

Customs Amendment (Anti-Dumping Commission) Bill 2013

Introduced into the House of Representatives on 6 February 2013

Portfolio: Home Affairs

Summary of committee view

1.33 The committee seeks clarification as to whether the relevant existing powers in Part XVB of the *Customs Act 1901*, which are to be conferred on the proposed new Commissioner of the Anti-Dumping Commission, are compatible with human rights.

1.34 The committee seeks clarification as to whether provisions which give the Minister the power to terminate the appointment of a part-time Commissioner, if of the opinion that the Commissioner's outside work may conflict with the Commissioner's duties, are compatible with the right to work and the right to a fair hearing.

Overview

1.35 This bill seeks to amend the *Customs Act 1901* to establish a new Anti-Dumping Commission and Commissioner within the Australian Customs and Border Protection Services. The bill gives the Commissioner of the Anti-Dumping Commission all of the powers currently available under the *Customs Act 1901*, particularly Part XVB which deals with the taking of anti-dumping measures. It sets out procedures for the appointment of the Commissioner, the Commissioner's terms and conditions, methods for termination of the appointment of the Commissioner etc. The bill also amends a number of other Acts⁷ to make reference to the new Commissioner.

Compatibility with human rights

1.36 The bill is accompanied by a self-contained statement of compatibility. The statement notes:

The Bill does not raise any human rights issues. No new powers, functions or duties will be imposed on the Commission or the Commissioner by this legislation. Instead, existing legislative powers contained in Part XVB of the *Customs Act 1901* will be transferred from the CEO to the Commissioner.⁸

1.37 The purpose of the bill is to establish the Anti-Dumping Commission within the Australian Customs and Border Protection Service. The Commission will consist

⁷ *Customs Administration Act 1985; Criminal Code Act 1995; Law Enforcement Integrity Commissioner Act 2006.*

⁸ Statement of compatibility, p 3.

of the Anti-Dumping Commissioner and staff assisting the Commissioner (to be made available by the CEO of Customs). The Commissioner is to be given the existing powers and functions of the CEO of Customs which relate to anti-dumping matters. These are contained in Part XVB of the *Customs Act 1901*.

1.38 In general terms the purpose of Part XVB of the *Customs Act 1901* is to establish the framework for:

the taking of anti-dumping measures in respect of goods whose importation into Australia involves a dumping or countervailable subsidisation of those goods that injures, or threatens to injure, Australian industry. Those measures might consist of the publication of a dumping duty notice or a countervailing duty notice or the acceptance of an undertaking on conditions that make it unnecessary to publish such a notice.⁹

Powers in existing legislation

1.39 The committee notes, as it has previously, that where an amending Act incorporates by reference the provisions of an existing enactment or introduces a new office-holder into the scheme of an Act who is to exercise powers under that Act, the statement of compatibility should include an analysis of the human rights implications and compatibility of the provisions of that enactment as they are applied or extended by the amendment. This is so, even where the Act being amended or incorporated by reference commenced operation before the commencement of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.40 In this case the statement of compatibility should have provided an analysis of the existing powers in Part XVB of the *Customs Act 1901* insofar as these are to be conferred on the new Commissioner of the Anti-Dumping Commission which is to be established by the bill.

1.41 For example, if a notice is published, that may lead to the imposition of the liability to pay a special customs duty on the importation of those goods into Australia. These existing provisions in the *Customs Act 1901* may engage the right to a fair hearing under article 14 of the International Covenant on Civil and Political Rights (ICCPR) insofar as the imposition of a special customs duty is concerned.

1.42 The committee intends to write to the Minister to seek clarification as to whether the relevant existing powers in Part XVB of the *Customs Act 1901* are compatible with human rights.

9 *Customs Act 1901*, s 269SM (1).

Right not to be subject to arbitrary or unlawful interference with privacy

1.43 Proposed new section 269SML requires the Commissioner to give written notice to the Minister disclosing 'all interests, pecuniary or otherwise, that the Commissioner has or acquires and that conflict or could conflict with the proper performance of the Commissioner's functions.'

1.44 This requirement appears to engage the right to privacy under article 17 of the ICCPR, but the committee considers that, as the duty of disclosure is limited to disclosure of interests relating to the proper performance of the duties of the office, it appears to be a reasonable and proportionate limit of the enjoyment of the right to privacy.

Right to work

1.45 Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to work, including the 'opportunity to gain his living by work which he freely chooses or accepts'. Proposed new subsection 269SMM(1) provides that if a Commissioner is employed on a full-time basis, 'he or she must not engage in paid employment outside the duties of his or her office without the Minister's approval.' Proposed new subsection 269SMM(2) provides that if the Commissioner is appointed on a part-time basis, he or she must not engage in any paid employment that 'in the Minister's opinion, conflicts or may conflict with the proper performance of his or her duties'. Proposed new subparagraphs 269SMO(2)(d) and (e) provide that the Commissioner's appointment may be terminated by the Minister if the Commissioner, appointed on a full time basis, engages in work without approval, or, if appointed on a part-time basis, engages in paid employment that in the Minister's opinion conflicts with the proper performance of duties.

1.46 The committee considers that proposed new subsection 269SMM(2) and subparagraph 269SMO(2)(e), which allow a part-time Commissioner's appointment to be terminated if he or she engages in paid employment that may conflict with the proper performance of his or her duties engages the right to work. Under the provisions as currently drafted there is no requirement for the part-time Commissioner to seek the Minister's approval for paid work, so it is not clear that the part-time Commissioner will know what the Minister's opinion is of the work he or she is undertaking. This would enable the Minister to terminate the appointment of a part-time Commissioner on the basis of other work the Commissioner is undertaking, despite the Commissioner not being aware (as it rests solely on the Minister's opinion) that this outside work was considered objectionable. There is nothing in the bill that provides for merits review of the Minister's decision to terminate the appointment, which would appear to engage article 14(1) of the ICCPR, the right to a fair hearing.

1.47 The committee considers that proposed new subsection 269SMM(1) and subparagraph 269SMO(2)(d) appear to limit the right to work, but in the context of the bill which creates the office of Commissioner as a full-time position, this restriction can be viewed as a reasonable and proportionate limitation on that right.

1.48 The committee intends to write to the Minister to seek clarification as to whether proposed new subsection 269SMM(2) and subparagraph 269SMO(2)(e) are compatible with the right to work and the right to a fair hearing, as it gives the Minister the power to terminate the appointment of a part-time Commissioner on the basis of the Minister's opinion which may, or may not, have been known to the Commissioner prior to termination of the appointment.