

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS (VALUATION) AMENDMENT BILL 1987

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Industry,
Technology and Commerce, Senator the Honourable John N. Button)

CUSTOMS (VALUATION) AMENDMENT BILL 1987

OUTLINE

This Bill proposes to amend the valuation provisions contained in Part VIII, Division 2 of the Customs Act 1901 ("the Act"). Part VIII, Division 2 of the Act is designed to give effect to Australia's obligations under the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT), to which Australia is a signatory.

The Agreement on implementing Article VII proceeds upon the basis that the value of imported goods for customs purposes should, so far as possible, be the price paid or payable under the actual import transaction. Provision is made in the Agreement for certain adjustments to the price in the determination of transaction value.

Article VII accords primacy to the price paid or payable for the goods under the actual transaction where that transaction has been dictated by commercial considerations. The Agreement implementing Article VII does not require effect to be given to the actual transaction where it has resulted from or been dictated in point of form by revenue considerations.

Since the enactment of the provisions of Part VIII, Division 2 in the Act, certain practices have emerged which are designed solely or predominantly to understate the value of imported goods and thereby minimise or avoid duty. These practices have been reflected in the import transactions themselves, the way in which related services have been provided, pricing arrangements, the quantification of interest and associated charges and other contrived arrangements.

The purpose of this Bill is to combat these practices.

The major changes contained in the Bill are:

- a. an amendment to introduce a definition of "associate", and an amendment to the definition of "price", in section 154 of the Act, to make it clear that the price is in fact the total price actually paid or payable by the purchaser of the goods, (whether paid for by services rendered (paragraph 4(a)), definition of "price") or through intermediaries (paragraph 4(b)), definition of "associate"), and that it applies to the precise goods sold for exportation to, or importation into Australia (paragraph 4(a), definition of "relevant transaction");

- b. an amendment to section 154 of the Act to provide that rebates or decreases in the value of the goods may be disregarded only where both the right and the benefit to such rebates or decreases have actually accrued and been received (paragraph 4(c));
- c. an amendment to section 159 of the Act to take account of a GATT decision to clarify the circumstances in which only interest paid under a finance agreement may be deducted from the customs value of goods (paragraph 4(e));
- d. an amendment to section 158 of the Act to counter the practice of "price-averaging" (clause 5), and to exclude from the customs value of goods only those commissions paid or payable by the purchaser to genuine buying agents acting solely for the purchaser (paragraphs 6(b) and 6(c));
- e. an amendment to section 159 of the Act to exclude the cost of a shipping container in the valuation of goods (paragraph 6(d));
- f. amendments to sections 154, 159, 161, and 161A of the Act removing the concept of "generally accepted accounting principles" (paragraphs 4(d), 4(f), 6(a) and 6(e); and clauses 7 and 8);
- g. an amendment to section 161D of the Act to remove the 12-month limit within which the Comptroller may review determinations and decisions made under this Division of the Act (clause 9);

FINANCIAL IMPACT STATEMENT

By closing loopholes in the existing legislation, the proposals put forward in the Bill will have a major impact on the Government's revenue resources. It is estimated that at least \$146 million might be saved on an annual basis, as follows:

- a. paragraphs 6(b) and 6(c) of the Bill will prevent the growth of a practice of claiming deductions for commissions paid or payable to so-called buying agents who are in fact agents of the vendor. This practice is estimated to represent a potential revenue loss of \$90 million in a full year;
- b. paragraph 4(e) of the Bill will clarify the circumstances in which only interest under a finance agreement may be deducted from the customs value of goods. The tightening of this provision is designed to prevent an estimated revenue loss of \$40 million in a full year;

- c. the balance of \$16 million represents the estimate of customs duty which might be saved by the Australian Customs Service as a result of the remaining proposed amendments.

The above figures include an estimate of the sales tax component on goods collected by the Australian Customs Service on behalf of the Australian Taxation Office.

NOTES ON CLAUSES

Short Title

Clause 1 is a formal machinery clause.

Commencement

Clause 2 for ease of comparison with other financial years, this clause provides for the Act to commence on 1 July 1987.

Application

Clause 3 is a savings provision preserving the rights of persons whose rights would otherwise be affected by clause 9, which amends section 161D of the Act to remove the 12-month limit within which the Comptroller may review determinations and decisions made under Division VIII of the Act.

Interpretation

Clause 4 amends section 154 of the Principal Act as follows:

- paragraph 4(a) amends the existing definitions of "price" and "relevant transaction":
 - . in relation to the definition of "price":
 - . In addition to the consideration passing under the main contract of sale, the definition of "price" is to include in the customs value of goods any consideration relating to the goods, paid for or on behalf of the purchaser, passing directly or indirectly under any formal or informal contract, agreement or arrangement, to or for the benefit of the vendor - paragraphs (a) and (b) of the definition;

The mischief to which these amendments are directed concern certain practices known as "transaction splitting" or "payment separation". The practices take various forms. Their common aim is to exclude certain payments or other consideration from the "price" upon which the value for customs purposes is determined. Thus, in certain circumstances, payments

are made or consideration supplied, pursuant to a transaction which is entered into separately from the contract of sale in which a service is performed for the purchaser in relation to the goods: the object of the transaction being to add value to the goods. Examples of such specialised services include: engineering; modifying the goods to comply with a standard in Australia; design modification; finishing; refurbishing and marketing services.

The definition of "price" has thus been extended to cover payments (or consideration supplied) to the vendor, or to associated entities for the benefit of the vendor, for work done on the goods to ensure that the goods comply with the quality required under the contract of sale; or that they satisfy a request by the purchaser or that they meet a standard required by the general law, the government or some other authority. The definition is not intended to apply to payments for services which are not directly related to the goods but have an incidental connection only with them, or which affect their value only to a slight degree.

- (ii) The definition of "price" includes the value, as determined by the Collector, of any goods or services supplied or any obligation incurred by the purchaser in accordance with a requirement of the contract for any warranty or guarantee or any advertising in relation to the goods. Such value is not an amount referred to in sub-section 154(2)(a)(ii) - paragraph (e) of the definition.
- (iii) the definition also applies to consideration passing under any contract relating to the purchase of the goods - see paragraphs (a) and (e) of the proposed definition;
 - the purpose of this amendment is to counter any attempt to avoid duty by means of a sham contract for an option to purchase, where in commercial reality the consideration for such an option is part of the price of the goods;

Operating in conjunction with the new definition of "associate" (as to which see paragraph 4(b)), this definition is designed to embody the concept of the total price paid or payable by the purchaser;

- . in relation to the definition of "relevant transaction":
 - . in addition to the main contract of sale, to extend the application of that definition to formal or informal contracts, agreements or arrangements under which services are performed relating to the relevant transaction (in a similar manner as the amendment also made by paragraph 4(a) to the expanded definition of "price");
 - . paragraph (a) of the amended definition adheres more closely to Article 1 of the GATT Valuation Agreement, which refers in this context to "goods when sold for export", and which this provision is intended to reflect;
 - . paragraph (b) of the amended definition applies to contracts of sale which involve the importation of goods into Australia, but which do not involve the exportation of goods from another country;
- the mischief to which paragraph (b) of the amended definition is specifically directed is an avoidance device whereby goods are sold in mid-voyage and ostensibly become goods which do not fall within the ambit of the existing provisions (it being then claimed that those goods are not the subject of a contract of sale which provides for their export from another country);
 - . paragraph (c) of the amended definition retains the existing provision which provides that, where there are two or more contracts of sale, the valuation provisions apply to the last contract of sale before the goods came under the control of the Customs;
- paragraph 4(b) introduces a definition of "associate" in relation to a vendor of goods, to be a person who substantially influences the business operations of the vendor, or whose business operations are substantially influenced by the vendor, or a third party who has an influence on such a person, or who is influenced by such a person, or a related person as defined by subsection 154(4);

The definition of "associate" is new. It relates to the amendments and the practices of "transaction splitting" and "payment separation" which have been referred to. A feature of those practices is that

payments are made to companies associated with the vendor for work done to increase the value of the goods or for services in relation to the goods. In this way payments have been excluded from the "price" upon which the transaction value is determined.

- paragraph 4(c) amends subparagraph 154(2)(a)(i) to restrict the deduction from the price of goods allowed by that provision for rebates or decreases obtained by the purchaser (with a consequent decrease in the amount of duty payable), to those rebates or decreases to which both the right has accrued, and the benefit has been received;
 - the mischief to which this provision is directed is the practice whereby importers arrange for an apparent rebate/discount etc to appear on the face of the documentation relating to the imported goods, usually expressed to be subject to some condition, etc. Under the former provisions this rebate/discount was then eligible as a deduction, even though in practice it may never in fact have eventuated as a benefit to the importer;
- paragraph 4(d) omits the reference in paragraph 154(2)(b) of the Act to "generally accepted accounting principles". This is one of a series of amendments throughout the Bill to omit all such references;
 - this phrase was originally included as a criterion for quantifying deductions and additions to the customs value of goods;
 - the phrase is being omitted because decisions of the Courts and the Administrative Appeals Tribunal have had the effect of requiring that "generally accepted accounting principles" be applicable to a transaction, as a pre-condition, before the provisions in which they appear can also be applied to the transaction - see for example the judgment of Beach J delivered on 4 Dec 1986 in the Victorian Supreme Court in the case of Ninette Trading Pty Ltd v Bates (unreported, No.C.L 175 of 1986). In certain circumstances no "generally accepted accounting principle" may exist, and the effect of the decisions referred to is that the current provisions cannot be applied to these circumstances. Henceforth, generally accepted accounting principles will thus no longer be a legislative requirement. They will, however, continue to be used in the

administration of the Act for the purposes of determining value;

- other references are omitted by paragraphs 4(f), 6(a) and 6(e); and clauses 7 and 8;

- paragraph 4(e) omits subparagraph 154(2)(b)(i) of the Act, which allows for the deduction from the customs value of goods "interest, or any other cost or charge" paid under a finance agreement, (referred to as a contract, agreement or other arrangement under which the purchaser is permitted to delay the payment of the price in return for a payment or an increase in the price), and substitutes a new subparagraph restricting this deduction to interest, and only then in cases where, if required, the interest component is clearly demonstrated by the purchaser to the satisfaction of a Collector;

- This provision is designed to prevent contrived interest arrangements and artificially excessive interest and other costs and charges paid or payable under financing arrangements which, under existing law, are deductible from the "price" for the purposes of determining transaction value. In this regard the amendment proposed has taken account of the decision by the GATT Committee on Customs Valuation dated 26 April 1984;

- paragraph 4(f) omits subsection 154(5), which is a reference to "generally accepted accounting principles". This is one of a series of amendments in the Bill to omit all such references;

- as to which see paragraph 4(d) above;

Circumstances in which the customs value of goods cannot be determined

- Clause 5 inserts new subsections 158(8), (9), (10) and (11) in section 158 of the Act to combat "price-averaging", "package deals", and similar practices whereby a purchaser, for the purpose of minimising or avoiding duty, arranges purchases of different goods in the same or separate transactions with the effect that an artificially lower price is constructed by the parties for a quantity of those goods, thus resulting in less duty being paid on them;

- paragraph 5(a) is a consequential amendment to insert in subsection 158(2) references to the new subsections 158(8), (9), (10) and (11);
- paragraph 5(b) inserts new subsections 158(8), (9), (10) and (11);
 - subsection 158(8) provides that, where different goods are sold in a relevant transaction or transactions, and a Collector is of the opinion that the price of some of those goods (referred to as "special price goods") is different from the price that would normally be paid for similar or identical goods in a transaction that would correspond to a relevant transaction, the Collector shall give an appropriate notice to the owner requiring the owner within a period specified in the notice (but not less than 28 days) to satisfy the Collector that the difference was not designed to obtain a reduction of, or to avoid, duty;
 - subsection 158(9) provides that, where such evidence relating to the pricing of goods is not forthcoming, the Collector shall determine that the transaction value of the goods cannot be determined. Where this occurs, the Collector may then determine a customs value for the goods in accordance with the provisions of section 157; .
 - subsections 158(10) and (11) are similar in effect to subsections 158(8) and (9), in circumstances where services have been provided to the purchaser in relation to the goods;

Transaction value of goods

Clause 6 amends section 159 of the Act as follows:

- paragraph 6(a) omits a reference in subsection 159(3) to "generally accepted accounting principles". This is one of a series of such amendments in the Bill to omit all such references;
 - as to which see paragraph 4(d) above;
- paragraphs 6(b) and 6(c) amend paragraph 159(3)(a) of the Act to exclude from the customs value of goods only that commission paid to the purchaser's buying agent, who acts solely for the purchaser and is not associated with the vendor except through the incidental association brought about by that agent acting for the

purchaser in respect of the relevant transaction;

- paragraph 6(d) amends paragraph 159(3)(b) of the Act to exclude from the customs value the cost of the container of the goods; other packing costs or charges, whether for materials or labour or both shall continue to be included in the customs value, and shall therefore remain dutiable;
 - . as a consequence of its accession to the international Customs Convention on Containers, Australia disregards the actual cost of a container in valuing an article. The amendment gives effect to this international obligation;
 - . the "containers" to be excluded by this amendment are generally of the large metal kind widely used by shipping companies to transport goods and to facilitate the loading and unloading of goods;
- paragraph 6(e) omits references in subsections 159(5), (6) and (7) of the Act to "generally accepted accounting principles". This is one of a series of such amendments in the Bill to omit all such references;
 - . as to which see paragraph 4(d) above;

Deductive unit price of goods

- Clause 7 amends subsection 161(7) of the Act to omit a reference to "generally accepted accounting principles". This is one of a series of such amendments in the Bill to omit all such references;
- . as to which see paragraph 4(d) above;
- Clause 8 amends subsection 161A(3) of the Act to omit a reference to "generally accepted accounting principles". This is one of a series of such amendments in the Bill to omit all such references;
- . as to which see paragraph 4(d) above;

Review of determinations and other decisions

- Clause 9 amends section 161D to remove the 12-month restriction imposed on the Comptroller, within which the Comptroller may review determinations or decisions. In future, the Comptroller will have an unrestricted right to review any determination or decision made

after the commencement of this Bill regardless of the date the determination or decision was made;

- . the purpose of this amendment is to enable the Comptroller, upon discovery of an abuse, to have an unrestrained power to protect the revenue unrestricted by time restraints;
- . the savings provision to provide that the 12-months restriction still applies to determinations or decisions made before the commencement of the amending Act is at Clause 3 of the Bill;
- . the amendment does not extend the 12-month limitation period currently specified in section 165 of the Act within which duty shortpaid through error can be recovered;

