

1989

THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

SENATE

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1988

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 1988

OUTLINE

The principal changes proposed to the Bill concern the transfer of the administrative penalty regime from the Customs and Excise Legislation Amendment Bill (No. 2) 1987 to this Bill and the amendments to the forfeiture provisions for the making of a false or misleading statement to an officer of Customs (Amendment No. 11, Clauses 23 and 23A respectively).

- . The proposed amendments to the forfeiture provisions acknowledge community and judicial concern that the forfeiture of a person's goods for the making of a false or misleading statement in respect of those goods can be a sanction disproportionate to the misconduct involved. The amendments originally proposed in Clauses 19, 21 and 23 of the Bill (relating to the seizure of goods for the making of a false or misleading statement, the forfeiture circumstance relating to such a statement and the offence provision in respect of such a statement) are therefore not to be proceeded with. Instead, amendments are proposed to the offence provision for the making of a false or misleading statement (paragraph 234(1)(d) of the Customs Act 1901) and the corresponding forfeiture circumstance (paragraph 229(1)(i)), to remove forfeiture as a sanction for a false or misleading statement (Amendment No. 10 and Amendment No. 11, new Clause 23 refers), and introduce instead a pecuniary penalty where such a statement is knowingly or recklessly made.
- . The administrative penalty provisions (proposed new sections 243T and 243U of the Customs Act 1901 contained in Clause 26 of the Customs and Excise Legislation Amendment Bill (No. 2) 1987) are transferred to this Bill so that the complete package of proposed penal provisions for the making of a false or misleading statement is presented in the one Bill.
 - As a result of the consultations on the proposed administrative penalty system two substantive amendments to the regime as originally introduced are proposed.
 - . the first is to the remission of penalty provision (proposed new Section 243U), to make reviewable by the Administrative Appeals Tribunal remission decisions in certain circumstances (Amendment No. 12, proposed new paragraph 273GA (ka)),
 - . the second is to provide a mechanism by which persons who are genuinely uncertain as to the truth of material to be submitted to Customs can gain an exemption from the penalty duty provision of new Section 243T. (Amendment No. 11, new Clause 23A, new Section 243V).

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 deterrent element of the penalty duty proposals, is expected to significantly reduce for future years the \$26 million duty short-payment in calendar year 1988 which was directly attributable to errors on import entry documentation. Costs of administration of the new review circumstance proposed for remission decisions is difficult to quantify, but is expected to be in the order of \$500,000.

Notes on Amendments

Amendment 1: Clause 2 - Commencement

The proposed amendment deletes subclause (4), making the commencement date for the proposed Clause 11 concession for goods from Christmas Island (and Norfolk and Cocos (Keeling) Islands, see amendment 5) the date of Royal Assent of this Bill, rather than the 1 January 1989 commencement which was originally proposed on the basis of the Bill's anticipated passage through the Parliament last Sittings.

Amendment 2: Clause 2 - Commencement

The proposed amendment changes subclause (6) to provide for the proposed package of penal provisions for the making of a false or misleading statement (Amendment Nos. 7, 9, 10 and 11) to commence on 1 July 1989. This will enable both the Customs community and the Customs administration adequate lead time to prepare for the new regime.

Amendment 3: Clause 4 - Interpretation

The proposed amendment effects a technical drafting change to the Clause by deleting paragraph (a), relating to the proposed alteration to the Customs Act's definitions of "officer" and "Officer of Customs". Those proposed alterations are to proceed in the 1987 Customs and Excise Legislation Amendment Bill (No. 2) (see paragraph 4(a) on page 2 of that Bill).

Amendment 4: Clause 5 - Delegation by Minister

The proposed amendment restricts the class of persons to whom delegations of the Minister's powers under the Customs Act might be given, to persons who are "officers of Customs"; in effect, persons employed by the Australian Customs Service, or authorised in writing to perform the functions of an officer of Customs

The proposed restriction is consistent with the trend in recent legislation to limit the Minister's powers to delegate to those persons in the Commonwealth Department of State for which the relevant Minister has administrative and portfolio responsibility. It will also acquit the undertaking by the Minister for Science, Customs and Small Business to the Senate Standing Committee for the Scrutiny of Bills in its consideration of this Bill in its 16th Report dated 30 November 1988.

Amendment 5: Clause 8 - Prohibited Exports

The proposed amendment to paragraph 8(1)(b) extends the limited power of the Minister for Defence to suspend in the national interest, export licences or export permissions for dual-use technology goods (military use and commercial use). In addition to exercising export control over military goods, the Minister for Defence has responsibility under Regulation 13E of the Customs (Prohibited Exports) Regulations for dual-use technology goods. The proposed suspension power is intended to provide a necessary safeguarding control where circumstances (which are contrary to the national interest) arise in a likely destination of the goods.

Amendment 6: Clause 11 - When goods treated as the produce or manufacture of a country

The proposed amendment seeks to extend the same preferential treatment proposed for goods imported into Australia from Christmas Island (Clause 11 of the Bill) to Norfolk and Cocos (Keeling) Islands as well.

Amendment 7: Clause 14 - Renewal of licence

The proposed amendment extends the time period within which Customs agents must apply for a renewal of their licences from one month to two months.

Agents have represented to the Government that as their licences commonly expire at the end of a given calendar year, the legislation currently obliges them to apply for renewal during the very busy month of December. The proposed extension of the period within which one might apply for renewal will alleviate this problem, and is supported by the relevant Customs Agents' Organisations.

Amendment 8: Clause 19 - Collector may retain goods and require owner to proceed for restoration

The proposed amendment deletes clause 19, which had proposed the insertion in section 208A of the Customs Act 1901 of a statutory defence to the two seizure related actions which can arise in relation to goods that are forfeited by reason of the operation of paragraph 229(1)(i) (the forfeiture circumstance for goods in respect of which a false or misleading statement has been made).

It is now proposed that that forfeiture circumstance be deleted (see amendment 9), as a consequence of the proposed amendments to the offence provision of the Customs Act 1901 (section 234) to effectively remove forfeiture as a sanction for a false or misleading statement (see amendment 10, new Clause 23). These proposed changes render Clause 19 unnecessary.

Further, as a result of the proposed deletion of forfeiture circumstance 229(1)(i), a consequential amendment is required to Section 209 (relating to the power to impound certain forfeited goods and release them on payment of a penalty duty) as follows;

- new Clause 19 proposes to amend Section 209 by removing the reference to 229(1)(i) (paragraph (a)) and clarifying that the penalty duty which might be applied in subsection 209(6) is only the amount of duty which was sought to be evaded, or twice that amount;

Amendment 9: Clause 20 - Forfeited ships and aircraft

The proposed amendment effects a minor drafting change to paragraph 20(c) to ensure that the term "overall length" appears consistently throughout section 228.

Amendment 10: Clause 21 - Forfeited goods

The proposed amendment deletes the existing forfeiture circumstance in paragraph 229(1)(i), so that forfeiture of goods will no longer result from a false or misleading statement made in respect of goods. This proposed amendment is the corollary to the proposed amendment to the offence provision for the making of a false or misleading statement (Section 234(1)(d) of the Customs Act 1901), which will now require intent to be proven or reckless indifference to be established. (See amendment 10, new Clause 23).

Amendment 11: Clause 23 - Customs offences

The proposed amendment to Clause 23 effects two substantive changes, as follows:

- a new Clause 23 is inserted which substitutes the offence provision for the making of a false or misleading statement originally proposed in Clause 24 of the Customs and Excise Legislation Amendment

Bill (No. 2) 1987, for the offence provision currently in this Bill.

- the new offence provision is now dependent upon intent or recklessness; it is not a strict liability offence (paragraph a)
- the penalty upon conviction for the redrafted offence, where the relevant misstatement was made in respect of the amount of duty payable in relation to particular goods, is an amount not exceeding the sum of \$5000 and twice the amount of the duty payable on the goods (paragraph c).
 - .. this penalty level is to be compared to the lesser penalty level for a false or misleading statement under the administrative penalty regime in proposed new Section 243T (Clause 23A following) which is calculated as twice the difference between the amount of duty payable on the goods, and the amount which in fact was paid.

a new Clause 23A is also inserted, which effectively transfers the proposed administrative penalty provisions for the making of a false or misleading statement from the Customs and Excise Legislation Amendment Bill (No. 2) 1987 to this Bill. The proposed administrative penalty regime (with some proposed alterations to the scheme as originally introduced in the other Bill), contains three proposed sections, as follows:

- new Section 243T - Penalty for making false statements

Subsection 1 remains substantially as previously drafted, providing the Comptroller (instead of the Collector) with a discretion to require the owner of goods (expressly "defined" as not including an agent of the owner) to pay within 90 days (up from 60) penalty duty (calculated as twice the difference between the amount of duty payable on the goods, and the amount which in fact was paid) where the owner has made a false or misleading statement to an officer in respect of the goods, and by reason

thereof, a short-payment of duty has occurred.

Subsection 2 is new, providing that the penalty duty demand on the owner of the goods may be served on the owner's agent.

Subsection 3 is in the same terms as the previously drafted subsection 243T(2) with the exception that the time period before the amount demanded becomes a debt due to the Commonwealth has been extended from 60 to 90 days.

Subsection 4 is new, to make clear that the 90 day period prescribed for the payment of penalty duty is stayed where any application is made to the Administrative Appeals Tribunal for review of the decision as to the amount of duty payable on the relevant goods. Further, the notice for penalty duty (which is calculated on the basis of the difference between the duty payable on the goods and the duty which in fact is paid) is effectively amended, as necessary, where an AAT decision determines that the duty payable on the goods is less than was in fact demanded.

Subsection 5 is in substantially the same terms as the previously drafted subsection 243T(3), and precludes action against a person for the same misstatement or omission under Section 234 of the Act where a penalty duty demand is served under 243T.

new Section 243U - Remission of penalty

This proposed Section, which provides the mechanism for the remission of a penalty imposed pursuant to Section 243T (above), is in exactly the same terms as the remission provision previously drafted, with the addition of a time schedule within which a remission application must be made (subsection (1)) and answered (subsection (2)) (a period of 30 days is proposed for each) and the prescription of the grounds which the Comptroller shall have regard to when considering a remission application.

- a related amendment is the proposal to make reviewable by the AAT remission decisions under this section (see discussion in amendment No. 11).

new Section 243V - Section 243T not to apply in certain cases

This proposed section is new, and is intended to provide a mechanism by which persons who are genuinely uncertain as to the truth of information to be submitted to Customs can exempt that information from penalty duty under Section 243T if in fact the information turns out to be false or misleading in a material particular.

- to gain the benefit of the exemption, the information about which one is uncertain must be nominated on the particular statement, and the reasons or grounds for that uncertainty must be included.

Amendment 12: New Clause - Review of Decisions

The proposed amendment inserts a new clause in Part II of the Bill, to provide for the review by the AAT of a decision of the Comptroller under proposed subsection 243U (see amendment 10 above) not to remit a penalty payable under proposed section 243T, or to remit only part of penalty.

Amendment 13: Clause 29 - Interpretation

The proposed amendment deletes paragraph 29(a) for the reasons discussed at Amendment 1.

Amendment 14: Clause 39 - Offences

The proposed amendment effects the same amendment to the offence provision in Section 120 of the Excise Act as proposed in Amendment No. 10 to paragraph 234(1)(d) of the Customs Act.