

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS LEGISLATION (ANTI-DUMPING AMENDMENTS) BILL 1988

EXPLANATORY MEMORANDUM

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

(This memorandum supersedes the explanatory memorandum tabled with this Bill on 28 April 1988.)

Customs Legislation (Anti-Dumping Amendments) Bill 1988

Outline

This Bill, together with the Anti-Dumping Authority Bill 1988 and the Customs Tariff (Anti-Dumping) Amendment Bill 1988 comprise a legislation package amending Australia's anti-dumping legislation, to give effect to the Government's response to the Review of the Customs Tariff (Anti-Dumping) Act 1975 ("the Gruen Report"), prepared by Professor F.H. Gruen.

This Bill essentially amends Part XVB of the Customs Act 1901, and has the effect of defining the role of the Australian Customs Service in dumping inquiries to that of conducting preliminary investigations and gathering relevant evidence regarding dumping complaints. The proposed new section 269TD inserted into the Act provides that any positive preliminary finding by the Customs Service that grounds exist for the imposition of dumping duties must be reviewed by the Anti-Dumping Authority, created by the Anti-Dumping Authority Bill 1988. Certain other preliminary decisions or findings of the Customs Service that are adverse to a complainant are also available for independent merit review by the Authority pursuant to the new section 269TF.

The Bill also imposes for the first time in legislation strict time limits within which the Customs Service must conclude its preliminary investigations. New section 269TC will provide that:

- . within 70 days of receiving an application complaining of dumping, the Customs Service must determine whether the application contains grounds that would, if established, permit the Minister to impose dumping duty under the Anti-Dumping Act, and whether an Australian industry produces or may be established to produce, goods of a like kind to those under investigation;
- . if a *prima facie* dumping complaint is made out, the Customs Service must undertake a dumping inquiry inviting submissions from interested parties, and within 180 days make a preliminary finding as to whether or not it considers dumping to have occurred (new subsection 269TC)).

Clause 4 of the Bill makes clear that the Customs Service may only require or take provisional dumping securities after it has made a preliminary finding that grounds exist for the imposition of dumping duties under the Anti-Dumping Act. This will put beyond doubt Australia's GATT obligation to only take provisional measures to protect a local industry after a preliminary finding of dumping has been made.

In Part III of the Bill, a consequential amendment is made to the Industries Assistance Commission Act 1973, to remove its review and recommendatory role in anti-dumping matters, on the ground that this is now to be performed by the Anti-Dumping Authority.

Financial Impact Statement

The proposed amendments in this Bill have no direct financial implications.

NOTES ON CLAUSES

PART I - PRELIMINARY

Short Title

Clause 1 provides for the citation of this Act as the Customs Legislation (Anti-Dumping Amendments) Act 1988.

Commencement

Clause 2 provides for the Act to commence on the day that the Anti-Dumping Authority Act 1988 commences operation, which is a day to be fixed by Proclamation. It is expected that day will be 1 September 1988.

PART II - AMENDMENTS OF THE CUSTOMS ACT 1901

Principal Act

Clause 3 identifies the Customs Act 1901 as the Principal Act for the purposes of this Part.

Right to require security

Clause 4 amends subsection 42(1B) of the Principal Act to restrict the general right of the Australian Customs Service to require and take securities on goods subject to Customs control when such securities are required or taken in respect of any duty that may become payable on such goods under the Customs Tariff (Anti-Dumping) Act 1975.

- . the amendment provides that securities may only be required or taken under the Act after the Comptroller-General of Customs has made a preliminary finding pursuant to the proposed new section 269TD of the Principal Act (discussed below) that there are sufficient grounds for the imposition of dumping duties or countervailing duties in respect of the goods referred to in the section 269TB application (which includes like goods that may be imported into Australia).
- . The amendment gives effect to Article 10 of the General Agreement on Tariffs and Trade (GATT), which provides that provisional measures may only be taken to protect an

industry after a preliminary finding of dumping has been made.

Cancellation of Bonds

Clause 5 amends Section 45 of the Principal Act as follows:

- subsection (2) is redrafted to make clear that a security taken as a provisional measure under the Customs Tariff (Anti-Dumping) Act 1975 (ie. before the publication of a dumping or countervailing duty notice by the Minister), must be cancelled before the expiration of 4 months (or, in certain circumstances, 6 months subsection (3)) after the date of the security;
- this provision gives effect to the requirement of Article 10(3) of the GATT, which expressly limits the period for which provisional dumping securities can be held,
- a new subsection (4) is added to put beyond doubt that the limitation on the duration of a security which is taken as a provisional measure in respect of a duty that may become payable in respect of goods of a particular kind (which includes, in the case of an 8(2), 9(2), 10(2) or 11(2) notice, "like goods", as defined in Section 4 of the Act) does not apply where a dumping notice which covers those goods is actually in place;
- in this instance, the security is taken not as a provisional measure, but rather, as a means of ensuring the payment of a duty of customs owing on the goods. As such, there is no time limit within which the security must be cancelled, similar to the position for general Customs securities.

Clause 6

repeals the existing interpretation section to Part XVB of the Principal Act, which contains special provisions relating to anti-dumping matters, and adds the following seven new sections to the Part. The new sections highlight the role of the Customs Service in receiving dumping complaints, and its responsibility for all action (within strict time limits) up to a preliminary finding stage, after which time, the Anti-Dumping Authority (created by one of the other Bills in this package) will conduct its independent examination of the dumping complaint (again within strict time limits)

and make recommendations to the Minister as to whether or not dumping or countervailing duties should be imposed on the goods referred to in the section 269TB application.

Interpretation

New section 269T defines certain words and phrases used in this Part.

In particular, subclause(1):

- . "countervailing duty" is defined as a duty under section 10 of the Customs Tariff (Anti-Dumping) Act 1975, but specifically excludes duties imposed pursuant to subsections 10(2B), 10(2C) and 10(2D) of that Act, which are imposed in retaliation for the imposition of countervailing duty on Australian-produced products by other nations.
- retaliatory duties are expressly excluded from this process because they are punitive in nature against the actions of another country.
- . "interested party" is defined, (for the purpose of making submissions to a dumping enquiry notified pursuant to paragraph 269TC(4)(e)), as the applicant seeking the dumping protection; a person representing the industry or part thereof in Australia producing, or likely to produce like goods; importers or exporters of the particular goods in question, or of like goods, or of any such goods likely to be so imported or exported; and the Government of the country which has exported the goods or is likely to export such goods or any government of a country which may export or be likely to export like goods; and
- . "like goods" are defined as being goods that are either identical to the goods under consideration, or have characteristics (both functional and physical) that closely resemble the goods under consideration.
- . this definition adopts the meaning of the term as used in the GATT Anti-Dumping Code (Article 2);

subclauses 2 and 3 define the proportion of a manufactured good that must be produced in Australia before it can be deemed to have been "produced" in Australia;

- . it is a necessary pre-condition for initiating a dumping complaint that there is an Australian industry producing, or likely to be established to produce like goods to those imported goods which it is alleged are being dumped (ie. new paragraph 269TB(1)(b)).

subclause 4 provides that where there is only one person producing goods of a particular kind in Australia, that person may be considered to be an Australian "industry"

- . this is again relevant for the purposes of new paragraph 269TB(1)(b), as above;

subclause 5 defines the reference appearing throughout the new sections to "goods the subject of an application under section 269TB" -

- . the phrase will pick up goods referred to in the application;
 - that have been imported into Australia,
 - that are likely to be so imported, or
 - that are like goods to those referred to in the previous two categories that may be imported.
- . the phrase highlights the facility in new section 269TB that a dumping complaint may be initiated in anticipation of injurious imports.

subclause (6) provides for a special definition of "days" for the purposes of this Part, so that Sundays and Public Holidays are counted in the calculations of the various time limits prescribed by new sections 269TC and 269TD;

- . But for this definition, the general definition of "days" in section 4 of the Act would apply, with the effect that Sundays and Public Holidays would not be counted for the purposes of the prescribed time limits. This result would unnecessarily lengthen the strictly limited periods which are prescribed for the various preliminary stages of a dumping inquiry;
- . The general operation of section 36 of the Acts Interpretation Act 1901 is, however, preserved. That section provides that where the last day of a prescribed period falls on a Saturday, Sunday, or a Public or Bank Holiday, the thing which is required to be done may be done on the next day which is not a Saturday, Sunday, etc.

Minister may give directions to Comptroller in relation to powers and duties under this Part.

New section 269TA allows the Minister to give directions to the Comptroller as to how the Comptroller is to carry out his responsibilities under this Part of the Act.

- . To ensure consistency in decision-making a power such as this is required so that the Minister may give guidance to both the Comptroller and the Authority (for which a similar provision exists in the Anti-Dumping Authority Bill 1988) in technical matters;
 - The aim is to ensure that both are guided by the industry policy objectives of the Government;
 - Such directions however are expressly required to be general in nature, dealing with the general principles of anti-dumping matters, and not with particular consignments of goods or like goods to goods in a particular consignment.
- . These directions must be advertised publicly in the Gazette and tabled in Parliament (subsection (3)), and may be disallowed by either House of Parliament (subsection (4))

Application for action under the Anti-Dumping Act

New section 269TB prescribes the procedure by which a person may apply for the imposition of dumping or countervailing duties on particular goods that have been imported into Australia, or on goods that are likely to be imported into Australia, or on like goods (as defined) to those goods that may be imported into Australia;

- . In the case of applications requesting dumping or countervailing relief where (subsection (1)):
 - a consignment of goods has been imported into Australia, or is likely to be so imported, or where there are like goods that may be imported, and
 - there is or there may be established an Australian industry producing like goods, and
 - the complainant believes that there are or may be reasonable grounds for the Minister to legally impose dumping or countervailing duties under the Customs Tariff (Anti-Dumping) Act 1975 on that consignment of goods,

the complainant may, via an application lodged with the Comptroller, made on an approved form (ie. a form approved by the Comptroller in writing), and complying with new subsection 269TB(3), request the Minister to impose dumping or countervailing duties in respect of those goods.

The complainant may be any person. Thus, for instance, employees or their representatives might initiate an action in respect of an Australian industry which may be affected by the dumping or subsidisation where the industry itself might be inhibited from doing so.

- the new subsection also anticipates the possibility of initiating a dumping complaint in anticipation of injurious imports, for instance, where there is knowledge that imports of dumped or subsidised goods are to arrive in volumes which will cause injury to an Australian industry.

In the case of "third party" dumping or countervailing duties (i.e. where the "dumping" of goods on the Australian market by another country prejudices the industry of a third country which has an established market share in Australia), where (subsection (2)):

- a consignment of goods produced in another country has been imported, or where there are like goods that may be imported, and;
- there is in a third country an industry manufacturing like goods to those goods, and that country exports the like goods to Australia; and
- the Government of that third country believes that there are or may be reasonable grounds for the Minister to legally impose dumping or countervailing duties on that consignment of goods,

the Government may, via an application lodged with the Comptroller, made on an approved form (ie. a form approved by the Comptroller in writing), and complying with new subsection 269TB(3), request the Minister to impose dumping or countervailing duties in respect of those goods.

Consideration of Application

New section 269TC prescribes the manner and specifies the time within which the Comptroller must consider an application requesting the imposition of dumping or countervailing duties on goods the subject of a 269TB application (as defined in 269T(5));

- When considering a complaint made by a person, subsection (1) requires the Comptroller to consider within 70 days (or such other period as may be prescribed), whether or not:
 - the application complies with the formalities of the approved form;
 - there is an Australian industry producing like goods; or there is likely to be established an Australian industry producing like goods; and

- there are matters set out in the application which, if established, would constitute reasonable grounds for imposing dumping or countervailing duties;

When considering dumping complaints made by a third country, subsection (2) requires the Comptroller to consider within 70 days (or such other period as may be prescribed), whether or not:

- the application complies with the formalities of the approved form;
- there is a producer in a third country producing like goods to the goods complained of, and the country exports those goods to Australia; and
- there are matters set out in the application which, if established, would constitute reasonable grounds for imposing dumping or countervailing duties;

In either of the above cases, if the Comptroller rejects an application, subsection (3) requires the Comptroller to send a notice to the applicant giving the reasons for the rejection, as well as informing the applicant of the applicant's right to have the matter reviewed by the Anti-Dumping Authority.

If however, the Comptroller does not reject the application, subsection (4) requires the Comptroller to publish in both the Gazette and in a newspaper circulating in each State and in the internal Territories, a notice containing:

- the particulars of the goods the subject of the section 269TB application;
- the identity of the complainant, and the identity of the relevant producers or third country producers;
- a statement declaring that within 180 days (or such other period as may be prescribed), the Comptroller will make a preliminary finding as to whether or not dumping duties should be imposed on the goods the subject of the application;
- a statement advising that a preliminary finding that dumping may have occurred could result in the imposition of provisional measures including, amongst other things, the taking of securities on the importation of the goods the subject of the application; and
- an invitation to "interested parties" (as defined in section 269T) to lodge within 40 days (or such lesser

period as may be indicated in the Gazette notice) a submission with the Comptroller concerning the imposition of the duty sought by the application;

- paragraph 269 TC(4)(e) provides that the maximum statutory time for inviting interested parties to make submissions concerning the imposition of dumping duties may be altered by the Comptroller in the Gazette notice. As securities may only be imposed after the Comptroller has made a preliminary finding with regard to the relevant dumping complaint (see clause 4), in certain circumstances (ie. where the material injury threatened is severe) it may be in the interests of parties to expedite the consideration of a preliminary finding. It is noted notwithstanding this facility however, that the ultimate recommendation as to whether dumping has occurred is still made by the Anti-Dumping Authority.

Preliminary Findings

New section 269TD sets out the procedure for what is to occur at the conclusion of the preliminary dumping inquiry notified in subsection 269TC(4); ie the preliminary finding stage. After considering the application and any submissions made by interested parties under section 269TC, and any other information that may have been collected by the Australian Customs Service that is considered relevant (subsection (1));

- if the Comptroller finds that dumping duties should be imposed, subsection (2) provides that the Comptroller must notify the applicant of the decision, notify in the Gazette and in a newspaper circulating in each of the States and the internal Territories that such a decision has been made (paragraph (1)(a)), refer the matter to the Anti-Dumping Authority within 7 days for a review of the decision on its merits (paragraph (1)(b)), and, if considered necessary, take securities pursuant to section 42 of the Principal Act upon the importation of goods referred to in the application in respect of any dumping or countervailing duty that may become payable;
- if the Comptroller finds that dumping or countervailing duties should not be imposed, subsections (3) and (4) require the Comptroller to declare that a preliminary finding that grounds do not exist for the imposition of dumping or countervailing duties has been made, and he must publicise that decision in the Gazette and in a newspaper circulating in each of the States and the internal Territories, as well as notify the unsuccessful applicant, giving the reasons for the decision, and advising the applicant of his or her right to have the decision reviewed on its merits by the Anti-Dumping Authority.

- It should be noted that the decision of the Comptroller is not the recommendation which goes to the Minister on whether the Minister should make the decision whether to impose dumping or countervailing duties. Rather, the Comptroller merely makes a preliminary determination; all recommendations by the Comptroller as to the imposition or otherwise of duties can or must be reviewed by the independent Anti-Dumping Authority.

Comptroller to have regard to same considerations as Minister in certain circumstances

New section 269TE provides that when the Comptroller is required to make a recommendation as to whether or not dumping or countervailing duties are to be imposed on goods, the Comptroller must adopt the same tests and formulae that the Minister is required to use in the Customs Tariff (Anti-Dumping) Act 1975 before the Minister imposes dumping or countervailing duties (subsection (1))

- subsection (2) provides that where the Comptroller is considering an application for dumping relief in anticipation of an injurious import (one of the situations countenanced by new subsection 269TB(1)), the Comptroller shall determine the matter pursuant to the Anti-Dumping Act at the time of the anticipated importation of the goods into Australia.

Reviews by Authority

New section 269TF outlines the role of the Anti-Dumping Authority in reviewing decisions of the Comptroller;

- where a person has had an application rejected by the Comptroller pursuant to subsections 269TC(1) and (2), (ie - a negative *prima facie* decision) or where the Comptroller has made a preliminary finding that there are not sufficient grounds to impose dumping or countervailing duties pursuant to subsection 269TD(3) (ie - a negative preliminary finding) that person may apply to the Authority, on a form approved by the Authority for the purpose within a time prescribed by the Regulations, for a review of that decision (subsection (1));
- A decision made by the Comptroller to reject an application pursuant to section 269TC may either be confirmed or revoked by the Authority. Should the decision of the Comptroller be revoked by the Authority, the Authority's decision shall be substituted for the decision of the Comptroller, and the Comptroller shall be obliged to perform the responsibilities prescribed in subsection 269TC(4), ie commence the preliminary dumping inquiry (subsection (2));
- The Authority may also review the preliminary finding of the Comptroller. In this case the Authority may come to its own decision, and if it decides there are grounds for the imposition of dumping duties it shall conduct the formal 120

day dumping inquiry under section 7 of the Anti-Dumping Authority Act; the Comptroller may also exercise from the date the Authority revokes the Comptroller's preliminary finding, the powers in 269TD(2)(c), ie. the power to take securities upon the importation of goods referred to in the application in respect of any dumping or countervailing duty that may become payable (subsection (3)) in respect of goods the subject of a section 269TB application;

- this is a technical drafting change to pick up the expanded range of goods referred to in 269T(5).

Inquiries in relation to undertakings

Clause 7 provides that inquiries as to whether or not the Minister should accept an undertaking from an exporter not to export goods to Australia below a specified price may be made.

Repeal of section 269V

Clause 8 repeals section 269V of the Principal Act, relating to the way information had to be supplied in "dumping inquiries", as it is no longer relevant to the new dumping inquiry procedure. Now, for both preliminary inquiries by Customs and formal inquiries by the Anti-Dumping Authority, the manner in which information is required to be given is prescribed on the relevant approved form.

PART III - AMENDMENTS TO THE INDUSTRIES ASSISTANCE COMMISSION ACT 19

Principal Act

Clause 9 identifies the Industries Assistance Commission Act 1973 as the Principal Act for the purposes of this Part.

Reference of Matters to Commission

Clause 10 amends section 23 of the Principal Act by removing the Industries Assistance Commission as a recommendatory and review body on dumping matters.

- That function is now performed by the Anti-Dumping Authority.

