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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS AMENDMENT (MISCELLANEOUS MEASURES) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Home Affairs,
the Honourable Jason Clare MP)

CUSTOMS AMENDMENT (MISCELLANEOUS MEASURES) BILL 2012

OUTLINE

1. The purpose of this Bill is to amend the *Customs Act 1901* (the Act) to introduce a new offence for bringing into Australia a new category of goods known as ‘restricted goods.’ Restricted goods will be prescribed by regulation and would be prohibited imports if they were imported into Australia.
2. The Bill will also 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;
 - 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);
 - enabling officers of Customs to designate a customs controlled area for both passengers and crew, and the CEO to designate a seaport as a customs controlled area;
 - allowing the CEO to request further information from an applicant, to address any concerns, prior to the grant of a warehouse licence;
 - aligning the treatment of the timeliness of the report of cargo reporters;
 - repealing the legislation which introduced the accredited client program;
 - repealing expired moratorium period for cargo reporting; and
 - make other minor technical amendments.

FINANCIAL IMPACT STATEMENT

Nil.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

CUSTOMS AMENDMENT (MISCELLANEOUS MEASURES) BILL 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill will amend the Act to introduce a new offence for bringing into Australia a new category of goods known as ‘restricted goods’ as well as make a number of other minor technical amendments.

Human rights implication

Minimum guarantees in criminal proceedings

The Bill will create a new offence with a civil penalty. As noted by the Parliamentary Joint Committee on Human Rights in its Fifth Report of 2012, where a civil penalty regime subjects a person to a high penalty and is intended to be punitive or deterrent in nature it may engage article 14 of the International Covenant on Civil and Political Rights (ICCPR).

As the Bill creates a new offence with a high penalty intended to have a deterrent effect it engages the minimum guarantees in criminal proceedings contained in article 14 of the ICCPR. Although a new offence will be created, the Bill does not affect or limit any of the existing human rights protections, including the minimum guarantees in criminal proceedings contained in Australian law.

Conclusion

The Bill is compatible with human rights as although the Bill engages the minimum guarantees in criminal proceedings, the Bill maintains all existing protections contained in Australian law and does not seek to limit the guarantees in any way.

The Minister for Home Affairs, the Honourable Jason Clare MP

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NOTES ON CLAUSES

Clause 1 – Short title

1. This clause provides for the Bill, when enacted, to be cited as the *Customs Amendment (Miscellaneous Measures) Act 2012*.

Clause 2 – Commencement

2. This clause provides for the Bill to commence on the day after the Act receives the Royal Assent.

Clause 3 – Schedules

3. This clause is the formal enabling provision for the Schedule to the Bill, providing that each Act specified in a Schedule is amended in accordance with the applicable items of the Schedule. In this Bill the Acts being amended are the *Customs Act 1901*, the *Import Processing Charges Act 2001* and the *A New Tax System (Wine Equalisation Tax) Act 1999*.
4. The clause also provides that the other items of the Schedules have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation. In this Bill there is an application provision in item 2 of Schedule 1.

Schedule 1 – Amendments

Part 1–Unlawful bringing of restricted goods into Australia

Customs Act 1901

5. Section 50 of the Customs Act empowers the Governor-General to prohibit the importation of goods into Australia. Section 229(1)(b) of the Customs Act forfeits all prohibited imports to the Crown. Subsection 183UA(1) of the Customs Act defines all prohibited imports as special forfeited goods. Section 203B of the Customs Act permits the seizure of special forfeited goods without warrant at a Customs place.
6. Under the current regime, prohibited imports such as child pornography that are detected in the personal effects of ship crew cannot be seized as prohibited imports unless there is an intention to import them. This is because such items are not considered to have landed, or intended to be landed, in Australia. In most instances there is no intention to import such items, so they are secured on board the ship and returned to the owner when the ship departs Australia.
7. The items contained in this Part will make it an offence to bring into Australia a new category of goods known as ‘restricted goods’..
8. Initially, it is proposed to make child pornography and child abuse material a restricted good under this new provision. Child pornography is included in Regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* (PI Regulations) and is a prohibited import when imported into Australia without a permit. Accordingly, where this material is imported it is able to be seized and may subsequently be forfeited to the Crown.
9. **Item 6** inserts new section 233BABAE which creates a new offence where a person brings into Australia goods known as ‘restricted goods’. New subsection 233BABAE(1) provides a person commits a strict liability offence where the person brings goods into Australia and the goods are restricted goods. The maximum penalty for this offence is 1000 penalty units.
10. Given the nature of the material proposed to be included as restricted goods, 1000 penalty units is appropriately high so as to deter people from bringing into Australia the kinds of goods which will be restricted goods.
11. New subsection 233BABAE(3) provides that restricted goods are:
 - (a) goods that, if imported, would be prohibited imports; and
 - (b) that are prescribed by the regulations for the purposes of the definition.
12. Creating a category of ‘restricted goods’ which will be defined by regulation will give Customs and Border Protection some flexibility in regulating goods consistent with international treaty obligations and matters of international concern without the need for legislative amendment.

13. New subsection (4) provides that new section 233BABAE only has effect for the purposes related to external affairs, including:
 - (a) for purposes related to giving effect to an international agreement to which Australia is a party; and
 - (b) for purposes related to addressing matters of international concern.
14. As restricted goods will be brought into Australia and will not be imported, or intended to be imported, the Commonwealth will not be able to rely on the Trade and Commerce Power. Instead, two aspects of the external affairs power will be relied on:
 - the domestic implementation of international treaty obligations; and
 - matters of international concern.
15. Subsection (4) limits the scope of the new offence to ensure that it falls within the scope of these two aspects of the external affairs power.
16. New subsection 233BABAE(2) will provide that the offence created by subsection (1) does not apply if the person brings goods into Australia in accordance with a written permission given by the Minister for the purposes of this subsection. This is consistent with provisions regarding prohibited imports and would allow, for example, restricted goods to transit through Australia without it being an offence where the material is being used for law enforcement purposes.
17. **Item 1** inserts a reference to ‘restricted goods’ in the definition of prohibited goods. This will ensure the same provisions which apply to prohibited goods also apply to restricted goods.
18. **Item 2** inserts the term ‘restricted goods’ into section 4 which contains definitions has the meaning given by section 233BABAE.
19. **Item 3** inserts new subsection 4(19A) which provides, without limiting Part XII, a person is taken to be unlawfully carrying prohibited goods on his or her body if the person is carrying, on his or her body, restricted goods that have been brought into Australia other than in accordance with a permission under new subsection 233BABAE(2).
20. **Item 4** inserts a reference to restricted goods in the definition of special forfeited goods. This will ensure the provisions which apply to special forfeited goods also apply to restricted goods. In particular, this will allow restricted goods to be seized without a warrant.
21. **Item 5** includes a reference to restricted goods in section 229. Section 229 contains goods which are forfeited to the Crown. This item will provide that restricted goods will be forfeited to the Crown.
22. **Items 7 and 8** will amend section 233BABA to ensure that an officer of Customs, in the course of duty, or a person acting in accordance with written instructions referring to section 233BABA issued by an officer of Customs acting in the course of duty, possesses or conveys, or facilitates the conveyance of restricted goods is not criminally responsible for an offence against a law of the Commonwealth or of a State or Territory relating to the possession, conveyance or facilitation of such goods.

Part 2—Entry of ships or aircraft for home consumption or warehousing

Customs Act 1901

23. The amendments made by this Part will clarify 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.

Items 10 and 11 – paragraphs 30(1)(a) and (aa)

24. Section 30 sets out the circumstances under which goods are subject to the control of Customs. The amendments being made by these items make it clear that self-powered ships and aircraft that are imported or intended to be imported shall be subject to the control of Customs from the time of arrival in Australia until the ship or aircraft is entered or is exported to a place outside Australia.

Item 12 – Subsection 68(2) and (3)

25. Section 68 of the Act requires that goods, unless covered by an exemption, must be either entered for home consumption or warehousing after they first arrive in Australia. Goods can also be entered in advance of their arrival in Australia. Section 68(1)(c) of the Act applies to ships and aircraft that are imported or intended to be imported that have commenced their journey to Australia.
26. Subsection 68(2) establishes that the owner may enter the goods before the ship or aircraft carrying the goods first arrives at a port or airport at which any goods are to be discharged. Subsection 68(3) provides that if they have not entered the goods under subsection (2) then they must enter the goods when the ship arrives. The proposed amendments make it clear that these subsections also apply to self-powered ships and aircraft.

Item 13 – Subsections 71A(7) and (8)

27. Subsections 71A(7) and (8) set out the circumstances in which goods to which an import entry relates are taken to have been entered for home consumption. The time at which goods are taken to have been entered for home consumption is important for the purposes of section 132 of the Customs Act, which specifies the rate of duty that is payable on goods. Under subsection 132(1), the rate of import duty payable on goods is the rate of duty in force when the goods are entered for home consumption.
28. Under subsection 71A(7), reference is made to the entry of goods where the goods have been imported or brought to the first port or airport in Australia at which any goods are to be discharged.
29. Under subsection 71A(8), reference is made to the entry of goods before the goods have been brought to the first port or airport in Australia at which any goods are to be discharged.

30. This item amends both subsection 71A(7) and (8) to clarify that they apply in relation to self-powered ships or aircraft which are imported.

Item 14 – Subsection 71E(2A)

31. Section 71E concerns the making of an application for movement permission for goods which are subject to Customs control. This amendment will make it clear that this subsection will also apply to goods that are a ship or aircraft and that are not carried on board a ship or aircraft.

Items 15 and 16

32. These items make technical amendments to section 104 of the Act to repeal references to entering goods for transshipment. Transshipment entries have been repealed, however these cross-references were missed.

Item 17 – Saving provisions

33. Item 17 inserts a savings provision which provides that: the amendments made by item 12, regarding the entry of imported goods, does not affect the validity of entries of goods for home consumption or warehousing made before the commencement of that item; and the amendment made by item 14, concerning movement applications, does not affect the validity of movement applications made before the commencement of that item.

Part 3—Valuation of imported goods

Customs Act 1901

34. Division 2 of the Customs Act sets out provisions relating to the Customs valuation of imported goods, giving effect to Australia's obligations under the World Trade Organization (WTO) Customs Valuation Agreement. The WTO Customs Valuation Agreement provides that production assist costs be included in determining the customs value of imported goods.
35. The definition of 'purchaser's material costs' in sub-section 154(1) of the Customs Act requires the actual *cost* of acquisition of the material to be included in the customs value of the imported goods. In circumstances where the material was provided free of charge by the buyer to the seller in the import sales transaction and the material was acquired free of charge by the buyer from an unrelated person, the cost of acquisition is treated as zero under the legislation.
36. This is contrary to the intention of Article 8(1)(b)(i) of the WTO Customs Valuation Agreement which is to attribute a reasonable value to the material supplied by the buyer for use in the production of imported goods and to include that value in the customs value despite the buyer acquiring the material from a third party at zero cost. Similar inconsistencies exist in the definitions of 'purchaser's tooling costs', 'purchaser's work costs' and 'purchaser's subsidiary costs.'
37. The items contained in this Part will amend these definitions to better reflect the intention of the WTO Customs Valuation Agreement.
38. **Items 18 and 19** amend the definition of 'purchaser's material costs.'
39. **Items 20, 21 and 22** amend the definition of 'purchaser's subsidiary costs.'
40. **Items 23 and 24** amend the definition of 'purchaser's tooling costs.'
41. **Items 25, 26 and 27** amend the definition of 'purchaser's work costs.'
42. **Item 28** inserts an application provision which provides that the amendments made by Part 3 apply in relation to goods imported into Australia on or after commencement of Part 3 and goods imported before commencement of Part 3 where the time for working out the rate of import duty on the goods had not occurred before the commencement of Part 3.

Part 4 – Designation of Customs controlled area

Customs Act 1901

43. Section 234AA of the Customs Act allows places to be set aside for the purposes of examining the personal baggage of and holding passengers. Sections 234A and 234AB contain offence provisions relating to places designated under section 234AA.
44. However, the reference to passengers in section 234AA does not include a reference to crew. Consequently, a Customs controlled area cannot be designated under section 234AA for the purposes of clearing an aircraft or vessel that arrives in or departs from Australia carrying only crew, where that Customs place is not also used for clearing passengers.
45. The amendment made by **item 29** will allow a Collector to designate a section 234AA place for crew.
46. The amendments made by items **31, 32 and 33** will amend sections 234A and 234AB consequentially to **item 29** to ensure these offence provisions concerning 234AA places extends to any areas designated as 234AA places for crew.
47. In addition, the CEO may, under subsection 234AA(3) of the Customs Act, specify through a Gazette Notice an area of an airport appointed under section 15 of the Customs Act as a place to which section 234AA applies. However this power does not extend to seaports. **Item 30** will extend this power to seaports.
48. **Item 34** inserts an application provision which provides:
 - (1) The amendment made by item 31 applies in relation to the examination of baggage on or after the commencement of that item;
 - (2) The amendment made by item 32 applies in relation to notices given on or after the commencement of that item;
 - (3) The amendment made by item 33 applies in relation to directions given on or after the commencement of that item.

Part 5 – Warehouse licences

Customs Act 1901

49. The *Customs Act 1901* (the Customs Act) allows the CEO to request further information after receiving an application for the grant of:
 - i. a depot licence (section 81B)
 - ii. the variation to an application for a depot licence (section 77LA) and,
 - iii. the variation to an application for a warehouse licence (section 77J)
50. The CEO is unable however to request further information after receiving an application for the grant of a warehouse licence. The CEO is only able to grant or refuse the licence on the basis of the original application.
51. The amendments made by this Part will allow the CEO to request additional information from the applicant for a warehouse licence.
52. **Item 35** will insert new section 80A.
53. New subsection 80A(1) provides the CEO may, in writing, request further information from an applicant for a warehouse licence within a period specified in the notice.
54. New subsection 80A(2) allows the CEO, in writing, to extend the time period specified in the request under subsection (1) within which an applicant must provide the further information.
55. New subsection 80A(3) provides that if the applicant fails to provide the further information requested under subsection (1) within the specified period but provides it at a later time, the CEO must not take into account the further information in determining whether to grant a warehouse licence.
56. **Item 36** makes a consequential amendment to paragraph 81(2)(d) as a result of new section 80A.
57. Subsection 81(1) provides that the CEO shall not grant a warehouse licence if, in his or her opinion, the applicant or certain other persons are not fit and proper. The amendment made by item 36 will require the CEO to have regard to any misleading statement made in the further information requested by the CEO in determining whether a person is a fit and proper person under subsection 81(1).
58. **Item 37** makes a consequential amendment to subsection 81A(1).
59. Subsection 81A(1) requires the CEO to make a decision on an application for a warehouse licence within 60 days after receiving the application. The amendment made by item 37 will clarify that the 60 day period is from receipt of the application or, where further information is requested under new section 80A, 60 days from receipt of that further information.

60. **Item 38** inserts an application provision which provides that the amendments made by Part 5 apply in relation to applications for warehouses made on or after the commencement of Part 5.

Part 6 – Notification of particulars of cargo reporters

Customs Act 1901

Item 39 – At the end of section 64AAB

61. The Customs Act requires a cargo reporter to make a report of cargo before the start of a certain period measured with respect to the estimated time of arrival. Where the actual time of arrival is after the estimated time of arrival, the cargo reporter will not be prosecuted or served with an infringement notice if the report of cargo is made before the start of the same period measured with respect to the actual time of arrival.
62. The report of other cargo reporters, required under section 64AAB, is to be made in the same timeframe as the cargo report. The amendments contained in this item align the requirements for the two reports. The amendments will establish that a person will not be liable to be prosecuted or cannot be served with an infringement notice for an offence under section 64AAB if the report of other cargo reporters is made no later than the period required by the Customs Act before the actual arrival of the ship or aircraft in Australia where the actual arrival is after the estimated time of arrival.

Part 7 - Accredited client program

A New Tax System (Wine Equalisation Tax) Act 1999

Customs Act 1901

Import Processing Charges Act 2001

63. The accredited client program was co-designed with industry partners (Business Partner Group) and Government stakeholders to deliver benefits for industry as a trade facilitation measure for highly compliant, low risk traders. Subsequent technology improvements and changes in the policy, procedural and cost environment meant that the program has never been implemented operationally.
64. The accredited client program has never been implemented operationally. The amendments contained in this Part repeal the provisions establishing the accredited client program.

Part 8 – Electronic cargo reporting

Customs Act 1901

65. Section 64AB of the Customs Act requires all cargo reports to be made electronically. This requirement commenced when the imports functionality of the integrated cargo system (ICS) was turned on in October 2005.
66. The *Customs Amendment and Repeal (International Trade Modernisation) Act 2001* amended the Customs Act to include this requirement. This legislation introduced a general moratorium period of six months to provide industry with a transition period to move from documentary cargo reporting to electronic cargo reporting. Upon application to the CEO, a further moratorium period of up to 18 months could be provided.
67. The period available under both moratoriums expired in October 2007.
68. The amendments made by this Part remove the redundant provisions regarding the moratorium.

Part 9 – Other amendments

Customs Act 1901

Item 98 – Subsection 69(8)

69. This item makes a technical amendment to correct an incorrect reference.

Item 99 – Subsection 77F(1)(definition of Tribunal)

70. This item repeals a redundant definition.