledge because they lack relevant experience. An adequate level of experience of suitable depth and breadth is essential to provide some assurance that a broker, once licensed, will not prove to be an unacceptable risk to the Commonwealth the community and their clients.

Licensing, accreditation, etc.

In some professions, suitably qualified and experienced practitioners are not said to be "licensed" but rather they are "accredited", issued with a "practising certificate" or recognised in some other way.

However, these distinctions are essentially just matters of terminology. Accreditation, certification and other forms of recognition are just licensing by another name.

While it would of course be possible to adopt different terminology to that currently used in respect of customs brokers (such as "certified customs broker"), this would by itself achieve no practical effect.

It is the view of this submission that it would be undesirable to denigrate the proud history and tradition of licensed customs brokers by adopting some alternative terminology for no benefit other than semantics.

The licensed entity

Under the present regime, broker licences can be issued to:

- Companies and partnerships; or
- Natural persons as either:
    - A sole trader; or
    - A nominee broker, who may only act as a broker when employed by a corporate license holder or a sole trader license holder.

Conceivably, this structure could be changed so that licences were issued only to the natural persons who actually lodge entries whether on their own behalf as sole traders or as employees of another entity). In the view of this submission, this would be a retrograde step for two fundamental reasons:

- Under general employment law, an employer has a power to direct the manner in which their employees perform their duties. It is a fundamental precept of the current regime that that employer/employee relationship is tempered so that the employer of a licensed broker cannot direct that broker in the performance of their statutory obligations to lodge an entry that is in all respects correct and not misleading. Licensing employing brokerages provides some assurance that employers understand this limitation on their power of direction and face some consequence if they transgress. It should not be assumed that all licensed employees would have the fortitude to defy an employer direction when to do so could place their employment and livelihood at risk.

- Employers also bear vicarious liability for the actions of their employees. In the present context, this extends to providing supervision and control designed to ensure that their licensed employees meet their statutory duties and do not lodge incorrect entries through either incompetence or deceit. Because licensed employees operate in a complex technical environment, providing the requisite degree of supervision and control requires greater import-specific awareness and understanding than is required for the supervision and control of other general employees. Licensing employing brokerages provides some assurance that they possess this awareness and understanding and face some consequence

if they fail to exercise it. . Indeed it can be argued compliance activity in relation to corporate brokerages should be increased to ensure that they are taking appropriate steps to ensure their vicarious liability responsibilities are being carried out.

Alternatively, the structure could be changed so that only companies, partnerships and sole traders were licensed and it became their responsibility to ensure that the individuals they employed to lodge entries on their behalf were fit and proper persons and appropriately educated and experienced. It is the view of this submission this too would be a retrograde step. It is noteworthy that all nominee licence applicants present NCBLAC with at least two references from present or past employers attesting (or purporting to attest) that the applicant has the degree of experience that is required of a licensed broker. Despite this, after interviewing the applicant, NCBLAC finds that around 50% or applicants have an inadequate degree of experience and that the references provided are not reliable as a test of relevant experience. This may be for a variety of reasons:

- some references are really just character references – e.g., "she is an enthusiastic worker who is popular with our staff and the clients with who she deals";

- some references only address the question of experience with bald assertions but no detail or substantiation;

- some references have very obviously been written by the applicant themselves and simply signed by the licensed broker without any critical review – typographical errors, stilted expression and strange phrases that mirror the applicant's own documents really are a dead give-away;

- some applications are written in ambiguous and apparently guarded terms that suggest reservations – e.g., "I am sure he will make a fine broker" says nothing about whether he is ready to be licensed today - there are occasions on which it seems that referees have just left it to NCBLAC to give their staff the frank and disappointing assessment that they share but are not prepared to convey personally;

- and sometimes it may be that the referee is just focussing on what they have observed the applicant doing to their satisfaction in what might be a quite limited range of broker-like activity but has not really cast their mind to how the applicant would cope if confronted with broker-like activity outside their direct experience or the scope of their usual duties in their employing brokerage.

It is thus the view of this submission that, for whatever reasons, relying on employing brokerages to determine whether an individual has the requisite skills and experience to operate as a broker would risk a significant loss of quality assurance and likely lead to a higher level of incorrect entries, not all of which the Department would be adequately resourced to detect and remedy before detriment was caused to the public interest.

Accordingly, it is recommended that licences should continue to be required for:

- Companies and partnerships; and

- Natural persons as either:

    - A sole trader; or

- A nominee broker.

It has at times been suggested that these nominee licences should be able to be issued in two distinct classes:

- A Probationary Licence, which would limit the broker activities the holder could undertake for a period of, say, 2 years; and

- A Full Licence, which would be issued only after the probationary period had been satisfactorily served.

While superficially attractive, this submission does not favour this approach for a number of reasons:

- It would be effectively impossible to satisfactorily identify the categories of entries that a probationary licensee should be able to handle and those that they should not be able to handle;

- The alternative of requiring that all entries prepared by a probationary licensee be approved by a full licence holder before lodgement would simply replicate the present regime under which unlicensed compiler/classifiers can "pre-podge" entries which are then lodged by a licensed broker after checking; and

- Assessing whether the probationary period had been satisfactorily served would require a further regulatory intervention.

Who should issue licences?

Under the present regime, licences are issued by the Comptroller-General (or a delegate), but only after receipt of a recommendation and report from NCBLAC which assesses all licence applications.

There are other optional structures that could be considered:

- NCBLAC could be abolished and the licensing function could reside entirely within the Department;

- The licensing power could be transferred from the Comptroller-General and vested instead in an industry self-regulator; or

- NCBLAC could be renamed the "National Customs Brokers Licensing Committee (NCBLC)" or similar, and reconstituted as the decision-maker in lieu of the Comptroller-General.

It is the view of this submission that it would be undesirable to adopt the first option. This would deprive the broking industry, as a key stakeholder, of any formal role in the licensing process. It is NCBLAC's experience that the industry member on each panel brings a valuable insight and expertise into the process for assessing the experience of licence applicants. Assessment of experience is a complex issue and needs to consider issues extending far beyond "time served".

Similarly, the second option would deprive the Commonwealth, as the predominant stakeholder, of a formal role in the licensing process. The quality and performance of customs brokers is of such

criticality to the capacity of the Department and the Comptroller-General to acquit their responsibilities for the proper administration of the laws.

Historically, the former Chief Executive Officer of Customs or the present Comptroller-General have accepted NCBLAC recommendations to grant or not grant customs broker licences – it is understood that, some years ago, a single recommendation not to grant may have been rejected and a nominee licence may have instead been granted, but so far as NCBLAC is aware this is the only instance. In these circumstances, it is appropriate to ask what added quality assurance is given by requiring a delegate to formally adopt each NCBLAC recommendation. Reconstituting NCBLAC as the decision-maker rather than as a recommendatory body would eliminate some "red-tape" and speed up and streamline the licencing process, albeit only a little. [If this model was adopted, it would however still be desirable for the Comptroller-General to be empowered, as now, to suspend an existing licence pending investigation and disciplinary action review by the reconstituted NCBLC.]

It is the view of this submission that, unless there are compelling reasons to retain the Comptroller-General as the decision-maker, preferably the third option should be adopted or, if not, that the present arrangements should be retained.

Committee membership

NCBLAC currently comprises:

- In independent chair (who must either be or have been a magistrate, or who otherwise possesses special knowledge or skill in relation to the matters within the role of the Committee);

- A member to represent customs brokers (who is either the Industry Member or the Deputy Industry Member); and

- A member to represent the Commonwealth (who is an officer of the Department).

It has from time to time been suggested that Commonwealth entities in addition to Customs/the Department should be represented on NCBLAC. Clearly, many other Commonwealth agencies are stakeholders in the functions performed by customs brokers – notably the agency responsible for quarantine, but also numerous others such as the environment agency, the transport agency, the therapeutics goods agency, the veterinary chemicals agency, the asbestos agency, etc., etc.

If NCBLAC focussed only on customs-related matters in its assessment of licence applicant, the case for other agencies to have formal membership of NCBLAC would have some real merit. However, NCBLAC is not so limited in its approach - it actively and routinely assesses licence applicants for their knowledge and experience across all areas of import-related regulation, and not just those administered directly by the Department.

To add additional Commonwealth representatives to NCBLAC would, in the view of this submission, be unnecessary and needlessly expensive.

It might also be suggested that industry should have greater representation on NCBLAC, either by adding representatives from other industry sectors (such as freight forwarders) or by increasing the number of broker representatives that participate on each panel.

It is the view of this submission that neither course of action would be desirable. As to the first, it is customs brokers who are regulated rather than sectors such as freight forwarders and, while the

various sectors must interact and work well together, customs broking is a separate and distinct professional discipline. As to the second, given that it is the Department and the Comptroller-General who are the primary stakeholders in the licensing of customs brokers, there appears to be no good reason why brokers should have any greater number if representatives on NCBLAC than the Commonwealth.

It is noted that some other occupational bodies, such as those listed in Attachment D to the Department's discussion paper, have more members than NCBLAC. But that of itself provides no necessary argument for increasing the number of NCBLAC members. The present composition ensures that both key stakeholders are represented and NCBLAC experience is that decisions are made by consensus and without sectional disagreement.

Finally, it is the view of this submission that it is desirable to retain an independent NCBLAC chair who is able to both contribute to the substantive discussion of matters before the Committee and provide direction and guidance on compliance with the principles of procedural fairness.

NCBLAC functions

In addition to assessing all applications for new broker licences, NCBLAC has the additional roles of advising the Comptroller-General on:

- The approval of courses of study for customs brokers;
- When so requested by the Comptroller-General, the standards that customs brokers should meet on the performance of their duties and obligations as customs brokers; and
- Disciplinary action that should be taken or not taken against licensed brokers.

The first of these additional functions arises only occasionally but is important and vitally connected to the licensing process. In recent times, the approved course of study has been ungraded from Certificate IV to Diploma status, in consultation and with the support of industry stakeholders. By interviewing licence applicants who have completed the approved course, NCBLAC is well placed to identify any shortcomings in the course as structured or delivered from time to time.

So far as the authors of this submission are aware, NCBLAC has not been called upon to exercise the second function above, but it nevertheless seems appropriate (and see the comments below about a Code of Conduct for licensed brokers).

The third function is not performed often but is vital. Licences once issued cannot be allowed to remain in force in perpetuity and must be able to be conditioned, suspended or revoked where unacceptable broker conduct is identified. At the same time, independent NCBLAC examination of that conduct and of the appropriate response provides important procedural fairness to the brokerage or broker concerned. With the increasing Departmental focus on compliance, this is a key NCBLAC function that should be retained.

It is the view of this submission that each of these additional NCBLAC functions should be retained.

Operation of the present regime

NCBLAC has developed and evolved its methods of operation over time in an endeavour to provide greater clarity and transparency for licence applicants:

- It has issued guidelines for applicants to explain what documentation is required to constitute a valid application;

- It has issued guidelines for applicants to assist them to address relevant issues in making written or oral submissions on the factors that are considered when assessing acquired experience;

- It has issued guidelines for referees to assist them in preparing references in support of licence applicants;

- The NCBLAC Secretariat assesses all incoming applications for completeness and coverage and, as appropriate, suggests that applicants provide additional material in support of their application before consideration by the Committee;

- To avoid undue delay the Committee is prepared to interview applicants before the results of "fit and proper person" integrity checks are available (with final recommendations of course not made until those checks are finalised);

- More recently NCBLAC has adopted new and enhanced statements of reasons for recommendations that are adverse to an applicant, to provide far greater explanation of the reasoning underlying such recommendations and suggestions as to the areas in which applicants need to direct attention before making a further application.

NCBLAC has not received any adverse comment on these guidelines and processes but would welcome and fully consider any feedback that might be received in the course of the current review.

Timeliness of licence application processing is an important consideration. It frequently takes a number of months from application to decision. But there are limited opportunities to compress this process:

- Applications once received must be assessed for completeness and coverage – the Secretariat does this as speedily as its resources permit;

- Fit and proper person integrity checks take time and are dependent on priorities and workloads in other agencies;

- NCBLAC members examine every application to assess whether a favourable recommendation can be made "on the papers" or an interview is required , and generally do so within few days of receiving the papers;

- Current NCBLAC members make themselves available for interviews at quite short notice;

- Applicants, when offered an interview, not infrequently request a delay;

- Direct contact with referees, where required, is usually made within 1-2 days if interview being held;

- Recommendation reports are draft by the Secretariat, reviewed by the Chair and considered and amended or adopted by all Members as soon as possible after interviews are held; and

- Reports are understood to be generally considered by delegates within a short time after receipt.

As noted above, reconstituting NCBLAC as the decision-maker would streamline the process a little, but it must be recognised that it would not make a major change to the time taken.

It is noted that the Department's discussion paper has invited comment on a variety of other issues related to the current application process, such as whether or not the application forms require the provision of information or documentation that is difficult to provide. NCBLAC would welcome feedback on these issues also and would be keen to implement or support any appropriate changes that may appear to be desirable or necessary.

Attached to this submission is an extract from an affidavit prepared for a recent hearing before the Administrative Appeals Tribunal that provides some greater detail about the way in which NCBLAC acquits its function.

Suggestions for change

As will be apparent from the above, it is the view of this submission that the present broker licensing regime strikes pretty much the right balance:

- A regime for the formal recognition of persons entitled to act as customs brokers is necessary;
- The current criteria for the grant of recognition (fit and proper, education and experience) are appropriate and adequate;
- The current licence categories (corporate, sole trader and nominee) are correct and should not be reduced;
- The current membership structure of NCBLAC is appropriate and does not need to be augmented; and
- The current roles of NCBLAC are appropriate and should not be curtailed.

Nevertheless, this submission does recommend a number of changes:

- The Customs Act does not make clear the purpose of broker licensing. It is assumed by many to be solely for the protection of the Commonwealth Revenue. But there are broader and increasing more important reasons that, it is submitted, should be reflected in the Act. It is suggested that the Act be amended to make clear that the purpose of broker licensing is to foster persons who are able to process the importation or exportation of goods on behalf of their client:
    - at no unacceptable risk to the Commonwealth revenue;
    - at no unacceptable risk to the Australian community in relation to the many restrictions on importation; and
    - without causing their client to unknowingly bear any avoidable cost of importation or exportation.
- As noted above, the Act in section 183D makes reference to "the standards that customs brokers should meet in the performance of their duties and obligations as customs brokers" and allows for the disciplining of customs brokers for unacceptable conduct. To bring

greater clarity to these issues and to better enable brokers to understand what is expected of them, it is suggest that the Act should either:

- Set out a Code of Conduct for customs brokers; or

- Empower the Comptroller-General to determine such a Code of Conduct (after receiving advice from NCBLAC under section 183D(2)(d) and appropriate industry consultation).

Having such a Code would not only reinforce the professional nature of customs broking but would also be consistent with practices in a number of other regulated professions.

Of these two options, the authors favour the second as this would facilitate ongoing updating of the Code in light of experience with it without the need to secure parliamentary agreement to amendment of the Act for that purpose.

- In recent years, with the advent of Continuing Professional Development for licensed brokers, NCBLAC has played a role in the development of that system and in the assessment of CPD activities submitted to the Comptroller-General for accreditation. While the CPD scheme is not within the scop e of the present review, it is suggested that section 183D(2) of the Customs Act should be amended to reflect this role amongst the statutory functions of the Committee.

- Section 183DD of the Act appears to contemplate that the Deputy Industry Member should act only when the Industry Member is unavailable to attend a NCBLAC meeting. In the interests of economy, it is suggested that the provision be amended to make clear that the Chair can direct which Industry Member is to act at any time, this allowing a Member to be deployed at no or lower cost in airfares, etc.

- Section 183CQ of the Act specifies the various disciplinary actions that can be taken where unacceptable broker conduct is detected. Separately sections 183CGA and 183CGB allow the Comptroller-General to add or vary licence conditions. It is suggested that section 183CQ be amended to put beyond doubt the capacity of NCBLAC to recommend that licence conditions be added or varied as an alternative action following a disciplinary referral and investigation.

- Section 183CQ(4) requires that, where the Comptroller-General suspends a licence, the matter of disciplinary action should be referred to NCBLAC “forthwith”. This is a very demanding requirement and any delay, no matter how reasonably necessary from a practical perspective, raises the risk that referral and subsequent action might be judicially challenged for non-compliance with that provision. It is thus suggested that, to moderate this risk, the Act be amended to require that referral occur “as soon as practicable but no later than within 30 days”, or similar.

- In the course of considering a licence application, it is not unprecedented for NCBLAC to identify unacceptable broker conduct which, after providing the broker concerned with procedural fairness rights, it may resolve to refer to the Comptroller-General. In those circumstances, the Comptroller-General would be unable to take any disciplinary action without referral back to NCBLAC. This seems to be an unnecessary second NCBLAC consideration and report process. The Act could be amended to remove this requirement.

- Section 182 has caused considerable confusion amongst brokers. It is suggested that it be amended to require that:
    - a broker cannot act for an importer unless they have a written letter of authority; and
    - a letter must specify the licensed brokerage or licensed sole trader that is authorised to act and cannot simply specify that an unnamed broker who is appointed by a freight forwarder or other third party is so authorised.

Other issues

The preceding sections address many but not all of the questions raised in the Department's discussion paper. In this section, therefore, we address those outstanding questions:

- *Whether the criteria to meet the 'fit and proper' requirements for customs licences are appropriate and meet the Government's objectives.*
- *Whether the requirement to meet fit and proper person requirements for both customs and biosecurity purposes is burdensome for persons or companies involved in the importation of goods into Australia.*
- *Whether a single or combined fit and proper person requirement could be developed and applied, which meets and is accepted, for both customs licensing and biosecurity purposes.*
- *If the current licensing regime is not retained, how any alternate model would ensure that fit and proper person requirements are met.*

    The requirement that a person be fit and proper addresses issues such as honesty, criminality and past conduct. A person that is fit and proper for one context will generally be fit and proper for another context, unless subsequent events have intervened. There may thus be some administrative scope for sharing (with consent of the individual) the results of fit and proper testing across agencies.

- *Whether any of the requirements for the grant of a licence are considered to be unnecessary or impose an unreasonable burden on the applicant*

    So far as the statutory requirements for broker licensing are concerned, no.

- *Whether there should be recognition of any other industry or government standards as alternatives to meeting the specified licensing requirements*

    So far as broker licensing is concerned, no. The specific roles and functions of customs brokers are so specific as to require the current specific standards. At the same time, of course, licensed brokers may also require additional recognition such as quarantine accreditation to undertake the full range of services they offer to their clients. But such additional forms of

recognition cannot be a proxy for or an alternative to meeting the broker licensing requirements of education and experience.

- *Whether there are any licence conditions considered to be unnecessary or impose an unreasonable burden on licence holders.*
- *Whether there should be any improvements or alternatives to the imposition of licence conditions.*

It is the view of this submission that the standard broker licence conditions set out in section 183CG of the Customs Act and the additional licence conditions routinely added to all licences by the Comptroller-General are all appropriate and should continue, subject to the following qualifications:

- The condition requiring that a broker must advise the Comptroller-General when they become aware that "information has been provided to the Department by or on behalf of a client of the broker is false, misleading or incomplete" is drafted in problematical terms and should be redrafted to provide greater clarity, precision and guidance; and

- Corporate and sole trader licences should be issued subject to a condition that the licensee obtain and maintain suitable professional indemnity insurance for the protection of their clients and the Commonwealth.

- *Whether securities should also be required and taken from applicants for a depot licence and/or a customs broker licence*

Section 183CK of the Customs Act allows the Comptroller-General to require a licensed broker to provide a security. This appears to be an adequate power for use on an as-required basis. NCBLAC does not perceive any need for security to be required from all licence-holders or any generic sub-category of them (especially if the above recommendation that a licence condition requiring professional indemnity insurance is implemented).

- *Whether the duration of licences should remain the same, or be changed.*
- *Whether the duration of all licences should be standardised. If so, what the standard period should be.*
- *Whether licence renewals should be done in bulk rounds or on an ongoing basis.*

The Customs Act currently provides that broker licences have a term of up to three years and all expire on a common date, at which they may be renewed. It is the view of this submission that a three year period is appropriate, particularly as a mechanism for verifying that the licence holder has met their CPD licence conditions. At the same time, we have no strong view on whether all licences should expire on a common date, whether they should be grouped to expire on staggered dates, or whether each should expire on the third anniversary of grant.

- *Whether there should be a statutory timeframe for the granting of a customs broker licence.*

  As noted above, the licensing process takes several months and there is not any great opportunity to abridge that period. Given that applications are dealt with on a timely basis within necessary constraints and subject to delays caused or requested by applicants themselves, it is not apparent that there would be any advantage to setting a statutory time limit for decision-making. If such a time-limit were set, it would however need to allow sufficient time for all necessary processes to be undertaken within the ordinary course of business, and the consequence of a failure to meet that time limit would need to be specified. We would strongly oppose a provision that deemed a licence to be granted if a decision were not taken within the specified time. We would be less resistant to a provision that allowed an appeal to the AAT if a decision were not taken within the time limit.

21 December 2015

ATTACHMENT

WITNESS STATEMENT BY [redacted]

[redacted]

2. ….

3. The purpose of this statement is to provide … factual background about:

   3.1. the Committee;

   3.2. the framework for licensing of customs brokers; and

   3.3. in particular, the processes the Committee follows in considering applications from persons seeking to be licensed as a nominee customs broker.

4. ….

The Committee and its Members

5. The Committee is established under section 183D of the *Customs Act 1901* (the Act). It comprises three members appointed by the CEO:

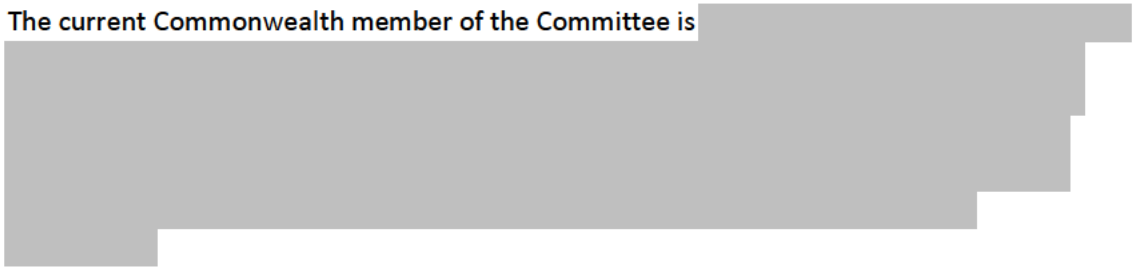
   5.1. the Chair;

   5.2. a member to represent customs brokers; and

   5.3. a member to represent the Commonwealth.

6. There are currently two members of the Committee appointed to represent customs brokers, each of whom were nominated for appointment by the Customs Brokers and Forwarders Council of Australia, Inc:

7. The current Commonwealth member of the Committee is



Licensing of Nominee Customs Brokers

8. Licences are issued by the CEO in three categories:

   8.1. a corporate customs broker licence may be issued to a company or partnership which, once licensed, must conduct its broker activities through natural persons who are licensed as customs brokers and nominees of it;

   8.2. a nominee customs broker licence may be issued to a natural person, thereby entitling them to conduct broker activities as a nominee of a corporate customs broker licence holder; and

   8.3. a sole trader customs broker licence may be issued to a natural person, thereby entitling them to conduct broker activities on their own behalf.

9. Sections 183CC(1)(A) and (2) of the Act have the effect that, to be licensed as a nominee customs broker, a person must:

   9.1. be a fit and proper person;

   9.2. have completed a course of study approved by the CEO (or be exempted from that requirement); and

   9.3. have "acquired experience that, in the opinion of the CEO, fits the applicant to be a customs broker".

10. While applications for licences are lodged with the CEO and while licences are issued by the CEO, section 183CB of the Act provides the CEO cannot issue a licence before referring the

application to the Committee and receiving and considering a report from the Committee. On receiving such a referral, the Committee is required to investigate and report to the CEO on the matters the CEO is required to consider.

11. The course of study approved by the CEO is the Diploma of Customs Broking TL150813. This course is currently offered by six educational providers: the Customs Brokers and Forwarders Council of Australia Inc; APC Logistics; TAFE NSW; Holmesglen Institute of TAFE; Kangan Institute; and myfreightcareer.

12. For many years the Customs Brokers and Forwarders Council of Australia, Inc has conducted twice yearly what it terms a "National Examination". More recently, the firm myfreightcareer has offered an examination which it has named "Customs Broking Experience Assessment". These examinations are NOT part of the approved course of study and are quite separate from it. Their purpose is to assist in the assessment of whether or not a person wishing to apply for a nominee licence has the acquired experience that fits them to be a customs broker. A score of 70% or better is required to pass each of these examinations. However, neither sitting nor passing one of these exams is a pre-requisite to the grant of a licence. …

13. A result in either of the currently offered examinations is regarded by the Committee as a relevant but not decisive consideration in determining whether it is satisfied an applicant has sufficient acquired experience. This reflects the Committee's view that, while it may readily be used to test knowledge, a written examination is not necessarily a compelling tool in assessing acquired experience. Licences have been granted on the Committee's recommendation to persons who have not passed or even sat either of these examinations, where the Committee was satisfied those persons had appropriate acquired experience. Conversely, licences have been refused on the Committee's recommendation to persons who have passed one of these examinations but where the Committee considered these persons nevertheless did not have sufficient acquired experience.

14. The National Examination offered by the Customs Brokers and Forwarders Council of Australia, Inc has a long history and the Committee has had the opportunity over the years to assess some hundreds of applicants who have sat that examination. In contrast, the myfreightcareer Customs Broking Experience Assessment has only been offered since November 2013 and the Committee has accordingly had the opportunity to assess only a small number of applicants who have sat that assessment. For these reasons and at this stage in its evolution, the Committee is more comfortable in assessing the weight to be attributed to a particular score attained in the National Examination than the same score in the myfreightcareer Customs Broking Experience Assessment. Notwithstanding, the Committee views the results in either as relevant in assessing "acquired experience".

Committee process for investigation of a nominee licence application

15. There is a prescribed form of application for a nominee broker licence …. The Committee has prepared Guidelines to assist applicants in completing that form and in preparing other documentation in support of their application …. The Committee has also prepared Guidelines to assist applicants preparing submissions in relation to their acquired experience and licensed brokers preparing references in support of an applicant for a nominee licence ….

16. The Committee is supported by a Secretariat within the Australian Customs and Border Protection Service, Canberra. Upon receipt of an application for a nominee licence, the Secretariat conducts some initial checks for the Committee including:

    16.1. assessing whether all requirements of the prescribed form have been met, and following up with the applicant as required;

    16.2. arranging for police and other integrity checks relevant to assessing whether an applicant is a fit and proper person to be licensed; and

    16.3. considering whether the applicant has provided any or sufficient relevant material in support of their claim to have the requisite acquired experience. Where the Secretariat considers that the material provided is clearly deficient, it will invite the applicant to augment their application by providing additional information or references.

17. The Secretariat then refers the application and supporting documentation to the three members of the Committee, and the members indicate whether:

    17.1. they are prepared to recommend on the strength of those papers that the CEO issue a licence without the need for any further investigation; or

    17.2. they desire to interview the applicant before deciding upon a recommendation to the CEO.

18. Of the three essential requirements for the grant of a licence:

    18.1. it is rare that there is any issue about whether an applicant is “fit and proper”;

    18.2. requests for exemption from the requirement to complete the prescribed course of study are made, but are uncommon; and

    18.3. therefore most interviews focus on the applicant’s acquired experience.

19. Where interviews are held regarding an applicant’s acquired experience, as in this matter, the Committee is keen to ensure that the atmosphere is as non-threatening and non-intimidating as possible. The Committee recognises that many applicants are extremely nervous, and seeks to put them at their ease – often with some light-hearted conversation. Breaks during interview are offered where it is felt this may assist an applicant to re-compose themselves. Questions are re-phrased, if necessary, to ensure that the applicant understands the nature of the issue being raised with them and is not confused by terminology. Where a question is apparently well understood but an answer is not forthcoming, the Committee frequently provides some prompting in an endeavour to assist the applicant to reveal relevant information that they might otherwise not disclose.

20. In assessing acquired experience of an applicant after an interview, the Committee has regard to all the relevant material it has, which includes:

    20.1. the applicant’s written application and supporting documentation in which they describe their relevant experience;

    20.2. the applicant’s response at interview to the Committee’s invitation to describe the breadth and depth of their experience of broker-like activity;

    20.3. the content of written references provided by referees familiar with the applicant’s work performance and, when sought by the Committee, any additional oral comments provided by those referees;

20.4. the applicant's work history and, in particular, the length of service in and range of duties of relevant positions they have held;

20.5. the applicant's academic achievements, both in the approved course of study and in any other relevant degree, diploma or other studies;

20.6. the results achieved by the applicant in any National Examination or Customs Broking Experience Assessment examination which they have sat; and

20.7. the applicant's responses to questions and hypothetical scenarios put to them during the course of the interview.

21. It is the view of the Committee that a licensed broker should be able to process the importation or exportation of goods on behalf of their client:

21.1. at no unacceptable risk to the Commonwealth revenue;

21.2. at no unacceptable risk to the Australian community in relation to the many restrictions on importation; and

21.3. without causing their client to unknowingly bear any avoidable cost of importation or exportation.

22. The factors to which a licensed broker should have regard in seeking to perform in this manner are very numerous and extend well beyond merely classifying the goods in question under the proper item in Schedule 3 to the *Customs Tariff Act 1995*. For example:

22.1. lawful valuation of the goods may require the inclusion of costs not shown on the commercial invoice provided to the broker, so the broker needs to be alert to that possibility;

22.2. an absence of local production of substitutable goods may entitle the importer to apply for a Tariff Concession Order which would render otherwise dutiable goods duty-free;

22.3. obtaining a Tradex Order may enable an importer who re-exports goods to avoid the need to pay duty on importation;

22.4. lodging a drawback application within time may entitle an importer who paid duty on goods when they were imported to gain repayment of that duty when they are re-exported, even after being further manufactured in Australia;

22.5. lodging a refund application within shorter than usual time-limits my entitle an importer to a refund of duty paid on goods found to be damaged on arrival;

22.6. securing a telex release for goods covered by an Original Bill of Lading that is not in the possession of the importer may enable goods to be delivered from the wharf after arrival without incurring expensive detention charges;

22.7. arranging inspection, cleaning and fumigation of goods before they are shipped may avoid delay and cost in quarantine processes on their arrival in Australia;

22.8. securing all necessary permits for otherwise prohibited goods may avoid those goods being seized on arrival in Australia;

22.9. understanding the different documentary requirements under the various Free Trade Agreements to which Australia is a party may render free of duty goods that would otherwise be dutiable;

22.10. recognising the requirements of the various By-laws in Schedule 4 to the *Customs Tariff Act 1995* may allow goods to be entered duty free or at lower duty rates; and

22.11. understanding that clothing that does not bear "care instructions" may be able to be legally imported into Australia but not legally sold in Australia may allow an importer to avoid significant cost in re-labelling goods post-importation.

23. The above are only some of the considerations to which a competent licensed broker should be able to direct their attention.

24. Once licensed, a nominee customs broker is lawfully able to deal with each and every importation or exportation, is not confined to dealing only with those goods or processes of which they have prior experience, and is not required to be supervised by another licensed broker with actual experience in other goods or processes. For this reason, the Committee considers it vital to ensure that applicants have experience of a significant depth and breadth.

25. At the same time, the Committee does not require applicants to demonstrate that they have actual workplace experience in every such relevant consideration. If it were to do so, it is unlikely that it would ever recommend the grant of a licence.

26. Instead, the Committee seeks to ascertain whether the applicant has sufficient acquired experience that equips them with knowledge and intuition to recognise the potential for such considerations to arise and with the basic research and other skills to make proper inquiry and arrive at a correct conclusion even though they may not have had direct experience of that consideration before. In seeking to assess whether this is the case, the Committee asks direct questions and also poses hypothetical fact situations which it is satisfied that a licensed nominee broker could reasonably be required to confront when working as a broker. The Committee advises all applicants that it is "not fatal" if they cannot claim direct experience or pre-existing knowledge on a particular issue but that, where this is the case, they should seek to advise the Committee about how they would go about arriving at a proper answer. In this regard the Committee is hoping to be advised of relatively definite lines of inquiry that would be followed, and not simple generalised statements that the applicant would "look at the Act and Regulations" or "visit the Customs website".

27. In the calendar year 2014:

27.1. 53 applications for a nominee licence were referred to the Committee;

27.2. the Committee recommended that a licence be granted in 2 cases without the need for interview;

27.3. the Committee interviewed 48 applicants for a nominee licence (3 applicants referred to the Committee in 2014 are yet to be interviewed);

27.4. of those interviewed, the Committee recommended that a licence be granted in 26 cases;

27.5. in the remaining 22 cases, the Committee recommended that a licence not be granted as in its opinion the applicant did not yet have sufficient acquired experience; and

27.6. in all cases, a delegate of the CEO accepted the Committee's recommendation.

28. Where the Committee identifies deficiencies in the breadth or depth of an applicant's experience, the Committee seeks to identify for the applicant the particular areas in which it perceives that new or additional experience is required and encourages the applicant to seek

to gain, and their employer to provide, that experience before making a further application for the grant of a nominee broker licence.

29. The Committee's experience is that, of those applicants who do not succeed on their first application:

    29.1. most actively set about acquiring the additional experience suggested by the Committee;

    29.2. most reapply within 12-18 months; and

    29.3. almost all of these succeed on their second application.