Contemporary Issues in Broker Licensing

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Over the last few years there have been some significant changes in the administration of the licensing regime for customs brokers.

More recently there has been a review of all customs licensing regimes – for brokers, for warehouses and for depots.

The review of broker licensing has affirmed the core pillars of the current system:

- Licences are issued to individuals employed as nominees of brokerage firms;
- Licences are also issued to brokerage firms, which may be companies, partnerships, or sole traders;
- Nominee licence applicants must meet fit and proper person, education and experience tests;
- Brokerage firms must operate through fit and proper persons and the firms themselves must also be fit and proper;
- Brokers and brokerages may be disciplined in a variety of ways if they fail to perform their broker functions in a satisfactory and responsible manner; and
- Licence applications and broker discipline are matters on which the National Brokers Licensing Advisory Committee provides advice to the Comptroller-General of Customs, ensuring that he has the benefit of an independent view and one that takes into account contemporary broking industry experience

At the same time, the review found that there are administrative improvements that can be made in the way the current licensing regime operates. Amongst other things, these will make electronic lodgement of licence applications easier and quicker, and provide better guidance to applicants and their referees with a view to increasing the prospects of applications being successful.

These are all good and sensible outcomes.

At present and looking forward, the bottom line is that it is now harder than it used to be to win the grant of a new customs broker licence a few years ago, and that it is becoming increasingly easy to lose one previously granted.

This is as it should be.

Customs brokers play an essential part in ensuring the lawful entry of goods into Australia. "Customs" does not have and will never have the resources necessary to exhaustively examine every shipment to ensure its legal compliance. Reliance must necessarily be placed on the skills and integrity of customs brokers.

But the licensing of customs brokers serves a far wider purpose than merely accrediting persons on whom Government regulators can rely. Quality brokers are fundamental for the benefit of us all:

- Import tariffs exist for the protection of Australian manufacturers;
- Import restrictions, such as those applying to asbestos, exist for the protection of the community;
- Correct duty collection is important for public revenue; and
- Quality brokers ensure their clients pay no less duty than they should but, equally importantly, that they pay no more duty than they should and that their importations are cleared as quickly and as painlessly as possible.

In short, properly licensing and disciplining customs brokers is in everyone's best interests.

So, as Chair of the National Customs Brokers Licensing Advisory Committee – NCBLAC - let me offer my perspective on a few contemporary issues around broker licensing.

NCBLAC sits as a panel of three members. In addition to the Chair, there is a Commonwealth member nominated from time to time by the Comptroller-General and an Industry Member (currently either Ernie Dean or his deputy, John Skevington).

NCBLAC has three roles:

- It advises the Comptroller-General on the educational requirements that should be met by aspiring customs brokers or by licensed brokers under the CPD regime;

- It advises the Comptroller-General on whether or not licences should be granted to those seeking to be nominee brokers, corporate brokers or sole trader brokers; and

- It advises the Comptroller-General on whether and what disciplinary action should be taken against existing licensees who have come to adverse attention.

Let me talk first about new licence applications and why they're now harder to win than in the past. But let me stress at the outset that what I am about to say about applications for new licences has some clear messages for existing licence holders – and particularly about how they can avoid the risk of losing their current licences.

In the interests of brevity I'll concentrate on applications for a nominee licence rather than a corporate licence or sole trader licence.

There are three essential pre-conditions to the grant of a nominee licence:

- the applicant must be a fit and proper person;
- they must have completed an approved course of study, or be exempted from that requirement; and
- they must have the acquired experience that fits them to be a broker.

NCBLAC assesses whether an applicant is fit and proper primarily through a series of police and similar integrity checks. To facilitate these checks, the applicant must provide their consent and in so doing they are asked to answer various questions about their previous criminal history.

Most applicants, as you would expect, have no prior criminal record.

Some have convictions for relatively minor "youthful indiscretions", which don't fuss the Committee too much.

Some occasionally have a conviction for what might be generically described as a "dishonesty offence". Given the inherent necessity for the Comptroller-General to be able to rely on the honesty, accuracy and integrity of licensed brokers, these offences naturally cause us to think carefully.

But we equally worry about an applicant who fails to disclose a prior conviction, no matter how minor, and then, when confronted with their official police record, offers what seems to be a "cock and bull story" to explain away that failure to disclose. If you are mentoring a licence applicant, please urge them to make early and full disclosure of any offence in their past as sought on the official form – they will save themselves considerable grief by being honest and upfront.

Completion of the approved course of study is generally a matter of record and we get few applications for exemption – when they arise it is generally for no more than one or two uncompleted subjects, and we simply question the applicant with a view to ascertaining whether they have, through other studies or on-the-job experience, learnt what we would expect them to have learnt had they completed the missing subjects. But note that the approved course is now a Diploma – not the lower level Certificate IV previously required. In this sense getting a licence is harder than it used to be.

But the really hard criterion for an applicant to meet is the requirement for acquired experience.

In days gone by, the then Committee and the then CEO of Customs accepted that a pass in the National Examination then conducted by the CBFCA was adequate evidence of acquired experience – if you had a clean police record, had completed your Certificate studies and had passed the National Examination, your application "went through to the keeper" and did so "on the papers". It was really only applicants who had failed the National Examination (often on multiple occasions) who were interviewed by the Committee.

When I joined the Committee, I thought this to be passing strange but went along with the established protocol – for a while.

But then I saw an application from a young man who had (only just) passed the National Examination and whose employing broker had provided a superficially glowing reference - but one that I thought was signalling reservations. So we interviewed that applicant and we assessed him as well short on requisite experience.

Against the possibility that this was a "one-off", we then interviewed a number of other applicants who had attained similar marks in the National Examination and we assessed that a significant proportion of them were similarly shy on experience.

At this stage we effectively ditched the previous protocol that a pass in the National Exam automatically meant that you met the acquired experience criterion. Instead, we assessed every application on its merits.

Passing the National Exam was still relevant but it wasn't determinative. A pass in the National Exam (or nowadays the comparable assessment conducted by myfreightcareer) combined with a well-presented application and referee reports that provide real evidence of good experience can still induce us to recommend the grant of a licence without requiring an interview.

But, in all other cases, we conduct an interview with the applicant. In this sense too, getting a licence is now harder than it used to be.

So, how do licence applicants fare at these interviews? In the calendar year 2014 (he most recent year for which statistics are available without a tedious manual file count):

- 53 applications for a nominee licence were referred to the Committee;
- the Committee recommended that a licence be granted in 2 cases without the need for interview;
- the Committee interviewed 48 applicants for a nominee licence;
- of those interviewed, the Committee recommended that a licence be granted in 26 cases;
- in the remaining 22 cases (46%), the Committee recommended that a licence not be granted as in its opinion the applicant did not yet have sufficient acquired experience; and
- in all cases, a delegate of the CEO accepted the Committee's recommendation.

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.

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

- most actively set about acquiring the additional experience suggested by the Committee;
- most reapply within 12-18 months; and
- almost all of these succeed on their second application.

So, about 40-50% of the applicants interview by the Committee are found to be lacking in the breadth and depth of experience that we think a licensed broker should have.

Does this mean that we think about half your compiler-classifiers are no good? Certainly not. Some of them are brilliant; some are very good; some are fair to middling; very few indeed are apparently without the potential to become

viable licensed brokers. All it means is that about 50% are making their application too soon – before they have managed to get enough experience.

Does this mean the Committee is setting the experience bar unreasonably high. We don't think so.

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 unfamiliar goods or processes. For this reason, the Committee considers it vital to ensure that applicants have experience of a significant depth and breadth.

At the same time, the Committee does not require applicants to demonstrate that they have actual workplace experience in every type of matter a licensed broker may be asked to handle. If we were to do so, it is unlikely that we would ever recommend the grant of a licence.

Instead, the Committee seeks to ascertain whether the applicant has sufficient acquired experience to equip them with adequate knowledge and intuition to recognise the potential for such matters 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 matter 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 legislation" or "visit the Customs website".

The Committee's approach to assessing acquired experience was recently considered by the Administrative Appeals Tribunal in the Holc matter. In essence, the Tribunal adopted no different approach and, on the facts before it, affirmed the decision that had been made by the former Chief Executive Officer of Customs to accept the Committee's recommendation that a licence not be granted to the individual in question.

One might well ask why the Committee rejects so many applications when every applicant presents the Committee with at least two references from already licensed brokers with whom they have worked.

Every applicant probably thinks these references are glowing. Maybe the signing referee does too.

But the Committee doesn't always share that view:

- some references are really just character references – eg, "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 – eg, "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 we think referees have just left it to the Committee to give their staff the frank and disappointing assessment that they share but are not prepared to convey personally;

- and sometimes I guess 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 comfort zone or the scope of their usual duties in their employing brokerage. In essence, it seems that most referees are asking themselves the wrong question – whether the applicant has performed their current job well, rather than whether the applicant has enough experience to be able to tackle, on their own and without the referee's supervision, any task that might reasonably be asked of a licensed broker.

At the risk of being impertinent, we do think there is room for more rigour and analysis by licensed brokers before they sign off on references for their compiler/classifiers.

Of course, not every employing brokerage is able to expose its compiler/classifiers to the full range of broker-like activities and this can be for a variety of very legitimate business reasons – for example:

- the brokerage may have a focus on air freight to the virtual exclusion of sea freight, or vice versa;

- the brokerage may use external specialist consultants for some activities – such as preparing applications for new TCOs; or

- the brokerage may have clients only within a relatively narrow range of tariff classifications.

To overcome the disadvantage that these employees may suffer because of where they work, their employers might consider the possibility of some form of mentoring arrangement that would give these aspiring licence applicants an exposure to broker-like activities they may not face in their day-to-day employment. For example, the larger, multi-department brokerages should perhaps be rotating their compiler/classifiers though their various departments in order to broaden their experience base.

But these limits on exposure to a fuller range of broker-like activities do not explain away all the shortcomings that the Committee sees in the applicants it interviews.

So, what shortcomings do we commonly see emerging at interview?

Let me give you just a few examples:

- very, very few applicants understand the Infringement Notice Scheme;

- very few applicants can give an intelligent summary of the rules around production assists;

- many applicants cannot explain the core criteria of the TCO regime;

- lots of applicants think you have 4 years to lodge an application for a duty refund for damaged goods; and

- some even have great difficulty explaining how they go about their day to day task of classifying goods – they may acknowledge the existence of the Interpretative Rules only when prompted, and often can't tell the Committee how Rule 3 operates to eliminate competing alternative classifications.

Quite often an applicant may exhibit relatively good knowledge of Customs law and process but demonstrate a complete naivety about the underlying commercial transaction with which they are assisting an importer – for example:

- they don't understand why a shipping line won't give a DO if the importer can't produce an applicable original bill of lading;

- they know there is a thing called an express release but have no idea how it works; or

- they can't tell us how to work out from the documents they routinely have whether a shipment is insured and by whom.

These are generally not esoteric issues where ignorance can be easily forgiven. Some of it is really bread and butter.

We are also frequently concerned when an applicant is unable to identify potential criminal activity when confronted with a hypothetical that we think reeks of it or, having identified the potential for that criminality, thinks it would be a good idea to ring their client to seek an assurance that they're not really doing anything criminal.

I would suggest that licensed brokerages and their clients should be just as worried about these shortcomings as we are. If brokerage staff are giving bad advice to clients, or failing to give good advice, and nominee brokers are not aware of this and stepping in to redress these shortcomings, then let's be quite clear that existing licences are at risk and clients can be materially disadvantaged.

Let me turn now to the question of disciplinary proceedings and how an existing licence might be easily lost.

This is not an issue that has loomed overly large on the horizon in the past but I think is more recently assuming a higher profile.

Flowing directly from my earlier comments on the shortcomings we see in new licence applicants, there is one in particular that I think should positively alarm licensed brokers and those who own or operate licensed brokerages.

A significant number of applicants the Committee sees do not understand the conditions that are attached to their employing or supervising broker's licence. For example, if they became aware that a new client's previous broker was lodging duty free entries using a TCO that they are convinced was not applicable, they would probably advise the client to talk to their previous broker about lodging amending entries, but it seems that very few would feel it important to pass this information on to their supervising broker.

In such a situation, there is a real possibility that the brokerage and its nominee brokers could be found to be vicariously in breach of their licence condition obligation to notify such information to the Comptroller-General and thereby become subject to disciplinary action - the brokerage through its employee knows information that it and its licensed brokers are legally bound to convey to Customs, but the licence holders have not placed themselves in a position where they can comply with their licence obligations.

If brokerage nominees and managers take nothing else away from today, please think about whether you have sufficient checks and balances in place to make sure that all your staff understand your obligations as a nominee broker or as a corporate broker and are trained to actively assist you to meet your licence obligations. Failure to have these checks and balances in place may mean that it is easier for you to lose your licence.

The concept of vicarious liability might also bite a licensed brokerage if it does not have in place adequate systems to monitor the activities not only of its junior staff but also of its licensed nominees. Employing a licensed nominee is not a "set and forget" situation.

Take the example of a nominee who, whenever he or she feels a bit strapped for cash for the kids' school fees or whatever, lodges a refund application for an earlier duty-paid shipment claiming the benefit of a previously unclaimed TCO and nominating their own bank account as the point of payment.

An inquisitive Comptroller-General or NCBLAC could well ask why the brokerage itself wasn't alert to this pattern of behaviour –

- why hadn't it noticed that the nominated bank account was not the one its records showed for that client;

- why hadn't it asked why, if the nominee really thought the TCO was applicable, amending entries were not being entered for all the client's entries of those same goods over the preceding 4 years?

Matters of this nature should be pretty readily observable to the management of a well monitored brokerage, especially with the sophisticated software systems now in common usage.

At the heart of this concept of vicarious liability, it is important to recognise that it's not just nominee brokers who are licensed – their employing brokerages are also licensed and those licences carry with them obligations and expectations of proper supervision and control. The principles of vicarious liability can also make a licence easier to lose.

It's also important to note that a conviction for an offence against the Act is not a precondition for disciplinary action being taken.

Section 183CQ of the Act sets out numerous grounds on which such action can be taken.

Some are simply matters of observable fact, such as whether a broker has been convicted of a prescribed offence or whether a company is in liquidation.

Others call for more subjective judgement, such as whether a broker has ceased to perform the duties of a customs broker "in a satisfactory and responsible manner" - and the Act specifically provides that a customs broker shall be taken to have ceased to perform the duties of a customs broker in that manner if the documents they have prepared contain errors that are unreasonable having regard to the nature or frequency of those errors. So simple "sloppy work" is enough to put a licence at risk. And sloppy work may occur not just in a nominee broker's entry preparation entries, but also with brokerage managers failing to adequately supervise and audit the work of their nominee brokers.

In this regard it is perhaps ironic that, as Commonwealth reliance on revenue from customs duty falls, the complexity of preparing a correct entry increases. Increasingly, a wider variety of FTAs with different scopes of application and eligibility criteria, new consumer protection regimes and other factors call for a greater range of knowledge on the part of customs brokers. Knowledge acquired in the approved course is no longer enough. Failure to keep abreast of such changes increases the risk of wrong entries and with it the possibility of disciplinary action for that reason alone.

The introduction of CPD in the last few years provides a real opportunity for practising brokers to keep up-to-date with the changing law and practice and reinforces the truly professional nature of customs broking. Interestingly, there were on 1 July 2015 significantly fewer licensed brokers than there were on 30 June 2015 – one cannot be certain, but it seems a fair guess that many of those who chose not to seek renewal of their licence at the end of the last triennium were not prepared to certify that that had met their CPD obligations and were thus ineligible for renewal. While this reduction in numbers of licensed brokers was not an intention of the introduction of CPD, it is nevertheless probably a good thing.

And while we're talking about CPD, let me also mention that it's not enough to certify that you have met your CPD obligation – you have to be able to demonstrate that you have actually done the CPD activities and Customs is actually randomly checking to see whether those who claim to have done so can provide that demonstration. Failure to do CPD as required breaches your licence condition; falsely certifying that you have done CPD may involve a separate and compounding offence under the Criminal Code.

Remember too that disciplinary action can also be taken where it otherwise appears to be "necessary for the protection of the revenue or otherwise in the public interest".

Greater reliance on these various tests can clearly make a licence easier to lose.

In short, disciplinary action against a brokerage or broker can be instituted not only where deliberate criminality is detected, but in many other circumstances including:

- technical incompetence or negligence;
- managerial incompetence or negligence;
- inadequate supervision of staff, including licensed staff;
- wilful ignorance of or disregard for matters relevant to the proper discharge of a broker's role and obligations; or
- inadequate quality control consistent with the principles of vicarious liability.

Moreover, inappropriate conduct does not have to be long-standing or repeated before action can be taken, and there does not necessarily have to have been any or any particular quantum of loss to the revenue. It is sufficient if the conduct is inconsistent with the public interest in the protection of any or all of Consolidated Revenue, community safety, or client wellbeing.

In this regard it is important to note that the Act makes provision for a range of graduated responses to unacceptable broker conduct. Conduct that is not bad enough to warrant licence revocation may nevertheless be punished – licenses can be not renewed; they can be suspended for a period; licensees can be reprimanded (with consequential potential detriment to their reputation and client base); and new licence conditions might be imposed (such as a requirement for client funds to be held only in an audited trust account, or disallowing EFT access).

So, while a licence might not always be completely lost, utilising it may become harder.

There have not been a great number of disciplinary matters referred to the Committee in the past, but the present stronger compliance focus within the Department and the Australian Border Force could well change this in the future.

It would not be right to say that the Committee has a zero tolerance for broker fraud or negligence – we must treat every case on its merits and in accordance with the principles of procedural fairness. But it would be fair to say that, if a broker or brokerage is found to have acted in a manner that smacks of fraud, incompetence or negligence, they will need to have a very good excuse to avoid a bad outcome.

And, if you though that you could just "bluff" your way through a disciplinary inquiry, please think again.

To enable it to properly discharge its role, especially in the disciplinary area, NCBLAC has a variety of wide but appropriate coercive powers:

- it can summons people to attend and produce documents – not just brokers referred to it but also other persons who might either corroborate or rebut a broker's story;

- it can require evidence to be given on oath or affirmation;

- it can require that its questions be answered, even if an answer might tend to incriminate;

- and failure to comply with these requirements is an offence under the Act with potentially serious consequences.

I'm sure that both you and I would prefer not to meet across the Committee table under those circumstances, but that's very much up to you corporately and individually. So the underlying message I want to convey today is that risk recognition, risk minimisation and risk management are the key.