Australian Government

Department of Immigration and Border Protection

Inquiry into the Customs and Other Legislation Amendment Bill 2016

Legal and Constitutional Affairs Committee

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Introduction

The Department of Immigration and Border Protection welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Customs and Other Legislation Amendment Bill 2016 (the Bill), following the introduction of the Bill into the House of Representatives on 16 March 2016.

This submission provides a response to the reasons for referral/principal issue of concern raised by the Selection of Bills Committee and will also briefly explain the measures included in the other Schedules to the Bill.

Portfolio Submission

1. Measures in the Bill

The measures in the Bill that propose to amend the *Customs Act 1901* (the Customs Act) are intended to:

- Allow for the exemption from paying import declaration processing charge;
- Extend the circumstances in which an application can be made to move, alter or interfere with goods for export that are subject to customs control;
- Clarify and simplify the provisions concerning the making of tariff concession orders for made-to-order capital equipment; and
- Remove unnecessary and outdated provisions.

The Bill proposes to amend the *Commerce (Trade Descriptions) Act 1905* (the CTD Act) to provide that the *Commerce (Imports) Regulations 1940* (the CI Regulations) may prescribe penalties for offences against those regulations.

The Bill proposes to amend the *Maritime Powers Act 2013* (the Maritime Powers Act) to confirm that the powers under that Act are able to be exercised in the course of passage through or above the waters of another country in a manner consistent with the United Nations Convention on the Law of the Sea (the Convention).

Further detail on each of these measures is included in Part 3 of this submission.

2. Reason for referral/principal issue of concern

The Bill was referred to the Legal and Constitutional Affairs Legislation Committee (the Committee) by the Selection of Bills Committee. The reason for the referral/principal issue for consideration by the Committee identified in the Selection of Bills Committee Report No.4 of 2016 is:

"Schedule 6 [of the Bill] pertains to the actions of officers at sea and appears to protect the action of officers where there has been a defective consideration of the UN Convention on the Law of the Sea".

Schedule 6 to the Bill amends section 40 of the Maritime Powers Act to confirm that powers under that Act are able to be exercised in the course of passage through or above the waters of another country in a manner consistent with the Convention.

Section 40 of the Maritime Powers Act allows for the exercise of powers in another country, including through or above waters that form part of that country, in defined circumstances. This section requires clarification to confirm the ability to exercise powers under the Maritime Powers Act in circumstances where vessels or aircraft are permitted or entitled under the Convention to exercise various rights through or above those waters.

The amendments clarify the exercise of those powers in those circumstances.

In relation to the specific referral by the Selection of Bills Committee, paragraph 87 of the Explanatory Memorandum states that:

"Where the operation of subsection 40(2) is dependent on the opinion of a relevant maritime officer by virtue of subsection 40(2)(b), there is recognition that his opinion will be the bona fide view of the maritime officer that the passage is in accordance with the Convention. Subsection 40(3) reflects a possibility that, on occasion, an officer though giving due consideration to the matter, comes to an incorrect conclusion".

Identical amendments to the Maritime Powers Act are in the Migration and Maritime Powers Amendment Bill (No.1) 2015 (the Migration Bill). The Migration Bill is still before the Parliament and was the subject of an inquiry and report by the Committee in November 2015.

Two submissions to the Committee in relation to the Migration Bill argued that the rationale for proposed subsection 40(3) of the Maritime Powers Act – consistency with international law – is not reflected in the substance of the provision. Those submissions argue that the new sub-section authorises the exercise of powers even in circumstances that are contrary to Australia's obligations under the Convention, and that the provision could breach international law.

The submissions further argued that proposed subsection 40(3) might be aimed at legitimising activities conducted under Operation Sovereign Borders. One submission contended that this aspect of the Bill would increase Ministerial discretion and empower the Minister to declare that turn backs and tow backs of vessels are consistent with the Convention, based on a subjective assessment. Further, this aspect of the Bill could place people subject to these powers at risk of *refoulement,* contrary to Australia's international obligations.

In response, the Department submitted that current section 40 of the Maritime Powers Act requires clarification and that the proposed amendment does not breach international law. The proposed amendment in fact facilitates compliance with Australia's intentional obligations under the Convention, in that it requires the relevant maritime officer or the Minister to consider whether the passage is in accordance with the Convention. In considering Australia's obligations under the Convention, the Executive will apply accepted principles of treaty interpretation, including the requirement to interpret those obligations in good faith.

The amendment is designed to ensure that where maritime operations take place within the waters subject to the sovereignty of another country, such as the territorial sea, they take place consistent with Australia's obligations under the Convention.

In its report on the Migration Bill, the Committee accepted the advice of the Department that the Migration Bill does not breach, and is consistent with, Australia's international obligations under the Convention.

The proposed amendments to section 40 of the Maritime Powers Act in the Bill are identical to those contained in the Migration Bill. Therefore, the Department submits that the proposed amendments are consistent with Australia's international obligations under the Convention, for the reasons set out above.

3. Other Measures in the Bill

Measures in Schedule 1 of the Bill

Schedule 1 of the Bill proposes to amend section 71B of the Customs Act to allow a determination that certain parties or goods are exempt from liability to pay the import declaration processing charge.

Currently, section 71B of the Customs Act imposes liability to pay import declaration processing charge without exemption and also does not contain any mechanism for the refund of import declaration processing charge to be given. These amendments will allow Australia to comply with international agreements and treaties involving the application of fees and charges at the border. These amendments ensure that payments of import declaration processing charge can be refunded where the charge is paid but an exemption applies. The amendment will also allow for the collection of unpaid import declaration processing charges.

Section 71DI of the Customs Act will be amended to allow for collection of unpaid warehouse declaration processing charges.

Support for the proposed amendments was provided by relevant Commonwealth Government Departments including the Department of Defence, the Department of Finance, the Attorney-General's Department and the Department of Foreign Affairs and Trade.

The amendments have no broader impacts on industry.

Measures in Schedule 2 of the Bill

Schedule 2 of the Bill proposes to amend section 119AA of the Customs Act to extend the circumstances in which an application can be made to move, alter or interfere with goods for export that are subject to customs control.

In April 2014, all Australian international gateway airports commenced screening all duty-free liquids, aerosols and gels (LAGs) presented at a departure screening point. This applies to LAGs provided they are contained in a sealed plastic bag, such as those under the current duty-free 'sealed bag scheme' and have an accompanying proof of purchase. In the event that a duty-free LAG item triggers an alarm, it requires re-screening by the screening authority using a suite of LAG screening technologies. This requires the item to be removed from the duty-free packaging. The opening of sealed duty-free bags and / or tampering with the contents while they are subject to customs control is unlawful under section 33 of the Customs Act, unless such interference is authorised by the Act.

Currently goods that are purchased at an outwards duty-free shop are not required to be entered for export under section 113. Therefore, permission to interfere with the goods cannot be granted under section 119AA and there is no other statutory means by which authority to interfere with such goods can be granted. Amending section 119AA will enable the Department of Infrastructure and Regional Development to apply to move, alter or interfere with duty-free LAGs where rescreening of the goods requires the item to be removed from the duty-free packaging. This application will be relevant to international gateway airports where screening of duty-free LAGs occurs prior to customs processing.

The amendments have no broader impacts on industry.

Measures in Schedule 3 of the Bill

Schedule 3 amends two provisions in the Customs Act in relation to the operation of the Tariff Concession System (TCS). The TCS allows certain goods to be imported duty free by the granting of a Tariff Concession Order (TCO).

Amendment to Section 269D of the Customs Act

This amendment proposes to remove the local content requirements under section 269D to reduce unnecessary burden on Australian manufacturers.

An Australian manufacturer may object to the making of a TCO, or request revocation of an existing TCO, if it can demonstrate it is a manufacturer of substitutable goods produced in Australia in the ordinary course of business.

Section 269D prescribes the test that determines when Australian manufactured goods are produced in Australia. The test, as it currently exists, is comprised of two components. The first component requires an Australian manufacturer to demonstrate that a minimum 25 per cent of the cost of production of the goods (labour, Australian materials and manufacturing overheads) was incurred in Australia. For companies, particularly Small and Medium Enterprises (SMEs), this demonstration involves the production of detailed cost analysis involving financial documents such as Bills of Materials and invoices for inputs. A suitable method of allocation of fixed costs such as manufacturing overheads must also be determined. This cost allocation can be complex and problematic if the SME produces multiple goods with shared costs. The complexity and difficulty associated with providing this detailed information may deter SMEs and other Australian manufacturers from lodging objections to TCO applications or requests to revoke TCOs. This is evidenced by the number of incomplete objection and revocation requests lodged. Australian manufacturers often are not willing to progress their requests due to the difficulty in providing verifiable costing information.

The second component under section 269D requires the local manufacturer to demonstrate that it undertakes a substantial process in the manufacture of its goods. This substantial process must be completed in order for the goods to be considered to be “produced in Australia”. Where a substantial process of manufacture has been demonstrated, the 25 per cent local content threshold has always been met. This makes the local content test redundant. The removal of the local content part of section 269D removes a complex and unnecessary burden on local manufacturers.

Public consultation on this proposed amendment was conducted in late 2014. Consultation with the TCS policy lead agency, the Department of Industry, Innovation and Science, was also undertaken.

Amendment to Section 269E of the Customs Act

This amendment clarifies section 269E, subsections 269E(2) and (3) of the Customs Act in relation to made-to-order capital equipment produced in Australia.

Made-to-order capital equipment are goods which can be characterised as large engineering projects that are made on a one-off basis to fulfil a particular order. An example of such goods would be a coal loader for use at a shipping wharf.

A recent decision by the Federal Court of Australia exposed weaknesses in the current construction of subsection 269E(2) of the Customs Act. This subsection is subject to misinterpretation and does not reflect the Parliament’s policy intent. From a policy perspective,

section 269E is intended to enable Australian producers to object successfully to a TCO for made-to-order capital equipment if they can demonstrate they have the capacity to produce substitutable goods. An Australian manufacturer is required to demonstrate it has manufactured goods utilising similar labour, technology and design expertise as the substitutable goods. The amendment will clarify the provision and align it with policy intent.

The amendment will also increase the time period to demonstrate capacity from two to five years. This better reflects the complex nature of made-to-order capital equipment that usually requires long production and procurement lead times (e.g. from a tender process, placement of order, to construction and delivery).

The Minister for Industry, Innovation and Science requested the amendment as it gives greater certainty for Australian heavy engineering manufacturers that may consider opposing TCOs for made-to-order capital equipment.

This amendment will have industry implications. As this amendment is a technical amendment and has been publically canvassed, no further consultation was required.

Measures in Schedule 4 of the Bill

Schedule 4 of the Bill repeals subsection 162A(5A) of the Customs Act as the subsection is no longer applicable.

Subsection 162A(5A) was inserted into the Customs Act in 1995 to allow goods to be temporarily imported for the Sydney 2000 Olympic Games and a number of other related events. Regulation 125A of the *Customs Regulations 1926* sunsetted on 1 April 2014. Regulation 125A was not replicated in the new *Customs Regulation 2015*. As a result of the sunsetting of the regulations, Section 162(5A) became redundant.

As subsection 162A(5A) is substantially identical to subsection 162A(5) of the Customs Act, a person who temporarily imports goods in contravention of the regulations would be liable to pay duty under subsection 162A(5).

The amendments have no broader impacts on industry.

Measures in Schedule 5 of the Bill

The CTD Act deals with the importation and exportation of goods without prescribed trade descriptions and to which false trade descriptions have been applied.

Schedule 5 of the Bill amends section 17 of the CTD Act so that it expressly provides that the regulations may prescribe penalties, not exceeding 50 penalty units, for offences against the CI Regulations.

The amendment ensures that provisions in the CI Regulations are supported by the general regulation-making power in section 17 of the CTD Act. This new power will not limit the general regulation-making power in subsection 17(1) of that Act.

An additional amendment has been proposed to clarify the ABF's powers to inspect and examine prescribed goods.

These amendments are minor and technical in nature, and also reflect modern drafting practices.