



Customs Amendment Bill 2004

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Customs Amendment Bill 2004

Date Introduced: 8 December 2004

House: Senate

Portfolio: Justice and Customs

Commencement: The Bill has been passed through both Houses and has commenced operation.

Purpose

The Customs Amendment Bill 2004 (the Bill) will prescribe commercial quantities for all illicit drugs prescribed in the *Customs Act 1901*.

Background

Policy background of the Bill

Australia's approach to illicit drugs has been characterised as embedding 'harm minimization strategies and a robust treatment framework ... in a strong law enforcement regime.'¹ Significant penalties for commercial traffickers have long been a feature of the law enforcement regime.

On 2 November 1997, the Howard Government launched 'Tough on Drugs', a strategy designed as a part of a 'national effort to combat the menace of illicit drugs.'² This strategy is a significant part of Australia's overarching *National Drug Strategy* which, in the government's view, is to provide 'a balanced and integrated approach to reducing the supply of and demand for illicit drugs'.³ In its paper *The National Drug Strategy – Australia's integrated framework 2004 – 2009*, the Ministerial Council on Drug Strategy noted that the reduction of supplies of illicit and other drugs is to be achieved by disrupting the production and supply of illicit drugs, especially by 'engaging law enforcement, health and other regulatory agencies.'⁴

Commercial quantities: life sentence under the *Customs Act 1901*

Tough, publicly pronounced penalties are designed to act as a strong deterrent for offenders and society in general.⁵ Such penalties are intended to make 'it clear to the offender and to other persons with similar impulses that, if they yield to [the commission of crimes], they will meet with severe punishment'.⁶ The introduction of tough penalties can also be seen as an indication that the legislature considers a particular crime particularly abhorrent.⁷

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Certain drug offences, including smuggling, unlawfully importing or exporting certain narcotic drugs on a commercial scale, have been identified by the government as particularly heinous crimes.⁸ The legislature has considered that the commitment of such offences should attract a maximum term of life imprisonment. Under subsection 235(2) of the *Customs Act 1901*, courts have the discretion to hand down this maximum penalty when satisfied that:

- the drug offence was committed in relation to a narcotic substance for which the *Customs Act 1901* prescribes a so called *commercial quantity*, and
- the quantity of the narcotic substance was not less than the *commercial quantity* prescribed in the *Customs Act 1901*.

Central to the offence attracting the life sentence is the term ‘commercial quantity’. Commercial quantities for individual narcotic substances are prescribed in column three of the table set out in Schedule IV of the *Customs Act 1901* and are expressed in kilograms (kg). Examples range from 1.5 kg for heroin, 2 kg for cocaine and up to 100 kg for cannabis.

However, currently only a minority of narcotic drugs are allocated a prescribed commercial quantity. In other words, regardless of the quantity of drugs involved, offences committed in relation to the majority of the narcotic drugs specified in the *Customs Act 1901* will not attract a maximum penalty of life imprisonment (unless the offender is a repeat offender for a trafficable amount under section 235(2)(c)(ii) of the *Customs Act 1901*.)

Recently, this gap has been criticised by Finnane J of the New South Wales District Court. In the matter of *R v Zhang and ors* (unreported decision, dated 4 December 2004) Finnane J sentenced two drug dealers to 25 years jail for the possession of over 320 kg of the designer drug ‘Ice’, one of the street names for methamphetamine.⁹ In his judgment, His Honour mentioned that:

The Commonwealth of Australia has, through the Customs Act, over many years prohibited the import of narcotics. Schedules to that Act set out quantities of various types that constitute various offences. Although this drug is obviously a very dangerous one, the Commonwealth did not apparently consider it necessary to prescribe any commercial quantity of it. The only relevant offence is dealing in a trafficable quantity; the maximum penalty for which is twenty-five years imprisonment and/or a fine of up to \$500,000. I would urge those who are responsible to create a category of offence which prohibited the importing into Australia of more than some quantity which they could devise as being a commercial quantity. The quantities of drugs imported here and the likely profits to be made would be equivalent, in my opinion, to the type of commercial dealing in heroin and cocaine. It is difficult to see why the most serious offence of importing this drug is one of importing a trafficable quantity.¹⁰

His Honour also noted that:

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If this drug were heroin or cocaine clearly the applicable sentence would be one of life imprisonment.¹¹

The proposed amendments will close this apparent gap by prescribing commercial quantities for all remaining narcotic drugs listed in Schedule IV of the *Customs Act 1901* providing the courts with the ability to hand down life sentences in appropriate cases in relation to all drugs listed there.

Main Provisions

Item 1 to item 109 will insert the commercial quantity for the remainder of the listed narcotics. The amount is expressed in kilograms.

Item 110 prescribes that the commercial quantities will become applicable to offences after the commencement of the amendments to the *Customs Act 1901*.

Concluding Comments

The quantities prescribed by the amendment are based on quantities prescribed under state and territory laws as well as under the Commonwealth's *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*. However, the measures in this Bill are only intermediate measures. In his second reading speech, Senator Ellison, Minister for Justice and Customs, pointed out that:

Next year, the Government will be bringing forward further improvements, including new serious drug offences for inclusion in the Criminal code.¹²

In the meantime, the amendments in this Bill will allow the courts to impose the maximum life sentence for the most serious drug offences. This does not mean that every offender who is arrested and charged under the *Customs Act 1901* with importing a commercial quantity of narcotic drugs will in fact be sentenced to life imprisonment. Rather, the maximum penalty will only apply to the:

worst type of case falling within the prohibition or, as it is expressed by Dwyer CJ in *Reynolds v Wilkinson* (1948) 51 WALR 17 at 18, 'for the worst cases of the sort'. That expression should be understood to be marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was.¹³

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Endnotes

- 1 G Bammer, W Hall, M Hamilton and R Ali, 'Harm Minimization in a Prohibition Context—Australia', *The Annals of the American Academy*, Vol 582, 2002, p. 80.
- 2 J. Howard, Prime Minister of Australia, *Tough On Drugs - Launch Of The National Illicit Drug Strategy*, [Launch](#) of the National Illicit Drugs Strategy, The Ted Noffs Foundation Randwick, Sydney, 1997.
- 3 Department of Health and Ageing, National Illicit Drug Strategy, <http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/health-publth-strateg-drugs-illicit-index.htm>, accessed on 13 December 2004.
- 4 Ministerial Council on Drug Strategy, The National Drug Strategy – Australia's integrated framework 2004 – 2009, <http://www.nationaldrugstrategy.gov.au/pdf/framework0409.pdf>, accessed 13 December 2004, p. 7.
- 5 This is only one aspect of sentencing. Fox and Freiberg identify retribution, proportionality, rehabilitation, denunciation, incapacitation and the protection of the community as further aspects. R. Fox and A. Freiberg, 'Sentencing—State and Federal Law in Victoria', Oxford University Press, Melbourne, 1999, p. 202–232.
- 6 *Radich* [1954] NZLR 86, p. 87.
- 7 Fox and Freiberg, *op. cit.*, p. 233.
- 8 Subsection 231(1) of the *Customs Act 1901* (Assembly of persons with the intention of: importing prohibited imports, smuggling or preventing the seizure, or rescuing after seizure, of any prohibited imports or smuggled goods), section 233AC (the master of a ship or aircraft must not use or allow the use of the ship or aircraft for smuggling etc. of narcotic goods) or subsection 233B(1) (Prohibition of importing, possessing imported narcotics or conveying imported narcotic drugs).
- 9 See generally J. Norberry, 'Illicit Drugs, their Use and the Law in Australia', [Background paper](#), no. 12, Parliamentary Library, Canberra, 1996–1997.
- 10 *R v Wei Liang Tu And Anna Zhang*, Unpublished decision of the District Court of New South Wales, Finnane J, dated 3 December 2004, pp. 3–4.
- 11 *ibid.*, p. 4.
- 12 Senator Chris Ellison, Minister for Justice and Customs, 'Second reading speech: Customs Amendment Bill 2004', Senate, Debates, 9 December 2004, p. 1.
- 13 *R v Tait and Bartley* (1979) 24 ALR 473, p. 484–485. Brennan, Deane and Gallop JJ cited with approval Burt CJ in *Bensegger v R* [1979] WAR 65, p. 68.

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