SUBMISSION OF MATTHEW MCAULIFFE TO THE REVIEW OF CUSTOMS LICENSING REGIMES

1. AUTHORITY TO ACT AS A CUSTOMS BROKER

Sub-Section 181(1) Customs Act states that the owner of goods may authorise in writing a person to act their agent (subject to Sub-Section 181(2) of the Customs Act).

Sub-Section 181(2) Customs Act states a person cannot act as agent in certain circumstances unless the person is an employee of the owner or a Customs Broker.

ISSUE:
Does Sub-Section 181(2) obviate the need for authorisation as an agent to be in writing, as Section 182 Customs Act seems to indicate that a person may act as the agent of an owner of goods without written authority.

Recommendation:
Clarify whether a broker requires written authority to act for another person.

In regard to Export Entries

Sub-Section 181(5) states that sub-section 181(2) of the Customs Act does not apply to the making of an Export Entry.

ISSUE:
However the requirements of sub-Section 181(1) of the Customs Act would still appear to apply to the making of Export Entries and that as a minimum the person making the export entry on behalf of an exporter must have written authority from the exporter appointing the person as agent of the exporter, with sub-Section 181(5) of the customs Act merely removing the requirement that the agent must be a Customs Broker.

Recommendation:
This area needs clarification as to whether a person making Export Entries on behalf of the exporter must have written authority to act as agent of the exporter. Alternatively should the requirement that Export entries made on behalf of an exporter can only be made by a Customs Broker be restored?

In regard to SAC's

Sub-Section 71AAAF(1) of the Customs Act states despite Section 181 Customs an owner or importer goods or a person acting on behalf of an owner must give Customs a Self-Assessed Clearance Declaration.

ISSUE:
To act on behalf of an importer, some form of authority ought to be needed by the person so acting, but what sort of authority is required?

Recommendation:
This area needs clarification as to whether a person giving a Self-Assessed Clearance Declaration on behalf of an importer, must have authority (written or otherwise).

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2. REMOVE CUSTOMS BROKERS FROM BEING OWNERS

"Owner" is defined in Section 4(1) of the Customs Act as

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

ISSUES:

(a) Should Customs Brokers be removed from the definition of "owner" in sub-Section 4(1) of the Customs Act where a Broker has been duly appointed as the customs broker for another person - Section 181 of the Customs Act has the effect of making the Customs Broker an "agent"?

(b) Should the reference to agent in sub-sections 183(1) and 183(2) of the Customs Act, be removed to the extent that it does not apply to a person who is the duly authorised agent of the owner for the purpose of the Customs Act and such persons who are nominee brokers of such duly authorised persons?

Recommendation:

A Customs Broker should not be included as "owner" where the true "owner" is known and has authorised in writing, a Customs Broker to act on their behalf, as the Customs Broker

(a) In their role as a Customs Broker for the purposes of the Customs Act does not play any part in the importation of goods;
(b) does not have any power of ownership over imported goods;
(c) does not have any power of control or disposition over imported goods,

yet sub-Section 183(1) and 183(2) impose liabilities upon Brokers who do not have any control over the goods being imported.

For example,

- Section 68 Customs Act technically imposes on a Customs Broker the obligation to enter imported goods.
- Sub-Section 165(1) of the Customs Act states that an amount of duty is payable by the owner. (cf Section 165(2) where drawback or duty refund has been overpaid, recovery is not against the "owner" of the goods but the person to whom the duty was overpaid.)
- Section 167 of the Customs Act permits the owner to "pay under protest". Should a Broker have the power to do this against the will of the true owner?

Having regard to these (and there are other examples), it is not equitable to impose rights and liabilities of an owner upon the owner's Broker, in circumstances where the true of owner of imported goods is known and the true owner has been responsible for organising their importing affairs.

To do so is akin to making a tax agent liable for the taxes of their taxpayer client, merely because a tax agent / taxpayer relationship exists. There should be more than the existence of a mere agency relationship to invoke such liability.

3. ISSUES WITH ADDITIONAL CONDITIONS ON BROKER LICENCES

It would appear that the new Additional Conditions to Broker Licences are a one size fits all approach. This it is submitted results in a number issues as outlined below.

Additional Condition 1

"The holder of the broker's licence must, when requested by the Department of Immigration and Border Protection (the Department), ensure that the licence holder and any person who participates in the work of the customs broker completes a Consent to Obtain Personal Information form to allow the Department to undertake a fit and proper person check for each relevant person. The holder of the broker's licence must forward the form to the Comptroller-General of Customs if requested."

ISSUE:
A nominee broker being an employee of a corporate broker would not have the authority within the corporate brokerage to require other staff to complete the *"Consent to Obtain Personal Information"* forms yet this additional condition imposes on the Nominee Broker a legal obligation to comply.

Further the phrase *"Participate in the work of the Customs Broker"* as used in Additional Clause 1 is defined in Section 183B(2) of the Customs Act, states

a person shall be taken to participate in the work of a customs broker if:
(a) he or she has authority as a nominee of, or as an agent, officer or employee of, the customs broker, to do any act or thing for the purposes of the Customs Acts on behalf of an owner of goods; or
(b) he or she has authority to direct a person who has authority referred to in paragraph (a) in the exercise of that authority.

If a person falling within (b) was the supervisor of a nominee broker, how is it proposed that a nominee broker can direct their supervisor to provide the relevant form, particularly if the supervisor was not a Customs Broker and therefore had no legal requirement to provide the form?

Recommendation:

This requirement should be removed to the extent it requires Nominee Brokers to obtain *Consent to Obtain Personal Information forms from other employees of the Corporate broker.*

The requirement to obtain *"Consent to Obtain Personal Information"* forms from employees of the Brokerage should form part of the licence of the Sole trader, Partnership or Corporate Customs Brokerage only.

Also see comments made in point 4 below in regard to Section 183CGC of the Customs Act.

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Additional Condition 2

"If a holder of the broker's licence becomes aware that information that has been provided to the Department of Immigration and Border Protection by or 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 Comptroller-General of Customs."

ISSUE:

Additional Condition 2 imposes a positive obligation on the Broker to report to the Department of Immigration and Border Protection (DIBP) as soon as practicable after becoming aware of errors or omissions that have arisen from false, misleading or incomplete information being provided to the DIBP on behalf of a client.

In considering the wording of Additional Condition 2, for it to give rise to the obligation to provide written particulars of the incident to the Comptroller-General, it would appear that all of the following 5 circumstances must exist,

- (i) **there must be information that is "false, misleading or incomplete"?**
- (ii) **If there is evidence of (i), has that "false, misleading or incomplete" information been communicated to the DIBP?**
- (iii) **If there is evidence of both (i) and (ii), was the false, misleading or incomplete information communicated to the DIBP on behalf of the client?**
- (iv) **If there is evidence of (i), (ii) and (iii), did the false, misleading or incomplete information result in an error or omission?**
- (v) **If the above 4 points (i), (ii), (iii) and (iv) exist, their existence must be known to the Broker.**

If points (i), (ii), (iii), (iv) and (v) are satisfied, then the Broker at point (v) has an obligation to advise the Comptroller-General in writing of the error or omission.

This gives rise to a number of issues such as:

(a) Under Section 181 of the Customs Act where an importer nominates a Broker to act as their agent, they will nominate the Corporate Broker not the nominee.

Sub-Section 183CG(2) states that a nominee broker cannot act as a Customs Broker in their own right.

So where Additional Condition 2 refers to "client", can the "client" referred to be the client of the nominee when a nominee broker cannot act as a Customs Broker in their own right and where the client nominates a Corporate Broker to be their agent?

As such should this obligation be imposed on Nominee Brokers?

(b) What is the standard of evidence required that establishes in the mind of the Broker that a statement is false, misleading or incomplete?

In some instances it will be clearly obvious - this is probably the standard to be applied.

If it is not obvious from the evidence that a statement is false, misleading or incomplete or there is doubt or there is a dispute the requirement is not triggered.

A difference of opinion (arguable case) with that of an ABF Officer or other person would not be sufficient to trigger an obligation until the difference of opinion has been resolved.

What happens in circumstances where a Broker does not have the authority of say a former client to challenge a decision of an ABF Officer?

Maybe guidelines should be issued to clarify this area.

(c) Considering the issue of "client" again, where for example a broker becomes aware that another broker may have made a false or misleading statement in regard to a joint client.

The term "client" is not defined in the Customs Act, so it would assume its natural meaning.

The Macquarie Dictionary defines "client" as,

"1. One who applies to a solicitor for advice or commits his cause or legal interests to a solicitor's management; 2. One who employs or seeks advice from a professional adviser; 3 a customer."

In the circumstance described above, the "client" would not appear to be your client for the purposes of the statement made by the other Broker, as you had no dealings with the client in regard to that particular shipment?

Recommendation:

Guidelines should be issued to clarify this area.

Please see Point 4 below for comments concerning the interaction of Additional Condition 2, Section 183CGC of the Customs Act and Regulation 136 of Customs Regulation 2015.

Additional Condition 3

"The holder of a broker's licence must not allow Department systems or information provided by the department to be used for an unauthorised purpose or to assist, aid, facilitate or participate in any unlawful or illegal activity."

ISSUE:

See comments made in point 4 below in regard to Section 183CGC of the Customs Act.

Additional Condition 4

"A natural person who hold a broker's licence must undertake accredited Continuing Professional Development (CPD) as per the following requirements:

(a) for the purposes of this condition, accredited CPD activities are the activities accredited by the Comptroller-General of Customs or by a CPD provider that has been granted Accredited CPD Provider status by the Department. A broker must complete sufficient accredited CPD activities to acquire the minimum number of points each year as specified in the CPD scheme.

(b) The holder of the broker's licence must keep accurate, auditable, written records of completion of accredited CPD activities and provide them upon request to the Comptroller-General of Customs.

(c) The holder of the broker's licence must notify the Comptroller-General of Customs if the holder of the broker's licence has failed to complete the required number of points and provide a written explanation of the circumstances surrounding the failure."

ISSUE:

See comments made in point 4 below in regard to Section 183CGC of the Customs Act.

4. Section 183CGC Customs Act

Should a breach Section 183CGC be a Strict Liability Offence?

Section 183CGC states

(1) The holder of a broker's licence must not breach a condition to which the licence is subject under section 183CG or 183CGA (including a condition varied under subsection 183CG(7) or section 183CGB).
Penalty: 60 penalty units.

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

Clause 6.1 of the Schedule to the Criminal Code Act 1995 has the effect that for strict liability offences, fault is not an element that has to be proved.

The combined effect of Section 183 CGC of the Customs Act and Clause 6.1 of the Schedule to the Criminal Code Act 1995, is that for a holder of a Broker licence to commit an offence against Section 183CGC all that has to be proved is that a breach occurred, it is not relevant why it occurred.

As an offence against Section 183CGC is an offence of Strict Liability it also falls under the Infringement Notice Scheme (Item 60 of the Table to Schedule 8 of the Customs Regulation 2015).

Regulation 136 of the Customs Regulation 2015, requires for the issuance of an Infringement Notice, that an Infringement Officer only has to believe on reasonable grounds that a contravention has occurred.

In the Federal Court in Civil Aviation Safety Authority v Alligator Airways Pty Limited (No 3) [2012] FCA 601, Murphy J, quoting from the High Court of Australia, stated in regard to "reasonable *grounds"* that

28. The requirement to establish reasonable grounds precludes the arbitrary exercise of many statutory powers. When a statute requires there must be "reasonable grounds" for belief it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person: George v Rockett (1990) 170 CLR 104 ("George v Rockett") at 112. At 116 in that case the High Court explained:

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

Application of Section 183CGC to Additional Clause 1 of a Broker Licence

ISSUE:

As was explained at Point 3 above in regard to Additional Clause 1, nominee brokers will in the main not have authority within a Corporate Brokerage to demand that others within the Brokerage provide *"Consent to Obtain Personal Information".*

However as Section 183CGC of the Customs Act makes it an offence of strict liability to breach a condition of a Broker Licence, the mere failure, when requested, to get others to provide *"Consent to Obtain Personal Information"* regardless of any attempts to do so, will constitute a breach of sub-Section 183CGC(1), even though the Broker has no power to compel the other person to give the required document.

Recommendation:

Section 183CGC of the Customs Act should be amended so that it is no longer a Strict Liability Offence.

Application of Section 183CGC to Additional Clause 2 of a Broker Licence

As discussed at Point 3 in this submission, to trigger an obligation to provide "written particulars" to the Comptroller-General under Additional Clause 2 of a Broker Licence, a Broker must know that a *false misleading or incomplete statement has been made and that it has resulted in an error or omission.*

ISSUE:

In considering the above comments on Section 183CGC and the Infringement Notice Scheme, and the requirements of Additional Clause 2, there appears to be 3 different levels of proof to be achieved to issuance of an Infringement Notice for a breach of Additional Condition 2.

Firstly the Holder of the Licence must know that a *false misleading or incomplete statement has been made and that it has resulted in an error or omission* to trigger obligations under Additional Condition 2.

If the Broker is not aware that a *false misleading or incomplete statement has been made or* that if it was made the Broker did not know that *it has resulted in an error or omission,* then there has been no breach of Additional Condition 2.

As such to prove a breach of Section 183CGC in regard to Additional Clause 2, the DIBP would have to have evidence that,

(a) the Broker knew that a *false misleading or incomplete statement has been made;* and
(b) the Broker knew *that it has resulted in an error or omission;* and
(c) the Broker failed to provide written particulars of the incident.

As such there must be evidence of the "fault element" to prove an offence against Section 183CGC of the Customs Act in regard to breaches of Additional Clause 2.

This being the case an offence against Section 183CGC is not really a strict liability offence as it does not meet the requirements of strict liability offence set out in Clause 6.1 of the Schedule to the Criminal Code Act 1995 that there is no fault element. If the offence is not a strict liability offence it should not fall under the Infringement Notice Scheme.

If a breach of Section 183CGC is a strict liability offence to which the INS applies, then there would appear to be evidentiary problems to be overcome, before an Infringement Notice can be issued.

I would submit that to issue an Infringement Notice for a breach of Additional Condition 2, having regard to the Federal Courts comments in Civil Aviation Safety Authority v Alligator Airways Pty Limited (No 3), the Infringement Officer must have evidence that the Broker

(a) knew that a *false misleading or incomplete statement has been made;* and
(b) knew *that it has resulted in an error or omission;* and
(c) failed to provide written particulars of the incident.

In such a circumstance, is it appropriate to require a non-judicial officer, such as an Infringement Officer, to form an opinion on the state of knowledge of another person as part of the process for issuing an Infringement Notice?

I would suggest it is not because the concept of strict liability and Infringement Notice Schemes is that they are predicated on fault not being an element of an offence.

If it is also taken into account that NCBLAC has indicated that Infringement Notices will be taken into account in determining whether a person's Broker licence may be revoked or suspended, is it appropriate that the standard of proof be reduced to "reasonable belief" that an offence has occurred (which is the standard required to issue an infringement notice) for a Broker to lose its licence and potentially its livelihood, particularly considering the issuance of an infringement notice is non-appellable.

Recommendation:

Section 183CGC of the Customs Act should be amended so that it is no longer a Strict Liability Offence.

Application of Section 183CGC to Additional Clause 3 of a Broker Licence

Under Additional Clause 3
"The holder of a broker's licence must not allow Department systems or information provided by the department to be used for an unauthorised purpose or to assist, aid, facilitate or participate in any unlawful or illegal activity."

ISSUE:

As Section 183CGC of the Customs Act makes it an offence of strict liability to breach a condition of a Broker Licence, any inadvertent misuse would be a breach of the Customs Act.

What if a Broker provides normal information from a Departmental System to a client of the Broker, information such as whether the client's container is held or clear and the client uses this information to *"assist, aid, facilitate or participate in any unlawful or illegal activity."*

Technically the Broker has committed an offence as there is no element of fault. All that needs to be proved is that the Broker provided information to a person and that person used the information to *"assist, aid, facilitate or participate in any unlawful or illegal activity."*

The Broker is defenceless against this.

Recommendation:

Section 183CGC of the Customs Act should be amended so that it is no longer a Strict Liability Offence.

The offence should occur where a Broker has deliberately allowed *Department systems or information provided by the department to be used for an unauthorised purpose or to assist, aid, facilitate or participate in any unlawful or illegal activity."*

Application of Section 183CGC to Additional Clause 4 of a Broker Licence

ISSUE:

Should the failure by a Broker to maintain their CPD Points be an offence against the Customs Act or merely be an issue of whether a holder should retain their licence?

Why should the failure to attend seminars et al, be a criminal offence?

Recommendation:

Section 183CGC of the Customs Act should be amended so that failure to maintain CPD points is not an offence against the Customs Act.

If it is to be maintained as an offence, then there should be a mechanism by which a Broker who for whatever reason does not attain the appropriate number of CPD points in a CPD year can make up those points and an offence is deemed not to have occurred. (cf sub-Section 243T(4) the defence of voluntary disclosure).

A Broker should have the ability to voluntarily correct this situation.

5. EXPERIENCE & OTHER ISSUES IN REGARD TO THE GRANT OF A BROKER LICENCE

Currently employment in the Customs Broking industry is skewed against more mature persons who are seeking to enter the industry, as they find it difficult to obtain entry level positions and employers are reluctant to employ older persons in entry level positions due to costs.

If you combine this with the fact that in studying to be a Customs Broker a person is studying a specialised and complex area of law and that not all persons are not necessarily suited to this, it means that the pool of potential Customs Brokers is very small and the industry is missing out on persons with wider life experiences.

ISSUE:

Should the experience requirement for obtaining a Broker Licence be broadened to not only encompass on the job experience within a brokerage but if practical courses could be established to give persons experience in handling complex Customs issues, that such course be taken into account?

This could then be matched with a 3 tiered "P Plate" licence system which could consist of

(a) Junior or "P Plate" Brokers being persons who have completed the Diploma and passed the Fit and Proper Persons requirements. These would be persons who currently might be called compiler classifiers. They could not lodge Import Declarations but can perform other functions of a nominee broker but they must work directly under and be supervised by a Senior Broker or Principal Broker.
(b) Senior Broker – a person who has been determined by NCBLAC to have the required experience.
(c) Principal Broker – each Corporate Broker must have one – the person must be a Senior Broker and have at least 10 years' experience as a Senior Broker.

The concept of a Principal Broker seeks to ensure that any Corporate Broker has a person with a minimum amount of industry experience in the clearance of imported goods. It may be that a Principal Broker could be required to undertake further technical training or ethics courses etc.

Recommendation:

A 3 tiered licence system could achieve the following benefits (and more)

- Increase the pool of people from which potential Customs Brokers could be drawn;
- Increase access for Junior Brokers to obtaining relevant industry experience;
- Improve quality of work by ensuring every Corporate Brokerage has a Broker with a minimum 10 years broking experience;
- Provide an industry pathway for Customs Brokers.

All this could be achieved without any amendments to the Customs Act by merely varying or adding to the conditions of a Broker Licence – Section 183CF and 183CG of the Customs Act.

6. NATIONAL CUSTOMS BROKER LICENCING ADVISORY COMMITTEE (NCBLAC)

ISSUE:

NCBLAC not to be permitted to take into account the issuance Infringement Notices in determining whether to recommend to the Comptroller-General whether a Broker Licence Holder should retain of lose the Broker Licence.

The reasons for this are:

(a) **The loss or suspension of a Broker licence deprives persons of their livelihood and for those working for a Corporate Broker who may have done nothing wrong can find themselves out of a job if the Corporate broker loses its licence;**
(b) **The standard of proof for issuing an Infringement Notice is "reasonable belief" which is much less than "balance of probabilities" or "beyond reasonable doubt";**
(c) **Infringement Notice Systems by the very nature are coercive and intended to bring a matter to an end.**
(d) **Sub-Regulation 137(4) and Regulation 141 of the Customs Regulation 2015, make it clear that payment of an Infringement Notice is not an admission of guilt or liability. As such there should be no further consequences arising from the payment of an Infringement Notice.**
(e) **The issuance of an Infringement Notice is not appellable to the Administrative Appeals tribunal.**
(f) **Infringement Notices can be issued for alleged offence where the matter giving rise to the alleged offence are non-appellable to the AAT and can only be appealed to the Federal Court; for example Dumping and Countervailing Duties cannot be paid under protest (Section 167(1) Customs Act), or disputes involving Tariff Classification where there is no duty change.**
(g) **A person may decide to pay an Infringement Notice as it is a cheaper option to having a matter dealt with by the courts.**

Recommendation:

The Customs Act should be amended to prevent NCBLAC from being be able to take into account the issuance of Infringement Notices for determining whether a Broker Licence holder should retain or lose their Broker licence.