

The Senate

Legal and Constitutional
Legislation Committee

Customs Legislation Amendment (Modernising
Import Controls and Other Measures) Bill 2006

August 2006

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TABLE OF CONTENTS

MEMBERS OF THE LEGISLATION COMMITTEE	iii
ABBREVIATIONS	vii
RECOMMENDATIONS.....	ix
CHAPTER 1	1
INTRODUCTION	1
Background.....	1
Conduct of the inquiry.....	1
Acknowledgement.....	2
Note on references.....	2
CHAPTER 2	3
OVERVIEW OF THE BILL	3
Main provisions of the Bill.....	3
New section 209M – application of Subdivision GB.....	7
New section 209N – surrender of goods	7
New section 209P – effect of surrender	8
New section 209Q – right of compensation in certain circumstances for goods disposed of or destroyed.....	9
New section 209R – disposal of surrendered goods.....	9
New section 209S – definitions.....	10
New section 209T – application of Subdivision GC	11
New section 209U – power to detain goods.....	11
New section 209V – detained goods to be secured	13
New section 209W – requirement to serve detention notice.....	13
New section 209X – matters to be dealt with in a detention notice	14
New section 209Y – effect of detaining goods	15
New section 209Z – evidence not provided or permission not granted or given.....	16

New section 209ZA – evidence provided and permission granted or given.....	18
New section 209ZB – service by post	18
New section 209ZC – liability for detention of goods	18
New section 243ZF – application of Subdivision B.....	19
New section 243ZG – guidelines for serving infringement notices.....	21
New section 243ZH – when an infringement notice can be served	21
New section 243ZI – matters to be included in an infringement notice	22
New section 243ZJ – withdrawal of infringement notices.....	23
New section 243ZK – what happens if the infringement notice penalty is paid..	24
New section 243ZL – more than one infringement notice may not be served for the same offence	24
New section 243ZM – infringement notice not required to be served.....	24
New section 243ZN – right of compensation in certain circumstances for goods disposed of or destroyed.....	25
New section 243ZO – disposal of forfeited goods	25
Use of a Certificate of Origin	29
CHAPTER 3	31
KEY ISSUES.....	31
General concerns	31
Schedule 1 – Import controls.....	34
CHAPTER 4	43
COMMITTEE VIEW	43
APPENDIX 1	47
SUBMISSIONS RECEIVED.....	47
APPENDIX 2	49
Questions on Notice from the Senate Legal and Constitutional Legislation Committee	49

ABBREVIATIONS

ALRC	Australian Law Reform Commission
Bill	Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006
Border Compliance Bill	Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006
CEO	Chief Executive Officer
Customs	Australian Customs Service
Customs Act	<i>Customs Act 1901</i>
EM	Explanatory Memorandum
IPC	Incoming Passenger Card
JSCOT	Joint Standing Committee on Treaties
Law Council	Law Council of Australia
PI Regulations	Customs (Prohibited Imports) Regulations 1956
SAFTA	Singapore-Australia Free Trade Agreement
Trade Legislation	Modernisation <i>Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001</i>

RECOMMENDATIONS

Recommendation 1

4.6 The committee recommends that the type of prohibited imports subject to the surrender regime under new Subdivision GB be identified prior to the Bill being considered by Parliament and prior to any implementation of the regime.

Recommendation 2

4.7 The committee recommends that the type of prohibited imports subject to the post-importation regime under new Subdivision GC be identified prior to the Bill being considered by Parliament and prior to any implementation of the regime

Recommendation 3

4.8 The committee recommends that the guidelines for serving infringement notices under new section 243ZG of the Bill be released for comment and consultation prior to implementation of the import control regime.

Recommendation 4

4.10 The committee recommends that the Bill be amended to contain a specific statement to make absolutely clear that the power of the CEO to issue an infringement notice under new section 243ZH includes the power to issue an infringement notice outside a section 234AA place, but that its application outside a section 234AA place is limited only to a section 234ABA area, the postal environment and circumstances where baggage is unaccompanied.

Recommendation 5

4.11 The committee recommends that new subparagraph 243ZI(1)(e)(ii), relating to matters to be included in an infringement notice, be amended to specifically provide that the phrase 'in any other case' relates only to the postal environment and circumstances where baggage is unaccompanied.

Recommendation 6

4.12 The committee recommends that a comprehensive public education campaign, aimed at those to whom the import control regime is intended to apply, be conducted in relation to the measures proposed in the Bill.

Recommendation 7

4.13 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

CHAPTER 1

INTRODUCTION

Background

1.1 On 22 June 2006, the Senate referred the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006 (Bill) to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 1 August 2006.

1.2 The Bill seeks to amend the *Customs Act 1901* (Customs Act) to:

- allow a person to surrender certain prohibited imports that have not been concealed;
- allow for the granting of post-importation permissions for certain prohibited imports;
- allow infringement notices to be served for certain offences including importing certain prohibited imports, and border security related offences; and
- amend the Customs Act to reflect new Certificate of Origin requirements for the Singapore-Australia Free Trade Agreement to allow importers to provide less documentation to Customs when claiming preferential rates of duty on imported goods.

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 27 June 2006 and 5 July 2006, and invited submissions by 10 July 2006. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to 20 organisations and individuals.

1.4 The committee received two submissions, from the Australian Customs Service (Customs), and the Law Council of Australia (Law Council). Customs also provided the committee with a supplementary submission which addressed major issues raised by the Law Council in its submission. Chapter 3 of the committee's report examines the concerns raised by the Law Council, and includes Customs' response to these concerns.

1.5 Given the small number of submissions received for this inquiry, the committee resolved not to hold a public hearing and instead placed a significant number of questions on notice to Customs. However due to the large volume of questions, the time needed for Customs to prepare answers, and the short timeframe between the provision of answers and the reporting date, the committee has not had the opportunity to consider fully all the answers given. Accordingly, and to assist the Senate in its consideration of the Bill, Appendix 2 to the committee's report simply

presents the questions asked by the committee and the corresponding answers given by Customs.

1.6 Chapter 4 of the report contains the committee's view and recommendations.

Acknowledgement

1.7 The committee thanks Customs and the Law Council for making submissions to its inquiry.

Note on references

1.8 References in this report are to individual submissions as received by the committee, not to a bound volume.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Main provisions of the Bill

Schedule 1 – Import controls

2.2 Section 50 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the importation of goods into Australia and that the power may be exercised by prohibiting the importation of goods absolutely or by prohibiting the importation of goods unless specified conditions or restrictions are complied with. Section 51 of the Customs Act provides that goods, the importation of which is prohibited under section 50, are prohibited imports.

2.3 The Customs (Prohibited Imports) Regulations 1956 (PI Regulations) control the importation of the goods specified in the various regulations and the Schedules to the PI Regulations, by prohibiting importation absolutely, or by making importation subject to a permission or licence.

2.4 Paragraph 233(1)(b) of the Customs Act prohibits the importation of any prohibited imports. A contravention of paragraph 233(1)(b) is an offence of strict liability. Currently, all prohibited items under the PI Regulations that are imported into Australia must be seized by Customs under section 203B of the Customs Act, regardless of their perceived threat to the community.¹

2.5 In his second reading speech, Senator the Hon Eric Abetz stated that the Bill will provide Customs officers 'with additional powers to deal efficiently with prescribed prohibited imports that are low value and low risk'.²

2.6 The second reading speech noted further that the Bill:

... will enable Customs to establish a tiered response to sanctions for dealing with prohibited imports. The process will allow for the possible voluntary surrender of the goods, payment of a penalty under an infringement notice, or the seeking of a post-importation permission, rather than automatic seizure of the goods.³

1 Australian Customs Service, *Submission 1*, p. 2.

2 Minister for Fisheries, Forestry and Conservation, *Senate Hansard*, 21 June 2006, p. 1.

3 *Senate Hansard*, 21 June 2006, p. 1.

2.7 Seizure will still be utilised in relation to higher value and more serious prohibited items.⁴

2.8 The aim of the proposed regime is to improve the efficiency of Customs operations at airports by providing sanctions appropriate to the level of threat to the community, and by reducing the time spent by Customs officers on administration and the level of post-seizure claims made on seized items.⁵

Consequential amendments to seizure provisions

2.9 The Explanatory Memorandum (EM) to the Bill explains that, where Customs seizes prohibited imports without warrant, the Customs Act contains provisions that oblige Customs to, among other things:

- issue a seizure notice to the owner of the goods;
- provide the owner with an opportunity to make a claim for return of the goods and,
- except in specified circumstances, return the goods to the owner who has made such a claim.⁶

2.10 Under new Subdivision B of Division 5 of Part XIII (as inserted by Item 36 of Schedule 1 of the Bill), when Customs issues the seizure notice, Customs may also issue an infringement notice at the same time on the owner of the goods in respect of importing prohibited imports. In that event, the provisions of the new infringement notice scheme operate concurrently with the provisions relating to seizure.

2.11 Under new section 243ZK in new Subdivision B, the goods are taken to be condemned as forfeited to the Crown if the following conditions (section 243ZK conditions) are satisfied:

- an infringement notice for an offence in relation to the importation of the goods has been served with the seizure notice; and
- the penalty specified in the infringement notice is paid within the period that, or by the time by which, the penalty is required to be paid; and
- the infringement notice is not withdrawn.

2.12 The EM indicates that this requires the operation of certain seizure provisions in the Customs Act to be 'ceased or modified'.⁷

4 Australian Customs Service, *Submission 1*, p. 2.

5 *Submission 1A*, p. 2.

6 p. 5.

7 p. 5.

Items 6 to 13

2.13 Items 6 to 8 amend section 205A of the Customs Act, which deals with matters to be included in a seizure notice. Item 7 will require a new statement to be included in a seizure notice that a claim for the return of the goods cannot be made if the section 234ZK conditions are satisfied.

2.14 Items 6 and 8 will amend the existing matters to be included in a seizure notice to account for the circumstance where the section 243ZK conditions are satisfied and a claim for the return of goods cannot be made.

2.15 Items 9 and 10 amend section 205B of the Customs Act, which relates to making a claim for the return of goods seized. Item 10 inserts new subsection (1A) to provide that a claim may not be made for the return of goods that have been taken to be condemned as forfeited under new section 243ZK. Item 9 amends subsection (1) so that subsection (1), which provides for an owner of seized goods to make a claim for return, is subject to new subsection (1A).

2.16 Item 11 inserts a new paragraph (ba) into section 205C of the Customs Act, which relates to the treatment of seized goods where no claim of return is made. The new paragraph accounts for the circumstance where the section 243ZK conditions are satisfied and a claim for return of the goods cannot be made. In that event, section 205C will cease to apply.

2.17 Items 12 and 13 amend section 205D of the Customs Act, which deals with the treatment of seized goods for which a claim for return is made. Item 12 inserts new paragraph (aa) into subsection 205D(1) to account for the circumstance where the section 243ZK conditions are satisfied and a claim for return of the goods cannot be made. In that event and where the owner has not made a claim for return, section 205D will cease to apply.

2.18 Item 13 inserts new paragraph (aa) into subsection 205D(2), which provides for the return of the seized goods to the owner except in specified circumstances. The effect of new paragraph (aa) is that goods seized do not have to be returned if they have been condemned as forfeited to the Crown under section 243ZK, that is, the section 243ZK conditions have been satisfied. This applies to the situation where a person makes a claim for return of goods before the section 243ZK conditions are satisfied.

Item 14

2.19 Item 14 inserts new Subdivisions GB (voluntary surrender of prohibited items) and GC (post-importation permission) into Division 1 of Part XII of the Customs Act.

2.20 According to the EM and as indicated in the Second Reading Speech, the new regimes in these two Subdivisions, along with the new infringement notice scheme in new Subdivision B of Division 5 of Part XIII (see Item 36 of Schedule 1), are

designed to reduce the administrative burden involved in seizing prohibited imports that are low value and low risk.⁸

New Subdivision GB – surrender of prescribed prohibited imports

2.21 New Subdivision GB will insert a new regime to allow for the surrender of certain prohibited imports to Customs in specified circumstances. The decision to allow such goods to be surrendered will be exercised in lieu of seizing the goods without a warrant. The consequences of surrendering such goods will be that a person will not be able to be prosecuted for an offence against the Customs Act in relation to the importation of the goods and the title to the goods will immediately vest in the Crown.⁹

2.22 The new surrender regime will not apply to all prohibited imports but only to those prescribed by regulation. However, all prohibited imports, regardless of how they are dealt with, will not be released into the community. The importation of prohibited imports is prohibited under the Customs Act, and this position is not altered by the introduction of these additional measures.¹⁰

2.23 The new surrender regime will only apply in a Customs-controlled area – a section 234AA place¹¹ – and only for those prohibited items that have not been 'concealed' by the passenger.¹² Where a prohibited item has been concealed, surrender of the item will not be an option and an infringement notice will be issued.¹³

2.24 Customs advised the committee that a consent form, which includes the passenger's details, signature and a list of the surrendered items, must be signed at the point of surrender. The signing of this form by the passenger is determined to be the point of surrender, and at this point the title of the goods passes to the Commonwealth. If the owner of the goods surrenders the items, it is deemed that the goods have been surrendered for disposal. A person who surrenders an item will not be liable for an offence under the Customs Act and Customs will have no power to take any further action.¹⁴

8 p. 6.

9 EM, p. 7.

10 EM, p. 7.

11 A section 234AA place is an area at an airport or a port that is set aside for the questioning of passengers and the examination of their personal baggage. According to the EM, most minor contraventions of the PI Regulations occur at airports and ports: p. 8.

12 Note that the scheme does not extend to dutiable goods: Australian Customs Service, *Submission 1*, p. 2.

13 *Submission 1A*, p. 4.

14 *Submission 1*, p. 2.

New section 209M – application of Subdivision GB

2.25 New section 209M provides that new Subdivision GB applies to goods that are prohibited imports of a kind prescribed by regulations made for the purposes of this section.

2.26 The PI Regulations control the importation of certain specified goods, by prohibiting importation absolutely, or by making importation subject to a permission or licence. The EM states that the new surrender regime will not apply to all of the prohibited imports specified in the PI Regulations as it is not considered appropriate that the importation of all prohibited imports should be subject to the regime.¹⁵

2.27 The new regime will only apply to those prohibited imports that are prescribed for its purposes, with the aim of balancing the threat posed to the community by minor contraventions of the PI Regulations against the administrative burden that the seizure regime places on Customs.¹⁶

New section 209N – surrender of goods

2.28 New section 209N sets out the circumstances when the prescribed prohibited imports would be able to be surrendered to an officer of Customs. Subsection 209N(1) provides that an officer of Customs may, instead of seizing the goods under section 203B of the Customs Act, permit the person to surrender the goods to the officer in a section 234AA place if the officer has reasonable grounds to believe that the goods:

- have been imported by the person;
- have not been concealed from Customs by the person;
- are 'accompanied personal or household effects' of the person; and
 - the person has been informed, by the officer in writing, of the available options for dealing with the goods and the consequences of exercising each of these options; and
 - the person has indicated to Customs, in writing, that he or she intends to surrender the goods; and
 - the officer has indicated to the person that the goods may be surrendered to the officer.

2.29 It is proposed that the permission to surrender prescribed prohibited imports will be granted entirely at the discretion of an officer of Customs. If the officer decides that the circumstances of the importation require different action to be taken in respect of the person and the goods, he or she may refuse to permit the goods to be

15 p. 7.

16 p. 7.

surrendered. The EM notes that it may be appropriate to permit the goods to be surrendered for a one-off contravention of the PI Regulations.¹⁷

2.30 Permission to surrender the goods can only be given if the goods have not been concealed from Customs. If, for example, the person indicated on their Incoming Passenger Card (IPC) that they were bringing into Australia a prohibited import and the IPC was presented to Customs, they would not be considered as having concealed the goods from Customs. If, however, they failed to indicate this on the IPC, they would be considered as having concealed the goods from Customs and would not be permitted to surrender the goods. In that circumstance, the goods could either be the subject of an infringement notice under the new regime or be seized by Customs.¹⁸

2.31 Alternatively, under new Subdivision GC (discussed below), a person may also be given the option, at the discretion of an officer of Customs, of seeking a post-importation permission in respect of the goods. The EM states that it is important that a person is aware of the consequences of surrendering the goods and that the person's intention to surrender the goods is clearly indicated. In order to ensure this, all of these actions must be in writing.¹⁹

2.32 Subsection 209N(2) provides that without limiting the meaning of 'concealed' in subparagraph (1)(a)(ii), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with sections 71, 71K or 71L of the Customs Act and the person failed to do so. According to the EM, the purpose of this provision is to make it clear that concealment of goods extends beyond physical concealment to, for example, the failure to declare to Customs in an IPC the fact that a person is bringing into Australia prohibited goods.²⁰

New section 209P – effect of surrender

2.33 New section 209P sets out the effects of the surrender under section 209N on the goods and in relation to the person. This section provides that if the goods are surrendered under section 209N:

- proceedings cannot be brought for an offence against the Customs Act in relation to the importation of the goods; and
- the goods are taken as condemned as forfeited to the Crown, such that title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods and the title cannot be called into question.

2.34 The person will not be able to make a claim for the return of the goods.

17 p. 8.

18 pp 8-9.

19 p. 9.

20 p. 9.

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

2.35 New section 209Q sets out the compensation provisions if surrendered goods were not prohibited imports but have been disposed or destroyed before this is established.

2.36 Subsection 209Q(1) provides that, despite the disposal or destruction of the goods taken to be condemned as forfeited to the Crown because the goods have been surrendered under section 209N, a person may apply to a court of competent jurisdiction under this section for compensation.

2.37 Subsection 209Q(2) provides that a right to compensation exists if:

- the goods were not prohibited imports; and
- the goods were not used or otherwise involved in the commission of an offence; and
- the person establishes, to the satisfaction of the court, that he or she is the rightful owner of the goods.

2.38 Subsection 209Q(3) provides that if a right to compensation exists under subsection (2), the court must order the payment by the Commonwealth to the person of an amount equal to the market value of the goods at the time of their disposal or destruction.

2.39 The EM notes that these provisions are similar to other compensation arrangements in the Customs Act in relation to seized goods that have been disposed of or destroyed, for example, section 205F.²¹

New section 209R – disposal of surrendered goods

2.40 New section 209R provides that all goods surrendered under section 209N must be dealt with and disposed of in accordance with the directions of the Chief Executive Officer (CEO) of Customs. This provision is similar to other provisions dealing with the disposal of goods that have been seized by Customs, for example, section 208D.

New subdivision GC – post-importation permission

2.41 New Subdivision GC of Division 1 of Part XII of the Customs Act will insert a new regime which will allow for the granting or giving of post-importation permissions, licences or other documents, in specified circumstances, in respect of certain goods whose importation is prohibited under the PI Regulations.

2.42 As previously mentioned, the importation of most goods in the PI Regulations is prohibited unless a licence or permission to import the goods is obtained. In some

21 p. 10.

cases, other conditions or restrictions must also be complied with. The EM gives the example of the importation of certain firearms, where a written confirmation is required from the police of the state or territory in which the firearm will be used, to the effect that the importer holds a licence or authorisation according to the law of the state or territory to possess the firearm.²²

2.43 The licence or permission or other document must be obtained prior to the importation of the goods. If it has not been obtained prior to importation, the goods will be prohibited imports in accordance with section 51 of the Customs Act. Prohibited imports are special forfeited goods under the Customs Act and will become subject to the provisions of the Customs Act that apply to such goods, which include the power to seize the goods without a warrant when they are in a Customs place. There are also offences in the Customs Act that apply to the importation of prohibited imports.

2.44 The EM states that, for a variety of reasons, it is not always possible to obtain a licence or permission to import goods before their importation. In some cases, a permit would most likely have been granted if an importer had been aware of the control prior to importing the goods. The EM notes that seizure and forfeiture of the goods in these circumstances, without providing the importer with an opportunity to apply for a permission, is unreasonable where an importer is acting in good faith.²³

2.45 Therefore, the Bill introduces a new regime whereby, in specified circumstances, the owner of prohibited imports may apply for, and the decision-maker may in the exercise of their discretion grant or give, the required permission to import the goods after the goods have been imported. The relevant goods will remain in the custody of Customs at all times until the required permission is granted or given.

2.46 If the required permission is not subsequently granted or given within the specified period, the goods are taken to be seized and the normal seizure process will follow.

New section 209S – definitions

2.47 New section 209S inserts definitions for the purposes of new Subdivision GC.

2.48 Subsection 209S(1) inserts the following definitions:

- 'application period' which for goods that have been detained under new section 209U means the period that, in accordance with new subparagraph 209X(2)(d)(i), is specified in the detention notice identifying the goods.
- 'detention notice' which means a notice of a kind mentioned in new section 209X.

22 p. 10.

23 p. 11.

- 'grant period' which for goods that have been detained under new section 209U means the period that, in accordance with new subparagraph 209X(2)(d)(ii), is specified in the detention notice identifying the goods.

2.49 New subsection 209S(2) provides that if regulations made under section 50 of the Customs Act provide that the importation of goods is prohibited unless a licence, permission, consent, approval or other document (however described) is granted or given, then the licence, permission, consent, approval or other document is a 'required permission to import the goods'. The EM states that this provision will eliminate the need to list all of the different types of licences etcetera each time they are referred to in Subdivision GC.²⁴

New section 209T – application of Subdivision GC

2.50 New section 209T sets out the goods to which new Subdivision GC applies. Similar to new Subdivision GB, Subdivision GC will only apply to goods that are prohibited imports of a kind prescribed by regulation made for the purposes of this section.

2.51 Goods to be prescribed for the purposes of Subdivision GC are only those determined by the agency responsible for the permission or control as being suitable for post-importation consideration.

New section 209U – power to detain goods

2.52 New section 209U sets out the circumstances in which an officer of Customs may allow a person to apply for a required permission to import the goods after the goods have been imported, in lieu of immediately seizing the goods.

2.53 Subsection 209U(1) provides that an officer of Customs may, instead of seizing goods under section 203B, detain the goods if:

- the goods are imported without one or more required permissions to import the goods having been granted or given; and
- any other conditions or restrictions specified in the regulations made under section 50 in respect of the importation have been complied with; and
- the officer has reasonable grounds to believe that:
 - the goods have not been concealed from Customs by the person who imported them; and
 - no application for any of the required permissions to import the goods has previously been refused; and
- if the goods are accompanied personal effects or household effects of the person, the person:

- has been informed, by the officer in writing, of the available options for dealing with the goods and the consequences of exercising each of those options; and
- has indicated to Customs, in writing, that he or she has applied, or intends to apply, for each of the required permissions to import the goods that have not already been granted.

2.54 Under paragraph 209U(1)(b), if there are any other conditions or restrictions which must be complied with prior to the importation of the goods, other than obtaining the required permission to import the goods, and these have not been complied with, the new regime will not apply to the goods.

2.55 Similar to new Subdivision GB, the detention of prescribed prohibited imports in lieu of seizure will be entirely at the discretion of the officer of Customs. If the officer decides that the circumstances of the importation require different action to be taken in respect of the person and the goods, he or she may refuse to detain the goods. In addition, the officer's discretion could only be exercised if no application for any of the required permissions to import the goods had previously been refused.²⁵

2.56 Similar also to new Subdivision GB, detention of the goods in lieu of seizure can only occur if the goods have not been concealed from Customs. If, for example, the person indicated on their IPC that they were bringing into Australia a prohibited import and the IPC was presented to Customs, they would not be considered as having concealed the goods from Customs. If, however, they failed to indicate this on the IPC, they may be considered as having concealed the goods from Customs and would not be permitted to seek the required permission to import the goods. In that circumstance, the goods would either be subject to an infringement notice or be seized by Customs.²⁶

2.57 Again, the EM stresses that it is important that a person is fully aware of the options available to them. If the goods are in a section 234AA place and are the accompanied personal or household effects of the person, a person may also be given the option of surrendering the goods under new Subdivision GB. (The circumstances that trigger the operation of Subdivision GB are the same as those that trigger the operation of Subdivision GC in respect of goods in a section 234AA place that are the accompanied personal or household effects of the person). It is also important that a person is aware of the consequences of seeking the required permission to import the goods and that their intentions in respect of the goods are clearly indicated. In order to ensure this, all of these actions must be in writing.²⁷

25 EM, p. 13.

26 EM, p. 13.

27 EM, p. 13.

2.58 Subsection 209U(2) provides, similar to subsection 209N(2), that without limiting the meaning of 'concealed' in subparagraph (1)(c)(i), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with section 71, 71K or 71L of the Customs Act and the person failed to do so.

New section 209V – detained goods to be secured

2.59 New section 209V set out the procedures for the storage of goods detained under section 209U.

2.60 New subsection 209V(1) provides that in this section, 'approved place', in relation to goods detained under section 209U, means a place approved by a Collector of Customs²⁸ as a place for the storage of goods of that kind.

2.61 New subsection 209V(2) provides that if an officer of Customs detains goods under section 209U, the officer must, as soon as practicable, take the goods to an approved place.

2.62 Depending on the types of prohibited imports that are prescribed for the purposes of new Subdivision GC, there may be more than one approved place approved under section 209V.

New section 209W – requirement to serve detention notice

2.63 New section 209W sets out the requirements in relation to detention notices for goods detained under section 209U.

2.64 Subsection 209W(1) provides that if an officer of Customs detains goods under section 209U, the officer must serve, within 7 days after the day on which the goods were detained, a detention notice on:

- the owner of the goods; or
- if the owner cannot be identified after reasonable inquiry, the person in whose possession or under whose control the goods were when they were detained.

2.65 Subsection 209W(2) provides that the notice must be in writing and must be served:

- personally or by post; or
- if no person of the kind referred to in paragraph (1)(a) or (b) can be identified after reasonable inquiry, by publishing a copy of the notice in a newspaper circulating in the location in which the goods were detained.

28 A Collector of Customs is a reference to the CEO, the Regional Director for a state or territory, or any officer doing duty in the matter in relation to which the expression is used: *Customs Act 1901*, para 8(1)(a).

2.66 Subsection 209W(3) provides that a detention notice may be served on a person who is outside Australia.

2.67 As the detention notice may eventually serve as a seizure notice under new subsection 209Z(3) below, it will be served in the same way that a seizure notice is served under section 205 of the Customs Act.

New section 209X – matters to be dealt with in a detention notice

2.68 New section 209X sets out the matters that will need to be dealt with in a detention notice served under section 209W.

2.69 Subsection 209X(1) provides that a detention notice must set out the following:

- a statement identifying the goods;
- the day on which the goods were detained;
- the ground, or each of the grounds, on which the goods were detained;
- a statement that the goods will be taken to be seized if:
 - written evidence, of the making of an application for each required permission to import the goods that was not granted or given by the time the goods were imported, is not provided to Customs by the end of a specified period (the application period); or
 - not all of the required permissions to import the goods are granted or given by the end of a specified period (the grant period); or
 - during the application period or the grant period, the owner of the goods notifies Customs, in writing, that an application for a required permission to import the goods has been refused;
- a statement that, if the goods are taken to be seized because written evidence is not provided to Customs by the end of the application period, the goods will be taken to be seized on the day after the end of the application period;
- a statement that, if the goods are taken to be seized because not all of the required permissions to import the goods are granted, or given, by the end of the grant period, the goods will be taken to be seized on the day after the end of the grant period;
- a statement that, if the goods are taken to be seized because during the application period or the grant period the owner of the goods notifies Customs, in writing, that an application for a required permission to import the goods has been refused, the goods will be taken to be seized on the day after Customs is so notified;
- the ground, or each of the grounds, on which the goods will be taken to be seized;

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- a statement that, if the goods are taken to be seized and a claim for the return of the goods has not already been made, and is not made within 30 days after the day the goods are taken to be seized, the goods will be taken to be condemned as forfeited to the Crown;
 - if the notice is to be served in a foreign country – a statement that the person served, if that person has not yet made a claim for the return of the goods, may not make such a claim unless he or she has first appointed in writing an agent in Australia with authority to accept service of documents, including process in any proceedings arising out of the matter.

2.70 As this detention notice may also serve as a seizure notice in relation to the goods under 209Z(3) below, it will contain the same details that a seizure notice must contain under section 205A of the Customs Act.

2.71 New subsection 209X(2) provides that the application period specified in a detention notice under subparagraph (1)(d)(i) must be the period that:

- starts on the day that the notice is served; and
- ends 30 days, or such other period as is prescribed by the regulations, after that day.

2.72 New subsection 209X(3) provides that the grant period specified in a detention notice under subparagraph (1)(d)(ii) must be the period that:

- starts on the day written evidence of the making of an application for a required permission to import the goods is first provided to Customs (paragraph 209X(3)(a)); and
- ends 30 days, or such other period as is prescribed by the regulations, after the first day on which written evidence, of the making of an application for all of the required permissions to import the goods that were not granted or given by the time the goods were imported, has been provided to Customs (paragraph 209X(3)(b)).

2.73 The EM explains that the effect of paragraph 209X(3)(a) is that if more than one required permissions to import the goods are required, the grant period will commence when written evidence of one of the applications for that permission is provided to Customs. The effect of paragraph 209X(3)(b) is that the grant period will end 30 days after written evidence of the making of the last application for the required permission is provided to Customs. Therefore, the grant period may be more than 30 days long.²⁹

New section 209Y – effect of detaining goods

2.74 New section 209Y provides that while goods are detained under section 209U:

- an application for a required permission to import the goods may be made (paragraph 209Y(a)); and
- a required permission to import the goods may be granted or given (paragraph 209Y(b)).

2.75 This is despite the goods having already been imported.

2.76 The effect of paragraph 209Y(b) is that the PI Regulations will be overridden to the extent that they would have otherwise prevented a decision-maker granting or giving a required permission to import the goods after the goods had been imported.

New section 209Z – evidence not provided or permission not granted or given

2.77 New section 209Z sets out the consequences of the failure to provide to Customs written evidence of the making of an application for a required permission to import the goods, and the failure to have the permission granted or given, in the specified timeframes.

2.78 Subsection 209Z(1) provides that this section applies if:

- goods have been detained under section 209U (paragraph 209Z(1)(a)); and
- a detention notice identifying the goods has been served (paragraph 209Z(1)(b)); and
- any of the following apply:
 - written evidence, of the making of an application for each required permission to import the goods that was not granted, or given, by the time the goods were imported, has not been provided to Customs by the end of the application period for the goods (that is, within 30 days after the detention notice is served) (subparagraph 209Z(1)(c)(i));
 - not all of the required permissions to import the goods have been granted, or given, by the end of the grant period for the goods (subparagraph 209Z(1)(c)(ii));
 - during the application period, or the grant period, for the goods, the owner of the goods has notified Customs, in writing, that an application for a required permission to import the goods has been refused (subparagraph 209Z(1)(c)(iii)). (In this circumstance, it will not be necessary to wait until the end of the application period or the grant period for this section to operate).

2.79 If one of these circumstances applies, and the goods are at an approved place within the meaning of section 209V, subsection 209Z(2) provides that the goods cease to be detained under section 209U and are taken to be seized under section 203B on:

- if, during the application period, the owner of the goods notified Customs, in writing, that an application for a required permission to import the goods was refused – the day after Customs was so notified; or

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- if paragraph 209Z(1)(a) does not apply and written evidence, of the making of an application for each required permission to import the goods that was not granted or given by the time the goods were imported, was not provided by the end of the application period – the day after the end of the application period; or
 - if paragraphs 209Z(1)(a) and (b) do not apply and, during the grant period, the owner of the goods notified Customs, in writing, that an application for a required permission to import the goods was refused – the day after Customs was so notified; or
 - if paragraphs 209Z(1)(a), (b) and (c) do not apply and not all of the required permissions to import the goods were granted, or given, by the end of the grant period – the day after the end of the grant period.

2.80 The EM states that if a person finds out, either during the application period or the grant period, that the application for a required permission to import the goods was refused, they can inform Customs at that point and the goods will be seized under section 203B on the day after the notification. However, the person may otherwise choose not to tell Customs of this occurrence and simply wait out the application period or the grant period. In that circumstance, the goods will be seized on the day after the end of the relevant period.³⁰

2.81 The EM also points out that the onus at all times is on the person to provide written evidence to Customs, either of the application for the required permission or of its granting or giving, within the specified timeframes.³¹

2.82 Subsection 209Z(3) provides that the detention notice is also taken to be a seizure notice that:

- is in accordance with section 205A; and
- was served:
 - under section 205 by the responsible person; and
 - on the day the goods are taken to be seized.

2.83 The fact that goods are seized by operation of this section means that the provisions of the Customs Act that apply to goods seized under section 203B will now apply to the goods. These provisions are set out in Subdivision G of Division 1 of Part XII of the Customs Act. They include the right for the owner of the goods to make a claim for the return of the goods and provisions indicating when proceedings in respect of offences involving the goods must be commenced.³²

30 p. 17.

31 p. 18.

32 EM, p. 18.

New section 209ZA – evidence provided and permission granted or given

2.84 New section 209ZA sets out the consequences of providing to Customs written evidence of the making of an application for a required permission to import the goods, and having the permission granted or given, in the specified timeframes.

2.85 Subsection 209ZA(1) provides that this section applies if:

- goods have been detained under section 209U; and
- a detention notice identifying the goods has been served; and
- written evidence, of the making of an application for each required permission to import the goods that was not granted, or given, by the time the goods were imported, has been provided to Customs by the end of the application period for the goods; and
- all the required permissions to import the goods have been granted, or given, on or before the end of the grant period for the goods.

2.86 Subsection 209ZA(2) provides that if all the circumstances are satisfied, an officer of Customs must return the goods to the owner.

2.87 Subsection 209ZA(3) provides that at the time the last required permission to import the goods is granted or given, the goods cease to be prohibited imports.

2.88 Subsection 209ZA(4) provides that proceedings cannot be brought for an offence against the Customs Act in relation to the importation of the goods. Therefore, a person will not be able to be prosecuted for the offence of importing a prohibited import.

New section 209ZB – service by post

2.89 New section 209ZB provides that, for the purposes of the application of section 29 of the *Acts Interpretation Act 1901* to the service by post of a detention notice under Subdivision GC on a person, such a notice posted as a letter addressed to that person at the last address of that person known to the sender is taken to be properly addressed. Section 29 of the *Acts Interpretation Act 1901* sets out when the service of a document that is to be served by post is effected and the time at which the service is effected.

New section 209ZC – liability for detention of goods

2.90 New section 209ZC provides that neither the Commonwealth nor an officer or other person is under any liability in relation to the detention of any goods under Subdivision GC for which there was reasonable cause.

Item 19 – before section 243X

2.91 The provisions of current Division 5 of Part XIII (including sections 243X to 243ZE) of the Customs Act deals with the issue of infringement notices in lieu of

prosecution for offences relating to false and misleading statements, cargo reporting and the movement of goods.

2.92 Item 19 of Schedule 1 inserts a new Subdivision A of Division 5 of Part XIII for these provisions. The EM notes that this is to keep these current provisions separate from the new provisions relating to the issue of infringement notices in lieu of prosecution for offences relating to prohibited imports and restricted areas that will be located under new Subdivision B of the Division 5 of Part XIII.³³

Items 20 to 35 – consequential amendments

2.93 Items 20 to 35 contain amendments to provisions in existing Division 5 of Part XIII as a result of the insertion of the new heading for these provisions.

Item 36 – at the end of Division 5 of Part XIII

2.94 Item 36 inserts new Subdivision B of Division 5 of Part XIII. Subdivision B provides a new scheme to enable the issue of infringement notices in lieu of prosecution for offences relating to prohibited imports and restricted Customs areas.

New section 243ZF – application of Subdivision B

2.95 New section 243ZF sets out the offences to which the new infringement notice scheme in Subdivision B applies.

Prescribed prohibited imports

2.96 Paragraph 243ZF(a) provides that Subdivision B will apply to the offence of importing goods that are prohibited imports of a kind prescribed for the purposes of section 243ZF. This is similar to the application of the new surrender and post-importation permissions regimes (see Item 14 of Schedule 1 above).

2.97 The new Subdivision B will allow the issue of an infringement notice in lieu of prosecution for the offence of contravening paragraph 233(1)(b) of the Customs Act, if the offence relates to goods that are prohibited imports prescribed for the purposes of section 243ZF.

2.98 The large range of goods that are controlled under the PI Regulations means that the threat posed to the community of these goods also varies greatly. Together with the new surrender and post-importation permissions regime, this part of the new infringement notice scheme is designed to reduce the administrative burden that is involved in seizing prohibited imports that are low value and low risk. However, in contrast to the new surrender and post-importation permissions regime, the new infringement notice scheme will only apply to prescribed prohibited imports that are concealed from Customs.

2.99 An infringement notice will be issued to those passengers who attempt to import a certain prescribed prohibited item by concealing the item, or have regularly attempted to import prohibited items. Payment of the infringement notice will remove liability for the offence.³⁴

2.100 The passenger must pay the infringement notice before leaving the Customs-controlled area to remove liability for the offence. The proposed model requires the Customs officer to accompany the passenger to the duty collection area while the notice is paid. Customs advised the committee that this is necessary because payment of the notice results in a transfer of title of the goods to the Commonwealth.³⁵ If a passenger chooses not to pay the infringement notice before leaving the Customs-controlled area, the goods will automatically be seized and Customs may prosecute the person for the offence.³⁶

2.101 Customs advised the committee that an infringement notice may also be issued for certain prohibited items imported through the postal system. Surrendering the goods will not be an option available in this environment. The infringement notice will be issued at the same time as the seizure notice. The infringement notice will provide 28 days to pay the notice and the seizure notice provides 30 days to make a claim for return of the goods. However, these time periods will run concurrently.³⁷

Restricted area offences

2.102 Subdivision B will also apply to an offence for a contravention of subsections 234A(1) and 234AB(3) of the Customs Act. These offences relate to restricted areas known as section 234AA places.

2.103 As previously noted, section 234AA of the Customs Act allows a Collector of Customs to display a sign at or near a place that is to be used by officers of Customs for the questioning of ship or aircraft passengers, the examining of the personal baggage of such passengers and as a holding place for such passengers.

2.104 In addition, a Collector of Customs may also display signs at or near that place that indicate that the use of cameras, sound recorders and mobile phones or other electronic forms of communication at the place by unauthorized persons is prohibited.

2.105 It is an offence under subsection 234A(1) of the Customs Act to:

- enter into, or be in, a section 234AA place; or

34 *Submission 1*, p. 3.

35 *Submission 1*, p. 3.

36 *Submission 1*, p. 3.

37 *Submission 1*, p. 3.

- enter into, or be in, a ship, aircraft or wharf at which a ship is berthed, when the personal baggage of a disembarking or embarking passenger is being examined at or in the vicinity of the ship, aircraft or wharf.

2.106 It is an offence under subsection 234AB(3) of the Customs Act to fail to comply with a direction by an officer of Customs not to use a camera, sound recorder or mobile phone or other electronic forms of communication:

- at a section 234AA place; or
- at a place in a ship, aircraft or wharf at which a ship is berthed, when the personal baggage of a disembarking or embarking passenger is being examined at or in the vicinity of that place.

2.107 Subdivision B will allow an infringement notice to be issued in lieu of prosecution for an offence under subsections 234A(1) or 234AB(3). Both subsections are offences of strict liability and are relatively minor offences.

2.108 A person who is issued with an infringement notice under subsection 234AB(3) will have 28 days to pay the notice. Payment of the infringement notice will remove liability for the offence. However, if the person fails to pay the notice within 28 days, customs will prosecute the person for the offence.³⁸

New section 243ZG – guidelines for serving infringement notices

2.109 New section 243ZG provides that the CEO of Customs must make guidelines in respect of the administration of Subdivision B of Division 5 of Part XIII to which the CEO must have regard when exercising powers under Subdivision B.

New section 243ZH – when an infringement notice can be served

2.110 New section 243ZH sets out the circumstances under which an infringement notice can be served, and related matters.

2.111 Under subsection 243ZH(1), if the CEO has reasonable grounds to believe that a person has committed an offence to which Subdivision B applies, the CEO may cause an infringement notice to be served in accordance with this Subdivision. For an offence of importing prohibited imports, the CEO must also have reasonable grounds to believe that the person concealed from Customs the goods to which the offence relates.

2.112 Under subsection 243ZH(2), an infringement notice for the offence of importing prohibited imports does not have any effect unless it is served:

- if the person to be served is in a section 234AA place – before the person leaves the section 234AA place (paragraph 243ZH(2)(a)); or

- if the person to be served is not in a section 234AA place and the goods to which the offence relates have been seized under section 203B – with the seizure notice issued under section 205 in respect of the goods (paragraph 243ZH(2)(b)).

2.113 Paragraph 243ZH(2)(a) relates to where the offence is detected during the examination of the personal baggage of a passenger at the border. In this situation, the infringement notice must be served before the passenger leaves the examination area. This ensures that the offence is dealt with quickly and while the passenger is in contact with Customs.

2.114 Paragraph 243ZH(2)(b) relates to where the offence is detected in respect of goods imported as unaccompanied baggage or through the post. In this situation, Customs would seize the goods and issue the infringement notice at the same time as the seizure notice. This ensures that the time periods in relation to the infringement notice process and the seizure notice process start at the same time, which will facilitate the concurrent operation of both processes and minimise the time taken to deal with the offence.

2.115 Subsection 243ZH(3) provides that an infringement notice for an offence related to subsection 234A(1) or 234AB(3) does not have any effect unless it is served within one year after the day on which the offence is alleged to have been committed.

2.116 Subsection 243ZH(4) provides that, without limiting the meaning of 'concealed' in paragraph 243ZH(1)(b), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with section 71, 71K or 71L and the person failed to do so.³⁹

New section 243ZI – matters to be included in an infringement notice

2.117 New section 243ZI lists the matters to be included in an infringement notice served under Subdivision B. Subsection 243ZI(1) provides that such a notice must:

- state the name of the person on whom it is to be served; and
- state that it is being served on behalf of the CEO; and
- state:
 - the nature of the alleged offence; and
 - the time (if known) and date on which, and the place at which, the offence is alleged to have been committed; and
 - the maximum penalty that a court could impose for the alleged offence; and

39 For example, if a passenger fails to declare a prohibited import on an IPC, he or she will be taken to have 'concealed' that prohibited item from Customs.

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- specify that a penalty of 2 penalty units is payable under the notice in respect of the alleged offence; and
 - state that, if the person on whom the notice is served does not wish the matter to be dealt with by a court, the person may pay to the CEO the amount of the penalty specified in the notice:
 - if the notice is served on the person in a section 234AA place and relates to an alleged offence covered by paragraph 243ZF(a) – before the person leaves the place for the first time after the notice is served; or
 - in any other case – within 28 days after the date of service of the notice; and
 - state that compliance with the notice is not an admission of guilt or liability; and
 - if the notice relates to an alleged offence covered by paragraph 243ZF(a) – state that, if the penalty specified in the notice is paid and the notice is not withdrawn, the goods to which the offence relates will be taken to be condemned as forfeited to the Crown such that:
 - the title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question; and
 - a claim for the return of the goods cannot be made; and
 - if the penalty is paid after a claim for the return of the goods is made, the goods cannot be returned; and
 - state that the person may make written representations to the CEO seeking the withdrawal of the notice.

2.118 Under subsection 243ZI(2), an infringement notice served under Subdivision B may contain any other matters that the CEO considers necessary.

New section 243ZJ – withdrawal of infringement notices

2.119 New section 243ZJ provides for matters related to the withdrawal of infringement notices. Subsection 243ZJ(1) enables a person on whom an infringement notice has been served under Subdivision B to make written representations to the CEO seeking the withdrawal of the notice.

2.120 Under subsection 243ZJ(2), the CEO may withdraw the infringement notice served on a person (whether or not the person has made representations) by causing written notice of the withdrawal to be served on the person within the time period given for the payment of the infringement notice penalty.

2.121 Subsection 243ZJ(3) sets out some matters the CEO may have regard to in deciding whether or not to withdraw an infringement notice served under Subdivision B, including:

- whether the person has previously been convicted of an offence for a contravention of the Customs Act;
- the circumstances in which the offence specified in the notice is alleged to have been committed;
- whether the person has previously been served with an infringement notice under Subdivision B in respect of which the person paid the penalty specified in the notice; and
- any written representations made by the person.

2.122 Subsection 243ZJ(4) requires that, where an infringement notice served under Subdivision B on a person is withdrawn after that person has paid the infringement notice penalty, the CEO must refund to that person an amount equal to the amount paid.

New section 243ZK – what happens if the infringement notice penalty is paid

2.123 New section 243ZK deals with the consequences of paying the infringement notice penalty. Under subsection 243ZK(1), this section applies if an infringement notice is served on a person under Subdivision B, the person pays the penalty within the required time, and the notice is not withdrawn. In that event:

- any liability of the person for the offence specified in the notice is discharged (subsection 243ZK(2));
- further proceedings cannot be taken against the person for the offence (subsection 243ZK(3));
- the person is not regarded as having been convicted of the offence (subsection 243ZK(4)); and
- if the notice is for the offence of importing prescribed prohibited imports, the goods are taken to be condemned as forfeited to the Crown, title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question (subsection 243ZK(5)).

2.124 In addition, the operation of the provisions relating to the seizure process will be ceased or modified as a result of the goods being taken to be condemned as forfeited to the Crown. The relevant provisions will be amended to achieve the desired outcome (see Items 6 to 13 of Schedule 1 above).

New section 243ZL – more than one infringement notice may not be served for the same offence

2.125 New section 243ZL clarifies that Subdivision B does not permit the service of more than one infringement notice on a person for the same offence.

New section 243ZM – infringement notice not required to be served

2.126 New section 243ZM clarifies the intended operation of Subdivision B. The section makes it clear that Subdivision B does not:

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- require an infringement notice to be served on a person in relation to an offence; or
 - affect the liability of a person to be prosecuted for an offence if:
 - an infringement notice is not served on the person in relation to the offence; or
 - an infringement notice served on the person in relation to the offence has been withdrawn; or
 - affect the liability of a person to be prosecuted for an offence if the person does not comply with an infringement notice served on the person in relation to the offence; or
 - limit the amount of the penalty that may be imposed by a court on a person convicted of an offence.

New section 243ZN – right of compensation in certain circumstances for goods disposed of or destroyed

2.127 New section 243ZN sets out the compensation provisions if goods taken to be condemned as forfeited under section 243ZK were not prohibited imports but have been disposed of or destroyed before this is established.

2.128 Subsection 243ZN(1) provides that despite the disposal or destruction of the goods taken to be condemned as forfeited to the Crown under section 243ZK, a person may apply to a court of competent jurisdiction under this section for compensation.

2.129 Subsection 243ZN(2) provides that a right to compensation exists if:

- the goods were not prohibited imports; and
- the goods were not used or otherwise involved in the commission of an offence; and
- the person establishes, to the satisfaction of the court, that he or she is the rightful owner of the goods.

2.130 Subsection 243ZN(3) provides that if a right to compensation exists under subsection 243ZN(2), the court must order the payment by the Commonwealth to the person of an amount equal to the market value of the goods at the time of their disposal or destruction.

2.131 These provisions are similar to other compensation arrangements in the Customs Act in relation to seized goods that have been disposed of or destroyed, for example, section 205F.

New section 243ZO – disposal of forfeited goods

2.132 New section 243ZO provides that all goods condemned as forfeited to the Crown under Subdivision B must be dealt with and disposed of in accordance with the directions of the CEO of Customs. This provision is similar to other provisions

dealing with the disposal of goods that have been seized by Customs, for example, section 208D.

Item 37 – application

2.133 Subclause (1) of Item 37 provides that the provisions of new Subdivision GB (relating to surrender of prescribed prohibited imports) and GC (relating to post-importation permissions) of Division 1 of Part XII only apply in relation to goods imported into Australia on or after the commencement of this item.

2.134 Subclause (2) provides that the provisions of new Subdivision B of Division 5 of Part XIII (relating to the infringement notice scheme for offences relating to prohibited imports and restricted areas) only apply to offences alleged to have been committed on or after the commencement of Item 37.

2.135 The EM states that this ensures that the provisions of all three new Subdivisions do not have any retrospective effect.

Schedule 2 - goods claimed to be produce or manufacture of Singapore

2.136 The EM provides the following background information in relation to the Singapore-Australia Free Trade Agreement (SAFTA).

2.137 The SAFTA entered into force for Australia on 28 July 2003. The SAFTA provided for ministerial review of the SAFTA one year after entry into force and biennially thereafter, and allows for the SAFTA to be amended to ensure that it remains relevant and able to offer additional benefits to business.

2.138 The first ministerial review meeting took place in July 2004. A package of amendments to the SAFTA was agreed to at that meeting to incorporate additional measures into the SAFTA. The package of amendments was tabled on 15 March 2005, re-tabled on 31 May 2005, and referred to the Joint Standing Committee on Treaties (JSCOT). JSCOT recommended that binding treaty action be taken in respect of the amendments.

2.139 The purpose of Schedule 2 is to implement the amendments to Articles 11 and 12 of Chapter 3 of the SAFTA to incorporate changes to Certificates of Origin.

2.140 Under the SAFTA, an importer of goods from Singapore into Australia requires a Certificate of Origin (issued by the Government of Singapore) and a Declaration (made by the Singaporean exporter) in order to claim a preferential rate of duty for the goods under the SAFTA. Preferential tariff treatment may be claimed by importers in respect of imported goods that are the produce or manufacture of Singapore under the SAFTA.

2.141 The Certificate of Origin is the certification by the Government of Singapore that particular goods being exported from Singapore are originating goods for the purposes of the SAFTA. A Certificate of Origin is required to contain a full

description of the goods to which the Certificate relates, including the relevant code under the Harmonized Commodity Description and Coding System and, if applicable, product number and brand name.

2.142 The Declaration is by the Singaporean exporter of goods that the goods are originating goods and must contain, among other things, a statement that the goods being exported are identical to goods specified in a valid Certificate of Origin.

Current documentary requirements under SAFTA

2.143 Under current Articles 11 and 12 of Chapter 3 of the SAFTA, a Certificate of Origin can be used for multiple shipments of goods to which that Certificate relates within two years of its issue, provided that the first shipment occurs within the first year of issue. By contrast, an accompanying Declaration must be made for every shipment of the relevant goods.

2.144 Further, both the Certificate of Origin and Declaration must be issued or made and possessed by the importer before the goods to which these documents relate are exported. Both documents must also be produced by the importer to an officer of Customs upon request.

2.145 Customs advised the committee that approaches to Australian Customs by both Australian importers and Singaporean exporters have raised administrative difficulties with regard to preparation of the Certificate of Origin. For example, before exportation of bulk goods from Singapore, the Certificate of Origin could not be properly prepared to cover all of the goods in a given shipment as the exact volumes were not known until after loading. The problem was exacerbated in circumstances where goods were loaded after-hours or on weekends.⁴⁰

Proposed documentary requirements under SAFTA

2.146 The proposed amendments would enable a Certificate of Origin to be used for a single shipment (provided it is used within a year of its issue) or for multiple shipments (provided the shipments occur within two years of its issue and the first shipment occurred within the first year).

2.147 Where a Certificate of Origin is used for a single shipment of goods, a Declaration is not necessary. Where a Certificate of Origin is used for multiple shipments of goods, a Declaration is not necessary for the first shipment but is required for every subsequent shipment. At a practical level, this would mean that a Declaration would not be required by the importer for the first shipment of goods specified in a Certificate of Origin.

2.148 The proposed amendments would also require both the Certificate of Origin and Declaration, if required, to be issued and possessed by the importer before the

40 *Submission 1*, p. 3.

goods to which the documents relate are entered for home consumption in the territory of the importing Party, as opposed to before the goods are exported. This provides more time for the Certificate of Origin and the Declaration to be obtained.

2.149 The Certificate of Origin and the Declaration, where required, must still be produced to an officer of Customs upon request.

Item 1 – subsection 153VE(1)

2.150 Item 1 repeals current subsection 153VE(1) and substitutes a new subsection. New subsection 153VE(1) implements the new documentary requirements under the proposed amendments with respect to a claim for preferential tariff treatment for goods imported from Singapore.

2.151 New subsection 153VE(1) provides that goods claimed to be the produce or manufacture of Singapore (and thereby eligible for preferential tariff treatment under the SAFTA as implemented in the *Customs Tariff Act 1995*) are not the produce or manufacture of Singapore unless:

- at the time of entry of the goods, the importer of the goods holds a valid Certificate of Origin relevant to those goods (paragraph 153VE(1)(a));
- if, at the time of entry of the goods, the importer of the goods has previously used that Certificate of Origin in respect of goods of the same kind – at the time of entry of the goods to which the claim relates the importer of those goods also holds a Declaration relevant to those goods (paragraph 153VE(1)(b)); and
- if an officer requests production of a copy of any document that the importer of the goods is required to hold under paragraph (a) or (b) – a copy of that document is produced to the officer (paragraph 153VE(1)(c)).

2.152 Paragraph 153VE(1)(a) maintains the requirement on importers to hold a valid Certificate of Origin relevant to goods on which preferential tariff treatment is claimed. Paragraph 153VE(1)(a) makes it clear that the importer must possess the Certificate of Origin at the time of entry of the goods. This ensures that the Certificate of Origin must be issued before the goods are entered.

2.153 Paragraph 153VE(1)(b) implements the change in the requirement for a Declaration. It provides that a Declaration is required only where the Certificate of Origin has been previously used in respect of goods of the same kind. Therefore, a Declaration is not required when the Certificate of Origin is being used for the first time in respect of goods to which the Certificate relates.

2.154 Paragraph 153VE(1)(b) also makes it clear that, where required, the importer must hold the Declaration at the time of entry of the goods. This ensures that, where required, the exporter must make, and the importer must possess, the Declaration before the relevant goods are entered.

2.155 Paragraph 153VE(1)(c) maintains the requirement on importers to produce the required Certificate of Origin or Declaration or both upon request.

Use of a Certificate of Origin

2.156 The EM explains that an importer uses a Certificate of Origin when the importer claims the preferential rate of duty under the SAFTA on goods to which the Certificate relates. In practice, a claim for a preferential rate of duty is made as part of the import declaration when entering the relevant goods for home consumption.⁴¹

2.157 Further, a Certificate of Origin may be issued in respect of one particular kind of good or may relate to two or more different kinds of goods. Where a Certificate of Origin relates to two or more different kinds of goods, a Declaration in respect of each kind of good specified in the Certificate will not be required on the first time the Certificate is used for that kind of good.⁴²

Item 2 – application

2.158 The EM states that Item 2 makes it clear that new subsection 153VE(1) applies only to goods claimed, on or after the commencement of Item 2, to be the produce or manufacture of Singapore.⁴³

41 p. 30.

42 p. 30.

43 p. 31.

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.

CHAPTER 4

COMMITTEE VIEW

4.1 The committee acknowledges concerns raised by the Law Council in relation to aspects of the proposed regimes in the Bill, including the apparent absence of broad consultation with interested stakeholders and the lack of clarity contained in the Bill with respect to certain of its key elements. The committee is surprised at the apparent expedited introduction of the Bill and notes that the Bill's proposals were not revealed during the committee's inquiry into the Border Compliance Bill which took place only three months ago. The committee acknowledges the Law Council of Australia's criticism that inadequate opportunities were provided for consultation on the Bill, but notes advice from Customs indicating that consultation did take place with the Passenger Facilitation Taskforce (which has expressed its satisfaction with the Bill).¹ The committee suggests that, in the light of the Law Council's criticism, Customs give consideration to developing more wide-ranging consultation mechanisms prior to introducing future amendments into Parliament.

4.2 The committee also shares the concerns raised about uncertainty as to how the proposed arrangements will actually work. The practical and operational impact of the proposed regimes, including their interrelationship and possible overlap, is not readily comprehensible from a simple reading of the Bill and the EM. The Bill is lengthy and the regimes it seeks to set in place appear complex; yet in some respects, it comprises a fairly minimalist framework for the regimes by omitting fundamental details which might have assisted the committee to gain more readily an understanding of how the regimes will operate.

4.3 As a result, the committee has been obliged to place a large number of questions on notice to Customs, and to rely on information provided by Customs in its responses to these questions to 'fill in the gaps'. Unfortunately, however, time constraints have not allowed the committee to consider these responses as comprehensively as it would have liked. While the extensive amounts of information provided by Customs in its answers have ultimately been of assistance, the committee is of the view that some of the details provided in these answers would have been more appropriately placed in the Bill itself or, at the very least, included as background information in the EM or Second Reading Speech. In this context, the committee particularly notes the helpful nature of the flow charts which were provided to the committee as part of the answers.

4.4 The committee also considers that Customs' communications about the application of the powers in the Bill were both conflicting and wrong. Customs appears to have provided the committee with conflicting advice: on the one hand, '(t)he import control measures in the [Bill] ... will not operate in the commercial air or

1 Australian Customs Service, Answers to Questions on Notice, Question No. 3.

sea cargo environments'² and '(t)he commercial air and sea cargo environments are excluded from the regime via their omission from the Bill';³ yet, on the other hand, '(t)he post-importation permission arrangements are intended to apply to all environments'.⁴ Clearly both positions cannot be correct: in future the committee recommends that Customs make it absolutely clear, at the outset, the environments in which the regimes are intended to operate and the persons to whom the regimes are intended to apply.

4.5 Having said this, however, the committee concurs with the broad purposes of the Bill and sees the merit in streamlining procedures dealing with the importation of low-end prohibited items to reduce the administrative burden for Customs. In addition, the goods detention regime that applies across all Customs/trade environments will be of benefit to industry. Given the more thorough explanations and assurances by Customs in its answers to questions on notice in relation to the operation, interaction and implications of the proposed regimes, the committee does not consider that major amendments to the Bill are necessary. However, the committee is of the view that certain aspects of the proposed regimes should be more clearly enunciated. The committee puts forward a series of recommendations which it considers will aid interpretation of the proposed regimes by those to whom the committee understands they are intended to apply, and which aim to improve the application and operation of the regimes in a practical sense.

Recommendation 1

4.6 The committee recommends that the type of prohibited imports subject to the surrender regime under new Subdivision GB be identified prior to the Bill being considered by Parliament and prior to any implementation of the regime.

Recommendation 2

4.7 The committee recommends that the type of prohibited imports subject to the post-importation regime under new Subdivision GC be identified prior to the Bill being considered by Parliament and prior to any implementation of the regime.

Recommendation 3

4.8 The committee recommends that the guidelines for serving infringement notices under new section 243ZG of the Bill be released for comment and consultation prior to implementation of the import control regime.

4.9 The committee notes Customs' reference to the EM as a means of explaining the limitation of the section 234ZH infringement notice regime, but instead prefers as

2 Australian Customs Service, *Submission 1*, p. 1.

3 Australian Customs Service, Answers to Questions on Notice, Question No. 39.

4 Australian Customs Service, Answers to Questions on Notice, Question No. 4.

a matter of general principle that such limitation of the power should not be contained in ancillary aids to interpretation but instead in the actual text of the law (for which such aids are no substitute). Accordingly:

Recommendation 4

4.10 The committee recommends that the Bill be amended to contain a specific statement to make absolutely clear that the power of the CEO to issue an infringement notice under new section 243ZH includes the power to issue an infringement notice outside a section 234AA place, but that its application outside a section 234AA place is limited only to a section 234ABA area, the postal environment and circumstances where baggage is unaccompanied.

Recommendation 5

4.11 The committee recommends that new subparagraph 243ZI(1)(e)(ii), relating to matters to be included in an infringement notice, be amended to specifically provide that the phrase 'in any other case' relates only to the postal environment and circumstances where baggage is unaccompanied.

Recommendation 6

4.12 The committee recommends that a comprehensive public education campaign, aimed at those to whom the import control regime is intended to apply, be conducted in relation to the measures proposed in the Bill.

Recommendation 7

4.13 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Committee Chair

APPENDIX 1

SUBMISSIONS RECEIVED

- 1 Australian Customs Service
- 1A Australian Customs Service
- 1B Australian Customs Service
- 2 Law Council of Australia

APPENDIX 2

Questions on Notice from the Senate Legal and Constitutional Legislation Committee

Question Number	Question
1	Can you provide examples of the range of prohibited goods that would be subject to the procedures outlined in schedule 1- import controls?
2	<p>Will ACS take into consideration the total value of a prohibited import in deciding whether to issue an infringement notice?</p> <p style="padding-left: 40px;">a. Does ACS have an upper limit or threshold in mind (provide if applicable) above which infringement notices will not be issued or will be unlikely to be issued?</p>
3	<p>Can ACS outline the types of persons or entities that the proposed scheme is aimed or directed towards? For example airline passengers, importers of parcels, general air freight, freight forwarders.</p> <p style="padding-left: 40px;">a. If any of the above groups are contemplated to be subject to the proposed scheme, can ACS provide details as to who has been consulted and when, and can the minutes or outcomes of these consultations be provided to the committee. If not why not? When will they be consulted?</p> <p style="padding-left: 40px;">b. If no consultations occurred, how is it proposed to take any of the views of these groups into consideration, if the bill is now drafted? If their views were sought and provided, can the ACS provide details of them and indicate what parts of the bill were changed as a result of this?</p>
4	<p>This question relates to the extent to which the new infringement notice regime could be applicable to importers and exporters rather than merely passengers and their luggage in a s234AA place.</p> <p>The regime sets up:</p> <ul style="list-style-type: none"> - a surrender of goods mechanism under section 209 N - a detention of goods under section 209U - an infringement notice scheme dealing with concealed goods under section 243ZH. <p>ACS has indicated that the infringement notice regime will only apply to ship and aircraft passengers. You will note however that only the surrender of goods regime under Section 209N and the infringement scheme s243ZH are limited to goods in a s234AA place. Section 209U which covers goods detained makes no reference to suggest that it is limited to s234AA places.</p> <p>These regimes are intended to replace or substitute for the operation of Section 203B which when we determine what that applies to, applies to containers and</p>

Question Number	Question
	<p>conveyances as well as simply passengers at airports and customs designated Section 234AA areas. Therefore, 1 of the 3 pillars to the regime seemingly may have application outside the limitation of Section 234AA places.</p> <ol style="list-style-type: none"> a. In relation to this detention scheme, does it apply outside of section 243AA areas (ACS indicated that it may apply to the postal environment)? b. Could it also apply to the shipping container environment or the air container environment? c. Can ACS provide the definition and other examples of a 234AA place? d. Can you please explain how this will interact with the accredited client program and any other infringement schemes, or advise how you intend to limit the application? e. Will the infringement notice regime be applicable to persons other than passengers with their luggage? For example brokers, importing businesses or freight forwarders. <ol style="list-style-type: none"> i. If so, will the penalties that apply differ and how so? ii. If so, who will be deemed to be the owner of the goods for the purposes of the regime?
5	<p>What is the penalty regime (i.e. range of penalties, civil/criminal forfeiture regime), and how is it calculated?</p> <ol style="list-style-type: none"> a. How will the penalty regime be applied to ensure fairness and avoid unjust outcomes or inconsistent treatment of persons or entities? b. How will recovery of unpaid penalties be recovered? c. How much revenue is projected to be obtained from introducing the proposed scheme?
6	<p>Has the ACS considered an alternative low-cost procedure to providing importers with the right to apply to a court for compensation in respect of goods that have been surrendered? (The Law Council has argued that the costs of applying to a court would likely exceed the amount of compensation)</p>
7	<p>Have any efficiency gains been forecast from the introduction of the new scheme? If so, provide details.</p>
8	<p>What training of ACS staff has been undertaken to date, in respect of the proposed scheme?</p> <ol style="list-style-type: none"> a. What type of training of staff is contemplated for staff of the proposed scheme? b. Have the relevant unions been consulted about the proposed changes? If not, why not?
9	<p>Have the regulations contemplated in sections 209M and 209T been drafted, if not why not? If yes, can you provide a copy?</p>

Question Number	Question
10	<p>Are the directions of the CEO under 209R specified?</p> <p>a. If yes, can you provide a copy? If not, why not?</p> <p>b. What types of directions are contemplated under these directions?</p>
11	<p>Have the guidelines provided for under section 243ZG been developed? If they have been can the ACS provide a copy, if not why not?</p>
12	<p>Can the ACS provide a diagrammatic description (i.e. flow chart) of how the proposed scheme, including the infringement notices under this bill, will work?</p>
13	<p>In respect of the discretion the customs officer has in deciding to use the power under 209N, can ACS outline the training or provide a copy of the guidelines that will assist Customs officers in carrying out there duties?</p>
14	<p>What systems or procedures or internal reviews are in place or will be put in place to ensure that officers carry out their duties diligently?</p>
15	<p>What review mechanisms are available to persons subject to the exercise of a customs officer discretion contemplated in the new proposals?</p>
16	<p>Is there a complaint handling procedure in place to deal with the use of the discretion?</p> <p>a. If so, can you provide a copy of it? If not why not?</p>
17	<p>Can you provide a copy of those items under the PI regulations that will be subject to the regime?</p> <p>a. Can this list be changed, if so what processes will be adopted when changes to the PI regulations are contemplated?</p> <p>b. Are the PI regulations disallowable instruments?</p>
18	<p>Will both the infringement scheme and the post-importation declaration procedures apply to postal articles, either mail or parcels? If not why not?</p>
19	<p>What procedures are provided to ensure the under subdivision GC a person can be given the option of obtaining a post-importation permission?</p> <p>a. Is any decision on this matter made by the Customs officer subject to either internal or external review?</p> <p>b. Is it subject to judicial review?</p>
20	<p>What procedures are in place to ensure the integrity of the system?</p> <p>a. If there are procedures in place, can they be provided to the committee?</p>

Question Number	Question
21	<p>What discretion is available for a customs officer to decide that there was no intention by the person subject of investigation not to conceal the goods in accordance with the relevant section? (ie what happens where a person is unaware that they have concealed a prohibited item?)</p> <ol style="list-style-type: none"> a. If this discretion exists, is it too broad and open to abuse? b. If this discretion does not exist, how are ACS personnel expected to determine whether an intention existed?
22	<p>Will this proposed scheme be available to be used by part time or casual employees of customs? If yes, what safeguards are put in place to ensure the power is exercised correctly?</p>
23	<p>Can any of the time periods specified in the Bill be extended?</p> <ol style="list-style-type: none"> a. If so can you provide outline how any extension would operate and on what basis the periods could be extended? b. If not, why not in the cases of hardship or if there exists reasonable grounds?
24	<p>This question relates to the disposal of surrendered goods and forfeited goods which are classified as prohibited imports. Does the use of the term disposal open up the possibility that the goods are not necessarily destroyed? For example, that the goods can be disposed of through sale rather than disposed of through destruction.</p> <ol style="list-style-type: none"> a. If so, under what circumstances might the goods end up not being destroyed?
25	<p>In relation to Section 209V (Detained goods to be secured), why were the additional instructions of the equivalent ss204 (3) to (5) not applied here in relation to this new regime for detention of goods?</p>
26	<p>How does the new system apply in the circumstances where a person's suitcase contains a prohibited import or when a parcel containing multiple items contains a prohibited import?</p> <ol style="list-style-type: none"> a. Are all contents deemed to be forfeited or just the prohibited item?
27	<p>With regards to Section 243ZA subsection (4) as it exists under the Act, every other reference to infringement notice has been modified in this Division (now subdivision). Why has this subsection not been modified to include the terms "served under this subdivision" or similar?</p>

Question Number	Question
28	<p>In the ACS submission on the Bill, it was indicated that passengers must pay the infringement notice before leaving the ACS controlled area to remove liability for the offence and the proposed model requires the customs officer to accompany the passenger to the duty collection area while the notice is paid:</p> <ol style="list-style-type: none"> a. How labour intensive is this likely to be? b. Why are these people not to be allowed to leave until they have paid? c. Does ACS intend to escort people to a place they can obtain the required funds (e.g. an ATM)? d. What will happen should a person wish to pay the penalty but not have immediate access to electronic funds? e. In the above circumstances will the ACS allow the person to arrange for a third party to arrange the funds to be brought to the duty collection area? For example a friend or relative to bring the required cash: f. In the situation where someone can arrange for a friend or relative to drop the money off at the airport please advise as to whether the ACS is planning to keep a Customs officer in accompaniment until the friend or relative arrives with the cash? g. Does ACS intend to set any time limits for the person to arrange the payment of the penalty? If so, provide details.
29	Will there be a public education campaign to inform the travelling public of the new regime?
30	Will there be a trial period before the regime officially commences?
31	There appears to be a drafting error in Item 5 of Schedule 1 – does paragraph 203(3)(e) of the Customs Act exist?
32	<p>Proposed section 209N refers to 'the available options' for dealing with the goods and the consequence of exercising each of these options.</p> <ol style="list-style-type: none"> a. What are these options? Can you provide the committee with a copy of the options? b. What are all the relevant consequences of exercising the options? Can you provide the committee with a copy of these?
33	Can you provide the committee with an explanation of what 'concealed' actually means in the context of the proposed regime and provide the committee with details of all the circumstances/situations where the term is intended to apply?

Question Number	Question
34	<p>Proposed paragraph 209X(1)(j) refers to notices being served in a foreign country.</p> <ol style="list-style-type: none"> a. How is this intended to operate in practice? b. What legislation underpins the operation of this proposed paragraph (eg mutual assistance legislation)? c. Is a formal relationship with relevant countries required? d. What will happen if no diplomatic relationship between Australia and the relevant country exists?
35	<p>The committee has previously requested a flow chart of how the infringement notices regime will operate (Q.11).</p> <ol style="list-style-type: none"> a. Can the ACS also provide flow charts of how the post-importation permission scheme will operate and how the seizure of goods scheme will operate – essentially there will be 3 separate regimes in operation. b. Could the ACS also set out how the 3 separate processes will interrelate?
36	<p>Why must a passenger pay an infringement notice before leaving a section 234AA area? Why can't the passenger be given a certain period of time (eg 28 days) to pay (cf parking infringement notices etc)?</p>
37	<p>Why has a distinction been made in proposed subparagraphs 243ZI(1)(e)(i) and (ii) between persons in section 234AA areas and 'in any other case'? What does 'in any other case' mean? Please provide the committee with details of what this is intended to cover. If it is intended to only cover the postal environment, why isn't this specifically mentioned in the Bill/EM?</p>
38	<p>Is there a definition of the passenger processing area or the postal environment? If not, why not?</p>
39	<p>How does the bill actually differentiate between the areas of postal environment and the commercial air or sea cargo environments?</p>
40	<p>What is the definition of the commercial air or sea cargo environments that will be used in the bill to differentiate these services from the actual areas of passenger processing or postal environments? If there is no definition, how will the ACS decide which is commercial air or which is postal environments?</p>
41	<p>Can ACS provide examples of what is said to be in the commercial air environment and what is in the postal environments?</p>
42	<p>Will all parcel post be subject to the new regime proposed in the bill?</p>
43	<p>Can ACS demonstrate in the bill how the above areas are separated? If not, can customs explain how the bill will not have application to the commercial air or sea cargo areas?</p>

Question Number	Question
44	Can ACS confirm that the infringement notice scheme can apply in any area subject to a 203B seizure, if yes can ACS explain why it will not operate in the commercial area of sea cargo or air cargo? If yes, can customs explain how the bill will not apply in these areas?
45	Will the infringement notice scheme and the detention scheme operate in the international postal exchanges? If yes, can you provide a list of those sites?
46	Will the bill apply to the air parcel post operators such as Fed Ex and DHL etc.? If not, why not? If not, can you explain how the bill does not apply to these operations?
47	Can a person be prosecuted under the bill as well as having the goods detained and post import permission sought? If not, can you explain in the bill where that outcome is excluded, if yes, can you explain what decision-making process will be used to decide whether to prosecute or not? Will this be dependant on whether a good is granted permission or not or can a person be prosecuted irrespective of whether the importer is granted permission to import the good or not? What safeguards are in place to ensure that the detention regime and the post import permission regime operates fairly?

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 1

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

1. Can you provide examples of the range of prohibited goods that would be subject to the procedures outlined in schedule 1- import controls?

The answer to the Committee's question is as follows:

As a part of the policy implementation process Customs will determine which prohibited imports controlled under the Prohibited Imports Regulations it considers lower risk community and consumer protection related items. These prohibited imports will then be prescribed by regulation as subject to the surrender bin regime and/or the infringement notice scheme.

Customs is aiming to address the large number of low risk, high volume prohibited items that are bought through Australian airports on a daily basis. Items such as nunchakus, electric fly swatters, and electric shock devices will be subject to this regime.

Customs believes the method of addressing prohibited items should be commensurate with the level of threat posed to society. As such the proposed surrender bin and infringement notice regimes compliment the seizure process to provide a tiered response to the importation of prohibited items.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 2

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

2. Will ACS take into consideration the total value of a prohibited import in deciding whether to issue an infringement notice?
 - a. Does ACS have an upper limit or threshold in mind (provide if applicable) above which infringement notices will not be issued or will be unlikely to be issued?

The answer to the Committee's question is as follows:

The proposed Infringement Notice Scheme (INS) takes into consideration the low risk and low value of the prohibited items when prescribing goods for inclusion in the scheme. However, when deciding whether to issue an infringement notice the total value of a prohibited item is not the only consideration.

An infringement notice will be issued to those passengers who attempt to import a certain prescribed prohibited item by concealing the item, or have regularly attempted to import prohibited items.

The introduction of the INS will allow an intermediate sanction (commensurate with the level of threat posed to society) to be imposed where prosecution is deemed inappropriate but some sanction is warranted.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 3

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

3. Can ACS outline the types of persons or entities that the proposed scheme is aimed or directed towards? For example airline passengers, importers of parcels, general air freight, freight forwarders.
 - a. If any of the above groups are contemplated to be subject to the proposed scheme, can ACS provide details as to who has been consulted and when, and can the minutes or outcomes of these consultations be provided to the committee. If not why not? When will they be consulted?
 - b. If no consultations occurred, how is it proposed to take any of the views of these groups into consideration, if the bill is now drafted? If their views were sought and provided, can the ACS provide details of them and indicate what parts of the bill were changed as a result of this?

The answer to the Committee's question is as follows:

The surrender bin regime and the INS will operate in the passenger processing environment. The INS will also operate in the postal environment. These regimes will not operate in the commercial air or sea cargo environments.

The proposed scheme is aimed at airline passengers and items in the postal stream.

- a. Customs has advised members of the Passenger Facilitation Taskforce of the Bill and its effect. Participants at the meeting indicated their satisfaction with the proposed initiatives and did not request any changes or amendments. Please see below for Passenger Facilitation Taskforce, Aviation and Industry Consultation participants.
- b. Customs has not undertaken direct consultation with passengers as it is envisaged that the people who will most likely be subject to the regime will be first time, one off importers.

Passenger Facilitation Taskforce, Aviation and Tourism Industry Consultation participants

- Airport Coordination Australia
- Australia Pacific Airports Melbourne
- Australian Airports Association Adelaide
- Board of Airline Representatives of Australia
BARA
- Brisbane Airport Corporation
- Cairns Port Authority
- Darwin International Airport
- Gold Coast Airport
- Jetstar
- Qantas

- Sydney Airport Corporation Limited SACL
- Tourism and Transport Forum Australia
- Tourism Australia
- Virgin Blue
- Westralia Airports Corporation

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 4

The Committee asked the following question in relation to the Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006:

4. This question relates to the extent to which the new infringement notice regime could be applicable to importers and exporters rather than merely passengers and their luggage in a s234AA place.

The regime sets up:

- a surrender of goods mechanism under section 209 N
- a detention of goods under section 209U
- an infringement notice scheme dealing with concealed goods under section 243ZH.

ACS has indicated that the infringement notice regime will only apply to ship and aircraft passengers. You will note however that only the surrender of goods regime under Section 209N and the infringement scheme s243ZH are limited to goods in a s234AA place. Section 209U which covers goods detained makes no reference to suggest that it is limited to s234AA places.

These regimes are intended to replace or substitute for the operation of Section 203B which when we determine what that applies to, applies to containers and conveyances as well as simply passengers at airports and customs designated Section 234AA areas. Therefore, 1 of the 3 pillars to the regime seemingly may have application outside the limitation of Section 234AA places.

- a. In relation to this detention scheme, does it apply outside of section 243AA areas (ACS indicated that it may apply to the postal environment)?
- b. Could it also apply to the shipping container environment or the air container environment?
- c. Can ACS provide the definition and other examples of a 234AA place?
- d. Can you please explain how this will interact with the accredited client program and any other infringement schemes, or advise how you intend to limit the application?
- e. Will the infringement notice regime be applicable to persons other than passengers with their luggage? For example brokers, importing businesses or freight forwarders.
 - i. If so, will the penalties that apply differ and how so?
 - ii. If so, who will be deemed to be the owner of the goods for the purposes of the regime?

The answer to the Committee's question is as follows:

- a. The detention of goods under section 209U is wholly related to the post importation permission amendments. It enables detention of the prohibited or restricted goods by Customs while a permission is sought, rather than immediate seizure. It therefore operates outside of a section 234AA place.

- b. The post importation permission arrangements are intended to apply to all environments. The surrender bin arrangements and infringement notice scheme do not apply to shipping container and air container environments.
- c. A section 234AA place is a place that has been set aside that is to be used by officers of Customs for questioning passengers disembarking from or embarking on a ship or aircraft or for examining the personal baggage of such passengers or as a holding place for such passengers. Such a place must be identified by signs displayed at or near the place. An example of such a place is the baggage hall at major Australian international airports.
- d. The scheme will not have any interaction with the Accredited Client Program or other infringement notice schemes.
- e. The infringement notice scheme will be applicable in the passenger and postal environments. It will not apply to brokers, importing businesses or freight forwarders.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 5

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

5. What is the penalty regime (i.e. range of penalties, civil/criminal forfeiture regime), and how is it calculated?
 - a. How will the penalty regime be applied to ensure fairness and avoid unjust outcomes or inconsistent treatment of persons or entities?
 - b. How will recovery of unpaid penalties be recovered?
 - c. How much revenue is projected to be obtained from introducing the proposed scheme?

The answer to the Committee's question is as follows:

The penalty regime is determined by statute. Paragraph 243ZI(1)(d) provides that a penalty of 2 penalty units (\$220) is payable. This is the same penalty as the Quarantine regime.

- a. As there is no discretion regarding the amount of penalty, issues of fairness and unjust outcomes do not arise. If the matter proceeds to Court, the Court imposes the penalty.
- b. If the penalty is not paid, Customs retains the discretion to prosecute the offender.
- c. This regime was not developed in order to generate revenue for Customs. It is instead an administration efficiency regime. Customs has not undertaken an assessment of the projected revenue as it is difficult to fully determine the number of people who will be subject to an infringement notice prior to implementation. Customs undertakes on-going review of all its business practices at airports. The surrender bin and INS regimes will become part of this on-going review.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 6

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

6. Has the ACS considered an alternative low-cost procedure to providing importers with the right to apply to a court for compensation in respect of goods that have been surrendered? (The Law Council has argued that the costs of applying to a court would likely exceed the amount of compensation).

The answer to the Committee's question is as follows:

Customs has not provided an alternative low-cost procedure to provide importers with the right to apply to a court for compensation in respect of goods that have been surrendered. This is because there 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.

The 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.

If an importer chooses not to surrender a prohibited item, the item will be seized in accordance with current processes. The importer will then have the opportunity to apply for the return of the goods under the seizure regime.

In respect of the Law Council submission, the compensation procedures in the Bill are based on existing compensation procedures in the Customs Act.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 7

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

7. Have any efficiency gains been forecast from the introduction of the new scheme? If so, provide details.

The answer to the Committee's question is as follows:

The surrender bin regime and the INS are being introduced as administration efficiency regimes. Customs has not undertaken a full assessment of the projected efficiency gains, as it is difficult to fully determine the number of people who will be subject to these schemes prior to implementation. Customs undertakes on-going review of all its business practices at airports. The surrender bin and INS regimes will become part of this on-going review

Presently, all prohibited items that are imported must be seized, regardless of their perceived threat to the community. This is a time-consuming and resource intensive process, impacting on the efficiency of Customs operations at airports. The introduction of the surrender bin regime and the INS will provide sanctions appropriate to the level of threat to the community and will reduce the time spent by Customs officers on administration and the level of post-seizure claims made on seized items.

Implementation of the proposed regimes would result in a number of specific savings. The major saving would be in the hours that are currently spent preparing files for the prosecution of low value prohibited imports. For example in Melbourne approximately 120 cases per year are recommended for prosecution in the passengers environment. Of these approximately two thirds eventuate in prosecution action, however the remaining one third are eventually deemed not suitable for legal action. These remaining cases still require a number of hours work to determine a course of action. This would include Record's of Interview, Briefs of Evidence and preparing Customs Officers for possible court appearances. Other direct savings would include the reduction in hours for officers involved in the Detained Goods Management process and the reduction of time involved in the completion of seizure notices and goods detained forms for low value prohibited imports.

With the implementation of the surrender bins and infringement notices these saved hours of work could be re-directed into high priority work such as targeting terrorism and illicit drugs.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 8

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

8. What training of ACS staff has been undertaken to date, in respect of the proposed scheme?
 - a. What type of training of staff is contemplated for staff of the proposed scheme?
 - b. Have the relevant unions been consulted about the proposed changes? If not, why not?

The answer to the Committee's question is as follows:

To date no training has been undertaken in respect of the proposed scheme.

- a. Training will be delivered to Customs Officers at airports before the implementation of the proposed scheme.

This training is currently being scoped with input from clients and stakeholders in Customs. The training will be delivered as a pilot and evaluated to ensure relevant feedback from officers and their managers is included in the future training sessions. Once the initial rollout of the training has been conducted it will be integrated into the Customs Trainee program to ensure all relevant staff receive the training when they join Customs.

- b. Unions have not been consulted about the proposed changes; this scheme will streamline the process of dealing with prohibited imports in the air passenger environment, thereby lessening the workload, rather than create an additional workload.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 9

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

9. Have the regulations contemplated in sections 209M and 209T been drafted, if not why not? If yes, can you provide a copy?

The answer to the Committee's question is as follows:

The regulations contemplated in sections 209M and 209T have not yet been drafted. The content of those regulations is still to be decided, in consultation with the relevant authorising agencies (e.g. the Therapeutic Goods Administration, the Department of Environment and Heritage, the Australian Radiation Protection and Nuclear Safety Authority etc) who have policy responsibility for prohibited imports.

The goods under 209T will be a subset of goods currently restricted or prohibited, and may include goods ranging from pharmaceuticals prescribed by a doctor to goods containing radioactive substances.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 10

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

10. Are the directions of the CEO under 209R specified?
- a. If yes, can you provide a copy? If not, why not?
 - b. What types of directions are contemplated under these directions?

The answer to the Committee's question is as follows:

The directions of the CEO under 209R are not yet specified.

- a. Customs does not have the power to specify the directions until the Bill has been passed. However, the directions will be specified in time for the implementation of the schemes and will reflect current disposal practices.
- b. As the goods are prohibited imports, the goods would most likely be destroyed. The only other option may be disposal of those prohibited items that have breached trademark laws. Disposal in this instance would constitute donation of the items to a charity with the consent of the trademark holder.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 11

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

11. Have the guidelines provided for under section 243ZG been developed? If they have been can the ACS provide a copy, if not why not?

The answer to the Committee's question is as follows:

The content of the guidelines are still being developed. Customs will have up to 6 months after Royal Assent to develop all of the necessary procedures and guidelines in relation to these new regimes.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 12

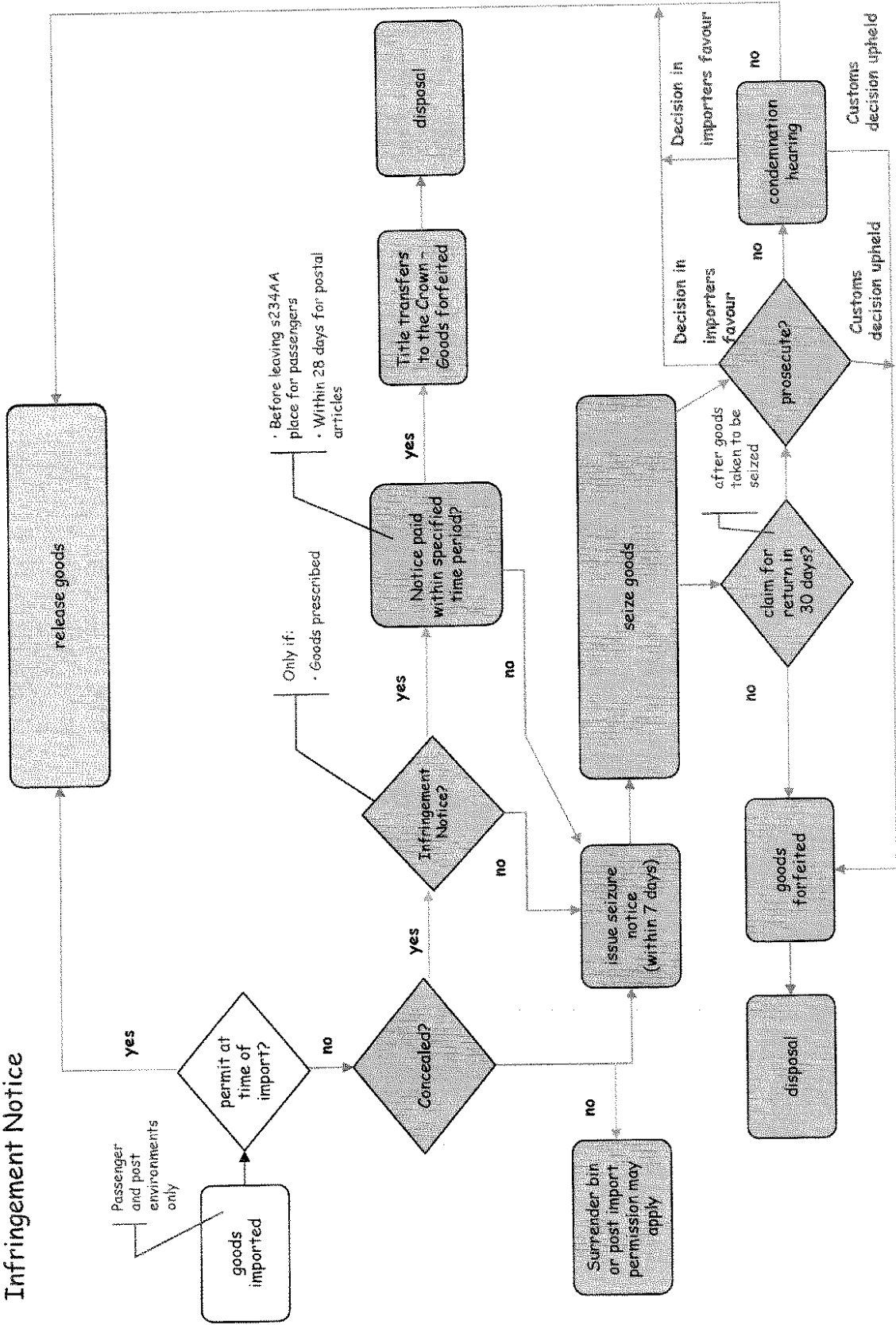
The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

12. Can the ACS provide a diagrammatic description (i.e. flow chart) of how the proposed scheme, including the infringement notices under this bill, will work?

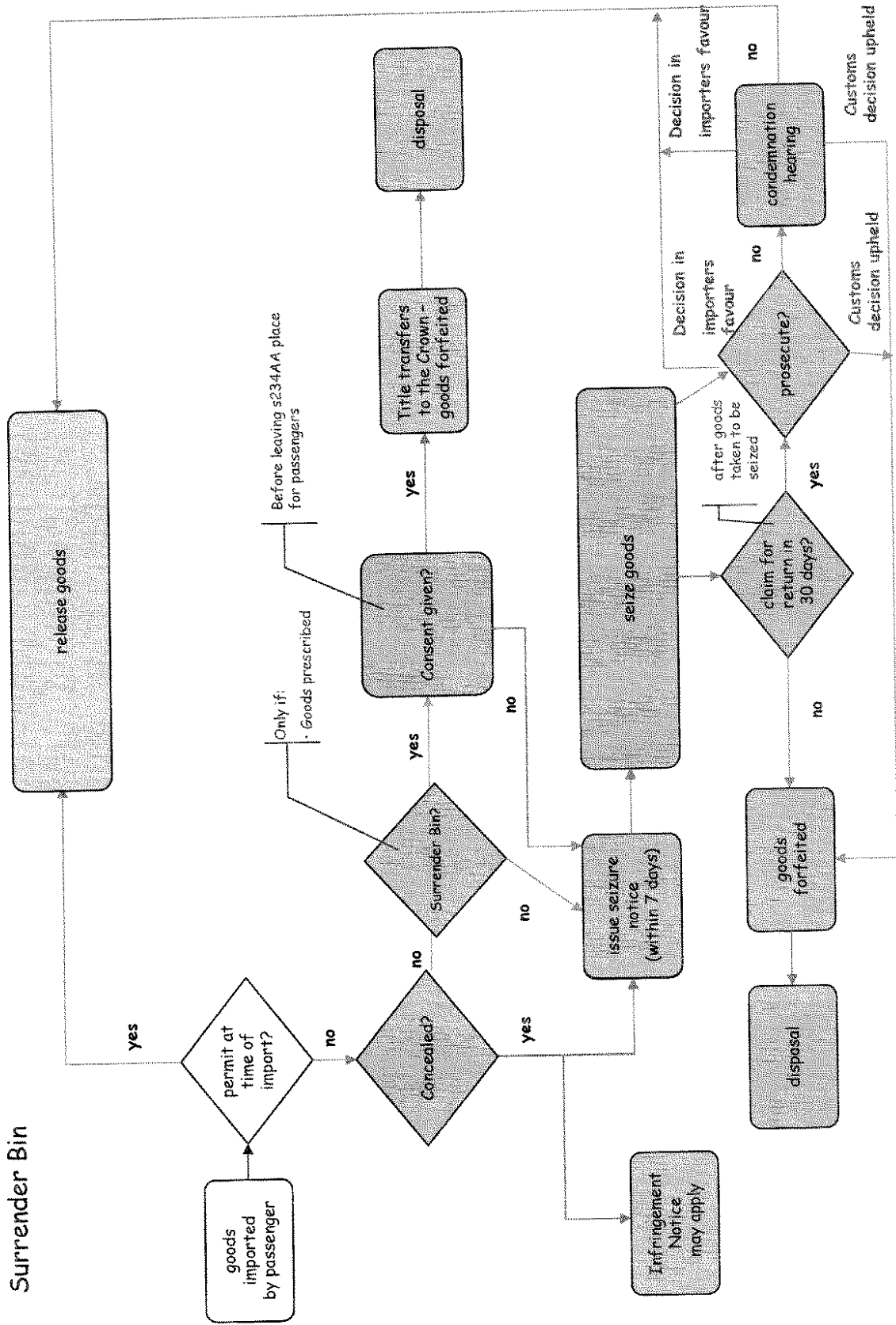
The answer to the Committee's question is as follows:

See attached flow charts.

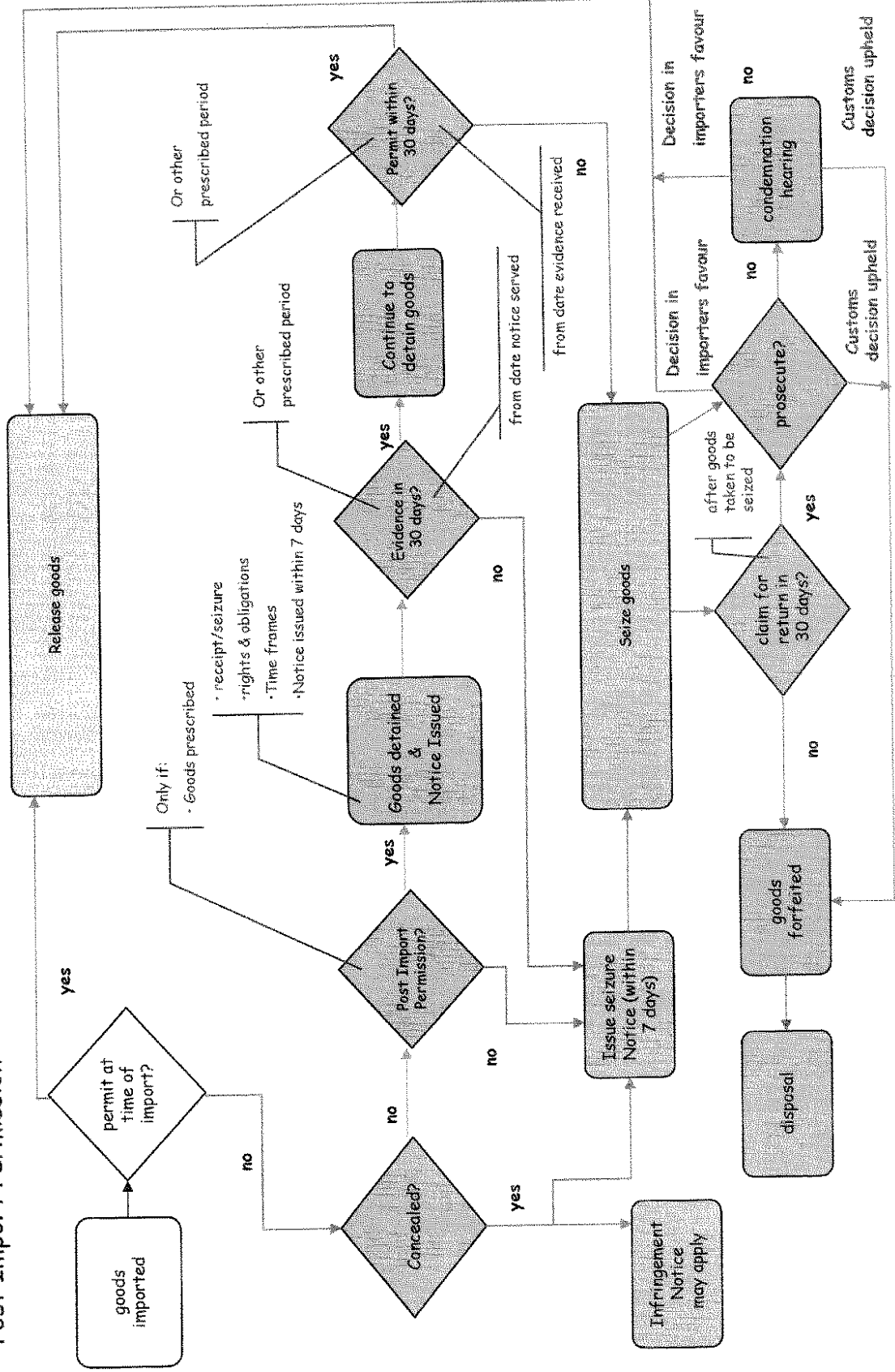
Infringement Notice

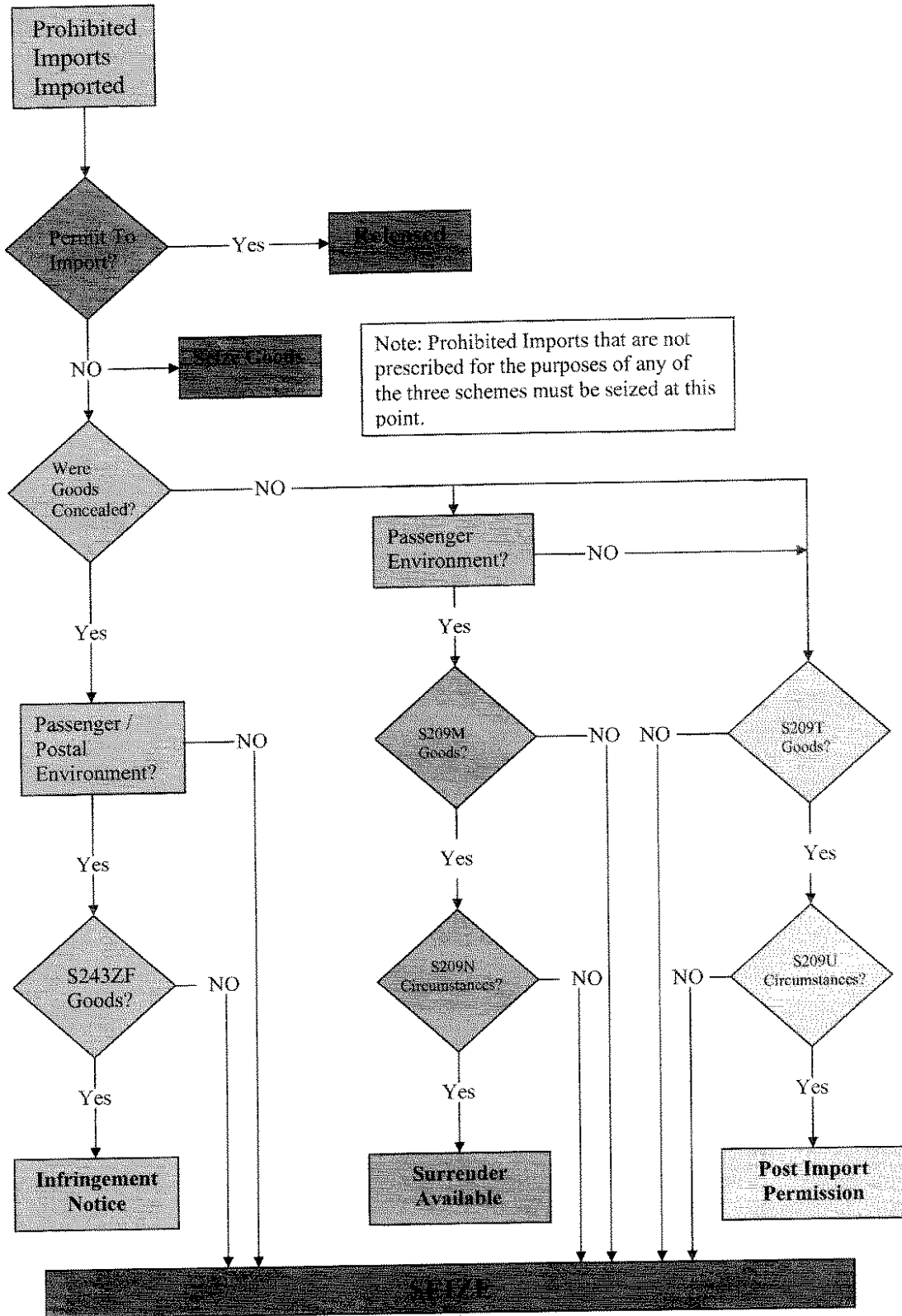


Surrender Bin



Post Import Permission





SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 13

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

13. In respect of the discretion the customs officer has in deciding to use the power under 209N, can ACS outline the training or provide a copy of the guidelines that will assist Customs officers in carrying out their duties?

The answer to the Committee's question is as follows:

As outlined in Question 8, Customs officers at airports will attend training sessions on the proposed scheme before it is implemented.

A number of administrative guidelines, Standing Operating Procedures (SOPs) and forms will be developed for the scheme. These will be circulated to all officers at airports and copies provided to staff during relevant training sessions.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 14

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

14. What systems or procedures or internal reviews are in place or will be put in place to ensure that officers carry out their duties diligently?

The answer to the Committee's question is as follows:

As mentioned in Question 13 a number of administrative documents such as guidelines, SOPs and forms will be developed to provide consistent application of the scheme.

Customs undertakes on-going review of its business practices and officer competency at all airports. Once implemented, the surrender bin regime and INS will be included in this continuous review, both in terms of business processes and officer competency and performance.

In addition, the new regimes will be subject to the normal range of internal and external audits that are conducted on various Branches and programs in Customs.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 15

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

15. What review mechanisms are available to persons subject to the exercise of a customs officer discretion contemplated in the new proposals?

The answer to the Committee's question is as follows:

Passengers may ask to speak to a duty manager, or they may make use of the complaints and compliments processes. Please see question 16 for more information on Customs complaints and compliments procedures.

Regardless of the measure imposed (surrender, INS, seizure or prosecution), the person has committed an offence by importing a prohibited item. Customs is providing the person with an alternative to seizure and prosecution which removes any liability for the offence.

Standard administrative appeals processes are available to all persons subject of an administrative regime that imposes a penalty, however the item will not be returned because of its prohibited nature.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 16

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

16. Is there a complaint handling procedure in place to deal with the use of the discretion?
a. If so, can you provide a copy of it? If not why not?

The answer to the Committee's question is as follows:

There is a complaints handling procedure in place to deal with use of the discretion. Customs has a sound and long-established complaints presence at international airports. Its Complaints & Compliments brochure is widely publicised, provides information in 12 languages, and is supported by a freecall number. Information on progressing complaints to the Ombudsman, local members, or Minister for Justice and Customs is also provided in the brochure.

Complaints and compliments signage is prevalent at airports and Customs provides several options for complainants to lodge complaints, including:

- submission of the complaints brochure at the airport
- freecall number
- reply paid postal address
- fax number
- internet feedback form
- information on how to lodge a Ministerial or Ombudsman complaint.

A copy of the Complaints and Compliments brochure is attached.

Customs Complaints & Compliments

Customs Complaints and Compliments is designed to give you an opportunity to comment on any aspect of your dealings with us.

We use your comments to provide feedback on how service can be improved.

Our commitment to you

Customs is committed to:

- dealing with complaints and compliments quickly and effectively
- seeking satisfactory outcomes
- meeting our service standards.

Customs aims to provide a high standard of service to all our clients. Our staff are committed to:

- being honest
- being fair
- being courteous and helpful
- being flexible
- avoiding conflict of interest
- applying a high level of professionalism in everything we do.

Our standards

Customs recognises your right to comment on our services and we are interested in what you have to say, be it a complaint or a compliment.

If you have a complaint we will investigate it promptly.

If you write to us or email us

We aim to acknowledge your communication within five working days and to respond within 15 working days of receipt of your email or written correspondence. If we cannot fully answer your query in that time, we will give you an interim response and advise you as to when a final response can be expected.

If you telephone a Customs Office during business hours

We will respond to your query, or take your details and arrange for the appropriate person to return your call as soon as possible.

Referral to Other Organisations

If the comments included in this brochure relate to an organisation other than the Australian Customs Service, Customs will refer the comments to the relevant organisation and advise you of the contact details.

If you do not want your comments referred please state this clearly in the comments box on the following page.

Complaints & Compliments

Completed comment sheets may be given to a Customs officer, placed in one of the boxes provided, or posted to Customs free of charge. If you prefer, you can ring Complaints and Compliments staff on FREECALL - 1800 228 227 (during office hours)

My contact with Customs was in _____ on _____ at _____
(USE BLOCK LETTERS)

I was / was not satisfied with the service I received because: (please enclose sheet if insufficient space for comments)

TEAR OFF, MOSTEN, FOLD AND SEAL

What I would like to see happen is:

Given Names _____

Family Name _____

Address _____

Telephone _____

Today's Date _____

Email _____

Would you like a reply?

YES

NO

(please tick box and ensure you have completed your contact details. Customs will reply within 15 working days of receipt of your comments.)

All information will be treated as confidential.



Australian Government
Australian Customs Service

How to contact us

Customs would like to work with you to resolve your complaint.

You may contact Customs Complaints and Compliments via:

- Freecall - 1800 228 227
- Facsimile - 02 6275 8099
- Email - comments@customs.gov.au
- Internet - www.customs.gov.au
- Speak to a Customs officer
- Freepost (no stamp required):
- Compliments and Complaints Australian Customs Service Reply Paid 9834 (in your capital city)

Customs Information and Support Centre:

General inquiries or requests for information should be directed to 1 300 363 263 (for the cost of a local call) or email information@customs.gov.au

At any time you may take your complaint to a body which is not part of Customs, such as:

- The Commonwealth Ombudsman
GPO Box 442
Canberra City ACT 2601, or
Internet: www.comb.gov.au
- Your Federal Member of Parliament
- the Minister for Justice and Customs
c/ Parliament House
Canberra City ACT 2600

Complaints & Compliments

A guide to Customs complaints and compliments procedures



Freecall 1800 228 227
www.customs.gov.au

November 2003

Arabic
إننا نرتب التلقي على أي عنصر من عناصر الخدمة التي نقدمها. يرجى الاتصال بنظام موظفينا العاملين بإدارة خدمة العملاء على الرقم 1800 228 227 وهو خط مجاني، أو قم بملء الاستمارة المرفقة.

Chinese (Simplified)
如果您对我们的服务的任何方面发表意见，请打免费电话 1800 228 227 和我们的客户服务人员联系，或填写所附的表格。

Chinese (Traditional)
如果您對我們的服務有任何意見，請打免費電話 1800 228 227 聯絡我們的客戶服務人員，或填寫隨附的表格。

Greek
Αν επιθυμείτε να διατυπώσετε σχόλια για οποιοδήποτε άποψη της υπηρεσίας μας, παρακαλούμε να επικοινωνήσετε με το προσωπικό εξυπηρέτησης πελατών μας στον αριθμό 1800 228 227 χωρίς χρέωση ή να συμπληρώσετε το συννημένο έντυπο.

Indonesian
Jika Anda ingin berkomentar tentang aspek apapun dari pelayanan kami, silakan menghubungi karyawan pelayanan pelanggan kami dengan nomor bebas biaya 1800 228 227 atau silakan mengisi formulir terlampir.

Italian
Se desiderate formulare dei commenti in merito a qualsiasi aspetto del nostro servizio, rivolgetevi ai nostri addetti al servizio alla clientela al numero verde 1800 228 227 oppure compilate il modulo in allegato.

Japanese
当方業務につきまして、どのようなことでもコメントをされた場合は、1800 228 227 (トールフリー)の顧客サービス担当者にご連絡いただくか、添付のフォームにご記入ください。

Korean
저희 서비스와 관련하여 의견이 있으시면, 무료로 이용하실 수 있는 1800 228 227번으로 전화하여 저희 고객 서비스 담당자에게 말씀을 해 주시거나, 첨부된 양식에 기입해 주십시오.

Malay
Jika anda ingin memberi komen mengenai sebarang aspek perkhidmatan kami, sila hubungi kakitangan pelayanatan pelanggan kami pada nombor bebas tol 1800 228 227 atau islah borang yang disertakan.

Thai
หากท่านมีความเห็นหรือข้อคิดเกี่ยวกับบริการของเราไม่ว่าจะเป็นข้อคิดชมเชยหรือข้อคิดปรับปรุงโปรดแจ้งให้เราทราบโดยไม่มีค่าใช้จ่ายที่ 1800 228 227 หรือกรอกแบบฟอร์มที่แนบมา

Spanish
Si desea hacer un comentario sobre algún aspecto de nuestro servicio, llame a nuestro personal de atención al público al 1800 228 227 (llamada gratuita) o complete el formulario adjunto.

Vietnamese
Nếu quý vị muốn phê bình về mọi khía cạnh liên quan tới dịch vụ của chúng tôi, xin vui lòng liên lạc với Phòng Quản Trị Nét Văn Viên Phục Vụ số điện thoại miễn phí 1800 228 227 hay điền mẫu đơn đính kèm.

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SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 17

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

17. Can you provide a copy of those items under the PI regulations that will be subject to the regime?
- a. Can this list be changed, if so what processes will be adopted when changes to the PI regulations are contemplated?
 - b. Are the PI regulations disallowable instruments?

The answer to the Committee's question is as follows:

Please refer to question 1 for a response regarding those items that will be subject to the surrender and infringement notice regimes.

- a. Yes, this list can be changed and in doing so, the relevant agencies that have policy responsibility for prohibited imports would be consulted. Any changes that are made will be communicated to customs officers through training, the intranet, and airport advices.
- b. Yes.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 18

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

18. Will both the infringement scheme and the post-importation declaration procedures apply to postal articles, either mail or parcels? If not why not?

The answer to the Committee's question is as follows:

Both the infringement notice scheme and the post importation regime will apply to the postal environment. They will apply to both mail and parcels.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 19

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

19. What procedures are provided to ensure that under subdivision GC a person can be given the option of obtaining a post-importation permission?
- a. Is any decision on this matter made by the Customs officer subject to either internal or external review?
 - b. Is it subject to judicial review?

The answer to the Committee's question is as follows:

A person may be given the option of applying for a post import permission if the goods they are importing are eligible goods for the purposes of the regime, the goods have not been concealed in any way and the officer believes that the person has not previously had an application to import those goods refused.

In the passenger environment, if the goods are also eligible for the surrender bin scheme, the passenger may also be given the option to surrender the goods.

Guidelines covering the post import permission procedures have not yet been drafted.

The decision to not allow a person to apply for a post import permission means that the goods will be seized under the current seizure provisions. The owner of the goods has 30 days from seizure in which to lodge a claim for the return of those goods.

Where a claim for the return of goods is made, the matter is subject to judicial review. If no claim is made then the goods are forfeited to the crown.

THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 20

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

20. What procedures are in place to ensure the integrity of the system?
- a. If there are procedures in place, can they be provided to the committee?

The answer to the Committee's question is as follows:

All of the regimes proposed will be subject to standard operating procedures, guidelines and internal and external audit. In addition, all Customs officers will be assessed on their competency to implement the regimes through the continuous performance assessment process that Customs has in place.

The post importation permission arrangements are an extension of the existing provisions governing the control and seizure of prohibited and restricted goods. The post importation permission arrangements simply provide a window to eligible importers to seek a required permission even though the goods have already arrived in Australia.

For any importer denied the opportunity by Customs to seek a permission after importation because the goods were not prescribed, not declared or were concealed, the existing arrangements will continue to apply. Additionally any importer subsequently denied a permission by the authorising authority after importation reverts back into the existing arrangements.

All importers who have goods seized under both the existing and the proposed provisions, may still make a claim for the goods, and proceed to a hearing by magistrate for determination.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 21

The Committee asked the following question in relation to the Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006:

21. What discretion is available for a customs officer to decide that there was no intention by the person subject of investigation not to conceal the goods in accordance with the relevant section? (ie what happens where a person is unaware that they have concealed a prohibited item?)
- a. If this discretion exists, is it too broad and open to abuse?
 - b. If this discretion does not exist, how are ACS personnel expected to determine whether an intention existed?

The answer to the Committee's question is as follows:

Section 209N(2) of the Bill states:

Without limiting the meaning of *concealed* in subparagraph (1)(a)(ii), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with section 71, 71K or 71L and the person failed to do so.

In the airport environment, all people and accompanied baggage entering Australia are required to be declared to Customs. Passengers make this declaration by completing the Incoming Passenger Card (IPC) prior to their arrival to Australia. The IPC is issued in multiple languages.

The IPC requests the following information:

Are you bringing into Australia:

1. Goods that may be prohibited or subject to restriction such as medicines, steroids, firearms, weapons of any kind or illicit drugs.

The IPC also instructs that where passengers are unsure of the status of the goods, that they answer in the affirmative.

Customs officers also reconfirm the declaration with passengers at the beginning of baggage examinations by asking a set of standard questions including if the passenger has any items to declare. During this process, the Customs officer is making an assessment of the passenger and their level of compliance. Customs officers undertake significant training and make these assessments on a daily basis drawing on their experience of these situations to make their decisions. Passengers dissatisfied with the Customs officers' decision may also request to speak with the Customs Duty Manager.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 22

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

22. Will this proposed scheme be available to be used by part time or casual employees of customs?
If yes, what safeguards are put in place to ensure the power is exercised correctly?

The answer to the Committee's question is as follows:

All Customs employees will have the power to administer the proposed schemes, including part time and full time employees. Part time employees are provided with the same level of training as full time employees and exercise the same powers as full time Customs employees.

Customs also employs intermittent and / or irregular employees in the airport environment. These employees are only located at Sydney and Adelaide airports and undertake limited duties mainly on the primary line. Intermittent / irregular employees are provided with all training relevant to their limited duties.

Customs does not employ casual employees.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 23

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

23. Can any of the time periods specified in the Bill be extended?
- a. If so can you provide outline how any extension would operate and on what basis the periods could be extended?
 - b. If not, why not in the cases of hardship or if there exists reasonable grounds?

The answer to the Committee's question is as follows:

Most of the time periods specified in the Bill cannot be extended.

The time periods used in relation to the surrendering of goods or paying of an infringement notice in the passenger environment require these actions to be done before the person leaves the s234AA place. This is to ensure that the matters are finalised before the passenger leaves the Customs area.

Concerns of hardship are alleviated by the passengers access to electronic funds available through the Customs Duty Collector. Should a passenger be unable to pay the infringement notice before departing from the 234AA area, Customs will seize the prohibited item in accordance with current processes. Fundamentally, this represents no change to the existing process. Even if the passenger chooses to pay the infringement notice, the goods will not be returned to the passenger.

The time period for the payment of an infringement notice in the postal environment and other infringement notices for unauthorised use of electronic items is 28 days. This is considered sufficient time to allow importers to pay the infringement notice. This time period runs concurrently with the seizure notice.

The time period specified in the Bill for Customs to serve a detention notice (7 days) for goods that have been detained cannot be extended. This is the same time period that applies to the serving of seizure notices.

The application and grant periods for post import permissions are 30 days unless another period is prescribed by regulation. The intention is to commence the scheme with these periods being 30 days. It is felt that this time period will allow importers sufficient opportunity to apply for a required permission, and as no cost is involved, no hardship provisions for this aspect are considered necessary.

The time period during which a person may lodge a claim for the return of goods seized is already in the Customs Act (section 205C).

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 24

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

24. This question relates to the disposal of surrendered goods and forfeited goods which are classified as prohibited imports. Does the use of the term disposal open up the possibility that the goods are not necessarily destroyed? For example, that the goods can be disposed of through sale rather than disposed of through destruction.
- a. If so, under what circumstances might the goods end up not being destroyed?

The answer to the Committee's question is as follows:

Customs does not dispose of prohibited items through sale.

Prohibited items may be either destroyed or disposed of. Disposal of prohibited items may occur for those items not considered a high risk or threat to the community. For example, prohibited items that infringe copyright/trademark law may be disposed of rather than destroyed with the permission of the trademark owner. Disposal in this situation would constitute donation of the item(s) to a charity.

Customs may also dispose of some prohibited items by retaining them for use in travelling road shows or community education campaigns. These items would be used to demonstrate to the community examples of items that cannot be bought into Australia for public safety reasons.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 25

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

25. In relation to Section 209V (Detained goods to be secured), why were the additional instructions of the equivalent ss204 (3) to (5) not applied here in relation to this new regime for detention of goods?

The answer to the Committee's question is as follows:

The provisions of s204 (3) and s204 (5) were not applied to s209V because only officers of Customs will be detaining goods under subdivision GC.

The provisions of s204 (4) were not applied to s209V because it is not intended for narcotic goods to be prescribed for the purposes of subdivision GC. Narcotics by their nature require strict handling and storage procedures that include transfer of custody to the Australian Federal Police.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 26

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

26. How does the new system apply in the circumstances where a person's suitcase contains a prohibited import or when a parcel containing multiple items contains a prohibited import?
- a. Are all contents deemed to be forfeited or just the prohibited item?

The answer to the Committee's question is as follows:

In circumstances where a passenger's suitcase contains a prohibited import and where the passenger has not concealed the item, a Customs officer may provide the owner of the goods with an option to surrender the goods rather than have the goods seized. An infringement notice will be issued to those passengers who attempt to import a prohibited item by concealing the item. In both of these instances only the prohibited item is forfeited.

In circumstances where a parcel containing multiple items contains a prohibited import, an infringement notice may be issued. Surrendering the goods will not be an option available in this environment. As with the passenger environment, only the prohibited item is forfeited.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 27

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

27. With regards to Section 243ZA subsection (4) as it exists under the Act, every other reference to infringement notice has been modified in this Division (now subdivision). Why has this subsection not been modified to include the terms “served under this subdivision” or similar?

The answer to the Committee’s question is as follows:

This is a drafting oversight that will be addressed, but in the context, it is clear that subsection 243ZA(4) would be referring to an infringement notice served under Subdivision A.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 28

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

28. In the ACS submission on the Bill, it was indicated that passengers must pay the infringement notice before leaving the ACS controlled area to remove liability for the offence and the proposed model requires the customs officer to accompany the passenger to the duty collection area while the notice is paid:
- a. How labour intensive is this likely to be?
 - b. Why are these people not to be allowed to leave until they have paid?
 - c. Does ACS intend to escort people to a place they can obtain the required funds (e.g. an ATM)?
 - d. What will happen should a person wish to pay the penalty but not have immediate access to electronic funds?
 - e. In the above circumstances will the ACS allow the person to arrange for a third party to arrange the funds to be brought to the duty collection area? For example a friend or relative to bring the required cash?
 - f. In the situation where someone can arrange for a friend or relative to drop the money off at the airport please advise as to whether the ACS is planning to keep a Customs officer in accompaniment until the friend or relative arrives with the cash?
 - g. Does ACS intend to set any time limits for the person to arrange the payment of the penalty? If so, provide details.

The answer to the Committee's question is as follows:

- a. This proposed process is considered to be less labour intensive than current practices. Accompanying the passenger to the Customs Duty Collectors office is a similar process to that already in use by Customs and Quarantine for other matters. In all cases, the Duty Collector is located in the Customs Hall.
- b. Passengers will not be prevented from leaving the 234AA area, however if they choose to leave the area without paying the infringement notice, the item(s) will be seized and the person is liable for the offence. Payment is necessary prior to departure from the 234AA area as payment of the notice results in a transfer of the title of the goods to the Commonwealth and the goods will not be returned to the passenger.
- c. Customs does not intend escorting people to a place where they can obtain the required funds. Customs officers will escort the passenger to the Duty Collectors office located in the baggage examination area (section 234AA), which has the existing infrastructure to support the payment (including electronic payment) of infringement notices.
- d. Customs does not foresee this as an issue as the existing infrastructure for electronic payment already exists at the Duty Collectors office.

- e. In circumstances where a passenger does not have immediate access to funds, Customs will allow for the person to arrange for a third party to be brought to the duty collection area.
- f. Customs does not foresee this as a likely or common occurrence. However, in circumstances where a passenger has arranged for money to be delivered to the airport, Customs would keep an officer with the person until the friend or relative arrives with the payment.
- g. Customs will not set any time limit for the person to arrange for the payment of the infringement notice. The only requirement is that the infringement notice is paid before the passenger leaves the 234AA area in order to discharge the passengers' liability. Although, Customs does recognise that in this environment time is a limiting factor, and not all airports operate on a 24/7 basis.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 29

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

29. Will there be a public education campaign to inform the travelling public of the new regime?

The answer to the Committee's question is as follows:

Yes.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 30

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

30. Will there be a trial period before the regime officially commences?

The answer to the Committee's question is as follows:

There will not be a trial period before the regime officially commences, as the scheme is required to be implemented within six months of Royal Assent.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 31

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

31. There appears to be a drafting error in Item 5 of Schedule 1 – does paragraph 203(3)(e) of the Customs Act exist?

The answer to the Committee's question is as follows:

Paragraph 203(3)(e) doesn't exist in the current legislation. This paragraph was included as a new paragraph in the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006, currently before parliament. This paragraph will exist in the revised legislation after the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006 is passed.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 32

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

32. Proposed section 209N refers to 'the available options' for dealing with the goods and the consequence of exercising each of these options.
- a. What are these options? Can you provide the committee with a copy of the options?
 - b. What are all the relevant consequences of exercising the options? Can you provide the committee with a copy of these?

The answer to the Committee's question is as follows:

- a. The options are surrendering the goods, seizure of the goods or prosecution.
- b. Surrender – the passenger will not be liable for an offence against the Customs Act, and Customs will have no power to take further action.

Seizure – the good will be seized and held by Customs for thirty days to provide the passenger with the opportunity to apply for their return. However, the liability for the offence will remain and Customs may choose to prosecute.

Prosecution – Customs will seize the goods and begin prosecution against the passenger.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 33

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

33. Can you provide the committee with an explanation of what 'concealed' actually means in the context of the proposed regime and provide the committee with details of all the circumstances/situations where the term is intended to apply?

The answer to the Committee's question is as follows:

Please see question 21 for a definition of 'concealed'.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 34

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

34. Proposed paragraph 209X(1)(j) refers to notices being served in a foreign country.
- a. How is this intended to operate in practice?
 - b. What legislation underpins the operation of this proposed paragraph (eg mutual assistance legislation)?
 - c. Is a formal relationship with relevant countries required?
 - d. What will happen if no diplomatic relationship between Australia and the relevant country exists?

The answer to the Committee's question is as follows:

Paragraph 209X (1)(j) mirrors the equivalent provision of S205A(e) which has been in operation for more than 10 years, and ensures the seizure notices are consistent. The answers to each specific question are:

- a) Paragraph 290X(1)(j) is simply effected by the posting of the seizure notice to the registered overseas address. In turn the overseas entity may contact their Australian representative to make a claim (if desired) on their behalf.
- b) None, other than this provision.
- c) No
- d) Not relevant

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 35

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

35. The committee has previously requested a flow chart of how the infringement notices regime will operate (Q.11).
- a. Can the ACS also provide flow charts of how the post-importation permission scheme will operate and how the seizure of goods scheme will operate – essentially there will be 3 separate regimes in operation.
 - b. Could the ACS also set out how the 3 separate processes will interrelate?

The answer to the Committee's question is as follows:

- a. See flow charts at question 12.
- b. All three processes will only interrelate in the passengers environment. The infringement and post import permissions will also interrelate in the postal environment.

Where prohibited imports are imported in any environment (passengers, post or cargo) without a required permission, they have been declared to Customs and are eligible goods for the purposes of s209T (post import permission), Customs may allow the owner of the goods to apply for a post import permission.

Where prohibited imports are imported in the passengers environment without a required permission, and those goods have not been concealed, Customs will have the discretion to allow the passenger to surrender the goods (if they are eligible under s209M) or to apply for a post import permission (if they are eligible under s209T).

Where prohibited imports are imported in the passengers or postal environment, without a required permission, and the goods have been concealed, Customs will have the ability to issue an infringement notice, if the goods are eligible for an infringement notice under s243ZF.

Regardless of eligibility for the above schemes, seizure and prosecution remain an option. Where prohibited imports that are not eligible goods for s209M, s209T or s243ZF are imported, Customs is required to seize those goods.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 36

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

36. Why must a passenger pay an infringement notice before leaving a section 234AA area? Why can't the passenger be given a certain period of time (eg 28 days) to pay (cf parking infringement notices etc)?

The answer to the Committee's question is as follows:

The passenger must pay the infringement notice before leaving the Customs controlled area to remove liability for the offence, and to transfer title of the item(s) to the Commonwealth. The proposed model requires the Customs officer to accompany the passenger to the duty collection area while the notice is paid. This is necessary because payment of the notice results in a transfer of title of the goods to the Commonwealth. Should the passenger choose not to pay the infringement notice before leaving the Customs controlled area, the goods will automatically be seized and Customs may prosecute the person for the offence.

This approach has been adopted due to the nature of the airport environment. Thousands of people pass through an airport daily, many staying in the country for very short periods. To allow for a 28 day payment period would require extensive, time-consuming and expensive administration controls, with little or no result for the work.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 37

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

37. Why has a distinction been made in proposed subparagraphs 243ZI(1)(e)(i) and (ii) between persons in section 234AA areas and 'in any other case'? What does 'in any other case' mean? Please provide the committee with details of what this is intended to cover. If it is intended to only cover the postal environment, why isn't this specifically mentioned in the Bill/EM?

The answer to the Committee's question is as follows:

In the context of the INS 'in any other case' means those areas, where an infringement notice can be served which is not the 234AA area. It is intended to cover the postal environment and unaccompanied baggage. Paragraph 124 of the EM specifically mentions these environments.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 38

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

Is there a definition of the passenger processing area or the postal environment? If not, why not?

The answer to the Committee's question is as follows:

The passenger processing area is a section 234AA area. For a definition of a section 234AA area please refer to question 4(c).

An International Mail Centre is defined under section 77F of the Customs Act as a place approved in writing by the CEO for the examination of international mail. There are seven designated International Mail Centres as listed in question 45.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 39

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

How does the bill actually differentiate between the areas of postal environment and the commercial air or sea cargo environments?

The answer to the Committee's question is as follows:

The Bill sets out those areas where the regimes will apply – 234AA and 'in any other case'. The 'in any other case' areas are listed as the post and unaccompanied baggage (paragraph 124 of the EM). The commercial air and sea cargo environments are excluded from the regime via their omission from the Bill.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 40

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

What is the definition of the commercial air or sea cargo environments that will be used in the bill to differentiate these services from the actual areas of passenger processing or postal environments? If there is no definition, how will the ACS decide which is commercial air or which is postal environments?

The answer to the Committee's question is as follows:

Please refer to questions 38 and 39 for a response.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 41

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

Can ACS provide examples of what is said to be in the commercial air environment and what is in the postal environments?

The answer to the Committee's question is as follows:

Please refer to question 38 for a definition of the postal environment. As previously stated this regime does not apply to the commercial air environment.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 42

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

Will all parcel post be subject to the new regime proposed in the bill?

The answer to the Committee's question is as follows:

Yes. All parcel post that enters the country through an International Mail Centre will be subject to the regime.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 43

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

Can ACS demonstrate in the bill how the above areas are separated? If not, can customs explain how the bill will not have application to the commercial air or sea cargo areas?

The answer to the Committee's question is as follows:

Please refer to question 39 for a response.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 44

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

Can ACS confirm that the infringement notice scheme can apply in any area subject to a 203B seizure, if yes can ACS explain why it will not operate in the commercial area of sea cargo or air cargo? If yes, can customs explain how the bill will not apply in these areas?

The answer to the Committee's question is as follows:

The areas to which 203B applies are much broader than those in which the Infringement Notice Scheme (INS) applies. However, there is some overlap such as 234AA areas, 234ABA areas, the postal environment and unaccompanied baggage. Only where there is overlap will the two systems operate.

For the reasons stated in question 39, the INS will not apply in the commercial air and sea cargo environments.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 45

The Committee asked the following question in relation to the Inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

45. Will the infringement notice scheme and the detention scheme operate in the international postal exchanges? If yes, can you provide a list of those sites?

The answer to the Committee's question is as follows:

Yes.

International Mail exchanges operated by Australia Post are located in each Australian capital city except Canberra and Hobart, with two operating in Sydney. There are seven (7) International Mail Centres in total:

- Sydney – Mascot
- Sydney – Clyde
- Melbourne
- Brisbane
- Perth
- Adelaide
- Darwin

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 46

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

46. Will the bill apply to the air parcel post operators such as Fed Ex and DHL etc.? If not, why not? If not, can you explain how the bill does not apply to these operations?

The answer to the Committee's question is as follows:

The bill has no effect on the operators of express courier services. These operators already have existing reporting obligations under the Customs Act with accompanying penalty provisions.

The surrender of goods is limited to the passenger environment by virtue of s209N (1). The new infringement notice arrangements are limited to the passenger and postal environments by the practicality of its application, and therefore will be established by policy and guidelines.

The post importation permission arrangements apply to all environments, to ensure all importers are given the opportunity to avail themselves of this option, which ensures a fairer application of the permission arrangements.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN CUSTOMS SERVICE

Question No. 47

The Committee asked the following question in relation to the *Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*:

In the Customs submission at page one, the penultimate paragraph says, "The import control measures ... are intended to operate in the passenger processing and the postal environments. They will not operate in the commercial air or sea cargo environments."

47. Can a person be prosecuted under the bill as well as having the goods detained and post import permission sought? If not, can you explain in the bill where that outcome is excluded, if yes, can you explain what decision-making process will be used to decide whether to prosecute or not? Will this be dependant on whether a good is granted permission or not or can a person be prosecuted irrespective of whether the importer is granted permission to import the good or not? What safeguards are in place to ensure that the detention regime and the post import permission regime operates fairly?

The answer to the Committee's question is as follows:

Application for a post import permission does not preclude the possibility that an importer may later be prosecuted for an offence. However, a prosecution may not proceed until the outcome of the application for a permission is known, as the goods would no longer be prohibited imports if a permission were granted.

The decision making process on prosecution is governed by a number of factors, and will be unchanged by these amendment provisions. They include:

1. The nature of the prohibited or restricted goods.
2. Whether the goods have been declared or concealed, i.e. was there any intent to mislead Customs.
3. The volume or value of the goods (for example a single item versus a commercial quantity)
4. The known history of the offender.
5. The circumstances of the offence, and the relevant evidence to support a prosecution.

The new permission arrangements are covered by the existing safeguards that apply to the seizure of prohibited and restricted goods. Any goods seized by Customs may later be the subject of a claim for return by the importer, within a statutory deadline. Such claims are then subject to a hearing by magistrate who makes a determination on the status of the goods, and as appropriate, orders the return of the goods or issues a condemnation order.

It is important to note that the current legislation usually requires an importer to obtain any required permissions prior to the arrival of the goods in Australia. In certain circumstances, however the importer may have been unable to obtain the necessary permission, or have been unaware of the requirement to obtain a permission, before the goods have arrived. The new post importation permission arrangements are intended to ensure these importers are not unfairly disadvantaged, and are of themselves intended as a safeguard measure to assist importers to conform with the law.