



Australian Government
Australian Customs Service

**SUPPLEMENTARY SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL LEGISLATION
COMMITTEE INQUIRY INTO THE
CUSTOMS LEGISLATION AMENDMENT (MODERNISING IMPORT
CONTROLS AND OTHER MEASURES) BILL 2006
JULY 2006**

Introduction

This supplementary submission is made by the Australian Customs Service in response to issues raised in the Law Council of Australia's submission to the Legal and Constitutional Legislation Committee inquiry into the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006*.

Introductory Comments

The submission put forward by the Law Council of Australia (LCA) covered a number of broad issues including:

- Extent of change to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*;
- Duty recovery and Customs prosecutions;
- Introduction of surrender bins and an Infringement Notice Scheme; and
- Singapore-Australia Free Trade Agreement Amendments.

Customs response to the major issues raised by the LCA is provided below.

Extent of Change to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*

The LCA stated that the Bill contains the seventh set of amendments to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (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.

Duty Recovery and Customs Prosecutions

The LCA has suggested that Customs resources would be better served making amendments to provisions of the Customs Act addressing duty recovery and Customs prosecutions.

Duty Recovery

In relation to duty recovery, the LCA has stated that current policy allows Customs an indefinite period to recover customs duty without a corresponding indefinite period for importers to seek refunds of overpaid duty.

Following the decision of the High Court in *Malika Holdings Pty Ltd v Stretton* (Malika), Customs position is that most duty recovery activity is authorised by section 153 of the *Customs Act 1901* (Customs Act). Section 153 is not limited to fraud and is not limited in time. The only exception to this 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. This position was supported by the Full Federal Court decision in *Parks Holdings trading as Gladstone v CEO of Customs* (Gladstone).

Although section 153 is not limited in time, Customs practice 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.

Customs 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 LCA with an invitation to provide a submission to Customs on the proposed amendments.

Customs Prosecutions

In relation to amendment of provisions dealing with Customs prosecutions, the LCA has suggested that Customs is not addressing reform in this area as the issue has not been discussed with industry or other interested parties.

Customs is in the process of developing a response to Customs specific recommendations of the Australian Law Reform Commission (ALRC) Report 95 entitled Principle Regulation. Customs has developed criteria for classifying offences as civil or criminal. 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.

As there are a number of offences in the Customs Act, the project is large and extremely complex and will require some time to complete. When the consultation rounds within Government have been completed, Customs intends to consult with industry and interested parties before implementing any amendments.

Introduction of Surrender Bins and an Infringement Notice Scheme

The proposed introduction of Subdivision GB of Division 1 of Part XII and Subdivision B to Division 5 of Part XIII of the *Customs Act 1901* (the Act) will allow for the establishment of a tiered response to the handling of prohibited imports.

Passengers to Australia import a significant number of items that are controlled under the Customs (Prohibited Imports) Regulations 1956 (the Regulations) that are low value and low risk. 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. Customs is proposing the introduction of a regime that will provide sanctions appropriate to the level of threat to the community and which will reduce the time spent by Customs officers on administration and the level of post-seizure claims made on seized items.

Customs will be undertaking consultation regarding the operational impact of the surrender bin and infringement notice scheme through the Passenger Facilitation Taskforce.

The LCA made a number of comments in its submission to the Inquiry regarding Customs proposed introduction of surrender bins and an Infringement Notice Scheme (INS). These comments are addressed below.

Surrender Bins

Prohibited Imports to be Included in the Surrender Bin Regime

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 blow pipes, flick knives, nunchakus, electric fly swatters, and electric shock devices.

Customs believes that method of addressing prohibited items should be commensurate with the level of threat posed to society. The proposed surrender regime is to provide an alternative to the current process of seizing all prohibited imports. This regime is aimed at one off, minor instances of the importation of prohibited items.

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. Providing importers with the option to surrender prohibited items will streamline the process and minimise the associated administrative burden.

As a part of the policy implementation, Customs will determine which prohibited imports controlled under the *Customs (Prohibited Imports) Regulations 1956* 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 surrender bin regime and/or the infringement notice scheme.

Timeframes for decision to surrender goods

The proposed regime imposes no limit on the amount of time the importer takes to make a decision regarding the surrender of goods, however, the decision to surrender must be made before leaving the Customs controlled area.

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 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.

Compensation in respect of goods that have been surrendered

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 in the first instance.

Issuance of an infringement notice for goods subject to the surrender bin regime

The option to surrender lower risk community and consumer protection related items will only be given to those importers that have not concealed the prohibited items. Where goods have been concealed, surrender will not be an option and an infringement notice will be issued.

A person importing unconcealed prohibited items that are subject to the surrender bin regime will not be issued with an infringement notice

Infringement Notice Scheme

New regime for issue of infringement notices

The proposed introduction of Subdivision B to Division 5 of Part XIII to the Act will introduce an infringement notice scheme (INS) to the aviation and post environments. This new regime is unrelated to the 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.

Prohibited Imports to be subject to the Infringement Notice Scheme

As a part of the policy implementation, Customs will determine which prohibited imports controlled under the *Customs (Prohibited Imports) Regulations 1956* 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 surrender bin regime and/or the infringement notice scheme.

Legislative Instruments

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 Act.

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. It would therefore be inappropriate to amend the section 243ZG as suggested.

Delegations to issue infringement notices

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.

Condemnation of goods

The introduction of the infringement notice scheme is intended to provide an alternative to prosecution for goods that do not warrant further action. 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 offence. However, liability for the offence is discharged upon payment of the notice.

Singapore-Australia Free Trade Agreement Amendments

Customs welcomes the LCA comment (page 3 of its Submission) that its Business Law Section appreciates the need for changes to SAFTA.

With reference to the LCA comment that there appear to be no obvious reasons for the expedited introduction of the Bill, the LCA may not be aware that in Customs submission of 7 July 2006 to the Senate Legal and Constitutional Legislation Committee, Customs noted that the proposed legislative amendments resulted from a Ministerial Review (Australia and Singapore) in 2004. As the next proposed review is intended for 2007, it would be timely to implement the outcomes of the 2004 review.

**AUSTRALIAN CUSTOMS SERVICE
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