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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS TARIFF (ANTI-DUMPING) AMENDMENT BILL (NO. 2) 1992

EXPLANATORY MEMORANDUM

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



## CUSTOMS TARIFF (ANTI-DUMPING) AMENDMENT BILL (No. 2) 1992

### OUTLINE

This Bill proposes to amend the Customs Tariff (Anti-Dumping) Act 1975 as part of the legislative package announced by the Government in December 1991 to introduce a new system for the imposition and collection of anti-dumping and countervailing duties. This Bill introduces the new taxing regime for the imposition and collection of both interim and final dumping and countervailing duties, while the other Bill in the package, the Customs Legislation (Anti-Dumping Amendments) Bill 1992, amends the Customs Act 1901 and the Anti-Dumping Authority Act 1988 to provide the mechanism for the determination of interim and final duties, as well as introducing the two means by which subsequent adjustments of duty liability can be effected.

At present dumping duties are imposed by the Minister under the Customs Tariff (Anti-Dumping) Act 1975 if he or she is satisfied that goods exported to Australia have been dumped (ie., their export price is less than their normal value), and that dumping is causing or threatening material injury to an Australian industry or hindering the establishment of such an industry. Likewise, countervailing duties may be imposed if the Minister is satisfied that goods exported to Australia have had financial assistance, for example a subsidy, bounty, reduction or remission of freight, and, because of that financial assistance, material injury to an Australian industry is caused or threatened.

Under the present regime, dumping duty is not payable where the dumping margin is purportedly eliminated by an exporter raising the export price of the goods to the level of the normal value. This Bill proposes to alter that approach, and to strengthen the overall operation of the anti-dumping regime, by adopting a position similar to that used by other signatories to the General Agreement on Tariffs and Trade; that is, to impose an "up-front" duty regardless of the export price or the actual subsidy paid on the particular goods, and then provide a facility for the importer to have his or her actual duty liability assessed by the Minister at a later stage with the possibility of having any excess "up-front" duty repaid.

The main proposals contained in this Bill which implement this new scheme relate to:

- i) the facility for the Minister, pending a final determination of duty liability, to impose an interim duty on dumped or subsidised products where it is established that the dumping or subsidisation is causing injury to an Australian industry producing like goods. The interim duty concept will apply to the four types of duties imposed under this Act, ie., dumping duties, third country dumping duties, countervailing duties and third country countervailing duties (Clause 4, new subsection 8(3); clause 5, new subsection 9(3); clause 6, new subsection 10(3); and clause 7, new subsection 11(2), refer).

The interim duty will be an "up front" duty payable on all goods the subject of a duty notice (issued under subsections 269TG(1) or (2), 269TH(1) or (2), 269TJ(1) or (2) or 269TK(1) or (2) of the Customs Act 1901). The amount of interim duty payable will depend upon certain values or prices which are based on evidence presented and a decision taken at the original inquiry stage or subsequently during a review of the interim duty under the new Division 5 of the Customs Act 1901;

- ii) the provisions to enable the Minister to impose the interim duty on an ad valorem or specific rate basis (new subsections 8(5), 9(5), 10(3B) and 11(4) respectively, clauses 4,5,6 and 7 refer);
- iii) the provisions which ensure that in imposing the interim duties, Australia's obligations as a signatory to the General Agreement on Tariffs and Trade are given effect to; in particular, by ensuring that the Minister has regard to the desirability of imposing a duty less than the full margin of dumping or less than the full amount of the subsidy if such lesser duty would be sufficient to remove the injury to the Australian industry (new subsections 8(5A), 9(5A), 10(3C) and 11(5) respectively, clauses 4,5,6 and 7 refer); and
- iv) the provisions which ensure that an importer's actual duty liability (ie., the dumping or countervailing duty actually payable) is to be ascertained having regard to the export price and the normal value of the particular imported goods (in the case of dumping duties), or the relevant subsidy actually paid on the particular imported goods (in the case of countervailing duties) (new subsections 8(6), 9(6), 10(3E), 11(7) respectively, clauses 4,5,6 and 7 refer).

#### Financial Impact Statement

The measures contained in this Bill (and the corresponding amendments to the Customs Legislation (Anti-Dumping Amendments) Bill 1992) relating to the introduction of the new system for the imposition and collection of anti-dumping and countervailing duties, are expected to result in additional salary and administrative costs totalling \$0.4m in 1992-93 and \$0.75m in 1993-94 and 1994-95, in present dollar values.

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NOTES ON CLAUSES

Short title etc.

- Clause 1 provides for the citation of the Act to be the Customs Tariff (Anti-Dumping) Amendment Act (No. 2) 1992 (subclause 1(1)) and identifies the Customs Tariff (Anti-Dumping Act) 1975 as the Principal Act for the purposes of this Act (subclause 1(2)).

Commencement

- Clause 2 provides for the citation and commencement provisions of the Act to commence on Royal Assent, but for the other provisions in the Act to commence on the day on which the provisions which give effect to the proposed new dumping regime in the Customs Legislation (Anti-Dumping Amendments) Act 1992 (the Dumping Legislation Act) commence.
- . This Act contains the new taxing provisions to give effect to the proposed new dumping regime and therefore these provisions must commence on the same day as the new scheme would commence.

Insertion of new section

- Clause 3 inserts an Interpretation section (section 3) into the Principal Act to provide a definition of "relevant subsidy" which is used in clauses 6 and 7. The definition includes the payments or financial assistance specified in subsection 269TJ(1) and (2) of the Customs Act 1901.

Dumping duties

- Clause 4 amends section 8 of the Principal Act to provide for the new method of imposing dumping duties. As outlined previously, the new method of imposition involves the following:
- . the Minister, after being satisfied that goods have been dumped and that the dumping is causing material injury to an Australian industry producing like goods, may, by notice published in the Gazette, declare that section 8 of the Principal Act applies to the dumped goods and like goods exported to Australia in the future (subsection 269TG(1) and (2) of the Customs Act 1901);

- . the notice must contain the amounts that the Minister ascertains (either in the original notice or after a review pursuant to new Division 5 in Part XVB of the Customs Act 1901) to be the normal value, export price and non-injurious price of goods of that kind, unless the confidentiality provision in new subsection 269TG(3A) (contained in section 11 of the Dumping Legislation Act) applies, in which case the Minister will not make these amounts public but will have still ascertained them;
- . the interim duty is then collected in accordance with these figures; and
- . after application to Customs under the provisions of new Division 4 of Part XVB of the Customs Act 1901, introduced by section 15 of the Dumping Legislation Act, for a duty assessment, the Minister ascertains the normal value and export price pertaining to each consignment of goods in the relevant importation period and this may result in the repayment of some of the interim duty in circumstances where the total duty payable for a particular importation period is less than the total amount of interim duty actually collected.

Paragraph 4(a) of this Act omits the present subsections 8(3), 8(4), 8(5), 8(5A), 8(5AA), 8(5B) and 8(6) and introduces new subsections 8(2), 8(3), 8(4), 8(5), 8(5A), 8(5B), 8(5C), 8(5D) and 8(6) which implement the proposed policy as follows:

New subsection 8(2) specifies that the special duty of Customs imposed on goods by virtue of a notice under subsection 269TG(1) or (2) of the Customs Act 1901 is a dumping duty (not an interim dumping duty) and that the amount of the dumping duty is calculated in accordance with new subsection 8(6).

New subsection 8(3) enables the imposition and collection of an interim dumping duty on goods the subject of a notice under section 269TG(1) or (2) of the Customs Act 1901, pending the Minister's final assessment of dumping duty payable on those goods.

New subsection 8(4) specifies that the amount of interim dumping duty payable on goods the subject of a 269TG(1) or (2) notice is the difference between the normal value and the export price of the goods as ascertained by the Minister for the purposes of the 269TG(1) or (2) notice (new paragraph 8(4)(a)). That is, irrespective of the actual export price of the particular goods or

the actual normal value of those goods, the interim dumping duty applicable to goods is in accordance with the figures the Minister has established in the notice.

- . Example: if the Minister has published a notice under subsection 269TG(2) (ie. a prospective notice, or a notice which applies to like goods entered for home consumption after the date of publication of the notice) specifying "widgets" (the goods) from "Northland" (the country), and specifies that the normal value (NV) of widgets is \$10 and the export price (EP) of widgets is \$8, then the interim dumping duty on all future importations subject to these dumping measures of widgets from Northland is \$2.

ie. NV = \$10  
 EP = \$ 8  
 therefore, interim duty = \$2

If a widget is imported at \$10, that is, if the actual export price (AEP) is \$10, then the interim duty applicable is still \$2.

- this "up front" payment of an interim duty based on historical fact (ie., the inquiry period leading to the 269TG notice or the period of a review which may have been undertaken) is one of the key reforms in this legislative package to ensure Australian industry is adequately protected against unfair trading practices.

To ensure the proposed scheme is both consistent with Australia's obligations as a signatory to the General Agreement on Tariff and Trade (GATT), and also delivers the necessary protection to the Australian industry, a number of refinements to the basic scheme promulgated by new paragraph 8(4)(a) of the Principal Act are necessary.

New paragraph 8(4)(b) covers the circumstance where the export price of the goods drops to a price below the export price specified in the notice. Where this occurs the effect of new paragraph 8(4)(b) is to lift the actual export price of the goods up to the export price specified in the notice before the interim duty under new paragraph 8(4)(a) is calculated.

- . Example:

if NV = \$10  
 and EP = \$8

but a widget is imported at \$4, ie., AEP = \$4, then the effect of new subsection 8(4) is that:

Amount of interim duty = \$6 (made-up of \$4 which is the amount pursuant to new paragraph 8(4)(b) to lift the export price of the particular goods up to the export price of goods of that kind as specified by the Minister in the 269TG(2) notice) + \$2 (the difference between the normal value and export price pursuant to new paragraph 8(4)(a) as specified by the Minister in the notice).

New subsection 8(5) ensures that the interim dumping duty component referred to in new paragraph 8(4)(a) is to be levied on an ad valorem basis (ie., x % of the export price) or levied as a price per quantity (eg., \$y per tonne or z¢ per can) or as a combination of the two.

The amount referred to in new paragraph 8(4)(b) is not to be collected in such a manner, but is simply to be the amount necessary to raise the export price of a particular consignment up to the export price as specified by the Minister in the notice.

Example: consider a shipment of widgets where NV = \$10 per widget and EP = \$8 per widget. Suppose that widgets varied in weight and size and so the Minister considers it appropriate to sign a notice under new subsection 8(5) directing that the interim duty is to be collected on the basis of an ad valorem duty of 25% (the proportion of \$2 interim duty to \$8 export price). The shipment contains 100 widgets and its actual export price is \$1000. Therefore the interim dumping duty imposed is \$250, (ie., 25% of \$1000) notwithstanding that it is fairly clear that the export price of each widget is more than \$8 per widget.

- In this example, new paragraph 8(4)(b) would not be relevant because the export price of the particular goods is not less than the export price as specified in the notice.

Example: a shipment of widgets contains 100 widgets, but its actual export price is \$700. The export price of the shipment should be at least \$800 (100 widgets at \$8 each), and so the appropriate interim duty must first include an amount of \$100 (the amount necessary to raise the actual export price to the export price of the widgets as



ascertained for the purposes of the notice) and then the duty of 25% of the export price as ascertained by the Minister for the purpose of the notice, ie., 25% of \$800, or \$200.

Therefore, the total landed price of the consignment of 100 widgets would be:

\$700 (AEP)  
 + \$100 (pursuant to new paragraph 8(4)(b))  
 + \$200 (pursuant to new paragraph 8(5)(a))  
 = \$1000, which is equivalent to the normal value of the goods as ascertained by the Minister for the purposes of the notice.

New subsection 8(5A) provides a further refinement to the proposed scheme to ensure GATT consistency.

Article 8.1 of the GATT Anti-Dumping Code states that it "... is desirable that ... the [dumping] duty be less than the margin [ie. NV-EP], if such lesser duty would be adequate to remove the injury to the domestic industry." New subsection 8(5A) provides for this by ensuring that the Minister, when deciding how much dumping duty should be imposed, must have regard to the desirability of imposing a lesser amount of duty than the full margin of dumping if that lesser duty would be sufficient to remove the injury to the Australian industry.

This provision introduces the concept of the "non-injurious price", or NIP, into the Principal Act. The NIP is defined exhaustively in new section 269TACA of the Customs Act 1901, introduced by section 5 of the Dumping Legislation Act, and is basically the price at which the goods can be brought into Australia without causing injury to the Australian industry. It needs to be emphasised that the decision to impose a lesser amount of duty is up to the discretion of the Minister - the Minister cannot impose more than the dumping margin, but may impose less if that lesser amount is sufficient to remove the injury.

- Example: consider the whatsit, where the Minister has ascertained for the purposes of the 269TG(2) notice that:

NV = \$5  
 EP = \$3  
 NIP = \$4

that is, if the whatsits were imported at \$4 each, then the injury to the Australian

industry producing whatsits would be removed.

The Minister, in setting the rate of interim duty to be imposed under new subsection 8(5) must have regard to the desirability of setting a lower rate if that lower rate would be sufficient to remove the injury to the Australian industry. Suppose for the present case that the Minister considers it desirable that such a lower rate should be imposed.

In this example, if the whatsits are given a value according to weight then

NV = \$100 per kg  
 EP = \$60 per kg  
 and NIP = \$80 per kg

The Minister then considers it appropriate that the 8(5) notice should set the interim duty pursuant to paragraph (b) and therefore the Minister determines the interim duty to be \$20 per kg.

The combined effect of new subsection 8(4), 8(5) and 8(5A) is that if a 100kg consignment of whatsits were imported at an export price of \$15,000 (ie., \$150 per kg), then the interim duty payable would be \$2000 (\$20 per kg).

If, on the other hand, the 100kg consignment of whatsits are imported at an export price of \$5000 (ie., \$50 per kg) then the interim duty payable on that consignment would be:

\$1000 (amount to lift the export price of the consignment up to the export price equivalent to that in the notice pursuant to paragraph 8(4)(b))  
 + \$2000 (\$20 per kg, pursuant to paragraph 8(5)(b) and subsection 8(5A))  
 = \$3000

New subsection 8(5B) places the same limitation upon the Minister as 8(5A) in that where the Minister has published both a dumping duty notice and a countervailing duty notice in respect of the same goods (ie. s269TJA of the Customs Act 1901 applies), the Minister must have regard to the desirability of ensuring that the interim dumping duty added to the interim countervailing duty is not more than is necessary to remove the injury to the Australian industry producing like goods.

New subsection 8(5C) is a standard notification provision, in that the notice under new subsection 8(5) must be published in the Gazette unless the Minister considers that such a publication would adversely affect the business or commercial interests of any person.

New subsection 8(5D) allows the notice under new subsection 8(5) to be retrospective to cover the notice published under subsection 269TG(1), but specifies that the period of time covered by the 269TG(1) notice cannot also be a time covered by an earlier 269TG(2) notice - that is, 8(5D) ensures there cannot be two 269TG notices in force in respect of the same goods at the same time.

New subsections 8(3), 8(4), 8(5), 8(5A), 8(5B), 8(5C) and 8(5D) complete the taxing code for the imposition of interim dumping duties. After the interim duty has been imposed and collected, the new Division 4 of Part XVB of the Customs Act 1901 provides a facility whereby an importer can apply to Customs to request the Minister to ascertain the importer's actual duty liability and repay to the importer any excess interim duty collected. The ascertainment of the actual duty liability involves the Minister ascertaining the normal value and export price relating to each particular consignment of goods during a particular importation period, as distinct from the imposition of interim duty which has no regard to the actual normal value or export price (unless paragraph 8(4)(b) is relevant), but uses an "up front" flat rate or ad valorem rate.

New subsection 8(6) specifies the amount of dumping duty payable as follows:

if the Minister did not have reference to the NIP when imposing the interim duty, then the dumping duty payable in respect of particular goods is the difference between the amount that the Minister ascertains to be the export price of the particular goods and the amount that the Minister ascertains to be the normal value of the particular goods (new paragraph 8(6)(a)).

If the Minister did have reference to the NIP when imposing the interim duty, then the dumping duty payable in respect of particular goods is the difference between the amount that the Minister ascertains to be the export price of the particular goods and the lower of the amounts that the Minister ascertains to be the normal value of the particular goods or the non-injurious price of the goods as specified in the 269TG(1) or (2) notices.

- . For the ascertainment of the dumping duty payable, the relevant NIP is still the NIP specified in the 269TG notice; the Minister does not ascertain a NIP for the particular goods.
- . Example: consider the importation of widgets, where the Minister specified, for the purpose of the 269TG(2) notice that

NV = \$10  
EP = \$ 8  
NIP = \$ 9, and therefore the interim  
dumping duty is \$1 per widget

A particular importation of widgets contained 100 widgets and the actual export price of that consignment was \$800. The interim duty imposed is therefore \$100.

Pursuant to a duty assessment application, the Minister ascertained that the export price of that particular consignment was \$800, but that the normal value of that particular consignment had dropped to \$850.

Therefore, the dumping duty payable pursuant to new paragraph 8(6)(b) is the difference between:

- i) \$800 (the amount that the Minister ascertains to be the export price of the particular shipment); and
- ii) \$850 (the lower of:
  - a) the normal value of the particular goods as ascertained by the Minister for the purposes of the duty assessment or
  - b) the NIP as ascertained by the Minister for the purpose of the notice),
- ie) \$50; therefore a repayment of \$50 pursuant to paragraph 269Y(1)(b) of the Customs Act 1901 would be due to the importer.

Clause 4(b) is a consequential amendment to subsection 8(7) of the Principal Act. Subsection 8(7) permits the Minister to exempt certain goods from dumping duty; the consequential amendment ensures the Minister is also empowered to exclude those goods from interim dumping duty as well.

Clause 4(c) is a similar consequential amendment to subsection 8(8) of the Principal Act also

reflecting the fact that the exemption from dumping duty also includes an exemption from interim dumping duty.

### Third country dumping duties

Clause 5 amends section 9 of the Principal Act to provide for the new method of imposing third country dumping duties. Third country duties are imposed where the Minister is satisfied that goods are dumped in Australia and the dumping has caused or threatened material injury to a producer or manufacturer of like goods in a third country (ie. not the country of export, nor Australia), and the Minister is requested by the Government of the third country to declare that section 9 of the Principal Act applies to the dumped good already exported to Australia, and to like goods imported to Australia in the future. As outlined previously, the new method of imposition of third country dumping duties involves the following:

- . the Minister, after being satisfied that goods have been dumped and that the dumping is causing material injury to an industry in a third country producing like goods, may, upon request by the Government of that third country, by notice published in the Gazette, declare that section 9 of the Principal Act applies to the dumped goods and like goods exported to Australia in the future (subsection 269TH(1) and (2) of the Customs Act 1901 refers);
- . the notice must contain the amounts that the Minister ascertains (either in the original notice or after a review pursuant to new Division 5 in Part XVB of the Customs Act 1901) to be the normal value, export price and non-injurious price of goods of that kind, unless the confidentiality provision in new subsection 269TH(3) (contained in section 12 of the Dumping Legislation Act) applies, in which case the Minister will not make these amounts public but will have still ascertained them;
- . the interim duty is then collected in accordance with these figures, regardless of the actual export price or the actual normal value of the particular shipment; and
- . after application to Customs under the provisions of new Division 4 of Part XVB of the Customs Act 1901, introduced by section 15 of the Dumping Legislation Act, for a duty assessment, the Minister ascertains the normal value and export price pertaining to each consignment of goods in

the relevant importation period and this may result in the repayment of some of the interim duty paid in circumstances where the total duty payable for a particular importation period is less than the total amount of interim duty actually collected.

Paragraph 5(a) of this Act omits the present subsections 9(3), 9(4), 9(5), 9(5A), 9(5B) and 9(6) and introduces new subsections 9(2), 9(3), 9(4), 9(5), 9(5A), 9(5B), 9(5C), and 9(6) which implement the proposed policy as follows:

New subsection 9(2) specifies that the special duty of Customs imposed on goods by virtue of a notice under subsection 269TH(1) or (2) of the Customs Act 1901 is a third country dumping duty (not an interim third country dumping duty) and that the amount of the third country dumping duty is calculated in accordance with new subsection 9(6).

New subsection 9(3) enables the imposition and collection of an interim third country dumping duty on goods the subject of a notice under section 269TH(1) or (2) of the Customs Act 1901, pending the Minister's final assessment of third country dumping duty payable on those goods.

New subsection 9(4) specifies that the amount of interim third country dumping duty payable on goods the subject of a 269TH(1) or (2) notice is the difference between the normal value and the export price of the goods as ascertained by the Minister for the purposes of the 269TH(1) or (2) notice (new paragraph 9(4)(a)). That is, irrespective of the actual export price of the particular goods or the actual normal value of those goods, the interim third country dumping duty applicable to goods is in accordance with the figures the Minister has established in the notice.

To ensure the proposed scheme is both consistent with Australia's obligation's as a signatory to the GATT, and also delivers the necessary protection to the third country's industry, a number of refinements to the basic scheme promulgated by new paragraph 9(4)(a) of the Principal Act are necessary.

New paragraph 9(4)(b) covers the circumstance where the export price of the goods drops to a price below the export price specified in the notice. Where this occurs the effect of new paragraph 9(4)(b) is to lift the actual export price of the goods up to the export price

specified in the notice before the interim duty under new paragraph 9(4)(a) is calculated.

New subsection 9(5) ensures that the interim third country dumping duty component referred to in new paragraph 9(4)(a) is to be levied on an ad valorem basis (ie., x % of the export price) or levied as a price per quantity (eg., \$y per tonne or z¢ per can) or as a combination of the two.

The amount referred to in new paragraph 9(4)(b) is not to be collected in such a manner, but is simply to be the amount necessary to raise the export price of a particular consignment up to the export price as specified by the Minister in the notice.

New subsection 9(5A) provides a further refinement to the proposed scheme to ensure GATT consistency.

Article 8.1 of the GATT Anti-Dumping Code states that it "... is desirable that ... the [dumping] duty be less than the margin [ie. NV-EP], if such lesser duty would be adequate to remove the injury to the domestic industry." New subsection 9(5A) provides this by ensuring that the Minister, when deciding how much third country dumping duty should be imposed, must have regard to the desirability of imposing a lesser amount of duty than the full margin of dumping if that lesser duty would be sufficient to remove the injury to the third country's industry.

New subsection 9(5B) is a standard notification provision, in that the notice under new subsection 9(5) must be published in the Gazette unless the Minister considers that such a publication would adversely affect the business or commercial interests of any person.

New subsection 9(5C) allows the notice under new subsection 9(5) to be retrospective to cover the notice published under subsection 269TH(1), but specifies that the period of time covered by the 269TH(1) notice cannot also be a time covered by an earlier 269TH(2) notice - that is, 9(5C) ensures there cannot be two 269TH notices in force in respect of the same goods at the same time.

New subsections 9(3), 9(4), 9(5), 9(5A), 9(5B) and 9(5C) complete the taxing code for the imposition of interim third country dumping duties. After the interim duty has been imposed and collected, the new Division 4 of Part XV of the Customs Act 1901 provides a facility whereby an importer can apply to Customs to request the Minister to ascertain the importer's actual duty

liability and repay to the importer any excess interim duty collected. The ascertainment of the actual duty liability involves the Minister ascertaining the normal value and export price relating to each particular consignment of goods during a particular importation period, as distinct from the imposition of interim duty which has no regard to the actual normal value or export price (unless paragraph 9(4)(b) is relevant), but uses an "up front" flat rate or ad valorem rate.

New subsection 9(6) specifies the amount of third country dumping duty payable as follows:

If the Minister did not have reference to the NIP when imposing the interim duty, then the third country dumping duty payable in respect of particular goods is the difference between the amount that the Minister ascertains to be the export price of the particular goods and the amount that the Minister ascertains to be the normal value of the particular goods (new paragraph 9(6)(a)).

If the Minister did have reference to the NIP when imposing the interim duty, then the third country dumping duty payable in respect of particular goods is the difference between the amount that the Minister ascertains to be the export price of the particular goods and the lower of the amount that the Minister ascertains to be the normal value of the particular goods or the non-injurious price of the goods as specified in the 269TH(1) or (2) notices.

- . For the ascertainment of the third country dumping duty payable, the relevant NIP is still the NIP specified in the 269TH notice; the Minister does not ascertain a NIP for the particular goods.

Clause 5(b) is a consequential amendment to subsection 9(7) of the Principal Act. Subsection 9(7) permits the Minister to exempt certain goods from third country dumping duty; the consequential amendment ensures the Minister is also empowered to exclude those goods from interim third country dumping duty as well.

Clause 5(c) is a similar consequential amendment to subsection 9(8) of the Principal Act, also reflecting the fact that the exemption from third country dumping duty also includes an exemption from interim third country dumping duty.



Countervailing duties

Clause 6 amends section 10 of the Principal Act to provide for the new method of imposing countervailing duties. As outlined previously, the new method of imposition involves the following:

- . after being satisfied that goods have had a relevant subsidy paid on them and because of the relevant subsidy material injury has been caused to an Australian industry producing like goods, the Minister may, by notice published in the Gazette, declare that section 10 of the Principal Act applies to the subsidised goods already exported to Australia (subsection 269TJ(1) of the Customs Act 1901 refers) and to like goods exported to Australia in the future (subsection 269TJ(2) the Customs Act 1901 refers);
- . the notice pursuant to new subsection 269TJ(11) (introduced by section 13 of the Dumping Legislation Act) must contain the amounts that the Minister ascertains (either in the original notice or after a review pursuant to new Division 5 in Part XVB of the Customs Act 1901) to be the relevant subsidy and non-injurious price of goods of that kind, unless the confidentiality provision in new subsection 269TJ(12) (contained in section 13 of the Dumping Legislation Act) apply, in which case the Minister will not make these amounts public but will have still ascertained them;
- . the interim duty is then collected in accordance with these figures, regardless of the actual amount of subsidy paid on the goods in the particular shipment; and
- . after application to Customs under the provisions of new Division 4 of Part XVB of the Customs Act 1901, introduced by section 15 of the Dumping Legislation Act, for a duty assessment, the Minister ascertains the relevant subsidy and the export price pertaining to each consignment of goods in the relevant importation period and this may result in the repayment of some of the interim duty paid in circumstances where the total duty payable for a particular importation period is less than the total amount of interim duty actually collected.

Paragraph 6(a) of this Act omits the present subsection 10(3) and introduces new subsections 10(1), 10(2), 10(3), 10(3A), 10(3B), 10(3C), 10(3D),

and 10(3E) which implement the proposed policy as follows:

new subsection 10(1) specifies that the special duty of Customs imposed on goods by virtue of a notice under subsection 269TJ(1) or (2) of the Customs Act 1901 is a countervailing duty (not an interim countervailing duty).

New subsection 10(2) specifies the separate methods by which the countervailing duty on goods is calculated. If the duty is imposed by virtue of a notice under section 269TJ(1) or (2) of the Customs Act 1901, then the duty is calculated in accordance with new subsection 10(3E). If, however, the duty is imposed by virtue of a notice under section 269TJ(4), (5) or (6), then the duty is calculated in accordance with the present subsection 10(5).

- . This dichotomy reflects the policy that the new scheme is not to apply to a duty imposed by virtue of a notice under section 269TJ(4), (5) or (6). These provision provide for the implementation of duties which are not strict countervailing duties and so it is not considered appropriate to convert them to the new scheme.

New subsection 10(3) enables the imposition and collection of an interim countervailing duty on goods the subject of a notice under section 269TJ(1) or (2) of the Customs Act 1901, pending the Minister's final assessment of countervailing duty payable on those goods.

New subsection 10(3A) specifies that the amount of interim countervailing duty payable on goods the subject of a 269TJ(1) or (2) notice is the amount of the relevant subsidy paid on the goods as ascertained by the Minister for the purposes of the 269TJ(1) or (2) notice. That is, irrespective of the actual subsidy paid on those goods the interim countervailing duty applicable to goods is in accordance with the figures the Minister has established in the notice.

- . Example: if the Minister has published a notice under subsection 269TJ(2) of the Customs Act 1901 (ie. a prospective notice, or a notice applying to goods entered for home consumption after the date of publication of the notice) specifying that a subsidy of \$10 per widget has been paid on the export of widgets from Northland, then the interim countervailing duty on all future importations of widgets for the purpose of the notice is \$10.

Similar to the new dumping and third country dumping regimes, in ensuring this scheme is both consistent with the GATT and delivers the necessary assistance to the Australian industry there are a number of refinements necessary.

New subsection 10(3B), similar to new subsection 8(5), ensures that the interim countervailing duty is to be levied on an ad valorem basis or levied as a price per quantity or as a combination of the two.

New subsection 10(3C) provides a refinement to the proposed scheme to ensure GATT consistency.

Article 4.1 of the GATT Subsidies Code states that it "... is desirable that ... the [countervailing] duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry". New subsection 10(3) provides this by ensuring that the Minister, when deciding how much countervailing duty should be imposed, must have regard to the desirability of imposing a lesser amount of duty than the full amount of subsidy if that lesser duty would be sufficient to remove the injury to the Australian industry.

- . It should be noted that the decision to impose a lesser amount of duty is at the discretion of the Minister - the Minister cannot impose more than the amount of subsidy, but may impose less if that lesser amount would be sufficient to remove the injury.
- . Example: the Minister, pursuant to subsection 269TJ(2) of the Customs Act 1901, ascertains that the subsidy in relation to widgets from Northland is \$10 and the non-injurious price is \$50, that is, if the widgets were imported at \$50 each, then the injury to the Australian industry producing widgets would be removed.

Pursuant to new subsection 10(3C) the Minister must have regard to the desirability of imposing less than the full subsidy if that lesser amount would remove the injury. Suppose for the present example the Minister considers it desirable that such a lesser rate be imposed.

Suppose there are 3 importations of widgets from Northland, with the following export prices:

EP(1) = \$30    EP(2) = \$45    EP(3) = \$50.

The interim countervailing duty appropriate for each importation would be:

Importation 1 = \$10 (the full amount of subsidy since EP + Subsidy is less than the NIP)  
 Importation 2 = \$5 (that part of the amount of the subsidy necessary to bring the EP up to the NIP)  
 Importation 3 = \$0 (importation 3 is imported at the NIP).

- It is clear from the above example that there is a distinct difference between the interim dumping duty and the interim countervailing duty schemes. In setting the rate for the interim dumping duty, regard may be had to the NIP, but once the rate is set, that rate is to apply until it is reviewed regardless of whether the export price of a particular shipment exceeds the NIP. In the case of interim countervailing duty however, regard must be had to each shipment in determining whether the subsidy added to the export price would exceed the NIP. The reason for this distinction is that the export price is not ascertained by the Minister for the purpose of the countervailing duty notice - the only relevant considerations are whether a subsidy has been paid and, because of that subsidy, whether material injury has been caused to the Australian industry.

New subsection 10(3D) is a mirror provision to new subsection 8(5B) and places the same obligation upon the Minister as 10(3C) in that where the Minister has published both a countervailing duty notice and a dumping duty notice in respect of the same goods (ie. s269TJA of the Customs Act 9101 applies), the Minister must have regard to the desirability of ensuring that the interim countervailing duty added to the interim dumping duty is not more than is necessary to remove the injury to the Australian industry producing like goods.

New subsections 10(3), 10(3A), 10(3B), 10(3C) and 10(3D) complete the taxing code for the imposition of interim countervailing duties. After the interim duty has been imposed and collected, the new Division 4 of Part XVB of the Customs Act 1901 provides a facility whereby the

importer can apply to Customs to request the Minister to ascertain the importer's actual duty liability and repay to the importer any excess interim duty collected. The calculation of the actual duty liability involves the Minister ascertaining the relevant subsidy and export price relating to each particular consignment of goods during a particular importation period.

New subsection 10(3E) specifies the amount of countervailing duty payable as follows:

If the Minister did not have reference to the NIP when imposing the interim duty, then the countervailing duty payable in respect of particular goods is the relevant subsidy paid on the particular goods (new paragraph 10(3E)(a)).

If the Minister did have reference to the NIP when imposing the interim duty, then the countervailing duty payable in respect of particular goods is the difference between the amount that the Minister ascertains to be the export price of the particular goods and the lower of

- i) the NIP or
- ii) the sum of the export price of the particular goods and the amount of subsidy relating to the particular goods.
- . Similar to the ascertainment of dumping duty payable, the NIP for the ascertainment of countervailing duty actually payable is the NIP specified in the 269TJ notice; the Minister does not ascertain a NIP for the particular goods.
- . **Example:** the Minister ascertains that the subsidy in relation to widgets from Northland is \$10, and the NIP is \$50.

An importation of 100 widgets arrived in Australia, with an export price of \$30 each, and so each widget attracted an interim countervailing duty of \$10 (the level of the subsidy) ie. \$1000 total interim countervailing duty.

Pursuant to a duty assessment application, the Minister ascertained that the export price of the particular consignment was actually \$2000 and not \$3000 as stated on the import entry. The amount of subsidy paid on each widget, however, was ascertained to be \$5 and not \$10.

Therefore, the countervailing duty payable is the difference between

\$2000 (the amount the Minister ascertains to be the export price of the particular goods); and

\$2500 (the sum of the export price of the particular goods and the relevant subsidy paid on the particular goods)

ie. \$500; therefore a repayment of \$500 interim duty pursuant to paragraph 269Y(1)(b) of the Customs Act 1901 would be due to the importer.

Paragraphs 6(b), 6(c), 6(d) and 6(e) of the Act amend the Principal Act to provide for the taxing provisions where the Minister declares subsection 269TJ(4), (5) or (6) of the Customs Act 1901 to apply. As outlined previously, these duties are not to be part of the new scheme; therefore amendments to the Principal Act are necessary to ensure they remain part of the present scheme.

Paragraph 6(b) amends subsection 10(4) of the Principal Act to reflect the fact that countervailing duties imposed by the Minister by virtue of a notice under subsection 269TJ(4), (5) or (6) of the Customs Act 1901 are calculated in accordance with subsection 10(4) of the Principal Act.

Paragraph 6(c) amends paragraph 10(4)(a) of the Principal Act to remove the reference to subsection 269TJ(1) and (2) of the Customs Act 1901; countervailing duties by virtue of a notice under these provisions are calculated in accordance with new subsection 10(3E). The effect of this is that the countervailing duty in respect of goods by virtue of a notice under subsection 269TJ(4) is an amount equal to the relevant subsidy in respect of those goods. It should be noted that there is no limitation on this provision for the Minister to have regard to desirability of imposing a lesser amount of duty - the appropriate duty is the full amount of the relevant subsidy.

Paragraph 6(d) provides for a minor technical amendment to change the reference to a "declaration" in paragraph 10(4)(b) to a reference to a "notice" to ensure consistency with the other provisions introduced by this Act.

Paragraph 6(e) is another minor technical amendment to paragraph 10(4)(b) of the Principal Act to change the reference to "a sum" to "an

amount"; again, to ensure consistency with other provisions introduced by this Act.

Paragraph 6(f) amends subsection 10(5) of the Principal Act to specify that it only applies to countervailing duties imposed under subsection 10(4) of the Principal Act.

Paragraph 6(g) omits subsection 10(5A) and 10(5AA) from the Principal Act. The policies reflected by these provisions are now in new subsections 10(3C) and 10(3D) respectively.

Paragraph 6(h) amends the standard notification provision in subsection 10(5B) to ensure it refers to the notice specifying how the interim countervailing duty imposed under new subsection 10(3B) is to be collected, as well as the countervailing duty imposed under subsection 10(5).

- Subsection 10(5B) directs the Minister to publish the notices under subsection 10(3B) and 10(5) unless the Minister considers that publication of either notice would adversely affect the business or commercial interest of any person.

Paragraph 6(i) inserts two new subsections as follows:

new subsection 10(6) allows the notice under new subsection 10(3B) and subsection 10(5) to be retrospective to cover the period of time covered by a notice published under subsection 269TJ(1) of the Customs Act 1901, but specifies that the period of time covered by the 269TJ(1) notice cannot also be a time covered by an earlier 269TJ(2) notice - that is, new subsection 10(6) ensures there cannot be two 269TJ notices in force in respect of the same goods at the same time; and

new subsection 10(7) amends the present subsection 10(7) to ensure it conforms with the new drafting style adopted in this Act; ie., the term "relevant subsidy" is used to replace the expanded statement of what the relevant subsidy is, and the reference to a "declaration" under subsection 269TJ(1),(2) or (4) is replaced with a reference to a "notice" under subsection 269TJ(1),(2) or (4).

Paragraph 6(j) provides for a minor consequential amendment to subsection 10(7A) to replace "declaration" with "notice", consistent with the provisions inserted by this Act.

Paragraph 6(k) is a consequential amendment to subsection 10(8) of the Principal Act. Subsection 10(8) permits the Minister to exempt certain goods from countervailing duty; the consequential amendment ensures the Minister is also empowered to exclude these goods from interim countervailing duty as well.

Paragraph 6(l) is a similar consequential amendment to subsection 10(9) of the Principal Act, also reflecting the fact that the exemption from countervailing duty also includes an exemption from interim countervailing duty.

### Third country countervailing duties

Clause 7 amends section 11 of the Principal Act to provide for the new method of imposing third country countervailing duties. Third country countervailing duties are imposed where the Minister is satisfied that goods have had financial assistance in the form of a relevant subsidy, and because of the subsidy, material injury to a producer or manufacturer of like goods in a third country has been caused or threatened. In such a case the Minister may be requested by the Government of that third country to declare that section 11 of the Principal Act applies to the subsidised goods already exported to Australia, and to like goods exported to Australia in the future. As outlined previously, the new method of imposition of third country countervailing duties involves the following:

- . after being satisfied that goods exported to Australia have had a relevant subsidy paid on them and because of the relevant subsidy, material injury has been caused to a third country's industry producing like goods, the Minister may, by notice published in the Gazette, declare that section 11 of the Principal Act applies to the subsidised goods already exported to Australia (subsection 269TK(1) of the Customs Act 1901 refers) and to like goods exported to Australia in the future (subsection 269TK(2) the Customs Act 1901 refers);
- . the notice pursuant to new subsection 269TK(5) (introduced by section 14 of the Dumping Legislation Act) must contain the amounts that the Minister ascertains (either in the original notice or after a review pursuant to new Division 5 in Part XVB of the Customs Act 1901) to be the relevant subsidy and non-injurious price of goods of that kind, unless the confidentiality provision in new subsection 269TK(6) (contained in section 14 of the Dumping



Legislation Act) apply, in which case the Minister will not make these amounts public but will have still ascertained them;

- . the interim duty is then collected in accordance with these figures, regardless of the actual amount of subsidy paid on the goods in the particular shipment; and
- . after application to Customs under the provisions of new Division 4 of Part XVB of the Customs Act 1901, introduced by section 15 of the Dumping Legislation Act, for a duty assessment, the Minister ascertains the relevant subsidy and the export price pertaining to each consignment of goods in the relevant importation period and this may result in the repayment of some of the interim duty paid in circumstances where the total duty payable for a particular importation period is less than the total amount of interim duty actually collected.

Paragraph 7(a) of this Act omits the present subsections 11(3), 11(4), 11(5), 11(5A), 11(5B), 11(6) and 11(7) and introduces new subsections 11(1), 11(2), 11(3), 11(4), 11(5), 11(6), 11(7), 11(7A) and 11(7B) which implement the proposed policy as follows:

new subsection 11(1) specifies that the special duty of Customs imposed on goods by virtue of a notice under subsection 269TK(1) or (2) of the Customs Act 1901 is a third country countervailing duty (not an interim third country countervailing duty).

new subsection 11(2) enables the imposition and collection of an interim third country countervailing duty on goods the subject of a notice under section 269TK(1) or (2) of the Customs Act 1901, pending the Minister's final assessment of third country countervailing duty payable on those goods.

new subsection 11(3) specifies that the amount of interim third country countervailing duty payable on goods the subject of a 269TK(1) or (2) notice is the amount of the relevant subsidy paid on the goods as ascertained by the Minister for the purposes of the 269TK(1) or (2) notice. That is, irrespective of the actual subsidy paid on those goods the interim third country countervailing duty applicable to goods is in accordance with the figures the Minister has established in the notice.

Similar to the new dumping and countervailing

regimes, in ensuring this scheme is both consistent with the GATT and delivers the necessary assistance to the Australian industry there are a number of refinements necessary.

New subsection 11(4), ensures that the interim third country countervailing duty is to be levied on an ad valorem basis or levied as a price per quantity or as a combination of the two.

New subsection 11(5) provides a refinement to the proposed scheme to ensure GATT consistency.

Article 4.1 of the GATT Subsidies Code states that it "... is desirable that ... the [countervailing] duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury". New subsection 11(3) provides this by ensuring that the Minister, when deciding how much third country countervailing duty should be imposed, must have regard to the desirability of imposing a lesser amount of duty than the full amount of subsidy if that lesser duty would be sufficient to remove the injury to the third country's industry.

- . It should be noted that the decision to impose a lesser amount of duty is at the discretion of the Minister - the Minister cannot impose more than the amount of subsidy, but may impose less if that lesser amount would be sufficient to remove the injury.

New subsection 11(6) is the standard notification provision to ensure the notice signed under 11(4) is published in the Gazette unless the Minister considers that the notice would adversely affect the business or commercial interests of any person.

New subsection 11(7) specifies the amount of third country countervailing duty payable as follows:

if the Minister did not have reference to the NIP when imposing the interim duty, then the third country countervailing duty payable in respect of particular goods is the relevant subsidy paid on the goods (new paragraph 11(7)(a)).

If the Minister did have reference to the NIP when imposing the interim duty, then the third country countervailing duty payable in respect of particular goods is the difference between the amount that the Minister ascertains to be the export price of the particular goods

and the lower of the NIP or the sum of the export price and the subsidy relating to the particular goods.

- . Similar to the ascertainment of dumping duty payable, the NIP for the ascertainment of third country countervailing duty actually payable is the NIP specified in the 269TK notice; the Minister does not ascertain a NIP for the particular goods.

New subsection 11(7A) allows the notice under new subsection 11(4) to be retrospective to cover the notice published under subsection 269TK(1), but specifies that the period of time covered by the 269TK(1) notice cannot be a time covered by an earlier 269TK(2) notice - that is, 11(7A) ensures that there cannot be two 269TK notices in force in respect of the same goods at the same time.

New subsection 11(7B) specifies that where the Minister cannot get adequate information to ascertain the level of subsidy for the purposes of subsection 269TK(1) or (2), the Minister can determine the level of subsidy.

Paragraph 7(b) is a consequential amendment to subsection 11(8) of the Principal Act. Subsection 11(8) permits the Minister to exempt certain goods from third country countervailing duty; the consequential amendment ensures the Minister is also empowered to exclude those goods from interim third country countervailing duty.

Paragraph 7(c) is a similar consequential amendment to subsection 11(9) of the Principal Act, also reflecting the fact that the exemption from third country countervailing duty includes an exemption from interim third country countervailing duty.

### Transitional

- Clause 8 gives effect to the policy that the proposed new scheme of imposing and collecting interim dumping and countervailing duties pending their final assessment, is to apply to dumping or countervailing duty notices published by the Minister after the commencement of the proposed new scheme.





