Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the Customs Amendment (Miscellaneous Measures) Bill 2012

Submission by:

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Executive Summary

While supporting most of the content of the *Customs Amendment (Miscellaneous Measures) Bill 2012*, and the relevant clarifications that the Bill provides, the Australian Shipowners Association wishes to highlight to the Senate Legal and Constitutional Affairs Legislation Committee that there are additional urgent matters for consideration in relation to the way the *Customs Act 1901* is being implemented in very recent times.

There has been a change in the approach of Customs and Border Protection towards vessel importation with significant negative consequences to industry and the nation. Importation decisions are being based on a new interpretation by Customs of when a vessel is entered into the commerce of Australia, with no regard to the particular circumstances and timeframes in question or the intentions of the operator. Determinations around vessel importation has serious consequences for the application of other Australian laws, including immigration law, and threatens the ability of many operators to continue to do business in Australia.

There are a number of recent case studies that clearly demonstrate a policy shift within Customs and Border Protection - and the negative flow on effects. Case studies that this organisation is aware of are briefly outlined within this document.

This submission aims to highlight some of the negative impacts that the new approach taken by Customs and Border Protection to vessel importation is having on a range of industries including shipping, ship repair and maintenance, manufacturing, Antarctic research and oil refining.

The consequential financial or practical burden of importing these ships is so great, that the businesses are likely, if they have not already done so, to restructure their operations in such a way so as to avoid doing business in Australia.

Industry needs long term clarity and certainty around ship importation. Furthermore, the ongoing approach of Customs and Border Protection towards this issue should consider the costs and benefits to Australia as a nation, Australian industry and local economies and ensure that the net result from ship importation is a positive one and one which does not result in perverse inefficiencies and a disincentive to do business in this country.

1 Introduction

This submission is made on behalf of the Australian Shipowners Association (**ASA**).

ASA represents Australian companies which own or operate international and domestic trading ships, cruise ships, domestic towage and salvage tugs, scientific research vessels and offshore oil and gas support vessels. ASA also represents employers of Australian and international maritime labour.

The "trading fleet" Members of ASA include companies whose primary business is to provide sea transport services for the freight market as well as companies whose shipping operations form an element of their supply chain. ASA Members participate in domestic trade and are active in dedicated international trades under both Australian and foreign flags.

ASA provides an important focal point for the companies which choose to base their shipping and seafaring employment operations in Australia. The Association provides a range of support services and advice in the areas of ship operations and safety, environment, human resources, workplace practices, government relations, commercial operations, public relations and international direction.

2 Overview

ASA supports the content of the *Customs Amendment (Miscellaneous Measures) Bill 2012*, and the relevant clarifications that the Bill provides. However, there are some concerns relating to the consequences of the proposed amendments to sections 71A (7) and (8) and 68 (2) and (3) and the new policy approach of Customs and Border Protection in relation to ship importation, an issue which is the focus of our submission.

We wish to highlight to the Senate Legal and Constitutional Affairs Legislation Committee that there are additional urgent matters for consideration in relation to the way the *Customs Act 1901* is being implemented in very recent times.

The circumstances under which ships are deemed by Customs to be imported and required to be entered for home consumption has changed. Customs decisions to import seem now to be based on a very strict interpretation of whether the vessel has entered the commerce of Australia and no longer consider the actual intentions of the operator.

This is an issue which is currently of great concern to ship owners and operators and which is not addressed and is potentially exacerbated as a result of the proposed amendments.

Industry needs long term clarity and certainty around ship importation. Furthermore, the ongoing approach of Customs and Border Protection towards this issue should consider the costs and benefits to Australia as a nation, Australian industry and local economies and ensure that the net result from ship importation is a positive one and one which does not result in perverse inefficiencies and a disincentive to do business in this country.

3 Determining whether a ship is imported or intended to be imported – previous circumstance

ASA was recently advised by Customs and Border Protection (prior to 1 July 2012) of the following:

- Customs and Border Protection considers all the facts and the circumstances around the arrival of a ship to determine if a ship is imported or intended to be imported.

- Section 68 of the *Customs Act 1901* requires that ships that are imported or intended to be imported are entered for home consumption.

- There are significant penalties for 'Failure to make entries' under Section 72 (b) of the *Customs Act 1901,* which outlines that if an entry is not made in the prescribed time Customs and Border Protection may direct the goods (including ships and aircraft) to be held at a secure place. Regulation 43(1)(a) sets out the prescribed time, effectively close of business the working day after a ship is imported or intended to be imported.

- Guidance utilised by Customs and Border Protection in order to determine if a ship should be imported includes whether they are operating under a Single Voyage Permit (SVP) or a Continuous Voyage Permit (CVP). The use of an SVP or CVP would demonstrate that the ship is on a continuing international voyage and that there is no intention to import the ship – and no requirement to import the ship and enter the ship for home consumption.

- As an extension of that, the '90 days' that a vessel operating under a CVP was able to ply the coast before having to leave and go to a place outside Australia, is used as a rule of thumb in determining the length of time that a vessel (even if not operating under a CVP) should be allowed to remain on the coast and not be required to be imported.

- In order to maintain consistent treatment for all ships, Customs and Border Protection had a policy in place that expects if a commercial ship remains in Australia for 90 days and the operator cannot demonstrate the ship is on a continuing international voyage and is not operating under a SVP, a CVP or as a cruise ship compliant with a section 286(6) Notice *(Navigation Act 1912)* then the operator must enter the ship for home consumption or the ship must leave Australia to a place outside Australia.

This advice was provided prior to the implementation of the Coastal Trading (Revitalising Australian Shipping) Act 2012 and under the new legislation, CVP's and SVP's have been replaced by Temporary Licences to which different timeframes and different conditions apply.

Coinciding with the change in legislation governing coastal trading, there has been a change in the approach of Customs and Border Protection towards vessel importation with significant negative consequences to industry and the nation.

4 More importations that ever before - current circumstances

We see no reason why a change in legislation governing coastal trading should have any bearing on the policy determinations made by Customs and Border Protection in relation to ship importation.

There is significant uncertainty within industry. The policy connection between the changes to coastal trading legislation and Customs importation decisions has not been clearly articulated by Customs and there has been no industry wide consultation about the fact that the '90 day rule' no longer applies. Some of our member companies have only been informed as to this policy connection upon asking the direct question.

Importation decisions are being based on a new interpretation by Customs of when a vessel is entered into the commerce of Australia, with no regard to the particular

circumstances and timeframes in question or the intentions of the operator. The issue of when a ship is imported is a question of fact, yet Customs' new approach predetermines that importation occurs even where the ship operator does not intend to operate the ship in Australia and is only undertaking repairs and maintenance for a very short period of time as an incidental part of the ship's international voyage schedule. There does not appear to be an opportunity for a review of Customs' interpretation available to operators.

There are a number of recent case studies that clearly demonstrate a policy shift within Customs and Border Protection – and negative flow on effects. Vessels are now being required to be imported that would not have been previously.

4.1 Case studies

Ship owners of non-Australian registered vessels wishing to undergo dry docking, ship repair and maintenance works while in Australia – an important source of income for the Australian ship repair and maintenance industry - are now being required to import their ships for the duration of their dry docking. This is despite the fact that most dry dock operations are only two to three weeks in duration and the ship operators have no intention of the vessel remaining in Australia.

The negative impact of this direction in policy is particularly evident in Tasmania, where Antarctic research vessels planning to dry dock and lay up in Tasmania during the off season are now taking their business to New Zealand instead. Obviously this has serious negative consequences for the Tasmanian economy in terms of the State's ability to market itself as the 'Gateway to Antarctica', offering complete services in relation to Antarctic capability.

Furthermore, there are additional consequences to the cruise ship sector in relation to the proposed amendments to sections 71A(7) and (8) and 68(2) and (3). When a foreign flagged cruise ship is undertaking a coastal cruise under the Ministerial exemption from the coastal trading legislation just prior to or after dry docking in Australia, these amendments may mean that even if Customs considers the dry docking to be the event that requires importation, importation (and the related flow on effects in relation to compliance with Australian laws, including immigration law) will be deemed to occur from the time the ship arrives in Australia to begin its coastal cruise. Where a coastal cruise is planned after the dry dock (which is often done as a safeguard in case

the dry dock works take longer than expected), the vessel would remain imported until it departs for a place outside Australia. It is not clear, how vessel importation under these circumstances interacts with the Ministerial exemption. A foreign flagged cruise ship operating coastal trade under a Ministerial exemption is clearly not intended to be imported for the duration of such approved coastal trade.

As well as giving rise to flow on compliance effects (the full effect of which are not yet established), the amendments would also lead to the unreasonable outcome that a ship having to undergo unscheduled repairs in dry dock, may be deemed to be imported before the need for the repairs was even discovered. For example, a ship operating coastal cruises under a Ministerial exemption (which is not required to be imported) which subsequently enters a dry dock facility for unscheduled repairs would technically have been required to have been entered for home consumption before the date it arrived in Australia for its coastal cruises. That is, the importation would occur retrospectively. This cannot be the outcome Customs intends.

The flow on effects resulting from Customs importation of specialised heavy lift vessels contracted on a short term basis to move Australian manufactured project cargo intra-state is likely to result in the materials being sourced offshore. Such is the difficulty, expense and impracticality of this new Customs policy approach.

Oil refiners, wanting to reposition ships on international voyages to act as short term cargo storage facilities while maintenance works are undertaken at terminals and facilities are now being required to import these ships for the duration of the maintenance work – or in order to avoid importation, travel to a place outside Australia and back again. This creates a perverse incentive to operate inefficiently, with no obvious benefit to the nation.

It should be noted that the above scenario falls outside the current policy settings and definitions relating to coastal trading – the oil refiners do not necessarily qualify for Temporary Licences under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* for this purpose. The *Coastal Trading (Revitalising Australian Shipping) Act 2012* has clear policy parameters which focus on coastal cargo/ passenger voyages.

In all the above scenarios, it is not practical to import these vessels. The consequential financial or practical burden of importing these ships is so great, that the businesses are

likely, if they have not already done so, to restructure their operations in such a way so as to avoid doing business in Australia.

5 Consequences of importation

There are significant negative flow on effects to Australian businesses and the Australian economy as a result of this new approach to vessel importation requirements, with no obvious benefit to the nation. The duty payable on importation of these ships is effectively zero. However, where a ship is entered for home consumption the owner of the ship may be liable for import GST. If the owner of the ship does not already have a business in Australia, they face a prohibitive administrative and cash flow burden in ensuring they receive an input credit for this GST payment. Businesses who do not operate in Australia may also be hesitant to obtain an Australian Business Number for fear of triggering other Australian taxation issues, so may view the payment of import GST as a real cost to their business.

Many of the companies that operate vessels that now face importation have either already reviewed or restructured their operations to avoid doing business in Australia or are planning to do so, due to the significant burden placed on their businesses as a result. While vessel importation is not new – the circumstances under which Customs and Border Protection are requiring vessels to be imported has certainly changed, with no real guidance as to under what circumstances this will occur.

Vessels that are imported are deemed to be registered in Australia as required by the *Navigation Act 1912* and as such must comply with all relevant Australian laws, including Australian immigration law and Marine Orders.

5.1 Marine Orders

Marine Orders are the means by which the Australian Government implements the many detailed technical requirements of international conventions governing shipping. Some Marine Orders implement the basic requirements of conventions, however many domestic requirements which apply to vessels registered in Australia go above and beyond that which is required internationally. As such when a vessel is imported, and is subsequently deemed to be an 'Australian' vessel, it must comply with all relevant Marine Orders.

For example, Australia has some unique crew certification requirements relating to training and qualifications and operations that will not be able to be met by foreign crew and foreign ships.

5.2 Maritime Crew Visa (MCV)

Crew on foreign flag vessels are required to hold a specific Maritime Crew Visa. This visa allows a foreign crew to enter Australian waters on a ship multiple times over a three year period and permits work associated with the duties performed as crew on the vessel. Once a vessel is imported, MCV holders have five days to leave the country.

Where importation is not the intention of the operator, this creates significant and often insurmountable practical and economic issues, such as;

- Visa issues:
    - Obtaining new visas for the crew to allow them to continue to carry out their shipboard duties during dry dock. Visa processing for this purpose is an extremely expensive and time consuming option and is an entirely unsustainable process in the long term.
    - Accessing adequately trained Australian crew for the specific needs of the operation. For instance, crew that are sufficiently familiar with the vessel in order to allow the ship to continue to function during the dry dock. In most cases, particularly with regard to cruise ships, this is not a tenable proposition.
    - The significant cost differential between foreign crew trained and employed for the specific purpose associated with the operation and Australian crew.
    - Practicalities of acquiring a full Australian crew for such a short duration.

The economic and practical consequences of vessel importation under the below scenarios are such that operators are considering changing the way they do business in order to avoid these consequences, with significant negative impacts on the Australian economy and productivity.

6 Recommendation

What the industry requires is clear guidance and timeframes relating to when vessels should be imported. There are a number of possible options that could be utilised in order to rectify the issue and provide the required certainty and flexibility to ensure these operators continue to do business in this country:

- Clear policy advice issued indicating that the 90 day rule will be reinstated in certain circumstances – or some other distinct timeframe.

- Section 49A of the *Customs Act 1901* talks about where a ship or aircraft remains in Australia throughout a period of 30 days then the ship or aircraft may be deemed to be imported. In including section 49A in the legislation, clearly the parliament considered that where a ship is in the jurisdiction for less than 30 days there was not sufficient grounds to consider it imported. Perhaps this 30 day period could be used in conjunction with the criteria listed below to assist Customs in making a decision on importation.

- The *Customs Act 1901* should be amended to specifically allow ship owners and operators to apply for exemptions from ship importation under certain circumstances.

Possible criteria for importation decision making:

- Timeframes in question – how long would the vessel be in the country? In accordance with the above, we envisage that where a vessel will be in Australia for repairs for a short period of time (less than 30, 60 or 90 days) it should not be considered to be imported.

- What are the actual intentions of the operator - does the operator intend to import the vessel? That is, to operate it from Australia longer term.

- Is there a net benefit or cost to the nation from importing the vessel?

- What are the practical implications of ship importation?

It is the view of the Australian Shipowners Association that the ongoing approach of Customs and Border Protection towards this issue should be one that considers the costs and benefits to Australia as a nation, Australian industry and local economies and

ensures that the net result from ship importation is a positive one which does not result in perverse inefficiencies and a disincentive to do business in this country.