

Customs seeks comment on new regulation of exports, depots and warehouses

BY way of Australian Customs and Border Protection Notice No. 2011/04 ("Notice") and subsequent announcement on its website, the Australian Customs and Border Protection Service ("Customs") has sought feedback from industry on the Exposure Draft legislation entitled the "Customs Amendment (Export Controls and Other Measures) Bill 2011" ("Bill").

The Bill would have the effect of amending the Customs Act 1901 and the Customs Depot Licensing Charges Act 1997 "to increase primarily the level of security in the air cargo environment".

According to the Notice, the Bill is expressed to constitute the Government's response to the "Independent Review of Airport Security and Policing for the Government of Australia" (the Wheeler Report) and the ANAO Report "Customs Cargo Management Re-Engineering Project".

The impact of the Bill can be summarised as follows.

- Increase the ability to move goods "no longer for export" from the prescribed place for export without liability to the person holding those goods.
- Introduce new provisions to allow Customs to give directions as to the movement of goods intended for export.
- Introduce new provisions to allow Customs to suspend an Authority to Deal ("ATD") which has already been issued for goods to be exported. Such a suspension could be to verify particulars in relation to goods or require production of commercial documents.
- Allow the imposition of additional conditions on those holding depot or warehouse licences.
- Provide for Infringement Notices to be issued for breaches of depot and warehouse licences (giving Customs more flexibility in enforcing compliance with such conditions).
- Strengthen the powers of Customs' officers to give directions regarding goods

for export to those holding depot licences.

- Allow Customs to suspend or cancel depot licences.
- Set out timeframes within which Customs must decide whether or not to grant a warehouse licence (and provide for a default provision that the licence has been denied if a positive decision is not made within the prescribed time of 60 days).
- Allow Customs to vary the area covered by a warehouse licence. This includes the ability to Customs to specify minimum requirements as to physical security, plant and equipment, accounting and record keeping before granting any application to vary a licence.

In accordance with Customs' Practice Statement No. PS2011/02, Customs is seeking comment on the provisions of the Bill.

While the proposed increase in the level of security in the air cargo environment is an expected consequence of the Wheeler Report and the ANAO Report, some of the aspects of the Bill will create some concerns and challenges for industry. Some of those are listed below.

- Additional conditions on the holders of depot or warehouse licences can be imposed to require compliance with "prescribed relevant Commonwealth, State or Territory legislation". At this stage, we are unaware as to the types of legislation which may be the source of such additional conditions by Customs. However, it does raise the possibility of a Commonwealth agency (such as Customs) giving directions and imposing conditions associated with State legislation. Presumably Customs would need to act on a request from the State or Territory agency rather than unilaterally deciding to impose conditions in an area where it would not otherwise have responsibility.
- There are significant commercial and legal risks to operators holding warehouse or depot licences should Customs suspend



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an ATD or direct the movement and storage of goods otherwise due for export. Compliance with those directions by Customs could cause operators to breach their commercial contracts with their customers which required movement of goods by prescribed times. If the directions by Customs lead to goods being held by such operators for a longer time, the operators will need to be protected against being in breach and will need to recover additional costs against their customers. This will require attention to terms and conditions of trade and consideration as to the risks associated with dealing with certain customers.

- There is a commercial risk to the operator of a depot whose licence may be suspended or revoked but is subsequently reinstated without finding a fault against those operators. Clearly there are adverse commercial and financial consequences to an operator whose business is closed down by a suspension. Further, there is the additional exposure to charges by Customs for services provided during the suspension at the premises.
- The ability to review the decisions by Customs may be of concern. The new provisions do allow for review of decisions by the Administrative Appeals Tribunal but the threshold test for Customs to make the decision in the first instance is that the decision needs to be "necessary or desirable". There is no