Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2013] AATA 100

Division	**GENERAL ADMINISTRATIVE DIVISION**
File Number(s)	**2012/4685**
Re	**BR Williams Customs and Freight Forwarding Pty Ltd**
	APPLICANT
And	**Chief Executive Officer of Customs**
	RESPONDENT

DECISION

Tribunal	**Ms J L Redfern, Senior Member**
Date	**27 February 2013**
Place	**Sydney**

The decision under review is set aside and in substitution the Tribunal decides that the applicant should be reprimanded in terms consistent with this decision.

.....[sgd].....

Ms J L Redfern, Senior Member

CATCHWORDS

CUSTOMS AND EXCISE – licensing – customs broker – cancellation of licence – whether cancellation "necessary" for the protection of revenue or for the purpose of ensuring compliance with the Customs Acts – standard of proof – decision set aside and substituted with reprimand

LEGISLATION

Customs Act 191 ss 33, 183CQ, 183CS, 273GA

CASES

Briginshaw v Briginshaw (1938) 60 CLR 336
Jones v Dunkel (1959) 101 CLR 298
Minister of Immigration v Pochi (1980) 4 ALD 139
Re Control Customs Pty Ltd and Chief Executive Officer of Customs [2001] AATA 284; (2001) 64 ALD 461
Re Martino and Australian Taxation Office [2002] AATA 1242; (2002) 70 ALD 403
State Drug Crime Commission of NSW v Chapman (1987) 12 NSWLR 447

REASONS FOR DECISION

Ms J L Redfern, Senior Member

27 February 2013

1. The applicant was granted a customs broker's licence in 2007. The holder of a customs broker's licence may accept authorisation from an owner of goods to act as their agent for the purposes of the *Customs Act 1901* (the Act).

2. After considering a report from the National Customs Brokers Licensing Advisory Committee (NCBLAC) dated 25 September 2012, a delegate of the respondent decided on 5 October 2012 to cancel the licence of the applicant with effect on 23 October 2012. The applicant sought a review and stay of the decision of the respondent by application to this Tribunal filed on 18 October 2012. The respondent initially opposed the stay but subsequently consented on the applicant agreeing to pay a bond to the respondent and opening a trust account and the matter being listed for hearing expeditiously. The matter was heard within two months of the application for review.

3. The issue for determination was whether, in the circumstances of the case and having regard to the report of the NCBLAC, the licence of the applicant should be cancelled or whether some other action should be taken.

LEGISLATIVE FRAMEWORK

4. The Act deals with the importation and exportation of goods to and from Australia and includes provisions that promote border protection, compliance with international treaties and conventions and the recovery of revenue. The Act is administered by the Chief Executive Officer of Customs (the CEO). Only licensed customs brokers, and authorised employees of importers, can enter imported goods into Australia on behalf of importers, creating a "statutory monopoly". The Act establishes a regulatory regime through which the CEO may monitor and enforce compliance with the Act using licensed customs brokers as gatekeepers. For instance, a licensed customs broker is obliged to ensure that imported goods remain under Customs control until certain regulatory and/or revenue requirements are met, such as the obligation of the owner of the goods to pay duty or for the goods to be examined. It is an offence for goods subject to Customs control to be moved or delivered without the appropriate authority.

5. Part XIII, Division 5 of the Act provides an infringement notice scheme for certain offences under the Act, including offences relating to the unauthorised movement or delivery of goods. The penalty applicable on infringement notice is one fifth of the maximum penalty for the offence. If the infringement notice is paid, the liability of the

person for the offence is discharged, the person cannot be prosecuted for the offence and the person is not regarded as having being convicted of the offence.

6. Part XI of the Act governs the regulation of licensed customs brokers. Section 183CQ(5) of the Act provides that the CEO may give notice to a licensed customs broker of the intention to refer to the NCBLAC for investigation and report on the question of whether he or she should take action in relation to the licence under s 183CS(1) of the Act. Such notice may be given if the CEO has reasonable grounds to believe, relevantly for the purposes of this case, that the customs broker has "ceased to perform the duties of a customs broker in a satisfactory and responsible manner" (s 183CQ(1)(d)) or "it otherwise appears to the CEO to be necessary for the protection of the revenue or otherwise in the public interest to give notice".

7. Section 183CS of the Act provides as follows:

> ***Powers of CEO***
>
> *(1) Where the CEO, after considering a report under subsection 183CQ(7) in relation to a broker's licence, is:*
>
> *(a) satisfied in relation to the licence as to any of the matters mentioned in paragraphs (a) to (j) (inclusive) of subsection 183CQ(1); or*
>
> *(b) satisfied on any other grounds that it is necessary to do so for the protection of the revenue or for the purpose of ensuring compliance with the Customs Acts;*
>
> *he or she may, by notice to the customs broker:*
>
> *(c) cancel the licence; or*
>
> *(d) if the licence is about to expire-order that the licence not be renewed; or*
>
> *(e) reprimand the customs broker; or*
>
> *(f) in a case where the licence is not already suspended-suspend the licence for a period specified in the notice; or*
>
> *(g) in a case where the licence is already suspended-further suspend the licence for a period specified in the notice.*
>
> *(2) Where the CEO, after considering a report under subsection 183CQ(7) in relation to a broker's licence, decides not to take any further action in the matter, he or she shall, by notice in writing to the customs broker, inform the customs broker*

accordingly, and, if the licence of the customs broker is suspended, he or she shall revoke the suspension.

(3) A notice under subsection (1) shall:

(a) be in writing; and

(b) be served, either personally or by post, on the holder of the licence.

(4) The period for which the CEO may suspend or further suspend a licence under subsection (1) may be a period expiring after the date on which the licence, if not renewed, would expire.

(5) Where the CEO orders under paragraph (1)(d) that a licence not be renewed, he or she shall notify the appropriate Collector accordingly.

8. A decision of the CEO under Part XI is reviewable by the Tribunal (s 273GA(1)(k) of the Act).

BACKGROUND FACTS

9. There is little factual dispute in this matter. Mr Barry Williams is the sole director of the applicant. He has been engaged in the customs and freight forwarding industry since 1966 and worked for various customs and freight forwarding businesses until 1998, when he started his own business through BR Williams Pty Ltd. According to Mr Williams, BR Williams Pty Ltd was a licensed customs broker which went into administration in 2007 following a dispute with the Australian Taxation Office. Mr Williams established the applicant in 2007 following the collapse of BR Williams Pty Ltd. The applicant employs two licensed customs brokers, Mr Philip Cole and Mr Gary Johnson, and is reported to have 16 employees, although according to the evidence of Mr Williams, not all staff are employed by the applicant. Staff are also employed by two related family companies that provide equipment and services to the applicant.

10. In January 2010 the respondent conducted an audit of the applicant's business activities for the period 1 January 2009 to 1 January 2010. The respondent reviewed a sample of 30 import declarations lodged by the applicant and found errors in eight of those declarations. The respondent gave notice to the applicant of the findings of the audit by letter dated 30 June 2010. Relevantly, the "Detailed Results and Recommendations" attached to the letter recorded the following by way of summary:

> *While the numbers of the errors detected were (13) high, most of the errors resulted in no revenue adjustments. The majority of errors related to errors in classification. Studying commercial documentation more closely should ensure that simple mistakes are no longer an issue. Improving these practices should ensure that the error rate improves.*
>
> *The misuse of various Tariff Concession Orders did present potential for significant revenue loss and had the origin of the goods been different (not eligible for DCS rates of duty), significant revenue adjustments may have been required. Similarly, had the incorrectly classified goods being re-classified to headings that attracted a higher duty rate, additional duty and GST may have been payable.*

11. The applicant provided explanations for some of the errors, but otherwise accepted the findings of the audit. No further issues were raised by the respondent in relation to these findings at this time.

12. After detecting discrepancies, officers of the respondent conducted enquiries and identified that 24 containers of goods had been moved and/or delivered by the applicant without the appropriate authority between 4 November 2010 and 18 January 2011 and on 20 May 2011. The applicant disputed that the movement of a container on 20 May 2011 was unauthorised and the respondent subsequently accepted this contention. In respect of the other unauthorised movements and/or deliveries, it is common ground that three containers were delivered to the importer, Mort Bay Traders Pty Limited, on 4 November 2010 and 6 January 2011 before duty had been remitted to Customs and that twenty containers imported by China Green International Limited were delivered to the applicant's warehouse, which was not a designated bonded facility under Customs control, between 17 and 18 January 2011. The applicant did not notify the respondent about these breaches and later argued that it experienced particular problems at the time with the availability of delivery time slots on the wharf and designated bonded facilities. This was exacerbated by the large number of containers that the applicant was handling for China Green International Limited (there were 26 containers in total) and the absence through serious illness of Mr Williams and Mr Cole, who were involved in the day-today management of the applicant's operations.

13. These unauthorised movements were alleged by the respondent to be in breach of s 33(6) of the Act and between May 2011 and February 2012 the respondent issued 23

infringement notices to the applicant in respect of the breaches. The total value of the infringement notices issued was $30,360. The applicant paid these infringement notices.

14. It is also common ground that:

(a) In respect of the three containers imported by Mort Bay Traders Pty Limited, duty was paid to the applicant on 1 November and 29 December 2010 in the sum of $29,981.46, but was not remitted to Customs until 9 and 10 June 2011 respectively; and

(b) In respect of the goods imported by China Green International Limited, payment for 10 containers was received by the applicant on 31 January 2011 ($19,081.08), but not remitted to Customs until 10 June 2011 and payment for 16 containers was not received by the applicant until 9 March 2011 yet payment of the duty (being $28,795.24) was made by the applicant to Customs on 31 January 2011.

15. Between 2 February 2010 and 31 August 2011 23 electronic funds transfer (EFT) payments by the applicant to the respondent were dishonoured and on 4 August 2011, the respondent removed the applicant's entitlement to pay by EFT. These amounts were subsequently paid. According to records provided by the respondent, during 2010 these amounts were paid within days, but during 2011 there were delays of up to two weeks in some cases. It is not in dispute that the applicant was experiencing cash flow difficulties during this period and did not have an overdraft facility until 2012.

16. On 2 March 2012 a delegate of the respondent issued a notice to BR Williams Pty Ltd under s 183CQ of the Act notifying that it was intended to refer BR Williams Pty Ltd to the NCBLAC for investigation and report on the question of whether the respondent should take action under s 183CS(1) of the Act. The grounds for the referral were threefold, namely: whether the applicant had ceased to perform the duties of a customs broker in a satisfactory and responsible matter; concern that documents prepared by the applicant contained errors that were unreasonable having regard to the nature and frequency of those errors; and whether it was necessary for the protection of the revenue and in the public interest for action to be taken. It should be noted that this notice was in

error as it referred to BR Williams Pty Ltd not the applicant. This error was subsequently corrected and there is no suggestion that this administrative error resulted in a flaw in the referral and investigation process.

17. The matter was referred to the NCBLAC and by letter dated 28 March 2012, the NCBLAC invited the applicant to provide written submissions and any other documents relevant to its inquiry and investigation. The applicant was also invited to attend a meeting with the NCBLAC to present its response to the issues that had been referred. The NCBLAC's inquiry and investigation was held on 8 May 2012. Mr Barry Williams, Mr Philip Cole, Mr Gary Johnson and Mr Ian Rodda, the applicant's representative, attended the inquiry and made representations. The applicant also provided written submissions and documents to the NCBLAC and there was further correspondence between the NCBLAC and the applicant from 18 May to 14 September 2012. In its letter of 14 September 2004, the applicant attached, amongst other things, a document headed "Guidance for Standard Operation Operating Procedures".

18. The NCBLAC issued its report on 25 September 2012 and recommended to the respondent that the applicant's customs broker's licence be revoked with effect from one month after notification of the decision.

19. The NCBLAC considered the five matters that had been referred, which were summarised by the NCBLAC as follows:

    1. *The movement without authority and delivery without authority of 24 containers in NSW between 4 November 2010 and 18 January 2011 and one container in Queensland on 20 May 2011;*

    2. *Various tariff classification and related issues detected in a Customs audit;*

    3. *Dishonouring of payments leading to revocation of the Company's electronic funds transfer privileges with Customs;*

    4. *Failure to remit to Customs client funds provided for the payment of duty within a reasonable period; and*

    5. *Failure to finalise various declarations within the required period.*

20. The NCBLAC expressed concern that issues 3, 4 and 5 may have occurred because the applicant was in significant financial distress, but accepted the evidence from the applicant and its accountant that the applicant was not insolvent. The NCBLAC nonetheless expressed concern that "the only logical reason for these issues to have arisen is poor internal management". The NCBLAC considered the tariff classification issues and noted that while "these matters do not by themselves warrant an adverse action, they do add to the overall concerns about the internal management and operations of the Company". The issue that caused the NCBLAC the most concern was the unauthorised movement and/or delivery of goods. Relevantly, the NCBLAC reported as follows:

> *The Committee notes that the delivery without authority in this case is not limited to an isolated, small shipment of goods known to be of little concern. The deliveries that occurred without authority are multiple in number and of considerable size, and the deliveries occurred without any acceptable reason. Notwithstanding that the entries lodged in respect of them indicated that the goods allegedly contained in the shipping containers attracted relatively modest duty liability and should not have attracted other importation concerns, their removal from Customs control without authority as required by the law left open the possibility that the goods may not have been as described and denied Customs the opportunity to verify content without doubt. Conceivably, depriving Customs of this opportunity could have had major public interest concerns – whether for the Commonwealth Revenue through duty, GST or other impost, for Australia's biodiversity security, or for other factors such as endangerment to public health if illicit drugs or other prohibited items were concealed therein.*
>
> *In these circumstances the Committee considers that the inherent breach of trust evidenced by the Company as a licensed broker of itself warrants denial of its status as a licensee for a period of 12 months.*

21. The NCBLAC raised concerns about the capacity of the applicant to "consistently meet on an ongoing basis its obligations as a licensed broker" and observed that the applicant did not appear to have adequate internal procedures in place and had demonstrated a level of disorganisation when responding to the NCBLAC's queries. The NCBLAC concluded:

> *Accordingly, the Committee considers that the prudent course would be to require that the Company, during the period it is unable to operate as a licensed broker, take steps to "get its house in order" and that there be put in place arrangements when and if it resumes operating as a broker that will demonstrate that the CEO can have reasonable confidence that the events of the past will not be repeated. While as noted above its recently prepared Standard Operating Procedure is a step in the right direction, the*

Committee considers that it is not yet sufficiently comprehensive or detailed to inspire the necessary degree of confidence.

22. A delegate of the respondent accepted the findings and recommendation of the NCBLAC and cancelled the applicant's licence with effect on 23 October 2012. It should also be noted that while this process was being undertaken, the applicant's licence was renewed on 1 July 2012 under s 183CJ of the Act for a period of three years.

SUBMISSIONS OF THE PARTIES AND ISSUES FOR DETERMINATION

23. The applicant submitted that the only basis on which the applicant's licence could be cancelled was if the Tribunal was satisfied as to any of the matters mentioned in s 183CQ(1)(a) to (j)) of the Act or if the Tribunal was satisfied that it was "necessary … for the protection of the revenue or for the purpose of ensuring compliance with the Customs Acts". There was no evidence to establish any of the grounds set out in s 183CQ(1) and therefore the respondent must rely on s 183CS(1)(b) of the Act, namely, that cancellation was necessary to protect revenue and ensure compliance. The Tribunal could not be satisfied in the circumstances of the case and based on the evidence that cancellation is necessary. Necessary means "no plausible alternative". Cancellation is a drastic outcome and should not be used as a punishment. The applicant was punished for the unauthorised movement and/or delivery of goods by the issue of the infringement notices, which have been paid. As such, punishment is not a relevant consideration and there must be some connection between the conduct alleged and the risk to revenue or compliance with the Customs Acts.

24. The applicant further submitted that the relevant issue for consideration was whether it is likely the applicant will repeat the previous breaches. The Tribunal should be satisfied that there is no real risk of further breaches by the applicant. The breaches in relation to the unauthorised movement and/or delivery of goods were isolated incidents over a period of two months at a time when both Mr Williams and Mr Cole were ill and away from the office. These circumstances were exceptional. There is no evidence of non-compliance since this time. Changes have been made to the operating procedures of the applicant. There is no evidence of financial risk – all revenue has been received and the applicant has paid a bond to the respondent to guarantee payment of duty. Furthermore,

the submission by the respondent that the applicant is untrustworthy is "misplaced". This was not raised with the applicant or directly with Mr Williams by the NCBLAC or by the respondent's advocate during the hearing. For instance, there was no evidence that the failure to remit payment was a deliberate act to withhold funds for working capital. The respondent bears the onus of establishing that cancellation is "necessary" and the respondent cannot simply rely on past breaches or the findings of the NCBLAC. The Tribunal must consider the report of the NCBLAC, but its findings are not evidence. There is insufficient evidence to satisfy the Tribunal that cancellation is necessary and the Tribunal should set aside the decision of the respondent.

25. The respondent submitted that that the Tribunal must consider the report of the NCBLAC in making a decision, and it was relevant that the NCBLAC had expressed concern about the applicant's capacity to consistently meet its obligations as a licensed broker. The conduct of the applicant in respect of the unauthorised movements and/or deliveries involved serious breaches. Of particular concern was that goods were released without the payment of duty and that duty had been received from clients but not remitted to Customs in a timely manner. The applicant was not full and frank in disclosing the extent of unauthorised movements and deliveries to Customs. The integrity and competence of customs brokers was "essential to the proper collection of revenue on entry and preventing prohibited imports". The nature of these breaches and the other concerns raised by the NCBLAC about the entry of inappropriate tariff classifications, dishonoured EFT payments and the lack of internal procedures was evidence that there was significant likelihood that the applicant would reoffend. Nothing had changed. Mr Williams was still managing the applicant and Mr Cole and Mr Johnson were still its nominees.

26. Given the important role of customs brokers, it was a "breach of trust" that money had not been remitted as soon as it was received from clients and it was relevant that Mr Williams did not disclose the breaches earlier or failed to disclose all information to the NCBLAC at the time of its inquiry. A reprimand would not be sufficient given the seriousness of the previous breaches and cancellation of the applicant's licence was necessary for the protection of revenue and to ensure compliance with the Act.

Furthermore, there was "necessarily an element of deterrence" in deciding what the appropriate response would be in order to protect revenue and ensure compliance.

27. There was an issue raised by the NCBLAC, and therefore by the parties in their evidence and at the hearing, about whether the applicant could continue to operate its business in a more limited capacity without the need for a customs broker's licence. There was evidence from the applicant that this would not be financially viable as most of its income was generated through the customs broking business rather than freight forwarding, which was a developing but small part of the business. There was also evidence from Mr Peter McKie, retired customs broker, and Mr Robert Fraser, licensed customs broker and director, about the extent to which a customs broker would be able to transfer or subcontract the customs broking part of its business to another licensed broker. Mr McKie gave evidence that this would not be commercially viable and would be likely to result in the loss of business to the broker. Mr Fraser said that it would be possible to subcontract, but conceded it would be difficult for a small freight forwarding company to remain commercially viable. In summary, the evidence of both experts was consistent on this issue.

28. In their final submissions the parties agreed that the issue of whether or not the applicant could continue to operate its business without a customs brokers licence was not a key issue in the dispute. It was accepted by both parties that cancellation was serious and would have a significant impact on the applicant's business. It was common ground that the issue for determination was whether, having regard to the evidence and the report of the NCBLAC, cancellation of the applicant's licence, or some other action as specified in s 183CS(1) of the Act, is necessary for the protection of revenue or to ensure compliance with the Customs Acts.

CONSIDERATION

29. I accept the submission of the applicant (which is also accepted by the respondent) that cancellation of a customs broker's licence, particularly when the licensee is an established business employing staff, is a serious measure. The legislation provides limited circumstances in which such action can be contemplated and in this case the

parties agree that the relevant provision for consideration is s 183CS(1)(b) of the Act, namely that the Tribunal must be satisfied cancellation (or some other action) is necessary for the protection of revenue or for the purposes of ensuring compliance with the Customs Acts.

30. The authorities referred to by the respondent primarily focussed on the question of whether a person or entity was "fit and proper" to be registered under regulatory regimes involving tax agents and barristers. The respondent also referred to the decision of Deputy President Purvis in *Re Control Customs Pty Ltd and Chief Executive Officer of Customs* [2001] AATA 284; (2001) 64 ALD 461, which was a case about the refusal to grant a corporate customs broker's licence on the basis that the director of the company had been convicted of fraud and was not a person of integrity. This case sets out some important observations about the regulatory regime for Customs control but does not deal with the application of s 183CS(1)(b). The parties did not refer to any authorities where this provision had been considered and it seems there has been no judicial or Tribunal consideration of this particular issue. However, similar provisions have been considered in the context of customs and excise by Deputy President Forgie in *Re Martino and Australian Taxation Office* [2002] AATA 1242; (2002) 70 ALD 403. One of the issues for determination was whether the licence of a tobacco producer should be suspended on the basis that it was necessary for the protection of revenue.

31. Deputy President Forgie referred to the meaning of "necessary" adopted by Allen J in *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447 at 452:

> *As to the word "necessary" it does not have, in my judgment, the meaning of "essential". The word is to be subjected to the touchstone of reasonableness.*
>
> *The concept is one as to what reasonably is necessary in a commonsense way. As Pollock CB said in* Attorney-General v Walker *(1849) 3 Ex 242; 154 ER 833:*
>
> > *'It may be stated as a general rule that those things are necessary for the doing of a thing which are reasonably required or which are legally ancillary to its accomplishment.'*

32. According to the Macquarie Dictionary (Fifth Edition), "necessary" means "cannot be dispensed with". Counsel for the applicant submitted that if there was room for doubt

then the power under s 183CS(1) should not be exercised. In other words, the Tribunal must be satisfied "beyond reasonable doubt" that the exercise of the s 183CS(1) power is required to meet the prescribed objectives of protecting the revenue or ensuring compliance with the Customs Acts.

33. I do not accept this submission. It is well settled law that administrative decision-makers must have sufficient information on which to ground a decision to their "reasonable satisfaction". As observed by DP Forgie in *Martino* (at para 54) "Satisfaction, for all practical purposes, equates with the civil standard of proof which may be expressed as 'the balance of probabilities'." However, where an adverse finding carries serious consequences there is authority that the decision-maker should not be lightly persuaded (*Briginshaw v Briginshaw* (1938) 60 CLR 336). In such circumstances, the Tribunal must be satisfied by "some rationally probative evidence and not merely raised before it as a matter of suspicion or speculation or left, on material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had." (Deane J in *Minister of Immigration v Pochi* (1980) 4 ALD 139 at 156.)

34. Section 183CS(1) provides for a number of different outcomes if the decision-maker is satisfied that some action should be taken to protect revenue or ensure compliance. The decision-maker may cancel the customs broker's licence, the licence may be suspended or not renewed or the broker may be reprimanded. The consequences of cancellation are the most significant and as such, I accept that I must be satisfied there is cogent evidence to support a finding that cancellation is "necessary".

35. In this case, there is no dispute that in the period from 4 November 2010 to 18 January 2011, the applicant moved and/or delivered 23 containers without appropriate Customs' authority. There is also no dispute that there were numerous errors in tariff classifications entered by the applicant in 2009 and that the applicant had cash flow problems during 2010 and 2011 resulting in 23 electronic fund transfer payments being dishonoured. There were significant delays in the applicant making payments to Customs in late 2010 and early 2011 – even though the duty had been paid by clients.

The applicant failed to remit four payments totalling nearly $50,000 to the respondent and these payments were not made until June 2011, several months after payment had been received and, in one case, after seven months.

36. To assess whether it is necessary to take any of the actions prescribed in s 183CS(1), including cancellation, it is relevant to consider the conduct of the applicant in managing its business, past breaches and internal management procedures of the applicant.

37. The issues that gave rise to the referral to the NCBLAC fall into three categories. First, there is the unauthorised movement of goods; secondly, there are the tariff classification problems and, thirdly, there are the financial and cash flow problems evidenced by the dishonouring of payments and the failure to remit duty. There was a fourth issue raised by the NCBLAC and this is whether the applicant has sufficient internal management controls in place to comply with its obligations under the Act. It is relevant to consider each of these matters separately and cumulatively.

38. I accept the submission of the respondent, and the findings of the NCBLAC, that the unauthorised movement of goods in late 2010 and early 2011 were serious breaches that had the potential to undermine the regulatory regime of Customs control established by the Act. The importance of this regime was referred to in the respondent's written submissions and is described in some detail in the decision of Deputy President Purvis in *Re Control Customs Pty Ltd* (at [12] – [16]).

39. The question is whether these breaches are likely to be repeated. If so, there is a good argument that cancellation would be "necessary" to protect revenue and ensure compliance. The respondent submitted there is significant risk and, unsurprisingly, the applicant submitted there was no risk. While neither party addressed the question, there is a threshold issue about the nature of the risk and how this should be measured having regard to the implications for the public interest if there is a breach and the adverse consequences for the applicant if its licence is cancelled. Given the seriousness of cancellation, I am of the view that there must be cogent evidence that there is a significant risk of future breach.

40. Mr Williams gave evidence that he was ill during 2010 and 2011 and this made it difficult for him to work in the business during this period. He was diagnosed with cancer in 2008 and commenced chemotherapy in 2010 once he had recovered from heart bypass surgery. This treatment continued every six weeks until March 2012 and while he endeavoured to work, this was difficult because of the effects of the treatment. The main burden of the day-to-day management of the applicant rested with Mr Cole. On 13 November 2010 Mr Cole suffered a stroke and was therefore absent from the office from mid-November 2010 until late January 2011. Mr Williams spent a few hours in the office during this period when he was able, but the day-to-day management was undertaken by Mr Gary Johnson, who was an experienced customs broker and had been working with Mr Williams for many years. Mr Johnson gave evidence that he found it very difficult to cope during this period because of the workload.

41. Mr Williams was not personally involved in supervising the movement of containers during this period, but he made enquiries about what had happened and prepared a submission to the NCBLAC in a letter dated 18 May 2012. According to Mr Williams, the period between November 2010 and January 2011 was very busy and it was difficult to obtain delivery time slots from staff at the wharf. This meant that the applicant was under pressure to accept deliveries even though payment had not yet been received from its client, China Green International Limited. The client was importing 26 containers over a period of a few days and the large number of containers added pressure to the resources of the applicant at a time when neither Mr Williams nor Mr Cole were available to supervise the shipment. The applicant accepted delivery time slots for these containers, but was then required to immediately move the containers to designated bonded areas. On Mr Williams' account, errors were made by the staff member who was arranging the transport and delivery of the goods (the allocator) and 20 of the containers were delivered to the wrong facilities, including the applicant's warehouse which was not a designated bonded area.

42. There was some inconsistency between the evidence of Mr Williams, Mr Johnson and the written account of Mr Williams to the NCBLAC about who authorised the movement

of goods, but my overall impression of the evidence was that there was confusion, a lack of leadership and poor internal management and control.

43. While Mr Williams was at a loss to explain how this had happened, he gave evidence that changes had been made to the applicant's procedures since this time to ensure that these problems would not be repeated. One of the problems was that China Green International Limited, which was a new but difficult client, had failed to pay duty to the applicant at the time of importing the goods. This necessitated multiple movements of containers to a designated bonded facility after deliver time slots had been accepted.

44. Mr Williams said he had learned from this experience and had changed the applicant's procedures to ensure staff would not allocate delivery slots until duty had been paid by the client. He had also taken steps to ensure that containers were sent to the correct location and were not released until duty had been paid by designating a staff member to specifically oversight these activities. Mr Luke Smith was the employee of the applicant who had been instructed to undertake this task. He reported directly to Mr Williams and spent approximately two hours every day supervising and checking these matters. As far as Mr Williams was aware there had been no breaches or any unauthorised movements since this system had been in place and he was confident there would be no further breaches of Customs control.

45. There was no independent evidence to corroborate this, such as an expert review of the applicant's procedures or evidence from Mr Smith. The respondent tendered a spreadsheet which the respondent submitted showed that the applicant had made three 'under bond' movements of goods in 2012. This was said to be contrary to Mr Williams' evidence that the applicant no longer took delivery of goods from the wharf without duty having been first paid. Mr Williams was cross-examined about these movements and said that they may have been directed by Customs for quarantine purposes. He had no recollection of these particular movements, but if they had been moved for quarantine examination, there was no conflict with his evidence. He maintained there had been no unauthorised movement and/or delivery of goods in the past 18 months. The respondent did not adduce any evidence to the contrary.

46. Having considered all of the evidence, I am not satisfied that there is a significant risk the applicant will breach Customs control in the future by the unauthorised movement of imported goods. While I agree with the finding of the NCBLAC that this was not an "isolated" incident, all but three of the unauthorised movements involved two shipments over a period of five days comprising 26 containers for one client. This does not evidence persistent or systemic breach. I accept the evidence of Mr Williams and Mr Johnson that the circumstances that gave rise to the breaches were out of the ordinary. Errors were made because of the pressure caused by the absence of two key officers of the applicant. The applicant created some of this pressure by accepting containers for delivery when the client had not paid duty. Furthermore, the applicant did not have appropriate internal procedures in place at the relevant time to properly monitor the movement of goods or to ensure duty was paid before goods were released. If these procedures had been in place, it is likely that the absence of Mr Williams and Mr Cole would not have been so critical.

47. Notwithstanding this, there is evidence that procedures have changed but, more importantly, there is no evidence that there have been any further breaches since this time. The applicant submitted that the onus is on the respondent to produce evidence of breach to contradict Mr Williams' assertion there have been no subsequent breaches. According to counsel for the applicant, the failure to do so should lead the Tribunal to form the adverse inference that there is no such evidence available (*Jones v Dunkel* (1959) 101 CLR 298).

48. There is some force to this contention in the circumstances of this case. In a case such as this, it would be difficult for a licensed customs broker to prove the negative, namely, that it has not breached the provisions relating to unauthorised movement of goods. Presumably it would be easier for the respondent to identify whether there had been further contraventions, particularly given that the respondent has access to electronic data, such as the spreadsheet previously referred to, and other risk based tools that would be essential for a regulator to monitor compliance. While it is likely the respondent would have such tools, there was no evidence about what further investigations were made by the respondent and as such I should exercise caution in drawing inferences.

However, it is relevant to note that the applicant has been the subject of regulatory scrutiny by the respondent since at least June 2011, when Mr Williams met with the Director Compliance Operations NSW, and was referred to the NCBLAC for investigation and report in March 2012. It is therefore not unreasonable to infer that if there was evidence of further unauthorised movements and/or delivery of goods, this evidence would have been provided to the Tribunal by the respondent.

49. The second issue referred to the NCBLAC were the errors in the tariff classifications which had been the subject of the audit in 2010. Mr Cole gave evidence about these issues. He stated that many of the problems identified were a "matter of opinion" as between him and the author of the audit report. He said that he had made concessions on these matters to resolve what he considered to be "semantic disputes with Customs that have no revenue implications". Mr Cole conceded in cross-examination that he may have overstated this issue as there was only one such classification that fell into this category. He nonetheless maintained that he was not in error in relation to the classification of cheese products imported by Katoomba Trading. He said that he based his classification on information provided by Katoomba Trading and had no reason to question the classification or seek further information. A further issue raised with Mr Cole was that he had proceeded with an import entry without first obtaining a letter of authority from the client. Mr Cole said that he had proceeded because the client had failed to respond to his request for the letter of authority and while this was not his usual practice it would happen on occasion.

50. The NCBLAC concluded that "these matters would not, by themselves, justify taking any adverse action against either the Company itself for the individual nominee broker involved", but added to "the overall concerns about the internal management and operations of the Company".

51. I agree with the conclusion of the NCBLAC that these classification issues do not warrant cancellation, but I am not persuaded that these matters of themselves give rise to concerns about the internal management and operations of the applicant. The audit was over two years ago, it related to import entries in 2009 and did not have any revenue

implications. Furthermore, it represented a small sample of import entries, some of the issues raised could be characterised as 'matters of opinion' and no action was taken by the respondent at the time of the audit. There is no evidence these issues were widespread or systemic.

52. The third matter raised was the failure of the applicant to remit payments and the consistent dishonouring of payments in 2010 and 2011.

53. It was not in dispute that the applicant dishonoured 23 EFT payments in 2010 and 2011. Most of the dishonours in 2010 were rectified within days, but as noted earlier, some of the delays in 2011 were significant. Mr Williams conceded that the applicant experienced cash flow difficulties in 2010 and 2011 and the applicant provided an affidavit from its accountant, Mr David Cassaniti, seeking to put these matters in context. According to Mr Cassaniti, the applicant's cash flow issues arose in 2010 and 2011 because the applicant had a number of debtors who were exceeding their terms of trade. Credit management was difficult for many small businesses in this period, including the applicant and its clients. Mr Cassaniti stated that he had examined the financial records of the applicant from September 2011 and since this time the applicant had "traded successfully, positively and cash flow positive". He stated that he was unaware of any cheques or electronic payments being dishonoured since September 2011. Mr Cassaniti was not cross-examined on this evidence nor did the respondent present any evidence to the contrary.

54. Mr Cassaniti noted that the applicant had lodged 11,894 import declarations in the period 1 January 2012 and 18 October 2012. He opined that, assuming that there were a similar number of import declarations for 2011, nine dishonoured payments during the period represented a very small percentage of the import declarations. The applicant conceded that Mr Cassaniti had incorrectly calculated the percentage in his affidavit, but both parties agreed that if import declarations for 2011 were similar to 2012, the nine dishonoured payments in that period would only represent 0.07566% of total declarations.

55. The NCBLAC did not form a view that there had been insolvent trading, but rather characterised these dishonoured payments as evidence of "poor internal management". The failure to manage cash flow may be considered as such, but it should also be recognised that the effect of the Global Financial Crisis has placed businesses under considerable pressure to manage credit and cash flow over the past four years. This was the evidence of Mr Williams and Mr Cassaniti and has been the subject of the media reports and economic analysis. While this does not excuse the persistent dishonours in payments, it is relevant to note that there was no loss in revenue and all payments for duty were made by the applicant in most cases within days.

56. On the other hand, the failure of the applicant to remit payments from Mort Bay Traders Pty Limited and China Green International Limited until June 2011 was unexplained. It is unclear whether this was an administrative oversight, and therefore poor internal management, or the result of cash flow pressures. While the respondent submitted this was a breach of trust, suggesting mala fides, there was no evidence of this and Mr Williams was not tested on this issue. The NCBLAC made no such finding. The more likely explanation is that the applicant failed to remit payment because of poor systems and possibly cash flow issues relating to China Green International Limited. Mr Williams said that he had ongoing issues with late payments by this company which continued after January 2011. The meeting with the Director Compliance Operations NSW and other Customs staff in June 2011 no doubt motivated Mr Williams to investigate the unauthorised delivery of goods and regularise any payments. Again while this is no excuse for the failure to remit payments, properly understood these delays arose out of the circumstances that gave rise to the infringement notices.

57. I am not satisfied these breaches will be repeated with the frequency or to the extent previously reported and, as such, I am not satisfied they warrant cancellation of the applicant's licence. Mr Williams gave evidence that the applicant now has an overdraft facility and Mr Cassaniti gave evidence that the applicant was trading profitably and, importantly, cash flow positive. The respondent holds a bond to guarantee the applicant's financial obligations and there is no evidence that the applicant has dishonoured or failed to remit payments since at least 2 September 2011. As noted given

the regulatory scrutiny of the respondent, it would not be unreasonable to infer that if there was evidence of dishonoured payments or payments that had not been remitted, this evidence would have been provided to the Tribunal by the respondent.

58. A further issue arises as to whether these matters cumulatively warrant cancellation of the applicant's customs broker's licence. The NCBLAC formed the view that they did as can be seen for the following extract from its report:

> [T]*he Committee considers that there remains an underlying and quite fundamental doubt about the degree of confidence that the CEO could hold as to the capacity of the Company to consistently meet on an ongoing basis its obligations as a licensed broker under the Customs Acts. The Committee does not suggest that the Company and its officers are ill-motivated or incompetent. Rather, it appears that they are just extremely disorganised.*

59. As counsel for the applicant submitted, I must consider this report but the findings of the NCBLAC are not evidence and I am not bound by its conclusions or recommendations. I must make the correct or preferable decision having regard to this report, but on the basis of the evidence before me and applying the relevant administrative law principles. I give the report considerable weight as the NCBLAC comprised senior executives and an industry expert and it carefully considered the information provided by both the applicant and staff from the respondent. Despite this, I have come to a different view to the NCBLAC.

60. Even though there are numerous complaints against the applicant I am not satisfied that cancellation of the applicant's licence is "necessary" for the protection of revenue or to ensure compliance in the circumstances of the case. As submitted by the applicant, the breaches are in the more distant past and there is evidence that changes have been made so it is less likely they will be repeated. When the nature and extent of the breaches is examined in detail and in context, the conduct of the applicant certainly falls short, but not critically so. There was no finding by the NCBLAC (nor is there evidence in these proceedings) of dishonesty or wilful misconduct nor that its officers were "ill-motivated or incompetent". It is also relevant to note that, notwithstanding these problems, there was no loss of revenue to the Commonwealth nor was there evidence of other risks, such as endangerment of biodiversity or public health. There was no evidence of continuing

and persistent breach or incidents of payment default or breach of Customs control. Relevantly, Mr Williams has taken on a more active role in the business since 2012 to get the applicant's house in order, as recommended by the NCBLAC.

61. Suspension of the applicant's licence for a period pending remedial action may have been appropriate if there had been evidence of ongoing breach and remedial action identified to rectify the potential for breach. There was no evidence to support this and I am not satisfied based on the evidence that suspension is necessary for the protection of revenue or to ensure compliance. Section 183CS(1) does not provide for the respondent to impose conditions on the applicant, which may have been a more flexible remedy in a case such as this, although I note the respondent has already informally imposed administrative limitations on the applicant by removing its EFT privileges. I also note that the respondent has insisted on the applicant paying a bond of $20,000, which has been paid by the applicant. The respondent may have considered imposing conditions on the applicant as part of the licence renewal process, but given the licence renewal arose during the NCBLAC investigation process, this path was not examined.

62. A reprimand may serve a regulatory purpose in disciplinary proceedings, but the issue is whether it would serve any purpose in this case. For the Tribunal to impose a reprimand, I would have to be satisfied that it is necessary for the protection of revenue and/or to ensure compliance. The applicant submitted that there is no need for a reprimand because the applicant has been apprised of the seriousness of the breaches, has paid fines, incurred significant costs and made changes to its procedures. Section 183CS(1) of that Act is not intended to be punitive. The respondent made no submissions about this issue and contended that cancellation was the appropriate outcome. While these provisions are protective in nature, I accept the submission of the respondent that where the conduct of a licensed broker fails short of expected standards, a decision-maker may take into account the importance of general deterrence when determining the appropriate outcome under s 183CS(1).

63. Having regard to the facts in this case, which are essentially not in dispute, I am satisfied that a reprimand is necessary to protect revenue and/or ensure compliance by the

applicant. First, a formal reprimand provides a clear message to the applicant that its conduct fell below the standards expected of an entity granted the privileges and rights to be a licence holder. Secondly, but perhaps more importantly, a reprimand establishes guidelines for other licensed customs brokers about the type of conduct that will attract regulatory intervention and, if repeated and systemic, may lead to cancellation or suspension.

64. I therefore set aside the decision of the respondent and substitute a decision that the applicant should be reprimanded in terms consistent with this decision.

I certify that the preceding 64 (sixty - four) paragraphs are a true copy of the reasons for the decision herein of Ms J L Redfern, Senior Member

....[sgd].....

Associate

Dated 27 February 2013

Dates of hearing	**12 and 13 December 2012**
Counsel for the Applicant	**Mr V Gray, instructed by Mr I Rodda, BDO**
Solicitor for the Respondent	**Mr R Northcote, Australian Customs and Border Protection Service**