



# **Current challenges in border clearance**

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# “Structured Ordering”

## ACN 2021 / 01:

- Structured ordering is where multiple orders are placed with one supplier in a relatively short timeframe (for example, within hours or days), with all orders having a customs value at or below the AUD1000 threshold, and all orders arriving in Australia at or about (i.e. Within a relatively short timeframe)
- ABF consider that it is not acceptable for an importer to deliberately structure orders in such a way as to ensure consignments have a value at or below the AUD1000 threshold in order to avoid customs duty and GST liabilities. Goods that are ‘known to be part of the same order’ are one consignment (even if the goods arrive in separate packages on separate days) and a FID is required if the total value of the consignment is over AUD1000.



# Customs Act s.71A

## Making an import declaration

(1) An import declaration is a communication to the Department in accordance with this section of information about:

(a) **goods to which section 68 applies** ; or

(b) warehoused goods;

that are intended to be entered for home consumption.





# Customs Act s.68 Entry of Imported Goods

(1) This section applies to:

(a) goods that are imported into Australia; and

(b) goods that are intended to be imported into Australia and that are on board a ship or aircraft that has commenced its journey to Australia; and

(c) a ship or aircraft that is intended to be imported into Australia and that has commenced its journey to Australia;

**but does not apply to .....**

**(f) goods, other than prescribed goods:**

**(i) that are included in a consignment consigned otherwise than by post by one person to another; and**

**(ii) that are all transported to Australia in the same ship or aircraft; and**

**(iii) that have a value not exceeding \$250 or such other amount as is prescribed (i.e. \$1000);**



# Duty minimisation (i.e. tariff engineering)

In the past, the term duty avoidance as distinct from duty evasion was used to signify that the importer had employed legitimate methods or “schemes” for reducing their tax liability. It did not imply any conscious wrongdoing, but merely involved paying less tax than normally required.

This process is sometimes referred to as duty minimisation and is the end product or objective of duty planning. It includes classification reviews, TCOs and of course FTA and preference .





# ACN 2021/01

The ACN provides that the ABF does not consider businesses that normally place multiple small orders at ad hoc intervals and ad hoc values, as attempting structured ordering.

If the importer objects to the ABF's assessment of whether multiple orders of goods are separate consignments, the onus is on them to provide additional information, such as evidence of ordering patterns over previous months that would support a different conclusion.



# Don't you have the right to arrange your financial affairs to minimise the duty otherwise payable?

Mr Justice Barwick:

*"every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be"*



154,568	95,054	124,500
56,845	97,511	125,000
110,000	99,011	154,000
150,000	99,216	95,000
35,000	101,090	154,200
	101,684	110,000
	101,962	89,000
		50,000
		10,700



# Section 15AA Acts Interpretation Act

*In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.*

*Object of the Act (as per that Act): An Act relating to the Customs*





(a) Acts Interpretation Act 1901

The amendment to this Act made by clause 115 provides that a court, in interpreting a provision of an Act, is to have regard to the general legislative purpose or object underlying the Act. The amendment preserves existing rules of statutory interpretation relating to the use of extraneous materials.

# Interpretation of legislation

# Important principles of statutory interpretation

- An Act should be construed as a whole, considering the language, purpose, and policy of all the provisions.
- The statute should be read in a way that is **consistent**, rational, and convenient, promoting the express or implied objects of the Act and **avoiding internal inconsistency** or absurdity.
- **Words and expressions are used consistently throughout a statute**, and each word in a provision should be given effect as far as possible.
- **The meaning of a word is derived from the context in which it appears**, and more general words in a list may be read down in light of specific words preceding them.
- A specific power with specific conditions attached to it takes precedence over a more general power without such conditions.
- These rules must be approached with caution and should not override the meaning derived from the text itself.





**Is the ABF interpretation valid? Only the Courts can decide, but always request a review of any decision.**



# S. 4 definition of “owner”

- *"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."*
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# s.65 demands and INS penalties are approached differently.

Duty and taxes determined to be shortpaid may be demanded by ABF under s.165 because of the very broad definition of “owner” in s.4 Customs Act 1901. This applies whether or not the owner as defined in s.4 is the consignee or importer of those goods.

Section 165 provides that:

(1) *An amount of duty that is due and payable in respect of goods:*

...

*(a) is a debt due to the Commonwealth; and*

*(b) is payable by the **owner** of the goods.*

# Infringement Notice


Section 243T (1) provides that penalties can be imposed upon

*A person commits an offence if:*

**(a) the person:**

**(i) makes, or causes to be made, to an officer a statement (other than a statement in a cargo report or an outturn report) that is false or misleading in a material particular; or**

**(ii) omits, or causes to be omitted, from a statement (other than a statement in a cargo report or an outturn report) made to an officer any matter or thing without which the statement is false or misleading in a material particular; and**



Australian  
BORDER FORCE

INFRINGEMENT NOTICE  
CUSTOMS ACT 1901

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**Infringement Notice Number:** 111049

I, George Binos, being an infringement officer authorised by the Comptroller-General of Customs to issue infringement notices, have reasonable grounds to believe that the person named in this notice has contravened a provision of the Customs Act 1901 (the Act) as detailed below, which is subject to a notice under Division 2 of Part 15 of the Customs Regulation 2015. This infringement notice is issued in accordance with section 136 of the Customs Regulation 2015.

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Date

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Name \_\_\_\_\_ Address \_\_\_\_\_

**This notice is for an alleged contravention against:**  
Subsection 243T(1) of the Customs Act 1901 - False or misleading statements resulting in a loss of duty.

**Details of the Alleged Contravention:**  
Date: 23/07/2023 Time: \_\_\_\_\_  
Place: VIC

**Alleged Contravention Descriptions:**  
\_\_\_\_\_

**Penalty Payable under this Notice** **\$14,085**  
Four thousand and eighty-five

**Payment Period**  
In order to discharge your liability for the alleged contravention you must, within 28 days (excluding Sundays and public holidays) after the notice is given to you, pay the penalty amount, in full, to the Commonwealth. If the Payment Period is extended, then you must pay the penalty amount, in full, to the Commonwealth within the period so extended.



# Suggested response - appeal against imposition and seek withdrawal

- Different officer reviews
- Evidence to support ordering methodology, frequency and payment
- Supplier statements
- Incoterms – what are they? Especially if they're DDP
- Whether the responsible party for the process of ordering and shipping consignments was within the consignee's / importer's control or handled exclusively by the shipper (as in DDP). This includes freight, clearance and supplying docs for clearance.
- Courier's failure to provide importer with docs. Implications for s.240.
- Civil penalties do not apply where actions taken by third parties are outside the control of the recipient of that penalty.





# Regulatory Powers (Standard Provisions) Act 2014

## 95 Mistake of fact

*(1) A person is not liable to have a civil penalty order made against the person for a contravention of a civil penalty provision if:*

*at or before the time of the conduct constituting the contravention, the person:*

*considered whether or not facts existed; and*

*was under a mistaken but reasonable belief about those facts; and*

*had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.*

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## **Ford Motor case in USA – there is a lesson here about sham dealings**

US govt alleged that Ford devised a scheme to avoid higher duties by misclassifying cargo vans imported from Turkey from April 2009 to March 2013.

Customs and Border Protection ruled in 2013 that Transit Connects imported as passenger wagons and later converted into cargo vans were subject to the 25% duty applicable to cargo vehicles, rather than the 2.5% passenger vehicle duty.





**Questions???**