



Law Council
OF AUSTRALIA

Law Council of Australia
Business Law Section

**Customs and International
Transactions Committee**

**Submission to the Inquiry by the Senate
Standing Committee on Foreign Affairs,
Defence and Trade into the Customs
Amendment (2007 Harmonized System
Changes) Bill 2006 and the Customs Tariff
Amendment (2007 Harmonized System
Changes) Bill 2006**

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Background

The Customs and International Transactions Committee ("**Customs Committee**") of the Business Law Section of the Law Council of Australia welcomes the opportunity to respond to the Inquiry by the Senate Standing Committee on Foreign Affairs, Defence and Trade ("**Standing Committee**") into the provisions of the *Customs Amendment (2007 Harmonized System Changes) Bill 2006* and the *Customs Tariff Amendment (2007 Harmonized System Changes) Bill 2006* ("**Bills**").

Introduction

Unfortunately, the Customs Committee has not had the opportunity to afford the Bills with the detailed review which they deserve. As the Standing Committee would appreciate, the members of the Customs Committee are all volunteers who practice in the field of customs and international trade. Given the limited time provided to provide a submission, this submission is, of necessity, brief. The Customs Committee regrets that it has been unable to make a more substantive response as it believes that the contents of the Bills are extremely important.

Comments on the Bills

Subject to the reservations described above, the Customs Committee wishes to make the following submission regarding the Bills:

1. Timing of the Bills

The Customs Committee recognises that as a member of the World Customs Organisation ("**WCO**") Australia is obliged to adopt the amendments to the International Convention on the Harmonised Commodity Description and Coding System, commonly referred to as the Harmonised System ("**HS**"). This obliges Australia to implement approximately 600 amendments to the HS approved by the WCO from 1 January 2007 ("**HS 2007**"). As the Standing Committee would appreciate, the HS forms the basis of the Australian Customs Tariff ("**the Customs Tariff**") and the Australian Harmonised Export Commodity Classification ("**AHECC**"). However, the Customs Committee is concerned that the Bills have only very recently been introduced into Parliament even though they contain significant amendments representing detailed technical changes to the Customs Tariff and AHECC which will have effect from 1 January 2007. The Customs Committee believes that the WCO endorsed the HS 2007 changes some time ago. This may have afforded the Australian Customs Service ("**Customs**") adequate time to have provided advance notice of these proposed amendments contemplated by the Bills at an earlier stage. However, the Customs Committee recognises that Customs may not have been afforded significant resources to effect the amendments contemplated by the Bills. The Customs Committee recommends that the Standing Committee ask Customs for a timetable setting out the process since the resolution of the WCO to adopt the HS 2007 changes and the preparation of materials to implement the changes to

the HS in the Customs Tariff. The Standing Committee should also enquire whether Customs believe they have been afforded adequate resources by Government to ensure the timely and comprehensive implementation of the HS 2007 changes.

2. Consultation on the Bills

The Customs Committee has regularly observed that Customs may not have consulted in as timely or broad a fashion as would be ideal in relation to significant proposed legislative changes.

The Standing Committee should be aware that Customs have recently introduced a number of other bills into the Parliament with little notice and with a lack of broad or early consultation. These other bills have been reviewed by the Senate Legal and Constitutional Legislation Committee. That Committee also expressed concerns as to a lack of consultation.

The Customs Committee is concerned to enquire as to the extent to which there has been consultation regarding the Bills with those parties directly affected by the amendments contemplated by the Bills. Parties affected include, without limitation, customs brokers, importers and exporters.

The Customs Committee believes that consultation would have been vital in relation to the Bills given the financial impact on importers and their advisers and the necessary administrative and operational changes which importers and their advisers will need to make to their management of their importing transactions. Many customs brokers and importers rely on databases of tariff classifications, tariff concession orders, tariff advices and origin rulings developed over a period of many years. These assist timely and accurate reporting and allow Customs to properly conduct their statutory obligations, including collection of customs duty and GST. Those databases will now need to be reviewed and amended as a matter of urgency before the Bills come into effect on 1 January 2007. As a result, it is hoped that there has been significant consultation with the relevant affected parties.

3. Notification of the effect of the Bills

Following on from the issues raised in the preceding paragraphs, the Customs Committee is concerned that there may have been inadequate dissemination of the introduction of the Bills and their likely effect.

For these purposes, the Standing Committee should be aware of the following:

- (a) The amendments affect tariff concession orders (by revoking existing tariff concession orders and providing the opportunity for new tariff concession orders to be implemented based on new tariff classifications), tariff precedents, tariff advices, origin rulings and import declarations. As stated above, this will represent significant amendments to operations and practices.
- (b) Australian Customs Notice ("**ACN**") 2006/45 issued by Customs on 13 September 2006 identifies a number of consequences of the Bills. For example, Customs indicates that tariff advices affected by the HS 2007

changes will lapse but that applications for revised tariff advices cannot be lodged until **after** 1 January 2007. Given that many applications will be made for new tariff advices and that some time will elapse before new tariff advices are given, importers and their customs brokers will be at some risk of liability for incorrect statements without the ability to rely upon the protections in a tariff advice. Similar concerns may arise in relation to parties who have the benefit of origin rulings who may not have the protection of those origin rulings from 1 January 2007.

- (c) ACN 2006/44 issued by Customs on 13 September 2006 also raises some relevant issues of concern. In this case, it refers to changes to the statistical codes being drafted by the Australian Bureau of Statistics to reflect the HS 2007 changes. In the ACN, Customs indicate that comments can only be made to the ABS until 6 October 2006. This provides little real opportunity for parties to advise the ABS if they believe that the new statistical codes have been made in error.

Accordingly, the Customs Committee is concerned that the current level of dissemination of information regarding the amendments may not be adequate. In addition to the information made available on Customs website and through various other Customs resources, the Customs Committee is of the view that Customs should undertake an exhaustive series of information sessions with industry (on a face-to-face and on-line basis) to discuss the impact of the Bills.

4. Liability for incorrect information on reports to Customs

The Standing Committee should be made aware that under the provisions of the *Customs Act 1901* ("**Act**"), a person who makes an error (inadvertent, negligent or deliberate) in any report to Customs is exposed to a potential liability to Customs. The liability could range from an infringement notice, prosecution for a strict liability offence or prosecution in circumstances where Customs believes that there has been a deliberate or reckless fraud or misstatement. The Bills implement significant changes which will not only affect the Customs Tariff (which must be identified in import declarations) but will also alter such items as tariff advices and origin rulings which are used by importers and customs brokers to clarify their position with Customs and minimise the prospect of liability. Given the late introduction of the Bills, and the potential adverse consequences for importers and customs brokers who may make inadvertent errors by using "outdated" information in reporting to Customs, the Customs Committee would strongly recommend that Customs provide a moratorium period (for example, 6 months) during which no importer, customs broker or other person making a report to Customs will face any liability in terms of infringement notice or strict liability prosecution if the error which exposes them to liability to Customs arises from the changes effected by the Bills. Customs may assert that the Guidelines associated with the infringement notice scheme provide Customs with some discretion as to whether to take action against a person who makes an error in a report to Customs. However, there is no express provision for exception due to legislative change. Further, the Guidelines only relate to the operation of the infringement notice scheme and do not necessarily bind Customs in relation to any other compliance action or prosecution. Accordingly, in the circumstances, the Customs Committee believes that a moratorium is the only appropriate remedy.

5. The "slip" rule

According to ACN 2006/44:

"The legislation has been designed to preserve, to the greatest extent possible, existing duty rates for imports into Australia at margins of tariff preference accorded to Australia's trading partners."

It is the view of the Customs Committee that there may be circumstances in which the Bills have unintended consequences, whether by way of legislative oversight in the drafting of the Bills or otherwise. These consequences may not arise for some time. The moratorium may assist to protect against adverse penalty consequences. Further, we believe that the Bills would also benefit from a provision which enables the CEO of Customs to make such other orders or regulations as are necessary to overcome unintended consequences of the Bills pending necessary legislative change.

Conclusion

The Customs Committee is grateful for the opportunity to have commented on the Bills and would welcome the opportunity of making further submissions, whether in writing or in person before the Standing Committee.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.