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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CUSTOMS AND EXCISE LEGISLATION
AMENDMENT BILL (NO. 1) 1996**

REPLACEMENT EXPLANATORY MEMORANDUM

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS
MADE BY THE SENATE TO THE BILL AS INTRODUCED



CUSTOMS AND EXCISE LEGISLATION
AMENDMENT BILL (NO. 1) 1996

OUTLINE

The purpose of this Bill is to amend the *Customs and Excise Legislation Amendment Act 1995* (Act No. 87 of 1995) (the CELA Act).

The CELA Act made substantial amendments to the *Customs Act 1901* and the *Excise Act 1901* relating to the Diesel Fuel Rebate Scheme, to tighten the eligibility criteria for rebates of customs and excise duty paid on purchases of diesel fuel.

In the course of the Senate debate on the CELA Act on 29 and 30 June 1995, 80 amendments were successfully moved to the CELA Bill as introduced. In the course of translating those amendments into a final Royal Assent Bill, several substantive problems with the commencement and the application and savings provisions were created which were acknowledged as contrary to the expressed intention of the Senate.

The application and savings provisions problems arose because modifications were not made to these provisions to take account of amendments made by the then Opposition and Greens, in particular relating to the law as it applied to quarrying and sand mining prior to 1 July 1995. Also, consequential amendments were not made to the commencement provisions even though it was agreed that particular amendments would commence at particular times. Several minor transcription errors in the CELA Act were also identified.

On 29 August 1995, the then Government introduced the Customs and Excise Legislation Amendment Bill (No. 2) 1995 into the Senate. The purpose of that Bill was to amend the CELA Act to correct the transcription errors and the problems with the commencement and the application and savings provisions. However, the Bill lapsed upon the prorogation of Parliament on 29 January 1996.

This Bill is in substantially the same form as the 29 August 1995 Bill and is being pursued because the need to correct the problems with the application provisions and restore the Senate's intention still exists, particularly in relation to the law applicable to mining for minerals. The CELA Act amended the definition of minerals by excluding certain materials, with effect from 1 July 1995 only. Any existing rebate applications, or any matters before the Administrative Appeals Tribunal (AAT) or the courts, that relate to the use of diesel fuel in mining operations prior to 1 July 1995 were intended to be decided in accordance with the law as it existed prior to 1 July 1995.

The CELA Act as passed did not give effect to this intention and without the corrections to the CELA Act proposed in this Bill, these applications will be governed by the amended law. The effect of the Bill is to allow those companies which had lodged applications before 1 July 1995 to have them considered on the basis of the law as it existed prior to 1 July 1995, thereby restoring the original intention of the CELA Act.

The Bill as introduced into the Senate also proposed one minor addition to restore the eligibility for diesel fuel rebate in respect of the extraction of limestone for use in the de-acidification of soil. Amendments were moved by the WA Greens to remove the items of the Bill which proposed this addition and the Senate agreed to these amendments.

The Senate also agreed to amendments moved by the WA Greens to amend the *Income Tax Assessment Act 1936* (the Income Tax Act). This amendment inserted new section 75E into that Act (Schedule 2 refers) which provides for the payment of a cash rebate in respect of activities undertaken to prevent land degradation in years when deductions cannot be made from income under section 75D of the Income Tax Act due to lack of assessable income.

FINANCIAL IMPACT STATEMENT

The technical "correction" amendments proposed in this Bill have no additional financial impact to the CELA Act.

The financial impact of the amendment in this Bill to the *Income Tax Assessment Act 1936* concerning the payment of cash rebates in respect of activities undertaken to prevent land degradation is not known.

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NOTES ON CLAUSES

Clause 1 - Short Title

This clause provides for the Bill to be cited as the *Customs and Excise Legislation Amendment Act (No. 1) 1996* (hereinafter referred to as the CELA Act 1996).

Clause 2 - Commencement

This clause provides that the CELA Act 1996 is taken to have commenced on 1 July 1995. This is the same date that the *Customs and Excise Legislation Amendment Act 1995* (Act No. 87 of 1995 - hereinafter referred to as the CELA Act) received the Royal Assent.

Clause 3- Schedule(s)

This clause is the formal enabling provision for Schedules 1 and 2, providing that each Act that is specified in a Schedule (ie. the CELA Act and the Income Tax Act) is amended as set out in the applicable items in the Schedule. The clause also provides that the other items of a Schedule have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation. This Bill, however, has no such items.

SCHEDULE 1

AMENDMENT OF THE CUSTOMS AND EXCISE LEGISLATION AMENDMENT ACT 1995

Item 1 - Subsection 2(2)

This item amends subsection 2(2) of the CELA Act so that it now provides for the 1 August 1986 commencement of the amendments in that Act as follows:

"(2) Items 2, 6 (only insofar as that item refers to water) and items 7, 10 and 11 of Schedule 1 are taken to have commenced on 1 August 1986."

The 5 items which are now taken to have commenced on 1 August 1986 (the commencement date of the current Diesel Fuel Rebate Scheme) are as follows:

- item 2 - the new definition of "agriculture", which specifies a clear list of activities in which the use of diesel fuel is to be eligible for the payment of rebate;
- item 6 - the new definition of "minerals", insofar as that definition now excludes water from its ambit;
- item 7 - the new definition of "mining operations", which specifies a clear list of activities in which the use of diesel fuel is to be eligible for rebate;

item 10 - the new definitions of:

- "agricultural activity", "core agricultural activity", "approved catchment area" and "earthworks", all of which appear in the various paragraphs under the item 2 definition of "agriculture"; and
- "mining town", "State or Territory authority" and "transport networks", all of which appear in the various paragraphs under the item 7 definition of "mining operations"; and
- item 11 - which inserts new subsections 164(8) and 164(9) into the Customs Act, to ensure that agricultural or mining activities undertaken by contractors are also eligible for rebate if carried out by subcontractors.

Items 2 and 3 - Subsection 2(3)

These items amend subsection 2(3) of the CELA Act so that it now provides for the 1 July 1995 commencement of the amendments in that Act as follows:

"(3) Items 1, 1A, 3, 3A, 4, 5, 6 (insofar as that item refers to sand, sandstone, soil, slate, clay (other than bentonite and kaolin), basalt, granite, gravel and limestone) 9 of Schedule 1, and Schedule 2, commence on the day on which this Act receives the Royal Assent." (The CELA Act received the Royal Assent on 1 July 1995).

The 8 items from Schedules 1 and 2 which are now taken to have commenced on 1 July 1995 are as follows:

- items 1, 4, 5 and 9 of Schedule 1 and item 1 of Schedule 2 - the "residential premises" changes which remove eligibility for rebate of customs and excise duty where diesel fuel is purchased for use at residential premises after 1 July 1995 (item 1 of each Schedule refers), except where the premises are located:
 - on an agricultural property (item 4 refers); or
 - at the place (or at a place adjoining that place) where mining activities are carried out (item 9 refers);
- items 3 and 3A - which add "the carrying out of firefighting activities" to the definition of "agriculture" (new paragraph (1a) of the definition). This becomes an additional activity for which the use of diesel fuel is to be eligible for the payment of rebate post 1 July 1995;
- item 6 - the new definition of "minerals", which excludes from eligibility for the payment of rebate diesel fuel for use in the extraction of all the nominated minerals (except bentonite, kaolin, or agricultural use limestone);

The reference to item 1A in item 2 of Schedule 1 to the CELA Act 1996 is the result of an oversight when the CELA Act 1996 was amended by the Senate. Item 1A was proposed to be inserted by item 9 of the CELA Act 1996 as introduced into the Senate. The Senate amended to CELA Act to omit item 9 and the cross reference to item 1A in item 2 was not omitted. This reference, therefore, is of no effect.

Item 4 - Paragraph 5(2)(b)

This item amends subsection 5(2) of the CELA Act by omitting paragraph 5(2)(b) and substituting new paragraphs 5(2)(b) and (c).

Subsection 5(1) of the CELA Act provides that all rebate applications made before, but not decided before, the day on which the CELA Act receives the Royal Assent and all applications made to the Administrative Appeals Tribunal (AAT) before, but not decided before that day in respect of decisions relating to rebate applications, are to be decided under the Customs Act and the *Excise Act 1901* (the Excise Act) as in force on or after that day, that is, under the amended provisions of these two Acts. This is because the CELA Act limits the circumstances in which the use of diesel fuel is eligible with effect from 1 August 1986.

New paragraph 5(2)(b) provides that subsection 5(1) of the CELA Act does not apply to rebate applications that are made by a person prior to 1 July 1995 in respect of diesel fuel purchased by the person for use in a mining operation:

- (a) referred to in a paragraph of the definition of mining operation (other than paragraphs (d), (e), (f), (g), (h) or (i)); and
- (b) that relates to sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or limestone (other than agricultural use limestone).

The reason for the exclusion of such applications from subsection 5(1) is that sand, sandstone, soil etc are excluded from the definition of "minerals" only with effect from 1 July 1995. The eligibility for rebate of diesel fuel purchased for use before 1 July 1995 to extract such materials will continue to be determined in accordance with the law which existed before that date. Therefore, any existing rebate applications that relate to the use of diesel fuel in the extraction of certain minerals (including sand) are not to be decided in accordance with the *amended* provisions of the Customs Act and the Excise Act. New subsection 5(3A) contains the provisions that govern the payment of rebate in respect of such applications (see item 6 below).

New paragraph 5(2)(c) also provides that subsection 5(1) does not apply to an application made to the AAT in relation to a rebate application referred to in paragraph (a) or (b). Paragraph 5(2)(a) refers to claims made in respect of diesel fuel for use at residential premises.

Item 5 - subsection 5(3)

This item amends the CELA Act by omitting the present subsection 5(3) and substituting new subsections 5(3) and 5(3A).

New subsection 5(3) is similar to the existing subsection 5(3) as it governs the circumstances in which a person has purchased diesel fuel for use by that person at residential premises in an activity referred to in subparagraphs 5(2)(a)(i), (ii) or (iii) before the day on which the CELA Act received the Royal Assent, ie 1 July 1995.

A rebate application may be made in respect of the duty paid on that fuel. If that application is not made, or not finally decided before 1 July 1995, new subsection 5(3) provides that for all purposes connected with the making and deciding of that application, and the payment of rebate, the Customs Act and the Excise Act have effect as if the amendments set out in items 1, 4, 5 and 9 of Schedule 1 to the CELA Act, and Schedule 2 to the CELA Act, had not been made.

These items in Schedule 1, and Schedule 2, effect the amendments to the "residential premises" category of diesel fuel rebate, narrowing the circumstances in which diesel fuel purchased for use at residential premises will be eligible for rebate with effect from 1 July 1995.

The effect of new subsection 5(3), therefore, is that rebate applications in respect of fuel purchased before 1 July 1995 for use at residential premises which have not been made or finally determined before 1 July 1995 are to be determined in accordance with the provisions of the Customs Act and the Excise Act in force before 1 July 1995.

Subsection 5(3) also provides that a person making an application in accordance with this subsection is not otherwise entitled to make an application for rebate for that fuel. Applications for rebate under subsection 5(3) will also be subject to subsection 164(4A) of the Customs Act, ie in respect of all applications for rebate received on or after 1 July 1994, rebate is only payable in respect of diesel fuel purchased within 3

years before an application is received except where a notice of intention has been given before 1 July 1994.

New subsection 5(3A) is similar to new subsection 5(3) as it governs the circumstances where a person has purchased diesel fuel before the day on which the CELA Act received the Royal Assent, ie 1 July 1995, for use in a mining operation:

- (a) referred to in a paragraph of the definition of mining operations (other than paragraphs (d), (e), (f), (g), (h) or (i)); and
- (b) that relates to sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or limestone.

A person may make an application for rebate in respect of the duty paid on that fuel. If an application is not made, or is not finally decided, before 1 July 1995, new subsection 5(3A) provides that for all purposes connected with the making and deciding of that application, and the payment of rebate, the Customs Act and the Excise Act have effect as if the amendment in item 6 of Schedule 1 to the CELA Act (insofar as that item refers to sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or limestone) had not been made.

Therefore, diesel fuel purchased on and after 1 July 1995 for use in the extraction of certain minerals referred to in a paragraph of the definition of mining operations (other than paragraphs (d), (e), (f), (g), (h) or (i)) and that relates to any of these materials will no longer be eligible for rebate.

The effect of new subsection 5(3A), is that rebate applications in respect of fuel purchased before 1 July 1995 for use in the extraction of certain minerals referred to in a paragraph of the definition of mining operations (other than paragraphs (d), (e), (f), (g), (h) or (i)) and that relates to sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or limestone (other than agricultural use limestone) which have not been made or finally determined before 1 July 1995 are to be determined in accordance with the provisions of the Customs Act and the Excise Act in force before 1 July 1995.

Similar to new subsection 5(3), new subsection 5(3A) also provides that a person making an application in accordance with this subsection is not otherwise entitled to make an application for rebate for that fuel. Applications for rebate under subsection 5(3A) will also be subject to subsection 164(4A) of the Customs Act, ie in respect of all applications for rebate received on or after 1 July 1994, rebate is only payable in respect of diesel fuel purchased within 3 years before an application is received except where a notice of intention has been given before 1 July 1994.

Item 6 - After subsection 5(4)

This item amends the CELA Act by inserting new subsection 5(4A). New subsection 5(4A) provides that subsection 5(4) does not apply in relation to a rebate application that is made by a person in respect of diesel fuel purchased for use in a mining operation:

- (a) referred to in a paragraph of the definition of mining operations other than paragraphs (d), (e), (f), (g), (h) or (i); and
- (b) that relates to sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or limestone (other than agricultural use limestone).

Subsection 5(4) of the CELA Act sets out the provisions that govern the law that is applicable to legal proceedings relating to rebate application which are brought in the Federal Court of Australia or the High Court before the day on which the CELA Act received the Royal Assent in relation to rebate application (ie. 1 July 1995). The law that is applicable is the Customs Act and the Excise Act in force on and after that day, ie the amended provisions of these Acts.

New subsection 5(4A) specifically excludes those rebate applications that relate to the extraction of certain minerals (including sand) referred to therein for the same reasons as set out in item 5 above. As sand, sandstone etc are only excluded from the definition of "minerals" on and from 1 July 1995, existing legal proceedings in the Federal Court or High Court in respect of such applications are to be governed by the provisions of the Customs Act and the Excise Act as if the amendments to these Acts had *not* been made.

Item 7 - Item 1 of Schedule 1

This item omits and substitutes the wording of item 1 of Schedule 1 to the CELA Act. This is a grammatical amendment only and is necessary to remove the duplication of the word "in" in the amended provisions of paragraph 164(1)(b) of the Customs Act.

Item 8 - Item 2 of Schedule 1 (paragraph (l) of the definition of *agriculture*)

This item amends paragraph (l) of the definition of "agriculture" set out in item 2 of Schedule 1 to the CELA Act by omitting the phrase "first-mentioned agricultural activity" and substituting the phrase "first-mentioned activity". This is a grammatical amendment only to make the wording of this paragraph consistent with the wording of similar paragraphs in the definition of "agriculture".

Item 9 - Item 2 of Schedule 1 (paragraph (p) of the definition of *agriculture*)

This item amends paragraph (p) of the definition of "agriculture" set out in item 2 of the Schedule to the CELA Act by omitting the phrase "and silage pits" and substituting the phrase "or silage pits". Paragraph (p) provides for the payment of rebate for the construction or maintenance of sheds, pens, silos and silage pits. This current wording provides that rebate is payable only if all these items are constructed or maintained. The amendment in this item will provide that rebate is now payable for the separate construction or maintenance of any of these items.

Item 10 - Item 2 of Schedule 1 (note to the definition of *agriculture*)

This item amends item 2 of Schedule 1 to the CELA Act by omitting and substituting the note to the proposed definition of "agriculture". The note to the definition

indicates those agricultural activities (which are given an expanded meaning by subsection 164(8) of the Customs Act) by reference to the relevant paragraphs of the definition of "agriculture",.

The paragraphs of the definition of "agriculture" were re-numbered as a result of the Senate amendments to item 2 of Schedule 1 to the CELA Act. The purpose of the amendment in this item is to insert the correct cross-references in the note to the relevant paragraphs of the definition of the "agriculture" which are to be given an expanded meaning by subsection 164(8).

Item 11 - After item 3 of Schedule 1

This item amends the CELA Act by inserting new item 3A into Schedule 1. New item 3A amends the note to the definition of "agriculture" in item 2 of Schedule 1 by inserting a reference to paragraph (la) after paragraph (l).

Similar to item 12 above, the purpose of the amendment in this item is to insert a cross-reference in the note to another of the relevant paragraphs of the definition of "agriculture" which is to be given an expanded meaning by subsection 164(8). This cross reference was not inserted at the time the CELA Act was amended by the Senate to insert paragraph (la) into the definition of "agriculture".

Item 12 - Item 5 of Schedule 1

This item amends the CELA Act by omitting and substituting item 5 of Schedule 1. The purpose of this amendment is to insert the correct cross-references to relevant paragraphs of the definition of "agriculture" in item 5. This amendment is necessary due to the re-numbering of the paragraphs of the definition of "agriculture" as a result of Senate amendments to the definition.

Item 13 - Item 6 of Schedule 1

This item amends the CELA Act by omitting and substituting item 6 of Schedule 1, relating to the new definition of "minerals". This is a technical amendment which only amends the setting out of the definition of "minerals".

Item 14 - Item 7 of Schedule 1 (paragraph (a) of the definition of *mining operations*)

This item amends item 7 of Schedule 1 to the CELA Act by omitting and substituting paragraph (a) of the definition of "mining operations". This is a grammatical amendment only to insert commas after the word "prospecting" in paragraph (a). The wording of the new paragraph is also intended to put beyond doubt that the activities nominated in the paragraph relating to the preparation of sites must be undertaken in the preparation of such sites to enable mining for minerals to commence.

Item 15 - Item 7 of Schedule 1 (paragraph (k) of the definition of *mining operations*)

This item amends item 7 of Schedule 1 to the CELA Act by omitting and substituting paragraph (k) of the definition of mining operations. This amendment (in combination with that proposed in **item 16** below) is a technical amendment to include in paragraph (k) the requirement that the rehabilitation of a mining site eligible under this paragraph must have taken place before 1 July 1995.

Paragraph (k) as originally inserted by item 7 was accepted by all parties in the Senate, with a retrospective commencement of 1 August 1986. The Senate, however, amended paragraph (k) to extend eligibility to rehabilitation of "places affected by a mining operation referred to in paragraph (a) or (b) ... " (item 8 of the CELA Act refers). This amended paragraph (k) commenced on 1 July 1995.

As the CELA Act received the Royal Assent on 1 July 1995 the item 7 version of paragraph (k) was repealed on the same day on which it received the Royal Assent. This meant that the item 7 version of paragraph (k) would never appear as a printed provision of the Customs Act, even though it was taken to have been in force from 1 August 1986 until 1 July 1995.

Rebate claims lodged after 1 July 1995 in respect of diesel fuel used between 1 August 1986 and 1 July 1995 must be assessed against the narrower item 7 version of paragraph (k). To assist claimants and officers in determining eligibility under this paragraph, the end date has now been written into paragraph (k) and the item 8 version of paragraph (k) (which commenced on 1 July 1995) has been re-numbered as paragraph (ka) (**item 16** below refers). Both versions will now appear in the definition of "mining operations".

Item 16 - Item 8 of Schedule 1

This item amends Schedule 1 to the CELA Act by omitting and substituting item 8.

Item 8 amended paragraph (k) of the definition of "mining operations" (inserted by item 7 of Schedule 1 to the CELA Act) to extend the rehabilitation circumstances under that paragraph to include places affected by mining operations in paragraphs (a) and (b) of this definition, with effect from 1 July 1995 (see also item 3 above). The present wording of item 8, however, does not make grammatical sense when applied to paragraph (k).

This item, therefore, proposes a new item 8 which will completely omit and substitute the terms of the paragraph in order to implement the intended effect of item 8. The new paragraph has also been re-numbered as "paragraph (ka)" for the reasons detailed above for **item 15**.

Item 17 - Item 10 of Schedule 1

This item amends item 10 to Schedule 1 to the CELA Act by inserting a new definition of "approved catchment area" after the definition of "agricultural activity". This new

definition is for the purposes of paragraph (t) of the definition of "agriculture", which allows rebate to paid in respect of activities undertaken for the purposes of soil or water conservation within an approved catchment area by a person who carries on a core agricultural activity within such an area.

"Approved catchment area" is defined as an area in respect of which a soil or water conservation plan has been adopted by, or has been made between, the persons who carry on core agricultural activities within that area.

Items 18 and 19 - Item 10 of Schedule 1 (definition of *mining town*)

These items amend the definition of "mining town" in item 10 of Schedule 1 to the CELA Act by inserting the word "principally" before "to house employees" and omitting the phrase "principally administered" and substituting "administered". This is a technical amendment only and places the word "principally" in the position that the Senate intended when the Senate originally agreed to insert the word into the definition.

Items 20 and 21 - Item 11 of Schedule 1 (subsection 164(8))

These items amend item 11 of the CELA Act, specifically by amending proposed subsection 164(8) of the Customs Act by omitting the reference to "(h)" and substituting "(i)" and inserting a reference to paragraph "(t)" after "(s)". These are technical amendments only, the purpose being to insert the correct cross-references in subsection 164(8) to the relevant paragraphs of the definition of the "agriculture" to which subsection 164(8) applies. The paragraphs of the definition of "agriculture" were re-numbered as a result of the Senate amendments to item 2 of Schedule 1 to the CELA Act.

Item 22 - After item 11 of Schedule 1

This item amends the CELA Act by inserting new items 12 and 13 into Schedule 1.

New item 12 amends proposed subsection 164(8) of the Customs Act by inserting a reference to paragraph (la) after paragraph (l). Similar to item 21 above, the purpose of the amendment in this item is to insert a cross-reference to another of the relevant paragraphs of the definition of the "agriculture" to which subsection 164(8) is to apply. This cross reference was not inserted at the time the CELA Act was amended by the Senate to insert paragraph (la) into the definition of "agriculture".

New item 13 amends proposed subsection 164(9) of the Act by inserting a reference to paragraph (ka) after paragraph (k). This is a technical amendment to include a cross reference in that subsection to the re-numbered "post 1 July 1995" version of paragraph (k) of the definition of "mining operations" (see the explanation for **items 15 and 16** above).

The effect of the 2 subsections in the Customs Act (ie. 164(8) and 164(9)) is to ensure that agricultural or mining activities undertaken by contractors are also eligible for rebate if carried out by subcontractors.

Item 22 - Item 1 of Schedule 2

This item omits and substitutes the wording of item 1 of Schedule 2 to the CELA Act. This is a grammatical amendment only and is necessary to remove the duplication of the word "in" in the amended provisions of paragraph 78A(1)(b) of the Excise Act.

SCHEDULE 2

AMENDMENT OF THE INCOME TAX ASSESSMENT ACT 1936

Item 1 - After section 75D

This item amends the *Income Tax Assessment Act 1936* by inserting new section 75E after section 75D. Section 75D of that Act presently provides for the deduction of expenditure from income in respect of the activities undertaken to prevent land degradation. For example, deductions from income can be made in respect of operations for the purpose of eradicating animal or vegetable pests from land or for the purpose of destroying detrimental weed or plant growth.

The purpose of section 75E is to provide for the payment of a cash rebate in respect of expenditure on prevention of land degradation in years when deductions cannot be made from income under section 75D due to lack of assessable income. Such payments are to be paid out of moneys appropriated by Parliament for the purpose.

This amendment did not form part of the Bill as originally introduced into the Senate but was one of the amendments to the Bill moved by the WA Greens to which the Senate agreed.

