

Customs and Global Trade Update

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Customs Brokers – Now's the time to review and rewrite your terms and conditions

A lot has changed in the customs world over the past 18 months and with new FTAs, the Trusted Trader Program and even a new name for Customs all happening soon, more changes are still on the way.

It's hard to keep up, let alone find time to check that your terms and conditions are up to date.

Terms and conditions (T&Cs) set out each party's rights and obligations and allocate risk in the event something goes wrong. Your pricing may be based on the importer/exporter carrying all the risk, but if your T&Cs are out of date, you may be exposed.

Below we set out the signs that as a customs broker or freight forwarder it's time to update your T&Cs:

- 1 You are using template terms and conditions
 - Many brokers use template T&Cs provided by an insurer or professional association. Further, many brokers only update those T&Cs when the original provider updates them. The terms will usually be updated to reflect some significant legislative change and changes will not be driven by your own individual circumstances. Further, it also not uncommon to see a set of template T&Cs adopted by a broker at one stage and then not updated as the broker has left the association, or ceased using the insurer, that provided the original template T&Cs. This means the terms and conditions used will be very dated.

Review your T&Cs. Do they reflect your current business and the relationship you want with your clients? Is a "one size fits all" set of T&Cs appropriate for your unique business? Are you exposed to risk?

2. Your T&Cs do not deal with broker mandatory disclosure obligations

Under the conditions of your broker licence, if you take on a new client and discover that they have been incorrectly claiming a tariff concession order, you must disclose this incorrect use to Australian Customs.

What do your T&Cs say about your liability to the client for any fines or additional duty they are required to pay? Are you required to inform the client that you intend to disclose the breach? What if they instruct you not to make disclosure?

Your T&Cs must address this issue.

3. Your T&Cs still refer to the Trade Practices Act

Do your T&Cs still refer to the Trade Practices Act? If so it is likely that they have not been reviewed from the perspective of compliance with the Competition and Consumer Law which replaced the Trade Practices Act.

Consumer protection provisions introduced in 2012 restrict reliance on, and can make invalid, unfair terms in consumer contracts. An important exception to these requirements is contracts for the carriage of goods.

This creates specific issues for customs brokers and trade forwarders. If your T&Cs do not have specific provisions for consumer contracts you may be using terms you cannot enforce against consumers.

4. Your T&Cs were drafted in the old compliance environment

It is becoming increasingly difficult to classify a good or apply a tariff concession order with confidence. Customs' own position is at best uncertain and at worst directly opposite to positions adopted in the past.

In this environment even the most skilful brokers risk misusing a TCO.

- » Are you liable for underpaid duty in this instance?
- » Can you insist that your client obtain a tariff advice?
- » Can you obtain a tariff advice without their consent?

These issues were probably not a priority when your current T&Cs were drafted, but should be now.

5. Your T&Cs do not reference the Personal Property Security Act

The 2012 Personal Property Security Act (PPSA) legislation is no longer new, but neither might be your T&Cs. If your T&Cs do not specifically refer to the PPSA there is a good chance that no one has considered the impact of this legislation on your business.

The PPSA sets out a system of prioritising interests in personal property. Your T&Cs should maximise your rights to register any security interest you hold in personal property (i.e. goods). Failure to do this may see your interest in the goods being defeated by a third party with more up to date T&Cs.

6. Your terms do not mention the Australian Border Force

From 1 July 2015 the Australian Customs and Border Protection Service will become part of the Department of Immigration and Border Protection and operate under the name the Australian Border Force. The CEO of Customs will become the Comptroller General of Customs.

Some T&Cs will be drafted in a way that accommodates Government name changes. Other T&Cs may not expressly refer to this issue. This can create uncertainty which can result in, or draw out, disputes.

Even if you are not worried about disputes, it is not the best first impression for a customs broker to ask its client to enter into a contract that does not use the correct name for Customs.

7. Your indemnity clause has not been recently reviewed

Indemnities from clients are crucial for customs brokers. This is because brokers make many payments, or engage services, on behalf of importers/exporters. A poorly drafted indemnity clause could mean that you are liable to forwarders, shipping companies or Customs for payment without being able to seek reimbursement from the client.

It is often assumed that simply having an indemnity clause will provide “dollar for dollar” compensation for losses. In fact, this is not always the case and many indemnity clauses have technical problems limiting their usefulness. Further, indemnity clauses need to be wide enough to cover all amounts potentially payable by brokers.

Does your indemnity clause contemplate reimbursement of penalties payable for incorrect cargo reporting, breach of broker licencing obligation or incorrectly using a TCO?

Hunt & Hunt’s Customs and Global Trade team can update your existing terms and conditions or draft a brand new set of conditions. We aim to provide T&Cs that you and your clients can understand, and that are as short as possible.

Crucially, we will also review your methods for obtaining client acceptance of those T&Cs.

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