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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CUSTOMS AMENDMENT (PREVENTING CHILD LABOUR) BILL 2023

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Roberts)

CUSTOMS AMENDMENT (PREVENTING CHILD LABOUR) BILL 2023

OUTLINE

The *Customs Amendment (Preventing Child Labour) Bill 2023* amends the *Customs Act 1901* to make a person liable to a civil penalty (or to prohibit the person from importing goods into Australia) in certain circumstances where the person imports goods at a time when the person has not complied with a notice under section 56 or 57 of the *Customs Act 1901*. A notice may be given to an importer under section 56 or 57 if an authorised officer reasonably suspects, or reasonably believes, that goods imported or proposed to be imported are goods involving child labour.

The definition of child labour draws on the International Labour Organisation Convention No. 138: Convention concerning Minimum Age for Admission to Employment (the *ILO Convention*) and considers the education status of the child. Child labour occurs where an individual who is under 14 years of age performs work in a foreign country and (if there is compulsory schooling and a minimum age for ceasing compulsory schooling in that foreign country) the individual is under that minimum age and absent from that compulsory schooling as a result of carrying out the work. A child under the age of 14 may work if their age is above the minimum age for compulsory school in their country.

Rationale for the bill

By placing the emphasis on education, this bill is designed to break the poverty cycle affecting children and their families in developing nations. Children who work contribute nothing in the case of slave labour, or a tiny amount in the case of paid labour. This comes at a cost of missing out on any chance of progressing their own lives beyond subsistence level. Education is the way in which these children can get ahead and break the poverty cycle.

Villages and regions rely on child labour for a meagre income, removing that income in the name of fighting child labour could be counterproductive. By allowing a 48-month arc between non-compliance with the notice and banning, suppliers have time to work with producers to correct their labour practices.

This process also allows ethical suppliers to ramp up production to meet additional demand. Mines take time to ramp up, coffee plants do not produce a first crop for four years on average, and expanding a textile factory is a multi-year undertaking. Knee-jerk bans will lead to supply shortages that may encourage dishonest behaviour that undermines the intention of the bill.

Western nations have an obligation to consider their actions in a wider international context. Having access to cheap electronics, clothing and coffee (as examples) should not come at the cost of children in other countries being sentenced to a life of physical hardship and poverty.

Child labour covered by this bill

In a primary production context the bill regulates an element of the product, such as cobalt in a battery. In an assembly context it includes a child working on a production line such as in a textiles factory or phone assembly line.

The bill specifically exempts packaging. This decision was taken for practicality. It is fair to

require an importer to know where their materials came from, and who made their product. Beyond that it would be impractical to police.

Child labour -vs- child slavery

The bill defines work as “any work whether for reward or otherwise”. This captures any work arrangement, including forced work.

Anticipated workflow

The bill operates by exception. This means most importers will not have cause to review their supply chain. Every importer should however ask themselves if there is a possibility their good may be a good involving child labour and investigate their supply chain to ensure this is not the case.

There are multiple organisations who track goods involving child labour. Once the Act comes into force those organisations, or any concerned party would be able to advise Australian Border Force of a suspected good. If an authorised officer (in Australian Border Force), reasonably suspects that goods imported, or intended to be imported, are goods involving child labour, the authorised officer may issue a notice to the importer requiring the importer to provide further information or documents about the goods. Following the importer giving information or documents about the goods, the authorised officer may give another notice to the importer requiring the importer to take particular action to reduce the risk that the goods involve child labour if the authorised officer reasonably believes the goods are goods involving child labour.

The importer has three months on each notice to comply with notice as required. The importer will be subject to either civil penalties or a ban on the importation of the goods if the goods are imported at a time when the importer has not complied with the notice. The issuing of notices is subject to judicial review.

Penalties

The bill imposes a sliding scale of penalties leading to a total ban on importation after 48 months of non-compliance with a notice. A sliding scale is used to allow importers time to check their supply lines, and then make changes necessary to become compliant with this legislation.

Penalties are calculated on a percentage of the value of the goods, or a fixed penalty where the value of the goods is not able to be determined. These penalties are:

1. for goods imported less than 24 months after the end of the period in which importer was required to comply with the notice—10% of the value of the goods or 200 penalty units;
2. for goods imported at least 24 months and less than 48 months after the end of the period in which the importer was required to comply with the notice—33% of the value of the goods or 500 penalty units.

The bill is written to make a ban the default action, which the importer can prevent by cooperating with the process. Only in the event of an importer failing to comply with the process will the financial penalties apply. Penalties may be imposed by the Federal Court or the Federal Circuit and Family Court of Australia (Division 2), at their discretion, following an application by an authorised applicant.

Prohibition on the importation of goods under section 51B is automatically applied to an importer, if at the time of the import:

- a) the importer has failed to comply with the requirements of a notice (to give information or documents or to take a particular action in relation to the goods); and
- b) at least 48 months has elapsed since the end of the period in which the importer was required to comply with the notice.

The automatic ban should encourage importers to work with the relevant authority to eliminate child labour from their supply chain. Penalties can be imposed through to the 48 months on any importer who chooses to ignore the process.

Commencement

The bill would come into force 6 months after the Royal Assent to give the Australian Border Force and its staff time to prepare.

NOTES ON CLAUSES

Clause 1: Short Title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.

Clause 3 – Schedules

4. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Customs Act 1901

Item 1 – Subsection 4(1)

5. This item adds new definitions to the *Customs Act 1901* required for this bill.

Item 2 – Subsection 51(1)

6. This item makes a consequential amendment to section 51 of the *Customs Act 1901*, as a result of amending item 3.

Item 3 – Subsection 51(1)

7. adds a new section 51B to the *Customs Act 1901*, which provides for the prohibition on the import of goods into Australia by an importer in certain circumstances where the importer has not complied with a notice in relation to the goods.

Item 4 – After Division 1 of Part IV

8. This item inserts a new Division 2A into Part IV of the *Customs Act 1901*, which contains the following proposed sections.

53 Meaning of child labour

9. Section 53 defines child labour as work carried out in a foreign country where the individual is under 14 years of age and (if there is compulsory schooling and a minimum age for ceasing compulsory schooling in that foreign country) the individual is under that minimum age and absent from that compulsory schooling as a result of carrying out the work. The wording reflects the fact that while the ILO Convention generally provides that a minimum age for admission to employment or work should be either 14 or 15 years of age, many countries only have compulsory schooling to a lesser age. Parts of South Asia are only 9.
10. It should be noted that every country where child labour is known to occur has a minimum age for schooling. This section does not let any country “off the hook”. However it is not Australia’s place to specify a higher age for work than the country itself requires. The whole point of the ILO Convention is to ensure every child receives compulsory schooling, and in that process, is equipped with the knowledge to advance their economic status. It remains a sovereign right of each country to specify what age that is.
11. As a result, the definition in section 53 excludes a child under 14 who has completed compulsory schooling and is working.

54 Meaning of goods involving child labour

12. Section 54 adds the definition of goods involving child labour and exempts packaging materials. This exemption is for clarity as in other situations unrelated to this Act packaging may be considered part of the product.

55 Penalties for importing goods covered by a notice that has not been complied with

13. This section sets out that a person is liable to a civil penalty in certain circumstances where the person imports goods into Australia at a time when the person has not complied with a notice under section 56 or 57 of the *Customs Act 1901*. The intention here is to allow sufficient time for the importer to provide information or documents about their goods or to comply with a requirement to take particular action in relation to the goods, in response to the notice.
14. It is open to the importer to cease importing the goods, source an alternative goods or factory, or require a change in the supply of a component in the goods, then advise the relevant authority of this.
15. It would also be prudent for an importer to start the process of auditing their supply chain at the time the bill passes, giving 6 months before the relevant authority will commence their own inquiry should the importer come to their attention.
16. The bill seeks to encourage an importer to stop the importation of goods involving child labour. This is made obvious in Sections 57 of this bill.

56 Authorised officers may require information or documents about suspected goods involving child labour

17. This section establishes the power of an authorised officer (of Australian Border Force), who reasonably suspects goods involve child labour to give an importer of the goods a notice requiring the importer to give information or produce documents about the goods. The importer must comply with the notice within 3 months.

57 Authorised officers may require specified action to reduce the risk that goods are goods involving child labour

18. This provision allows an authorised officer who reasonably believes goods involve child labour (having regard to information given or documents produced under a section 56 notice and any other relevant matter) to give a notice requiring the importer to take a specified action in relation to the goods. The importer must comply with the notice within 3 months.

57A Self-incrimination

19. This section specifies that an importer is not excused from providing information or producing documents in response to a notice given under section 56 by invoking the privilege against self-incrimination or penalty privilege. The section further provides for a use and derivative use immunity, so that such information or documents can't be used for a criminal prosecution against the importer other than under section 137.1 and 137.2 of the *Criminal Code*, which relates to knowingly providing false or misleading information or documents.
20. This section has been included to ensure authorised officers are able to get the information required to make a fair determination on a good without being needlessly hampered in that duty.

57B Authorised officers may inspect, copy and retain documents

21. This section establishes an authorised officer's power to handle and retain documents pursuant to the terms of this bill. Provision is made having the intention of ensuring the importer can conduct business as normal.

57C Civil penalty provisions

22. This section triggers Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* to provide for a framework for enforcing the civil penalty provision in section 55 of the *Customs Act 1901*.

57D Publication of information about notices and non-compliance

23. Naming and shaming will be a powerful weapon in the fight against goods involving child labour. It is also true anyone named and shamed must receive procedural fairness. This section sets out rules whereby the Secretary of the Department of Home Affairs can publish on their website details of any notices issued to an importer or details of any contravention of section 55 (penalties for importing goods covered by a notice that has not been complied with) or paragraph 223(1)(b) in relation to goods imported in circumstances described in section 51B (importing prohibited goods) of the *Customs Act*

1901. Before publication, the Department must provide the importer with a notice of intention to publish and invite a response. The decision to publish remains at the discretion of the Secretary of the Department.

Item 5 – Paragraph 244(a)

24. This item makes a consequential amendment to the definition of Customs prosecution in section 244 of the *Customs Act 1901* to exclude the recovery of pecuniary penalties under section 55.

Item 6 – After paragraph 264(2)(a)

25. This item makes a consequential amendment to insert paragraph 264(2)(aa) in the *Customs Act 1901* to ensure section 264 does not apply in relation to penalties recovered in relation to a contravention of subsection 55(1).

Item 7 – Application of amendments

26. This item clarifies the application of the amended and new provisions of the *Customs Act 1901*. The amendments and new provisions apply in relation to notices given under section 56 or 57 of that Act on or after the commencement of the item (whether or not the reasonable suspicion or belief for the notice relates to goods imported, or intended to be imported, into Australia before, on or after that commencement).

Statement of Compatibility with Human Rights

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

Customs Amendment (Preventing Child Labour) Bill 2023

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 *Customs Amendment (Preventing Child Labour) Bill 2023* amends the *Customs Act 1901* to make a person liable to a civil penalty (or to prohibit the person from importing goods into Australia) in certain circumstances where the person imports goods at a time when the person has not complied with a notice under section 56 or 57 of the *Customs Act 1901*. A notice may be given to an importer under section 56 or 57 if an authorised officer reasonably suspects, or reasonably believes, that goods imported or proposed to be imported are goods involving child labour.

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Human rights implications

On the 5th of April 2022 Australia ratified the International Labour Organisation (ILO) *Protocol of 2014 to Forced Labour Convention 1930*. This protocol has the aim, in part of:

- preventing and suppressing forced labour;
- protecting victims and providing access to appropriate and effective remedies; and
- penalising the perpetrators of forced labour.

This bill seeks to protect children involved in forced labour by preventing the importation of goods to which their labour has contributed. The bill is further structured to encourage producers to change their business model to include paid labour of an appropriately aged person by allowing time for that transition or penalising the supplier with loss of supply.

In 2021 Anti-Slavery International and European Center for Constitutional and Human Rights' published their *position paper on import controls to address forced labour in supply chains*. This document called upon the EU and all governments to introduce import controls to block or seize the imports of goods made or transported in-whole or in-part with forced labour, including forced labour of children.

The position paper also called for “grace periods” to allow prevention, remediation and re-sourcing, while preventing unintended consequences by avoiding arbitrary actions.

This position is well represented in the provisions of the bill.

The position paper went on to say:

“It is important to note here that child labour is not forced labour. Child labour nevertheless hinders children’s education and development. Child labour tends to take place within a familial setting (for example, parents bringing children for farm work), and is driven by systemic issues relating to poverty...lack of access to education, as well as the purchasing practices of large multinationals and a reliance on certification schemes. The introduction of import controls to respond to child labour, is likely to have short-term, far-reaching devastating impacts on the economy (unless handled correctly). Businesses should be compelled to prevent child labour through their due diligence processes.”

This position assumes child labour is binary – children are working or not working. However the bill allows families to have their children help them at all times other than during school hours on a school day.

Accordingly the bill does respond to the concerns around the effect of eliminating child labour from village economies. Much of the objection to eliminating child labour revolves around much more onerous industry-wide or regional-wide bans. This is not how the bill has been structured.

The ILO Minimum Age Convention 1973 Article 2 specifies a minimum age for employment at 15 or a lesser age as specified by a ratifying nation. Australia is listed as ratifying this treaty with an age of 14. The bill meets the Convention by specifying a starting age of 14, and then allowing for a younger age if specified by the ratifying nation.

Article 32 of the *United Nations Convention on the Rights of the Child* recognizes the “right of the child to be protected from economic exploitation and from performing any work that is likely to...interfere with the child’s education.” Australia is signatory to this Convention. The bill meets our obligation under this Convention.

Trade implications

Article XX of the General Agreement on Trade and Tariffs allows for tariffs or outright bans where they are considered necessary for the “protection of human health”. The United States is the only country in the world with legislation to achieve the same outcome as this bill. The USA has made over 20 orders restricting imports. The World Trade Organisation has not intervened. The procedural fairness established in this bill is cautious in part to ensure WTO accept decisions made under this bill as being fair and designed to protect children from exploitation and the health outcomes that result from early labour and lost education.

Conclusion

The Bill is compatible with human rights because it implements our international obligations under the human rights conventions listed in this section while including provisions to address concerns regarding unintended outcomes.

Senator Malcolm Roberts