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Australian Customs and
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Ms Julie Dennett
Committee Secretary
The Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
PO Box 6100
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Dear Ms Dennett,

Inquiry into the Customs Amendment (Miscellaneous Measures) Bill 2012

On 4 December 2012, the Senate Standing Committee on Legal and Constitutional Affairs invited Customs and Border Protection to make a submission to the Legal and Constitutional Affairs Legislation Committee inquiry into the Customs Amendment (Miscellaneous Measures) Bill 2012.

Customs and Border Protection manages the security and integrity of Australia's border and these legislative changes will enhance our capacity to perform this function. As such, Customs and Border Protection supports the measures included in the Bill.

Schedule 1 Amendments

Part 1 - Unlawful bringing of restricted goods into Australia

1. In most instances the *Customs Act 1901* (Customs Act) limits the application of Customs and Border Protection's powers to goods that are imported or exported, or are intended to be imported or exported. This Bill will enable Customs and Border Protection to seize 'restricted goods', and consider prosecution of the owner, when the goods are detected in Australia's Territorial Sea without having to first ascertain that they are to be imported.

2. 'Restricted goods' will be defined by regulation as this provides Customs and Border Protection with the flexibility to regulate goods in the future without requiring further legislative amendment.
3. 'Restricted goods' will be limited to goods that would be prohibited imports if they were imported as this will ensure consistency at the border.
4. 'Restricted goods' only has effect for purposes relating to the external affairs power in the Constitution, including for purposes related to giving effect to an international agreements and for purposes related to addressing matters of international concern. The Australian Government Solicitor has advised that this approach is Constitutionally sound and is consistent with similar provisions such as subsection 21(2)(a) of the *Australian Sports Anti-Doping Authority Act 2006* and subsection 7(4)(a) of the *Tourism Australia Act 2004* amongst others.
5. Classing 'restricted goods' as special forfeited goods is necessary to ensure Customs and Border Protection can seize these goods without warrant when they are detected in a Customs Place, such as on a vessel in a Customs Port.
6. Customs and Border Protection initially intends to prescribe child pornography and child abuse material as 'restricted goods'. On occasion, Customs and Border Protection identifies the presence of child pornography in the personal effects of commercial ship's crew. As there is no intention to import these goods, the owner has not breached Customs law. Customs and Border Protection may refer the detection to the state or territory police force for consideration of a possession offence; however this approach provides an inconsistent result based on the police resources available to respond to such a referral as well as the different laws in place in different states. Alternatively, the Customs Act empowers Customs and Border Protection to secure these types of goods on board or withhold the goods, but regardless of whether the goods are secured on board or withheld, they are returned to the owner on their departure from Australia.
7. The return of these goods to the owner is unlikely to be consistent with community expectations around law enforcement's treatment of child pornography and child abuse material. It is also likely to be seen as incongruent with Australia's ratification of the United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

Part 2 - Entry of ships or aircraft for home consumption or warehousing

8. Section 68 of the Customs Act requires that goods, unless covered by an exemption, must be either entered for home consumption or warehousing after they first arrive in Australia. Goods can also be entered in advance of their arrival in Australia. Section 68(1)(c) of the Customs Act applies to ships and aircraft that are imported or intended to be imported that have commenced their journey to Australia.
9. Subsection 68(2) establishes that the owner may enter the goods before the ship or aircraft carrying the goods first arrives at a port or airport at which any goods are to be discharged. Subsection 68(3) provides that if they have not entered the goods under subsection (2) then they must enter the goods when the ship arrives. The proposed amendments make it clear that these subsections also apply to self-powered ships and aircraft.
10. Section 30 sets out the circumstances under which goods are subject to the control of Customs. The proposed amendments also make it clear that self-powered ships and aircraft that are imported or intended to be imported shall be subject to the control of Customs from the time of arrival in Australia until the ship or aircraft is entered or is exported to a place outside Australia

Part 3 - Valuation of imported goods

11. Division 2 of the Customs Act sets out provisions relating to the Customs valuation of imported goods, giving effect to Australia's obligations under the World Trade Organization (WTO) valuation agreement. The valuation agreement provides that production assist costs be included in determining the customs value of imported goods.
12. The definition of "purchaser's material costs" in sub-section 154(1) of the Customs Act requires the actual cost of acquisition of the material to be included in the customs value of the imported goods. In circumstances where the material was provided free of charge by the buyer to the seller in the import sales transaction and the material was acquired free of charge by the buyer from an unrelated person, the cost of acquisition is treated as zero under the legislation.
13. This is contrary to the intention of Article 8(1)(b)(i) of the WTO Valuation Agreement which is to attribute a reasonable value to the material supplied by the buyer for use in the production of imported goods and to include that value in the customs value despite the buyer acquiring the material from a third part at zero cost. Similar inconsistencies exist in

the definitions of 'purchaser's tooling costs', 'purchaser's work costs' and 'purchaser's subsidiary costs.

14. The proposed amendments to the definitions reflect the language of the WTO Valuation Agreement and ensure consistency with the Agreement.

Part 4 – Designation of Customs Places

15. Customs Controlled areas form an important part of Customs and Border Protection's control mechanisms in airports and ports by giving officers the ability to question, remove and restrict access to non-travellers to certain areas when Customs and Border Protection is performing its function. The changes will ensure Customs and Border Protection is able to setup permanent and temporary Customs Controlled areas in the maritime and airport environments when dealing with aircraft and ships carrying only crew and when processing cruise ships.

Part 5 – Warehouse licences

16. The Customs Act allows the CEO to request further information after receiving an application for the grant of:

- a depot licence (section 81B)
- the variation to an application for a depot licence (section 77LA) and,
- the variation to an application for a warehouse licence (section 77J).

17. However, the CEO is unable to request further information after receiving an application for the grant of a warehouse licence. The CEO is only able to grant or refuse the licence on the basis of the original application. The proposed amendments will allow the CEO to request additional information from an applicant for a warehouse licence enabling any concerns to be addressed without the need for the applicant to submit a new application.

Part 6 – Notification of particulars of cargo reporters

18. The Customs Act requires a cargo reporter to make a report of cargo before the start of a certain period measured with respect to the estimated time of arrival. Where the actual time of arrival is after the estimated time of arrival, the cargo reporter will not be prosecuted or served with an infringement notice if the report of cargo is made before the start of the same period measured with respect to the actual time of arrival.
19. The report of other cargo reporters, required under section 64AAB, is to be made in the same timeframe as the cargo report. The proposed amendments align the requirements for

the two reports. They will establish that a person will not be liable to be prosecuted or cannot be served with an infringement notice for an offence under section 64AAB if the report of other cargo reporters is made no later than the period required by the Customs Act before the actual arrival of the ship or aircraft in Australia where the actual arrival is after the estimated time of arrival.

20. By way of illustration, a ship is estimated to arrive at midday on Friday and is delayed 24 hours until midday on Saturday. The usual requirement is that the cargo report and the report of other cargo reporters must be made no later than 48 hours before the estimated time of arrival or no later than midday on the Wednesday. Where the cargo reporter fails to meet this time frame, but makes the report 48 hours before the actual time of arrival of the ship at its first port in Australia, (no later than midday on Thursday), they will not be liable to be prosecuted or served with an infringement notice.

Part 7 - Accredited client program

21. The accredited client program was co-designed with industry partners (Business Partner Group) and Government stakeholders to deliver benefits for industry as a trade facilitation measure for highly compliant, low risk traders. Subsequent technology improvements and changes in the policy, procedural and cost environment meant that the program has never been implemented operationally.
22. The Minister for Home Affairs, members of the Business Partner Group and the other relevant agencies were advised in 2008 that the program would not proceed.
23. The proposed amendments repeal the redundant provisions.

Part 8 – Electronic cargo reporting

24. Section 64AB of the Customs Act requires all cargo reports to be made electronically. This requirement commenced when the imports functionality of the ICS was turned on in October 2005.
25. The proposed amendments repeal expired moratorium periods introduced to support industry in transitioning to electronic cargo reporting.

Consultation on the Bill

26. During the development of the Bill, and as part of the process of assessing the regulatory impact, Customs and Border Protection provided industry with an opportunity to comment

on the proposed policy change to the method of calculating the production assist costs. Customs and Border Protection Notice 2012/290 advised of the consultation.

<http://customs.gov.au/webdata/resources/files/201220.pdf>

27. Industry responses to the proposal were that the change would have a minor effect as the circumstances set out in the amended provisions were unlikely to occur in commercial world.
28. In accordance with established practice, Customs and Border Protection sought and obtained the agreement of the Prime Minister to release an exposure draft of those measures in the Bill that may have an impact on industry (measures 2, 3, 5, 6, 7 and 8 of the final Bill). Customs and Border Protection released an Australian Customs and Border Protection Notice 2012/53, advising industry of this opportunity for comment.
<http://customs.gov.au/webdata/resources/files/ACBPNexposedraft.pdf>
29. As advised in the Notice, a copy of the draft Bill and an associated explanatory document were placed on the Custom and Border Protection website for comment.
<http://customs.gov.au/site/page4671.asp>
30. In addition, members of the Customs and Border Protection National Consultative Committee were advised by email of the opportunity to provide comment.
31. Customs and Border Protection received two submission responses by email. The Law Council of Australia stated "No errors or inconsistencies in the changes have come to our attention". Shipping Australia advised "Our members have considered its contents and have no objections"
32. Representatives of the Confederations of Asia Pacific Express Carriers (CAPEC) discussed a couple of the measures on a telephone hook-up. They advised they had no concerns and would not be making a submission. A representative from a major airline clarified some matters by telephone but did not make a submission.
33. Customs and Border Protection and a representative from the Minister for Home Affairs' office met with representatives from a shipping company after they raised concerns with the measure concerning self-powered ships and aircraft that are imported, or intended to be imported. The meeting clarified that the measure was not a change in policy or practice but an amendment that provides clarity and is of a minor or machinery nature. It

does not affect ships or aircraft on a continuing international voyage to a place outside Australia.

Yours sincerely,

Roger Northcote

Acting General Counsel

7 February 2013