

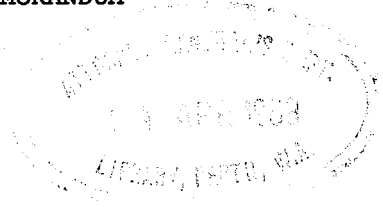
1989

THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

SENATE

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (NO. 2) 1987

SUPPLEMENTARY EXPLANATORY MEMORANDUM



Amendments and New Clauses to be Moved on Behalf of
the Government

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

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (NO. 2) 1987

OUTLINE

The principal changes proposed to the Bill concern:

- . the transfer of the administrative penalty regime and the offence provision for the making of a false or misleading statement to the Customs and Excise Legislation Amendment Bill 1988 (Amendment Nos. 41 and 37 respectively), so that the complete package of proposed penal provisions for the making of a false or misleading statement is presented in the one Bill; and
- . the removal of Clause 16 (relating to the proposed extension to 3 years for the recovery of shortpaid duty (section 165 of the Customs Act 1901)(Amendment No. 27)).

This will effectively leave the Bill with two substantive elements only, ie.

- 1) the redraft of Division 2 of Part 8 of the Customs Act 1901, relating to the valuation of imported goods (Clause 12) and
- 2) the audit and verification of information powers of officers of Customs and the complementary provision relating to the requirement to keep commercial documents (Clauses 6, 22 and 25).

The principal amendments relating to these two remaining elements in the Bill concern;

- 1) Clause 12 (Valuation Division amendments)
 - . the removal of advertising and warranty costs from the definition of "price" (Amendment No. 11);
 - . the amendments to the definition of buying commission (new section 155 - Amendment No. 18); and
 - . the removal of the requirement to make a valuation statement (new section 159 - Amendment Nos. 20 and 22-25).
- 2) With regard to the document retention obligation and the audit of information powers,
 - . the ambit of documents that have to be kept for the purposes of the Customs Act 1901 has been clarified so that the documents that are to be kept by the importer are only those commercial documents which will enable imported goods to be properly identified, and, in the case of goods entered for home consumption, properly valued or rated for duty. In addition the surrender of the documents to other bodies is permitted in certain circumstances, so long as a certified copy of the document is retained (Amendment No. 38);

. the notation of documents if it is within the ordinary course of business to mark the documents is now permitted (Amendments Nos. 39 and 40);

. the right to enter premises to inspect documents relating to the entry of imported goods will be limited to five years after the day on which the goods were entered for home consumption (Amendment No. 3); and

. the ability to permit Justices of the Peace to issue warrants under proposed section 214AB of the Customs Act 1901 has been removed (Amendment No. 2).

In addition, a number of other minor technical amendments are proposed to other Clauses of the Bill; these are set out in detail in the notes on amendments to this memorandum.

Financial Impact Statement

The amendments proposed have no direct financial impact.

Notes on Amendments

Amendment 1: Clause 2 - Commencement

The proposed amendment provides for the entire Bill to commence on 1 July 1989. The proposed prospective commencement date for the new valuation regime and the audit and verification of information powers is to enable both the importing community and the Customs Administration adequate lead time to prepare for the new regimes.

Amendment 2: Clause 4 - Interpretation

The proposed amendment removes the extended definition of "magistrate", which was proposed to include justices of the peace for the purposes of the issuing of warrants for the new audit powers in new Section 214AB of the Bill (see Clause 22)

- . The general criticism of having justices of the peace, most of whom are not legally trained judicial officers, issue warrants for Customs officers to enter non-business premises to inspect and make copies of commercial documents, was accepted.
- the method to be employed to gain a audit warrant in cases of urgency are discussed in amendment 36.

Amendment 3: Clause 6 - Authority to deal with goods

The proposed amendment effects a minor drafting change to the Clause, to put beyond doubt that the time within which an officer of Customs may enter business premises to examine particular commercial documents is five years after the time the goods to which the documents relate were entered for home consumption;

- . This time period corresponds with the time such commercial documents are now required to be kept for the purposes of the Customs Act 1901, under proposed new section 240 (Clause 25 of the Bill refers).

Amendment 4: Clauses 7 to 11

The proposed amendment omits five Clauses from the Bill, as they are no longer to be proceeded with.

The amendments proposed to Section 45 of the Customs Act 1901 (Clause 7 of the Bill) have been effected by amendments to the Act contained in the Customs Legislation (Anti-Dumping Amendments) Act 1988 (Act 76, 1988), whilst the amendments to Clauses 8-11 inclusive are now not to be

proceeded with following changes in the Government's and Customs' policy as to how ship's and aircraft's stores are to be accounted for and administered.

Amendments 5 to 10: Clause 12 - (re storage or handling costs)

The proposed amendments delete "storage or handling" costs from four definitions, "Australian inland freight", "Australian inland insurance", "foreign inland freight" and "foreign inland insurance";

- The deletion follows comments on the proposed definitions by members of the GATT Valuation Committee, in which it was alleged such charges were not related to transportation, and thus their inclusion was contrary to article 8(2)(b) of the GATT Valuation Agreement.

- As it was only intended to capture in the value of goods storage or handling charges where such charges are incidental to the transportation of the goods in question (which is permitted by the GATT) the course now proposed is to effect this change by altering the definition of "transportation" (see amendment No. 14).

Amendment 11: Clause 12 - (re advertising and warranty costs in the definition of "price")

The proposed amendment to the definition of "price" removes paragraph (e), which related to the possible inclusion in the price of goods of advertising or warranty costs;

- Advertising and warranty costs are inclusions in the "price" of goods (as defined in the Section 154(1) definition of "price"), subject to the proviso in the definition of "value unrelated matter" that if such activities are undertaken on the purchaser's own account, the costs incurred for these activities are not to be included in price. It was intended that the proviso operate in most cases to prohibit the inclusion of advertising and warranty costs except where the seller required the purchaser to undertake the activity as a necessary condition of the contract of sale (or any other contract or arrangements relating to the purchase of the imported goods)

- However, as a result of two recent judicial pronouncements on the meaning of the phrase "on the purchaser's own account" (in the full Federal Court in LNC, followed by the AAT in SAAB), the phrase has been given such a wide meaning that such costs will only rarely be included in customs value via the specific inclusion proposed in the definition of price, at paragraph (e). Hence, the paragraph has been deleted.

Amendment 12: Clause 12 (re royalties in "price related costs")

The proposed amendment adds a new subparagraph (iv) to paragraph (e), of "price related costs", to ensure that certain royalties and licence fees do not become dutiable (ie. included in "price related costs", thus becoming part of the dutiable value of goods) when such costs are incurred in respect of the imported goods after importation or in the calculation of transaction value (s161A) as a "price related cost" which is not subject to the provisions of paragraph 161A(2)(b);

- . as drafted the Bill includes such royalties in the calculation of transaction value (s.161A) as a "price related cost" which are not subject to the provisions of subsection 161A(2)(b)
- this procedure has caused confusion, and the amendment simplifies the calculation procedure by omitting such royalties from "price related costs".

Amendment 13: Clause 12 (re definition of "purchaser's subsidiary costs")

The proposed amendment effects a technical drafting change to the definition of "purchaser's subsidiary costs", to add a similar phrase employed in the other similar definitions in the Bill; ie. "purchaser's material costs", "purchaser's tooling costs", and "purchaser's work costs".

Amendment 14: Clause 12 (definition of "transportation")

the proposed amendment expands the definition of "transportation", by including storage or handling incidental to transportation, as a consequence of the proposed changes made to the definitions of "Australian inland freight", "Australian inland insurance", "foreign inland freight" and "foreign inland insurance".

- inclusion of storage and handling expenses incidental to the cost of transportation is consistent with the provision of Article 8(2) of the GATT Valuation Agreement.

Amendment 15: Clause 12 (subsection 154(2))

The proposed amendment is a technical drafting change only, replacing an incorrect reference to the "Act" with the proper reference to the "Division".

Amendment 16: Clause 12 (subsection 154(3))

The proposed amendment deletes paragraph (f) from the subsection (which purported to deem persons to be related to each other if they were trustees or beneficiaries of the same trust) on the grounds that circumstance is not provided for under Article 15(4) of the GATT Valuation Agreement.

Amendment 17: Clause 12 (subsection 154(6))

The proposed amendment is a technical drafting change only, which deletes the subsection on the grounds that it is superfluous.

- subsection 154(6) purports to define the circumstances where goods may be regarded as "goods of the same class " for the purposes of sections 161B, 161C and 161G inserted by this Bill.
- the only reference to "goods of the same class" in those three sections appears in paragraph 161G(1)(g)(page 36 of the Bill, line 26). However, paragraph 161G(1)(g) is drafted in terms which make subsection 154(6) unnecessary.

Amendment 18: Clause 12 (definition of buying commission - new section 155)

The proposed amendment alters the wording of paragraph 155(2)(e), to narrow the acknowledged overly broad coverage of the provision.

- In consultations with various industry groups and Customs Agents organisations, it was pointed out that the provision unnecessarily restricted buying agents.
- The proposed amended paragraph maintains the anti-avoidance nature of the provision by rejecting as buying agent (in relation to the imported goods) any person who acts as agent for or represents the producer,

supplier or vendor of the imported goods. Persons who are associated with any producer, supplier or vendor, except as agent of the purchaser in respect of the imported goods, are also rejected as buying agents.

However, the provision now allows a buying agent to represent other purchasers, vendors, suppliers, producers, etc. in transactions unconnected with the import sales transaction of particular imported goods.

Amendment 19: Clause 12 (definition of transportation costs - new Section 158)

The proposed amendment clarifies the addition to "transportation costs", of foreign Customs duties, sales taxes or other duties paid because of the importation into a foreign country of assists supplied free of charge or at reduced cost by the Australian purchaser.

Amendments 20, 22, 23, 24 and 25:

Clause 12 (re valuation statement - new Section 159, and consequential references to that Section)

The proposed amendment (No. 20) deletes proposed new Section 159, which would have required an importer to give a statement containing valuation information of a kind and in a form approved by the Comptroller, to ensure that all aspects of an importation transaction necessary to correctly value the goods would be brought to the notice of Customs.

- The requirement to bring such matters to notice is now addressed via the proposed penalty provision in Section 243T and the proposed new mechanism to highlight particular matters of uncertainty to Customs in Section 243V of the Customs and Excise Legislation Amendment Bill 1988. These provisions will ensure that importers bring to account all valuation matters relating to the correct calculation of duty payable, without imposing an acknowledged administrative burden and inconvenience on importers to complete a lengthy and detailed valuation statement.
- Amendments 22-25 effect consequential amendments to various provisions in the Bill which referred to the Section 159 Valuation Statement.

Amendment 21: Clause 12 (Value of imported goods - new Section 160)

The proposed amendment effects a technical drafting change to proposed new section 160, to place beyond doubt that it is the Customs which determines the customs value of goods, employing the various methods outlined in the section.

This repeats the similar provision in existing subsection 159(1) of the Customs Act 1901.

Amendments 26 & 27: Clauses 14 to 21

The proposed amendments delete these Clauses for the following reasons:

- Clause 15 (relating to a typographical amendment to section 164 of the Customs Act 1901) and Clauses 17 to 21 (relating to the Customs Agents Licensing provisions) have been transferred to the Customs and Excise Legislation Amendment Bill 1988.
- Clause 16, concerning the proposed extension to 3 years for the recovery of short-paid duty, is not to be proceeded with, following the Government's acceptance of the view that in the interest of equity, there should be symmetry between the time within which Customs can collect shortpaid duty (section 165 of the Customs Act 1901), and the time within which an application for a refund, rebate or remission of duty is to be made, (section 163). Given the overwhelming preference for a retention of the current 12 month time limit for each of the sections, the Government will not be proceeding with the proposed time limit extension in Clause 16 of the Bill.
- Clause 14, relating to minor amendments to the refund provision of the Act, Section 163, is to be deferred pending a review by the Government, in consultation with the Customs community, of the application fee (with exemptions) regime.

Amendments 28, 29, 32-35: (Clause 22 Powers of officers to inspect commercial documents (proposed new section 214AB))

The proposed amendments effect a technical drafting change to proposed new section 214AB, to

leave out the term "functions" and substitute it with the term "powers".

- . this is a technical amendment to make the provision consistent with proposed section 214AA, which provides for the powers of officers in relation to commercial documents required to be retained by force of the other provisions in the Bill. (As to which see Clause 25 of the Bill, page 48).

Amendments 30 and 31: Clause 22 - powers of officers to inspect commercial documents on "business premises" ie. - new Section 214AA.

These proposed amendments to clause 22 of the Bill will make clear that Officers of Customs may apply for a warrant pursuant to the proposed new Section 214AB of the Principal Act to enter business premises (ie. Section 214AA premises) and inspect commercial documents when a request to enter the premises without warrant under new Section 214AA of the Act is frustrated because either entry is refused or no access to the relevant documents is provided.

Amendment 36: adds a new section 214AC to the Bill.

Warrants may be granted by telephone etc.

new s214AC

provides that where, by reason of urgency, the Comptroller or a Collector considers it necessary to do so, he or she may make an application for a warrant under proposed subsection 214AB(2) by radio, telephone or other means of communication - subsection (1).

- . it is envisaged that warrants will be sought orally, or in writing (eg by facsimile) in accordance with this provision;
- . before the making of such an application the Comptroller or Collector shall prepare an information of the kind required by proposed subsection 214AB(3), but may, if it necessary to do so, make the application before the information has been sworn - subsection (2);
- . When determining whether a warrant should be granted, the Magistrate must satisfy himself or herself that there are commercial documents on the premises, and that the occupier has failed to give consent to the authorised officer to enter the premises for the purposes of the section - subsection (3).

- . when a Magistrate has decided to grant a warrant under this section, the Magistrate shall inform the Comptroller or the Collector of the details of the warrant, who shall then complete the warrant in those terms - subsection (4);
- . A warrant which is granted must include a statement of the purpose for which it is issued (ie. to inspect, etc commercial documents relating to any entry of goods on a particular date, for instance) and shall limit the time for which it can be used - subsection (4).
- . where a warrant has been issued and the details completed by the Comptroller or Collector in accordance with subsection (4), the Comptroller or Collector shall, not later than the day following the day next following the last day on which the warrant has effect, forward to the Magistrate the warrant completed by the Comptroller or Collector, accompanied by the sworn information - subsection (5);
- . a warrant which has been issued in accordance with this section is authority for the exercise of the powers of entry etc by an authorised officer, as set out in proposed subsection 214AB(7) - subsection (7)
- . Where a warrant has been issued, it must be shown to the occupier or person apparently in charge of the premises upon request - subsection (8)
- . subsection 214AB(1) provides that no warrant is required if the occupier consents to the authorised officer exercising his or her powers under this section.

As discussed in Amendment 2 the undesirability of permitting Justices of the Peace to issue warrants to Customs Officers so that they may enter private property has been accepted. However, circumstances will arise when the Customs Service will require such warrants in urgent circumstances. Accordingly, the above regime is proposed, which balances the needs of the ACS to have the means to have warrants issued to them in urgent circumstances and the rights to privacy of the individual.

- There are precedents in Commonwealth legislation permitting the issuing of

warrants under these conditions; see, for instance section 62 of the Nuclear (Non-Proliferation) Safeguards Act 1987 (Act No.8, 1987).

Amendment 37: Clauses 23 and 24 - Evidence of analyst, Customs offences

These proposed amendments have been transferred to the Customs and Excise Legislation Amendment Bill 1988, as discussed in the outline.

Amendment 38: Clause 25 - Commercial documents to be kept

The proposed amendment amends proposed new section 240 to be inserted by Clause 25 of the Bill (relating to the requirement to keep commercial documents) to

clarify the ambit of documents which are required to be kept for the purposes of the Customs Act 1901 and

exempt originals of documents from that obligation where such originals are required to be surrendered by force of law or in the ordinary course of business, as follows:

proposed new subsection (1) only obliges a person to keep those commercial documents which come into his or her possession as are necessary to enable a Collector to ascertain whether the goods are properly described and, in the case of goods entered for home consumption, properly valued or rated for duty.

proposed new subsection (1A) will excuse the keeping of the original commercial document where, in the ordinary course of dealings or pursuant to law, the document has been passed to another person and the person obliged to keep the commercial document for the purposes of the Customs keeps a copy of the commercial document which has been certified in the manner prescribed by proposed new section (1B).

Amendments 39 and 40: Clause 25 - Commercial documents to be kept

The proposed amendments alter the proposed offence provision in new subsection 240(2) insofar as the provision relates to the offence for altering or defacing commercial documents which are required to be kept. The amendments will permit the notation of original commercial

documents required to be retained by an importer for the purposes of the Customs when the notation is made in the ordinary course of business (proposed new subsection 240(2A)).

Amendment 41: Clauses 26 - 28

The proposed amendment deletes the 3 Clauses from the Bill, for the following reasons:

- Clause 26 of the Bill, dealing with the imposition of administrative penalties for the making of a false or misleading statement to an officer of Customs, and Clause 27, dealing with the giving of undertakings relating to tenders, having been transferred to the Customs and Excise Legislation Amendment Bill 1988. Clause 28, dealing with the making of regulations for the purposes of the Customs Tariff (Anti-Dumping) Act 1975 is now no longer necessary following amendments to anti-dumping legislation made during the Autumn Session of Parliament last year.

Amendment 42: Clause 29 - Review of decisions

The proposed amendment corrects a typographical error contained in Clause 29 of the Bill.

Amendment 43: Clause 30 - Goods entered before 1 January 1988

The proposed amendment amends the existing clause 30 of the Bill, to provide that the existing valuation regime applies to goods that are entered pursuant to section 36 of the Customs Act 1901 prior to 1 July 1989 (the new date of commencement of the new valuation provisions contained in this Bill), notwithstanding that the goods may be valued by the Customs Service after 1 July.

Amendment 44: Part III

The proposed amendment deletes Part III of the bill, relating to ship's and aircraft's stores provisions, which are not to be proceeded with for the reasons outlined in the note accompanying Amendment 4.

Amendment 45: Clause 36 - diesel fuel rebate provision

The proposed amendment deletes Clause 36, which has been transferred to the Customs and Excise Legislation Amendment Bill 1988.