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Customs Law E-alert

New ACN on Authorities to Act – get that paperwork completed!

Recent anecdotal evidence has pointed to failings by some providers of customs clearance services in observing the requirements of the *Customs Act 1901* ("Act") to secure proper authorities to act from their clients. In summary, the regime in the Act provides that:

- An owner of goods may, in writing, authorise a person to be their agent for the purposes of the Act.
- The owner of goods cannot authorise a person to be their agent unless that person is an employee of the owner, a customs broker or corporate customs broker. However, Import Declarations can only be made by a licensed customs broker.
- Customs may refuse to recognise the authority of a person to act on behalf of an owner if that person does not produce the written authority to act on behalf of the owner.
- It will be an offence against the Act if a person who does not have a written authority to act on behalf of an owner of goods, does things required to be done by an owner, or represents that they are able to do things on behalf of an owner as required by the Act.

Recent problems have arisen when parties have represented that they are acting as the customs broker of an owner without proper documentation evidencing that authority (whether deliberately or inadvertently). This could arise, for example, in the case where a carrier is organising the freight for goods into Australia and undertakes customs clearance as part of that role without securing a separate authority to act in addition to any contract for the freight.

ACN 2007/56 ("ACN") has been issued by Customs to clarify the obligations for a party to be approved as an agent. Although dated 28 September 2007 it seems to have only been placed on Customs website more recently. There had been consultation with relevant industry groups during the development of the ACN, although it is fair to say that it may not represent the views of all those industry groups. The ACN addresses a number of ways that a customs broker can be appointed as an agent under the Act. It should be considered carefully by those who are providing customs clearance services. The ACN does raise a number of interesting issues.

- The ACN should focus the attention of all of those providing customs clearance services as to whether their documentation satisfies the requirements of the Act.
- The ACN reflects that the appointment should be in writing and signed (or otherwise expressly accepted) by the owner. This is of fundamental importance and can be overlooked by those providing freight services. Some parties may endeavour to rely upon their terms and conditions or non-specific email exchanges. However, for acts such as customs clearance as contemplated by the Act, a specific written appointment (including acceptance by the owner) seems to be both prudent and required by the Act.
- Where the ACN discusses "email appointment" the ACN touches on the traditional legal issues whether parties have properly established a contract and the terms of that contract.
- Even though the ACN reflects the position that those preparing Export Declarations and Self-Assessed Clearance Declarations need not be formally appointed under the Act, it is our strong view that any appointment to undertake such other Declarations on behalf of a client should be properly recorded by way of contract or other agreement.

It is fair to say that the issue of the ACN and the associated procedural consequences may cause many to stop and reconsider their practices. It is also fair to assume that customs audits will now include a specific focus on whether the agent has been properly appointed in accordance with the Act to prepare Import Declarations and compliance action or penalties may follow if the appointment has not been properly undertaken. One last point is worthy of consideration. If a party is undertaking the preparation of an import declaration on behalf of another without due authority, then it may be that the person preparing the import declaration could be considered as a principal rather than an agent (especially given the definition of "owner" under the Act) and could be left primarily responsible for liabilities under the Act.