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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (NO.3) 1989

EXPLANATORY MEMORANDUM

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

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (NO.3) 1989

OUTLINE

This Bill is an omnibus measure, proposing amendments to the Customs Act 1901, the Excise Act 1901 and the Customs Administration Act 1985.

The Principal amendments in the Bill relate to the Diesel Fuel Rebate Scheme, and implement changes to that Scheme to improve its administration and correct some anomalies in the coverage of activities eligible for rebate announced by the Government on 3 March 1989.

In brief, the changes to the diesel fuel rebate scheme will :

- . permit the Comptroller-General of Customs to waive recovery of overpaid diesel fuel rebate in circumstances where the rebate has been paid in good faith, but as a result of a subsequent Court, Tribunal, or Attorney-General's decision or advice the rebate should not have been so paid, (Clauses 7 and 17);
- . remove some anomalies in the coverage of off-road operations eligible for rebate; in particular, fishing, forestry, and certain mining operations (Clause 5);
- . permit the review by the Administrative Appeals Tribunal of certain decisions of the Comptroller-General or a Collector of Customs to require the repayment of rebate (Clauses 10 and 19) ; and
- . permit the setting-off of amounts of rebate owed by claimants to the Commonwealth against money owed by the Commonwealth to those claimants (Clauses 8 and 18).

Financial Impact Statement

The removal of certain anomalies in the coverage of activities eligible for diesel fuel rebate under the scheme, effected by Clause 5 of the Bill, is expected to result in additional outlays per annum of \$20 million, as follows :

- . the additional fishing operations now eligible under the scheme will cost \$5 million,

- . the additional forestry operations now eligible under the scheme will cost \$3 million,
- . the additional mining operations now eligible under the scheme will cost \$12 million.

The remaining provisions of the Bill have no direct financial impact.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Short Title

Clause 1 provides for the citation of this Act as the Customs and Excise Legislation Amendment Act (No.3) 1989.

Commencement

Clause 2 provides for the Act to commence on the day on which it receives the Royal Assent (subclause 2(1)), with the exception of:

- Paragraphs 5(1)(c) - (g) (inclusive), which clarify certain activities that may receive rebate under the diesel fuel rebate scheme. These provisions commence operation on 3 March 1989, the date proposed by the Government in its announcement of that date ;
- clauses 6 and 16, which provide a capacity for claimants to pay a prescribed penalty rather than face prosecution in certain circumstances, and clauses 8 and 18, which oblige the Comptroller to set off monies owed by claimants to the Commonwealth under the diesel fuel rebate scheme against money owed by the Commonwealth to the claimants, will commence operation 28 days after the date of Royal Assent.

PART 2 - AMENDMENTS OF THE CUSTOMS ACT 1901

Principal Act

Clause 3 identifies the Customs Act 1901 as the Principal Act amended by this Part of the Bill.

Interpretation

Clause 4 amends section 4 of the Principal Act, by inserting a definition for the term "approved

form", a term frequently used in Customs legislation. The form is defined to mean one which is approved in writing by the Comptroller-General of Customs.

Rebate of duty in respect of diesel fuel used for certain purposes

Clause 5 amends section 164 of the Principal Act to clarify certain off-road uses of diesel fuel which are eligible to receive assistance under the diesel fuel rebate scheme (the "DFRS") as follows :

Subclause (1);

- paragraphs 5(1)(c),(d) and (f) provide for the DFRS to be amended to make eligible for rebate certain road making and maintenance operations in a forest or plantation which are integral to eligible forestry activities. In addition the milling of timber at a chipmill not situated in a forest or plantation (and the transporting of timber from the forest or plantation to the chipmill) is to be eligible to receive rebate ;
- paragraph 5(1)(g) provides that operations connected with the dressing or beneficiation of minerals (or ores bearing minerals) that are carried out in, or at a place adjacent to, the area in which the dressing or beneficiation occurs and where the dressing or beneficiation occurs as an integral part of operations for the recovery of minerals (eg the construction of beneficiation plants, leech dams &c) will now clearly be eligible to receive rebate ;
- paragraph 5(1)(e) provides that outward voyages by dedicated mother ships, gear trials, voyages to and from a port and fish farming i.e. operations pertinent to the operation of fishing as a primary industry, are uses that attract rebate of customs duty under the DFRS. The changes clarify however that rebate is not

available for recreational, sporting or tourist fishing operations.

paragraph 5(1)(a) and (b) effectively amend subsection (1), to permit a person to claim a rebate of diesel fuel duty after the duty has been paid, irrespective of whether the duty was paid before or after the diesel fuel was purchased;

- this proposed amendment will correct an apparant weakness in the current legislation, where it is alleged "rebate" of duty can only be paid when the product is duty paid prior to the purchase of the product by the rebate claimant,
- this amendment shall not affect applications for diesel fuel rebate lodged prior to the commencement of these paragraphs (ie - the date of Royal Assent) (Subclause (2));

Subclause (3) provides that where, at any time after 3 March 1989 a person has had an application for rebate refused, or has been required to pay back an amount of rebate because the use to which the diesel fuel was put was not then, but is now, eligible to receive assistance because of the amendments to the DFRS contained in subclause (1), the Commonwealth will be obliged to either pay the applicant the amount of rebate claimed, or refund to the applicant any amount of money the applicant repaid the Commonwealth.

Diesel fuel rebate - payment of penalty in lieu of prosecution

Clause 6 Adds a new subsection 164AA(1A) to provide that where a person makes a false or misleading statement in an application for rebate (paragraph (b)), or omits from the application information that makes the application false or misleading, the Comptroller may serve on the applicant a notice setting out particulars as to why the statement was false, and require the person to

repay the amount of rebate wrongly paid (if any), together with a penalty of 3 times the amount by which the amount applied for exceeds the rebate which is properly due, with such a penalty being not less than \$100, and not more than \$5,000.

The new subsection (2) provides that where a person pays the amount sought in a notice issued pursuant to section 164AA of the Principal Act within 21 days, the Comptroller will not proceed to prosecute the person for an offence under either section 164A of the Principal Act (where the person has failed to notify a Collector of selling the fuel, or under section 234 of the Principal Act, where the person has made a claim in circumstances where rebate is not payable).

- . Should the person believe that he or she did not attempt to obtain rebate which is not payable, or knowingly or recklessly make a false or misleading statement in the rebate application, the person is not obliged to pay the penalty demanded; the Australian Customs Service could then prosecute the person in Court, thus being required to prove its case on the criminal onus; however, should the person be found guilty, he or she is liable to a much higher penalty (ie - up to 5 times the rebate (234(2)(b) or 2 times that amount (234(3))).
- This measure is instituted in an endeavour to, ensure that taxpayers scarce resources are not misused, and mirrors the existing subsection 164A(1), which imposes a similar sanction where rebate has already been paid to the claimant, in circumstances that might constitute an offence against paragraph 234(1)(b)
- .. This provision will commence operation 28 days after the day of Royal Assent.

Short paid duty etc. may be recovered

- Clause 7 amends section 165 of the Principal Act, to
- . remove the responsibility of issuing notices for the repayment of duty short paid, or for the repayment of erroneous refunds or rebates of duty, from "Collectors" (that is, ordinary officers of the Australian Customs Service) and vests the responsibility with the Comptroller-General of Customs.
 - As from the day of Royal Assent, only officers of Customs who have been specifically delegated by the Comptroller with this responsibility will be able to issue these notices. (paragraphs (a) and (b)); and
 - . provide that where a Court or the Administrative Appeals Tribunal has decided, or an opinion from a lawyer from the Attorney-General's Department advises, that rebate should not have been paid to a person in a particular circumstance, then any person who has been paid rebate in that circumstance will not be obliged to repay that rebate.
 - In certain circumstances, whilst both the ACS and claimants may erroneously believe that as a matter of law, a particular use of diesel fuel may allow customs duty to be rebated under the DFRS, it may ultimately be determined as a matter of law that the use is not. In those circumstances, the Comptroller is obliged under the Audit Act 1901 to recover the monies erroneously paid out. The Government believes that in the circumstances where claimants have made their application in good faith, and the ACS has paid the rebate, it is undesirable to oblige the

claimant to repay the duty. Accordingly, this amendment to the law is made to preclude the Comptroller-General from demanding the repayment of the erroneously paid rebate. (new subsection 165(4)). The only exceptions to this provision are persons who are subsequently convicted of an offence under the Act, or have paid an amount of penalty pursuant to section 164AA of the Principal Act.

Diesel fuel rebate scheme set-offs

Clause 8 adds a new section 165A to the Principal Act to provide that where a person is obliged to repay amounts of diesel fuel rebate under subsection 164(2) or subsection 165(3) of the Principal Act, the Comptroller is obliged to set-off the amount owed against any amount that is due to the person at that time under the DFRS, that is, reduce that later payment by the amount owed (subsection (1)) ;

. The new subsection (3) provides that where a person has challenged a decision to repay amounts of rebate in the Administrative Appeals Tribunal, the Comptroller will not "set off" any amounts until that question has been determined.

- This regime has been proposed following approaches from claimants seeking an efficient method to offset amounts of money that may become due to the Commonwealth following (for example) an overpayment of rebate, against rebate that is owed to the claimant by the Commonwealth.

Disputes as to amount or rate of duty

Clause 9 amends section 167 of the Principal Act to remove any doubt that a decision of the Minister to impose dumping duties pursuant to the Customs Tariff (Anti-Dumping) Act 1975 may not be "paid under protest", and thus become reviewable by the Administrative Appeals Tribunal.

. Any preliminary finding of dumping by the Australian Customs Service is already reviewable on its merits by an independent organisation, the Anti-Dumping Authority, prior to the Minister imposing dumping duties. Accordingly, it is considered an unnecessary duplication for a decision to impose dumping duties to be examined again on its merits by the Administrative Appeals Tribunal after the Minister imposes such duty.

- The lawfulness of a decision to impose dumping duties may still be challenged pursuant to the Administrative Decisions (Judicial Review) Act 1978.

Review of Decisions

Clause 10 amends section 273GA of the Principal Act to provide that a decision of the Comptroller to recover rebate erroneously paid (subsection 165(3) (new paragraph 273GA(ja)) or to demand that a person repay rebate because the diesel fuel has been used for a purpose other than a reason for which rebate is payable (subsection 164(2) (new paragraph 273GA(haa)), may be reviewed on its merits by the Administrative Appeals Tribunal.

PART 3 - AMENDMENTS TO THE CUSTOMS ADMINISTRATION ACT 1985Principal Act

Clause 11 identifies the Customs Administration Act 1985 as the Act being amended by this Part of the Bill.

Delegation

Clause 12 amends section 14 of the Principal Act to provide that the Comptroller-General of Customs may only delegate powers to officers of the Australian Customs Service.

- . Currently, the Comptroller-General may delegate powers to "any person".

- This amendment acquits an undertaking given to the Senate Standing Committee for the Scrutiny of Bills (reported in the 16th Report for 1988 of that Committee dated 30 November 1988) to restrict this power of delegation, consistent with recent legislative drafting practice.

PART 4 - AMENDMENTS OF THE EXCISE ACT 1901

Principal Act

Clause 13 identifies the Excise Act 1901 as the Act being amended by this Part of the Bill.

Interpretation

Clause 14 amends section 4 of the Principal Act by inserting a new definition for "approved form", similar to that amendment proposed in Clause 4.

Rebate of duty in respect of diesel fuel used for certain purposes

Clause 15 amends subsection 78A(1) of the Principal Act to effectively permit a person to claim a rebate of diesel fuel duty after the duty has been paid, irrespective of whether the duty was paid before or after the diesel fuel was purchased ;

- . The amendments are identical to those in Clause 5, paragraphs 1(a) and (b).

- . The amendments to correct various anomalies in certain diesel fuel

off-road uses (Clause 5, paragraphs (c) to (g)) are effectively made in this Act by virtue of the operation of 78A(7) of the Act.

Diesel fuel rebate - payment of penalty in lieu of prosecution

Clause 16 adds a new subsection 78AA(1A) to provide a sanction for the making of a false or misleading statement in an application for diesel fuel rebate.

- . This provision is cast in identical terms, and inserted for the reasons discussed in Clause 6.

Recovery of overpayments of refunds, rebates or drawbacks

Clause 17 amends section 80 of the Principal Act to :

- . remove the responsibility of issuing notices for the repayment of erroneous refunds or rebates of duty from "Collectors" (that is, ordinary officers of the Australian Customs Service) and vests the responsibility with the Comptroller-General of Customs.
 - As from the day of Royal Assent, only officers of Customs who have been specifically delegated the responsibility will be able to issue these notices. (paragraphs (a) and (b));and
- . provide that where a Court or the Administrative Appeals Tribunal has decided, or an opinion from a lawyer from the Attorney-General's Department advises, that rebate should not have been paid to a person in a particular circumstance, then any person who has been paid rebate in that circumstance will not be obliged to repay that rebate.
 - This provision is cast in identical terms, and inserted for the reasons discussed in Clause 7

Diesel fuel rebate scheme set-offs

Clause 18 adds a new section 80A to the Principal Act to provide that the Comptroller shall set-off amounts of money claimants are obliged to pay the Commonwealth pursuant to subsections 78A(2) and 80(2) of the Principal Act against amounts of rebate a person is entitled to receive under the DFRS (subject to any challenge to the Administrative Appeals Tribunal of the decision to require the rebate to be repaid.

. This provision is cast in identical terms, and inserted for the reasons discussed in Clause 8

Review of Decisions

Clause 19 amends section 162C of the Principal Act to provide that a decision of the Comptroller to recover rebate erroneously paid (subsection 165(3) (new paragraph (fb)); or demand that a person repay rebate because the fuel has been used for a purpose other than a reason for which rebate is payable (subsection 78A(2)), (new paragraph (faa)) is reviewable by the Administrative Appeals Tribunal.

Transitional

Clause 20 provides that where, at any time after 3 March 1989, a person has had an application for rebate refused, or has been required to pay back an amount of rebate because the use to which the diesel fuel was put was not then, but is now, eligible to receive assistance because of the amendments to the DFRS contained in Clause 5 (above), the Commonwealth will be obliged to either pay the applicant the amount of rebate claimed, or refund the amount of money the applicant was obliged to pay back to the Commonwealth.

