

Ref No:

5 January 2007

Ms J Morris
Acting Committee Secretary
The Senate
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600



Dear Ms Morris

Re: Inquiry into Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006

Thank you for providing the opportunity for the Customs Brokers & Forwarders Council of Australia Inc. (CBFCA) to make a submission to the Standing Committee on Legal and Constitutional Affairs (the Committee) Inquiry into the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006 (the Bill).

The CBFCA notes with interest the following provisions in th Bill:

- duty recovery and payments of duty under protest, and
- employment arrangements for customs brokers

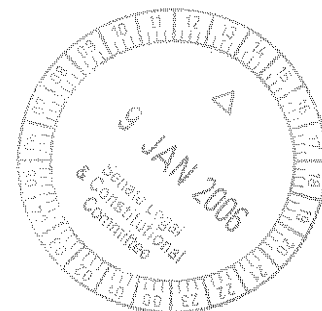
As an opening comment in relation to these issues, the CBFCA by way of an *In Confidence* arrangement with Australian Customs Service (Customs) was provided with the opportunity to make comment on the *Exposure Draft* of the proposed amendments to Section 153 and 165 of the Customs Act 1901 (the Act).

A copy of the CBFCA's letter to Customs on *Exposure Draft* is enclosed.

As regards the issue of employment arrangements for licensed individual customs brokers, the CBFCA was not consulted in the development of Customs policy in relation to those arrangements.

Duty recovery and payments of duty under protest

As to the proposed changes as referenced in the Bill, the CBFCA again emphasises that the definition of *owner* within Section 4 of the Act is wider than the commercial understanding of owner and the precedent(s) of Customs seeking recovery of a debt from other than the owner (as referenced in the import declaration) remains at issue for the CBFCA and its members.



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The CBFCA understands that Customs acknowledges that recovery of customs duty should be from the person who has the legal obligation to pay any customs duty. The CBFCA does not see that service providers, such as customs brokers, should be seen as the party which has that legal obligation (notwithstanding the provisions of Division 2, Part XI of the Act as to authorisation). The provisions of the United Nations Convention on Contracts for the International Sale of Goods clearly defines the parties to the contract of sale. It is therefore clear that the definition of *owner* within the Act needs early review.

As to the aspects of *fraud* or *evasion* it is appropriate to determine the party with the intent as to the *fraud* or *evasion* and clarification on this determination is required from Customs by way of a policy statement and appropriate workplace instructions to Customs compliance officers.

The CBFCA sees that the new provisions in the Bill have consequences for customs brokers (both individual and corporate) and other advisers who by way of advice or action may have contributed to a situation in which customs duty may have been underpaid. For many years customs brokers and other advisers have determined their exposure to claims for negligence or lack of duty of care based upon the existing legislative twelve (12) months provision.

The new provisions will see service providers with a longer period of exposure than previously anticipated. Such exposure could exist well after the entity or individual may have finalised business arrangements with the principal and or have left the business or industry altogether.

These issues will have an impact on the *run off* provisions for corporate member's professional indemnity insurance. If appropriate *run off* coverage has not been availed of a claim may arise where there is no professional indemnity coverage. This may leave the corporate customs brokerage, individual customs broker or other service provider exposed to claims for negligence without the benefit of adequate professional indemnity coverage.

While Customs may suggest that this is business related issue and outside the scope of its regulatory control what is appropriate is that Customs recognise the impact of such legislative change on business requirements and practices.

While the issues of *fraud* or *evasion* is accepted by the CBFCA as to penalty and / or restitution the aspects of a mistake made *knowingly*, *recklessly* or *otherwise* (*otherwise* being the key determinant) under the proposed sub section 165(5) of the Bill will see a four (4) year period for recovery and requires consideration.

As to why it should take Customs, under its audit regime, such a significant period of time to undertake compliance audits (based upon the existing level of compliance monitoring officers) appears less than acceptable in business terms. It is the CBFCA's position that Customs should conduct audits within commercially realistic timeframes so as to provide appropriate levels of certainty to importers, and their service providers, as to goods as imported meeting regulatory requirements.

It should be noted that there is a difference in terms of underpayment of tax and / or GST as to customs duty recovery in that for tax purposes the margin or profit has been received by the seller of the goods and incorporated into profits (and / or loss).

In terms of short payment of customs duty the end sale price of the goods does not provide for any additional customs duty that may be payable and as such no margin has been achieved in terms of recovery of the customs duty component.

As to the commercial and business implications relating to the importation of goods and their appropriate Customs clearance, while opportunity to have all Customs requirements (valuation, classification or use of concessional instruments etc.) agreed by Customs at the time of the release of the goods such arrangements, at the time of entry, are well outside of the scope of Customs resources to meet in a timely manner.

While Valuation and Tariff Advices and *Amber Line* lodgement provide a certain level of relief from mistakes made *otherwise* (under the existing self assessment regime) what is clear is that mistakes made *otherwise* will continue to be made by importers and / or their service providers. This is the reality of human intervention in any process.

The four (4) year time frame for recovery in such circumstance does, not in the opinion of the CBFCA, provide equity or recognition of commercial reality.

Employment arrangements for customs brokers

The CBFCA became aware, in August 2006, of work being undertaken by Customs as to changes to Part XI of the Act as it relates to licensed individual customs brokers being able to become nominees for more than one licensed corporate customs brokerage.

The CBFCA at that time wrote to Customs and stated, *inter alia*:

"Should a change of the legislation as regards nominees be applicable, the CBFCA would like to discuss with Customs the ramification of any such change.

The CBFCA looks forward to discussing these issues with Customs."

Customs responded that it was seeking to amend legislation in terms of nominees and would be happy to discuss issues regarding locum customs brokers with the CBFCA. Suffice to say that the first the CBFCA was aware of any further activity in relation to the proposed amendments was the tabling of the Bill.

The CBFCA notes from a regulatory point of view that the implications of the amendments would be perceived as being negligible. From a business perspective a need would exist for all contracts of employment of licensed individual customs brokers undertaking (additional) part time arrangements to be appropriately reviewed so as to ensure provision exists in terms of good governance principles, confidentiality of information and more appropriately issues relating to termination of employment should an individual licensed customs broker undertake part time work with another licensed corporate customs brokerage without authority or employer clearance.

In addition there are business requirements which would need to be assessed in terms of digital certificates to access Customs systems and the implications where a licensed corporate customs brokerage may subcontract or allow its licensed individual customs brokers to work with other licensed corporate customs brokerages. The key issue being Customs history records that may arise for mistakes made *knowingly, recklessly* or *otherwise* and which attach to the licensed corporate customs brokerage as well as to the licensed individual customs broker.

The question is put that in the determination by Customs of any Infringement Notice how would such compliance history be determined where a mistake may be made by the individual while employed part time or in a locum capacity with another licensed corporate customs brokerage?

Customs policy and workplace instructions on this issue needs to be determined accordingly.
Should you require any further information in relation to these issues raised, please do not hesitate to contact me. Please note that I will not be able to attend the Inquiry (if needs be) on 22 January 2007 due to other commitments.

Kind regards

A handwritten signature in black ink, appearing to read 'S. J. Morris', with a stylized flourish at the end.

STEPHEN J MORRIS
Executive Director

Ref No:

8 November 2006

Ms M Grant
National Director
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CBFCA

A U S T R A L I A

Communicate. Innovate.

Dear Marion

Re: Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006

Thank you for providing the opportunity for the Customs Brokers & Forwarders Council of Australia Inc. (CBFCA) to provide comment on the Exposure Draft to the abovementioned Bill.

From the CBFCA's perspective it appears that the changes contemplated to the legislation are based upon what is perceived by the Australian Customs Service (Customs) as contemporary tax practice. In particular as to the ability to prove a debt based upon the legislated maintenance of commercial documents, in the case of Australian Taxation Office to be held by the taxpayer for a period of seven (7) years, or as to Customs requirements for importers for a period of five (5) years.

In turning to the proposed amendments, the following comments are provided.

1. SECTION 165

• **OWNER**

Within the provisions of the proposed Section the CBFCA understands that any action contemplated as to recovery of the amount of duty that is due and payable in respect of goods relates to the *owner* of the goods which would have been ascertained or determined by way of the *owner* as referenced on any import declaration.

However the definition of *owner* within Section 4 of the Customs Act 1901 (the Act) is considerably wider than the commercial understanding of *owner* and there has been the precedent¹ of Customs moving outside of the conventional or commercial definition of *owner* and Customs has used the definition within the Act to seek recovery of a debt from other than the *owner* as referenced on the import declaration.

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¹ Clark v The Chief Executive Officer of Customs 2005 SASC 165



To this end it may be appropriate to ensure that service providers such as customs brokers would not be regarded as the party responsible for the amount of Customs duty that is due and payable in respect of goods. Perhaps a definition of *importer* may now be appropriate in terms of Section 4 to the Act and the linking of same to Section 165 and any other provision in the Act.

• FRAUD OR EVASION

As to recovery in court it is noted within Section 165 (5)(b) that any debt may be recovered in a court of competent jurisdiction when the debt arose as a result of *fraud* or *evasion*.

As to these terms (it is understood under existing Section 234 (1) the term *evade* is used) it is the CBFC's understanding that these do not appear elsewhere in the Act. Perhaps it may be prudent to link Section 165 (5)(b) to those existing Sections within the Act where the activity is referenced.

In addition it is not clear as to how underpayments which arise not from *fraud* or *evasion* but from "*recklessly or otherwise*" will be treated. Will recovery be only subject to demands for a period of four (4) years?

2. OFFSETS

In terms of the proposed provisions of Section 165A as to off sets the CBFC would see this as a contemporary tax collection arrangements and improvement of process management for both industry and Customs. However within Section 165A (1)(b) the impact of "*in respect of goods if the amount of duty payable were paid*" as to persons who may participate in the Accredited Client Program (which envisages amounts paid on other goods) is not clear. Perhaps this issue requires further consideration.

COMMENT

In terms of the overall impact of the proposed amendments there are significant differences between customs duty recovery as to existing tax arrangements. In essence the difference being that any derived benefit as to tax arrangements flows to the entity within an agreed financial timeframe as against customs duty debt recovery where goods have already on sold and cost recovery is not available. It is therefore imperative that the *owner* or more appropriately the *importer* as referenced on the import declaration, be the party responsible for the debt.

There will also be tax implications for tax reassessment for *owners* or *importers* where demands made impact on profit or loss determination.

In relation to all compliance regimes the key component is *informed compliance* and it has not been the position of Customs, or most Australian regulatory agencies to provide, what could be regarded by industry as appropriate levels of education or training, to enable *informed compliance* to underpin self assessments regimes.

This is a serious deficiency which needs to be considered by Customs in terms of compliance requirements and to suggest *that it is on the Web* in not an appropriate methodology of informing industry of compliance obligations and or changes in the Customs administered legislation.

The CBFC would be happy to further address these issues with you.

Kind regards



STEPHEN J MORRIS
Executive Director