



Via email: paul.barfoot@customs.gov.au

Mr Paul Barfoot
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Dear Paul

The Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia ('the Committee') has considered the Infringement Notice Guidelines (draft amendments) provided by your office. As a result of our review, the Committee has identified some areas of the document that require attention. These have been listed below for your consideration.

Subsection 64 AB (14A)

In relation to the terms of the new subsection 64AB (14A) the Committee recommends that the following issues need to be taken into account:

1. The amendments in subsection 64AB (14A), where there are to be no penalties or prosecution in the circumstance where the report is later than actual time of arrival, reflect the concepts in ACN 2007/03 (attached);

ACN 2007/03 should also be revised to maintain consistency between administration legislation;

2. ACN 2007/03 also draws attention to section 3.3 of the Guidelines (current) which refers to mitigating factors which may give relief to a freight forwarder, or customs broker;

The Committee recommends that in 3.3 (ref. 3.3.1/3.3.2/3.3.3), reference should be made to the mitigating factors as described in the ACN. 3.3.2. Section 3.3 can accommodate a new bullet point or indicator describing the conditions for not serving an Infringement Notice. The Committee notes that the reference to the minimum error rate of 5 or more reports (page 3 of the ACN) would be appropriate at 3.3.1 as a threshold for serving a notice;

3. The reference to subsection 64AB (10) in page 12 of Appendix A should be amended to include reference to the new subsection 64 AB (14A).

Significance of Breach

There should also be some specific new provisions on "significance of the breach" for the new sections 35, 36 and 37 offences. Minimum error rate thresholds used for cargo reporting may not be appropriate for these offences, however consideration should be given to some other quantitative measure of the materiality of a breach, such as value (the value of goods), or duty forgone.

Please note that these comments have been endorsed by the Business Law Section. Owing to time constraints, they have not been considered by the Directors of the Law Council of Australia Limited.

If you have any questions in relation to these comments, in the first instance please contact the Committee Chair, Bill Cole, on 03-8603 6043 or by email: bill.cole@au.pwc.com

Yours sincerely,



Bill Grant
Secretary-General

25 March 2010

Enc.



AUSTRALIAN CUSTOMS NOTICE NO. 2007/03

Customs' Approach to Managing Cargo Reporting Compliance

On 24 March 2006, Australian Customs Notice 2006/17 (ACN 2006/17) was published to inform those responsible for the reporting of cargo how we administer the Infringement Notice Scheme (INS) and to address concerns about our response to certain situations in which non-compliant behaviour may have arisen as a result of circumstances beyond a cargo reporter's control. In particular, ACN 2006/17 provided information on how we would apply the INS to those situations.

This ACN modifies the compliance approach outlined in ACN 2006/17 to take account of difficulties in reporting cargo that have been encountered by industry members and concerns about measuring cargo reporting timeliness for compliance purposes by reference to the estimated time of arrival as specified in the original version of the impending arrival report. We have been working with peak industry bodies to develop and explore options to take account of these difficulties and concerns. These options include the development of an alternative cargo reporting model based on reporting sea cargo before it is loaded at the port of export as well as alternative baselines for measuring cargo reporting timeliness. Given that these options will take some time to fully develop, evaluate and implement, a compliance approach that takes account of industry feedback in relation to the difficulties of reporting cargo is required in the interim.

The approach in this ACN takes into account feedback concerning:

- reporting surplus cargo;
- the need to re-report cargo that may have originally been reported on time in order to amend particular fields on a cargo report;
- differences between the estimated time of arrival of a ship or aircraft and the actual arrival time of the ship and aircraft; and
- the various versions of the estimated time of arrival of a ship or aircraft that may exist and may be relied upon by industry members to determine the time by when a cargo report needs to be made.

The approach outlined in this ACN is an interim response to the feedback that has been received and will be subject to regular review. You will be consulted on and notified of any changes to this interim compliance approach.

The interim compliance approach has 3 stages:

Stage 1: Indicative Assessment of Cargo Report Timeliness

- Uses the original version of the cargo report and estimated time of arrival at the first port or airport in Australia on the original version of the impending arrival report.
- Used for comparative purposes only and does not form part of the cargo reporter's compliance record or compliance history.
- Where possible, will not include:
 - Cargo reports submitted as re-reports of sea cargo originally reported on time; or
 - Sea cargo reports made for surplus cargo.
- Invitation given to the cargo reporter to explain the circumstances surrounding selected cargo reports - no more than 5 cargo reports, using the actual time of arrival to assess timeliness.

Stage 2: Provision of further information by the cargo reporter

- No more than 5 cargo reports, using the actual time of arrival to assess timeliness.
- Optional for the cargo reporter to provide further information.

Stage 3: Further Compliance Management Action

- Following consideration of any further information provided by the cargo reporter, further compliance management action (record of non-compliance, warning letter, infringement notice or prosecution) may be taken.
- Only for those selected reports (no more than 5) that would not be made on time if cargo report timeliness was assessed using the actual time of arrival.
- Infringement Notice Scheme Guidelines and other mitigating factors in an Australian Customs Notice or Australian Customs Cargo Advice will be considered.
- No record of non-compliance, warning letter or infringement notice if there is a sustained improving trend in the timeliness of cargo reports.

When must a cargo report be made by?

We rely upon accurate and timely information to assist in the risk assessment and clearance of cargo. The report of cargo in sufficient time prior to the arrival of a ship or aircraft is particularly important as the first step in our risk assessment process. Early reporting also assists in the early clearance of cargo.

If a cargo reporter is required to report the cargo that the cargo reporter has arranged to be carried on a ship, the report must be made within the following timeframes:

- For a voyage likely to take 48 hours or more – 48 hours or more before the estimated time of arrival at the first port in Australia;
- For a voyage likely to take 24 hours or more but less than 48 hours – 24 hours or more before the estimated time of arrival at the first port in Australia;
- For a voyage likely to take less than 24 hours – 12 hours or more before the estimated time of arrival at the first port in Australia.

If a cargo reporter is required to report the cargo that the cargo reporter has arranged to be carried on an aircraft, the report must be made 2 hours or more before the estimated time of arrival at the first airport in Australia as specified on the impending arrival report.

Improving Cargo Reporting Timeliness

To improve the overall timeliness of cargo reporting, we have initially focussed our compliance monitoring efforts on a selection of cargo reporters, taking into account both the volume and extent of reports that they appear to have not made on time. The selection of cargo reporters subject to compliance monitoring has been reviewed. You will be advised if you have been selected for compliance monitoring and we will invite you to provide an appropriate contact point to liaise with us about cargo reporting compliance matters. The location of the contact person will be taken into consideration when we allocate the compliance team responsible for monitoring your cargo reporting compliance.

As part of our approach to improving cargo reporting compliance, we have been providing the selected cargo reporters (responsible parties) a monthly list of sea cargo reports and air cargo reports that appear to have not been reported on time and may amount to an offence under subsection 64AB(9) or 64AB(10) of the Customs Act.

From 1 January 2007, these reports will be provided to the selected cargo reporters with a letter indicating the:

- number and percentage of sea cargo reports and/or air cargo reports that appear to be reported on time for the period;
- number and percentage of sea cargo reports and/or air cargo reports that appear to not be reported on time for the period; and
- proportion of those sea cargo reports and/or air cargo reports that were reported after the estimated time of arrival of the ship or aircraft at the first port in Australia for the period.

For the purposes of these reports, an indicative assessment of timeliness is made using the original version of the cargo report and the estimated time of arrival of the ship or aircraft at the first port or airport in Australia specified on the original version of the impending arrival report. Although it is sometimes inaccurate due to uncertainties in shipping schedules, the estimated time of arrival specified on the original version of the impending arrival report is used because it is information currently available in a report format from the ICS and it provides a common baseline for Customs and industry to make initial comparative assessments of timeliness.

The report will also include a detailed list of all sea cargo reports and/or air cargo reports that, on the basis of the information available to us, appear to not be reported on time and a comparison of the percentage of cargo reports that appear to not be reported on time with previous monthly percentages. The detailed report will clearly identify those reports that appear to have been made after the estimated time of arrival of the ship or aircraft at the first port or airport in Australia as specified on the original version of the impending arrival report. These reports are NOT considered to be a cargo reporter's compliance history or compliance record. The only purpose of these reports is to provide a list of those reports that appear to not be made on time to assist in managing compliance.

Where possible the information provided to the selected cargo reporters will not include:

- Cargo reports submitted as re-reports of sea cargo originally reported on time; or
- Sea cargo reports made for surplus cargo.

Our initial focus for compliance action has been on those reports made *after the actual arrival* of the ship or aircraft at the first port or airport in Australia as specified on the actual arrival report for the ship or aircraft. Over time our focus will expand to reports that have not been made *within the relevant timeframe prior to the actual arrival* of the ship or aircraft at the first port or airport in Australia. We will select no more than five cargo reports that fall into these categories and invite the cargo reporter (responsible party) to provide an explanation of the circumstances surrounding those reports.

It should be noted that while our compliance efforts are focussed on a selection of cargo reporters, other cargo reporters may be invited to provide an explanation of the circumstances surrounding no more than 5 cargo reports that appear to not be reported on time and may be subject to compliance management action as set out in this notice.

Compliance Management Action

Further compliance management action, such as making a record of non-compliance, issuing a warning letter or an infringement notice, or initiating prosecution action, will only occur after consideration of any further information provided to us in response to an invitation to explain the circumstances surrounding the selected reports. This means that further compliance management action will only be taken in relation to no more than 5 cargo reports.

No compliance management action will be taken for an offence under subsection 64AB(9) or 64AB(10) of the Customs Act in relation to cargo reports submitted as re-reports of cargo originally reported on time. However, any action that may be taken in relation to the accuracy of the cargo report would be treated as a separate matter.

In determining the nature of further compliance management action (if any), we will consider whether:

- there are reasonable grounds to believe that an offence under subsection 64AB(9) or 64AB(10) of the Customs Act has been committed;
- any legislative defences/exceptions apply;
- the discretionary considerations in the Infringement Notice Scheme Guidelines (2006) (the Guidelines) indicate that an infringement notice should be served for an offence under subsection 64AB(10) of the Customs Act;
- any other mitigating factor as specified in an Australian Customs Notice or Australian Customs Cargo Advice applies;
- having regard to the overall cargo reporting compliance level over a period of 6 months before the alleged offence occurred, there was a sustained improving trend in the timeliness of cargo reports.

An infringement notice for failing to meet the requirements for the reporting of cargo may be served when the CEO or a delegated Senior Executive Service officer considers that:

- There are reasonable grounds to believe that an offence under subsection 64AB(10) of the Customs Act has been committed and no defences/exceptions apply; AND
- The discretionary considerations in the Guidelines (section 3.3 of the Guidelines) indicate that an infringement notice should be served; AND
- No other mitigating factor as specified in an Australian Customs Notice or Australian Customs Cargo Advice applies; AND
- Having regard to the overall cargo reporting compliance level over a period of 6 months before the alleged offence, there is no sustained improving trend in timeliness of cargo reports.

If, after considering the Guidelines, it is considered that an infringement notice should not be served, we may make a record of non-compliance or issue a warning letter. This action may be taken when:

- There are reasonable grounds to believe that an offence under subsection 64AB(10) of the Customs Act has been committed and no defences/exceptions apply; AND
- The discretionary considerations in the Guidelines indicate that an infringement notice should not be served; AND
- No other mitigating factor as specified in an Australian Customs Notice or Australian Customs Cargo Advice applies; AND
- Having regard to the overall cargo reporting compliance level over a period of 6 months before the alleged offence, there is no sustained improving trend in the timeliness of cargo reports.

Any decision regarding the initiation of a prosecution for the failure to meet the requirements for the report of cargo will be made having regard to the Prosecution Policy of the Commonwealth.

Inquiries concerning this notice may be directed to Manager Infringement Notice Scheme by email to Compliance1@customs.gov.au.

Neil Mann
Deputy Chief Executive Officer
Passenger and Trade Facilitation
CANBERRA ACT

12 January 2007