



## Customs Tariff Validation Bill 2009

## Excise Tariff Validation Bill 2009

Paula Pyburne  
Law and Bills Digest Section

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## Customs Tariff Validation Bill 2009

## Excise Tariff Validation Bill 2009

**Date introduced:** 12 May 2009

**House:** House of Representatives

**Portfolio:** Department of Home Affairs (Customs) and Department of Treasury (Excise)

**Commencement:** 14 May 2009

**Links:** The [relevant links](#) to the Customs Tariff Validation Bill 2009, [relevant links](#) to the Excise Tariff Validation Bill 2009, Explanatory Memoranda and second reading speeches can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

## Purpose

The purpose of the Bills is to validate all duties demanded or collected before 14 May 2009 because of the *Customs Tariff Proposal (No. 1) 2008* and the *Excise Tariff Proposal (No. 1) 2008* so that they are taken to have been lawfully imposed and lawfully demanded or collected.<sup>1</sup>

## History of the Bills

### Background

In the Budget for the 2008–09 financial year, the Treasurer, Wayne Swan announced a proposed increase in the tax on ready-to-drink beverages (colloquially referred to as ‘alcopops’) of some 70%.<sup>2</sup> The measure would create an ongoing gain to revenue estimated at \$3.1 billion from 27 April 2008 and over the forward estimates period.<sup>3</sup>

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1. The Bills also validate the duties demanded or collected under the notices of proposal, as gazetted on 26 April 2008.
  2. J Topsfield, ‘Alcopop tax rise to net \$3.14bn’, *The Age*, 14 May 2008, p. 5 viewed on 28 May 2009:

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The increase in excise was presented by the Government as a part of its broader strategy to tackle the problem of ‘risky drinking’ among young Australians, and especially young women, on the grounds that ‘alcopops’ are recognised as being young Australian women’s drink of choice.<sup>4</sup>

### Introduction of tariff proposals

The ‘alcopops’ tax changes were contained in two proposals which were tabled in the House of Representatives by the Minister for Health and Ageing Nicola Roxon on 13 May 2008 who stated that:

The excise and customs tariff proposals that I have just tabled contain alterations to the *Excise Tariff Act 1921* and *Customs Tariff Act 1995*.

The proposals formally place before the parliament changes to both acts to increase the rate of excise and customs duty applying to ‘other excisable beverages not exceeding 10 per cent by volume of alcohol’ from \$39.36 to \$66.67 per litre of alcohol content, on and from 27 April 2008.<sup>5</sup>

The two proposals were [Excise Tariff Proposal \(No. 1\) 2008](#) (covering goods made in Australia)<sup>6</sup> and [Customs Tariff Proposal \(No. 1\) 2008](#) (covering imported goods).<sup>7</sup>

### Validating a tariff proposal

A tariff proposal is not legislation. It is an executive instrument. A proposal does not legally alter the relevant legislative tariff<sup>8</sup> and it is arguable that caselaw suggests that a

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FECFQ6%22>

3. Budget 2008–09 website, Budget Paper 2, Part 1 viewed on 28 May 2009:  
<http://www.budget.gov.au/2008-09/content/bp2/html/revenue-07.htm>
4. M Thomas and P Pyburne, *Excise Tariff Amendment (2009 Measures No. 1) Bill 2009 and Customs Tariff Amendment (2009 Measures No. 1) Bill 2009*, Bills Digest no. 100–101, 2008–09, Parliamentary Library, Canberra, 2009 viewed 28 May 2009,  
<http://www.aph.gov.au/library/pubs/bd/2008-09/09bd101.pdf>
5. N Roxon, (Minister for Health and Ageing), ‘Tariff Proposals: Excise Tariff Proposal (No. 1) 2008 and Customs Tariff Proposal (No. 1) 2008’, House of Representatives, *Debates*, 13 May 2008, p. 2613.
6. *Gazetted* in Commonwealth of Australia, *Special Gazette*, no. S.87, Attorney-General’s Department, 26 April 2008.
7. *Gazetted* in Commonwealth of Australia, *Special Gazette*, no. S.88, Attorney-General’s Department, 26 April 2008.
8. S Daley and R A Kenway, ‘*Customs and Excise*’, Laws of Australia, Lawbook Co., March 2001, Chapter 24.1, paragraph 233.

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proposal alone does not actually give the Commonwealth legal authority to collect duties according to the new or amended tariff contained in the proposal.<sup>9</sup>

However, using the example of the practical operation of the customs system, customs officials could simply refuse to release the goods which are the subject of a tariff proposal unless the customs duty was paid according to the proposal. In such a case, [section 226](#) of the *Customs Act 1901* prevents the importer of the goods who refuses to pay the tariff in the proposal from taking action against the customs officials for wrongfully withholding the goods.<sup>10</sup> According to section 226, that prohibition lasts for the period of 12 months from the date of the proposal or until the end of the parliamentary session, whichever is the earlier. This 12 month period provides the basis for the convention that governments pass validating legislation within 12 months of a proposal coming into effect.

Notwithstanding the doubtful legal force of tariff proposals as mentioned above, the content of the vast majority of such proposals are uncontroversial, and thus the amended duties are presumably paid in the expectation that validating legislation will be passed within the 12 month period.

### Response to the tariff proposals

When the tariff proposals were gazetted, the then leader of the Coalition, Dr Brendan Nelson threatened to block the proposed tax rise, branding it a revenue grab.<sup>11</sup> The consequence of the coalition's determination to vote against the legislation in the Senate was that the Government needed the votes of all the Green senators, as well as those of the two independent senators for the relevant legislation to be passed.

The Customs Tariff Amendment (2009 Measures No. 1) Bill 2009 and the Excise Tariff Amendment (2009 Measures No. 1) Bill 2009 were introduced in the House of Representatives on 11 February 2009. The relevant [Bills Digest](#) provides useful information.

In the period leading up to the crucial vote on the legislation on 18 March 2009 there was considerable debate about:

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9. See *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, per O'Connor J at 276, cited in S Daley and R A Kenway.

10. S Daley and R A Kenway.

11. General news, 'Alcopops tax gets grab rap', *Herald Sun*, 15 May 2008, p. 7 viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FVFSFQ6%22>

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- whether the increased tax on alcopops had actually limited binge drinking by young people<sup>12</sup> and
- whether in the event the legislation was not passed, the amount of the tax already collected, (being approximately \$290 million),<sup>13</sup> would need to be refunded and if so, to whom it would be refunded.<sup>14</sup>

The Government took the view that the monies collected would have to be returned to the distillers.<sup>15</sup>

The coalition argued that the money should be ‘allocated to proper education and to proper alcohol programs that will have a real impact on binge drinking’.<sup>16</sup>

Whilst the public position of the Distilled Spirits Industry Council of Australia was that the money collected to date should be used for preventative health measures by the Government, rather than being returned to the industry, it was reported that Bacardi Lion,

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12. Editorial, ‘Pop goes the alco tax: the party’s over for deceptive revenue-raising’, *The Australian*, 26 February 2009, p. 13, viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FGQVS6%22> and  
M McShane, ‘Alcopop tax must go down the tubes’, *Canberra Times*, 10 March 2009, p. 13, viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F21ZS6%22>
  13. P Maleny, ‘Alcopops defeat would give distillers \$290m’, *The Australian*, 16 March 2009, p. 2, viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FK11T6%22>
  14. M Madigan, ‘Windfall if alcopops tax voted down’, *Courier Mail*, 12 February 2009, p. 25, viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F71RS6%22>
  15. N Roxon (Minister for Health and Ageing), ‘Consideration of Senate Message: Customs Tariff Amendment (2009 Measures No. 1) Bill 2009’, *Debates*, 17 March 2009, p. 2914, viewed 29 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-03-17%2F0076%22>
  16. P Dutton, ‘Consideration of Senate Message: Customs Tariff Amendment (2009 Measures No. 1) Bill 2009’, *Debates*, 17 March 2009, p. 2916 viewed 29 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-03-17%2F0077%22>

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the maker of Bacardi Breezers, intended to make an application to the Australian Taxation Office to have the amount of additional excise that it had paid, refunded.<sup>17</sup>

In the context of this debate the Minister for Health and Ageing, Nicola Roxon, was able to:

... woo Independent Senator Nick Xenophon and the Greens with a package of measures that included an extra \$50 million for initiatives to tackle binge drinking.

The Government ... offered as concessions:

- a fund to provide sponsorship to local community organisations
- community-level initiatives to tackle binge drinking
- improved telephone counselling services, and
- possible expansion of social marketing campaigns.<sup>18</sup>

However, Senator Fielding ultimately voted against the proposed legislation in the Senate and the Bills were defeated.

### Introduction of these Bills

On 15 April 2009 the Treasurer, Wayne Swan and the Minister for Health and Ageing, Nicola Roxon announced that in May, the Government would:

- introduce a new tariff proposal with effect from 14 May 2009, ensuring the alcopops measure remains in place into the future
- introduce legislation to confirm the measure in the same session of Parliament, and
- introduce legislation to validate the revenue collected between 27 April 2008 and 13 May 2009.<sup>19</sup>

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17. M Jenkins, 'Alcopops maker to seek tax refund', *Canberra Times*, 12 March 2009, p. 4, viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FBXZS6%22>
  18. L Anderson, 'Fielding rejects 'tax grab' alcopop package', *Adelaide Advertiser*, 18 March 2009, p. 11, viewed 28 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FO42T6%22>
  19. W Swan (Treasurer) and N Roxon (Minister for health and Ageing), 'Government to re-introduce Alcopops Measure', Media Release, Canberra, 15 April 2009, viewed 29 May 2009:

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In response, Peter Dutton MP stated that:

The Coalition will support legislation to validate the revenue collected to date. We call on the Government to spend all of the money collected so far on alcohol education, prevention and rehabilitation measures.<sup>20</sup>

Similarly Senator Rachel Siewert on behalf of the Australian Greens stated that:

The decision by the Federal Government to reintroduce the 'Alcopops' tax was today welcomed by the Australian Greens as a common sense move to better managing alcohol-related harm...

The Government has also made the right decision by retaining the \$360 million already raised, and ensuring it is not returned to the distillers.<sup>21</sup>

Accordingly the Bills which are the subject of this Digest were introduced into the House of Representatives on 12 May 2009,<sup>22</sup> passed by the Senate without amendment on 13 May 2009<sup>23</sup> and given the Royal Assent by the Governor-General on the same day.<sup>24</sup>

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYHAT6%22>

20. P Dutton, 'Embarrassing Back-Flip for Roxon on Alcopops', *Media Release*, Brisbane, 15 April, 2009, viewed on 29 May 2009: <http://www.liberal.org.au/news.php?Id=2947>
21. R Siewert, 'Alcopops tax is right decision: Greens', *Media Release*, 15 April 2009 viewed on 29 May 2009: <http://rachel-siewert.greensmps.org.au/content/media-release/alcopops-tax-right-decision-greens>
22. See House of Representatives Votes and Proceedings 12 May 2009, viewed on 29 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=:group=:holdingType=:id=:orderBy=date-eFirst;page=0;query=customs%20tariff%20validation%20Date%3A12%2F05%2F2009%20%3E%3E%2016%2F05%2F2009%20Dataset%3Avotes;querytype=:rec=4;resCount=Default>
23. See House of Representatives Votes and Proceedings 13 May 2009, viewed on 29 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2009-05-13%2F0013%22>
24. See House of Representatives Votes and Proceedings 13 May 2009, viewed on 29 May 2009:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2009-05-14%2F0031%22>

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## Financial implications

According to the Explanatory Memorandum<sup>25</sup> these measures will validate revenues already collected to the value of:

<i>Revenue</i>	<i>2007-08</i>	<i>2008-09</i>
Australian Taxation Office	\$21.7m	\$139.2m
Australian Customs and Border Protection Service	\$44.0m	\$180.4m
Goods and services tax	\$6.6m	\$32.0m
Total revenue	\$72.3m	\$351.6m

## Main provisions

### Customs Tariff Validation Bill

**Item 3** of the Bill provides that all duties of customs demanded or collected from 13 May 2008 to 13 May 2009 inclusive arising from the tariff proposal of 13 May 2008 are taken to have been lawfully imposed and lawfully demanded and collected.<sup>26</sup>

**Item 4** of the Bill provides all of the duties of customs which have been demanded or collected because of the notice of the tariff proposal which was published in the *Gazette* on 26 April 2008 have been lawfully imposed and lawfully demanded or collected.

### Excise Tariff Validation Bill

**Item 3** of the Bill provides that all duties of excise demanded or collected from 13 May 2008 to 13 May 2009 inclusive arising from the tariff proposal of 13 May 2008 are taken to have been lawfully imposed and lawfully demanded and collected.<sup>27</sup>

25. Explanatory Memorandum, 'Excise Tariff Validation Bill 2009 and Customs Tariff Validation Bill 2009', p. 5.

26. According to the Explanatory Memorandum under tariff proposals the Government increased the excise and excise-equivalent customs duty rate applying to 'other excisable beverages not exceeding 10 per cent by volume of alcohol' (alcopops) from \$39.36 per litre of alcohol content' to \$66.67 per litre of alcohol content on and from 27 April 2008. This rate was increased to \$68.54 per litre of alcohol content on 1 August 2008 and increased again to \$69.16 per litre of alcohol content on 2 February 2009 as a result of the bi-annual indexation of excise and excise-equivalent customs duty rates: Explanatory Memorandum, 'Excise Tariff Validation Bill 2009 and Customs Tariff Validation Bill 2009', p. 7.

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**Item 4** of the Bill provides that all of the duties of excise which have been demanded or collected because of the notice of the tariff proposal which was published in the *Gazette* on 26 April 2008 have been lawfully imposed and lawfully demanded or collected.

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27. See footnote 24.

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