

Senate Standing Committee on Foreign Affairs, Defence and Trade

**Inquiry into the provisions of the Customs Tariff Amendment (2007
Harmonized System Changes) Bill 2006 and the Customs Amendment
(2007 Harmonized System Changes) Bill 2006**

Response to Questions on Notice for the Australian Customs Service

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1. *The committee understands that member countries of the International Convention on the Harmonized Commodity Description and Coding System may notify the Secretary-General of the World Customs Organization of an objection to a Harmonized System change within six months of being officially notified of that change.*

- *Did Australia make any official objections to the amendments brought about by the latest review (HS2007)?*
- *If objections were raised, what were they and what was the response from the WCO?*

Response

The Committee's understanding of the HS amendment process is correct. As Customs mentioned briefly in paragraphs 12 and 13 of its Submission of 25 September 2006 to the Committee, Contracting Parties to the HS Convention – including Australia – had six months to lodge objections after the Secretary General's 14 July 2004 notification of proposed amendments to the Convention's Annex.

The Annex sets out the 'Harmonized System Nomenclature' – including the General Rules for the Interpretation of the HS; Section, Chapter and Subheading Notes; and the headings and subheadings. Each heading is identified by four digits – the first two indicating the Chapter number and the second two showing the numerical order in which the heading appears within that Chapter. Heading numbers are shown in the first column of the Convention's Annex. The second column contains the six-digit codes for the HS, and the third column contains the texts of the headings and subheadings.

No Contracting Party (including Australia) lodged objections with the World Customs Organization (WCO) during the six months to 12 January 2005. This is because the amendments had been proposed and discussed at a technical level in meetings of the WCO's Harmonized System Committee during the five years since the previous HS review. The International Chamber of Commerce has observer status on this Committee.

Most HS amendments are agreed by consensus among member countries, although some specific decisions are voted on. The Australian Customs Service attends meetings of the HS Committee, and seeks views about specific topics from Australian policy departments, major industry groups and other stakeholders before each meeting. HS Committee decisions are then submitted to WCO's Council, and at its meeting in June 2004 the Council adopted the proposed 2007 changes.

As no Contracting Party objected to the proposed HS2007 amendments, under Article 16 of the Convention the changes at four-digit (heading) and six-digit levels were deemed to have been accepted.

On 19 January 2005 WCO's Secretary General notified Australia that the amendments would therefore enter into force on 1 January 2007, and that under Article 16(5) of the Convention, Contracting Parties would need to amend their Customs tariff and statistical nomenclature to conform with the HS changes.

2. *The Law Council of Australia submission raised a concern that Customs may not have had enough resources to provide advance notice of the changes proposed by these bills at an earlier stage. In the light of this concern, can Customs:*

- *provide the committee with a timetable setting out the process it has followed since the resolution of the WCO to adopt the HS2007 changes;*
- *advise what materials Customs prepared in order to implement the changes to the Harmonized System in the Customs Tariff; and*
- *inform the committee of any additional resources which the Government made available to enable Customs to implement the HS2007 changes in a timely and comprehensive manner.*

Response

At the outset Customs would like to affirm its commitment to providing timely advice to importers or their agents about forecast changes in the regulatory environment. In administering Customs laws, these responsibilities are shared with policy agencies. In adopting changes to international conventions, there is obviously a balance to be struck between giving early notice about changes where possible, and providing up-to-date and accurate information that reflects the Government's policy intentions, and takes account of Parliamentary processes.

As the 2007 changes are the outcome of a third five-yearly review of tariff classifications, there was an expectation on the part of industry that changes were likely to be implemented on 1 January 2007. The WCO maintains a website [www.wcoomd.org] that informs any interested party about progress on HS changes. However, Customs has taken the following key actions to provide more detailed advice to importers about the impending changes:

- regular dialogue with industry groups as changes have been gradually developed through the WCO;
- consultation with Australian policy agencies;
- careful development of Australian-based tariff classification changes so that duty rates are maintained where practicable, and import reporting is not unnecessarily complex;
- publishing the 2002 and 2007 proposed classification concordances to coincide with introduction into Parliament of the related legislation;
- establishment of an HS2007 section on Customs website, with links to all key documents;
- circulation of Australian Customs Notices about key issues;
- setting up a project team which acts as a contact point on HS2007; and
- planned additional communication, subject to successful passage of the Bills.

In March 2005 the first draft of the WCO's correlation table – which sets out the affected current (2002) HS Nomenclature at the six-digit level and compares them with the 2007 changes, with explanatory remarks – was made available to Contracting Parties to the HS Convention. Customs commenced the translation of the WCO correlations into Australia's 8-digit domestic tariff classifications during the following months.

In December 2005 the final draft of the WCO correlation table was made available to Contracting Parties, and was published on the WCO website on 19 December 2005. In February 2006, at a meeting convened in Canberra, Customs provided its first draft of Australia's (2002 to 2007) concordance to relevant Government Departments and Agencies – including the Departments of Foreign Affairs and Trade, Industry, Tourism and Resources, Agriculture, Fisheries

and Forestry, and the Australian Bureau of Statistics. Customs also consulted the Treasury in relation to duty rate issues.

Since that time Australia's concordance has been updated in minor ways – the final version being published on Customs' website on 13 September 2006 to reflect the content of the Customs Amendment (2007 Harmonized System Changes Bill) 2006 (the Customs Tariff Bill) that had been introduced into Parliament the previous week. Customs has continued to consult with policy departments and agencies in relation to their stakeholder and client interests.

On 24 March 2006 Customs provided drafting instructions to the Office of Parliamentary Counsel (OPC) to reflect the 1,200 changes that are contained in the Customs Tariff Bill. The first draft of the Bill was provided to Customs in May 2006, and after multiple proof-reading and editorial changes, the Bill was finalised in late-August 2006 for consideration by relevant Ministers. The Explanatory Memorandum for the Bill was prepared by Customs in consultation with policy agencies.

Customs has established a separate part of its internet website for HS2007 matters. The website contains the following material:

- the Customs Tariff Bill and the Customs Amendment (2007 Harmonized System Changes Bill) 2006;
- the related Explanatory Memorandums;
- the Concordance;
- Australian Customs Notices setting out the proposed process for implementation, subject to passage of the legislation.

Although the legislative changes were prepared within existing resources, Customs set aside specific funds from 1 July 2006 to establish a small team within Trade Branch – the HS2007 Implementation Project. Led by a Director, the team comprises some staff within the Branch who have responsibility for tariff classification, Tariff Concession Orders, Tariff Advices and Precedents. The team draws on the expertise of Customs' regional tariff staff, and some recently retired tariff officers.

Free Trade Agreement administration aspects of HS2007 (rules of origin, preferential duty rates) have been managed within Trade Branch's Valuation and Origin Section, in consultation with the Departments of Foreign Affairs and Trade, and Industry, Tourism and Resources. Trade Branch also liaises closely with other Branches within Customs (such as Compliance Branch, Cargo Branch, Cargo Systems Branch and Intelligence Branch) in respect of their regulatory or administrative responsibilities – such as cargo reporting, declarations by importers or their agents, information technology impacts, and risk assessment.

In July 2006 the HS2007 Implementation Project team commenced an analysis of existing Tariff Concessions Orders (TCOs) to identify those that will require revocation and re-issue as a result of the amendments contained in the Customs Tariff Bill. This process is expected to be completed by the end of October 2006. (Customs currently estimates that about 750 existing TCOs will need to be revoked and replaced with approximately 1,000 new TCOs).

As mentioned in the recent Australian Customs Notices, more information will be provided to interested parties as soon as this process is complete – including a concordance of existing and proposed replacement TCOs for the use of Customs clients. The other related Bill recently

introduced into Parliament – the Customs Amendment (2007 Harmonized System Changes) Bill 2006 (TCO Bill) – would allow anticipatory changes to be made to affected TCOs between the date of Royal Assent and 1 January 2007. In 2002, under the current legislation, this process was not able to be completed until after the HS2002 classification changes took effect, so successful passage of the TCO Bill would allow more timely implementation than occurred in 2002.

Funds have been set aside for the printing and publication of new tariff and tariff concessions working pages, used by importers and/or their agents. Funds have also been provided for expenses related to the provision of newspaper advertisements and information sessions in capital cities around Australia in the coming months.

3. *Your submission states that Customs is endeavouring to provide a "seamless transition" into HS2007 and its associated changes by consulting parties about the proposed changes. Describe the process by which Customs has consulted with industry stakeholders about the proposed amendments, especially customs brokers, importers and exporters? How widely, and by what methods, has information been disseminated to relevant affected parties?*

Response

As mentioned in response to question 1, where there are significant changes proposed as part of the five-year HS review process, Customs consults policy agencies and industry groups at an early stage when issues are being considered by the WCO's HS Committee.

As an example: in 2001-2002 Australian Customs participated in a WCO project to examine and update certain of the Explanatory Notes (ENs) to the HS and recommend any changes. Australia undertook to examine and update the ENs for high technology goods (*eg* information technology and telecommunications equipment), classified in Chapters 85 and 90 of the HS. This involved significant consultation with relevant industry groups in Australia including the Australian Electrical and Electronic Manufacturers Association and the Australian Information Industry Association.

Many of the issues raised by the industry groups that could not be resolved through amendment to the ENs were referred to a WCO working party set up to examine changes to the HS. This in turn led to significant changes to Chapters 85 and 90 as part of HS2007. Consultation with industry groups and bodies continued throughout this process.

During the preparation of the Australian 8-digit classifications and related duty rates, Customs also sought advice on technical aspects of the proposed changes from relevant industry associations, including in consultation with the Department of Industry, Tourism and Resources. Any discussions were based on the Government's intention that implementation of the HS2007 changes within Australian legislation should, to the greatest extent possible, preserve duty rates and margins of tariff preference.

Following introduction of the legislation in Parliament on 7 September 2006, Customs formally informed interested parties of the pending changes through the processes outlined below.

On 13 September 2006, Customs issued Australian Customs Notice 2006/44 about the proposed HS amendments, and ACN 2006/45 about changes to Tariff Concession Orders, Tariff Advices and Precedents, and Origin Advice Rulings. Both ACNs are available on the Customs website [www.customs.gov.au] and provide directions to the HS2007 information page.

The HS2007 information page contains links to all available information on the proposed tariff changes – including a copy of the legislation, the associated Explanatory Memorandums and a concordance showing linked current and proposed post-January 2007 tariff classifications. This page will also be used to provide advice about the revocation and reissue of Tariff Concession Orders, the voiding of and application for Tariff Advices, and the replacement of Tariff Precedents affected by the changes.

Copies of the documents contained on the website are available to Customs clients, on e-mail request, to an address specified in the ACNs mentioned above. There will be broadcast messages made available on Customs' Integrated Cargo System (ICS), drawing the attention of importers and their agents to the proposed changes. ICS also has a facility that allows Customs to identify clients who routinely import goods likely to be affected by the HS2007 changes, and regular messages will be supplied on-line to those clients when they import those goods over the coming months.

Customs clients are also invited to forward specific queries on the HS2007 changes to the address specified in the notice. We have received a low but steady level of inquiries through this avenue since the ACNs were published.

Due to the confidential nature of Origin Advice Rulings Customs will be corresponding directly with a small number of clients who may be affected by the HS2007 changes and therefore require new Advice Rulings. Customs will also be contacting clients who have received Tariff Advices for specific importations, in case they would be voided as a result of the HS2007 changes and replacement Tariff Advices might be needed for future importations.

In consultation with Customs, the Australian Bureau of Statistics is also preparing new statistical codes, where required, for amended or newly created tariff classifications. The proposed new statistical codes are available on the ABS website [www.abs.gov.au] and interested parties have been invited to provide comments to the ABS by 6 October 2006.

Customs proposes to hold information sessions in respect of the HS changes, in capital cities around Australia. Details of these sessions will be published in major metropolitan newspapers and circulated more widely, including through Customs National Consultative Committee members.

Subject to successful passage of the legislation, revised hard-copy Customs Tariff 'working pages' incorporating the HS changes and new statistical codes will be printed and distributed to Customs clients.

4. *Australian Customs Notice 2006/45 indicates that tariff advices affected by the HS2007 changes will lapse and that revised tariff advices cannot be lodged until after 1 January 2007. Is it the case that importers and their customs brokers will therefore be at risk of liability for incorrect statements without being able to rely on the protections in a tariff advice?*

Response

Customs' Compliance Philosophy is to improve the level of voluntary compliance by clients within the broader context of managing the security and integrity of Australia's borders, which includes the prevention of the illegal movement of cargo across our borders and the collection of revenue on border related transactions.

In performing this role Customs believes that the correct and timely reporting of information relating to cargo is crucial to the smooth movement of goods into the marketplace and for our efforts in identifying suspect transactions and cargo. With this in mind Customs and industry have worked closely together in recent years to achieve improved reporting and compliance. Customs has encouraged a regime of voluntary compliance through education, examination and feedback.

There is a legislated Infringement Notice Scheme that deals with non-compliance. The Infringement Notice Scheme (INS) Guidelines (a legislative instrument tabled in Parliament) provide the importer or customs broker with some protection from penalties issued under that scheme. A decision to issue an infringement notice can only be made by a delegate of the CEO of Customs. A judgement is made in each case based on the individual circumstances of the case. The delegate of the CEO may exercise discretion in this process, including whether an offence occurred as a result of recent legislative change or a reliance on Customs advice.

The INS Guidelines provide the importer or customs broker with protection from penalty by requiring a delegate of the Chief Executive Officer of Customs to consider the:

- significance of the breach;
- effort/attempt to comply;
- any reliance on Customs advice; and
- reasons beyond the person's control.

The *Customs Act 1901* (the Act) also contains two legislative defences to liability for a false and misleading statement – the 'amberline' defence and the voluntary disclosure defence. These defences can protect importers and their customs brokers from liability where they are awaiting a tariff advice. For example, penalties may not apply in certain circumstances where a person specifies uncertainty as to the accuracy of information included (or omitted) – that person will not be considered to have committed an offence if the statement was incorrect.

In a self-assessment environment for import declarations, false and misleading statement offences are generally identified by Customs some time after the goods were first entered for home consumption. Therefore, once an importer or customs broker has received a tariff advice indicating that goods have previously been entered in error, it should be possible to voluntarily disclose to Customs those entries in error and not be liable for the offence of a false and misleading statement.

It should be noted that Customs is disseminating all information about the proposed changes as it becomes available, including information concerning the voiding and replacement of Tariff Advices, to affected parties. Customs would expect those parties to take that information into account when entering imported goods from 1 January 2007.

5. *Why has Customs set a deadline of 6 October 2006 for comments to be provided on changes to the statistical codes being drafted by the Australian Bureau of Statistics, to reflect the HS2007 changes? How does this deadline give interested parties enough time to properly advise Customs of concerns they may have?*

Response

The Australian Bureau of Statistics (ABS) set the deadline of 6 October 2006 for comments to be provided on changes to the statistical codes being drafted by the ABS.

This deadline ensures that the ABS will have sufficient time to consider any comments and provide Customs with final statistical codes in time for the classifications to be advised to exporters, importers, their agents and statistical users for a 1 January 2007 implementation.

The majority of the statistical codes proposed by the ABS were released on the ABS website on 20 September with the remainder released on 25 September. The timing proposed by the ABS was advised in a discussion paper *ABS Implementation in January 2007 of Revisions to International Trade Classifications, 2007* (ABS Cat. no. 5368.0.55.005) released on 9 June 2006. The availability of this information paper was announced in relevant ABS publications and the Foreign trade theme page of the ABS website and was notified to clients receiving detailed statistical information.

The ABS approach to determining the statistical codes differed significantly from that used with the introduction of Harmonized System 2002, in that, the ABS approach for HS2007 was to maintain the existing statistical codes in the Customs Tariff and AHECC where possible.

The discussion paper mentioned above contained the following statement:

USER OPPORTUNITY TO REVIEW STATISTICAL CODE CHANGES

As the ABS is intending to maintain current statistical codes wherever possible, the ABS will generally not consult clients as part of this review. However, the ABS will appreciate feedback on any apparent errors in the statistical codes or concordances.

The ABS will progressively issue proposed changes to the 8-digit export statistical codes from August 2006 and then provide a limited period for interested parties to provide feedback. A similar process will be followed for the 10-digit import statistical codes, once Customs has released the 8-digit tariff items.

After the consultation period, the final new classifications will be made available progressively on the ABS website, so importers, exporters and their agents and statistical users can update their systems. It is expected that these will be available by mid to late November 2006. [Subsequent note: this is dependent on the passage of the related Customs' legislation through Parliament].

The above timing did not provide a long period for comment but the impact on statistical codes was not anticipated to be large and no requests for additional timing have been received. Any such requests would have been considered on a case-by-case basis.

While a longer period for feedback on errors may have been desirable, there were several constraints including when the statistical codes could be made public; the time required to ensure the classifications and relevant systems were updated by 1 January; and the need to ensure that the statistical codes reflected the latest concordances provided by Customs based on concordances from the World Customs Organisation.

In relation to the first point, the statistical codes could not be released before the Customs Tariff Bill was tabled in Parliament, which occurred on 7 September 2006, as

the import statistical codes can not be interpreted without the additional 2 digits used for the domestic imposition of customs duties detailed in that Bill. In relation to the third point, the draft Customs 8-digit concordance was substantially complete by the end of March 2006 but minor amendments continued to be made up to the time that the related Customs Tariff Bill was introduced into Parliament, and the draft concordance was published on the Customs website.

6. *The Law Council of Australia submission argued that Customs should provide a six-month moratorium for importers and customs brokers to prevent them being held liable for inadvertent errors and for using “outdated” information in reporting to Customs as a result of the proposed changes.*

- *What is Customs’ view on the idea of a moratorium?*
- *Why doesn’t the legislation contain a provision which explicitly enables Customs to exercise discretion as to whether or not action is taken against a person who makes an inadvertent error in reporting to Customs?*
- *What is Customs’ response to the argument that a moratorium may provide some protection from adverse consequences which might result in financial penalties for imports and customs brokers?*

Response

As identified in the answer to Question 4, the two offences under the Act that would apply to ‘inadvertent errors’ would be:

- a false and misleading statement resulting in a loss of duty (section 243T of the Act); and
- a false and misleading statement not resulting in a loss of duty (section 243U of the Act).

The answer to Question 4 explains the mechanisms in place to provide protections to importers and customs brokers. Customs does not consider a moratorium to be appropriate for this situation.

Under subsection 243ZA(1) of the Customs Act, it is a requirement that the Chief Executive Officer of Customs develop written guidelines in respect of the administration of the infringement notice scheme. As identified in the answer to Question 4, these guidelines must be considered when exercising powers in relation to the Infringement Notice Scheme.

Discretion currently exists in the legislation, as it is not mandatory for an infringement notice to be served in relation to an offence. The Infringement Notice Guidelines adequately enable such a discretion to be exercised.

Customs does not believe that a moratorium will be able to afford importers and customs brokers any better protection than is already available.

7. *The committee is concerned about any unintended consequences of the proposed amendments, which may not arise for some time. What is your response to the argument that the proposed legislation include a provision which enables the CEO of Customs to make such orders or regulations as are necessary to overcome any unintended consequences?*

Response

In respect of the amendments contained in the Customs Tariff Bill - if an error was identified, and Parliament was sitting, the Government could introduce a Customs Tariff Proposal into the House

of Representatives to correct the error. The moving of a Customs Tariff Proposal is normally treated as a formal procedure for the purpose of initiating the collection of a duty. Collection of duties is commenced on authority of an unresolved motion, and this has been accepted by convention (House of Representatives Practice, Fourth Edition, 2001).

In the event an error is detected when Parliament is not sitting, a Notice of a Customs Tariff Proposal may be published by the CEO of Customs in the Gazette, to correct the error. The Notice is deemed to have effect from such time, after its publication in the Gazette, as specified in the Notice. Any Customs Tariff Proposal given notice in this way must be proposed in the Parliament within seven sitting days of the next meeting of the House of Representatives.

A Customs Tariff Amendment Bill is introduced at an appropriate later time to incorporate outstanding Tariff Proposals. These Bills are necessarily retrospective in nature, reflecting the dates of effect set out in each Tariff Proposal.

If an error were identified before 1 January 2007, *ie* before any importations were impacted by an incorrect rate of duty, the Customs Tariff Proposal or Notice mechanism could be applied, with a date of effect of 1 January 2007.

Similarly, if an error were identified after 1 January 2007, which resulted in importers paying a higher rate of customs duty on goods than that paid prior to the introduction of HS2007, the Customs Tariff Proposal or Notice would be applied with a date of effect of 1 January 2007. This would allow importers to claim refunds for any affected consignments.

If, however, an error were identified after 1 January 2007 that resulted in importers paying a lower rate of customs duty on goods than that paid prior to the introduction of HS2007, the Customs Tariff Proposal or Notice could only be applied with a prospective date of effect. In this case, Customs would not seek the recovery of any duty shortpaid between 1 January 2007 and the date the error was corrected by the Customs Tariff Proposal or Notice.

In respect of TCOs, existing provisions under section 269SD of the Act allow the CEO to revoke and reissue TCOs where the tariff classification is incorrect or has been changed. Therefore, should a TCO be revoked or reissued incorrectly under proposed new subsection 269SD(2A), existing provisions would allow that error to be corrected with effect from 1 January 2007.

Customs is of the view that provisions already exist to ensure that inadvertent errors made in translating tariff classifications and TCOs as a result of HS2007 do not adversely impact on importers. Therefore, it is unnecessary for the proposed legislation to include a provision to enable the CEO of Customs to make orders or regulations to overcome any unintended consequences.