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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

# CUSTOMS AMENDMENT (CONTROLLED TRIALS) BILL 2021

EXPLANATORY MEMORANDUM

(Circulated by authority of the Assistant Minister for Customs, Community Safety and Multicultural Affairs, and Parliamentary Secretary to the Minister for Home Affairs, the Honourable Jason Wood MP)

# CUSTOMS AMENDMENT (CONTROLLED TRIALS) BILL 2021

## OUTLINE

The *Customs Amendment (Controlled Trials) Bill 2021* (the Bill) amends the *Customs Act 1901* (the Customs Act) to facilitate time-limited trials with approved entities in a controlled regulatory environment.

The Bill is part of the Government's Simplified Trade System (STS) agenda, announced in the 2020-21 Budget and establishes a new regulatory framework to facilitate proof-of-concept trials of new technology, business models and regulatory approaches with appropriate regulatory oversight.

The new regulatory framework is structured as follows:

- Division 1 provides a simplified outline of new Part XB of the Customs Act and its scope;
- Division 2 outlines an entity's obligations and the benefits an entity may receive if the entity is approved to participate in a controlled trial;
- Division 3 outlines the administration of participation in controlled trials. This includes the requirements for applications to participate in a controlled trial, elections to participate, the process for approving participation, conditions of approvals and the variation, suspension or revocation of approvals;;
- Division 4 outlines the Comptroller-General of Customs' rule making powers with respect to controlled trials. The Comptroller General of Customs may make general rules that determine the qualification criteria to participate in any trial. The Comptroller-General of Customs may also make rules outlining the establishment, purpose, period of operation, eligibility criteria, conditions and affected obligations under the Customs Act for each controlled trial. The Comptroller-General of Customs may also extend or revoke a controlled trial through these rule making powers.

Trials can be established with respect to the following parts of the Customs Act and associated regulations:

- Part IV – Imports (excluding prohibited imports);
- Part VI – Exports (excluding prohibited exports);
- Parts IVA – Depots;
- Part V – Warehouses;
- Part VIA – Electronic Communications;
- Part XI – Agents and Customs Brokers; and
- Part XVA – Tariff Concession Orders.

The new regulatory framework enables the Australian Border Force (ABF) to collaborate with industry in conducting proof of concept trials of new trade practices. Conducting controlled trials through this framework would allow the ABF to build a robust evidence base to inform the Government's future decisions on larger-scale reform under the STS agenda. Trial results will assist in simplifying the Australian customs framework whilst maintaining, and achieving, Australia's border security objectives.

The new regulatory framework will encourage innovation through testing new business models, technologies and regulatory approaches in a defined area, with appropriate safeguards. This will allow Government to build the evidence base for future, larger-scale deregulatory and technology reforms and the development of best practice regulation.

## FINANCIAL IMPACT STATEMENT

This measure was included as part of a broader regulatory and data reform program under the STS agenda in Budget 2020-21. There are no specific financial implications resulting from the Bill. Individual controlled trials may have financial and other implications, which will be dependent on the specific trial and assessed at the time the trial is proposed.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights in respect of the amendments contained in the Bill is at **Attachment A**. The Statement assesses the amendments to be compatible with Australia's human rights obligations.

# CUSTOMS AMENDMENT (CONTROLLED TRIALS) BILL 2021

## NOTES ON CLAUSES

### Clause 1 Short title

1. This clause provides that this Bill, when enacted, to be cited as the *Customs Amendment (Controlled Trials) Act 2021*.

### Clause 2 Commencement

2. This clause sets out in a table the date on which provisions of the Bill, when enacted, commence. It provides that any information in column 3 of the table is not part of the Act, and that information may be inserted in this column or information in it may be edited, in any published version of the Act.

3. Item 1 of the table provides that sections 1 to 3, and anything in the Act not elsewhere covered by the table, commence on the day that the Act receives the Royal Assent.

4. Item 2 of the table provides that Schedule 1 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day that the Act receives the Royal Assent, they commence on the day after the end of the period.

### Clause 3 Schedules

5. This is the formal enabling provision for the Schedule to the Bill providing that legislation that is specified in a Schedule to the Bill, when enacted, is amended in accordance with the applicable items of the Schedule concerned. In this Bill, the *Australian Border Force Act 2015* (the ABF Act) and the *Customs Act 1901* (the Customs Act) are being amended.

6. The clause also provides that other items of a Schedule to the Bill have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation.

### Schedule 1–Amendments

*Australian Border Force Act 2015*

### Item 1 Subsection 54(1)

7. This item amends subsection 54(1) of the *Australian Border Force Act 2015* (ABF Act) to insert ‘, 179K or 179L’ after ‘section 179’. Subsection 54(1) of the ABF Act allows the Comptroller-General of Customs to, by writing, delegate any of his or her powers under a law of the Commonwealth, excluding section 179 of the *Customs Act 1901* (Customs Act). The effect of this amendment is that the Comptroller-General of Customs’ powers to make rules with respect to controlled trials cannot be delegated.

*Customs Act 1901*

**Item 2 Subsection 4(1)**

8. This item inserts two new definitions, *controlled trials* and *controlled trial provision*, into subsection 4(1) of the Customs Act.

9. *Controlled trial* is defined as a controlled trial established under new section 179D of the Customs Act.

10. *Controlled trial provision* is defined as the following:
    (a) Part IV (importation of goods), other than Division 1 of that Part;
    (b) Part IVA (depots);
    (c) Part V (warehouses);
    (d) Part VI (exportation of goods), other than Division 1 of that Part;
    (e) Part VIA (electronic communications);
    (f) Part XI (agents and customs brokers);
    (g) Part XVA (tariff concession orders);
    (h) regulations made for the purposes of a provision covered by paragraph (a), (b), (c), (d), (e), (f) or (g).

11. The effect of these amendments is to limit the scope of controlled trials to specific Parts of the Customs Act and regulations made for the purposes of these Parts, including the *Customs Regulation 2015* (the Customs Regulation). Controlled trials are intended to be used to explore better regulatory administration of processes associated with imports, exports and licensing.

12. For example, a controlled trial could be established for 12 months with approved participants to investigate whether it would be more expedient that outturn reports for cargo be provided once a month instead of within certain timeframes that the cargo is unloaded as set out in section 64ABAB of the Customs Act.

**Item 3 Subsection 4(1) (definition of *rules*)**

13. This item repeals the definition of *rules* in subsection 4(1) of the Customs Act and substitutes a new definition such that *rules* means:
    (a) in relation to Part XA, means rules made under section 179; and
    (b) in relation to Part XB, means rules made under section 179L.

14. This item updates the Customs Act to refer to rules made in relation to the Australian Trusted Trader Programme and rules made in relation to controlled trials.

**Item 4 After Part XA**

15. This item inserts new Part XB, dealing with controlled trials, into the Customs Act. New Part XB establishes the legislative regime for controlled trials and contains four Divisions.

**Division 1–Preliminary**

16. Division 1 sets out a simplified outline for new Part XB of the Customs Act and provides a brief explanation of Part XB. This Division consists of new sections 179A and 179B.

**Section 179A Simplified Outline of this Part**

17. This section explains that the Comptroller-General of Customs may establish controlled trials and that a controlled trial can be for a period of up to 12 months, with a possible one-off extension of up to 12 months.

18. Entities may apply or will be invited to participate in a controlled trial. Entities participating in a controlled trial:
    (a) may be released from certain obligations under the Customs Act; or
    (b) may be required to satisfy certain obligations of the Customs Act in a different way to that is otherwise required under the Customs Act; or
    (c) may be required to comply with additional obligations; or
    (d) may receive benefits of a certain kind.

**Section 179B Application of this Part**

19. The effect of new section 179B is that that legal and natural persons and partnerships, as an entity, may participate in a controlled trial.

**Division 2–Obligations and benefits under controlled trials**

20. Division 2 of new Part XB deals with obligations under controlled trials, and consist of new sections 179C and 179D.

**Section 179C Obligations under controlled trials**

21. New section 179C specifies when an entity's obligations to comply with the requirements of a controlled trial begin and end.

*Entities released from obligations*

22. New subsection 179C(1) provides that an entity is only released from an obligation under the Customs Act when that entity holds an approval that is in force to participate in a controlled trial, where the obligation is one specified in the rules establishing a controlled trial as an obligation in relation to that trial that entities are released from.

23. The effect of this provision is to clearly specify when a participating entity is not required to comply with a requirement under the Customs Act that it may otherwise be required to comply with (a controlled trial provision). Note 1 under subsection 179C(1) refers to new section 179L which contains the power to make rules to establish a controlled trial. Note 2 under subsection 179C(1) indicates that the definition of a *controlled trial provision* is set out in subsection 4(1) of the Customs Act.

*Entities must satisfy obligations in a different way*

24. Subsections 179C(2) and 179C(3) identify when an entity participating in a controlled trial is required to perform an obligation under the Customs Act in a different way. When an entity's approval to participate in a controlled trial is in force, the entity is released from the affected obligation under the Customs Act, and during that time, must instead comply with the requirements as set out in the controlled trial rule. The Note under subsection 179C(3) notes that a failure to satisfy an obligation set out in the rule for a controlled trial is a ground for varying, suspending or revoking an entity's approval under new section 179J.

*Entity must comply with additional obligations*

25. Subsection 179C(4) applies where an entirely new obligation is included in a controlled trial rule. In that circumstance, an entity with an approval to participate in a controlled trial that is in force must comply with each obligation specified in the rules for that controlled trial. Note 1 under subsection 179(4) notes that entities are only required to comply with an additional obligation if it relates to a controlled trial provision. Note 2 under subsection 179C(4) notes that the failure to comply with a new obligation in an controlled trial is a ground for varying, suspending or revoking an entity's approval to participate in a controlled trial under new subsection 179J.

**Section 179D Benefits under controlled trials**

26. New section 179D provides that when an entity holds an approval to participate in a controlled trial and that approval is in force, that entity may receive benefits as outlined in the rule for a controlled trial.

27. The purpose of this section is to enable an entity to receive benefits during that entity's participation in a controlled trial. The Department recognises that entities may for example incur financial costs in participating in a controlled trial. New section 179D permits administrative or other benefits to be set out in the rule for a controlled trial to support or incentivise an entity's participation in a controlled trial.

28. For example, an entity may need to change its administrative systems to comply with an obligation in a different way. To facilitate this, the Comptroller-General of Customs may specify in the rule for that controlled trial that participating entities will receive extra administrative support from the Department that the entity would otherwise not receive, to facilitate that administrative change.

**Division 3–Participation in controlled trials**

29. This Division outlines the processes with respect to participation in a controlled trial. Once the Comptroller-General of Customs makes the rule outlining the scope of a controlled trial and the associated requirements, entities then consider whether they wish to participate in the trial and must be approved by the Comptroller-General to participate.

30. The Comptroller-General of Customs' rule making powers for controlled trials require that the rule specify when period of operation of a controlled trial. This means that there may be a time delay between when the controlled trial is established in a rule and when the controlled trial in is operation. This time delay allows for entities to be fully appraised on what the trial is, apply and receive approval to participate. Subject to new section 179J, the approval will be in operation for the same time that the controlled trial is in operation, as specified in the controlled trial rule.

31. This Division also provides for the variation, suspension or revocation of an approval. This ensures that where an entity is, for example, unable to comply with the requirements of the controlled trial, the Comptroller-General of Customs is afforded a degree of flexibility in responding to this circumstance, taking in to account the circumstances that are affecting that entity.

32. For example, where an entity is unable to comply with an additional obligation due to delays in implementing new processes to meet the requirements in a controlled trial, the Comptroller-General of Customs may suspend that entity's approval until the entity has the administrative infrastructure in place to comply. While the approval is suspended, the entity is required to comply with the Customs Act as usual, or would not be required to comply with an additional obligation.

33. New Division 3 consists of sections 179E, 179F, 179G, 179H and 179J.

**Section 179E Approval of participation in controlled trials**

34. New section 179E outlines the process for entities to be approved to participate in a controlled trial. Subsection 179E(1) provides that an entity may apply to participate in a controlled trial in accordance with section 179F or may elect to participate following a written invitation from the Comptroller-General of Customs.

35. In either case, the Comptroller-General of Customs may approve an entity where the Comptroller-General of Customs is satisfied the entity meets both the general qualification criteria to participate in controlled trials generally as outlined in a legislative instrument under new section 179K and meets the eligibility criteria as outlined in the rules establishing a particular controlled trial.

36. Subsection 179E(2) provides that in deciding whether to approve an entity's participation, the Comptroller-General of Customs must consider any matter specified in the rules for the controlled trial under paragraph 179L(3)(b) and any other matter the Comptroller-General of Customs considers relevant.

37. Subsection 179E(3) requires that an entity's approval to participate in a controlled trial must specify the period for which the approval is in force. The Note under this subsection notes that section 179J provides for the variation, suspension or revocation of an approval.

38. Subsection 179E(4) requires the Comptroller-General of Customs to give the entity a copy of the approval to participate in a controlled trial.

39. Subsection 179E(5) requires that the Comptroller-General of Customs give written notice and reasons when the Comptroller General refuses an entity's application or election to participate in a controlled trial.

40. The effect of subsection 179E(6) is to clarify that an approval to participate in a controlled trial is not a legislative instrument. This recognises the administrative nature of approvals and recognises that participating entities may wish to retain anonymity.

41. Controlled trials are strictly time limited. This means that any requirements or benefits conferred are not enduring in nature. This can be distinguished from the Australian Trusted Trader Programme, whereby entities receive enduring benefits. On this basis, it seems inappropriate to subject the decision of the Comptroller-General of Customs to refuse to approve an entity's participation in a controlled trial to merits review which typically would take many months or over a year to conduct.

**Section 179F Application to participate in a controlled trial**

42. New section 179F provides that an application to participate in a controlled trial may be made by document or electronically, and specifies the requirements for each type of application.

**Section 179G Election to participate in a controlled trial**

43. New section 179G provides that an election to participate in a controlled trial may be made by document or electronically, and specifies the requirements for each type of election.

**Section 179H Conditions of approvals**

44. New section 179H provides that an entity's approval to participate in a controlled trial is subject to the conditions specified in the rules in relation to that trial.

**Section 179J Variation, suspension or revocation of approvals**

45. New section 179J establishes the Comptroller-General of Customs' power to vary, suspend or revoke an entity's approval to participate in a controlled trial and the requirements to exercise this power. The exercise of these powers is subject to the matters and procedures established in the rule for a controlled trial. The exercise of these powers may be tailored to the circumstances of that trial. Furthermore, entities will have the opportunity to review these procedures before deciding whether to apply or elect to participate.

46. The need for these powers derives from the consideration that controlled trials involve a deviation from the Customs Act. Failure to comply with requirements in a controlled trial does not involve the penalty or sanction that would usually apply for failure to comply with the corresponding requirements under the Customs Act.

47. Subsection 179J(1) establishes the Comptroller-General of Customs' power to vary, suspend or revoke an entity's approval to participate in a controlled trial by written notice in certain circumstances. Those circumstances are when the Comptroller-General of Customs reasonably believes that the entity:
    (a) no longer meets the qualification criteria determined in an instrument under section 179K (if any);

(b) no longer meets the eligibility criteria (if any), specified in the rules for a controlled trial (see paragraphs 179L(3)(a)-(b));
(c) not complied, or is not complying, with a condition specified in relation to the rules for a controlled trial (see paragraph 179L(3)(c); or
(d) not complied with an obligation that has been created or varied for a controlled trial (see subsections 179C(2), (3) and (4)).

48. The Comptroller- General of Customs is required to provide the entity with written notice and provide a minimum of 7 days before the notice takes effect. The Comptroller-General of Customs must also consider any information and follow any procedures as specified in the rule for the controlled trial. This means that the procedures and considerations can be tailored to the specific trial. As the rule for the controlled trial is made before it comes into operation, entities will also have the opportunity to review these procedures before deciding whether to apply or elect to participate in the controlled trial.

49. Subsection 179J(2) requires the Comptroller-General of Customs to consider any matter specified in the rule relating to decisions to vary, suspend or revoke an approval and any other matter the Comptroller-General of Customs considers relevant when exercising the power to suspend, revoke or vary an entity's approval.

50. This provision recognises that different trials may have different circumstances and processes established in the rule for a controlled trial. This ensures that the Comptroller-General of Customs take into consideration specific circumstances that are unique to the controlled trial.

51. For example, it may be anticipated that entities participating in a controlled trial may experience issues updating systems. Therefore, the rule for a controlled trial may identify specific considerations the Comptroller-General of Customs must take into account such as consultation with the affected entity, consideration of the entity's history of compliance, or other considerations specific to that trial.

52. Subsection 179J(3) requires that any variation, suspension or revocation of approval must be made in accordance with the procedures specified in the rules in relation to that trial. The procedures for exercising these powers may be tailored to the specific circumstances of that controlled trial. As the rule for the controlled trial is made before the controlled trial comes into effect, entities will also have the opportunity to review these procedures before deciding whether to apply or elect to participate.

53. Notwithstanding any requirements specified in a rule for a controlled trial, subsections 179J(4) and (5) outline the requirements to exercise the powers under subsection 179J(1) in all cases. While the considerations and procedures may vary between each rule for the controlled trial, in all cases entities must be given at least 7 days' written notice before a variation, suspension or termination takes effect.

54. The purpose of the required notice period in subsection 179J(5) is to ensure entities are aware of when obligations under the controlled trial end and the usual obligations under the Customs Act resume. Unlike obligations under the Customs Act, an entity's failure to comply with the requirements of a controlled trial does not attract penalty or sanction. Penalties will apply for failing to comply with the Customs Act.

55. For the same reasons as set out above, the decision of the Comptroller-General to vary, suspend or revoke an entity's participation in a controlled trial is not subject to merits review. For similar reasons it is also not proposed to give an affected entity an opportunity to respond to the notice as this could undermine the effective and efficient operation of a controlled trial.

*Consequences of suspension*

56. Subsections 179J(6) to (9) specify the consequences of suspending an entity's approval to participate in a controlled trial. Collectively, these provisions set out the consequences for an entity's approval and when an entity is and isn't required to comply with the Customs Act during the suspension process.

57. Subsection 179J(6) identifies that while the approval has no effect while suspended, the overall time period that the approval was granted for continues to run despite the suspension.

58. The effect of subsection 179J(6) is to ensure that an entity's approval to participate in the controlled trial does not extend beyond the time a controlled trial is in operation. An approval may be granted for 12 months. If an approval is suspended for one month within that time period, this means that the approval is in operation for 11 months.

59. Subsections 179J(7) and (8) specify that the Comptroller-General of Customs may revoke a suspension by written notice to the entity specifying the day the revocation takes effect. Unlike subsection 179J(5), the notice period is left flexible to cater to the individual situation of the entity. The effect is to facilitate both situations where an entity is ready to immediately comply with the requirements of a controlled trial, or when an entity requires more time.

60. Subsection 179J(9) outlines that the Comptroller-General of Customs may vary or revoke an approval under subsection 179J(1) while it is suspended.

**Division 4–Instruments**

61. Division 4 sets out the power of the Comptroller-General to make legislative instruments with respect to controlled trials. The Comptroller-General of Customs is empowered to make two kinds of legislative instruments under this Division. New section 179K allows the Comptroller-General of Customs to make a legislative instrument that determine the qualification criteria that entities must meet to participate in any controlled trial. New section 179L empowers the Comptroller-General of Customs to make rules that outlines the operation and administration of each specific controlled trial.

62. The purpose of this regulatory framework is to test different approaches to operating at the border before widespread implementation and substantive legislative change is pursued. Administering the controlled trials framework in delegated legislation enables controlled trials to be undertaken with a greater degree of certainty and administered in a timely manner. If the Customs Act needed to be amended each time a trial was proposed, this would be subject to the potentially lengthy parliamentary processes which would make the process difficult to administer. The element of each trial that would modify the operation of the Customs Act would be set out in the rules and would still be subject to parliamentary oversight and potential disallowance.

63. As mentioned above, the Comptroller-General of Customs' instrument making powers under this Division cannot be delegated.

**Section 179K General qualification criteria for any controlled trial**

64. New section 179K allows the Comptroller-General of Customs to, by legislative instrument, determine qualification criteria for entities that must be met by entities in order to participate in any controlled trial. Unlike rules established under section 179L, a rule made under section 179K are not tied to a single time-limited controlled trial, rather it applies to all trials generally. Such qualification criteria could be requirements similar to what is used in Part 2 of the *Customs (Australian Trusted Trader Programme Rule) 2015*.

65. Examples of qualification criteria could be that an entity is able to pay all of its debts as they become liable, the entity satisfactorily complies with Customs-related laws, or that corporate entities have a registered ABN. This provision has effect of ensuring a degree of consistency and transparency in the expectations common for all trials.

**Section 179L Rules specific to a controlled trial**

66. New section 179L establishes the Comptroller-General of Customs' power to establish a controlled trial through a rule, the scope of that power, and the requirements for establishing a rule.

67. Subsection 179L(1) sets out the Comptroller-General of Customs' powers to make rules with respect to establishing a controlled trial, outlining the period of time in which that controlled trial is in operation, extending the period of operation, and revoking a controlled trial so it is no longer in operation.

68. Subsection 179L(2) establishes the requirements for exercising the powers in subsection 179L(1). Rules that establish a controlled trial must specify the purpose of that controlled trial. This requirement facilitates entities having the opportunity to be appraised on what the trial is about and opportunity to consider participation in that trial. In addition, the period of operation of a controlled trial must not be more than 12 months.

69. Furthermore, the rules may provide the period of operation of a controlled trial may begin on the day after the controlled trial is established. This requirement allows the operation of a controlled trial to begin after the trial has been established, also affording flexibility in determining the time lapse between when a trial is established and when a trial is in operation. In addition, a controlled trial can only be extended once and for no longer than 6 months.

70. Subsection 179L(3) outlines the scope of the rule making powers with respect to a particular controlled trial. This provision has effect of ensuring that the eligibility requirements, procedures and considerations with respect to allowing, varying, suspending or revoking an entity's participation are tailored to each trial and are transparently established by legislative instrument.

71. Paragraphs 179L(3)(a) and (b) provide that a rule for a controlled trial may outline the eligibility criteria an entity must meet in order for the Comptroller-General to approve an entity's participation in the trial and the matters that the Comptroller-General of Customs must consider in deciding whether to approve an entity's participation.

72. Paragraph 179L(3)(c) provides that the rule for a controlled trial may set out the conditions that approvals to participate in controlled trial are subject to.

73. Paragraph 179L(3)(d) sets out the rule making power with respect to the matters the Comptroller-General of Customs must consider when deciding to vary, revoke or suspend an approval.

74. Paragraph 179L(3)(e) sets out the rule making power with respect to the procedures the Comptroller-General of Customs must follow when considering whether to vary, suspend or revoke an approval.

75. Paragraphs 179L(3)(f), (g) and (h) establish the rule making power whereby obligations are created, or certain obligations under the Customs Act are waived or varied for the purposes of a controlled trial.

76. Section 179L(3)(f) sets out the rule making power to specify each obligation under the Customs Act (see the notes on clauses for the definition of *controlled trial provision*) that an approved entity is released from while the controlled trial and approval are in operation.

77. Paragraph 179L(3)(g) sets out the rule making power to specify the obligation that an entity cannot satisfy in the way required by the Customs Act, and the way in which approved entities must to satisfy that obligation while the controlled trial is in operation.

78. Paragraph 179L(3)(h) sets out the rule making power for a controlled trial to establish a new obligation, provided such an obligation is within the scope of a controlled trial provision.

79. Paragraph 179L(3)(i) specifies the rule-making power to establish benefits that an approved entity may receive while the controlled trial and approval are in operation. Such benefits may be used to incentivise or facilitate participation in a controlled trial. Examples of benefits could be priority processing or extra administrative support from the ABF to facilitate participation in and administration of the controlled trial.

80. Paragraph 179L(3)(j) allows for rules to be made with respect to matters that is incidental or ancillary to a matter covered by paragraphs 179L(3)(a) to (i)

81. Subsection 179L(4) clarifies the scope of the rule making power under section 179L. Any rules made under this section cannot create an offence or civil penalty; impose powers of arrest, detention or entry, search and seizure; impose a tax, set an amount to be appropriated or directly amend the text of the Customs Act.

82. The provision puts beyond doubt as to what the rules made may not do and in doing so, confirms that a rule for a controlled trial cannot impose penalty or sanction on an entity that does not comply with the requirements of the trial. The most severe consequence for failure to comply is having an approval to participate in the trial revoked.

**Attachment A**

# Statement of Compatibility with Human Rights

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

**Customs Amendment (Controlled Trials) Bill 2021**

The Customs Amendment (Controlled Trials) Bill 2021 (the 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 purpose of the Bill is to amend the *Customs Act 1901* (Customs Act) to enable small-scale trials of trade and customs practices in a controlled, time-limited regulatory environment. Results from controlled trials will build the evidence base to inform longer term deregulatory reform. This will assist Government in simplifying the Australian customs framework whilst maintaining, and achieving, Australia's border security objectives.

The Bill establishes a new regulatory framework in the Customs Act that outlines the Comptroller-General of Custom's power to establish a controlled trial, approve an entity's participation in a trial, and will also specify the circumstances in which an entity's participation in a trial may be varied, suspended or revoked. Within a controlled trial, requirements under the Customs Act could be waived or varied or new obligations could be created.

The Bill is in line with the Government's Simplified Trade System Agenda and Deregulation Agenda, and will assist Government in modernising the Australian customs regulatory framework whilst maintaining, and achieving, Australia's border security objectives.

Among other things, the Bill facilitates the establishment of a controlled trial with respect to customs brokers under Part XI of the Customs Act. For this reason, there is a possibility a controlled trial could be established that may apply to individuals insofar as they are a customs broker, operating as a sole trader or as a nominee of a customs broker.

## Human rights implications

The Bill may engage the following human rights:

- The right to privacy in Article 17 of the *International Covenant on Civil and Political Rights (*ICCPR); and
- The right to equality and non-discrimination in Article 26 of the ICCPR

Right to Privacy

Article 17(1) of the ICCPR states:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

In addition to requiring a lawful basis for limitation on the right to privacy, Article 17 prohibits arbitrary interference with privacy. Interference which is lawful may nonetheless be arbitrary where that interference is not in accordance with the objectives of the ICCPR and is not reasonable in the circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that limitations:

- serve a legitimate objective
- adopt a means that is rationally connected to that objective, and
- the means adopted are not more restrictive than they need to be to achieve that objective.

To the extent that the entity who wishes to participate in the trial is an individual, the amendments in the Bill engage the right to privacy.

The Bill provides that the Comptroller-General of Customs may approve an entity's participation in a controlled trial if, amongst other things, the entity nominates itself to participate in the controlled trial. Participation in a controlled trial is voluntary and requires the entity to disclose personal information to the Comptroller-General of Customs as part of its application. The Bill requires the collection, use and disclosure of commercial and personal information.

An entity's application to be a part of the trial must be in an approved form or statement and may involve the disclosure of personal information. This information may be used and disclosed to other Government agencies for the purposes of assessing the risk of the entity participating in a controlled trial.

This disclosure of private information is a mandatory criteria for all entities who elect to participate in the controlled trial, and is a necessary requirement to demonstrate suitability and capacity to adequately comply with the trial requirements for the duration of the controlled trial.

Information collected by an officer of customs for a controlled trial would be treated the same as information currently collected under the Customs Act. It would be considered as Immigration and Border Protection Information and covered by Part 6 of the *Australian Border Force Act 2015*. The collection, use and disclosure of this information will also be done in accordance with the *Privacy Act 1988* and associated *Australian Privacy Principles*.

It is reasonable, necessary and proportionate to collect, use and disclose personal information from entities as part of the application to enter the trial, to proper governance of this controlled trial within the Department. The impact that this may impose to an individual will be limited as it will only affect those entities that operate in a personal capacity and who "opt in" to participate in the controlled trials.

Right to Equality and Non-discrimination

This Bill may engage the right of equality and non-discrimination in Article 26 of the ICCPR, which states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against*

*discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The Bill provides that the Comptroller-General of Customs may establish a trial and approve an entity's application for participation if the Comptroller-General of Customs is satisfied that the entity has satisfy the qualification criteria set out in the rules. The requirement for entities to satisfy qualification criteria to participate in a controlled trial could be considered to limit the right to equality and non-discrimination as not all entities who apply to participate in a controlled trial will be approved to participate.

To the extent that an individual is not approved for participation in the trial, that may engage the right to non-discrimination on the basis of "other status". This limitation is necessary to ensure all entities who participate in trials have the capacity to complete the trial. The qualification criteria will also ensure that the integrity to the mechanism, and broader trade network, is maintained throughout the duration of a trial.

**Conclusions**

The Bill is compatible with the human rights and to the extent that it limits the right of an individual to privacy or equality and non-discrimination, those limitations are reasonable, necessary and proportionate to legitimate objective of enabling small- scale trials of trade and customs practices in a controlled, time-limited regulatory environment.

**The Hon. Jason Wood, Assistant Minister for Customs, Community Safety and Multicultural Affairs and Parliamentary Secretary to the Minister for Home Affairs**