



INFORMATION, ANALYSIS  
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 25 2002–03

## Customs Legislation Amendment Bill (No.1) 2002

ISSN 1328-8091

© Copyright Commonwealth of Australia 2002

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

## Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database. On the Internet the Department of the Parliamentary Library can be found at:  
<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2002

I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
No. 25 2002–03

Customs Legislation Amendment Bill (No.1) 2002

Susan Dudley and Mark Tapley  
Law and Bills Digest Group  
27 August 2002

# Contents

Purpose .....	1
Background .....	1
Main Provisions .....	1
Schedule 1: Harmonisation with the Criminal Code .....	1
Schedule 2: Valuation of imported goods .....	2
Schedule 3: The Trade Modernisation Act .....	4
Schedule 4: Goods in the Protected Zone .....	4
Schedule 5: Re-mail .....	6
Schedule 6 Passenger Movement Charge .....	8
Endnotes .....	9

# Customs Legislation Amendment Bill (No.1) 2002

**Date Introduced:** 19 June 2002

**House:** House of Representatives

**Portfolio:** Justice and Customs

**Commencement:** Schedules 1, 2, 4 and 6 commence on Royal Assent. The application dates of other measures are described below where relevant.

## Purpose

This Bill contains a series of amendments to the *Customs Act 2001* (Customs Act) and related legislation. The amendments have a variety of purposes and these are discussed under each schedule heading.

## Background

The bill contains six schedules. As there is no central theme to the Bill the background to the various measures will be discussed in the main provisions.

## Main Provisions

Schedule 1: Harmonisation with the Criminal Code

**Proposed schedule 1** contains a series of criminal code harmonisation amendments to the *Customs Act*.

The Model Criminal Code Project commenced in the early 1990's. The first major part of the Model Criminal Code to be developed was Chapter 2 Principles of Criminal Responsibility. This chapter formed the basis of the Commonwealth Criminal Code (the Code) and is contained within the *Criminal Code Act 1995*. For further information regarding the history and operation of the Code refer to the Bills Digests for the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

(Bills Digest No. 92, 2000-2001)<sup>1</sup> and Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002 (Bills Digest No 88, 2001-2002)<sup>2</sup>.

The Customs Act was amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* to harmonise the Customs Act with the principles contained within the Code (see related Bills Digest No 96, 2000-2001)<sup>3</sup>. This bill contains further amendments that aim to harmonise the Customs Act with the Code.

The bill, **in proposed items 1 to 5, 7 to 21, 23, 25, 27 to 31, 37, 39 to 41, 43, 49 to 59, 61, 62, 64 to 75, 76 to 83, 86, 88 to 98** converts penalties for offences under the Act from amounts expressed in dollars to amounts expressed in penalty units. There may be a drafting error in this legislation as subsections 114B(7) and 130B(3) remain expressed in dollar terms.

The Criminal Code requires all offences of strict liability<sup>4</sup> to be expressly identified as such. If the provisions in an Act fail to expressly identify an offence as one of strict liability, fault elements (for example, intention, knowledge, recklessness) will be applied to the physical elements of the offence. **Items 6, 22, 24, 26, 36, 38, 42, 44, 46, 48, 60, 63 and 87** amend the Customs Act to expressly provide that sections 19, 64, 64AA, 64AC, 67ET, 69, 71G, 74(1), 77D(5), 77E(5), 116(2), 122D(2) and 234A(1) are strict liability offences.

By way of note, the Senate Scrutiny of Bills Committee in their Alert Digest have raised issues with these amendments relating to strict liability. The Alert Digest states that the Committee has

‘sought the Minister’s advice on further details of the types of offence provisions to be amended and the reason, in each case, for his view that the offences are already ones of strict liability’.

The bill also makes amendments to clarify the requisite fault and physical elements of some offences under the Act. **Items 32, 33, 35, 36, 45-48** amend the current law to make it clear that a ‘reasonable excuse’ is an exception to (rather than an element of) the offences in sections 67ES, 67ET, 77D and 77E of the Customs Act. **Item 34** amends section 67ES to ensure that the fault and physical elements of the section are Code compliant.

## Schedule 2: Valuation of imported goods

The amendments contained in **schedule 2** are designed to protect customs revenue following the Full Federal Court decision in *CEO of Customs v AMI Toyota Ltd*<sup>5</sup> (the Toyota Case).

The case concerned which components of the price of imported goods should be included in calculating the amount of customs due on imported vehicles. The price of vehicles

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

imported by Toyota Australia from its Japanese parent includes a component (the average warranty cost) which relates to the cost of warranty given to Australian vehicle purchasers. Under sale contracts Toyota Australia is reimbursed by Toyota Japan for the cost of work performed in Australia under warranty. Litigation ensued when the Chief Executive Officer of Customs decided that the average warranty cost should be included when determining the customs value.

While Customs was successful at first instance in the Administrative Appeals Tribunal, Toyota won an appeal to single judge of the Federal Court. This decision was upheld by the Full Federal Court and an application by Customs to appeal was rejected by the High Court.

Under the Customs Act the value of duty payable is determined by applying the rate of duty to the value of the goods. Division 2 of Part VIII of the *Customs Act* sets out the valuation methodology.

Generally speaking the value of goods is their 'transaction value'.<sup>6</sup> This in turn is based upon their 'price'. Price does not include 'value unrelated matters'. This term is defined in subsection 154(1) as:

- a) any rebate of, or other decrease in, the price other than such a rebate or decrease the benefit of which has been received when the price is being determined; or
- b) any costs, charges or expenses in relation to activities undertaken by the purchaser on the purchaser's own account in relation to the goods (including any activities of the purchaser relating to advertising or promoting the sale of, or to warranties or guarantees in relation to, the goods).

The key question for the Court in the Toyota case was whether the average warranty costs component of the purchase price came within paragraph (b) of the definition of value unrelated matter and should be excluded from the price of the vehicles.

The Full Court answered this question in the affirmative. It stated that:

The average warranty costs are based on Toyota Japan's pre-estimate of the likely cost of the liability undertaken by Toyota Australia in giving and honouring its warranty obligations to customers in respect of warranty repairs under the Toyota Warranty policy. In return for payment of those costs [in the purchase price] the actual costs are to be reimbursed. Thus, the average warranty costs can be seen to relate to activities undertaken by Toyota Australia in relation to warranties it gives or its own account in relation to the cars it imports.<sup>7</sup>

The Government has taken the view that this interpretation is inconsistent with the [Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994](#) to which Australia is a party. It says that the agreement does not allow the deduction of the seller's warranty costs from the customs value.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

According to the Explanatory Memorandum the Court's decision could have significant revenue implications. The deduction of warranty costs from the customs value of motor vehicles has cost \$15 million in revenue and without the legislative action will continue to cost \$300,000 a month. In addition, Customs fears that a similar technique could potentially be employed in other industries further undermining revenue.

To counter the Full Federal Court's ruling the term 'value unrelated matter' is repealed by **item 3 of schedule 2**. In its place a definition of rebate is inserted which is based on paragraph (a) of the existing definition of value unrelated matter (**item 2**).

### Schedule 3: The Trade Modernisation Act

**Schedule 3** makes a number of amendments to provisions introduced in *the Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001 (the TMA)*. For an analysis of this legislation see [Bills Digest no.98 2000-2001](#).<sup>8</sup>

Many provisions of the TMA have not yet commenced. Section 2 of the Act provides that they are to commence on proclamation. If no proclamation has been made, the legislation commences 2 years after Royal Assent. The TMA received royal assent on 20 July 2001 meaning that the latest day it can commence is 20 July 2003.

The Government asserts that this time frame will not be sufficient to allow Customs to introduce a new cargo management system that underpins amendments made by the TMA.<sup>9</sup>

**Item 65 of schedule 3** amends section 2 of the TMA to extend the period for commencement until 20 July 2004.

Part 4 of schedule 3 of the TMA provides for the abolition of Customs existing computer systems. Subsection 2(4) of the TMA provides that the Part 3 commences on a date fixed by proclamation. As the law currently stands Customs is prevented from phasing in the introduction of its new cargo management computer system as all existing systems must be abolished on the same day. **Item 60** amends subsection 2(4) to allow the items in Part 4 abolishing existing systems to commence on different days.

These amendments commence on Royal Assent.

### Schedule 4: Goods in the Protected Zone

The bill also amends the Customs Act to increase Customs officer powers in relation to vessels that fall within the Protected Zone exemptions under the Act. The amendments in this Schedule form part of the package of the Government's counter-terrorism measures, the main tranche being introduced into Parliament in March 2002.<sup>10</sup>

The Torres Strait Treaty creates an area known as the Protected Zone which, generally speaking covers the span of water between Australia and Papua New Guinea. Subsection

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



30A(3) of the Customs Act provides that the Chief Executive Officer of Customs can, by notice published in the Gazette, exempt vessels that are owned or operated by traditional inhabitants of the Protected Zone (Protected Zone vessels) from the application of provisions in the Customs Act.

The CEO of Customs in 1986 through the Gazette, exempted the Protected Zone vessels from a number of reporting requirements that apply to vessels that enter or leave Australia. In particular the Protected Zone vessels are exempted from having to enter appointed ports (section 58), hold a Certificate of Clearance (section 118) and to go to a boarding station before departure (section 128). The effect of these exemptions has been to give traditional inhabitants the ability to move freely around places between Papua New Guinea and Australia.

This exemption has however created some enforcement problems for customs officials. Under the Act, customs officers that are at a 'Customs place' can monitor a vessel's cargo and seize the goods without a warrant (section 203B). The above exemptions have meant that Protected Zone vessels do not often enter Customs places. As a result surveillance of the Protected Zone vessels is normally performed in locations where customs officials need to obtain a warrant before seizing goods. The Explanatory Memorandum to the bill states that this arrangement 'poses considerable operational and safety problems for the officers concerned'<sup>11</sup>.

This bill amends the current arrangements so that Customs officials can seize goods from Protected Zone vessels without having to obtain a search warrant.

**Item 3** makes it clear that Customs officers can seize goods from a vessel (ships or aircraft) or near a vessel (where the goods have been unloaded from the vessel or will be loaded onto the vessel) where the vessel falls within the Protected Zone exemptions under the Customs Act, without a search warrant (**proposed sections 203CA and 203CB**). **Items 4 to 32** of the bill are consequential amendments to the Customs Act that facilitate the use of this new power.

The Senate Scrutiny of Bills Committee in their Alert Digest have sought the Minister's confirmation that consideration has been given to the Committee's Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation, April 2000 regarding this proposed increase in powers for customs officials.

In that report the Committee stated that

Legislation should authorise entry onto, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for a failure to comply. Legislation should authorise entry onto premises in the absence of consent or a warrant only in situations of emergency or serious threat.<sup>12</sup>

The report then went on to state that

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

There may be circumstances in which it may be impracticable to obtain a warrant (even though warrants are now often obtained by telephone.....Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must, as soon as reasonably possible, then justify that action to a judicial officer.<sup>13</sup>

The proposal in this Bill appears to be in accordance with the Senate Committee's principles. The Explanatory Memorandum to the legislation confirms that there are practical difficulties in obtaining a search warrant for Protected Zone vessels.<sup>14</sup> The vessels are often in remote locations making it difficult for officers to obtain a warrant. If the officer is able to obtain a warrant (for example by telephone), the time taken to make the arrangements may jeopardise the officer's ability to seize the goods. It may also pose a threat to the safety of the officers involved in the investigation.

### Schedule 5: Re-mail

Re-mail refers to a process where a company imports mail from a foreign organisation and then places it in the Australia Post system or delivers it themselves.<sup>15</sup>

The Customs Act presently requires a detailed report of re-mail items in a cargo when they are imported. Customs uses this information to determine if any prohibited material is being imported.

The amendments proposed by **schedule 5** reduce the amount of information required from re-mailers. Customs has taken the view re-mail material is unlikely to infringe Commonwealth legislation and that the existing reporting requirements impose an onerous compliance burden on mail importers.<sup>16</sup>

**Schedule 5** sets up a regime for the registration of re-mailers. Such persons will not be required to give more specificity than a submaster air waybill or an ocean bill of lading. These documents should contain information such as:<sup>17</sup>

- the invoice terms
- name and address of the seller of the goods (owner)
- name and address of the buyer of the goods (consignee)
- complete description of the goods
- name of the ship (or aircraft) on which the goods are to arrive in Australia, and
- country of origin of the goods.

**Item 1** inserts a definition of re-mail item into section 63A. It sets out a checklist of criteria that an item must satisfy in order to come within the definition. The criteria include that the item does not exceed 80 cm in length, that it consists only of paper and

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

weighs no more than a kilogram. The definition excludes 'mail'. Mail is defined in section 63A of the Customs Act as any goods consigned through the Post Office that are carried on the ship or aircraft; and any other correspondence carried on the ship or aircraft that is not consigned as cargo and that is not accompanied personal or household effects of a passenger or member of the crew.

**Item 2** defines a re-mail reporter as a person or partnership that has been so registered. The registration regime is inserted by **item 4**.

**Item 3** amends section 64 of the Customs Act which deals with cargo reports. It provides that a re-mail reporter will not be required to give more information about re-mail items than that contained in a submaster airway bill or ocean bill of lading unless more detailed information is available to them.

**Item 4** inserts **proposed section 67G** which requires the CEO of Customs to register a person who applies in the appropriate manner<sup>18</sup> to be a re-mail reporter if the CEO is satisfied:

- that the applicant would be unlikely to have information, or access to information, about re-mail items that would allow the applicant to make cargo reports more detailed than the information contained in a submaster air waybill or ocean bill of lading, and
- the applicant is a fit and proper person.

The fit and proper person test is set out in **proposed section 67H**. The test applies to applicants who are natural persons as well as partners in a partnership, company directors, officers and shareholders and employees. Where a company is seeking registration it is also subject to a separate a fit and proper person test (**proposed subsection 67H(3)**).

In deciding whether a person is fit and proper, the CEO of customs must have regard to matters including whether the person:

- has been convicted of an offence against the Customs Act in the last 10 years
- has been convicted of an offence under Commonwealth State or Territory in the last 10 years that is punishable by imprisonment for one year or more
- is an insolvent under administration
- whether the person has had their registration as a re-mailer cancelled previously, and
- whether the person has supplied any misleading information or documentation to the CEO of Customs in connection with the application (**proposed subsection 67H(2)**).

Under the fit and proper person test that applies for companies, the CEO of Customs must take into account whether existing directors, officers or shareholders were involved in the

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

company if it has been convicted of specified offences in the last 10 years. The test also requires the CEO of Customs to consider the company's solvency.

**Item 5** provides that decisions of the CEO of Customs in relation to re-mail registration are subject to review by the Administrative Appeals Tribunal.

These provisions commence on a date to be set by Proclamation or 6 months after Royal Assent.

## Schedule 6 Passenger Movement Charge

The Passenger Movement Charge (PMC) has its origins in the departure tax of \$10 that was introduced in 1978. The PMC was introduced in 1994 and is currently set at \$38.

The PMC was introduced as a cost recovery measure to recoup the notional cost of Customs, Immigration and Quarantine (CIQ) processing of inward and outward passengers and the cost of issuing short-term visitor visas.<sup>19</sup> Aggregate revenue collections from PMC were \$226.2 million in 1999–2000.<sup>20</sup>

The PMC is imposed by the *Passenger Movement Charge Act 1978* (the Charge Act) while *Passenger Movement Charge Collection Act 1978* (the Collection Act) provides for its collection. Separate legislation is required to comply with the requirements of section 55 of the Constitution.<sup>21</sup>

**Schedule 6** of the Bill proposes amendments to the Collection Act. Paragraph 5(j) of the Collection Act provides that a person is exempt from the PMC if they are 'in the course of a journey that has involved a previous departure by the person from Australia in respect of which the person paid the charge.' According to the Explanatory Memorandum this provision was intended to cover 'fly/cruise' trips where a person flew into Australia left on a cruise and then came back to Australia to fly home.<sup>22</sup> In this situation no charge would be payable on the second departure.

The Government is concerned that the language of the exemption in paragraph 5(j) is broad enough to capture a situation where a person departs Australia twice by aircraft. The amendment in **item 1** makes it clear that where a person is involved in multiple departures from Australia (such as a fly/cruise holiday) they will only be required to pay the passenger movement charge once if their departure involves a fly/cruise situation.

**Item 2** also amends the Collection Act so that representatives of the Taipei Economic and Cultural Office and the Hong Kong Economic and Trade Office are not required to pay the passenger movement charge. The bill achieves this by amending paragraph 5(k) so that it refers to the *Overseas Missions (Privileges and Immunities) Act 1995*. Currently paragraph 5(k) ensures that no exemption is payable by someone who has the benefit of:

- the *Consular Privileges and Immunities Act 1972*; or

### Warning:

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- the *Diplomatic Privileges and Immunities Act 1967*; or
- the *International Organisations (Privileges and Immunities) Act 1963*.

Taipei and Hong Kong officials are not covered by these existing diplomatic exemptions. The Government plans to designate them by regulation so that they will be covered by the *Overseas Missions (Privileges and Immunities) Act 1995*.

The Explanatory Memorandum states that changes to the Collection Act could result in a net increase in PMC revenue of up to \$100 000.<sup>23</sup>

## Endnotes

---

- 1 <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD092.htm>
- 2 <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd088.htm>
- 3 <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD096.htm>
- 4 For further discussion of strict liability see Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002 ([Bills Digest No 88, 2001–2002](#)).
- 5 (2000) 102 FCR 578.
- 6 Section 159.
- 7 *ibid.*, at p. 591.
- 8 The TMA was also examined by the Senate Legal and Constitutional Affairs Committee. A copy of the Committee's report may be found at :  
[http://wopared.parl.net/Senate/committee/legcon\\_ctte/cusimpbills2000/cusimpbill2000.pdf](http://wopared.parl.net/Senate/committee/legcon_ctte/cusimpbills2000/cusimpbill2000.pdf)
- 9 The Hon. Peter Slipper, *Second Reading Speech*, House of Representatives, *Hansard*, 19 June 2002, p. 3248.
- 10 Further information regarding associated amendments is contained within the Bills Digest for the Border Protection Legislation Amendment Bill 2002 (Bills Digest No 123 2000-2001).
- 11 *Explanatory Memorandum, Customs Legislation Amendment Bill (No. 1) 2002*.
- 12 *Senate Standing Committee for the Scrutiny of Bills Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, 6 April 2000, p. 73–74.
- 13 *ibid* p., 75.
- 14 p. 31.
- 15 Under the *Australian Postal Corporation Act 1989* Australia Post has the exclusive right to carry letters within Australia, whether the letters originated within or outside Australia. Other carriers may deliver items that do not come within the definition of letter.
- 16 Explanatory Memorandum, p. 35.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 17 A complete list of the information required can be found in Australian Customs Service, Customs Guide To Importing And Exporting. A copy of the report can be found at: [http://www.customs.gov.au/resources/Files/guideimport\\_export.pdf](http://www.customs.gov.au/resources/Files/guideimport_export.pdf)
- 18 This is set out in **proposed section 67F**.
- 19 The Australian National Audit Office (ANOA) has reported that the PMC is not linked to costs associated with these services and is a tax.
- 20 For a discussion of the administration of the PMC by the Australian Customs Service see ANAO, Passenger Movement Charge— Follow-up Audit, [Report No.12](#), 2000-2001.
- 21 Section 55 states:
- Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect, and
  - Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.
- 22 p. 41.
- 23 p. 2.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*