

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ANTI-DUMPING AUTHORITY BILL 1988

EXPLANATORY MEMORANDUM

Circulated by authority of the Minister for Industry, Technology
and Commerce, Senator the Honourable John N. Button

(This explanatory memorandum supersedes the explanatory memorandum
tabled with this Bill on 28 April 1988.)

Anti-Dumping Authority Bill 1988

Outline

This Bill, together with the Customs Legislation (Anti-Dumping Amendments) Bill 1988 and the Customs Tariff (Anti-Dumping) Amendment Bill 1988 is a legislation package amending Australia's anti-dumping legislation, to give effect to the Government's response to the Review of the Customs Tariff (Anti-Dumping) Act 1975 ("the Gruen Report"), prepared by Professor F.H. Gruen.

This Bill establishes an Anti-Dumping Authority of one member (clauses 4 and 13) who, whilst having regard to the same matters to which the Minister is to have regard when imposing dumping duties under the Customs Tariff (Anti-Dumping) Act 1975 is obliged to:

- . recommend to the Minister (within 120 days of receiving a matter from the Comptroller-General of Customs) whether or not duties should be imposed on specified goods pursuant to the Customs Tariff (Anti-Dumping) Act 1975 and, where applicable, whether undertakings as to the conduct of future export trade to Australia should be accepted from exporters under that Act (clause 7);
- . recommend to the Minister whether the Minister should revoke a notice under the Customs Tariff (Anti-Dumping) Act 1975 or release a person from an undertaking given under that Act (clause 7);
- . review (within 60 days of application) negative *prima facie* decisions and negative preliminary findings of the Comptroller-General of Customs, rejecting applications for the imposition of dumping duty or countervailing duty (clause 8); and
- . report generally to the Minister on anti-dumping matters (clause 9)

To assist the Member, associate members may be appointed (clause 15) and consultants possessing particular professional skills may also be engaged (clause 31).

The requirement to publicly advertise an inquiry into whether dumping duties should be imposed or not (Clause 23), together with the requirement to consider submissions from the public that have been received within 40 days of the announcement of the inquiry (subclause 7(6)) recognises for the first time the rights of end-use consumers to make submissions on the imposition of dumping duties.

The Authority is to expire five years after its creation (clause 35), with a further examination of anti-dumping administration to be made before that time.

Financial Impact Statement

The establishment of the Anti-Dumping Authority will involve a cost of \$1.12 million during its first year of operation, and \$0.92 million in subsequent years. These figures include the salary costs of the statutory appointee and 16 other staff (including consultants). These resources are to come from appropriations made to elements of the portfolio of the Minister for Industry, Technology and Commerce.

NOTES ON CLAUSESPART I - PRELIMINARYShort Title

Clause 1 provides for the citation of this Bill as the Anti-Dumping Authority Act 1988.

Commencement

Clause 2 provides for the Act to commence on a day to be proclaimed.

Interpretation

Clause 3 defines certain words and phrases used in the Act;

- in particular, the Bill defines the following terms:

"anti-dumping matter" as meaning any matter relating to the imposition of duties under the Customs Tariff (Anti-Dumping) Act 1975, or of the general operation of the Act;

"Countervailing duty notice" as meaning a notice published under subsections 10(1), 10(2), 11(1) or 11(2) of the Customs Tariff (Anti-Dumping) Act 1975 imposing countervailing duty on the goods specified in the notice, or on like goods to those goods;

"Dumping duty notice" as meaning a notice published under subsections 8(1), 8(2), 9(1) or 9(2) of the Customs Tariff (Anti-Dumping) Act 1975, imposing dumping duty on the goods specified in the notice, or on like goods to those goods;

"like goods" as meaning goods that are identical in all respects to the goods under consideration, or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

Subclause 3(2) defines the reference appearing throughout the Act to "goods the subject of an

application under section 269TB of the Customs Act 1901:

- . the phrase will pick up goods referred to in the application:
 - that have been imported into Australia,
 - that are likely to be so imported, or
 - that are like goods to those referred to in the previous two categories
- . the phrase highlights the facility in new section 269TB of the Customs Act (amended as part of the AntiDumping legislation package) that an application may be made in anticipation of injurious imports.

PART II - ESTABLISHMENT, FUNCTIONS AND POWERS OF ANTI-DUMPING AUTHORITY

Establishment

Clause 4 creates the Anti-Dumping Authority.

Functions

Clause 5 enumerates the responsibilities of the Authority. The Authority is to:

- . recommend to the Minister whether or not duties should be imposed on goods specified in an application for dumping or countervailing duty, pursuant to new section 269TB of the Customs Act 1901 contained in the Customs Legislation (Anti-Dumping Amendments) Bill 1988, that have or may be imported into Australia, or goods that are of a like kind to those goods, pursuant to the Customs Tariff (Anti-Dumping) Act 1975, and, where applicable, whether certain undertakings should be required under that Act from exporters as to their conduct of future export trade to Australia (paragraph 5(a)) following a preliminary finding of the Comptroller-General of Customs ("the Comptroller") that there are grounds for the Minister to publish an anti-dumping or countervailing duty notice.
- . recommend to the Minister whether to revoke notices imposing duty, or release exporters from undertakings (paragraph 5(b))

- review negative prima facie decisions (ie. decisions made by the Comptroller to reject an application for the imposition of dumping or countervailing duties pursuant to the new section 269TC(1) or (2) of the Customs Act 1901 contained in the Customs Legislation (Anti-Dumping Amendments) Bill 1988) or negative preliminary findings (ie. decisions made by the Comptroller that there are no grounds for the Minister to publish a dumping or countervailing duty notice after the Comptroller has conducted a preliminary investigation into the complaints alleged in the application, pursuant to the new section 269TD of the Customs Act 1901, contained in the Customs Legislation (Anti-Dumping Amendments) Bill 1988) (Paragraph 5(c)); and
- prepare reports on anti-dumping matters (as defined above) (paragraph 5(d)).

Powers

Clause 6 is a standard provision conferring on the Authority powers that are incidentally required for it to perform the functions specified in clause 5.

Authority to make recommendations on imposition of duties

Clause 7 specifies the procedure to be followed by the Authority when it either receives a preliminary finding of the Comptroller that grounds exist which would enable the Minister to publish a dumping or countervailing duty notice, or the Authority revokes a negative preliminary finding of the Comptroller that such grounds do not exist.

- subclause 7(1) provides that the Authority must within 120 days (or other period as prescribed by regulation) hold an inquiry as to whether or not a notice imposing dumping or countervailing notices should be published by the Minister, and after considering, amongst other things, submissions from the public made to the Authority within 40 days of the last public notification of the commencement of any such inquiry, recommend to the Minister whether a dumping or countervailing duty notice can and should be imposed on goods that were the subject of the original application for the imposition of dumping or countervailing duties pursuant to the Customs Tariff (Anti-Dumping) Act 1975, and the extent of any such duties.

- subclause 7(2) provides that in a report made by the Authority under subclause 7(1), the recommendations shall, to the extent practicable, relate to like goods imported since the day a preliminary finding that duties could have been imposed on the goods subject to the inquiry was made.
- subclauses 7(3) and 7(4) provide that where a person who is concerned with the importation or exportation of goods to which a notice issued under the Customs Tariff (Anti-Dumping) Act 1975 relates, or has made an undertaking to the Minister as to the conduct of future export trade to Australia under that Act the person may apply on an approved form to the Authority requesting it to inquire as to whether the notice or undertaking should be terminated. The Authority is obliged within 120 days (or other period as prescribed) to hold an inquiry and report to the Minister as to whether the relevant notice should be revoked, or the person released from the undertaking.
- subclauses 7(5) and 7(6) provide that when the Authority is obliged to conduct an inquiry the Authority is obliged to invite submissions and consider those received within 40 days from the last invitation for submissions from the public, but needn't consider submissions made after that time.

Review of prima facie decisions

Clause 8 specifies the procedure to be followed when the Comptroller rejects a complaint of dumping from an applicant, submitted pursuant to the new section 269TB of the Customs Act 1901, contained in the Customs Legislation (Anti-Dumping Amendments) Bill 1988.

- subclause 8(1) provides that where an applicant lodged an application with the Comptroller requesting the Minister to publish a dumping duty notice or countervailing duty notice, imposing duties pursuant to the Customs Tariff (Anti-Dumping) Act 1975, and the Comptroller has rejected the application because:
 - the applicant has failed to fulfill all the requirements of the application form;

- the Comptroller finds there is no industry in Australia producing goods that are identical or similar to the consignment of goods that gave rise to the anti-dumping application;
- the facts contained on the application form do not, in the opinion of the Comptroller, reveal grounds that would justify the Minister publishing a dumping or countervailing duty notice pursuant to the Customs Tariff (Anti-Dumping) Act 1975; (ie. a "negative prima facie finding") the Authority shall, on the application of the disappointed applicant, decide within 60 days to either confirm or revoke the decision of the Comptroller.
- should the Authority revoke the decision of the Comptroller, the Comptroller must then commence investigations, and then make a preliminary finding as to whether grounds exist for the publication of a dumping or countervailing duty notice pursuant to the Customs Tariff (Anti-Dumping) Act 1975, according to the provisions of the new section 269TD of the Customs Act 1901, proposed in the Customs Legislation (Anti-Dumping Amendments) Bill 1988.

subclause 8(2) provides that where an application is made requesting the Minister to publish a dumping or countervailing duty notice and the Comptroller subsequently finds, having conducted a preliminary investigation pursuant to the new section 269TD of the Customs Act 1901 (contained in the Customs Legislation (Anti-Dumping Amendments) Bill 1988 that there are not already existing sufficient grounds for the imposition of such duties, or if the goods have not yet been imported, sufficient grounds for publication of a notice will not exist before the arrival of the first consignment of goods under investigation (ie. a "negative preliminary finding") the applicant may refer that finding to the Authority for review. In such circumstances the Authority shall review the finding and within 60 days decide either to confirm or revoke the finding of the Comptroller.

- should the Authority revoke the finding of the Comptroller it must then hold an inquiry within 120 days and report to the Minister in accordance with clause 7.

subclause 8(3) provides that when reviewing the decision of the Comptroller under sub-clause 8(1) or 8(2), the Authority is only to take account of information available to the Comptroller at the time the Comptroller made the decision.

Reports on anti-dumping matters

- Clause 9 provides that the Authority may, either at the request of the Minister, or on its own motion, prepare and submit reports to the Minister on "anti-dumping matters", as defined in clause 3 (discussed above).

Matters to which the Authority is to have regard

- Clause 10 emphasises that when the Authority acts, it should have regard to the Commonwealth Government's policy in relation to anti-dumping matters and Australia's international obligations under the General Agreement on Tariffs and Trade (GATT)

one of the criticisms made by Professor Gruen in his report into the Customs Tariff (Anti-Dumping) Act 1975 was that the Act was invoked on occasions to protect Australian industry from overseas competition rather than to prevent the dumping of products on the Australian market. This clause reinforces the intention of the Government that anti-dumping duties are only to be imposed when dumping has occurred, and because of the act of dumping, Australian industry has or may be materially injured.

Authority to have the same regard as the Minister in certain circumstances

- Clause 11 provides in subclause 11(1) that when the Authority is required to make a recommendation as to whether or not a dumping or countervailing notice should be published, the Authority must adopt the same tests and formulae that the Minister is required to use in the Customs Tariff (Anti-Dumping) Act 1975 before the Minister imposes dumping or countervailing duties.

subclause 11(2) provides that where the Authority is considering an application for dumping relief in

anticipation of an injurious import (one of the situations countenanced by new subsection 269TB(1), of the Customs Act 1901 the Authority shall determine the matter pursuant to the Anti-Dumping Act at the time of the anticipated importation of the goods into Australia.

subclause 11(3) preserves to the Minister the ultimate right to determine whether or not dumping or countervailing duties should be imposed on goods, notwithstanding recommendation made to the Minister by the Authority.

Minister may give directions to Authority

Clause 12 allows the Minister to give directions to the Authority as to how it is to carry out its responsibilities under the Act.

- So as to ensure consistency in decision-making a power such as this is required so that the Minister may give guidance on technical matters to both the Authority and the Comptroller (for which a similar provision exists in the Customs Legislation (Anti-Dumping Amendments) Bill 1988)

. These directions must be advertised publicly in the Gazette and tabled in Parliament (subclause 12(3)) and may be disallowed by either House of Parliament. (Subclause 12(4))

- subclause 12(2) provides that these directions may only indicate the general principles that are to be followed by the Authority as it conducts inquiries; the Minister is expressly precluded from giving directions to the Authority as to how it will conduct particular inquiries.

PART III - CONSTITUTION OF AUTHORITY

Member of Authority

Clause 13 provides that the Authority shall consist of one member, to be appointed by the Governor-General for a period of up to five years, or until the Member attains the age of 65 years, on either a full-time or part-time basis and on such terms as are determined in writing by the Minister.

Acting Member

Clause 14 permits the Minister to appoint an Acting Member of the Authority during vacancies in the office of Member, or when the Member is unable to perform his or her statutory functions.

- . subclause 14(2) is a standard provision which validates actions taken by the Acting Member that may otherwise be invalid by reason of a technical defect in the appointment of the Acting Member.

Associate members

Clause 15 permits the appointment of Associate Members to assist the Member in discharging the responsibilities of the Authority. The Associate Member:

- . is appointed after consultation with the Member;
- . may be appointed for a period of up to twelve months, or to conduct a particular inquiry;
- . may be appointed on a full-time or part-time basis;
- . holds office on such terms and conditions as are determined in writing by the Minister; and
- . is deemed to have the same powers and responsibilities as the Member whilst the appointee is performing the duties of an Associate Member.

Outside employment

Clause 16 provides that the Member may not engage in any activity that may result in the Member being paid without the consent of the Minister.

- . This includes paid directorships.

Disclosure of interests

Clause 17 requires the Member to disclose to the Minister the Member's pecuniary and business interests.

Leave of Absence

Clause 18 allows the Minister to grant the Member leave of absence.

Retirement from office

Clause 19 allows the Governor-General to retire the Member on the grounds of invalidity, with the consent of the Member.

Suspension and removal from office

Clause 20 provides the grounds upon which the Governor-General may either suspend or remove the Member from office. Where the Governor-General suspends the Member from office on the grounds of misbehaviour or physical or mental incapacity the Minister shall cause a statement of the grounds for suspension to be tabled before both Houses within seven sitting days of each House after the suspension, after which the notice is subject to a procedure relating to the disallowance of the suspension.

. Subclause 20(5) provides that if after 15 sitting days of a suspension statement being tabled neither House has resolved that the suspended Member be returned to office, the Governor-General may then remove the Member from office.

- Subclause 20(6) sets out the grounds upon which the Governor-General may remove the Member from office without having to table a suspension statement.

Remuneration and allowances

Clause 21 Provides that the Member shall be paid the remuneration determined by the Remuneration Tribunal, or, in the absence of such a determination, an amount prescribed by the Regulations.

PART IV - INQUIRIESGeneral conduct of inquiries

Clause 22 Subclause 22(1) provides that in conducting an inquiry, the Authority may set the procedure to be followed, may act informally, not be bound by the rules of evidence and inform itself in such manner as it sees fit. This highlights the fact that the Authority is merely a fact-finding body, and not a judicial organisation.

subclause 22(2), however, does give the Authority one "quasi-judicial power", i.e. it permits the

Authority (at its option) to take evidence for the purposes of an inquiry on oath or affirmation.

- This express ability to take evidence on oath or affirmation brings into operation the penalty provisions of the Crimes Act 1914 for the giving of false or misleading information, where such information is indeed given on oath or affirmation (see sections 34 and 35 of the Crimes Act 1914).

Notice of Inquiries

Clause 23 requires the Authority to give reasonable advance notice of the conduct of an inquiry by notification in the Gazette, and by advertisement in a newspaper circulating in each State and internal Territory.

False or misleading evidence or information

Clause 24 is a standard penalty provision for the giving of false or misleading information, documents or evidence to the Authority.

- . The penalty prescribed for this offence in subclause 24(1) is the standard pecuniary penalty of \$2000 for a natural person and \$10,000 for a body corporate.
- . Subclause 24(2) provides that the penalty does not apply where a person informs the Authority of the nature of any flawed particulars which may be contained in a particular document produced to the Authority.

Protection of Member

Clause 25 protects the Member when performing his or her duties as the Authority, by conferring on the Member the same protection and immunity as a Justice of the High Court.

Powers of Authority relating to documents produced

Clause 26 indicates what a Member, or a person assisting the Member, may do with books and documents voluntarily forwarded to the Authority.

- . Subclause 26(2) specifically permits the person ordinarily entitled to possession of the materials to have access to and make copies of the materials lodged with the Authority at reasonable times.

Person prejudiced in employment because assisting Authority

Clause 27 makes it an offence for an employer to dismiss an employee, or prejudice an employee in his or her employment, or threaten to do same, because the employee has assisted, or intends to assist, the Authority with an inquiry.

- . The penalty prescribed for this offence is a pecuniary penalty of \$1000 for a natural person and \$5000 for a body corporate

PART V - MISCELLANEOUS

Availability of Reports etc. of Authority

Clause 28 imposes an obligation on the Authority to make copies of the reports or notices it has produced freely available to the public.

- . subclause 28(2) qualifies the obligation by giving the Authority a discretion to not put into the reports or notices any matters which it is of the opinion would adversely affect the business or commercial interests of any person.

Annual report

Clause 29 is a standard reporting procedure which requires the Authority to give the Minister a report of its activities for the financial year no later than 31 December of that year. Subclause 29(2) requires the Minister to then table a copy of the Report in each House of Parliament no later than 15 sitting days after the Minister has received the report.

Provision of resources to Authority

Clause 30 . subclause 30(1) provides that the Authority is to make arrangements with the Minister for the provision of resources to the Authority for the effective prosecution of its work.

- resources in this regard include both financial and manpower resources.

- . subclause 30(2) is intended to preserve the independence of the Authority by ensuring that any staff seconded to it (for instance, from the Department of Industry, Technology and Commerce or the

Australian Customs Service) shall be subject to, and shall perform work in accordance with, the directions of the Authority.

Engagement of Consultants

Clause 31 permits the Authority to engage specialists on such terms and conditions as the Authority determines for the purpose of conducting its work.

Authority may supply information

Clause 32 permits the Authority to supply information received by it to other persons, subject to the qualification contained in clause 33 (discussed below) regarding confidentiality.

Confidentiality

Clause 33 is a standard confidentiality provision which prohibits the supply of information by the Authority, or persons seconded to the Authority, or persons employed as consultants to the Authority, received by those persons in confidence, if the release of that information would constitute a breach of confidence.

- subclause 33(2) exempts from the above confidentiality provision the supply of information to the Minister, the two permanent heads and officers of the Department of Industry, Technology and Commerce and the Australian Customs Service designated specifically to assist the Authority.

Conduct by directors, servants or agents

Clause 34 is a standard provision that provides, in circumstances where it is necessary to ascribe "intent" or "conduct" to an inanimate body corporate (for example, in the penal provisions of the Bill), that certain classes of natural persons are deemed to have acted, or to have formed the intent of the body corporate.

Cessation of Act

Clause 35 is a sunset provision which provides that the Authority will cease operation 5 years after the day it commences.

- This sunset provision anticipates the Government's commitment to a further extensive review of the Anti-Dumping system, which is intended to include a reassessment of the role of the Authority.

Regulations

Clause 36

is a standard provision permitting the making of such regulations that are required to be made by the Act, or that are necessary or convenient to be made for the carrying out or giving effect to the Act.