LAW COUNCIL OF AUSTRALIA

BUSINESS LAW SECTION

CUSTOMS & INTERNATIONAL TRANSACTIONS COMMITTEE

SUMMARY OF SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE CUSTOMS LEGISLATION (BORDER COMPLIANCE AND OTHER MEASURES) BILL 2006

Summary of Submission by the Committee

This submission falls into two main areas.

- Preliminary comments
- Comments on provisions of the Bill.

Preliminary Comments

- The Customs and International Transactions Committee ("**Committee**") of the Business Law Section of the Law Council of Australia welcomes the chance to make this submission ("**Submission")** regarding the *Customs* Legislation Amendment (Border Compliance with and Other Measures) Bill 2006 ("**Bill**") at this public hearing.
- The Committee has a significant history of submissions in relation to Customs – related legislation of recent time. These include recent submissions to Parliamentary inquiries into the following areas –
  - The initial Bill for the "Trade Modernisation Legislation" (now known as the Customs Legislation Amendment and Repeal (*International Trade Modernisation*) Act 2001).
  - Strict and Absolute liability offences in Commonwealth legislation.
  - Search, entry and seizure powers in Commonwealth legislation.
  - The modern day usage of averments in Customs prosecutions.
- The Committee would welcome the opportunity to make further submissions or provide further information.
- Members of the Committee are also involved in other relevant industry forums including membership of the Customs National Consultative Committee and the reference group on the current administrative review of Australia's anti-dumping regime.

- The Committee has always offered itself as being available for consultation on matters where members if the Committee have expertise. However, there has been little adoption of that offer of consultation. For these purposes:

  - The Committee is concerned that it only received a late invitation to make this Submission which has adversely affected the ability of its (volunteer) members to contribute to the Submission.

  - The Committee continues to be disappointed that there is inadequate level of consultation between Customs and the Committee whether in relation to the Bill or in general. The Committee may be of assistance in relation to the new legislation and procedures.

- The Committee must express its concern and reservation that the Bill represents yet another amendment to the Customs Act 1901 ("**Act**") and is the sixth set of amendments to the Trade Modernisation Legislation. To this end the Committee notes that some of the provisions of the Bill are intended to correct provisions implementing the Australia and US Free Trade Agreement ("**AUSFTA**") and some other misdescriptions of sections within the Act. The Committee is concerned that these regular amendments (and corrections) do not aid easy comprehension of the legislation by interested parties. The Committee shares the view of other affected parties (such as the Customs Brokers and Forwarders Council Australia, the Australian Law Reform Commission and the House of Representatives Standing Committee on Legal and Constitutional Affairs that the Act requires extensive review to remedy areas of uncertainty.

Comments on the Bill

Areas of the Bill

- The Committee will confine itself to comments on the following provisions of the Bill:

  - Restrictions on access of those holding security identification cards to places prescribed ("**Prescribed Places**") under Section 234AA of the Act.

  - Corrections to the provisions implementing the AUSFTA.

  - Implementation of the accredited client program ("**ACP**").

Participation on access

- The Committee makes the following observations regarding the proposed restrictions against unauthorised entry to Prescribed Places:

  - The Committee understands the intent and the concerns expressed in these provisions. However, the Committee has some reservations as to the provisions of the Bill.

  - The Committee is concerned that the proposed amendments may have the affect of restricting legitimate access to the Prescribed Places by way of

(unfettered) direction of the Chief Executive Officer ("**CEO**") of Customs.

- The Committee maintains that there are many parties who hold security identification cards whose access to the Prescribed Places should be guaranteed rather than being subject to exclusion by way of directions by the CEO. Parties being questioned or otherwise restrained in Prescribed Places may require (legitimate) access to parties such as Union Delegates (in the case of persons handling baggage in the areas), lawyers representing persons subject to Customs inquiry or doctors (if persons subject to inquiry are subject to a medical condition or unwell) or translators. There is potential that such parties who may hold a security identification card (as a visitor identification card) and who may have a legitimate cause to enter the prescribed may be excluded by the mere expedient of a direction by the CEO. The Committee believes that a person who is to be excluded from the Prescribed Plans should be entitled to prior notice and an opportunity to defend their right of access. The persons being questioned or restrained by Customs should not have their rights limited by way of direction of the CEO by Customs.

- Accordingly, the Committee believes that the relevant provisions in the Bill should be amended to place limits on the ability of the CEO of Customs to issue such written directions excluding persons holding security identification cards from entering the Prescribed Plans. For these purposes the following amendments should be made. Firstly, the CEO should identify reasons why any party may be excluded from the Prescribed Places. Secondly, the CEO should notify a party to be asked to provide reasons and allow for objections. Thirdly, the CEO of Customs should not be able to issue such written directions in relation to persons with a legitimate reason to be on the relevant premises such as union delegates, lawyers, medical practitioners and translators. Fourthly, the Committee also believes that persons affected by a written direction from the CEO that they cannot enter Prescribed Places should be entitled to seek review of the direction (by way of administrative review and by way of judicial review).

AUSFTA

- The Committee wishes to make the following comments on the provisions correcting the implementation of the AUSFTA.

  - The Committee welcomes the changes.

  - However, the Committee believes that the changes do not go far enough. In a number of forums (and in writing to Customs), the Committee has expressed its concern that the "voluntary disclosure regime" for potential error in claims of preferential treatment in the Act is inconsistent to the corresponding provisions in the AUSFTA. For these purposes, the Committee would draw your attention to article 5.13.4 of the AUSFTA (**attached**) to be contrasted to sub-sections 243T(4) and (4A) and section 243(U)(4) and (4A) of the Act. The regime by which a party can voluntarily disclose errors in claims of preference under the AUSFTA

without the imposition of penalty is quite broad. However, the provisions of the Act are more limited. For example, if an affected party receives a notice under section 214AD of the Act that Customs is to exercise their monitoring powers (ie conduct an audit), and the relevant affected party undertakes a review of their practices and discovers an innocent error, then it would be too late to disclose that error under the Act even though such a disclosure would qualify under the AUSFTA as a disclosure for which no penalties should be imposed.

- Many of the offences which could attract penalties for incorrect claims for preference under the AUSTFA are strict liability provisions (such as section 243T and 243U). In those cases, affected parties may also receive infringement notices under the infringement notice scheme pursuant to the Act. While Customs have issued some proposed revised guidelines to govern the issue of infringement notices based on errors in claims of preferential status under AUSFTA in which "voluntary disclosure" is intended to be taken into account, those provisions still do not recognise the tension between the Act and the provisions of the AUSTFA. In any event parties can still be prosecuted in which case the guidelines are irrelevant and the voluntary disclosure provisions of the Act are still not entirely consistent with the provisions of the AUSFTA (in the opinion of the Committee). There are further tensions as to the need to repay underpaid duty at the time of voluntary disclosure. The Committee recommends further amendments to the Act so that voluntary disclosure of incorrect claims of preference under the AUSFTA should be governed by a voluntary disclosure regime which is more consistent to the provisions of the AUSFTA.

- The Committee notes that Australia already is a party to a variety of Free Trade Agreements and that a number of Free Trade Agreements are likely to be introduced. There are other issues in the implementation of the Thailand and Australia Free Trade Agreement ("**TAFTA**") regarding the incorrect (although innocent) use of Certificates of Origin to qualify for preferential treatment. This relates to a party using a Certificate of Origin from Thailand which, while it appears to be correct in all particulars, has not been issued by the correct department within the relevant Thai ministry. The Committee is of the view that this should not trigger liability and may usefully have been addressed in the Bill. This will be an issue of concern as other Free Trade Agreements which Australia will likely become a party are likely to adopt the "Certificate of Origin regime".

Implementation of the ACP

- The Committee wishes to make the following comments on the implementation of the ACP.

  - The Committee notes that there has yet to be a formal implementation of the ACP and regrets that the duty deferral aspect of the ACP has not been delivered by Government even though it was part of the raft of promises of benefits associated with the ACP.

- The Committee questions as to the benefits of the ACP when no duty deferral has been offered. There appear to be few other benefits to members of the ACP other than the use of less prescriptive entry and exit documentation in the short term.

- The Committee is concerned that the "running account" process set out in the Bill may not be of significant advantage to members of the ACP. There seems to be significant difficulties in requiring a member of the ACP to estimate duty and processing charges in advance, pay those amounts in advance and then attempt a monthly reconciliation together with Customs subject to payment of our outstanding amounts or refund of overpayments (which can otherwise be held over for further use). The Committee believes that the "up front" arrangements may be extensive and time-consuming.

- The Committee perceives that there may be difficulties in recovering moneys from Customs if there is a disagreement with Customs as to whether there has, in fact, been an overpayment. For this reason, it appears likely that the program would only work for a very few importers in very limited circumstances for very limited goods in which there is no dispute as to the goods or their value for customs duty.

- The Committee questions whether the importers will face action for incorrect statements (under sections 243T or 243U of the Act or by Customs prosecution under the Act) if there are found to be errors in their "Accredited Client Monthly Duty Estimates". Presumably, such an Estimate will be treated as "statement to Customs" which could attract liability under the Act. Will such Estimates may be excluded from liability under Section 243T, 243U and 214 and 233 if there prove to be errors?

The ACP and the WCO Framework of Standards

- The Committee notes that the provisions of the Bill raise the issue of the World Customs Organisation "Framework of Standards to Secure and Facilitate Global Trade" ("**Framework**").

- Notwithstanding views by some parties that the ACP is entirely consistent to the Framework, the Committee believes that the ACP does not reflect all intended aspects of the Framework. Indeed the ACP predates the Framework. For example, the ACP does not appear to provide affected importers with the benefits of expedited clearance of cargo or with less examination of their cargo. Further, the ACP does not have a 'security element' which is required by the Framework.

  Of particular concern to the Committee is that the Framework is intended afford benefits to **all** interested parties in the supply chain (known as Authorised Economic Operators). This would extend to transport companies, customs brokers and freight forwarders. However, the ACP is only limited to importers. The benefits of the ACP should be extended to all other interested parties in the supply chain who would otherwise be entitled to preferential or advantageous treatment under the frameworks.

Late in 2005, Customs raised the possibility of a new (and different) model to incorporate other aspects of the Framework in a way different to that set out in the ACP. However, the Committee is unaware of such an alternative model having been adopted or been raised for discussion. The Committee would be interested to review such an alternative model.

Conclusion

The Committee would welcome the opportunity to make further submissions on these topics.