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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS LEGISLATION (ANTI-DUMPING) BILL 1989

EXPLANATORY MEMORANDUM

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



## CUSTOMS LEGISLATION (ANTI-DUMPING) BILL 1989

### OUTLINE

This Bill proposes a series of amendments to the Anti-Dumping Authority Act 1988 and the Customs Act 1901 principally to restructure the anti-dumping provisions of the Customs legislation into discrete taxing and non-taxing Acts. Additionally, the Bill gives effect to the Government's acceptance of the Anti-Dumping Authority's recent Report No. 4, concerning the inclusion of profit margins in certain normal value calculations, announced on 10 September 1989, and to certain technical amendments designed to improve the administration of dumping investigations.

The purpose of the transfer of a series of existing sections from the Customs Tariff (Anti-Dumping) Act 1975 into Part XVB of the Customs Act 1901 (Part 3 of the Bill) is to avoid possible difficulties with the requirements of Section 55 of the Constitution, arising from the High Court Decision on the effect of that Section in Air Caledonie International and others v. The Commonwealth (24 November 1988).

- . The High Court's decision in part dealt with the breadth of the Section 55 constitutional requirement that laws imposing taxation or, in this case, duties of customs, shall deal only with the imposition of taxation, or duties of customs;
  - It had previously been considered that the prohibition on the mixing of taxing and non-taxing matters in legislation would not be infringed where an Act dealing only with the imposition of duties of Customs amended a principal Act which contained provisions dealing with other matters. Thus, Commonwealth drafting practice over the years has countenanced a situation where Bills enacted by Parliament are drafted with a view to the anti-mixing or anti-tacking prohibition, but the Principal Acts as amended are not so considered.
- . The High Court's Decision last year now construes Section 55 as extending to laws in the form in which they stand from time to time after enactment, with the requirement that such laws deal only with the imposition of taxation (or duties of customs etc.). Thus, laws imposing duties of customs must remain in a separate Act from laws dealing with "non-taxing" matters.

The repeal of the sections of the Customs Tariff (Anti-Dumping) Act 1975 effected in the companion Customs Tariff (Anti-Dumping) Amendment Bill 1989, and the transfer of those sections to the Customs Act 1901, effected in this Bill, removes from the Customs Tariff (Anti-Dumping) Act 1975 those provisions which have been rendered doubtful in the light of the High Court's decision.

- . A concordance of the Customs Tariff (Anti-Dumping) Act's proposed repealed provisions and the new Customs Act provisions (as proposed to be inserted by this Bill) appears at the end of this Explanatory Memorandum, for ease of reference. In the transfer, some provisions have undergone slight redrafting, to accord with modern drafting style (references to his or her, for instance).

The other substantive change proposed in this Bill relates to the amendments proposed in Clause 13, new section 269TAC, relating to the Government's decision on the Anti-Dumping Authority's Report to make provision for the inclusion of a profit margin when the normal value of goods is being constructed.

- . The proposed amendments, in new subsections 269TAC(2)(c)(ii)(B) and (4)(e)(iii) give effect to the Authority's recommendation that when a normal value is being constructed, a profit margin (which may be zero) should be included.
- . The one exception identified by the Authority and endorsed by the Government where a profit margin should not be included in a constructed normal value is where the relevant sales in the country of export have been made at a loss for an extended period of time. This has been given effect to in proposed new subsection 269TAC(13).

#### Financial Impact Statement

The proposed amendments in this Bill have no direct financial implications.

Notes on Clauses

PART 1 - PRELIMINARY

Short Title

Clause 1 provides for the citation of this Act as the Customs Legislation (Anti-Dumping) Act 1989.

Commencement

Clause 2 provides for this Act to commence on the day on which the principal provisions of the Customs Tariff (Anti-Dumping) Amendment Act 1989 commence.

PART 2 - AMENDMENTS OF THE ANTI-DUMPING AUTHORITY ACT 1988

Principal Act

Clause 3 identifies the Anti-Dumping Authority Act 1988 as the Principal Act for the purposes of this Part.

Interpretation

Clause 4 amends section 3 of the Anti-Dumping Authority Act 1988 by:

- . amending the definition of "anti-dumping matter" by adding the words "or of Part XVB of the Customs Act 1901" (subclause (a));
- as all the relevant provisions relating to anti-dumping matters were previously contained in the Customs Tariff (Anti-Dumping) Act 1975 it was only necessary to refer to that Act in conferring powers on the Anti-Dumping Authority. However, as many provisions have now been transferred to the Customs Act 1901, it is necessary to specifically include a reference to the relocated provisions, to allow the Anti-Dumping Authority to continue to perform the same role as it did previously;
- . omitting the existing definitions of 'countervailing duty notice' and 'dumping duty notice' as these definitions refer to subsections of the Customs Tariff (Anti-Dumping) Act 1975 which now appear in corresponding provisions in the Customs Act 1901. Accordingly, references to subsections 10(1), 10(2), 11(1) and 11(2) become references to subsections 269TJ(1), 269TJ(2), 269TK(1) and 269TK(2), and references to subsections 8(1), 8(2), 9(1) and 9(2) become

references to subsections 269TG(1), 269TG(2), 269TH(1) and 269TH(2) (subclause (b)).

### Functions

Clause 5 amends section 5 of the Anti-Dumping Authority Act 1988, to ensure that there is no diminution of the role played by the Anti-Dumping Authority in Australia's anti-dumping legislation, by:

- replacing references to subsections 8(2A) and 10(2A) of the Customs Tariff (Anti-Dumping) Act 1975 with references to the corresponding provisions which now appear in subsections 269TG(4) and 269TJ(3) of the Customs Act 1901 (subclause (a));
- replacing references to section 20 of the Customs Tariff (Anti-Dumping) Act 1975 with references to the corresponding provision which now appears in section 269TAJ of the Customs Act 1901, and references to revoking notices and releasing undertakings under the Customs Tariff (Anti-Dumping) Act 1975 with references to Part XVB of the Customs Act 1901 (subclause (b));

In addition, the functions of the Anti-Dumping Authority are being expanded to cover recommendations to the Minister by the Anti-Dumping Authority as to whether the Minister should partly revoke a notice under Part XVB of the Customs Act 1901 or partly release a person from an undertaking given under Part XVB of the Customs Act 1901. This amendment is consequential upon the amendment in clause 13 (see further below) where section 269TAJ is inserted into the Customs Act 1901.

### Authority to make recommendations on publication of dumping duty notices etc.

Clause 6 amends section 7 of the Anti-Dumping Authority Act 1988 by:

- amending paragraph (1)(d) by omitting the words "under the Anti-Dumping Act", on the basis that notices will in future be published under the Customs Act 1901 (subclause (a));
- amending paragraph (1)(e) by omitting references to subsections 8(2A) and 10(2A) of the Customs Tariff (Anti-Dumping) Act 1975 and replacing them with references to the corresponding provisions, subsections 269TG(4) and 269TJ(3) of the Customs Act 1901 (subclause (b));

- . amending subsection (3) by omitting the reference to section 20 of the Customs Tariff (Anti-Dumping) Act 1975 and revocations of notices and releases from undertakings given under that Act, and instead inserting a reference to revocations of notices which, by virtue of section 33 of the Acts Interpretation Act 1901, can still occur in respect of notices published under subsections 8(5), 9(5), 10(5) and 11(5) of the Customs Tariff (Anti-Dumping) Act 1975 and revocations or partial revocations of notices and undertakings under section 269TAJ of the Customs Act 1901 in respect of notices and undertakings given under Part XVB of the Customs Act 1901 (subclause (c));
- . amending subparagraph 4(b)(i) by adding the words "or a notice under Part XVB of the Customs Act 1901" to ensure that notices under both the Customs Tariff (Anti-Dumping) Act 1975 and notices under those provisions now to be inserted in Part XVB of the Customs Act 1901 may continue to be the subject of applications to the Anti-Dumping Authority (subclause (d));
- . omitting from subparagraph 4(b)(ii) the reference to undertakings given under the Customs Tariff (Anti-Dumping) Act 1975 and substituting a reference to undertakings given under Part XVB of the Customs Act 1901.
  - . there are no longer any provisions in the Customs Tariff (Anti-Dumping) Act 1975 which deal with undertakings, as all these now appear in corresponding provisions in Part XVB of the Customs Act 1901 (subclause (e)).

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

Clause 7 amends section 11 of the Anti-Dumping Authority Act 1988 by:

- . omitting the reference to the Customs Tariff (Anti-Dumping) Act 1975 in subsection (1) so as not to limit the Anti-Dumping Authority to determining only those matters which still remain in that Act (subclause (a));
- as a consequence to this amendment the Anti-Dumping Authority will be empowered to determine any matter ordinarily required to be determined by the Minister under the Customs Tariff (Anti-Dumping) Act 1975 or under Part XVB of the Customs Act 1901;

- . effecting a consequential amendment to subsection (1) as a result of the removal of the reference to the Anti-Dumping Act by subclause (a) (subclause (b));
- . amending subsection (3) by removing specific references to provisions in the Customs Tariff (Anti-Dumping) Act 1975 and inserting instead a general reference to both the Customs Tariff (Anti-Dumping) Act 1975 and Part XVB of the Customs Act 1901. This reflects the fact that the Minister still retains the power to make a final determination in respect of a matter for the purposes of either the Customs Tariff (Anti-Dumping) Act 1975 or Part XVB of the Customs Act 1901 in light of the transfer of provisions from the Customs Tariff (Anti-Dumping) Act 1975 to that Part (subclause (c)).

### PART 3 - AMENDMENTS OF THE CUSTOMS ACT 1901

#### Principal Act

Clause 8 identifies the Customs Act 1901 as the Principal Act for the purposes of this Part.

#### Delegation

Clause 9 amends section 9 of the Customs Act 1901 by:

- . inserting a new subsection (4) which, in effect, places an embargo on the Minister delegating his powers and functions under new subsections 269TG(1) and (2), 269TH(1) and (2), 269TJ(1), (2), (4), (5) and (6), 269TK(1) and (2) of the Customs Act 1901 and subsections 8(5), 9(5), 10(5) and 11(5) of the Customs Tariff (Anti-Dumping) Act 1975.

- as section 20 of the Customs Tariff (Anti-Dumping) Act 1975 previously contained an embargo on the delegation of these powers and functions, with the exception of the inclusion of subsections 269TJ(4), (5) and (6), this amendment maintains the status quo by making references to the corresponding provisions in the Customs Act 1901.

The embargo is extended to cover subsections 269TJ(4), (5) and (6), previously subsections 10(2B), (2C) and (2D) of the Customs Tariff (Anti-Dumping) Act 1975, as these subsections permit the Minister to declare that section 10 of the Customs Tariff (Anti-Dumping) Act 1975 applies to the goods, and so it is in keeping



with the other parts of the embargo  
that these subsections also be included.

#### Right to require security

Clause 10 amends section 42 of the Customs Act 1901 by inserting a new subsection (1C). This amendment will allow securities to be required and taken when an undertaking, given and accepted under subsection 269TG(4) or 269TJ(3) of the Customs Act 1901, has been breached.

- . An undertaking may be offered at any time during the period of investigation after initiation of an application for action under the Customs Tariff (Anti-Dumping) Act 1975. However the Minister may only accept an undertaking if it has been established that there is in fact dumping (or subsidisation) and that sufficient evidence has been produced to show that this dumping (or subsidisation) is causing or threatening material injury.

Having offered an undertaking to the Minister (which will only be accepted if it specifies a price below which the goods will not be sold in Australia, and this price is determined as being such that it will not cause injury), the exporter must ensure that future export prices are not less than that level.

If at any time goods arrive in Australia from the exporter at a price lower than the undertaking price, this proposed amendment will allow immediate consideration to be given to the application of dumping securities to the shipment. At present, no security can be taken prior to the Comptroller making a preliminary finding.

#### Insertion of new Division heading

Clause 11 inserts a new Division heading in Part XVB of the Customs Act 1901 before section 269T. Part XVB has been divided into three Divisions: Division 1 deals with preliminary matters, Division 2 with anti-dumping matters which fall to the Comptroller to be considered, and Division 3 deals with anti-dumping matters which fall to the Minister to be considered.

#### Interpretation

Clause 12 amends section 269T of the Customs Act 1901 by inserting additional definitions.

Paragraph (a) inserts definitions of the terms "determination", 'direction' and 'importer'.

- these definitions have been transferred from section 4 of the Customs Tariff (Anti-Dumping) Act 1975 as those are terms which are now used in Part XVB of the Customs Act 1901;

Paragraph (b) inserts new subsections (2A) and (2B) which correspond with subsections 4(4) and 4(5) of the Customs Tariff (Anti-Dumping) Act 1975 which are to be repealed by the companion Customs Tariff (Anti-Dumping) Amendment Bill 1989.

Clause 13 inserts nine new sections into Part XVB of the Customs Act 1901 which have been transferred from the Customs Tariff (Anti-Dumping) Act 1975. In the transfer, some provisions have undergone slight redrafting to accord with modern drafting style (references to his or her, for instance). In addition, necessary cross-referencing changes have been made. The new sections are as follows:

- section 269TAA, which deals with arms length transactions, was formerly subsections 4(2), (3), (3A) and (3B) of the Customs Tariff (Anti-Dumping) Act 1975. No substantive changes to the law are introduced;
- section 269TAB, which deals with export price, was formerly section 4A of the Customs Tariff (Anti-Dumping) Act 1975. No substantive changes to the law are introduced;
- section 269TAC, which deals with the normal value of goods, was formerly section 5 of the Customs Tariff (Anti-Dumping) Act 1975;

This section has been amended in line with the Government's decision on the Anti-Dumping Authority's Report No. 4, March 1989, to make provision for the inclusion of a profit margin when the normal value of goods is being constructed;

- new subparagraph 269TAC(2)(c)(ii)(B) and subparagraph (4)(e) (iii) (previously subparagraph 5(2)(c)(ii) (B) and subparagraph 5(3)(e)(iii) of the Customs Tariff (Anti-Dumping) Act 1975) give effect to the Authority's recommendation that when a normal value is being constructed, a profit margin (which may be zero) should be included;

- the one exception identified by the Authority and endorsed by the Government where a profit margin should not be included in a constructed normal value is where the relevant sales in the country of export have been made at a loss for an extended period of time. This has been given effect to in new subsection 269TAC(13).
- . section 269TAD, which deals with the Minister's power to re-ascertain certain normal values, was formerly section 5AA of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TAE, which deals with material injury to industry, was formerly section 5A of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TAF, which deals with the amount of subsidy determined by the Minister, was formerly section 11A of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TAG, which deals with freight, was formerly section 12 of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TAH, which deals with the ascertainment of equivalent amount in Australian currency, was formerly section 17 of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TAJ, which deals with the revocation of notices and releases from undertakings, was formerly section 20 of the Customs Tariff (Anti-Dumping) Act 1975. The substantive amendment to this provision is the inclusion of a power to partly revoke a notice, and to partly release a person from an undertaking. This Customs Tariff (Anti-Dumping) Amendment Act 1989. amendment is necessary to provide flexibility to deal with notices or undertakings which relate to a range of goods, a number of exporters and/or a number of countries.

#### Insertion of new Division heading

Clause 14 inserts a new Division heading in Part XV B of the Customs Act 1901 after section 269TA.

Consideration of application

Clause 15 amends section 269TC of the Customs Act 1901 to put beyond doubt the Comptroller's power to reject an application under subsection 269TB(1) or 269TB(2) where any of the three criteria set out in paragraphs (a), (b) or (c) of subsections 269TC(1) and (2) are not met.

Insertion of new Division heading and sections

Clause 16 inserts a new Divisional heading in Part XVB of the Customs Act 1901 after section 269TF, and inserts new sections 269TG, 269TH, 269TJ, 269TK, 269TL, 269TM, 269TN and 269TP which have been transferred from the Customs Tariff (Anti-Dumping) Act 1975. In the transfer, some provisions have undergone slight redrafting to accord with modern drafting style (references to his or her, for instance). In addition, necessary cross-referencing changes have been made. The new sections are as follows:

- section 269TG, which deals with dumping duties, was formerly subsections 8(1) to (2A) of the Customs Tariff (Anti-Dumping) Act 1975.
- a new subsection (5) is inserted which provides that the Minister must publish certain particulars upon accepting an undertaking under subsection (4), unless, in the opinion of the Minister, the publication of those particulars would adversely affect the business or commercial interests of any person.

These particulars relate to the goods in respect of which the undertaking was accepted, and the price below which, in accordance with the terms of the undertaking, the goods will not be sold in Australia.

This amendment is consistent with the approach adopted in relation to the publication of the amount of normal value of the goods under subsection (3).

- section 269TH, which deals with third country dumping duties, was formerly subsections 9(1) to (2A) of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- section 269TJ, which deals with countervailing duties, was formerly subsections 10(1) to (2E) and (7) to (7A) and (10) of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;

- . section 269TK, which deals with third country countervailing duties, was formerly subsections 11(1), (2), (7) and (10) of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TL, which deals with the Minister's power to give notice of a decision not to impose duty, was formerly section 12A of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TM, which deals with the period during which certain notices and undertakings remain in force, was formerly section 12B of the Customs Tariff (Anti-Dumping) Act 1975.
  - subsections (4) and (5) have been redrafted to take account of the fact that notices published before 1 March 1986 and undertakings entered into before 1 March 1986 have already expired on 1 March 1989, at the latest, and so provision no longer needs to be made for these. Notices and undertakings published and entered into on or after 1 March 1986 up until the commencement of section 12B of the Customs Tariff (Anti-Dumping) Act 1975 on 1 September 1988 are provided for in new subsections (4) and (5) of section 269TM. These are taken to have expired, unless sooner revoked or released, 3 years after the date of the original publication or when they were originally entered into;
- . section 269TN, which deals with retrospective notices, was formerly section 13 of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision;
- . section 269TP, which deals with the power to specify goods, was formerly section 18 of the Customs Tariff (Anti-Dumping) Act 1975. No substantive amendments are made to this provision.

#### Inquiries in relation to undertakings

Clause 17 amends section 269U of the Customs Act 1901 by:

- . replacing the reference to paragraph 8(2A)(a) of the Customs Tariff (Anti-Dumping) Act 1975 in paragraph (1)(a) with a reference to corresponding provision paragraph 269TG(4)(a) of the Customs Act 1901 (subclause (a));

- replacing the reference to paragraph 10(2A)(a) of the Customs Tariff (Anti-Dumping) Act 1975 in paragraph (1)(b) with a reference to corresponding provision paragraph 269TJ(3)(a) of the Customs Act 1901 (subclause (b)).

CONCORDANCECustoms Tariff (Anti-Dumping) Act 1975Customs Act 1901Current SectionProposed Section

1 - Short title	remains as is
2 - Commencement	remains as is
3 - Repeal and Saving	repealed
4 - Interpretation	repealed; certain definitions transferred to section 269T of the <u>Customs Act 1901</u>
. subsection 4(2),(3), (3A) and (3B)-arms length transaction	section 269TAA of the <u>Customs Act 1901</u>
. subsection 4(4)	subsection 269T(2A)
. subsection 4(5)	subsection 269T(2B)
4A - Export price	section 269TAB
5 - Normal value of goods	section 269TAC
. subsection 5(2A)	subsection 269TAC(3)
" 5(3)	" " (4)
" 5(3A)	" " (5)
" 5(4)	" " (6)
" 5(4A)	" " (7)
" 5(4B)	" " (8)
" 5(5)	" " (9)
" 5(6)	" " (10)
" 5(7)	" " (11)
" 5(8)	" " (12)
" 5(9)	" " (13)
5AA - Minister may re-ascertain certain normal values	section 269TAD
5A - Material injury to industry	section 269TAE
6 - Incorporation	remains as is
7 - Imposition of duties of Customs	remains as is
8 - Dumping duties	section 269TG
subsections (1) and (2)	subsection 269TG(1) and (2)
" (2AA)	" 269TG(3)
" (2A)	" 269TG(4)
subsections (3) to (8)	remains as is

- |     |                                                                                                                                                                                 |                                                                                                                                                  |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|
| 9   | - Third country dumping duties<br>subsections (1) to (2A)<br><br>subsections (3) to (8)                                                                                         | section 269TH<br>subsection 269TH(1) to (3)<br><br>remain                                                                                        |
| 10  | - Countervailing duties<br>subsections (1) to (2E)<br><br>subsections (3) to (6)<br><br>subsections (7) to (7A)<br><br>subsections (8) to (9)<br><br>subsection (10)            | section 269TJ<br>subsections (1) to (7)<br><br>remain<br><br>subsections 269TJ (8) and<br>(9)<br><br>remains as is<br><br>subsection 269TJ(10)   |
| 11  | - Third country countervailing<br>duties<br><br>subsections (1) and (2)<br><br>subsections (3) to (6)<br><br>subsection (7)<br><br>subsection (8) to (9)<br><br>subsection (10) | section 269TK<br><br>subsection 269TK(1) and (2)<br><br>remains as is<br><br>subsection 269TK(3)<br><br>remains as is<br><br>subsection 269TK(4) |
| 11A | - Amount of subsidy may be<br>determined by Minister for<br>purposes of section 10 or 11                                                                                        | section 269TAF                                                                                                                                   |
| 12  | - Freight less than normal<br>freight                                                                                                                                           | section 269TAG                                                                                                                                   |
| 12A | - Minister to give notice of<br>decision not to impose duty                                                                                                                     | section 269TL                                                                                                                                    |
| 12B | - Period during which certain<br>notices and undertakings to<br>remain in force                                                                                                 | section 269TM                                                                                                                                    |
| 13  | - Retrospective notices                                                                                                                                                         | section 269TN                                                                                                                                    |
| 16  | - Duties to be charged separately                                                                                                                                               | remains as is                                                                                                                                    |
| 17  | - Ascertainment of equivalent<br>amount in Australian currency                                                                                                                  | section 269TAH                                                                                                                                   |
| 18  | - Power to specify goods                                                                                                                                                        | section 269TP                                                                                                                                    |
| 19  | - Delegation                                                                                                                                                                    | relevant power now<br>section 9 of <u>Customs Act<br/>1901</u>                                                                                   |



- 20 - Revocation of notices etc section 269TAJ
- 21 - special duties to be additional to ordinary duties remains
- 22 - Regulations repealed - section 270 of the Customs Act 1901 can be relied upon to make regulations in respect of Part XVB of the Customs Act 1901, where the anti-dumping provisions now appear.