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## Excise and Other Legislation Amendment (Compliance Measures) Bill 2004

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Excise and Other Legislation Amendment (Compliance  
Measures) Bill 2004

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1 April 2004

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# Excise and Other Legislation Amendment (Compliance Measures) Bill 2004

**Date Introduced:** 25 March 2004

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** Sections 1 to 4 commence on Royal Assent, with Schedules 2, 3 and 4 commencing the day after Royal Assent. Commencement dates vary for different sections in Schedule 1.<sup>1</sup>

## Purpose

The main purpose is to amend excise and customs legislation to provide the Australian Tax Office (ATO) with greater compliance and administrative powers with respect to the payment of excise. The target appears to be persons seeking to avoid the payment of excise on tobacco.

## Background

The Excise and Other Legislation Amendment (Compliance Measures) Bill 2004 (hereafter: 'the Bill') contains four groups of amendments. Each of these are contained in a separate schedule in the Bill.

The amendments in **Schedule 1** are aimed at persons that attempt to avoid payment of excise by exploiting weaknesses in the ATO's<sup>2</sup> ability to control the movement of such goods that are, or were, ostensibly intended for export.<sup>3</sup> This weakness relates to movements of goods that are legislatively under ATO control but are actually authorised by the Australia Customs Service (Customs). Such authorisations originate from the fact that Customs used to administer both customs and excise legislation, whereas excise is now administered by the ATO. In relation to the tobacco industry, the Explanatory Memorandum to the Bill comments:

The diversion of excisable goods from export, particularly tobacco products, is considered to be high risk. There have been instances where excisable goods for export have not reached, or been diverted from within, the place of export. In other cases, the goods have not reached their overseas destination and it is unclear where

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they have been diverted. Containers have been found empty or not to contain the goods as described. However, as the goods are excisable, not customable, the provision for recovery of duty equivalent, available for goods under the control of Customs, cannot be applied.<sup>4</sup>

**Schedule 1** will effectively require relevant movements to be explicitly authorised by the ATO, thus enhancing their ability to ensure any excise due is in fact paid. It will also tighten accountability requirements for persons to whom excisable goods are delivered for export. See the relevant part of the Main Provisions section of this Digest for details.

The second group of amendments deal with a similar issue, but apply only to tobacco products. Under **Schedule 2**, movement of tobacco seed and plants will now require the permission of the ATO. Currently only tobacco leaf requires this. Also, an offence will be created where tobacco seed/plant delivered for export is not exported and is not returned to a specified place in accordance with the relevant ATO export permission.

**Schedule 3** will allow the ATO to dispose of seized excisable goods in a wider range of circumstances than at present. Currently disposal can only occur where the goods are perishable goods *and* the ATO is satisfied the retention of the goods would constitute a danger to public health.

The fourth change relates to confidentiality. At present, confidentiality provisions applying to the *Excise Act 1901* prevent the ATO from disclosing information about excise licences and permissions relating to goods to a second person that wishes to deal with the goods. The problem is illustrated by the Explanatory Memorandum:

Information on whether a person is licensed or has a permission to deal with particular goods or quantities of goods is at times a prerequisite for a second person to comply with the provisions of the legislation. The problem is illustrated in the illicit trade in tobacco, which poses a significant risk to the revenue base. It is an offence for a person to buy tobacco seed, leaf or plant from an unlicensed producer, manufacturer or dealer. However, the ATO is unable to provide information about licence status and conditions. Therefore, a tobacco cooperative with a dealer's licence cannot be advised whether a member is licensed as a producer or when a member's licence is cancelled or suspended.<sup>5</sup>

The change in **Schedule 4** will allow release of otherwise confidential information in such circumstances.

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## Main Provisions

### Schedule 1

**Commencement:** **Items 4 to 9** commence on a day to be fixed by proclamation or, failing that, six months after Royal assent. Commencement of **items 1 to 3** depends on commencement of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*.

**Items 1 and 2** are essentially identical provisions designed to delete existing paragraph 114D(2)(b) of the *Customs Act 1901*. Depending on the commencement time of item 62 in Part 3 of Schedule 3 to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*,<sup>6</sup> **item 1** may never come into force, in which case the deletion of existing paragraph 114D(2)(b) will be achieved by **item 2**. Alternatively, **item 1** may come into force to be eventually replaced by **item 2**. By deleting paragraph 114D(2)(b), goods that are to be moved out of a customs-licensed place because of cancellation or delay in export plans must have explicit permission of the ATO to do so. This requirement allows the ATO to maintain adequate control of such movements to ensure any excise payable is not avoided.

**Item 7** performs a similar function by repealing existing section 61AB of the *Excise Act 1901* so that Customs cannot effectively authorise movement of excisable goods under the *Customs Act 1901* for export. Movement of such goods will now require permission from the ATO under section 61A of the *Excise Act 1901*. **Item 8** inserts **new subsections 61A(2A) and (2B)** which allow the ATO to give such permission on a one-off or ongoing basis.

**Item 5**, which inserts a **new section 60(1C)**, covers the situation where goods have been delivered for export under a section 61A permission but on which excise has not been paid. The ATO may make a written demand for payment of excise to a person who is entrusted with possession or control of these goods if they fail to either (i) to keep the goods safely or (ii) satisfy the Collector that the goods have been exported *or* otherwise satisfactorily account for the goods. **Item 5** also provides that, for the purposes of establishing exportation of the goods, mere evidence of delivery for export does not constitute evidence that the goods have been exported: **new subsection 60(1D)**.

### Schedule 2

Under existing section 117D of the *Excise Act 1901*, movement of tobacco leaf requires the permission of the ATO. Such permissions are issued under section 44 and may have conditions applied to them. Where it involves intention or recklessness, the maximum penalty for unlawful movement of tobacco leaf, including contravention of a section 44 condition, is 2 years imprisonment *or* 500 penalty units (\$55 000)<sup>7</sup>, plus 5 times the amount of excise duty that would have been payable on the goods. A strict liability

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offence for unlawful movement/breach of condition also exists, in which case the maximum penalty is 100 penalty units (\$11 000).<sup>8</sup> **Items 1-3** and **5-9** make tobacco seeds and plants subject to these permission provisions and offences by amending various parts of existing sections 44, 116 and 117 of the *Excise Act 1901*.

**Item 4** inserts **new subsections 44(7)-(9)** in the *Excise Act 1901*. **New subsection (7)** provides that if a person knowingly or recklessly contravenes a condition of a section 44 permission *before* the tobacco seed, plant or leaf was actually moved, any subsequent movement is taken to have been without permission. Such contravention then enables any tobacco seed, plant or leaf to be forfeited to the Government under existing section 116. No rationale for this new provision is given in the Explanatory Memorandum or Second Reading Speech.

**New subsections 44(8)-(9)** deal with a situation where a person has a section 44 permission to deliver tobacco seed, plant or leaf for export but the relevant goods are, for whatever reason, not exported within 30 days (or other period specified in the permission) after the day of delivery for export. If a person fails to return the goods to a place specified in a permission within five days after the end of the 30 day or other specified period, or the goods are not destroyed,<sup>9</sup> the person commits an offence. The same maximum penalties as mentioned above – 2 years imprisonment etc – apply.

### Schedule 3

**Item 1** replaces existing subsection 107FJ(1) of the *Excise Act 1901* to allow the ATO to deal with (including destroy) goods where they are perishable, *or* do not meet any applicable quality standard *or* where the goods, if made available to the public, would constitute a risk to public health or public safety. Existing subsection 107FJ(6) allows for the owner of the goods to claim compensation for goods where the Court is satisfied that the grounds for dealing with the goods under section 107FJ(1) did not in fact exist. **Item 2** makes a consequential amendment to subsection 107FJ(6) by incorporating a listing of the revised grounds contained in **item 1**. **Item 3** inserts **new subsection 107FJ(8)** which defines ‘perishable goods’ as including goods that will perish unless treated with chemicals to preserve them or stored in special conditions.

**Item 4** adds **new sections 107GB-GD** which deal with record keeping of goods dealt with under **revised section 107FJ**. Essentially **new section 107GB** requires the taking of a sample and preparation of a written record of the goods in question. **New section 107GD** provides that evidentiary certificates and analysts’ certificates may be issued which constitute prima facie evidence, in proceedings relating to the disposed goods, of the matters stated in the certificates. Such proceedings would include a claim for compensation under **revised subsection 107FJ(6)**. Standard provisions regarding matters such as cross-examination of a person signing any certificate are included in **new section 107GB**.

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## Schedule 4

Under subsection 159(2) of the *Excise Act 1901*, it is an offence to record or disclose confidential information ('protected' information/documents in the language of the Act) that the person has obtained in the course of official employment. However, exceptions to this are listed in subsection 159(3). **Items 1 and 2** create another category of exception in **new subsection 159(3A)**. Whilst there are various technical criteria that have to be met for **new subsection 159(3A)** to apply, a key element is the person disclosing the information (the entrusted person) must have formed the opinion that the disclosure is necessary to ensure the dealing, or proposed dealing with excisable goods, is in accordance with the Act.

## Concluding Comments

The ATO's ongoing campaign against the illegal tobacco sector has been well documented in the press in recent years.<sup>10</sup> Presumably the various measures contained in this Bill are designed to assist the effectiveness of this campaign. Some of these measures do create new offences and/or require greater accountability for persons involved in the tobacco and export sectors. With this in mind, it is notable that neither the Explanatory Memorandum nor the Second Reading Speech indicate that any industry consultation has occurred in framing this Bill.

## Endnotes

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- 1 See Main Provisions section of this Digest for details on Schedule 1 commencement.
- 2 ATO control over excise matters in the *Excise Act 1901* is sometimes expressed to be in the hands of the CEO (Tax Commissioner) or the Collector (the Tax Commissioner or someone duly authorised for the purposes of the particular provision). In this Digest, the generic term ATO is used rather than CEO or Collector.
- 3 Goods that are subject to excise if consumed in Australia may be exempt if exported.
- 4 P. 6.
- 5 P. 17.
- 6 To be fixed by proclamation.
- 7 \$275 000 for companies.
- 8 \$55 000 for companies.
- 9 A person accused of a new section 44(8) offence bears the burden of proof as to the fact the goods have been destroyed.
- 10 For example, 'Seizures burn hole in illegal tobacco racket', *The Australian*, 16 June 2003 p. 5.

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