

2010-2011-2012-2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS AMENDMENT (ANTI-DUMPING COMMISSION) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Home Affairs,
the Honourable Jason Clare MP)

CUSTOMS AMENDMENT (ANTI-DUMPING COMMISSION) BILL 2013

OUTLINE

1. The purpose of this Bill is to amend the *Customs Act 1901* (the Act) to establish the Anti-Dumping Commission.
2. The Anti-Dumping Commission will be established within the Australian Customs and Border Protection Service and will consist of:
 - the Commissioner, and
 - staff assisting the Commissioner made available by the CEO of Customs.
3. The Commissioner will be given the existing powers and functions of the CEO which relate to anti-dumping matters contained in Part XVB of the *Customs Act 1901*.
4. The amendments in this Bill will deal with the establishment of the Commission and the appointment of the Commissioner.

FINANCIAL IMPACT STATEMENT

Nil.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

CUSTOMS AMENDMENT (ANTI-DUMPING COMMISSION) BILL 2013

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill will establish the Anti-Dumping Commission, including the Commissioner, within the Australian Customs and Border Protection Service.

Human rights implication

The Bill does not raise any human rights issues. No new powers, functions or duties will be imposed on the Commission or the Commissioner by this legislation. Instead, existing legislative powers contained in Part XVB of the *Customs Act 1901* will be transferred from the CEO to the Commissioner.

Conclusion

The Bill is compatible with human rights as it does not raise any human rights issues.

The Minister for Home Affairs, the Honourable Jason Clare MP

CUSTOMS AMENDMENT (ANTI-DUMPING COMMISSION) BILL 2013

NOTES ON CLAUSES

Clause 1 – Short title

1. This clause provides for the Bill, when enacted, to be cited as the *Customs Amendment (Anti-Dumping Commission) Act 2013*.

Clause 2 - Commencement

2. This clause provides for the Bill to commence on 1 July 2013.

Clause 3 – Schedule(s)

3. This clause is the formal enabling provision for the Schedule to the Bill, providing that each Act specified in a Schedule is amended in accordance with the applicable items of the Schedule. In this Bill the Act being amended is the *Customs Act 1901*.
4. The clause also provides that the other items of the Schedules have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation. In this Bill there is an application provision in item 2 of Schedule 1.
5. For ease of description, this explanatory memorandum uses the following abbreviation:

‘Administration Act’ means the *Customs Administration Act 1985*.

Schedule 1 – Amendments

Part 1 – Amendments

Customs Act 1901

Items 1, 4, 5 and 6 – definition of Commissioner

1. Currently, the Customs Act defines **Commissioner** as the Commissioner of Taxation. Item 1 will repeal the current definition of Commissioner and substitute it with a definition which defines Commissioner as the Commissioner of the Anti-Dumping Commission established under section 269SMB.
2. Items 4, 5 and 6 will omit and substitute the references to Commissioner with Commissioner of Taxation.

Items 2 and 3 –section 9

3. Subsection 9(1) allows the Minister to delegate to an officer of Customs all or any of the functions and powers of the Minister under the Customs Acts. Item 1 will amend section 9 to provide the Minister may delegate to the Commissioner, who is not an officer of Customs, all or any of the functions and powers of the Minister under Part XVB.
4. Despite subsection 9(1), subsection 9(4) does not allow the Minister to delegate the Minister's powers and functions conferred by provisions listed in that subsection. This includes powers and functions contained in Part XVB. Item 3 will amend subsection 9(4) consequential to the amendment made by item 2 to ensure the restriction on delegation of some of the Minister's powers and functions will also extend to the delegation of powers and functions to the Commissioner.

Item 7 – After subsection 269SM(2)

5. This item amends the overview of Part XVB contained in section 269SM to include a reference to new Division 1A which is being inserted to item 8.

Item 8 – Before Division 1 of Part XVB

6. This item inserts new Division 1A of Part XVB which will establish the Anti-Dumping Commission and the Commissioner.

The Anti-Dumping Commission

7. The Anti-Dumping Commission will consist of the:
 - the Commissioner; and
 - any staff assisting the Commissioner made available to the Commissioner by the CEO of Customs.

8. New Subdivision A will contain new section 269SMA which provides a brief overview of new Division 1A.
9. New Subdivision B provides for the Anti-Dumping Commission.
10. New section 269SMB establishes the Anti-Dumping Commission. The Anti-Dumping Commission is to be established within the Australian Customs and Border Protection Service.
11. New section 269SMC provides that the Anti-Dumping Commission is to consist of:
 - the Commissioner; and
 - staff assisting the Commissioner made available by the CEO of Customs.
12. Staff assisting the Commissioner will be Officers of Customs; however, they will report to the Commissioner in respect of all matters for which the Commissioner is responsible.
13. New section 269SMD provides that the Anti-Dumping Commission's function is to assist the Commissioner in the performance of his or her functions or the exercise of his or her powers.
14. The Anti-Dumping Commission will enjoy the same privileges and immunities as the Crown under section 269SME. The Anti-Dumping Commission will be legally and financially part of the Commonwealth and this provision will confer on the Anti-Dumping Commission the non-statutory privileges and immunities of the Crown.

The Commissioner

15. New Subdivision C creates the role of, and sets out matters in relation to, the Commissioner.
16. New section 269SMF establishes the role of the Commissioner. The Commissioner is to have the powers and functions conferred on him or her by the Bill or any other law. The Bill will confer on the Commissioner all of the powers contained in Part XVB of the Act.
17. New section 269SMG provides that the Commissioner has the power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions.

Terms and conditions of appointment

18. The Bill sets out the terms and conditions of the Commissioner's appointment.
19. The Commissioner will be appointed by the Minister on either a full-time or part time basis (new section 269SMH) for a period specified by the Minister which must not exceed 5 years (new section 269SMI).

20. New section 269SMJ allows the Minister to appoint an Acting Commissioner:
- during a vacancy in the office of the Commissioner; or
 - during any period, or during all periods, when the Commissioner is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
21. A note at the end of the section refers to sections 33AB and 33A of the *Acts Interpretation Act 1901* which contain rules that apply to acting appointments.
22. New subsection 269SMK(1) provides the Commissioner holds the office on the terms and conditions determined in writing by the Minister. The terms and conditions determined by the Minister will include such matters as remuneration and leave entitlements.
23. Guidance on the level of remuneration that is appropriate for the Commissioner's role was provided in the '*Review into Anti-Dumping Arrangements*' by the Hon John Brumby. While the Commissioner's actual terms and conditions (including remuneration) will be set by the Minister for Home Affairs, the Minister will seek the Remuneration Tribunal's advice to ensure that they are commensurate with those received by statutory office holders occupying similar positions.
24. New subsection 269SMK(2) clarifies that the office of the Commissioner is not a public office for the purposes of Part II of the *Remuneration Tribunal Act 1973*. This provision clarifies that the position does not fall within the scope of the *Remuneration Tribunal Act 1973* and instead allows the Minister to determine the terms and conditions of the Commissioner.
25. New section 269SML requires the Commissioner to disclose to the Minister, in writing, all interests, pecuniary or otherwise, that the Commissioner has or acquires and that conflict or could conflict with the proper performance of the Commissioner's functions.
26. New section 269SMM provides for outside employment. Where the Commissioner is appointed on a full-time basis, the Commissioner must not engage in paid employment outside the duties of his or her office without the Minister's approval. Where the Commissioner is employed on a part-time basis the Commissioner will be able to engage in other paid employment but must not engage in any paid employment which, in the Minister's opinion, conflicts or may conflict with the proper performance of the Commissioner's duties.
27. The Commissioner may resign from the office by giving the Minister a written resignation (new section 269SMO).
28. New section 269SMO provides the Minister may terminate the Commissioner's appointment in certain circumstances. The Minister may terminate the appointment of the Commissioner:
- for misbehaviour or incapacity (either mental or physical); or
 - if the Commissioner:

- becomes bankrupt;
 - applies for bankruptcy;
 - compounds with his or her creditors; or
 - assigns his or her remuneration for the benefit of creditors; or
- if the Commissioner is absent without a leave of absence for 14 consecutive days or for 28 days in a 12 month period;
 - if the Commissioner fails, without reasonable excuse, to disclose any interests as required by section 269SML; or
 - if the Commissioner is employed on a full-time basis and engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - if the Commissioner is engaged on a part-time basis and engages in paid employment that, in the Minister's opinion, conflicts or may conflict with the proper performance of his or her duties.

29. New section 269SMO is included to ensure that the Commissioner is able to perform his or her duties without interference, while acknowledging that there may be circumstances where it is both appropriate and warranted for the Commissioner to be replaced to ensure the proper function of the Anti-Dumping Commission.

30. New section 269SMP will allow the Commissioner to delegate any of his or her functions or powers to an officer of customs. Officer of Customs is defined in subsection 4(1) of the Act. Delegation to an officer of customs is consistent with existing practice and the CEO of Customs powers of delegation under the Administration Act.

31. Delegates must comply with any written directions provided by the Commissioner.

Staff assisting the Commissioner

32. New subdivision D contains provisions concerning the staff assisting the Commissioner.

33. The Commissioner will be assisted by staff made available to the Commissioner by the CEO of Customs.

34. New section 269SMQ provides that the staff assisting the Commissioner are to be staff referred to in section 15 of the *Customs Administration Act 1985* (the Administration Act), that is, persons engaged under the *Public Service Act 1999*, made available to the Commissioner by the CEO.

35. New subsection 269SMQ(2) provides that when performing services for the Commissioner, a staff member is subject to directions of the Commissioner.

Item 9 – Division 1 of Part XVB (heading)

36. Item 9 repeals and substitutes the heading to Division 1 of Part XVB changing the title from 'Preliminary' to 'Definitions and role of Minister.' This better describes the provisions contained in Division 1.

Items 10, 11, 12, 13 and 14 – Part XVB

37. The amendments made by these items will replace the references to the CEO with references to the Commissioner in Part XVB transferring the CEO's powers and functions under that Part to the Commissioner.

Customs Administration Act 1985

38. Items 15 to 19 make consequential amendments to the Administration Act.

Item 15 – Section 3

39. Item 15 will insert a definition of Commissioner into the Administration Act. Commissioner means the Commissioner of the Anti-Dumping Commission established under section 269SMB of the Act.

Items 16 and 17 – Section 4

40. Items 16 and 17 will amend section 4 of the Administration Act, which defines the Australian Customs and Border Protection Service, to include a reference to the Commissioner and clarify the Commissioner exercises the powers and functions under Part XVB of the Act.

Item 18 – After subsection 14(4)

41. Item 18 amends section 14, concerning delegation by the CEO of all or any of the CEO's functions and powers under a law of Customs, to allow the CEO to delegate to the Commissioner any of the powers of the CEO under section 16 of the Administration Act, to the extent those powers apply in connection with Part XVB of the Act.

42. Section 16 of the Administration Act prohibits the unauthorised recording or disclosure of certain information except in the certain circumstances. Section 16 allows the CEO to authorise the disclosure of information in the circumstances contained in that section. Item 18 will allow the CEO to delegate to the Commissioner the ability to authorise the disclosure of information relevant to the Commissioner's exercise of powers and functions under Part XVB of the Act.

Item 19 – After paragraph 16(1AA)(a)

43. Item 19 will insert a reference to the Commissioner into subsection 16(1AA) of the Administration Act to provide that section 16 will also apply to the Commissioner.

Part 2 –Other amendments

Criminal Code Act 1995

Item 20 – Item 146.1

This item amends the definition of Commonwealth law enforcement to include a reference to the Commissioner. This definition is relevant to Part 7.8 of the Criminal Code and flows on to the offences of causing harm to public officials and threatening to cause harm to a Commonwealth public official contained in items 146.1 and 147.1 respectively. Causing harm to or threatening a Commonwealth law enforcement officer attracts a higher maximum penalty (13 years instead of 10 years) under these provisions.

The definition of Commonwealth law enforcement officer includes the Chief Executive Officer of Customs and a person employed in the Customs. Adding a reference to the Commissioner will ensure the Commissioner is treated consistently with the CEO and a person employed in Customs.

Law Enforcement Integrity Commissioner Act 2006

Item 21 – After paragraph 10(2A)(a)

This item will amend the definition of *Customs staff members* to include a reference to the Commissioner. This amendment will ensure the Commissioner comes within the scope of the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity consistent with the CEO of Customs and Customs officers.

Part 3–Transitional provisions

44. The items in this Part will contain the necessary provisions to transition the powers and functions in Part XVB of the Act currently exercised by the CEO to the Commissioner.

Item 20 – Transitional–things done by, or in relation to, CEO

45. Subitem 20 provides that things done by, or in relation to, the CEO under Part XVB before the commencement of item 20 will have effect, after item 20 has commenced, as though it has been done by, or in relation to, the Commissioner.

46. New subitem 20(2) allows the Minister to determine in writing that subitem 20(1) does not apply in relation to a specified thing.

47. New subitem 20(3) clarifies that a determination by the Minister under subitem 35(2) is not a legislative instrument. This provision is included to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 21 – Transitional–legal proceedings involving the CEO

48. Item 21 provides that if any proceedings relating to Part XVB to which the CEO was a party were pending in any court or tribunal immediately before the commencement of item 21, the Commissioner is substituted for the CEO as a party from the date of commencement of item 21.

Item 22 – Transitional regulations

49. Item 60 allows the Governor-General to make regulations prescribing matters of a transitional nature relating to the amendments contained in Schedule 1.