

CHAPTER 1

PURPOSE OF THE BILL AND KEY ISSUES

1.1 On 28 November 2012, the Minister for Justice, the Hon Jason Clare MP (Minister), introduced the Customs Amendment (Miscellaneous Measures) Bill 2012 (Bill) into the House of Representatives.¹ On 29 November 2012, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 13 March 2013.²

Purpose of the Bill

1.2 The main purpose of the Bill is to introduce a new offence into the *Customs Act 1901* (Cth) (Customs Act) for bringing 'restricted goods' into Australia.³ The Bill will also make a number of technical amendments to the Customs Act, the *A New Tax System (Wine Equalisation Tax) Act 1999* (Cth) and the *Import Processing Charges Act 2001* (Cth), which are intended to improve regulation in areas such as entry of ships and aircraft for home consumption, warehouse licencing arrangements and timeliness of cargo reporting.⁴

1.3 The Australian Customs and Border Protection Service (Customs) consulted industry through the release of an exposure draft of the Bill in September 2012.⁵ Customs has advised the committee that key stakeholders responded positively to the proposed changes contained in the exposure draft.⁶

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* on 5 December 2012, and wrote to 65 stakeholders inviting submissions by 31 January 2013. Details of the inquiry, including the Bill and associated documents, were made available on the committee's website at www.aph.gov.au/senate_legalcon.

1.5 The committee received two submissions – from the Australian Shipowners Association (ASA) and Customs – and no public hearings were held for the inquiry.

1 House of Representatives, *Votes and Proceedings*, No. 145–28 November 2012, pp 2002-2003.

2 Senate, *Journals of the Senate*, No. 129–29 November 2012, pp 3480-3481.

3 Explanatory Memorandum (EM), p. 2.

4 EM, p. 2.

5 Australian Customs and Border Protection Notice No. 2012/53, Customs Amendment (Miscellaneous Measures) Bill 2012 Exposure Draft, available at: <http://www.customs.gov.au/notices/acn/default.asp> (accessed 25 February 2013).

6 *Submission 2*, p. 6.

Key provisions of the Bill

1.6 Schedule 1 of the Bill is comprised of nine Parts.

Part 1 of Schedule 1 – new offence for bringing 'restricted goods' into Australia

1.7 Part 1 of Schedule 1 of the Bill proposes amendments to the Customs Act to introduce an offence for bringing into Australia a new category of goods, known as 'restricted goods'. Proposed new section 233BABAE (item 6 of Schedule 1), which will create the offence, contains the definition of 'restricted goods':

restricted goods are goods:

- a. that, if imported, would be prohibited imports; and
- b. that are prescribed by the regulations for the purposes of this definition.⁷

1.8 In his second reading speech, the Minister explained that '[i]nitially, the new category of restricted goods will be limited to child pornography and child abuse material' but that, in future, it 'could be extended to give effect to international agreements or to address matters of international concern'.⁸ Proposed new subsection 233BABAE(4) provides that the proposed provision only has effect for 'purposes related to external affairs, including: for purposes giving effect to an international agreement to which Australia is a party; and for purposes related to addressing matters of international concern'.⁹

1.9 In its submission to the inquiry, Customs explained the basis for the proposed changes:

On occasion, Customs and Border Protection identifies the presence of child pornography in the personal effects of commercial ship's crew. As there is no intention to import these goods [however], the owner has not breached Customs law.¹⁰

1.10 Under the existing law, when such items are identified, Customs may either: refer the matter to state or territory police for consideration of offence charges; or Customs may secure the goods on board or withhold the goods.¹¹ Where Customs

7 Proposed new subsection 233BABAE(3) of the *Customs Act 1901* (Cth) (Customs Act).

8 *House of Representatives Hansard*, 28 November 2012, p. 13667.

9 As the 'restricted goods' being brought into Australia are not being imported, the Commonwealth cannot rely on the Trade and Commerce provision in subsection 51(i) of the Constitution. The Commonwealth is relying on the external affairs power in subsection 51(xxix) of the Constitution on the grounds of domestic implementation of international treaty obligations, and matters of international concern: EM, p. 7.

10 *Submission 2*, p. 2. The EM explains that, although child pornography and child abuse material is a prohibited import, when detected in the personal effects of ship crew, as the material is not intended to be imported it is not considered to have 'landed, or intended to be landed, in Australia' so cannot be seized as a prohibited import: EM, p. 6.

11 Australian Customs and Border Protection Service, *Submission 2*, p. 2.

secures or withholds the goods, the goods are returned to the owner on departure from Australia.¹²

1.11 The amendments proposed in Part 1 of Schedule 1 will enable Customs to seize 'restricted goods' without warrant, when they are detected, by amending the definition of 'special forfeited goods'¹³ to include 'restricted goods'¹⁴ (item 4 of Schedule 1). Where 'restricted goods' are seized, the person will be liable for an offence.¹⁵

1.12 The proposed new offence will carry a penalty of 1,000 penalty units.¹⁶ As the EM explains:

Given the nature of the material to be included as restricted goods, 1000 penalty units is appropriately high so as to deter people from bringing into Australia the kind of goods which will be restricted goods.¹⁷

Parts 2-9 of Schedule 1 – other amendments

1.13 The remaining eight Parts of Schedule 1 make a number of technical amendments, including:

- clarifying that self-powered ships and aircraft that are imported or intended to be imported are subject to the control of Customs and should be entered for home consumption (Part 2 of Schedule 1);
- amending a number of valuation definitions to ensure consistency with the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (World Trade Organisation Customs Valuation Agreement) (to give effect to Australia's obligations under the World Trade Organisation Customs Valuation Agreement) (Part 3 of Schedule 1);
- enabling officers of Customs to designate a customs-controlled area for both passengers and crew, and the Chief Executive Officer (CEO) of Customs to designate a seaport as a customs-controlled area (Part 4 of Schedule 1);
- allowing the CEO of Customs to request further information from an applicant, to address any concerns prior to the grant of a warehouse licence and without the need for the applicant to submit a new application (Part 5 of Schedule 1);

12 Australian Customs and Border Protection Service, *Submission 2*, p. 2.

13 'Special forfeited goods' can be seized by Customs without the need for a warrant at a Customs place: EM, p. 6.

14 EM, p. 7; Australian Customs and Border Protection Service, *Submission 2*, p. 2.

15 EM, p. 6. Proposed new subsection 233BABAE(3) of the Customs Act provides that the person will not be subject to an offence if they have brought the goods into Australia 'in accordance with a written permission given by the Minister'.

16 Proposed new subsection 233BABAE(1) of the Customs Act.

17 EM, p. 6.

- aligning the treatment of the timeliness of reports of relevant cargo reporters to ensure that, in the cases of unexpected changes to the time of arrival of voyages or flights to Australia, certain cargo reporters are not liable for an offence for not making their reports within the original prescribed timeframe (Part 6 of Schedule 1);
- repealing the legislation which introduced the accredited client program, since that program has never been implemented operationally (Part 7 of Schedule 1);
- repealing expired transitional moratorium periods for electronic cargo reporting (Part 8 of Schedule 1); and
- making other minor technical amendments (Part 9 of Schedule 1).¹⁸

Issues raised during the inquiry

1.14 The ASA's submission expressed support for 'most of the content of the [Bill], and the relevant clarifications that [it] provides';¹⁹ however, the ASA considered that 'there are additional urgent matters for consideration in relation to the way the [Customs Act] is being implemented in very recent times' in the context of ship importation and home consumption requirements.²⁰

1.15 The ASA was concerned in relation to the 'consequences of the proposed amendments to subsections 71A(7) and (8) and subsections 68(2) and (3) set out in the Bill [items 13 and 12 of Schedule 1, respectively], and the new policy approach of Customs...in relation to ship importation'.²¹ In particular:

The circumstances under which ships are deemed by Customs to be imported and required to be entered for home consumption has changed. Customs decisions to import seem now to be based on a very strict interpretation of whether the vessel has entered the commerce of Australia and no longer consider the actual intentions of the operator. This is an issue which is currently of great concern to ship owners and operators and which is not addressed and is potentially exacerbated as a result of the proposed amendments.²²

1.16 The ASA also pointed to the 'significant uncertainty within industry' regarding the policy connection between recent changes effected by the *Coastal Trading (Revitalising Australian Shipping) Act 2012* in relation to voyage permits and importation decisions by Customs about when a vessel has entered into the commerce of Australia.²³ Specifically, '(v)essels are now being required to be imported that

18 EM, p. 2 and pp 6-18.

19 *Submission 1*, p. 2.

20 *Submission 1*, pp 2 and 3.

21 *Submission 1*, p. 3.

22 *Submission 1*, pp 3-4.

23 *Submission 1*, pp 4-6.

would not have been previously',²⁴ which has 'significant negative flow on effects to Australian businesses and the Australian economy'.²⁵

1.17 Customs responded to the matters raised by the ASA as follows:

[T]he matters raised [by the ASA] are not relevant to the amendments proposed to be made in this Bill. Customs and Border Protection can also confirm that it does not have a new policy position in relation to importation of ships.²⁶

1.18 Further:

The proposed amendments are not about determining whether or not a ship is imported. The Bill is making clear that if self-powered ships or aircraft are imported or intended to be imported, they must (like all other goods) be entered for home consumption or warehousing in accordance with subsections 68(2) and 68(3) [of the Customs Act]. The Bill is clarifying existing policy.²⁷

1.19 The committee notes the concerns raised by the ASA, but is satisfied by the advice provided by Customs that these matters are not relevant to consideration of the Bill. The committee also notes that no other concerns have been raised in respect of the Bill.

Committee view

1.20 The main purpose of the Bill is to enable certain items, in the first instance child pornography and child abuse material, to be classified as 'restricted items' and therefore capable of being seized without warrant where found in the personal effects of a ship or aircraft's crew. The committee supports these proposed amendments.

1.21 The committee is of the view that the remaining amendments set out in the Bill are minor technical amendments that will assist in clarifying the law or removing now redundant provisions.

Recommendation 1

1.22 The committee recommends that the Senate pass the Bill.

Senator Trish Crossin Chair

24 *Submission 1*, p. 6.

25 *Submission 1*, p. 8.

26 Australian Customs and Border Protection Service, answer to written question on notice, received 28 February 2013, p. 1.

27 Australian Customs and Border Protection Service, answer to written question on notice, received 28 February 2013, p. 1.