

12 July 2005

Contact

Andrew Hudson Partner

Hunt & Hunt Level 26, 360 Collins Street, Melbourne Vic 3000

T 03 8602 9200 F 03 8602 9299 E andrew_hudson@hunthunt.com.au W www.hunthunt.com.au

Customs Issue Sample Statements to Support Claims of Preference Under AUSFTA

Introduction

Many readers will have noted the issue of the recent ACN by Customs regarding claims of preference in the new Integrated Cargo System. These claims will, of course, include claims of preference for goods on the basis that they are US 'originating goods' under the AUSFTA. As discussed in the last update, this requires the importer to identify the specific grounds on which it claims that the goods are 'originating goods' under the terms of the AUSFTA. As there is no requirement for the provision of a 'Certificate of Origin' under the AUSFTA, this raises the issue of the type of information which an importer (and therefore their Customs broker) must have before claiming preference and how that claim is to be made. This has led to significant interest from US exporters, Australian importers and Australian Customs brokers as to the type of supporting information which an importer should hold before making a claim of preference under the AUSFTA.

Issue of Customs Statements

Those readers who are customs brokers would have received, by now, a COMPILE message from Customs regarding their issue of sample statements which Customs believe to be acceptable in support of claims of preference under AUSFTA. These are now available on the Customs website. There are 4 types of sample statement depending upon the nature of the good and the grounds on which preference is claimed.

Consequences of the issue of Customs Statement

Customs actions raise a number of issues.

1. The AUSFTA does not require such a form of statement or declaration. As set out in the information from Customs, under the terms of the AUSFTA, an importer needs to possess information, or knowledge, that the imported good meets the relevant rule of origin. Presumably, that could be satisfied in a number of ways other than the provision of the statement.
2. Customs have also stated that:

'It should be noted that the sample statements are designed as a guide only. The use of such statements is discretionary, not compulsory, and Australian importers are entitled to claim a preferential rate of Customs duty without recourse to such statements.'

However, on one view, the issue by Customs of these statements could be construed as a de facto form of Certificate of Origin given that their use has the apparent endorsement of Customs.

3. The statements are prepared to be completed by the manufacturer or producer of the goods the subject of the importation. However, this raises a number of difficulties such as the following:
 - (a) An importer may not necessarily be dealing with the manufacturer or producer. In a large number of instances, an importer may be dealing with the exporter of the goods who has acquired those goods from a manufacturer or producer. The importer may have no contractual basis on which to seek this statement from the manufacturer or producer and, indeed, the exporter may have no contractual basis on which it can compel the manufacturer or producer to provide such a statement.
 - (b) A manufacturer or producer of goods in the United States will not necessarily wish to co-operate in the provision of such statements.

This leaves open the issue as to whether a statement can be properly provided (in the opinion of Customs) by an exporter on the basis of information it has secured from the manufacturer or producer or from other sources. There appears to be no reason, in principle, why an importer could not rely upon information provided by a manufacturer or importer.

This places a significant onus on the contractual relationship of an importer with its exporter and/or the manufacturer or producer of the goods to ensure that the statement (or equivalent information required to support a claim of preference) is provided.

4. As discussed in my last update, the statements do not include a warranty to an importer or its customs broker that the goods satisfy the rules of origin under the AUSFTA together with an indemnity in case of liability for incorrect claim of preference. If the statements are to be used (or a similar document), then it is important that an importer and its customs broker secure separate warranties from the party making the statement that the information is correct together with an indemnity in case it is established that the statement has been incorrectly provided as the importer and its customs broker may be subject to compliance action for the failure to properly claim preference.

5. Customs comments that it will accept the statements as 'prima facie' evidence that the goods meet a rule of origin under the AUSFTA. Accordingly, this raises the possibility that it may not be reasonable for an importer to have relied upon the statement from a producer or manufacturer alone. Clearly, there may be circumstances in which it will be unreasonable for an importer or their customs broker to claim preference based on the statements. Of relevance is that the statements include reference to specific provisions of the Customs Act 1901 and paragraphs of the AUSFTA. If the relevant provisions of the Customs Act 1901 and the AUSFTA have not been provided to the party providing the statement, then it is likely that a statement made by those parties in the form suggested by Customs would be unreasonable and not grounds for a proper claim of preference. Accordingly, at the least, when claiming that goods are entitled to preferential treatment under the AUSFTA, an Australian importer should have ensured that the American manufacturer, producer or exporter has been provided with copies of the relevant Customs legislation, the relevant provisions of the AUSFTA and other information provided by Customs order that the statement (or other declaration) can be considered to have been made in on informed and reasonable basis. Readers should be careful as many manufacturers, producers and exporters from the US will merely state that the goods are entitled to preference under the NAFTA and therefore they must be entitled to preferential treatment under the AUSFTA. Our AUSFTA is different to that NAFTA and the rules of origin will be different and accordingly care must be taken to ensure that any statement or declaration is properly made based on the specific provisions of the AUSFTA and the corresponding Australian legislation in the Customs Act 1901.
6. If in doubt, seek a ruling!

Conclusion

It was certainly the intention that AUSFTA should be a way to facilitate trade between Australia and the US. It was also intended that there should not be undue complexity in claims of preference. However, there is anecdotal evidence (at this early stage) that claiming and verifying preference has not been as easy as intended. It is complicated by the focus of US parties on NAFTA and their unwillingness to engage on AUSFTA. There is also the understandable concern as to possible penalty action for an incorrect claim of preference, and the limits to voluntary disclosure under our legislation when compared to AUSFTA. As a result, importers and their customs brokers will naturally focus on methods to minimise risk – which may lead to more complexity than originally intended. Accordingly, the mere presentation by Customs of these statements does not totally resolve this issue and more work will be required!

Postscript – ACN 2005/30 – Tips for new TCO players!

Readers would be aware that on 11 May 2005, the 3% customs duty levied on imported business inputs eligible for a TCO were removed. This had made the TCO process of significant additional interest and there seems to have been a surge in applications for TCO's. It would appear that many parties are applying for TCO's for the first time. It also appears that the applications may not have accorded with the required practice.

Customs have now issued ACN 2005/30 with some information regarding the basic requirements of a TCO and the application process. The ACN also refers to the detailed information available in ACN 1998/19. Happy reading for new players!