

CHAPTER 3

KEY ISSUES

3.1 This chapter considers the main issues and concerns raised by the Law Council in its submission. It also considers responses provided by Customs in relation to these issues and concerns.

General concerns

3.2 The Law Council made a number of general preliminary observations about the Bill.

Extent of changes to Customs legislation and lack of consultation

3.3 The Law Council reiterated its concerns and reservations, expressed previously to this committee in the context of other amending legislation,¹ about the 'unrelenting piecemeal changes'² being made to Customs legislation. It argued that the Bill represents 'yet another amendment' to the Customs Act and is the seventh set of amendments to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Trade Modernisation Legislation).³ The Law Council submitted that such frequent piecemeal amendments and corrections do not aid easy comprehension of Customs legislation by interested parties. In the Law Council's view, the Customs Act requires extensive review to remedy areas of uncertainty.⁴

3.4 The Law Council also noted comments made by representatives of Customs in the course of the committee's recent inquiry into the provisions of the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006 (Border Compliance Bill). In particular, the Law Council pointed to comments indicating that changes incorporated in the Border Compliance Bill were of a minor and technical nature and subject to the availability of resources within the Office of Parliamentary

1 See, for example, Senate Legal and Constitutional Legislation Committee, *Provisions of the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006*, May 2006, p. 17.

2 *Submission 2*, p. 2.

3 *Submission 2*, p. 1.

4 *Submission 2*, pp 1-2. The Law Council again noted that this view is shared by other organisations and bodies such as the Customs Brokers & Forwarders Council of Australia, the Australian Law Reform Commission and the House of Representatives Standing Committee on Legal and Constitutional Affairs.

Counsel.⁵ Against this background, the Law Council expressed surprise that the current Bill 'should be introduced so quickly after the Border [Compliance] Bill'.⁶

3.5 In the Law Council's view:

... the Bill implements another, entirely separate regime for the issue of infringement notices. This will create huge additional confusion. The [Law Council] reiterates its view that the parties subject to the [Customs] Act are being significantly disadvantaged by the repeated and regular changes to the [Customs] Act. It seems grossly unfair to the [Law Council] that the maxim "ignorance of law is no excuse" should be applied to those subject to the [Customs] Act given these regular changes.⁷

3.6 The Law Council was also critical of the lack of consultation with respect to the Bill:

... the Bill has been introduced with no obvious consultation. Customs regularly place significant reliance on their consultation processes. However, the [Law Council] is unaware of any consultation regarding the Bill.⁸

3.7 Further, the Law Council noted the apparent absence of reasons for the expedited introduction of the Bill. The Law Council again referred to advice given by representatives of Customs during the committee's inquiry into the Border Compliance Bill. At that time, Customs indicated that it was reviewing, and consulting upon, its duty recovery provisions and payment under protest provisions; and, more generally, all offences in the Customs Act in response to the Australian Law Reform Commission's review into civil and administrative penalties.⁹ Significantly, in the Law Council's view, the matters which are included in the current Bill were not included in the advice given at the time of the Border Compliance Bill inquiry.¹⁰

3.8 While appreciating the necessity of the Bill's proposed changes to the Singapore-Australia Free Trade Agreement (SAFTA), the Law Council expressed the view that 'the apparently limited resources of Customs and the Parliament could best be addressed to focus on other fundamental amendments' to the Customs Act.¹¹ In the

5 *Submission 2*, p. 2; see also Senate Legal and Constitutional Legislation Committee, *Provisions of the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006*, May 2006, pp 17-18.

6 *Submission 2*, p. 2

7 *Submission 2*, p. 2.

8 *Submission 2*, p. 2.

9 Senate Legal and Constitutional Legislation Committee, *Provisions of the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006*, May 2006, p. 18.

10 *Submission 2*, p. 3.

11 *Submission 2*, p. 3.

Law Council's view, changes are required to address anomalies created by the Customs duty recovery policy which allows Customs an indefinite period to recover customs duty without a corresponding indefinite period for importers to seek refunds of overpaid duty.¹²

3.9 Further, the Law Council suggested that changes should be made to the Customs prosecution and averment provisions, as recommended by the Australian Law Reform Commission (ALRC) in several reports dating back to 1992.¹³ The Law Council noted that 'no such reform has been discussed with industry and has not been sighted by interested parties'. In its view, the prosecution provisions warrant urgent review.¹⁴

Customs response

3.10 Customs provided the following response to the Law Council's assertion that the Bill contains the seventh set of amendments to the Trade Modernisation Legislation:

Customs notes that the Bill does not make any amendments to the trade modernisation legislation. Where the Bill amends a provision in the Customs Act previously inserted by the trade modernisation legislation, the amendment is not a correction of the previous provision but additional to address new policy.¹⁵

Duty recovery

3.11 In relation to duty recovery, Customs responded to the Law Council's argument that current policy allows Customs an indefinite period to recover customs duty. Customs pointed to the decision of the High Court in *Malika Holdings Pty Ltd v Stretton*, and advised that Customs' view is that most duty recovery activity is authorised by section 153 of the Customs Act. Section 153 is not limited to fraud and is not limited in time. The only exception to the general rule is where duty is underpaid due to error by Customs. In such cases, the CEO of Customs must demand the duty within four years of the short-levy in order to be able to recover the duty.¹⁶

3.12 Customs also advised that, although section 153 is not limited in time, the practice of Customs is to go back no further than four years to recover duty. The Customs Regulations 1926 have also been amended to increase the time period for importers to seek refunds of overpaid duty from 12 months to four years.¹⁷

12 *Submission 2*, p. 3.

13 *Submission 2*, p. 3.

14 *Submission 2*, p. 3.

15 *Submission 1A*, p. 1.

16 *Submission 1A*, p. 1.

17 *Submission 1A*, p. 2.

3.13 Customs advised that it is currently progressing legislative amendments to clarify the relevant provisions, using section 105-50 in Schedule 1 of the *Tax Administration Act 1953* as a model. An outline of the proposed amendments has been provided to the Law Council, along with an invitation to provide a submission to Customs on the proposed amendments.¹⁸

Customs prosecutions

3.14 In relation to the amendment of provisions dealing with Customs prosecutions, Customs responded to assertions by the Law Council that Customs is not addressing reform in this area.

3.15 Customs advised that it is in the process of developing a response to Customs-specific recommendations of the ALRC's Report 95.¹⁹ Customs has developed criteria for classifying offences as civil or criminal and an internal consultation phase has commenced to develop proposals for the amendment of relevant provisions of the Customs Act. Customs has also commenced research into the procedural aspects and other consequential amendments that will be required to support the civil and criminal offence structure.²⁰

3.16 Customs informed the committee that, since there are a number of offences in the Customs Act, the project is large and extremely complex and will require some time to complete. Customs advised further that it intends to consult with industry and interested parties once the consultation rounds within government have been completed, and before any amendments are implemented.²¹

Schedule 1 – Import controls

3.17 Most of the substantive comments made by the Law Council in its submission related to the new import control regime set out in Schedule 1 of the Bill.

New Subdivision GB – surrender of prescribed prohibited imports

3.18 The Law Council made several observations in relation to Subdivision GB of Division 1 of Part XII of the Bill which relates to the surrender of certain prohibited imports in section 234AA places as an alternative to seizure of such imports.

18 *Submission 1A*, p. 2.

19 Australian Law Reform Commission, Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 2002, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95> (accessed 26 July 2006).

20 *Submission 1A*, p. 2.

21 *Submission 1A*, p. 2.

Type of prohibited imports

3.19 The Law Council argued that clarification is required of the type of prohibited imports to be prescribed by regulation as being subject to the proposed surrender regime.

Customs response

3.20 Customs responded directly to the concerns raised by the Law Council in relation to certain aspects of the Bill and its proposed operation. At the outset of its response, Customs informed the committee that it will be undertaking consultation with respect to the operational impact of the proposed surrender and infringement notice scheme through the Passenger Facilitation Taskforce.²²

3.21 Customs advised that it is aiming to address the large number of low risk, high volume prohibited items that are brought through Australian airports on a daily basis. Such items include blow pipes, flick knives, nunchakus, electric fly swatters, and electric shock devices.²³

3.22 Customs is of the view that the method of addressing prohibited items should be commensurate with the level of threat posed to society. The aim of the proposed surrender regime is to provide an alternative to the current process of seizing all prohibited imports and is targeted towards 'one off, minor instances of the importation of prohibited items'.²⁴

3.23 Under the current seizure regime, prohibited imports are seized and held by Customs for thirty days to provide the importer with the opportunity to apply for their return. Due to the low value of many of the goods, applications for their return are rarely made and the goods are destroyed. Customs submitted that '(p)roviding importers with the option to surrender prohibited items will streamline the process and minimise the associated administrative burden'.²⁵

3.24 Customs advised that, as a part of the policy implementation, Customs will determine which prohibited imports controlled under the PI Regulations it considers to be lower risk community and consumer protection related items. These prohibited imports will then be prescribed by regulation as subject to the new surrender regime and/or the infringement notice scheme.²⁶

22 *Submission 1A*, p. 2.

23 *Submission 1A*, p. 3.

24 *Submission 1A*, p. 3.

25 *Submission 1A*, p. 3.

26 *Submission 1A*, p. 3.

New section 209N – surrender of goods

3.25 As outlined in Chapter 2, new section 209N of the Bill permits a person to surrender prescribed prohibited imports or prohibited exports to an officer of Customs where the officer has reasonable grounds to believe certain circumstances exist, as set out in subsection 209N(1).²⁷

3.26 The Law Council submitted that it is unclear exactly 'what policy objective is being served by conditioning the surrendering of goods on an officer of Customs holding a certain belief'.²⁸ Further:

... it is not clear what will be the effect on the surrender of goods if the officer in question either did not have the requisite belief or, if he did, that belief was not based on reasonable grounds. It is the [Law Council's] view that the surrendering of prohibited imports and prohibited exports should be encouraged and this could [be compromised] by enabling any prohibited import to be voluntarily surrendered to Customs and presumably without penalty.²⁹

3.27 New subsection 209N(1) also contains a requirement that an officer of Customs must inform a person importing goods of the available options for dealing with the goods so that the person can make a decision about whether or not to surrender them to Customs.³⁰ The Law Council expressed the view that specific provision should be made in the Bill for the length of time that a person may consider the available options and whether the person can seek legal or other advice before making a decision.³¹

Customs response

3.28 In direct response to the Law Council's concern that the proposed regime does not impose a limit on the amount of time a person takes to make a decision regarding the surrender of goods, Customs pointed out that the decision to surrender must be made before leaving the relevant Customs-controlled area.

3.29 Further:

If an importer wished to seek legal or other advice before making a decision in relation to the goods, they would not be prevented from doing so. In this context it is acknowledged that time is a limiting factor. However, as the

27 See para 2.27 above.

28 *Submission 2*, p. 4.

29 *Submission 2*, p. 4.

30 See para 2.33 above.

31 *Submission 2*, pp 4-5.

importer is not under arrest and the goods surrendered are low value, it is not envisaged that legal advice would commonly be required or sought.³²

New section 209P – effect of surrender

3.30 The Law Council made a pertinent observation in relation to new section 209P which deals with the effect of surrendering goods.³³ It pointed out that paragraph 209P(a) indicates that no proceedings can be brought in circumstances where relevant goods are surrendered. However:

... it may be that the person importing the goods may still receive an infringement notice pursuant to the proposed new Section 243ZF. Again, this will depend on the types of goods and offences prescribed for the purposes of the new proposed Section 243ZF. It may be misleading for Section 209P(a) to state that no prosecution action can still be issued. Accordingly, consideration should be given to amending Section 209P(a) so that it records that even though a prosecution action cannot be taken, an infringement notice can be issued.³⁴

New section 209Q – right of compensation in certain circumstances for goods disposed of or destroyed

3.31 New section 209Q provides a person who has surrendered goods with the right to apply to a court of competent jurisdiction for compensation in respect of the goods. The Law Council pointed out that:

As the costs of applying to a court for compensation would likely exceed the amount of compensation, the [Law Council] considers that there should be a less expensive initial avenue for compensation, such as applying to an independent administrative body for compensation, about which, if unsuccessful, application could then be made to a court.³⁵

Customs response

3.32 Customs confirmed that '(t)here is no general compensation in respect of goods that have been surrendered as they are prohibited imports and an offence occurred at the time of their importation'.³⁶ Further, '(t)he right to apply for compensation in respect of goods that have been surrendered only applies if it is later proved that the goods were not prohibited imports in the first instance'.³⁷

32 *Submission 1A*, p. 3.

33 For a detailed description of section 209P, see para 2.28.

34 *Submission 2*, p. 5.

35 *Submission 2*, p. 5.

36 *Submission 1A*, p. 3.

37 *Submission 1A*, p. 3.

New Subdivision GC – post-importation permission

3.33 New Subdivision GC of Division 1 of Part XII provides for post-importation permission for certain prohibited imports. However, the Law Council submitted that there is no clarity as to the type of goods which will be subject to that element of the proposed regime. The Law Council pointed out that, since new section 209T indicates that Subdivision GC will apply to goods as prescribed, some clarity needs to be provided as to the application of Subdivision GC.³⁸

3.34 The Law Council also noted that new Subdivision GC to Division 1 of Part XII provides for the detention of certain prohibited imports that are to be prescribed by regulations for the purposes of Subdivision GC. It expressed concern that the type of prohibited imports to which Subdivision GC will apply has not been identified apart from the fact that they will consist of prohibited imports for which a permit, licence or other approval to import them will be required. Further:

It is unclear to the [Law Council] why certain prohibited imports requiring a permission or licence to be imported may be prescribed for the purposes of this Subdivision and other prohibited imports requiring a permission or licence to be imported are not also so prescribed and what policy objective is served by prescribing some prohibited imports requiring permits or licences to be imported and not prescribing other such prohibited imports for the purposes of this Subdivision.³⁹

New Subdivision B to Division 5 of Part XIII – infringement notice scheme

3.35 The Law Council made several observations in relation to the proposed infringement notice scheme for certain offences relating to prohibited imports and section 234AA places.⁴⁰

New regime for issue of infringement notices

3.36 The Law Council expressed concern 'as to confusion created by an entirely new regime for the issue of infringement notices'.⁴¹

Customs response

3.37 Customs pointed out the proposed infringement notice scheme in the Bill will only apply to the aviation and postal environments and that it 'is unrelated to the

38 *Submission 2*, p. 5.

39 *Submission 2*, p. 5.

40 The Law Council noted that infringement notices in relation to other types of offences were introduced as part of the Trade Modernisation Legislation; the Law Council's comments about the adoption of infringement notices in the context of the Trade Modernisation Legislation are also endorsed for the purposes of the current Bill: *Submission 2*, p. 6.

41 *Submission 2*, p. 6.

regime currently in place in the cargo environment and will operate differently to the existing approach because of the scope and quantity of goods involved.⁴²

New paragraph 243ZF(a) – type of prohibited imports

3.38 New paragraph 243ZF(a) indicates that it will apply to contraventions of paragraph 233(1)(b) if the offence relates to goods that are prohibited imports of a kind prescribed by regulations made for the purposes of section 243ZF. Again, the Law Council called for clarity from Customs as to which goods will trigger liability by way of infringement notice.⁴³

Customs response

3.39 Customs again indicated that, as a part of the policy implementation, it will determine which prohibited imports controlled under the PI Regulations it considers to be lower risk community and consumer protection related items. Such prohibited imports will then be prescribed by regulation as subject to the surrender regime and/or the infringement notice scheme.⁴⁴

New section 243ZG – legislative instruments

3.40 New section 243ZG provides for the CEO of Customs to make guidelines 'by legislative instrument' to make guidelines in respect of the administration of Subdivision B to which he or she must have regard when exercising powers under Subdivision B. The Law Council suggested that, in practice, the guidelines will be considered by delegates of the CEO who will be empowered to issue infringement notices.⁴⁵

3.41 The Law Council also noted that, despite the guidelines being described as a 'legislative instrument', the corresponding provisions which currently apply in the Customs Act in relation to Division 5 of Part XIII (subsection 243XA(2)) state specifically that 'the guidelines are a disallowable instrument' for the purposes of section 46A of the *Acts Interpretation Act 1901*. It argued that section 243ZG should be amended to reflect that the guidelines for Subdivision B will constitute a disallowable instrument.⁴⁶

42 *Submission 1A*, p. 4.

43 *Submission 2*, p. 6.

44 *Submission 1A*, p. 4.

45 *Submission 2*, p. 6.

46 *Submission 2*, p. 6.

3.42 In relation to the adoption by Customs of the new infringement notice scheme, the Law Council pointed to Chapter 12 of the ALRC's Report 95⁴⁷ and, in particular, Recommendations 12-1 to 12-10 which set out recommendations regarding any infringement notice scheme.⁴⁸ The Law Council suggested that clarification be sought from Customs that the infringement notice scheme to be adopted for the offences in Subdivision B to Division 5 of Part XIII will comply with each of the ALRC's recommendations.⁴⁹

3.43 The Law Council also argued that the guidelines associated with the new offences are extremely important:

The [Law Council] recommends that Customs be required to produce the guidelines for consultation with interested parties before they are brought into effect. For these purposes, the Bill should reflect that the corresponding sections should not be implemented until the new guidelines have been fully implemented.⁵⁰

Customs response

3.44 With respect to the Law Council's argument about the guidelines and disallowable instruments, Customs pointed out that the guidelines, including the guidelines made under section 243XA, are legislative instruments for the purposes of the *Legislative Instruments Act 2003* and could be subject to disallowance under that piece of legislation. Since the commencement of the *Legislative Instruments Act 2003* on 1 January 2005, all new legislation must specifically refer to an instrument being a legislative instrument. Customs argued, therefore, that it would 'be inappropriate to amend the section 243AG as suggested'.⁵¹

Delegations to issue infringement notices

3.45 The current guidelines associated with infringement notices able to be issued by Customs for offences created by the Trade Modernisation Legislation reflect that infringement notices may only be issued by an authorised and trained delegate of the CEO of Customs. The Law Council stated that it assumed that this process would continue for the new infringement notice regime:

47 Australian Law Reform Commission, Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 2002, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95> (accessed 26 July 2006).

48 See further Australian Law Reform Commission, Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 2002 at http://www.austlii.edu.au/au/other/alrc/publications/reports/95/12.Infringement_notices.html#heading13 (accessed 26 July 2006).

49 *Submission 2*, p. 6.

50 *Submission 2*, p. 7.

51 *Submission 1A*, p. 4.

If so, then that may create difficulties as pursuant to the proposed new paragraph 243ZH(2)(a), service of the infringement notice must take place before a person leaves the Section 234AA place. Presumably, it will be difficult for the relevant officer in such a place to make representations to the appropriate delegate and for the delegate to properly consider the entire scheme of the guidelines and issue an infringement notice before the person leaves the Section 234AA place. Accordingly, [the Law Council] would recommend that this provision be reviewed as to its practical application.⁵²

Customs response

3.46 Customs told the committee that the process and appropriate authorisation with regard to delegations is still being developed:

As the provision does not determine who the delegate is, the decision regarding the appropriate delegation will take into account the environment in which this scheme will operate and the operational practicalities of the situation.⁵³

Condemnation of goods

3.47 The Law Council also noted that there may be some inconsistency between new paragraphs 243ZI(1)(f) and 243ZK(4) which state that compliance with an infringement notice is not an admission of guilt and liability, and new subsection 243ZK(5) which states that, if an infringement notice is paid, the relevant goods are taken to be condemned as forfeited to the Crown:

It is the view of the [Law Council] that such an action would be consistent to an offence being deemed to have been committed by the person subject to the infringement notice. The [Law Council] recommends that further consideration be given as to whether the automatic condemnation should apply following a party having complied with the terms of an infringement notice.⁵⁴

Customs response

3.48 With respect to the condemnation of goods, Customs informed the committee that the introduction of the infringement notice scheme is intended to provide an alternative to prosecution for goods that do not warrant further action. Further:

The person subject to the infringement notice has committed the offence of importing a prohibited item and as such the goods will not be returned. The issuing of an infringement notice is an intermediate sanction for the

52 *Submission 2*, p. 7.

53 *Submission 1A*, p. 4.

54 *Submission 2*, p. 7.

offence. However, liability for the offence is discharged upon payment of the notice.⁵⁵

55 *Submission 1A*, p. 5.