

update

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Customs & trade law

Obligations of importers, exporters and customs brokers to retain documents

A great deal has been written recently on the obligations of businesses to retain documents and their rights to destroy them. This issue was extensively canvassed in the Supreme Court case of McCabe against British American Tobacco Australia Services Ltd. that subsequently went on appeal to the Court of Appeal in 2002. The McCabe case led to changes being made to the law in this area with the passing of Crimes (Document Destruction) Act 2006 (Vic).

Obligation to retain documents governed by applicable legislation

A party's obligation to retain documents is governed by a number of Commonwealth and State laws that require individuals and companies to maintain particular records for varying periods of times. Different obligations arise depending on whether one is dealing with taxation, banking, corporate, employment, accounting or legal matters.

The following information looks at the obligations of importers, exporters and their agents such as Customs Brokers and freight forwarders to retain documents under the Customs Act and their rights to destroy them under The Crimes (Document Destruction) Act 2006 (Vic).

Persons who must retain documents under the Customs Act

The Customs Act nominates four classes of persons who must retain documents:

1. Persons who are the owners of goods imported into Australia (s.241 & 1AA) or exported from Australia (s.240(1A))
2. Persons who cause goods to be imported or exported into or from Australia (s.240(1B)(a))
3. Persons who receive goods imported into or exported from Australia (s.240(1B)(b))

4. Persons who make a communication to Customs. They must retain records verifying the contents of that communication (s.240AB(1) & (3)).

This means that importers, exporters Customs brokers, cargo handlers (including freight forwarders and cargo reporters) as well as and all other persons that communicate directly with Customs must retain records that will enable Customs to verify the contents of communications (s 240 (1B)).

Time documents to be retained

- Persons who fall within categories 1, 2 and 3 above must retain the relevant documents for five years from the time that the goods were imported or exported
- Persons who fall within category 4 above must retain the relevant documents for one year after the communication was made.

"Owner" of goods defined

"Owner" is defined in the Act to include any person being or "holding himself 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" (s.4).

Customs brokers acting to clear goods through Customs on behalf of owners of goods have been held to have the same obligations as "owners" under s.241 the Act (Clark v Chief Executive Officer of Customs (2005) SASC165).

This case has widespread ramifications for customs brokers who do not always retain commercial documents once they have cleared the goods through Customs as they generally return the Customs documents to their importer clients. In that case, the failure by the customs broker to retain copies of documents and not to pay duty on one of the

vehicles that he has cleared through Customs resulted in his prosecution and the imposition of a fine of \$3,100 and an order that he pay costs of \$35,000.

Documents to be retained

- The Act provides that **commercial documents** relating to goods imported or exported must be retained (s.240).
- The Act defines a commercial document to be a document prepared in the ordinary course of business for the purpose of a commercial transaction involving goods or their carriage but does not include electronic communications to or from Customs (s.4 (1)).
- The documents that must be kept are those that have come into the person's possession before, on or after the making of an entry for home consumption or a return that are necessary to enable the Collector to be satisfied of the correctness of the particulars of the entry or the return (s.240(1) & 1AA) or to assess whether the information communicated to Customs is correct.

Type of documents to be retained

Examples of the type of documents that should be retained include commercial invoices, packing lists, airway bills, bills of lading, evidence of payment made or received (for example, letters of credit, telegraphic transfers), permits, tally sheets, gate delivery and receipt records.

Obligations to produce commercial documents and records

The Act authorises Customs by written notice to require the person who keeps the record to produce the document or record for inspection either at the person's business premises in Australia or at a place that is specified in the notice within a period of not

less than 14 days after the notice was given (s. 240 AA and 240AC).

The documents and records must be able to be easily accessed in English and legible so that the Collector can readily ascertain whether the goods have been properly described for the purposes of importation or exportation and properly valued or rated for duty (s.240(5)).

The Act also authorises the Collector to issue a warrant to enter premises and to seize documents where "... information in writing has been given on oath to the Collector that goods have been unlawfully imported exported undervalued or entered or illegally dealt with" s 214 (1).

Consequences of failure to produce records

A failure to produce documents when requested by Customs is an offence under the Act (s.243SB). The penalty under this section is 30 penalty units (\$107.43 a penalty unit x 30 penalty units = \$3,222.90).

It is also an offence to deface or to alter commercial documents (s. 240 (6B)).

Obligations under the new Crimes Act legislation

Recent legislative changes have made it an offence to destroy certain documents in certain circumstances. The Crimes (Documents Destruction) Act 2006 commenced operation on 1 September 2006. It provides that a person who knows that a document is or is reasonably likely to be required in evidence in a legal proceeding and either destroys it or conceals it or authorises or permits someone else to do so with the intention of preventing it from being used in evidence in a legal proceeding will be guilty of a criminal offence and liable for imprisonment.

This Act also provides that even if an individual is not found guilty, a company may still be found guilty if the relevant mens rea is present. A company's mens rea will be determined by its "corporate culture" defined in this Act as an attitude, policy, rule, course of conduct or practice existing within the organization.

Conclusion

Importers, exporters, and Customs brokers need to be vigilant to ensure that the commercial documents relating to their businesses and the business of their clients are maintained for five years.

Other persons who communicate with Customs regarding the importing or exporting of goods must retain the documents for one year.

If the documents, however, are ones that are or are likely to be required to be used in legal proceedings, they should be retained in accordance with the requirements of The Crimes (Documents Destruction) Act 2006.

We recommend that you urgently review your present arrangements to ensure that your document retention and destruction policies are up to date and comply with current laws.

Documents should be properly catalogued and indexed to ensure that they can be located and accessed easily and that they are available if required at some later point either by a regulator or in the course of litigation.

Without a clear and well articulated document retention and document destruction policy in place, a company and its officers run the risk of prosecution and substantial penalties being imposed.

Please contact us if you require assistance in relation to document retention policies.

For more information

For more information, please contact:

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