



Customs Legislation Amendment (Border Compliance and other Measures) Bill 2006

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Law and Bills Digest Section

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Customs Legislation Amendment (Border Compliance and other Measures) Bill 2006

Date introduced: 29 March 2006

House: House of Representatives

Portfolio: Justice and Customs

Commencement: The operative provisions in sections 1 to 3, Schedule 6 and items 1 and 2 of Schedule 7 commence on Royal Assent. Schedules 1, 3 and 4 will commence the day after the Act receive Royal Assent. Schedule 2 will commence on the 28th day after the Act received Royal Assent. Schedule 5 will commence on a single day to be fixed by proclamation, however not later than 6 months after the Customs Legislation Amendment (Border Compliance and other Measures) Bill 2006 has received Royal Assent. Items 3 and 4 of Schedule 7 will commence retrospectively on 4 December 2003.

Purpose

The Customs Legislation Amendment (Border Compliance and other Measures) Bill 2006 (the Bill) will make amendments to the *Customs Act 1901* (the Customs Act) relating to:

- the disposal of dangerous goods
- security identification cards and card holders
- the Australia-United States Free Trade Agreement (AUSFTA)
- the criminal responsibility of customs officers, and
- the issuing of seizure warrants.

In addition, the Bill will implement the so-called ‘Accredited Client Program’.

Background

The Backgrounds to the individual measures in this Bill are addressed, where necessary, in the context of discussing the main provisions of the Bill.

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Main provisions

Schedule 1 – Dangerous goods

The proposed amendment will broaden the range of goods which can be disposed of by the Customs authorities. Currently, the Customs authorities are only able to dispose of a limited range of goods: perishable goods, live animals and unseaworthy vessels. **Item 1**, proposed **subsection 206(1A)** will enable the disposal of any goods if the relevant decision maker is satisfied that the retention of the good would constitute a danger to the public health or safety. Such goods will be classed as dangerous goods. The [Explanatory Memorandum](#) supplies as examples for such dangerous goods explosive materials and chemical or biological agents.

Schedule 2 – Unauthorised entry

The Bill proposes to make changes to the penal provisions in Part XIII of the Customs Act. Specifically, it is proposed to amend the provisions related to the unauthorised entry to places set aside for specific purposes under section 234AA of the Customs Act and to ships, aircraft or wharves.

Current law

Under the current law, no person shall enter into, or be in or on:

- a place which has been set aside by a Collector under subsection 234AA(1) of the Customs Act (paragraph 234A(1)(a)), or
- a ship, aircraft or wharf, or part of a wharf adjacent to that wharf where a ship is berthed, at a time when the personal baggage of disembarking embarking or passengers is examined (paragraph 234A(1)(b)).

The penalty for a violation of this provision is 50 penalty units or \$5 500.¹

Under subsections 234A(1A) and (2), some persons are exempt from the application of the general prohibition contained in subsection 234A(1). For example, the exemption applies to persons who enter a place set aside under subsection 234AA(1) by authority or as a holder of a specific security identification card (SIC) within the meaning of section 213A of the Customs Act.² In the latter case, it is also required that the person enters the place for employment purposes.

The SIC is a card of a kind specified in regulations made under the Customs Act (subsection 213A(7)). Regulation 170B of the Customs Regulations 1926 (Regulations) specifies two forms of security identification cards: the *Aviation Security Identification*

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Card (ASIC) and the Visitor Identification Card (VIC), both within the meaning of the Aviation Security Transport Security Regulations 2005 (the ASTS Regulations).

Part 6 of the ASTS Regulations regulates security identification and administrative issues relating to the ASIC and VIC. Under Division 6.5 of the ASTS Regulations, both cards may be issued only by so-called 'issuing bodies'.³ Division 6.3 of the ASTS Regulations stipulates a range of bodies considered to be 'issuing bodies'. Currently, issuing bodies include:

- Australian Customs Services (Regulation 6.12)
- Civil Aviation Safety Authority (Regulation 6.12A)
- Operators of security controlled airports (Regulation 6.14), or
- Other aviation industry participants or government agencies which have been approved by the Secretary (Regulation 6.15)

ASIC's and VIC's can expire, in which case they have to be returned to the issuing body under Regulation 6.45 of the ASTS Regulations. Further, the issuing bodies are equipped with the power to cancel an ASIC or VIC; Regulations 6.43 and 6.44 stipulate various circumstances in which the cancellation of a security card is mandatory or discretionary.

The proposed changes

The changes will only apply to persons who hold a SIC. **Item 2 of Schedule 2** will repeal the current paragraph 234A(1A)(ab), adding an additional requirement that a person holding a ASIC or a VIC may only be permitted to enter into, or be in or on at a relevant place if the person is:

- doing so for the purposes of his or her employment (proposed **subparagraph 234A(1A)(ab)(i)**), and
- not subject to a direction under proposed **subsection 234A(1B) (proposed subparagraph 234A(1A)(ab)(ii))**.

Item 4, proposed subsection 234A(1B) will confer upon a collector within the meaning of the Customs Act the power to issue a written notice to a SIC holder, directing the person not to enter into, or be in or on:⁴

- a place designated under subsection 234AA(1) (proposed **paragraph 234A(1B)(a)**), or
- a ship, aircraft or wharf, or part of a wharf adjacent to that wharf where a ship is berthed, at a time when the personal baggage of disembarking embarking or passengers is examined (proposed **paragraph 234A(1B)(b)**).

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Items 1 and 3 propose amendments to paragraph 234A(1A)(a) and (b) which will clarify that the authority to enter into, or be in or on either a place designated under subsection 234AA(1) or a ship, aircraft or wharf, must be given by a collector of customs.

Item 5 will repeal and substitute proposed **subsection 234A(2)**. It will remove the exemption in 234A(1) from staff not involved in the management of a place designated under subsection 234AA(1), wharfs, airports, ships or parts thereof. As a result, ‘cleaners, handymen, security staff and other staff’ not involved in the management of these places will need to satisfy one of the requirements set out in subsection 234A(1A).⁵

Comment

The proposed changes to the current law will add a second, cumulative layer to the exemption contained in subsection 234A(1A). This layer will be cumulative because under the proposed law, for a person to be eligible to enter the areas specified in proposed subsection 234A(1B), he or she must be:

- the holder of a security identification card, and
- must not be subject to a written direction by the Customs Authorities not to be in the place.

The [Explanatory Memorandum](#) states that:

In the circumstance where a person is a holder of a security identification card, it is proposed to tighten the exemption from the offence in subsection 234A(1). In addition to holding a [security identification] card, the person must also not be subject to a written direction from a Collector not to enter into, or be in or on the relevant place.⁶

Under current law, a variety of issuing bodies can issue security identification cards to employees and visitors. The proposed amendment will not only tighten the exemption in subsection 234A(1A), but will give the Customs authorities a stronger influence over who can access certain security sensitive areas.

This second layer of control proposed in this amendment warrants further comment:

- first, on the face of the proposed amendment, the discretion conferred upon the decision maker to issue a written notice directing a person not to be in a particular area is unfettered. The proposed legislation does not restrict the grounds upon which such a notice may be issued, nor does it specify limits as to against whom such a direction may be issued. Accordingly, based on the amendment, it is at least feasible that persons who ought to have access to places in which persons are held for the purpose of questioning or examination, could be subject to such notices. Examples would include lawyers who, despite being properly authorised, may be prevented from accessing such areas, significantly limiting their ability to advise persons of their rights and duties when searched or interviewed. The Law Council of Australia further

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mentioned union officials, doctors and translators who could be subject to such restrictions.⁷ In reply, Customs argues that section 234AA areas are designated sterile areas only to be accessed by certain people. Where the assistance of union officials or doctors is needed, such persons would be granted temporary escorted access to the area.⁸

- second, it appears that a decision made under proposed subsection 234(1B) will lack some of the hallmarks of natural justice. There is no legislative requirement that the decision-maker provides reasons for the decision to issue a direction under proposed subsection 234(1B). Further, there is no right to be heard granted to the person who will be subject to this notice. In addition, it has been noted that:

persons affected by a written direction from the [decision-maker] that they cannot enter Prescribed Places should be entitled to seek review of the direction (by way of administrative review and by way of judicial review).⁹

Customs has argued against this view that the decision made under proposed subsection 234(1B) will be a real-time instrument so that the review of such decisions is inappropriate to ensure the integrity of Australia's borders.¹⁰

- third, it seems that the amendment has the potential to create an ambiguity as to the scope of the exemption provided for in subsection 234A(1) of the Customs Act. On its face, the current law distinguishes between two different locations:
 - the area referred to as ‘the place’ pursuant to subsection 234AA(1), and
 - ships, aircrafts, wharfs or certain parts thereof (for the convenience of the reader, this location is referred to as the ‘other’ place).¹¹

The exemptions provided in subsection 234A(1A) reflect this distinction, referring to ‘the place’ in paragraphs 234A(1A)(a) and (ab) and to ships, aircrafts, wharfs or a part of a wharf in paragraph 234A(1A)(b). A further provision, subsection 234A(2), will provide a further exemption to members of authorities which have the management and control of airports and wharfs as long as these persons are in or enter the place for the purpose of management or control.¹²

Importantly, the power to issue notices under proposed subsection 234A(1B) is limited to persons who hold a SIC. Once such a notice is issued, it is envisaged that this person will be prohibited from entering or being in a location referred to as ‘the place’ or ‘the other place’ (proposed paragraphs 234A(1B)(a) and (b) respectively). However, on a plain reading of paragraph 234A(1A)(ab), a security card holder may only be exempt from the offence provision section 234A(1) if he or she enters into or be in ‘the place’ for employment purposes. As a corollary it seems to follow that a security card holder is not exempt if he or she enters into, or is in or on the ‘other place’ without separate authorisation. Against this background, the proposed insertion of proposed paragraph 234(1B)(b) is peculiar as it seems to provide the decision maker with the power to

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direct a person not to be within an area which, as indicated above, should be off-limits for security card holders in any event.

Parliament may want to consider whether the proposed amendment should be modified to:

- restrict the decision-maker's ability to limit access of, for example, lawyers and others to prescribed places
- comply with fundamental principles of natural justice by requiring the decision-maker to give reasons, providing for a right to be heard and permitting access to administrative and judicial review, and
- remove the potential ambiguity by clarifying the precise scope of exemptions applicable to security card holders.

Schedule 3 – US originating goods

The Bill proposes several amendments to the rules governing where goods originate for the purposes of the Australia-US Free Trade Agreement (AUSFTA). These rules are set out in Part VIII, Division 1C-US Originating Goods of the Customs Act. The reader may refer to the [Bills Digest](#) and the [Explanatory Memorandum](#) to the Australia-US Free Trade Agreement Bill 2004 for a discussion and examples of the complex rules of origin provisions.¹³

Goods taken from seabeds and outer space (Subdivisions A and B)

Under sections 153YA and YB, goods are considered to be wholly obtained or produced entirely in the US if these goods fulfil certain criteria. If they are considered to be wholly obtained or produced entirely in the US, the goods qualify for preferential tariff treatment under the AUSFTA.

The relevant criteria are set out in section 153YB. Under paragraphs 153YB(2)(g) and (h), goods will qualify, for example, if they are goods taken from:

- the seabed, or beneath the seabed, outside the territorial waters of the US by the US or a national of the US, but only if the US has the right to exploit that part of the seabed, or
- outer space by the US or a national of the US.

Importantly, both these criteria utilise the term 'national of the US'. The current provision in the Customs Act defines a 'national' of the US to be a natural person within the meaning given by Annex 1-A to Chapter 1 of the AUSFTA. Annex 1-A of the AUSFTA prescribes that, with respect to the US, a 'national' means a national of the United States as defined in Title III of the Immigration and Nationality Act or a permanent resident.¹⁴

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Items 1 to 4 of Schedule 3 of the Bill will make changes to these two criteria. Item 1 will repeal the current definition of ‘national’ set out above. Item 2 proposes to introduce a new definition of ‘person of the US’ into subsection 153YB(1), defining such person to be ‘a person of a Party, within the meaning, in so far as it relates to the US, of Article 1.2 of the AUSFTA. Article 1.2 of the AUSFTA stipulates a ‘person’ of the US to mean ‘a national or an enterprise’ of the US. This Article further provides that an enterprise of the US means an enterprise constituted or organised under US law and may include profit and not-for-profit entities, privately-owned or governmentally-owned or controlled entities, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization (Article 1.2.7. and 8. of the AUSFTA).

Items 3 and 4 will substitute the current wording of paragraphs 153YB(2)(g) and (h), inserting the proposed term ‘person of the US’. This amendment will broaden the scope of proposed **paragraphs 153YB(2)(g) and (h)** by expanding what qualifies as a good wholly obtained or produced entirely in the US. After passing the amendment, the provisions will not be limited to natural person or ‘national’, but will include any enterprise as defined in the AUSFTA.

Certain goods made from non-originating materials (Subdivision D)

Subdivision D sets out rules to ascertain when certain goods produced entirely in the US, or in the US and Australia, from non-originating materials only, or from non-originating materials and originating materials, are considered to be US originating goods for the purposes of the Customs Act. A ‘good’ will only qualify as a US originating good if it fulfils any of three requirements, including that the good satisfies:

- the transformation test set out in subsection 153YE(8) or, for example, that the non-originating material does not exceed 10 percent of the customs value of the goods (paragraph 153YE(2)(a) and (b))
- the regional value content requirement (paragraph 153YE(4)), or
- any other requirement set out in Schedule 1 of the Free Trade Agreement Regulations (paragraph 153YE(7)).

The reader is referred to the [Bills Digest](#) and the [Explanatory Memorandum](#) to the Australia-US Free Trade Agreement Bill 2004 for a discussion and examples of this complex provision.¹⁵

Item 5 proposes to amend subparagraph 153 YE(2)(b)(i). This subparagraph provides that a good fulfils the first requirement if the total value of all the non-originating materials does not exceed 10 percent of the customs value of the good. The proposed amendment will clarify that the non-originating materials referred to in this provisions are to be materials which themselves do not satisfy the transformation test as set out in subsection 153YE(8).

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Goods that are textiles and clothing (Subdivision E)

Subdivision E provides rules for assessing when clothing or textile goods, produced either entirely in the US or in the US and Australia from non-originating materials or from both, non-originating and originating materials, will qualify as US originating goods within the meaning of the Customs Act. Under the current law, textiles or clothing will qualify as US originating goods if the good:

- falls within a tariff classification specified in the Customs Act (paragraph 153YH(1)(a))
- is produced entirely in the US, or entirely in the US and Australia, from non-originating materials only or from non-originating materials and originating materials (paragraph 153YH(1)(b)), and
- fulfils two further specific requirements (the First and Second Requirement), including that the good fulfils the transformation test or that it fulfils any other requirement contained in the Free Trade Agreement Regulations (paragraph 153YH(1)(c), subsections 153YH(2) and (3)).

Special rules relating to elastomeric yarns

Item 6 of the Bill proposes to introduce a further requirement. Proposed **paragraph 153YH(1)(ba)** will introduce a specific rule applicable to elastomeric yarns: under the proposed law, these yarns must have been produced entirely in the US or Australia to qualify as a US originating good for the purposes of the Customs Act. This amendment will better reflect Paragraph 7 of Article 4.2 of the AUSFTA which relevantly reads:

7. [...], a good containing elastomeric yarns in the component of the good that determines the tariff classification of the good shall be considered to be an originating good only if such yarns are wholly formed in the territory of a Party.

A further note to be inserted after paragraph 153YH(1) will clarify this amendment (**items 7 and 8**).

The First Requirement—change of classification

Items 9 to 11 will make changes to the First Requirement, i.e. the change of classification provision. Paragraph 6 of Article 4.2 of the AUSFTA stipulates that textiles or clothing can be originating goods even though a certain percentage of the component that determines the tariff classification of the good is comprised of goods which are non-originating. The threshold set out in this *de minimis* provision is that a good will nonetheless be considered an originating good if the total weight of all non-originating fibres or yarns comprising the component that determines the classification of the good, is not more than seven percent of the total weight of that component.

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The current provision does not distinguish between the fibres and yarns which make up the component that determines the tariff classification of the textile or clothing and any other fibres and yarns which make up the good. Instead, the current provision only provides that a good is an originating good if ‘the total weight of all the non-originating materials does not exceed 7 percent of the total weight of the goods’, suggesting that a total weight of less than 7 percent of any non-originating fibre or yarn comprising the good suffices.

To rectify this imprecision, item 9 will repeal and substitute subparagraph 153YH(2)(b)(i) to:

- introduce the term ‘relevant non-originating material’ (that is material which is used to produce the component which determines the classification of the good and does not satisfy the transformation test, i.e. is non-originating; proposed **subsection 153YH(8)**), and
- clarify that the threshold of 7 per cent ‘relevant non-originating material’ is assessed against the weight of the component that determines the classification of the good.

Together, the two measures will ensure that the First Requirement is better aligned with the *de minimis* rule in the AUSFTA.

Consignment rules – process of production and other operations

Article 5.11 of the AUSFTA prescribes that:

A good shall not be considered to be an originating good if the good undergoes subsequent production or any other operation outside the territories of the Parties, other than unloading, reloading, or any other operation necessary to preserve it in good condition or to transport the good to the territory of a Party [emphasis added].

The current law is narrower than this clause, providing merely a good is not an originating good if it undergoes ‘any process of production in that country or place’. **Item 12** will amend paragraph 153YL(1)(b) to reflect the broader wording of Article 5.11, inserting the words ‘or any other operation’ contained in Article 5.11.

Schedule 4 – Providing Customs with information

The proposed amendments in **Schedule 4** must be read together with the amendments relating to the unauthorised entry provisions in Schedule 2 of this Bill. These amendments have been discussed above.

Schedule 4 of the Bill proposes further changes to the security identification card regime. As noted above, the Customs Act and Regulations currently provide for two kinds of security identification cards (SIC)—the Aviation Security Identity Card (ASIC) and the Visitors Identification Card (VIC). When issuing a SIC, the issuing person has to relay

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certain information to authorised officers of Customs. This so-called ‘required identity information’ is defined in section 213A of the Customs Act to mean:

- the name and address of the person
- the person’s date and place of birth
- any other information prescribed by the regulation.

The Explanatory Memorandum notices that the gathering of this information is essential because persons issued with an ASIC or VIC can place a potential:

threat to the integrity and security of the border. In order to monitor this threat, under section 213B of the Customs Act’, a person who issues an ASIC or a VIC to another person in respect of an international airport must provide specified information to an authorised officer of Customs within 7 days of doing so.¹⁶

However, under the current regime the relay of information will only occur at the time of issuing the SIC, no further provision of information to Customs is necessary subsequently, for example, should the bearer of the SIC change the address or name.

The proposed amendments are two-fold.

First, **items 1 to 3** of Schedule 4 will modify current subsections 213B(1) and (2), requiring the ‘issuing authority’ in relation to a SIC rather than the issuing person to transmit the information to Customs. This amendment will provide for continuity where the functions of one issuing authority are taken over by another, for example, where airport authorities are merged or taken over.

Item 4 of the Schedule 4 will enable Customs to request an update to the required identity information. Proposed **subsection 213B(2A)** will, upon request, require an authority which issued a SIC to a person in relation to specified airports to provide certain information to Customs. The purpose of this requested information is to update the information kept by Customs in relation to the holder of the SIC.

Comment

Schedule 4 of the Bill must be read together with Schedule 2 discussed above. Together, the two Schedules provide Customs with a powerful control mechanism over issuing authorities and holders of SIC’s: Schedule 4 enables Customs to update information available in relation to the holders of SIC’s whilst Schedule 2 allows Customs to use this and other information to prohibit a SIC holder to enter a place.

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Schedule 5 – Accredited clients

The *Accredited Client Program*

The Accredited Client Program (ACP) is designed to:

- simplify reporting requirements for Australian importers and exporters to improve the supply chain, and
- allocate more resources away from known reliable traders or low-risk cargo towards ‘areas of high risk.’¹⁷

To overcome the traditional ‘one size fits all’ approach, the ACP creates different categories of importers/exporters pursuant to their compliance history, aiming at providing a preferred treatment for those who have proven their compliance in the past. Simplification of the reporting requirements is achieved by requiring accredited clients to lodge only a minimum set of information upon transaction, with other data to be submitted in periodic intervals.

Traders with a proven high customs compliance standard will be eligible to use, and benefit from, this program. Once accepted into the ACP, the importer/exporter benefits from a more expedient treatment.

The ACP is based on so-called *import or export information contracts* (contracts) into which eligible importers/exporters may enter with Customs.¹⁸ Under these contracts, importers/exporters undertake to meet specified performance standards, to review regularly business processes and standards and provide periodic declarations rather than individual ones. Customs, in turn, is obliged to provide an alternative cargo reporting system for specified goods and will clear goods with minimum intervention.

The context of the *Accredited Client Program*

The ACP has a history spanning some ten years.¹⁹ The core of the program was introduced as part of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2000*.²⁰ After the terrorist attacks on the World Trade Centre in New York on 9 September 2001, the development of the ACP became closely linked with other aspects of safety measures and trade modernisation, especially the Cargo Management Re-engineering (CMR) Project and the Integrated Cargo System (ICS).

The ACP is, in parts at least, a reaction to the tension between strict requirements concerning border and trade or supply chain security, for example flowing on from measures such as the:

- US Container Security Initiative,²¹ and
- US Customs-Trade Partnership against Terrorism (C-TPAT)²²

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on the one hand, and free trade requirements stipulated:

- under the frameworks of the World Trade Organisation (WTO),
- in bilateral trade agreements, such as the Australia-US Free Trade Agreement (AUSFTA)
- the [*Kyoto Convention on the Simplification and Harmonisation of Customs Procedures*](#), and
- World Customs Organisation (WCO) Framework of Standards to Secure and Facilitate Global Trade (the Framework)

on the other. Securing these supply chains has been identified as vital to securing international trade against terrorism.

The proposed measure in relation to the *Accredited Client Program*

The purpose of the proposed measures in Schedule 5 of the Bill is to implement ‘a scheme for the payment of [import] duty and processing charges in relation to the ACP.’²³ The proposed regime is based on estimates and subsequent account reconciliation, involving three charges, a Request for Cargo Release (RCR) fee, a fee for periodic declarations and the so-called ‘accredited client monthly duty estimate’.

Main provision

Items 1 and 2 of Schedule 5 of the Bill will amend subsection 4(1) of the Customs Act, inserting new definitions for the terms *accredited client* and *accredited client payment day*. An *accredited client* will be a person who has entered into an import information contract. The *accredited client payment day* for a particular month means the 15th day of that month.

Item 5 repeals current subsection 71DC(2), inserting proposed **subsection 71DC(2)** which stipulates the mode for paying the request for container release (RCR). It is proposed that accredited clients will have to pay RCR processing charges on the accredited client payment day (under proposed subsection 4(1) the 15th day of a month) for the month following the month in which the goods were taken.

Item 8, proposed **subsection 71DD(4A)** will provide that import information contracts must stipulate the method by which the so-called *accredited client monthly duty* is calculated. The calculation method must result in an amount described as ‘approximately equal to the amount of import duty that [importer] will be liable to in respect of’ goods covered by the contract.

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Item 9 will substitute current section 71DF with proposed **section 71DF**. This new section will require accredited clients or a nominated customs broker to send electronically to Customs periodic declarations, providing goods-related information to Customs as provided for in an approved statement. Proposed **subsection 71DF(2)** will prescribe the certain due dates on which these declarations must be transmitted to Customs. Unless prescribed otherwise, the default due date is defined as ‘the first day of the month following the month during which the goods are taken to have been entered for home consumption’.

Item 11 repeals current subsection 71DG(2), substituting this provision with proposed **subsection 71DG(2)**. Proposed **subsection 71DG(2)** will stipulate the due date for the periodic declaration processing charge. Of the due date will be of the accredited client payment day for the month following the month during which the goods were taken.

Item 12 will introduce a new set of provisions which deals with the accredited client's liability for the *accredited claimed monthly duty estimate* and the liability for payment of import duty.

Proposed **section 71DGA** will set out the liability for the accredited client monthly duty estimate. Under proposed **subsection 71DGA(2)**, the due date for this estimate will be the *accredited client payment day*. Proposed **subsection 71DGA(3)** provides that the estimate must be worked out in accordance with the import information contract.

Proposed section 71DGB regulates the payment of import duty. Under **proposed subsection 71DGB(1)**, the import duty payable on goods covered by an import information contract will become payable on the accredited client payment day for the month following the month during which the goods were taken. Proposed **subsection 71DGB(2)** provides for the reconciliation of the accredited client monthly duty estimate against the amount of import duty which is payable by the accredited client. Proposed **subsection 71DGB(3)** stipulates that any excess amount, that is the amount which an accredited client has overpaid, will be dealt with in the manner agreed between Customs and the party having entered into the import information contract. Ways in which excess payments could be dealt with include:

- carrying forward of the excess amount into the next month, or
- refunding any excess amount to the accredited client.

The [Explanatory Memorandum](#) sets out a flowchart visualising the accredited client payment structure devised under the proposed amendments. This flowchart is reproduced here for the convenience of the reader:²⁴

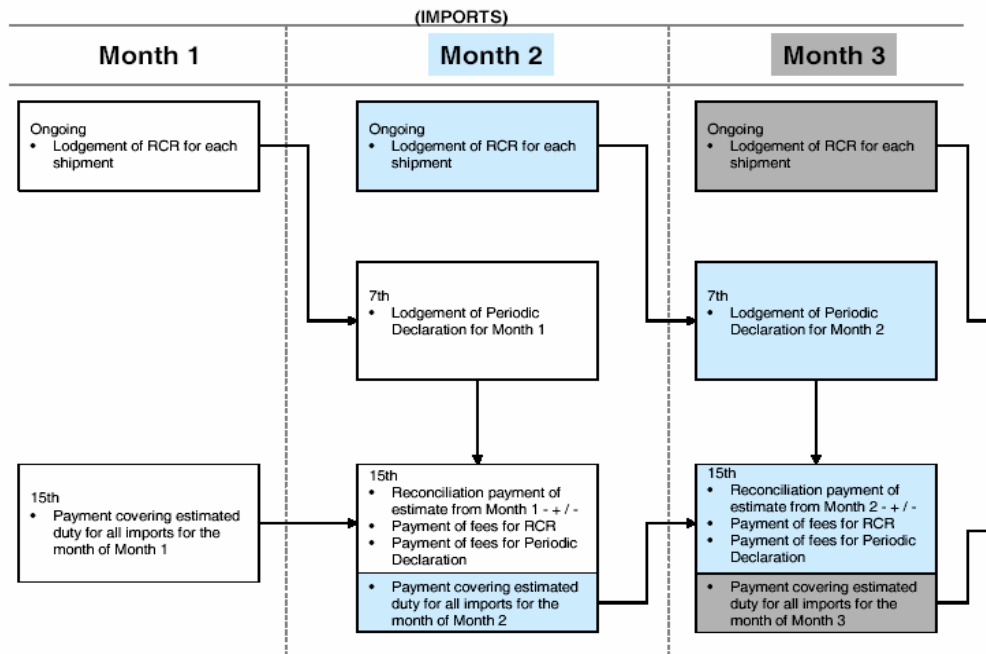
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ATTACHMENT A EXPLANATORY MEMORANDUM TO THE CUSTOMS LEGISLATION AMENDMENT (BORDER COMPLIANCE AND OTHER MEASURES) BILL 2006 [SCHEDULE 5 - ACCREDITED CLIENTS]

ACCREDITED CLIENT PAYMENT STRUCTURE



Comment

Especially after September 11, measures to protect supply chains in international trade from terrorism have become more important. Nitsch and Schumacher have identified three possible effects that international terrorism may have on trade, including that:

- terrorism may lead to insecurity raising the costs of doing business
- the typical response to an increase in terrorist activity is an increase in security measures, and
- there is a risk of a direct destruction of traded goods.²⁵

As indicated above, the ACP is part of a package which is a reaction to the tension between strict security requirements concerning border and trade and supply chain security on the one hand and the maintenance of free and unimpeded flow of goods on the other.

However, the proposed amendments have not been uncontroversial. In essence, it is possible to identify two major areas of disagreement between parts of the industry, advisers to the industry and the government.

The first key area of disagreement is about the level of consultation between the industry and the government in the preparation of those amendments. On the one hand it is argued

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that the proposed amendments are the result of long consultations between the industry and the government. The Business Partner Group (BPG), comprised of major import and export companies, stated:

The BPG would like to assure the Committee that a robust, open and in depth consultation process over many years has arrived at what is considered a sound and realistic ACP model.²⁶

On the other hand it has been pointed out by some parts of the industry that certain key players such as the Customs Brokers and Forwarder Council of Australia (CBFCA) were surprised that when the consultation fell dormant after 2003, the Government introduced the measures in this Bill. The CBFCA argued that:

Since meetings between Customs and industry in June 2003, the accreditation issue has, from a CBFCA perspective, remained dormant and the CBFCA was surprised to note the program re-emerging in the Bill.²⁷

The second key area of disagreement relates to the actual content of the proposed amendments, especially the issue of deferral of payment. Some of the submissions made to the recent Senate inquiry on this Bill have signalled their support for the regime. For example, the Business Partner Group, comprised of major import and export companies, endorses the proposed regime.²⁸ On the other hand, especially the CBFCA and the Law Council of Australia have noted their reservations to the proposed regime. For example, the CBFCA, submitted to the Senate inquiry that:

The program as foreshadowed, in the opinion of the CBFCA, is unrealistic in efficiency or effectiveness for importers in general, and service providers in particular. From the CBFCA's perspective, consultation on key issues of the Bill with the CBFCA has been non-existent and the CBFCA a query is the rationale of the programme which gives little, if any, benefit to the majority of importers and little cognisance of benefits to service providers.²⁹

There are certainly some issues for importers which flow from the chosen regime based on estimates and subsequent account reconciliation that may be considered. These include:

- the proposed regime does not appear to be based on a true deferral regime. Rather, the proposed mechanism takes the form of an estimate/reconciliation method. Whilst there is some aspect of deferral because the actual amount due is determined on a particular day during the month succeeding the month the goods have been imported, it is not a proper payment deferral because the estimate will have to be paid in advance
- the advance payment of the estimate will affect importers' cash-flow, and
- importers must put into place mechanisms which allow them to provide accurate estimates. It has been noted that these estimates are likely to be 'statements to customs' for the purposes of sections 243U and 243T of the Customs Act which are

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strict liability offences for making false or misleading statements to Customs which may or may not lead to a loss of duty.

Further issues which have been addressed include that the proposed regime will only allow importers and their delegates to join the ACP and it has been questioned whether this is a sufficient implementation of Australia's obligations under the WCO's Framework. In their [Summary of Submission to the Senate Legal and Constitutional Committee](#), the Customs and International Transaction Committee of the Law Council of Australia pointed out that:

Of particular concern to the Committee is that the Framework is intended [to] afford benefits to **all** interested parties in the supply chain (known as Authorised Economic Operators). This would extend to transport companies, custom brokers and freight forwarders. However, the ACP is only limited to importers. The benefits of the ACP should be extended to all other interested parties in the supply chain who would otherwise be entitled to preferential or advantageous treatment under the frameworks.³⁰

The Customs and International Transaction Committee also noted that the ACP in its current form appears to have no 'security element' required under the Framework.³¹

Schedule 6 – Protection from criminal responsibility

The measure proposed in Schedule 6 will expand the currently available protection from criminal responsibility to situations in which Customs officers, in the course of their duties, have certain dealings with narcotic goods.

Items 1 and 2 propose to make certain changes to subsections 233(3A), (3B) and (6) which are necessary in the light of the insertion of proposed **section 233BABA** by virtue of **item 3**. Proposed **subsection 233BABA(1)** will provide protection from criminal responsibility to officers of customs who, in the course of their duties:

- possess or convey, or
- facilitate the conveyance

of prohibited imports, prohibited exports or smuggled goods. By virtue of this subsection, any such dealings are deemed not to be an offence against a law of the Commonwealth, State or Territory.

Proposed subsection 233BABA(2) provides protection from criminal responsibility of identical scope to any person who has such dealings with narcotic goods acting in accordance with written instructions issued by an officer of customs acting in the course of his or her duties.

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Schedule 7 – Issue of seizure warrant

The measures contained in Schedule 7 of the Bill relate to the issue of seizure warrants. In essence, the measures prescribe a further factor which a judicial officer may consider when determining whether an authorised officer was able to demonstrate the necessity for the seizure of particular goods under section 203 of the Customs Act.

Background of this measure

This particular measure has been proposed earlier. It was part of the Customs Legislation Amendment Act (No. 1) Bill 2003 (CLAA 2003) (introduced on 12 December 2002 as Customs Legislation Amendment Act (No. 2) Bill 2002). Then, the measure was part of Schedule 3 which proposed technical amendments relating to trade modernisation.

However, despite passing the CLAA 2003, the amendment to section 203 Customs Act did not occur as it was misdescribed. The reason for this misdescription was a combination of:

- first—the delay in passing the CLAA 2003, and
- second—the date on which Schedule 3, Part 3 of the CLAA 2003 took effect.

Schedule 3, Part 3 of the CLAA repealed paragraph 203(3)(e) upon which the measure contained in Schedule 3, Part 1 depended. It was intended to repeal this paragraph prospectively, with the repeal taking effect on 1 July 2003. However, due to the delay in passing the CLAA 2003 and the omission to change the prospective repeal day for paragraph 203(3)(e), the prospective repeal became a retrospective repeal by the time the Bill was passed into law in December 2003. As a result, the retrospective repeal withdrew the legislative basis for the proposed amendment.

Main provisions

Item 1 will introduce proposed paragraph 203(3)(e) which again introduces a further factor which a judicial officer may consider when determining whether an authorised officer was able to demonstrate the necessity for the seizure of particular goods under section 203 of the Customs Act.

Item 2 is an application provision which ensures that the application of paragraph 203(3)(e) commences prospectively.

Items 3 and 4 repeal two items in Schedule 3 of the *Customs Legislation Amendment Act (No. 1) Act 2003* which are no longer required.

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Endnotes

1. On the basis that 1 penalty unit is the equivalent of \$110. See section 4AA of the *Crimes Act 1914*.
2. Please note the proposed changes to section 213B contained in Schedule 4 of this Bill. See discussion in this Digest below.
3. The power to issue an ASIC is conferred upon the Secretary or a delegate under Regulations 6.27 and 6.28 of the ASTS Regulations. The power to issue a VIC is conferred under Regulations 6.27 and 6.38 of the ASTS Regulations.
4. The term collector is defined in section 8 of the Customs Act to mean
5. [Explanatory Memorandum](#), op. cit., p. 8.
6. *ibid.*, p. 6.
7. Customs and International Transaction Committee, Business Law Section of the Law Council of Australia, [Summary of Submission to the Senate Legal and Constitutional Committee](#), Inquiry into the Provisions of the Customs Legislation (Border Compliance and Other Measures) Bill 2006, p. 3.
8. *ibid.* See also *ibid.*, p. 4.
9. Customs and International Transaction Committee, op. cit., p. 4.
10. The Australian Customs Service, Inquiry into the Custom Legislation (Border Compliance And Other Measures) Bill 2006, [Supplementary Submission to the Senate Legal And Constitutional Legislation Committee](#), Canberra, April 2006, p. 3.
11. Note that the [Explanatory Memorandum](#), *ibid.*, seems to suggest that the term ‘the place’ and what is referred to above as the ‘other place’ can be used interchangeably, using the term ‘relevant place’. However, this is not supported by the text of the law which indicates a differentiation between the two places (paragraphs 234A(1A)(a) and (b)).
12. Employees of these authorities, such as cleaners and handymen, will be excluded from this exemption under proposed subsection 234A(2).
13. B Donald, J Varghese, T John, ‘US Free Trade Agreement Implementation Bill 2004’, [Bills Digest](#), No. 21, Department of Parliamentary Services, Canberra, 2004-5. Explanatory memorandum to the US Free Trade Agreement Implementation Bill 2004, pp. 14–20.
14. Sections 301 to 361 of the US *Immigration and Nationality Act* or [U. S. Code, Title 8, Chapter 12, Subchapter III](#), §§ 1401 – 1504.
15. B Donald, J Varghese, T John, ‘US Free Trade Agreement Implementation Bill 2004’, [Bills Digest](#), No. 21, Department of Parliamentary Services, Canberra, 2004-5; Explanatory memorandum to the US Free Trade Agreement Implementation Bill 2004, pp. 14–20.
16. [Explanatory Memorandum](#), op. cit, p. 14.
17. T Curtis, Keep an eye on changes at Customs, *Australian Financial Review*, 15 May 2001. See also Senator C Ellison, Minister for Justice and Customs, Customs Streamline Business Import/Export Controls, *media release*, No. E67/01, 9 April 2001.

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18. Under subsection 71DD(1) of the Customs Act, a Customs CEO has the authority to enter into **import information contracts** (contracts) with certain importers for the purpose of enabling so-called 'request for cargo release' (RCR). However, subsection 71DD(2) requires that before entering into contracts, the CEO must be satisfied that the importer can provide Customs with accurate information. Whether the importer can satisfy the CEO depends upon the result of an audit. Section 114 BB of the Customs Act makes similar rules with respect to exporters, allowing a Customs CEO to enter into **export information contracts** (contracts) with an exporter for the purpose of enabling the use of *accredited client export approval numbers* (ACEANS) in connection with the export of the person's goods. Again, whether the exporter qualifies for the program must be assessed on the basis of an audit.
19. P Zalai, Manager, Customs Brokers and Forwarders Council of Australia, has been cited noting that the program was floated in 1996. See E Connors, Incentives for border security plan not paid, *Australian Financial Review*, 17 May 2004, p. 7.
20. I Ireland, 'Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000', Bills Digest, No. 98, Department of Parliamentary Services, Canberra, 2000-1. See also Senator C Ellison, Minister for Justice and Customs, Customs Streamline Business Import/Export Controls, *media release*, No. E67/01, 9 April 2001.
21. N Brew, 'Ripples from 9/11: the US Container Security Initiative and its Implications for Australia', *Current Issues Brief*, Department of Parliamentary Services, Canberra, 2002-3.
22. According to the US Department of Homeland Security, Customs and Border Protection Branch, C-TPAT 'is a voluntary government-business initiative to build cooperative relationships that strengthen and improve overall international supply chain and U.S. border security'. US Department of Homeland Security, Customs and Border Protection Branch, 'Customs-Trade Partnership Against Terrorism (C-TPAT): Partnership to Secure the Supply Chain', available at http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat, accessed 28 April 2006.
23. [Explanatory Memorandum](#), op. cit., p. 17.
24. *ibid.*, p. 27.
25. V Nitsch and D Schumacher, Terrorism and international trade: an empirical investigation, *European Journal of Political Economy*, Vol. 20, 2004, p. 424-4.
26. Business Partner Group, [Submission to the Senate Legal and Constitutional Committee](#), Inquiry into the Provisions of the Customs Legislation (Border Compliance and Other Measures) Bill 2006, p. 3.
27. Customs Brokers and Forwarder Council of Australia, [Submission to the Senate Legal and Constitutional Committee](#), Inquiry into the Provisions of the Customs Legislation (Border Compliance and Other Measures) Bill 2006, p. 1.
28. Business Partner Group, op. cit., p. 1.
29. Customs Brokers and Forwarder Council of Australia, op. cit., p. 1.
30. Customs and International Transaction Committee, op. cit., p. 5.
31. *ibid.*

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