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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

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

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CUSTOMS AMENDMENT BILL 1991

OUTLINE

This Bill proposes to amend the Customs Act 1901 ("the Act"), to:

- i) implement certain reforms to the current anti-dumping/subsidisation regime which were announced by the Government in the 12 March Industry Statement, and
- ii) effect technical drafting changes to the internal body search provisions of the Act to clarify the nature and function of Judges' orders made under those provisions.

In particular, the proposed amendments to Part XVB of the Act, relating to the anti-dumping and subsidisation provisions;

- a) provide for the calculation of a full dumping margin at the preliminary finding stage of a dumping or subsidisation inquiry (Clause 8),
- b) provide anti-dumping/countervailing remedies for primary producers in the agricultural/horticultural industries affected by dumping or subsidisation of imports of processed agricultural products (Clause 7), and
- c) ensure that each dumping or countervailing measure which may be in place for a particular product applies for 3 years (subject to revocation), and, the time for this sunset provision runs from the date on which each dumping or countervailing notice or undertaking was published, rather than from the date the first such notice or undertaking in respect of such goods may have been published (Clause 9).

The proposed amendments to Part XII of the Act relate to the conferral of power on judges to make orders under the internal body search provisions of the Act (Divisions 1B and 1C of Part XII), and remake those provisions consistent with the formulas that have been recently established for the conferral of non-judicial power on judges as designated persons (Clauses 3 and 4 refer). In addition, the provision which provides for the immunity and protection of Judges and Magistrates when exercising such non-judicial powers as designated persons has been amended to accord with the form which has been settled and accepted previously for these types of provisions (Clauses 5 and 6 refer).

Financial Impact Statement

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

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NOTES ON CLAUSES

Short title etc.

- Clause 1 provides for the Act to be cited as the Customs Amendment Act 1991, and identifies the Customs Act 1901 as the Principal Act being amended.

Commencement

- Clause 2 provides for the Act to commence on the day on which it receives the Royal Assent.

Interpretation

- Clause 3 amends the definition of "Division 1B Judge" in subsection 4(1) of the Principal Act, for the purposes of Subdivision C of Division 1B of Part XII (relating to the detention and internal search of persons suspected of internally concealing narcotics), as follows:

• a new paragraph (a) is substituted for the present paragraph (a) to add judges of the Family Court of Australia to the pool of federal judges available to order the detention, and if necessary, internal search of persons detained under Section 219S of the Principal Act;

• Additionally, the new paragraph ensures that those judges, together with their Federal Court counterparts, are given the choice of accepting the powers and functions conferred on them in their personal capacity by Section 219ZK, via the express reference to the new consent provision proposed in Clause 4 (new Section 219RA).

- Clause 4 inserts a new section 219RA into Subdivision C of Division 1B of Part XII of the Act (relating to the detention and internal search of persons suspected of internally concealing Narcotics), as follows:

Certain Judges and Magistrates eligible to give orders under this Subdivision

new section 219RA provides in a form similar to Section 219AA of the Principal Act that federal judges may consent to being nominated by the Minister as 'Division 1B Judges'. Upon such nomination, such judges may then make detention orders and internal search orders under the internal

search subdivision of the Act (Subdivision C of Division 1B of Part XII).

- . This follows the formula adopted as a matter of policy in provisions which confer power on federal judges as designated persons, such as Section 219AA of the Principal Act or Section 6D of the Telecommunication (Interception) Act 1979. The essence of these provisions is that where a function is to be exercised by federal judges personally, and not in their capacity as judicial officers, a duty of acceptance can not be imposed.

Repeal of section 219AB

- Clause 5 repeals section 219AB of the Principal Act as a consequence of its proposed remaking and relocation as new section 219ZL in Clause 6.
- Clause 6 repeals existing Section 219ZL of the Principal Act, and remakes it as follows:

Protection of Judge or Magistrate

new section 219ZL

- . new subsection (1) effectively duplicates the immunity provision of Section 219AB of the Principal Act, insofar as federal judges are concerned.
- . new subsections (2) and (3) effectively repeat the immunity provision for State Judges and Magistrates, and Northern Territory Judges, contained in current section 219ZL.

Interpretation

- Clause 7 amends Section 269T of the Principal Act to facilitate the use of anti-dumping or countervailing arrangements by agricultural or horticultural industries affected by the dumping of processed agricultural products, as follows:

paragraph (a) inserts into subsection (1) of Section 269T new definitions for the various primary producers to be included in the expanded group of industries which can claim relief from the dumping or subsidisation of processed agricultural products;

- . a definition of 'production costs' has been inserted as a consequence of a reference to that expression in new subparagraph (4B)(c)(ii), being part of the test for determining whether a good is a close processed agricultural good.

The expression has been defined as the sum of the direct labour costs, direct material costs and the factory overhead costs incurred in relation to processed agricultural goods and is intended together with the 'physical' tests in new paragraphs (4B)(a) and (4B)(b) to expand the current parameters of what constitutes the Australian industry in relation to good of a particular kind.

- . "raw agricultural goods" are defined to be goods directly obtained by the undertaking of any agricultural or fishing operation,
- "agricultural operation" is defined in similar form to the phrase "agriculture" in Section 164 of the Principal Act (relating to the diesel-fuel rebate scheme), and encompasses the rearing of livestock, the conduct of forestry operations, and the growing of grapes and other garden produce (viticulture and horticulture) and the keeping of bees (apiculture).
- "fishing operation" is also defined similar to its definition in Section 164 of the Principal Act.

paragraph (b) omits subsection (4) of Section 269T, which dealt with a definition for the term Australian industry, and inserts 4 new subsections to give effect to the expansion of the definition of an "Australian industry producing like goods", and thus allow primary producers in the agricultural industries access to dumping relief from the dumping or subsidisation of imports of processed agricultural products.

- . Primary producers (and other interested parties such as unions) may currently lodge a dumping complaint based on material injury to a processing industry as a result of a dumped or subsidised imported processed agricultural product (Section 269TB of the Principal Act

refers), but the current legislation does not provide anti-dumping or countervailing remedies on the basis of material injury to the upstream (agricultural) industry from the dumping of that imported processed agricultural product. This is because the current legislation requires that the Australian industry materially injured by the dumping must be an industry that produces "like goods" to those imported goods being complained about.

- A "like good" or product is defined in the Principal Act (Section 269T) as a product which is identical, ie. alike in all respects to the product under consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. This definition severely limits the application of dumping or countervailing duties where the upstream (eg. agricultural) industries (rather than the food processors) are the ones suffering material injury from imports of processed agricultural products.

the 4 new subsections propose to address the above limitation as follows:

new subsection (4) repeats the current subsection 269T(4) definition of what is to be regarded as an Australian industry, with the important proviso that the subsection is now subject to new subsection 4A, which effectively expands the definition of an "industry producing like goods";

new subsection (4A) provides that where the "imported" goods (ie. the goods the subject of complaint) are processed agricultural goods, then for the purposes of the definition of an Australian industry producing like goods to those imported processed agricultural goods, the Australian industry consists not only of the person or persons producing the processed agricultural good, but also the person or persons producing the raw material (defined as the goods directly obtained from agricultural or fishing operations) from which the processed goods are derived.

For the expanded industry definition to apply in new subsection (4A), the Comptroller must be satisfied that the processed agricultural good derived from the raw agricultural good is closely related, as defined in new subsection 4B.

- That subsection requires that

- .. the raw material (the agricultural good, for example, apples) is devoted completely or substantially to the processed agricultural good (for example, apple concentrate, or apple juice, or canned apples) (paragraph a) and,
- .. the processed agricultural good (for example, apple juice), is derived substantially or completely from the raw agricultural good (in this case, apples (paragraph (b)) and
- .. there is a close economic relationship between the raw agricultural good and the processed agricultural good, evidenced by either a close relationship between the price of each (subparagraph c(i)) or the fact that a significant part of the production cost of the latter is constituted by the cost to the producer of the former (subparagraph c(ii)).

'Production cost' is now defined in subsection 269T(1) as outlined previously in the Notes on Clauses to the amendments to that subsection.

new subsection (4c) provides the Comptroller with a power to construct the production cost of processed agricultural goods where sufficient information has not been furnished or is not available to ascertain that cost. The insertion of this power is intended to overcome the difficulties which an upstream (agricultural) industry would otherwise face in bringing a dumping complaint where the processing industry for any reason chooses not to divulge information relating to the cost of producing the processed agricultural good despite the actual or potential damage to the upstream supplier.

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

Clause 8

amends Section 269TE of the Principal Act by omitting subsection (1) and substituting a new subsection (1), to provide an exception to the obligation currently imposed upon the Comptroller-General to consider dumping complaints subject to the same statutory requirements as the Minister.

- The exception noted in new paragraph (d) will help give effect to the Government's decision to shorten the time taken to process dumping complaints.

The new paragraph will no longer require preliminary dumping investigations conducted by the Australian Customs Service to be determined on the basis that, where dumping is found, the level of the dumping margin should only be that which is necessary to remove the injury being suffered by the Australian industry as a result of the dumped or subsidised import. The ACS will now only apply the full dumping margin (that is, the difference between the normal value of the goods in the country of export, and the export price of the dumped product).

- In coming to a final decision on whether or not to impose dumping duties, the Minister is required by subsection 8(5A) of the Customs Tariff (Anti-Dumping) Act 1975 to have regard to the desirability of ensuring that the amount of dumping duty is not greater than is necessary to prevent the injury or a recurrence of the injury. This is consistent with Article 8.1 of the GATT Anti-Dumping Code)
- The proposed amendment will not alter this requirement at the final stage of a dumping inquiry (ie. when the Anti-Dumping Authority makes its final recommendation to the Minister under the Anti-Dumping Authority Act, and when the Minister exercises his power under Sections 8,9,10 or 11 of the Customs Tariff (Anti-Dumping) Act 1975 to impose dumping or countervailing duties).

Periods during which certain notices and undertakings to remain in force

Clause 9 amends Section 269TM of the Principal Act, relating to the 3 year sunset period for dumping or countervailing notices, or undertakings, as follows:

Subclause (1)

- paragraph (a) omits subsections (1), (2), and (3) of the Principal Act and inserts 2 new subsections to provide that dumping or countervailing notices (new subsection (1)), or undertakings (new subsection (2)) apply for 3 years (subject to revocation), and, the time for this sunset provision runs from the date on which each dumping or countervailing notice

or undertaking was published, rather than from the date the first such notice or undertaking in respect of such goods may have been published.

- Under the current provisions, although dumping or countervailing action may be taken against different source countries in respect of the same product at different times, these actions all lapse three years after the first measure was introduced. Importers frequently change their source country as anti-dumping action is taken. However, as the sunset date gets close, industry cannot justify the cost of mounting a dumping case when a dumping measure which may result will only be in place for a short time. To remove this disadvantage to Australian industry, the new provisions will ensure that each measure applies for three years (subject to revocation) without regard to other measures which may already be in place for the same product.

- paragraph (b) omits subsection 6, which is consequential on the amendments noted above. Because the new subsections make clear that notices or undertakings each have a maximum 3 year life, subsection (6) is no longer necessary.

Subclauses 2, 3 and 4

Subclauses (2), (3) and (4) are standard savings provisions, which preserve the current provisions concerning the 3 year sunset provision for notices (Subclause 2) or undertakings (Subclause 3) made prior to the Royal Assent commencement of the new provisions in this Act.