



## **AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE PRACTICE STATEMENT**

**File No:**

<b>Practice Statement No:</b>	PS2011/02
<b>Published Date:</b>	12 January 2011
<b>Review Period:</b>	3 years
<b>Availability:</b>	Internal and external

<b>Title:</b>	Customs and Border Protection legislation – Industry engagement
<b>Purpose:</b>	To ensure that Customs and Border Protection engages industry, where appropriate, in the development of its legislation.
<b>Owner:</b>	Chief Operating Officer
<b>Category:</b>	Corporate
<b>Contact:</b>	National Manager, Legal Services Branch, 02 6275 6752

### **Summary of main points**

Customs and Border Protection Practice Statements are endorsed policy and must be followed by all Customs and Border Protection employees. This Practice Statement outlines:

- Customs and Border Protection policy in relation to engaging industry during the development of legislation.

**The electronic version published on the intranet is the current Practice Statement.**

### **Introduction Statement**

The purpose of this Practice Statement is to ensure that Customs and Border Protection engages industry, where appropriate, in the development of its legislation.

Customs and Border Protection is committed to engaging industry on the development of its legislation program and on proposed legislative amendments.

Customs and Border Protection and the Minister for Home Affairs will make the final decision on what proposals to include in Customs and Border Protection's legislation program.

Some methods of consultation are also subject to the Minister's and the Prime Minister's/Cabinet's approval. Consultation may be undertaken on a confidential basis and may be subject to sensitivities and deadlines.

## Scope

This Practice Statement sets out Customs and Border Protection's policy in relation to industry engagement in respect of the following classes of legislation or quasi legislation:

- Bills
- Regulations
- By-laws
- Determinations made under section 273 of the *Customs Act 1901* (the Customs Act)
- Other instruments such as the determination of information technology requirements made under section 126DA of the Customs Act and the rules for working out strength of alcoholic beverages made under section 153AC of the Customs Act.
- Any other rule with which compliance is expected.

These will be referred to as 'legislation' throughout the remainder of this Practice Statement.

This Practice Statement does not cover tariff concession orders which are subject to legislative consultation requirements.

This Practice Statement applies to staff in the following areas:

- All Divisions

## Policy Statement

1. Where Customs and Border Protection has policy responsibility for proposed legislation, Customs and Border Protection will engage industry, where appropriate, in the preparation of that legislation.
2. Where another agency or Department has policy responsibility for an amendment being made to Customs and Border Protection legislation, Customs and Border Protection will confirm with the other agency or Department whether industry consultation has been, or is proposed to be, undertaken. Where Customs and Border Protection has responsibility for implementing proposed legislation, Customs and Border Protection will seek the agreement of the other agency or Department to consult industry either on its own or with the other agency or Department.

### **When should industry engagement occur?**

3. Industry engagement should be a continuous process that starts early in the policy development process. Industry engagement may occur at one or both of the following times:
  - during policy development;
  - after policy development but before introduction or making (e.g. using exposure drafts).
4. Industry may be engaged a number of times during these two stages.

### **Is industry engagement appropriate?**

5. As a general approach, industry engagement will be sought for all legislative proposals that may have an impact on commercial operations. Consultation on draft legislation will generally be aimed at ensuring that the legislation delivers the Government's policy intent effectively and efficiently, including from an industry perspective.
6. Consultation will be undertaken subject to Ministerial approval (where required), sensitivities and deadlines. For example, little or no consultation may be undertaken in relation to Budget measures that are subject to Government imposed deadlines.
7. Consultation must be undertaken in relation to legislative amendments which are subject to a Regulation Impact Statement (RIS). Many Customs and Border Protection initiatives will not require a RIS. However, industry engagement may still be required in accordance with this Practice Statement even where a RIS is not required.
8. From 1 July 2010, a RIS will be required if there is a *medium* impact on business.
9. A RIS must address the following criteria:
  - the problem;
  - the objectives of a regulatory proposal;
  - feasible options; the impact of each the feasible options;
  - details on consultation;
  - the conclusion and recommended option; and
  - details of implementation and review of the recommended option.

All RISs are cleared by OBPR to ensure that they adequately address these criteria.

Note: As Customs and Border Protection administers several policies that are the responsibility of another department or agency, a RIS (or a Preliminary Assessment) would not necessarily be prepared by Customs and Border Protection.

Also from 1 July 2010, a RIS will need to be signed off by departmental secretaries or deputy secretaries or equivalents before being forwarded to OBPR for clearance.

10. All RISs are currently made public, by various means, depending on the type of regulation. For example, in relation to amending Acts, the RIS is included in the Explanatory Memorandum for the Bill. From 1 July 2010, OBPR will also publish them on their website after the relevant policy announcement.

### **How should industry engagement be conducted?**

11. Industry engagement should be widely based to ensure it captures the diversity of stakeholders affected by the proposed changes. One or more of the following mechanisms may be used to conduct industry engagement:
  - existing forums;
  - co-design forums;
  - other forums;
  - consultation papers;
  - exposure drafts.

### ***Existing forums***

12. Existing forums should be used to engage industry where possible.
13. Existing groups and forums include:
  - the Customs and Border Protection National Consultative Committee (CBPNCC) and associated Sub-Committees;
  - the Passenger Facilitation Taskforce (PFTF);
  - the Intellectual Property Enforcement Consultative Group.
14. A list of members of these groups is attached (Attachment A).

### ***Co-design forums***

15. The Client Engagement & Cargo Systems Branch (CE&CS) in the Cargo Division has the ability to establish co-design forums for trade related matters. Based on topics and affected industry groups co-design forums are convened from representatives of relevant industry associations and/or specific industry clients. This Branch should be contacted to advise whether a co-design forum exists or could be created which could be used to consult industry about proposed legislation.

### ***Other forums***

16. If there are no appropriate existing forums for industry engagement, the relevant line area may organise one or more forums. IE&US should be consulted to ensure relevant industry groups are represented or may assist in the identification of potential members of the forum. The Legal Services Branch (LSB) should also be informed of any proposed forums and will identify opportunities to combine industry engagement.

### ***Consultation papers***

17. If the Minister determines that a proposal is significant enough to warrant a green paper, a green paper should be prepared by the relevant line area. A green paper should contain most of the elements of a RIS, such as:
  - the problem,
  - objectives,
  - some options (including a preferred option),
  - identifying the main groups affected by the options, and
  - a preliminary impact analysis.

Whilst a preferred option should be identified where possible, it is important that stakeholders are not left with the view that other options have been ruled out, otherwise they may limit their participation and reduce the effectiveness of the consultation process.

18. For consultation with a wide range of people in relation to less significant proposals, issues or information papers may be appropriate. The paper should set out the background and identify the problem, the objectives trying to be achieved, the issues involved and how feedback is to be provided. The paper may also ask for general feedback, include specific questions or set out options.
19. Where a consultation paper is the appropriate mechanism for engaging industry, Customs and Border Protection may need to seek the approval of the Prime Minister and/or the Minister for Home Affairs before the release of the consultation

paper. Line areas should contact the LSB to ascertain whether approval is required.

20. Consultation papers can be placed on the Customs and Border Protection website and the [www.business.gov.au](http://www.business.gov.au) website. [The [www.business.gov.au](http://www.business.gov.au) website has been established by the Department of Industry, Tourism and Resources and provides a mechanism to engage with industry and other stakeholders].

### **Exposure drafts**

21. Cabinet or the Prime Minister's approval is necessary before draft Bills can be circulated prior to their introduction into the Parliament. All policy approvals must be in place before your exposure draft Bill can be circulated.

The Prime Minister's approval is also necessary before regulations can be circulated prior to their making.

22. The LSB is responsible for preparing requests to the Prime Minister for agreement to release an exposure draft.
23. The LSB also coordinates and drafts requests for the Prime Minister's policy approval for Bills (other than for Tariff Bills). The LSB should be notified at this time if a line area intends to distribute an exposure draft of a Bill or part of a Bill.
24. For Bills, the Prime Minister may agree to the release of an exposure draft at the time policy approval for the amendments is provided. However, for some measures the Prime Minister may not agree to the release until the exposure draft of the Bill has been finalised.
25. A realistic timeframe for exposure drafts should be set.
26. For Bills, it is best practice to release an exposure draft 9 weeks prior to the proposed introduction of a Bill. This allows:
  - 4 weeks for comments;
  - 2 weeks for changes to be made; and
  - 2 weeks for the Minister's approval (which is required 1 week prior to introduction).
27. In practice this means that Bills will have to be drafted in one Parliamentary sitting and introduced in the following sitting: see Practice Statement: *Development, introduction and passage of Bills*.
28. For regulations, it is best practice to release an exposure draft 10 weeks prior to the date it is proposed to submit the regulations to Executive Council. This allows:
  - 4 weeks for comments;
  - 2 weeks for changes to be made; and
  - 2 weeks for the Minister's approval (which is required 2 weeks prior to the Executive Council meeting).
29. For other legislation, it is best practice to release an exposure draft 7 weeks prior to the date it is proposed to make the legislation. This allows:
  - 4 weeks for comments;

- 2 weeks for changes to be made; and
  - 1 week for approval.
30. Two types of exposure drafts may be issued: a confidential exposure draft may be issued to a limited group of people or an unlimited exposure draft may be issued publicly.
31. Once an exposure draft has been released, the relevant line area may meet with industry representatives, or conduct forums, to discuss the draft.

#### *Confidential exposure drafts*

32. In some circumstances it may be desirable to release a final draft of legislation to a limited group of people because of the sensitive nature of the amendments.
33. Further, where there is limited time for releasing an exposure draft it may be desirable to release working drafts to a limited group of people.
34. Where an exposure draft is going to be issued to a limited group of people on a confidential basis, Customs and Border Protection must seek an undertaking from those people that they will not disclose any such information to another person without the prior approval of the Commonwealth. A form of undertaking can be obtained from the LSB.

#### *Unlimited exposure drafts*

35. An unlimited exposure draft is released to the public.
36. As well as the exposure draft, it is desirable to also release a guide to the exposure draft (this will usually be the same as the proposed explanatory memorandum for the Bill).
37. To increase accessibility to these documents, they should be smaller than 1Mb. This may mean that the exposure draft of a Bill may need to split into a number of smaller documents.

### **Providing feedback**

38. The relevant line area must provide feedback to people who were consulted or provided comments on proposed legislation. This feedback must be specific, that is, it should set out what consultation occurred, a brief overview of the person's suggestions and Customs and Border Protection's response to those suggestions.

### **How do I find other people to consult?**

39. A list of people and groups who are not members of the groups and committees identified above and who may be relevant is attached ([Attachment B](#)). Many of the people and groups listed have made submissions to parliamentary committees in relation to Customs and Border Protection legislation in the past.
40. Customs and Border Protection may also use the [www.business.gov.au](http://www.business.gov.au) website to find out information about people, businesses and groups that are interested in being consulted on specified topics including Border Control/Customs/Excise. If you would like information from this website, please contact the LSB.

## **Principals for conducting industry engagement**

41. Effective industry engagement requires a culture of cooperation and trust between all the parties concerned. The parties must share a goal of achieving outcomes that best serve the national interest, and must all accept that this may often not coincide with the vested interests of particular parties.
42. To achieve such a culture, stakeholders taking part in industry engagement must understand clearly the purpose of the engagement. For instance, consultation on draft legislation will generally be aimed at ensuring that the legislation delivers the Government's policy intent effectively and efficiently. It will not be aimed at revisiting aspects of that policy intent.
43. It is the intention of Customs and Border Protection, where possible, to:
  1. Be upfront, clear and honest about the purpose of any legislative activity. Provide details for the requirement, the process to be undertaken and any known constraints (financial, technical or legal).
  2. Provide timely feedback to participants who have been involved in industry engagement activities. Customs and Border Protection sees this as an essential commitment, which will assist us to build credibility and respect for our processes.
  3. Work to agreed timelines in all industry engagement activities. Where unforeseen delays occur, inform participants of changes and anticipated response times.
  4. Integrate its industry engagement activities across the organisation to minimise duplication of effort, resources and risks of 'over-consultation'.
  5. Refer information that arises from industry engagement and impacts on other Branches of Customs and Border Protection for further consideration and action.
  6. Acknowledge that different industry groups may have differing views. Customs and Border Protection will work to create the environment where different opinions can be expressed in a *mutually* respectful and constructive way.
  7. Design industry engagement processes that meet the availability and accessibility needs of its clients.
  8. Provide quality information to its clients so that industry engagement is conducted in an informed atmosphere of shared knowledge and mutual respect.
  9. Evaluate clients' points of view drawn from industry engagement and learn from the process to continually improve.

## **Annual Regulatory Plans**

44. The OBPR requires Customs and Border Protection to publicly announce its regulatory intentions and past regulation in July each year. Where appropriate, Customs and Border Protection should include in the plan proposed legislation which has medium impact on business. These plans should identify opportunities for industry engagement.
45. The LSB will contact relevant areas of Customs and Border Protection in June each year to provide input for the Annual Regulatory Plan.
46. The Plan can be updated during the year. If you have any changes to the Plan, please contact the LSB.

## **Providing assistance to other agencies and Departments**

47. Some amendments to Customs and Border Protection legislation are undertaken on behalf of other agencies and Departments (e.g. the Therapeutic Goods Administration, the Treasury, the Department of Foreign Affairs and Trade).
48. In those circumstances, Customs and Border Protection will confirm with the other agency or Department whether industry consultation has been, or is proposed to be, undertaken. Where Customs and Border Protection has responsibility for implementing proposed legislation, Customs and Border Protection will seek the agreement of the other agency or Department to consult industry either on its own or with the other agency or Department.

## **Related Instructions and Guidelines**

- Preparing consultation papers – legislative proposals

## **Related policies and references**

Practice Statement: *Making primary and subsidiary legislation*

Instruction and Guideline: *Development, introduction and passage of Bills*

Instruction and Guideline: *Making Regulations and Ordinances*

Instruction and Guideline: *Making legislative instruments*

Practice Statement: *Assessing the impacts of regulatory proposals*

## **Key roles and responsibilities**

The Legal Services Branch has responsibility for this Practice Statement.

## **Consultation**

### **External Consultation**

This practice statement was presented to the Customs National Consultative Committee and the Passenger Facilitation Taskforce. It was also placed on the Customs and Border Protection website for public comment.

### **Internal Consultation**

The following internal stakeholders have been consulted in the development of this Practice Statement:

- Passengers
- Strategic Development (Cargo)
- Trade Policy and Regulation
- Trade Services
- Trade Measures
- Client Engagement & Cargo Systems
- Compliance
- Financial Services
- Enforcement Operations
- Investigations
- Strategic Development (Enforcement & Investigations)
- Law Enforcement Strategy
- Border Protection Command
- Legal Services Branch
- Parliamentary and Executive

## Approval

<b>Approved on</b>	11 November 2010	
<b>By</b>	Mike Pezzullo Chief Operating Officer	
<b>Endorsed on</b>	11 November 2010	
<b>By</b>	Michael Carmody Chief Executive Officer	

**Existing forums that may be used for industry engagement**

The following existing forums may be used for industry engagement.

***CBPNCC members:***

Shipping Australia

Customs Brokers and Forwarders Council of Australia

Australian Chamber of Commerce and Industry

Australian Federation of International Forwarders

International Air Couriers Association of Australia

Observer for the Conference of Asia Pacific Express Carriers

Australian Air Transport Association/ Board of Airline Representatives of Australia

Institute of Chartered Accountants

Law Council of Australia

Australian Exporters and Importers Association

Stevedoring Industry

The Parliamentary and Executive section should be contacted for further information.

The Client Engagement & Cargo Systems Branch should be contacted for further information.

***Passenger Facilitation Taskforce industry members:***

Adelaide Airport Limited

Airport Coordination Australia

Australian Pacific Airports (Melbourne)

Brisbane Airport Corporation

Cairns Port Authority

Canberra International Airport

Darwin International Airport

Gold Coast Airport

Hobart International Airport

Sydney Airport Corporation Limited

Westralia Airports Corporation

Northern Territory Airports

Australian Federation of Travel Agents

Australian Hotels Association

Australian Tourism Export Council

National Tourism Alliance

Tourism & Transport Forum Australia

Tourism Australia

Board of Airline Representative Australia

Jetstar

Qantas Airways Ltd

Virgin Blue

The Passengers Division should be contacted for further information.

***Intellectual Property Enforcement Consultative Group***

Trade Mark Investigation Services

Interactive Entertainment Assoc of Australia

Australian Subscription Television Association

Australian Toy Association

Music Industry Piracy Investigations Pty Ltd

Australian Sporting Goods Association

Anti-Counterfeiting Action Group

Australian Federation Against Copyright Theft

Business Software Association of Australia

Aristocrat Technologies Australia Pty Ltd

The Trade Policy and Regulation Branch should be contacted for further information.

**Other people and groups**

ACT Director of Public Prosecutions

Business Partnership Group

Manufacturing Industry Task Force

Trade Remedies Taskforce

Law Institute of Victoria

Independent Paper Group

Law Society of Western Australia

International Commission of Jurists

The Victorian Bar

International Air Transport Association

Australian International Movers Association

Sports Shooters Association

Frontline members