

OBLIGATIONS AND ETHICS – CLIENT ENGAGEMENTS AND INSTRUCTIONS



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Down Under Legal

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- Setting the Scene
- Questions
- Customs' Position
- Best Practice
- Summary

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Setting the Scene

“I accept that it would be (at least) unprofessional for a broker to act for an owner without any authority.

But I do not believe written authority is legally required before acting for an owner. be unable to meet the Customs requirement ...

Setting the Scene

...The Act simply says that a broker can be called upon to produce a written authority at some time. It would be lawful for a broker who had acted with oral authority to get the owner to give them written authority after receiving a Customs requirement to produce such.

But, as the ACN notes, it may not be prudent to act on this basis – the owner may have disappeared or be uncooperative when asked to provide written authority after the event, and the broker would then be unable to meet the Customs requirement”

Setting the Scene

As the role of border compliance service providers evolves, becomes more accountable and with expectations similar to the traditional and mainstream professions, so the obligations on services providers is more likely to adopt concepts such as "unprofessional conduct" or "professional misconduct".

Potentially Uncomfortable & Inconvenient Outcomes?

- Written authorities
- Broker licensing conditions
- INS
- Concept of conduct which is misleading & deceptive
- Some interesting questions, some posed by Customs
- Clearing cargo purchased on the internet
- Express carriers
- Integrity ,ethical behaviour and credibility

ACBPN 2013/64

CUSTOMS' PUBLISHED POSITION:

- Owner or licensed customs broker may enter goods for home consumption (declaration)
- It is not an offence for a licensed customs broker to enter the goods for home consumption without written authority from the owner
- Freight forwarders that are not themselves licensed customs brokers should not describe their businesses as customs brokerages

Sec 181 Customs Act

“... an officer may require that person to produce written authority from the owner authorising that person”

Making a statement or declaration

By making a statement or declaration to Customs on behalf of someone else, is there a reasonable expectation that :

- (a) The person making the statement has written authority to do so; and
- (b) The person who makes the statement has a line of communication for making inquiries of the owner

Integrity?

What does it say about the integrity of someone who regularly makes statements to Customs on behalf of owners without a written authority?

Is it reasonable to assume that a person who has no contact with an owner is reckless as to the truth of statements that they make on behalf of an owner and should be more closely monitored than brokers who always hold a written authority?

Inferences , very big questions & implications

Where statements and declarations are made without written authority as a (i) matter of course or (ii) on an irregular or (iii) an infrequent or an (iv) if ever basis?

Could there be reasonably negative inferences drawn in relation to assessments made re whether or not strict compliance is a priority or has even been attempted?

Inferences , very big questions & implications

Consider if these behaviours could impact on assessments re your compliance or non compliance with broker licensing conditions?

If statements are made without consultation with an owner, and apparently reckless as to whether or not the owner exists or owns the goods, what are the implications when assessing your trustworthiness, integrity and honesty?

Some thought provoking questions and issues

- Is verbal or oral authority permission to do the job?
- Can I act without verbal or written authority?
- What are the implications if I do?

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- Verbal authority is permission to do the job, but does not satisfy the requirement to have written authority
- If you act without any authority, is it reasonable to expect you will be held responsible for “your” declaration?

MORE thought provoking questions and issues

- What are the implications & possible consequences if I do not ascertain/identify/confirm who the owner is?

MORE thought provoking questions and issues

Without confirming who the owner is you are in breach of licence Condition 2 and you are opening the door to assuming all of the obligations and liabilities of the owner as defined in section 4 of the Customs Act

MORE thought provoking questions and issues (cont'd)

- What are the implications & possible consequences if I do not:
- “ascertain/identify/confirm all the relevant facts (and take all reasonable care), which is relevant to the customs treatment of the goods”

MORE thought provoking questions and issues (cont'd)

- You may be sued in negligence and breach of contract by the “owner”
- Customs may ask you to show cause as to why you should be regarded as a fit and proper person to be a LCB

Authority from an Agent

Should an authority from an agent of the principal be accepted as written authority to act when making statements to Customs?

Customs position

Are Customs justified in not recognising authority from an agent of the owner and expecting to see a written authority from the owner of goods to the person making a statement or declaration?

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- The definition of “owner” in section 4 of the Customs Act includes “agent”
- A written authority from an agent (AWAFAA) appears to be a valid legal option but does not tick all boxes
- What would you say about the performance of a broker who has (a) not checked the facts about the identity of an owner, (b) the identification of goods or if there are valuation issues, (c) concessions, (d) restrictions, which could all lead to being sued by the “owner”
- Is it smart or clever to operate like this for about \$100 a job or less?

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What would you say about the performance of a broker who has :

- (a) not checked the facts about the identity of an owner;
 - (b) the identification of goods; or
 - (c) If there are valuation issues,
 - (d) concessions; or
 - (e) restrictions,
- where errors could lead to being sued by the “owner”

**How can you be certain of any of these facts
without having at least a discussion with ‘the
owner’?**

Is it smart or clever to operate like this for however much you charge per clearance?

Nuremburg Defence

“... I did it because my boss told me to ... it was a part of doing my job ...”

Can an individual broker call on this Defence as a reasonable explanation for knowingly inputting data to ICS when there is no written authority to do so

This hasn't been tested – would you like to be the test case?

CUSTOMS' POSITION

“Piggy back”

Customs are escalating its focus on “piggy back” consignments whereby entities are illegally using the identity of a third party.

ASSIST IN COVERING UP IDENTITY FRAUD BY INACTION – is this a game you want to play?

How much time do you want to spend in discussions with Customs, the Australian Federal Police or The National Crime Commission?

“Meet the Director”

Customs have interviewed several customs brokers checking what “due diligence” checks they completed to check the identity of the importers

Do you have the time and the energy for this type of inquiry?

Sect 243T Customs Act

In some instances we understand that warnings have been issued to brokers with the possibility of prosecutions to follow, for making

“...a statement ...that is false or misleading in a material particular...” (or an omission)

Investigation Revelations

In some of these cases, the goods concerned have included smuggled cigarettes or other illicit goods. Subsequent enquiries have revealed that the customs broker relied totally on whatever information was provided by the freight forwarder and made no attempt to verify the bona fides of the importer, or even take reasonable steps to find out if a particular person or company exists.

Next steps

Characteristics relating to identity fraud will be developed and released in an ACBPN ... eventually incorporated into broker conditions.

“In future, brokers would be held accountable for these breaches”

Customs will not mandate “authorities to act”

The requirement is already in the Customs Act

Next steps (continued)

The Customs Act details what standard is required of Licensed Customs Brokers in Part XI of the Customs Act

A licensed broker should act lawfully and be commercially prudent – so is acting without a written authority taking a gamble and hoping nothing goes wrong with:

- (a) Compliance; or*
- (b) Commercially (ie in the client relationship)*

Is acting without written authority lawful or prudent?

You are the only person who can answer these questions

BEST PRACTICE

Due Diligence:

Contact the owner and ask:

- Who are they?
- Where are they?
- What are the goods?
- Where is the order?
- Are there other important questions to be answered which cannot be answered?
- Is it worth risking the business to make declarations on behalf of this owner?
- What does it say about me to the outside world if I do this job?

What if Customs take this approach...

It could be quite easily argued and prosecuted by Customs that (a) not identifying the “owner” and (b) acting without authority so that (c) a serious error is made in an import declaration, is justification for charges to be laid against a broker pursuant to sub paragraphs 234 (1) (d)(i), 234 (1) (d) (ii) and 234 (1) (d) (iii) of the Customs Act.

Sec 243 (3) – Could this be a part of the cost of not affecting due diligence...

“Where a person is convicted of an offence against paragraph (1)(d) in relation to a statement made, or an omission from a statement made, in respect of duty payable on particular goods, a Court may, in relation to the offence, impose a penalty not exceeding the sum of 50 penalty units and twice the amount of the duty payable on those goods”

Best Practice

- The 243 (1)(d) penalties which are provided in sub section 234(3) should be sufficient to discourage brokers from cutting corners when accepting “client” engagements
- Those who are not discouraged by these provisions have only themselves to blame if it all goes to dirt
- Imagine the consequences if you had multiple convictions under this style of prosecution, which could happen rather quickly if “instructed” by the wrong “characters”, or taking a punt when making declarations

Do you want to be the test case?

Best Practice (continued)

- Imagine the consequences if you had say 20 convictions under of this style of prosecution?
- This is a number a broker could achieve rather quickly if instructed by the wrong “characters” making regular importations
- *“I don’t think this would ever happen to me”*

Do you want to be the test case?

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SUMMARY

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Written Authority

The Act requires a written authority to be produced -
if requested

Written Authority (continued)

So, rather unsurprisingly, it seems that a broker should have a written authority to produce for any and all declarations / statements made to Customs, if they are requested by “an officer” do so

Written Authority (continued)

Why is it that people choose to argue and attempt to justify other positions, when the intention in the Act is so unambiguously obvious?

Do persons with these views think that they are above the law, or that it doesn't matter if they do not comply?

Is that a good look to present to public administrators and Courts?

Written Authority – (continued)

It seems that there is an implied statement made when every import declaration / statement is made, that the person who made a declaration/ statement has written authority to make the declaration / statement which can be produced if requested

What does it say about your honesty and your integrity if you make statements which are false, misleading or deceptive, and you do not have a written authority to produce if requested (knowing full well that this is a fundamental obligation of a Licensed Customs Broker)?

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Thank you

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