

Ms Julie Dennett
Acting Committee Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Ms Dennett,

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

I refer to your email of 26 June 2006 inviting the Law Council to make a submission to the Senate Legal and Constitutional Legislation Committee's parliamentary inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006.

I have pleasure in enclosing a submission which has been prepared by the Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia.

Please note that, owing to time constraints, the submission has been approved by the Business Law Section but has not been reviewed by the Council of the Law Council of Australia.

Yours sincerely,



Peter Webb

Secretary-General

10 July 2006

Enc.

LAW COUNCIL OF AUSTRALIA
BUSINESS LAW SECTION
CUSTOMS AND INTERNATIONAL TRANSACTIONS COMMITTEE

***SUMMARY OF SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL
COMMITTEE***

***INQUIRY INTO THE PROVISIONS OF THE CUSTOMS LEGISLATION
(MODERNISING IMPORT CONTROLS AND OTHER MEASURES) BILL 2006***

Introductory Comments

1. The Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia (the "**Committee**") welcomes the opportunity to make this submission ("**Submission**") regarding the *Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006* ("**Bill**").
2. The Committee has a significant history of submissions in relation to Customs – related legislation in recent times. These include recent submissions to Parliamentary inquiries into the following areas –
 - (a) The initial Bill for the "International Trade Modernisation Legislation" (formerly known as the Customs Legislation Amendment and Repeal (*International Trade Modernisation*) Act 2001).
 - (b) Strict and Absolute liability offences in Commonwealth legislation.
 - (c) Search, Entry and Seizure powers in Commonwealth legislation.
 - (d) The Modern Day Usage of Averments in Customs prosecutions.
 - (e) The Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006.
3. The Committee would welcome the opportunity to make further submissions or provide further information in relation to the Bill.
4. Members of the Committee are also involved in other relevant industry forums including membership of the Customs National Consultative Committee and the reference group on the current administrative review of Australia's anti-dumping regime.
5. The Committee must express its concerns and reservations that the Bill represents yet another amendment to the *Customs Act 1901* ("**Act**") and is the seventh set of amendments to the Trade Modernisation Legislation. The

Committee is concerned that these regular amendments do not aid easy comprehension of the legislation by interested parties. The Committee shares the view of other affected parties (such as the Customs Brokers & Forwarders Council of Australia, the Australian Law Reform Commission and the House of Representatives Standing Committee of Legal and Constitutional Affairs), that the Act requires extensive review to remedy areas of uncertainty.

6. The Committee is also concerned as to recent reports regarding proposed reform to the structure of committees conducted in the Senate. The Committee is firmly of the view that Senate Committees and the investigations they conduct represent an important part of the checks and balances on the actions of the Australian Parliament. As a result, the reported reforms are of significant concern.

Summary of Submissions by the Committee

The Submission falls into two main areas being preliminary comments regarding the Bill and substantive comments on provisions of the Bill.

Preliminary Comments on the Bill

1. As set out in the introductory paragraph the Committee wishes to raise its traditional concern as to the unrelenting piecemeal changes to the Act. During the very recent review of the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006 ("**Border Bill**"), the Committee lamented the process by which these piecemeal amendments were being made to the Act. The report ("**Report**") in relation to the Border Bill from this Senate Legal and Constitutional Committee ("**SLACC**") contained reference to comments by Customs (at paragraphs 3.4 to 3.8 of the report) that the changes incorporated in the Border Bill were only technical and were subject to the vagaries of availability of resources including resources within the Office of Parliamentary Council. The Committee is surprised that this Bill should be introduced so quickly after the Border Bill especially as the Committee is of the view that there are some significant changes introduced by this Bill. For example, the Bill implements another, entirely separate regime for the issue of infringement notices. This will create huge additional confusion. The Committee reiterates its view that the parties subject to the Act are being significantly disadvantaged by the repeated and regular changes to the Act. It seems grossly unfair to the Committee that the maxim "ignorance of law is no excuse" should be applied to those subject to the Act given these regular changes.
2. The Committee is concerned that the Bill has been introduced with no obvious consultation. Customs regularly place significant reliance on their consultation processes. However, the Committee is unaware of any consultation regarding the Bill.
3. The Committee is unaware of the imperative driving the introduction of the Bill. In paragraphs 3.6 of the Report, the representative of Customs identified some legislative provisions which were under review. The matters the

subjects of this Bill were not included in that reference. While the Committee appreciates the need for changes to the provisions regarding the Singapore and Australian Free Trade Agreement, there appear to be no obvious reasons for the expedited introduction of the Bill. To that effect, the Committee believes that the apparently limited resources of Customs and the Parliament could best be addressed to focus on other fundamental amendments to the Act such as:

- (a) changes to the 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 customs duty; and
- (b) changes to the Customs prosecution provisions (and averment provisions), recommended by the Australian Law Reform Commission ("**ALRC**") in its reports numbered 60 (entitled "Customs and Excise") ("**Report 60**") from 1992 and 95 (entitled "Principled Regulation") ("**Report 95**") from December 2002. The inquiry into the use of averment powers by Customs by the House of Representatives Standing Committee described above also recommended amendments to the Customs prosecution provisions. The recent response by Government to that inquiry intimated that Government was undertaking a review of the Customs prosecution provisions. However, no such reform has been discussed with industry and has not been sighted by interested parties, notwithstanding that nearly four years have expired since the release of the Report 95 and 14 years have expired since Report 60. For these purposes, the Committee recommends to the SLACC that the Customs prosecution provisions warrant the most urgent review. This urgency is evidenced by the decision of the Queensland Supreme Court in *CEO of Customs v. Labrador Liquor Wholesale Pty Ltd (No. 2)* [2006] QSC 040. In this decision, the directors of the defendant company were sentenced to a term of imprisonment even though that was not provided for in the Act. The imprisonment was due to specific legislation in Queensland which provided for imprisonment of parties who do not pay fines (such as a penalty pursuant to a Customs prosecution). This result is in clear distinction to the decision of the New South Wales Supreme Court in *CEO of Customs v. Ozzy Tyre & Tube Pty Ltd & Anor* [2005] NSWSC 948. In this case the New South Wales Supreme Court endorsed an agreement between Customs and defendants whereby the defendants consented to convictions and orders of penalties but Customs agreed that it would not pursue the penalties on the basis that the defendant company and defendant directors were unable to pay those penalties. These decisions point to significant inconsistency and also raise real risks for any attempt to defend Customs prosecutions in Queensland, however legitimate the defence.

Substantive Comments

1. The Committee notes that the Bill provides for the surrender and detention of certain prohibited imports as well as providing a regime for post-importation approval for the importation of goods requiring approvals prior to their importation where no such approvals had been secured. The Committee has the following comments regarding these provisions:
 - (a) The Committee made a submission in June 2004 to the Senate Standing Committee for the Scrutiny of Bills Inquiry into Entry, Search and Seizure provisions in Commonwealth Legislation. The submission by the Committee to that Inquiry addressed provisions similar to those subject to the amendment contemplated by the Bill. The introduction of the Bill serves as a reminder that the Senate Standing Committee for the Scrutiny of Bills does not appear to have completed its Inquiry which the Committee believes now merits completion.
 - (b) The proposed new Subdivision GB of Division 1 of Part XII provides for "surrender of prescribed prohibited imports in Section 243AA places as an alternative to seizure of those goods". For these purposes, the Committee makes the following comments:
 - (1) the Committee seeks clarification of the type of prohibited imports to be prescribed by regulation as being subject to these provisions;
 - (2) the proposed new Section 209N 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 matters set out in paragraph (a) of that section. It is unclear to the Committee what policy objective is being served by conditioning the surrendering of goods on an officer of Customs holding a certain belief. 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 Committee's view that the surrendering of prohibited imports and prohibited exports should be encouraged and this could be enabled by enabling any prohibited import to be voluntarily surrendered to Customs and presumably without penalty;
 - (3) the proposed new Section 209N also requires the importer be advised by Customs of the various options available to him/her for dealing with the goods and the importer can then decide whether to surrender the goods to Customs. No provision appears to have been made as to how long the importer may consider the available options and whether the importer can seek legal or other advice before making a

decision. The Committee considers that provision should be made for both these matters.

- (4) the proposed new Section 209Q provides importers with the right to apply to court for compensation in respect of goods that have been surrendered. As the costs of applying to a court for compensation would likely exceed the amount of compensation, the Committee 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;
- (5) the proposed new Section 209P(a) indicates that no prosecution 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 be taken while an infringement notice 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; and
- (6) the proposed Subdivision GC of Division 1 of Part XII provides for post-importation permission for certain prohibited imports. However, there is still no clarity as to the type of goods which will be subject to this element of the regime. The new proposed Section 209T indicates that Subdivision GC will apply to goods as prescribed. Accordingly, the Committee recommends some clarity needs to be provided as to the application of the Subdivision.

2. The Committee notes that the Bill proposes to introduce a new Subdivision GC to Division 1 of Part XII of the Act providing for the detention of certain prohibited imports that are to be prescribed by regulations for the purposes of this Subdivision. The Committee expresses concern that the type of prohibited imports to which the Subdivision 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. It is unclear to the Committee 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 proscribed 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.

3. The Committee notes that the Bill proposes to include a new Subdivision B to Division 5 of Part XIII. This provides for the issue of an infringement notice for certain offences relating to prohibited imports and restricted access areas. The Committee wishes to make the following observations in relation to these provisions.
- (a) Customs introduced an earlier scheme for the imposition of infringement notices in relation to other types of offences as part of the Trade Modernisation Legislation. The Committee made various observations regarding the adoption of infringement notices in relation to the Trade Modernisation Legislation which are also endorsed for these purposes.
 - (b) The proposed new Section 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 Committee wishes for clarity from Customs as to which goods will trigger liability by way of infringement notice.
 - (c) The proposed new Section 243ZG provides for the CEO (of Customs) by "legislative instrument" to make guidelines in respect of the administration of the Subdivision to which he or she must have regard when exercise powers under the Subdivision. In practice, the Committee assures that the guidelines will be considered by delegates of the CEO who are empowered to issue infringement notices. This procedure raises the following additional questions.
 - (1) The Committee is concerned as to confusion created by an entirely new regime for the issue of infringement notices.
 - (2) The guidelines are described as being "a legislative instrument". However, the corresponding provisions which currently apply in the Act (in Section 243XA(2)) state that "the guidelines are a disallowable instrument" for the purposes of Section 46A of the *Acts Interpretation Act* 1901. It would be appropriate if Section 243ZJ were amended to reflect that the guidelines will constitute a disallowable instrument.
 - (3) In adopting a new infringement notice scheme in relation to the offences, the Committee would draw the attention of the Inquiry to Chapter 12 of Report 95. Recommendation 12-1 to 12-10 of Report 95 set out some recommendations regarding an infringement notice scheme. The Committee should seek clarification from Customs that the infringement notice scheme to be adopted for these offences in the new Subdivision will comply with each of the recommendations of the ALRC.

- (4) The guidelines associated with these new offences are extremely important. The Committee 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.
- (5) The current guidelines associated with the 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. Presumably, that process is to continue. 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, we would recommend that this provision be reviewed as to its practical application.
- (6) There may be some inconsistency between proposed new paragraph 243ZI(1)(f) and 243ZK(4) (which state that compliance with an infringement notice is not an admission of guilt or liability) and the provisions of the proposed new Section 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 Committee 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 Committee 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.

Conclusion

The Committee would welcome the opportunity to make further submission on these topics and to appear before any hearing of the Inquiry.