



DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION NOTICE

No.2017/16

Definition of “Owner” and the compliance approach for the purposes of revenue recovery and duty demands

Purpose

The purpose of this Notice is to provide general advice to industry and owners/importers on the definition of “Owner” contained in the *Customs Act 1901* (Customs Act). In addition, this Notice outlines the broad compliance approach for the purposes of duty demands and revenue recovery under section 165 of the Customs Act.

This Notice should be read in conjunction with the Australian Customs and Border Protection Notice 2014/50 that relates specifically to the application of the definition of “Owner” to importations where the imported goods are sold under the ‘Delivered Duty Paid’ Incoterm[®] as set out in the International Chamber of Commerce Incoterm[®] Rules.

Who is an “Owner” under the Customs Act?

Section 4 of the Customs Act defines “Owner” as follows:

“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.

This means that most parties participating in an import or export supply chain, including licensed customs brokers, may be considered the “Owner” for the purposes of the Customs Act.

Why is the definition so broad?

Commercial arrangements covering the sale and importation of goods are many and varied. The contract of sale will generally set out the responsibilities of each party to the commercial transaction and usually identifies the person with the responsibility, under the contract, for paying the relevant duties and taxes. This is done through the use of the relevant Incoterm[®] as set out in the International Chamber of Commerce Incoterm[®] Rules.

Under the Customs Act however, the responsibility to comply with important provisions including in relation to the making of an import declaration and payment of duty, rests with the “Owner” as defined in section 4. This operates to make the liability effectively joint and several. For example, one of the persons mentioned in the definition has to comply with the requirements to make an import declaration and to pay the correct duty and once that is done, no other party is liable to pay the duty. That is the case regardless of the commercial arrangements.

What happens when the person who has responsibility to pay the duty under the commercial contract doesn’t pay?

Section 11 of the *Public Governance, Performance and Accountability Rule 2014*, places an obligation on the Department of Immigration and Border Protection (DIBP) to pursue a debt owing to the Commonwealth. This can include issuing a demand for duty on a party that may not be identified under the commercial contract as the person responsible for paying the duty. Examples of where this may happen include where a party cannot pay as that party is insolvent, or it is uneconomic to pursue the party for the debt such as may be the case where a party is based overseas.

Failure by a particular party to pay relevant duties and taxes may be a breach of a commercial contract. Commercial parties can take out insurance in relation to damages they may suffer as a result of breach of contracts. DIBP is not in a position to advise on these matters.

What is the approach to determining who a demand for duty will be issued to?

The importer named on the import declaration would generally be the party who would be issued with a demand for unpaid duty in the first instance. Where this demand is paid, no other party is liable for the duty.

The broad definition of "Owner" allows DIBP to consider issuing a demand for unpaid duty on parties other than the importer nominated on the import declaration. In such circumstances, DIBP will consider the facts of each matter carefully before determining which party to issue the demand on. The involvement and actions of parties, in relation to the goods, will be assessed based on the relevant circumstances and facts. DIBP may ask questions and request further information or documentation from parties to assist in clarifying the scope and degree of their involvement in the importation of the goods.

When considering if a demand should be issued to a party (person or entity) other than the importer specified on the import declaration, DIBP will have regard to all parties who could be determined as an owner. These parties may differ depending on the nature and circumstances of how the goods were imported and the status of the goods. For example, when goods have been entered for home consumption and duty is outstanding, it may be relevant to consider who is in possession or control of the goods as contemplated by the definition of "Owner" under section 4 of the Customs Act. Other parties involved in clearing goods imported into Australia, including licensed customs brokers, may meet the definition of "Owner".

The impact a party's conduct has had on the non-payment or underpayment of customs duty will be considered. For example, if a party acted in a manner that showed disregard for their obligations under the Customs Act, and this is a significant factor in the non-payment or underpayment of duty for the imported goods, that party is more likely to be issued with a demand.

Once a decision has been made that a demand for duty should be made on a party other than the importer named on the import declaration that demand will be issued in writing to that party. The demand notice will provide details as to why it was issued, a breakdown of the outstanding amount and details of how to proceed if the demand is disputed.

[signed]

Joshua Hutton
Acting Assistant Secretary
Trade and Customs Branch
CANBERRA ACT

5 June 2017

[signed]

Erin Dale
Commander
Customs Compliance Branch
CANBERRA ACT

5 June 2017

Section 165 of the *Customs Act 1901*

165 Recovery of unpaid duty etc.

- (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.
- (2) An amount of drawback, refund or rebate of duty that is overpaid to a person:
 - (a) is a debt due to the Commonwealth; and
 - (b) is payable by the person.

Demand for payment

- (3) The Comptroller-General of Customs may make, in writing, a demand for payment of an amount that is a debt due to the Commonwealth under subsection (1) or (2).
- (4) A demand, under subsection (3), for payment of an amount must specify the amount and include an explanation of how it has been calculated.
- (5) A demand, under subsection (3), for payment of an amount must be made within 4 years from:
 - (a) if the amount is a debt due to the Commonwealth under subsection (1)—the time the amount was to be paid by under this Act; or
 - (b) if the amount is a debt due to the Commonwealth under subsection (2)—the time the amount was paid;unless the Comptroller-General of Customs is satisfied that the debt arose as the result of fraud or evasion.

Recovery in court

- (6) An amount that is a debt due to the Commonwealth under subsection (1) or (2) may be sued for and recovered in a court of competent jurisdiction by proceedings in the name of the Collector if:
 - (a) the Comptroller-General of Customs has made a demand for payment of the amount in accordance with this section; or
 - (b) the Comptroller-General of Customs is satisfied that the debt arose as the result of fraud or evasion.