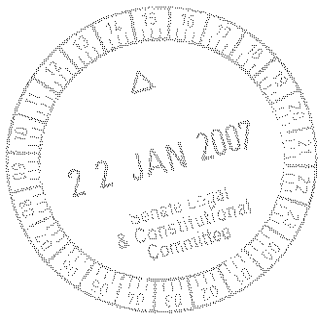

Law Council
OF AUSTRALIA

Ms Jackie Morris
A/g Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Ms Morris,

Inquiry into Customs Legislation Amendment (Augmenting Offshore Power and Other Measures) Bill 2006

Thank you for your letter of 11 December 2006 inviting the Law Council of Australia to make a submission to the Parliamentary Inquiry into the *Customs Legislation Amendment (Augmenting Offshore Power and Other Measures) Bill* 2006.

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

Please note that the submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been considered by the Council of the Law Council of Australia.

Yours sincerely,

Peter Webb
Secretary-General

22 January 2007

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LAW COUNCIL OF AUSTRALIA

BUSINESS LAW SECTION

CUSTOMS AND INTERNATIONAL TRANSACTIONS COMMITTEE

SUMMARY OF SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE *CUSTOMS LEGISLATION AMENDMENT (AUGMENTING OFF SHORE POWERS AND OTHER MEASURES) BILL 2006*

Introductory Comments

1. The Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia ('the Committee') welcomes the opportunity to make this Submission ('submission') regarding the *Customs Legislation Amendment (Augmenting Off Shore Powers of Other Measures) Bill 2006* ('the Bill').

2. The Committee has a significant history of submissions in relation to Customs – related legislation in recent times. These include recent submissions to parliamentary enquiries into the following areas.

   (a) The initial Bill for the "International Trade Modernisation Legislation" (formally known as the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001.*

   (b) Strict and absolute liability offences in Commonwealth Legislation.

   (c) Search, entry and seizure powers and Commonwealth Legislation.

   (d) The modern day usage of averments and customs prosecution.

   (e) The Customs Legislation Amendment (*Border Compliance and Other Measures) Bill 2006.*

   (f) The Customs Legislation (*Modernising Import Controls and Other Measures) Bill 2006.*

   (g) *The Customs amendment (2007 Harmonised System Changes) Bill 2007* and the *Customs Tariff Amendment (2007 Harmonised System Changes) Bill 2006.*

3. The Committee would welcome the opportunity to make further submissions or provide further information in relation to the Bill.

4. Members of the Committee are also involved in other relevant industry forums including membership of Customs National Consultative Committee and the Reference Group on the current administrative review of Australia's anti-dumping regime.

5. The Committee wishes to make the Senate Committee aware that it has been afforded the opportunity to comment on an earlier "Exposure Draft" of the Bill, so far as it related to revenue collection issues. The Committee has been informed by Australian Customs Service ("**Customs**") that some of the comments received from the Committee have lead to changes to the earlier Exposure Draft which are incorporated in the Bill. However, there are a number of other matters on which the Committee wishes to make comment. These comments relate to the amendments effected by schedules 2 and 3 of the Bill.

Comments on the Bill

1. Schedule 2 of the Bill – "Locum" Customs Brokers

The Committee is of the view that the provisions regarding changes to the licensing of customs brokers have merit and recognise the reality of the rise of the use of "locum" customs brokers('Locums').

The Committee further recognises that the changes contemplated by the Bill will require those contracting such Locums to review their appointment as contracting practices the Locums may work for more than one licensed broker (including competitors). This places a premium on issues such as preserving confidentiality and privacy of information and the use of digital certificates provided to Locums. However, at the same time, the Committee would make the following further observations.

(a) Customs may wish to review its processes and practices for licensing of customs brokers so that applicants to become licensed customs brokers should disclose if they intend to operate as Locums or when they subsequently become Locums. If so, additional training or accreditation should be required in relation to such issues as privacy, confidential information and restrictions on the use of digital certificates.

(b) An issue arises in relation to the "compliance record" of Locums. The compliance record will dictate action to be taken by Customs to remedy failures to comply. This action could include penalties and suspensions or revocation of licences. As a general proposition, when responding to perceptions of failures to comply, Customs first approach is to the employer or contracting customs brokers rather than the nominee customs broker. In the event that there is an increased use of Locums, there will need to be an increased emphasis on the record of those Locums with action to be taken on an individual basis. Customs will also need to be careful to ensure that the compliance record of the contracting/employing customs broker only includes reference to errors made by the Locums while contracted or employed by that entity.

(c) Customs will also need to consider how they are to treat the compliance record of the Locums based on their actions with different entities by whom they are retained. It is the view of the

Committee that Customs should take into account the specific working environment of each party with whom the Locums work as those environments may have an impact on the extent to which the Locums should be responsible for any non-compliance.

2. ***Schedule 3 of the Bill – Revenue collection issues***

(a) As stated above, the Committee was afforded the opportunity to comment on the "revenue collection" aspects of the Exposure Draft of the Bill. Some amendments have been made to the Bill taking into account the comments made by the Committee. However, the Committee would still make the following comments. The comments in paragraph 2(b), (d) and (e) below were not raised in the comments of the Committee in relation to the Exposure Draft.

(b) The Explanatory Memorandum to the Bill suggests that the changes to practices in relation to the recovery of customs duty are consistent to the recovery of other "indirect taxes". However, the Committee is of the view that:

(1) customs duty should not be considered in the same light as other "indirect taxes";

(2) there are different consequences for unpaid customs duty. For example, any underpaid customs duty cannot be recovered by a retrospective imposition of an additional charge in relation to goods on which the customs duty had been underpaid. The customs duty is paid at the time of importation of the goods. It is likely that those goods would have been sold and there is no way that a person facing an account for additional customs duty could recover that from end-purchasers or consumers of the goods; and

(3) GST can be deferred by an importer or be used against other GST payable. This regime will not necessarily be available to importers in relation to payments of customs duty.

Accordingly, the Committee wishes to ensure that the Senate Committee is aware that the analogy between customs duty and "other indirect taxes" should be considered very carefully by the Senate Committee. There are different parameters for underpaid customs duty.

(c) The new recovery provisions focus on recovery from the "owner". That term is defined very broadly in section 4 of the *Customs Act 1901* ("**Act**"). The Committee has been concerned for some time that the term "owner" is too broad and used in too many different contexts in the Act. The Committee believes that the use of the term "owner" creates confusion as to which party is responsible for various obligations under the Act, including the obligation to pay

customs duty but also including other obligations such as the obligation to retain "commercial documents". The continued use of the term "owner" does not specify who is responsible for the payment of customs duty and leaves a range of people who could be liable. Arguably, this could include a service provider such as a licensed customs broker. Indeed, in the recent South Australian case involving a licensed customs broker (the Clark case), a licensed customs broker was held liable as an "owner" for failure to retain commercial documents which should normally be maintained by the importer. The Committee is concerned that the continued use of the term "owner" in relation to the recovery of customs duty could expose licensed customs brokers and other service providers to action for recovery of customs duty when that customs duty would more properly be paid by the actual importer (ie the client of the licensed customs broker). This potential exposure also creates a significant problem for licensed customs brokers in terms of insurance against such liability. Accordingly, the Committee remains of the view that the term "owner" should be defined more precisely to include the person undertaking the export or import (as appropriate) in relation to goods. We understand that Customs is considering a review of the use of the term in this context, which review is endorsed by the Committee.

(d) The Committee is also concerned as to the provisions of sub-section 165(5) of the Act as contained in the Bill. This provides that a demand for the recovery of unpaid customs duty must be made within a period of 4 years "*unless the CEO is satisfied that the debt arises due to fraud or evasion*". Although not stated the presumption is that there is a right to recover customs duty underpaid for those reasons beyond 4 years on an unlimited basis. The Committee is concerned that leaving recovery of duty open for an unlimited period merely linked to a CEO "being satisfied" as to the existence of fraud or evasion could create problems. For example, the CEO may have satisfied himself (or herself) that there was fraud or evasion five years after the importation of the goods and demand repayment. However, the drafting of sub-section 165(5) in the Bill would not require there to be any form of proof that the underpayment of customs duty arose through fraud or evasion merely the opinion of the CEO of Customs. It would appear that the CEO of Customs would not be obliged to take action to prove fraud or evasion as a precondition to instituting the recovery of customs duty beyond the four year period. Accordingly, the Committee is of the view that the provision in sub-section 165(5) in the Bill should be amended so that the entitlement to recover customs duty underpaid through fraud or evasion for a period in excess of four years should only arise where it has been established that there has been under payment due to fraud or evasion, whether by way of concession of the importer or by way of a finding a court of competent jurisdiction. Otherwise, in attempting to defend any proceedings brought to recover customs duty based on this provision, then an importer may be obliged to

prove that the CEO was "not satisfied" or that the CEO "could not reasonably have been satisfied" that the debt arose due to fraud or evasion. Arguably, it may require the importer to prove that there was no fraud or evasion in an action concerning the recovery of the debt. There is the further complication in 'fraud or evasion' proceedings affecting Customs, that there is still the uncertain use of averments by Customs to establish such fraud or evasion. For many years the Committee has objected to the use of averments in such proceedings. In a number of cases, the Courts have found that averments had been incorrectly used. As recently as December 2006, the Queensland Supreme Court of Appeal (*in CEO of Customs v Labrador Liquor Wholesale Pty Ltd [2006] QCA 558*) found that many pleadings by the CEO of Customs were not the proper subject matter for an averment. If the CEO were to incorrectly use averments in discharging his findings of 'proof' pursuant to the new Section 165(5) of the Bill, that could also question the validity of those findings. It is the view of the Committee that it should be an affirmative duty on the CEO to prove in Court beyond reasonable doubt that there had been fraud or evasion (or that is conceded by an importer) before the provisions of section 165(5) of the Bill has effect.

(e) The reform of Customs' right to recover customs duty represents another reminder that the right to secure refunds of customs duty has not operated in the same way as the right to recover duty. At the time that Customs adopted their policy of an extended period to recover customs duty (as set out ACN 2003/60 following the decision in *Malika Holdings*), those paying customs duty were only provided with one year to recover overpaid customs duty. While Customs have amended the regulations to provide the same period for refunds as for recovery, that amendment only operated on a prospective basis. Accordingly, for some period the rights for Customs to recover customs duty and the rights for importers to seek refunds were not equal.

A recent example of the problem arose from the interpretation of the commencement of benefits under the AUSFTA. While the Federal Court found that Customs approach was incorrect in the *John Deere* case, some importers who had paid customs duty based on Customs incorrect approach may not be able to recover that customs duty as the court decision arose after the period to apply for refunds had expired.

Accordingly, the Committee perceives that the Bill may benefit from further amendment by making that extension of the period to seek refunds to have retrospective effect consistent with Customs right to recover customs duty.

Conclusion

As stated above, the Committee welcomes the opportunity to review the Bill and would also welcome the opportunity to make further submissions to the Senate Committee.