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Developments in Compensation. Merry Christmas?

Many of you are now aware of the approach currently being proposed by Customs regarding the lodging of claims for compensation. Set out below are some comments.

1. The compensation scheme appears much more limited than we had intended. The combined effect of the various limitations to the scheme may be to deter even the most deserving claimant from making a claim. This may “thin out” claims.
2. Some concerns as to the compensation scheme and its procedure are as follows:
 - (a) The forms are complex and call for a large amount of information which may not be relevant to the situation of a particular claimant. Information provided may be used by Customs against other parties in the supply chain (such as brokers, forwarders, transport companies or software providers) to allege blame against others.
 - (b) It may be unrealistic to expect customs brokers and forwarders to assist in completing the forms on the basis that their information may be “held in evidence against them at a later stage” by importers or others.
 - (c) There may be a significant cost to claimants in completing the forms and arranging for them to be completed by others. It is not clear that those costs will be recoverable.
 - (d) The forms expect a perfect level of knowledge as to exactly what happened in relation to any shipment on a particular date. This may be unreasonable.
 - (e) A separate claims for each container in a shipment is unrealistic.
 - (f) The forms contemplate that compensation is only payable under the Financial Management and Accountability Act 1997 (“FMA”) on the basis that Customs is legally liable to make the claim. While the legal issue is a “first stop”, there are also provisions for act of grace payments under the FMA without findings of liability. Further, there is also the “Compensation for Detriment Caused by Defective Administration” scheme. The CDDA Scheme, in fact, is established to compensate people for acts of administrators and government even where there is no legal liability to pay any compensation.
 - (g) The forms seem to contemplate that claims will, in fact, be limited to claims for storage costs. While the form does refer to claims for “other costs”, it is not clear which other claims will be entertained.

- (h) There is no transparency as to the process to be adopted once the claim has been made. It appears that Customs will review the claim once a claim is made, seek their own advice and then advise the claimant as to whether they have a claim based on that advice. There is no clarity as to the parties from whom Customs is seeking the advice. Further, there is no clarity as to what other information will be provided by Customs to the party providing the advice on the claims. Still further, there is an inherent conflict of interest in Customs managing the process for responding to a claim. There is no obvious provision for further submission, appeal or review.

In the circumstances, I understand that a number of customs brokers, forwarders, importers and other parties in the chain of supply will all be aggrieved and/or distressed at the approach being adopted by Customs and will despair as to any means to recover any compensation.

3. I appreciate that many customs brokers and forwarders (and other parties), may have responded to the situation by passing on storage charges to clients or applying levies and additional costs on their clients. However this is not a perfect solution as it assumes that everyone is co-operating. It also requires importers to bear all the costs! Accordingly, there is still significant exposure for all parties.
4. What would be an alternative proposal? An alternative would be for the appointment of an independent or expert who would review the whole episode and make general determinations as to the responsibility for the situation. That person could then advise on a general scheme by which different claimants in the supply chain would be entitled to submit claims and make determination on those claims. Compensation should be then made available by Government according to general principles and not solely limited by a strict analysis of potential legal liabilities of Customs. There is ample precedent for independent review of action by Government agencies through such bodies as the Commonwealth Ombudsman and the ATO’s Director-General.

I hope the main players in the supply chain maintain pressure on Government (not just Customs) for a better solution, whether by this proposal or otherwise. In the meantime, get working on the forms. We are happy to help!