Law Council
OF AUSTRALIA

Customs and Other Legislation Amendment Bill 2016

Senate legal and Constitutional Affairs Legislation Committee

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Introduction

1. The Law Council has a long history of providing assistance to the government of the day by offering considered, non-partisan opinions on the legislation that affects both Australian public and private interests. It is from this perspective that the Law Council welcomes the broad government initiatives regarding the reduction of red tape and the amendment of legislation in order to expedite government policy at the Australian border as it relates to commerce and the passage of natural persons. In this regard this submission seeks to provide our considered opinion on the action and outcomes flowing form some amendments proposed under the Customs and Other Legislation Amendment Bill 2016 (**the Bill**)**.**

2. The Bill represents a number of amendments to the *Customs Act 1901* (Cth), the *Commerce (Trade Descriptions) Act 1905* (Cth) and the *Maritime Powers Act 2013* (Cth). The focus of the Law Council in this instance is on the provisions relating to the following:

    (a) Subsections 40(2) and 40(3) of the Maritime Powers Act; and

    (b) Subsections 269D(1) and 269E(2) of the Customs Act.

3. To that end, the Business Law Section's Customs and International Transactions Committee and the Law Council Secretariat have together drafted this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**).

4. The recommendations of the Law Council for these provisions are as follows:

    (a) Proposed subsection 40(2) is amended to ensure compliance with Australia's obligations under the *United Nations Convention on the Law of the Sea*[1] (**UNCLOS**);

    (b) Proposed subsection 40(3) is not passed;

    (c) Proposed amendment to subsection 269D(1) is not passed; and

    (d) Proposed amendments to subsection 269E(2) are not passed.

5. The Law Council would be pleased to elaborate on any of the material contained in this submission, either in writing or in person, in order to assist the considerations of the Committee.

[1] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

Proposed amendments to subsections 40(2) and 40(3) of the *Maritime Powers Act 2013* (Cth)

6. Schedule 6 of the Bill reflects Schedule 4 of the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] (**the Migration and Maritime Powers Bill**). The Committee inquired into the Migration and Maritime Powers Bill and reported to Parliament on 10 November 2015, supporting the passage of the Bill, subject to a recommendation that:

   > *The Explanatory Memorandum to the Bill be amended to clarify the operation of the retrospective provisions of the Bill and the safeguards around the impact of these provisions on young people and people with cognitive impairment.*[2]

7. The Migration and Maritime Powers Bill was returned to the House of Representatives following amendments passed by the Senate, which were unrelated to Schedule 4.[3] That Bill lapsed at prorogation on 15 April 2016.

8. The Law Council made a submission to this Committee on the Migration and Maritime Powers Bill, and its submissions and concerns therefore remain relevant to the Bill before the Committee's current inquiry.[4] The Law Council remains concerned that the proposed amendments to the *Maritime Powers Act 2013* (Cth):

   (a) remove the Court's power to determine whether an act is consistent with UNCLOS;

   (b) widen the Minister's discretion to declare that 'turn backs' and 'tow backs' are consistent with UNCLOS based on subjective, rather than objective, criteria; and

[2] Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Amendment Bill (No.1) 2015 [Provisions]* (November 2015), vii ('Committee Report').

[3] The proposed amendments:
   (a) strengthen section 4AA of the Migration Act, to read: *The Parliament affirms as a principle that no minor is to be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a minor must be in conformity with the law and must only be used as a measure of last resort and for the shortest appropriate period of time*. The principle would be given practical effect by mandating that the Minister make a determination, as soon as practicable, but in any case within 30 days, that a minor is to reside at a specified place, instead of being detained in immigration detention;
   (b) create an offence for failure to report a 'reportable assault', punishable with a maximum pecuniary penalty of $10,800;
   (c) increase the transparency and accountability of immigration detention facilities both in Australia and in regional processing countries; and
   (d) permit a person to disclose or use 'protected immigration detention facility information' (information or a document that was obtained in the course of their employment and which relates to a detention facility) if the person reasonably believes that the disclosure or use would be in the public interest. This amendment reverses amendments to the Migration Act made by the *Australian Border Force Act 2015* (Cth).

[4] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions], 16 October 2015, available at: http://www.lawcouncil.asn.au/lawcouncil/images/3069_-_MA_MP_Amm_No_1_2015.pdf.

(c) could place people that are the subject of these powers at risk, in breach of *non-refoulement* obligations under the *Convention relating to the Status of Refugees* and other international instruments.[5]

9. In its inquiry into the Migration and Maritime Powers Bill, the Committee ultimately accepted the advice from the Department of Immigration and Border Protection (**the Department**) i that the Bill does not breach, and is consistent with, Australia's international obligations.[6]

10. Despite these assurances from the Department, the Law Council remains concerned that the Bill does not accord with international obligations accepted by Australia under UNCLOS, or its *non-refoulement* obligations. Although a relevant maritime officer, or the Minister, is required to consider whether passage of a vessel or aircraft through or above waters that are part of another country is in accordance with the UNCLOS, pursuant to new subsection 40(2), the proposed amendments do not require that this passage is in fact in accordance with Australia's international obligations. Furthermore, new subsection 40(3) specifically states that an exercise of such powers is not invalid if it was based on a defective consideration of UNCLOS.

11. Therefore, although the amendments may facilitate compliance with UNCLOS, the proposed amendments to not require Australia to comply with the Convention. The Law Council considers this is inconsistent with universally accepted principles of treaty interpretation, which requires that states parties must interpret and perform its treaty obligations in good faith.[7]

12. The Law Council therefore maintains its opposition to these provisions.

Recommendations:

- Proposed subsection 40(2) is amended to ensure compliance with Australia's obligations under UNCLOS
- Proposed subsection 40(3) is not passed

Proposed Amendments to subsection 269D(1) of the *Customs Act 1901* (Cth)

13. Item 1 of Schedule 3 of the Bill seeks to amend subsection 269D(1) of the Customs Act to remove the requirement that goods are only treated as locally made if a minimum of 25% of the cost of the goods are attributable to local sources.

[5] Under the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively,' the Refugee Convention'); the *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976); the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

[6] Committee Report, [2.76].

[7] *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31.

14. A tariff concession order (**TCO**) is a legislative instrument that reduces the customs duty payable on certain substitutable goods from 5% to 0%. Customs duty is a protectionist tax and TCOs are intended to be available where there is no Australian industry to protect. A TCO can be made where the core criteria in section 269C of the Act is met. Section 269C of the Act provides that:

    For the purpose of this Part, a TCO application is taken to meet the core criteria if, on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business.

15. The term 'produced in Australia' is defined in subsection 269D(1) of the Act. The current definition has two elements:

    (a) the goods are wholly or partly manufactured in Australia; and

    (b) not less than ¼ of the factory or work costs of the goods is represented by the sum of:

        (i) the value of Australian labour; and

        (ii) the value of Australian materials; and

        (iii) the factory and overhead expenses incurred in Australia in respect of the goods.

16. We will refer to the requirement in paragraph (b) as the **25%** Local Content Requirement.

17. Subsection 296D(2) provides that goods are taken to have been partly manufactured in Australia if at least on substantial process in the manufacture of the goods was carried out in Australia.

18. The explanatory memorandum to the Bill (**EM**) explains the reason for the proposed amendment in the following terms:

    35. This criterion requires Australian businesses to provide detailed and confidential accounting evidence in order to demonstrate compliance with the provision. This evidence is unnecessary because manufacturers who can demonstrate a substantial process of manufacture always easily exceed the 25 per cent factory or works costs test. The requirement to produce such evidence therefore places an unnecessary burden on Australian businesses.

    36. Consistent with the Government's deregulation agenda, new subsection 269D(1) of the Customs Act simplifies the test under which goods are taken to have been produced in Australia, such that goods (other than unmanufactured raw products) are taken to be produced in Australia if they are wholly or partly manufactured in Australia.

19. When considering the nature of value added activities in Australia, it is incorrect to assume that where a substantial process in the manufacture of goods occurs the 25% Local Content Requirement will always be satisfied. Industries where this may be the case is where there is a very expensive input into the manufacture of the goods and such manufacture is not labour intensive. Prominent examples of this are chemicals and plastics, particularly those where an oil based product is a key ingredient. Our members have been involved in cases where satisfaction of the 25% Local Content Requirement varied depending on the international oil price.

20. It should be noted that the 25% Local Content Requirement sets a low evidentiary burden. It can be meaningfully compared to the safe harbour provisions under the Australian Consumer Law which allow the labelling of goods as ;made in Australia' to be used where 50% or more of the total cost of production or manufacture were accrued in Australia.

21. It is also a concern that the proposed removal of the 25% Local Content Requirement is contradictory to the variety of free trade agreements (**FTA**) that Australia has entered into. While each FTA is different, where an FTA has an origin rule based on a percentage of local content, the minimum is usually above 35%.

22. In terms of the administration and keeping of information necessary to satisfy the 25% Local Content Requirement, it does have the character of being commercially sensitive. However, the Act does not require that information be provided to any entity other than the Comptroller General of Customs and his/her delegates.

23. Similarly, the merit reviews of decisions in respect of TCOs made to the Administrative Appeals Tribunal (**AAT**) are protected by orders and undertakings having regard to the confidentiality of sensitive information. We are not aware of any cases where such an undertaking has been breached.

24. The providing of information necessary to satisfy the 25% Local Content Requirement is said in the EM to be an unnecessary burden on Australian business. It is necessary to first consider that the TCO system is in place to remove unnecessary taxes on Australian businesses. The 25% Local Content Requirement is a requirement to be satisfied by one alleged local manufacture in order to avoid the burden of a protectionist tax being levied on potentially 1000s of importers.

25. Further, any Australian manufacturer should be able to easily satisfy the 25% Local Content Requirement. The information as to labour costs and overheads should be maintained as part of standard accounting practices. It is accepted that records may not be kept as to which material inputs are Australian originating and which are imported (particularly if sourced from Australian distributors). However, to the extent that these costs are material it should be possible to obtain the information.

26. It should be noted that Australian producer obligations under international agreements such as FTAs already require the use of similar commercial information for the purpose of substantiating claims for customs duty reductions and other benefits.

27. Satisfying the 25% Local Content Requirement is neither onerous nor unreasonable in the context of Australia's international trade policy settings. The removal of the 25% Local Content Requirement however introduces the potential for significant, negative externalities in imported consumption goods and inputs to manufacture.

Recommendation:

- Proposed amendment to subsection 269D(1) is not passed

Proposed amendments to subsection 269E(2) of the *Customs Act 1901* (Cth)

28. Item 1 of schedule 3 of the Bill seeks to amend subsection 269E(2) of the Act to extend the time during which an Australian producer can be deemed to have produced made to order capital equipment from 2 to 5 years.

29. This sub-section deals with the question of when **made to order capital equipment** may be treated as substitutable goods produced in Australia. Under s 269C of the Customs Act a Tariff Concession Order, which entitles an importer to a 0% rate of customs duty for particular products is only available where no substitutable goods are produced in Australia in the ordinary course of business.

30. The nature and rationale for the proposed amendments is discussed in paragraphs 38-44 of the Explanatory Memorandum to the Bill. The stated rationale is to ensure that subsection 269E(2) more accurately aligns with the policy intention which is said to be that an Australian manufacturer which has the capacity to manufacture substitutable made to order capital goods should be deemed to be a producer of substitutable goods even though they have not produced such goods in the past. To achieve this policy objective the key amendments are:

    (a) Insertion of the words 'taken to have been' in the chapeau of subsection 269E(2) in order to deem the production of substitutable goods;

    (b) The use of the words 'could produce' in each of subsection 269E(2)(b) and (c);

    (c) The extension of the period for the production of goods requiring the same labour skills, technology and design expertise from 2 years to 5 years.

31. These statutory provisions have most recently been interpreted by the Full Federal Court in the decision of *Comptroller-General of Customs v Vestas – Australian Wind Technology Pty Ltd* [2015] FCAFC 185. This decision overturned the earlier decision of the Commonwealth Administrative Appeals Tribunal ([2015] AATA 348) (AAT Decision). The Full Federal Court found that subsection 269E(2) can apply to Australian manufacturers that demonstrate a capacity to make made to order capital goods and which have not previously made such goods. Further, we understand that Vestas is applying for special leave to the High Court of Australia to appeal the Full Federal Court's findings. In light of both the broad current interpretation of subsection 269E(2) by the Full Federal Court (which ostensibly accords with the government's policy objectives) and the pending appeal by Vestas, we query whether the proposed amendments are premature.

32. Further, a criticism of the proposed amendments is that they are not sufficient to clearly achieve the policy outcomes sought. Section 269E is headed 'Interpretation – The Ordinary Course of Business' with subsection 269E(2) dealing with made to order capital goods and subsection 269E(1) dealing with other goods. Section 269E is to be read in conjunction with sections 269C (Core Criteria) and section 269D (Goods Produced in Australia). Section 269D importantly sets out the minimum requirements for goods to be deemed to be produced in Australia. The key requirements currently are that at least one substantial process of manufacture was carried out in Australia and that the aggregate of Australian labour, materials and factory overheads must exceed twenty five percent. (The 25 percent rule is proposed to be removed under this Bill). The difficulty with the proposed amendments to subsection 269E(2) is that they are still subject to the requirements of section 269D. The proposed amendments

potentially introduce new, extraordinary tests such as demonstrating a substantial process of manufacture and the twenty five percent local content rule on a hypothetical future capital goods order.

33. Similarly, in section 269C the core criteria for the granting of a TCO requires that 'no substitutable goods were produced in Australia in the ordinary course of business'. The hypothetical future production of made to order capital goods does not easily fit into this core criteria. The question of what exactly constitutes substitutable goods is also made more difficult.

34. An additional criticism of the proposed amendment to section 269E(2) is directed at the intended policy outcome. Namely that the amendments could excessively liberalise the use of this sub-section by potential objectors to TCO applications with the end result being that TCOs may be refused in instances where they should have been granted. In addition, significant numbers of existing TCOs would be open to challenge under a hypothetical production test. It would be open to Australian manufacturers to assert that they have a capability to produce certain made to order capital goods when they may not have such a capability. If this occurred and a TCO was not available then it would impose higher costs on businesses that import made to order capital goods which costs would be passed on to other businesses and consumers downstream in the supply chain. The Explanatory Memorandum to the 1992 amendments (in which subsection 269E(2) was legislated) stipulates that a separate test for made to order goods is intended to cover producers who have a proven capability to produce substitutable goods.

35. An anticipated response to our criticism is that the amendments simply conformed the pre-existing policy. However, the extension of the period from 2 years to 5 years to demonstrate the production of goods using the same skills and technology together with the multiple uses of the phrase 'could produce' does nonetheless, in our view, open up the amendments to potential abuse.

Recommendation:

- Proposed amendments to subsection 269E(2) should not be passed in their current form.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.