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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PRODUCT STEWARDSHIP (OIL) AMENDMENT BILL 2020

EXCISE TARIFF AMENDMENT BILL 2020

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment,
the Honourable Sussan Ley MP)

PRODUCT STEWARDSHIP (OIL) AMENDMENT BILL 2020

EXCISE TARIFF AMENDMENT BILL 2020

OUTLINE

The *Product Stewardship (Oil) Act 2000* (the PSO Act) establishes the Product Stewardship for Oil Scheme (PSO Scheme) to encourage the environmentally sustainable management and re-refining of used lubricant base oils and fluid base oils and greases by providing an incentive for oil and grease recyclers to collect and recycle such used oils and greases in Australia.

The *Excise Tariff Act 1921* (the Excise Tariff Act) imposes liability for excise duty on fuels, oils and greases. Excise duty applies to the manufacture in Australia of oils and greases and their synthetic equivalents. Excise-equivalent customs duty similarly applies under the *Customs Tariff Act 1995* (the Customs Tariff Act) to the importation of such products. Duty collected on oils and greases under the Excise Tariff Act and the Customs Tariff Act fund benefits paid under the PSO Scheme.

The Federal Court's Decision in *Caltex Petroleum Pty Ltd v Commissioner of Taxation* [2019] FCA 1849 (the Caltex case) gave a broad interpretation of the definition of *oils* in the PSO Act that included diesel. The effect of the decision was to allow benefit payments for the recycling of goods for which excise and excise-equivalent customs duty had not been imposed under the Excise Tariff Act and Customs Tariff Act as an oil. Another potential consequence of the Caltex case is that the duty collected under the Excise Tariff Act to fund the PSO Scheme could apply to diesel.

The purpose of the Product Stewardship (Oil) Amendment Bill 2020 (PSO Amendment Bill) and the Excise Tariff Amendment Bill 2020 (the Excise Tariff Amendment Bill) is to address the issues arising from the Caltex case by:

- (a) amending the definition of *oils* in the PSO Act to apply to lubricant oils, fluid oils and other oils and greases manufactured from base oils only to reflect the original intention of the PSO Scheme, which excludes diesel and other fuels; and
- (b) amending item 15 of the Schedule to the Excise Tariff Act to narrow the scope of petroleum-based oils and synthetic equivalents for which excise duties are imposed for the purposes of the PSO Scheme to exclude diesel and other fuels. Item 15 was inserted into the Excise Tariff Act for the purpose of levying oils for the PSO Scheme and did not historically include duties on diesel and other fuels. Diesel and other fuels will continue to be subject to excise duty under other items in the Schedule to the Excise Tariff Act.

FINANCIAL IMPACT STATEMENT

The Bills are estimated to reduce the Commonwealth's underlying cash balance by \$4 million over the forward estimates to 2023-24. This is based on a reduction in payments of benefits resulting in a saving of \$21 million and a reduction in excise collections of \$25 million.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Product Stewardship (Oil) Amendment Bill 2020

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 *Product Stewardship (Oil) Act 2000* (the PSO Act) establishes the Product Stewardship for Oil Scheme (PSO Scheme) to encourage the environmentally sustainable management and re-refining of used lubricant base oils and fluid base oils and greases by providing an incentive for oil and grease recyclers to collect and recycle such used oils and greases in Australia.

The *Excise Tariff Act 1921* (the Excise Tariff Act) imposes liability for excise duty on fuels, oils and greases. Excise duty applies to the manufacture in Australia of oils and greases and their synthetic equivalents. Excise-equivalent customs duty similarly applies under the *Customs Tariff Act 1995* (the Customs Tariff Act) to the importation of such products. Duty collected on oils and greases under the Excise Tariff Act and the Customs Tariff Act fund benefits paid under the PSO Scheme.

The Federal Court's Decision in *Caltex Petroleum Pty Ltd v Commissioner of Taxation* [2019] FCA 1849 (the Caltex case) gave a broad interpretation of the definition of *oils* in the PSO Act that included diesel. The effect of the decision was to allow benefit payments for the recycling of goods for which excise and excise-equivalent customs duty had not been imposed under the Excise Tariff Act and Customs Tariff Act as an oil. Another potential consequence of the Caltex case is that the duty collected under the Excise Tariff Act to fund the PSO Scheme could apply to diesel.

The purpose of the Product Stewardship (Oil) Amendment Bill 2020 (PSO Amendment Bill) is to address the issues arising from the Caltex case by amending the definition of *oils* in the PSO Act to apply to lubricant oils, fluid oils and other oils and greases manufactured from base oils only to reflect the original intention of the PSO Scheme, which excludes diesel and other fuels

The Excise Tariff Amendment Bill 2020 (the Excise Tariff Amendment Bill) will address issues arising from the Caltex case by amending item 15 of the Schedule to the Excise Tariff Act to narrow the scope of petroleum-based oils and synthetic equivalents for which excise duties are imposed for the purposes of the PSO Scheme to exclude diesel and other fuels. Item 15 was inserted into the Excise Tariff Act for the purpose of levying oils for the PSO Scheme and did not historically include duties on diesel and other fuels. Diesel and other fuels will continue to be subject to excise duty under other items in the Schedule to the Excise Tariff Act.

Human rights implications

The PSO Amendment Bill engages the right to an effective remedy in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR).

Article 2(3) of the ICCPR ensures that any person whose rights or freedoms are violated shall have an effective remedy, and that a person in claiming such a remedy shall have his or her rights determined by a competent judicial, administrative or legislative authority.

The PSO Amendment Bill amends the definition of oils, which in turn changes the types of recycled oils benefit payments that can be claimed for. Section 7 of the PSO Act provides that the Commissioner of Taxation has general administration of the PSO Act. The effect of section 7 is that the *Taxation Administration Act 1953* (TA Act) applies to the PSO Act as a taxation law. Paragraph 14ZZ(1)(b) of the TA Act allows for appeal to the Federal Court against the Commissioner's decisions. Therefore, a decision of the Commissioner of Taxation on whether to pay a benefit under the PSO Act may be subject to review under the provisions of the TA Act. As such, the Bill does not limit the right to an effective remedy in Article 2(3) of the ICCPR.

Conclusion

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

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Excise Tariff Amendment Bill 2020

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 *Excise Tariff Act 1921* (the Excise Tariff Act) imposes liability for excise duty on fuels, oils and greases. Excise duty applies to the manufacture in Australia of oils and greases and their synthetic equivalents. Excise-equivalent customs duty similarly applies under the *Customs Tariff Act 1995* (the Customs Tariff Act) to the importation of such products. Duty collected on oils and greases under the Excise Tariff Act and the Customs Tariff Act fund benefits paid under the Product Stewardship for Oil Scheme (PSO Scheme) which is established by the *Product Stewardship (Oil) Act 2000* (the PSO Act). The PSO Scheme encourages the environmentally sustainable management and re-refining of used lubricant base oils and fluid base oils and greases by providing an incentive for oil and grease recyclers to collect and recycle such used oils and greases in Australia.

The Federal Court's Decision in *Caltex Petroleum Pty Ltd v Commissioner of Taxation* [2019] FCA 1849 (the Caltex case) gave a broad interpretation of the definition of *oils* in the PSO Act that included diesel. The effect of the decision was to allow benefit payments for the recycling of goods for which excise and excise-equivalent customs duty had not been imposed under the Excise Tariff Act and Customs Tariff Act as an oil. Another potential consequence of the Caltex case is that the duty collected under the Excise Tariff Act to fund the PSO Scheme could apply to diesel.

The purpose of the Excise Tariff Amendment Bill 2020 (the Excise Tariff Amendment Bill) is to address the issues arising from the Caltex case by amending item 15 of the Schedule to the Excise Tariff Act to narrow the scope of petroleum-based oils and synthetic equivalents for which excise duties are imposed for the purposes of the PSO Scheme to exclude diesel and other fuels. Item 15 was inserted into the Excise Tariff Act for the purpose of levying oils for the PSO Scheme and did not historically include duties on diesel and other fuels. Diesel and other fuels will continue to be subject to excise duty under other items in the Schedule to the Excise Tariff Act.

The Product Stewardship (Oil) Amendment Bill (the PSO Amendment Bill) will address issues arising from the Caltex case by amending the definition of *oils* in the PSO Act to apply to lubricant oils, fluid oils and other oils and greases manufactured from base oils only to reflect the original intention of the PSO Scheme, which excludes diesel and other fuels.

Human rights implications

The Excise Tariff Amendment 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. This Bill does not engage any of the applicable rights or freedoms.

Conclusion

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

PRODUCT STEWARDSHIP (OIL) AMENDMENT BILL 2020

NOTES ON CLAUSES

Clause 1 – Short Title

1. This clause provides that the short title by which the Act may be cited is the *Product Stewardship (Oil) Amendment Act 2020*.

Clause 2 – Commencement

2. This clause provides that the Act will commence on the day after receiving the Royal Assent.

Clause 3 – Schedule

3. This clause provides that legislation specified in a Schedule is amended or repealed as set out in the Schedule and other items in the Schedule have effect according to their terms.

SCHEDULE 1

Item 1 – Subsection 6(1) – definition of *oils*

4. Under section 9 of the *Product Stewardship (Oil) Act 2000* (the PSO Act), a person is entitled to a product stewardship (oil) benefit for the sale or consumption of recycled oil that the person has recycled in Australia or for the consumption in Australia of gazetted oil for a gazetted use (gazetted oils and gazetted uses are set out in the *Product Stewardship (Oil) Declaration 2003*).
5. The definition of the term *oils* in subsection 6(1) sets out the type of oils covered by the Product Stewardship for Oil Scheme (the PSO Scheme), including petroleum based oils and their synthetic equivalents. Therefore, in order to be eligible for a benefit under the PSO Act, the recycled oil must have been of a type that met the definition of oils, in its pre-recycled and pre-used state, as set out in subsection 6(1) of the PSO Act.
6. The PSO Scheme was originally intended to be self-funding by offsetting the benefit payments to recyclers using revenue collected through the *Excise Tariff Act 1921* (the Excise Tariff Act) and the *Customs Tariff Act 1995* (the Customs Tariff Act) from refineries and oil importers. To achieve this intention, items were added to the Schedules of those Acts to impose duties on the import and manufacture of petroleum-based oils and their synthetic equivalents, intended to be the same types of oils as those covered by the PSO Scheme.
7. In *Caltex Petroleum Pty Ltd v Commissioner of Taxation* [2019] FCA 1849 (the Caltex case), the Court gave a broad interpretation of the definition of *oils* in the PSO Act, the effect of which was to allow benefit payments for the recycling of oils that were not subject to duties for the purposes of the PSO Scheme under the Excise Tariff Act and the Customs Tariff Act.
8. Item 1 repeals the definition of *oils* in subsection 6(1) of the PSO Act and substitutes it with a new definition of *oils*. Paragraphs (a) and (b) provide for an exhaustive list of petroleum

based oils and synthetic equivalents of petroleum based oils that are intended to be covered by the PSO Scheme. Paragraph (c) provides for the regulations to prescribe additional kinds of oils to be covered by the PSO Scheme. Paragraphs (d) to (f) specifically exclude diesel, blends of diesel with other goods, and goods ordinarily used as fuels from the definition of *oils*. Paragraph (g) provides the flexibility for the regulations to prescribe additional goods that are excluded from the definition of *oils*.

9. The note to the definition of *oils* clarifies the amendments made by item 1 are in response to the decision of the Federal Court of Australia in the Caltex case.

Item 2 – Application and saving provisions

10. Subitem 2(1) provides that the amendments made by the Schedule apply to claims for a product stewardship (oil) benefit in relation to the sale or consumption of recycled oil, or the consumption of gazetted oil, that occurs on or after the day of introduction of the Product Stewardship (Oil) Amendment Bill 2020 into the House of Representatives. This ensures that the proposed amendment to the PSO Act applies as soon as practical to clarify the operation of the PSO Scheme and ensure that the PSO Scheme operates consistently with the original policy intent that diesel is not considered to be an oil and hence was not intended to qualify for a benefit under the PSO Scheme. This application provision also aligns with the application provision in the Excise Tariff Amendment Bill 2020 (see subitem 2(1)). Because benefit payments under the PSO Scheme are funded by collected excise duties, the proposed amendments to both Bills should apply simultaneously to ensure the financial stability of the PSO Scheme.
11. Subitem 2(2) clarifies that subitem 2(1) does not apply to claims that were determined by the Commissioner of Taxation before the commencement date.
12. Under subsection 9(3) of the PSO Act, a person is entitled to a product stewardship (oil) benefit for the consumption of gazetted oil for a gazetted use in Australia. The definitions of *gazetted oil* and *gazetted use* in subsection 6(1) allows the Minister to declare certain oils to be a gazetted oil, and certain uses of gazetted oils as a gazetted use (as set out in the *Product Stewardship (Oil) Declaration 2003*). These uses are in manufacturing of a product or in a process that will not permit the oil to be recycled and constitute only a low risk to the environment.
13. Subitem 2(3) is a saving provision which ensures that the amendments made by the Schedule do not affect the validity of a declaration of *gazetted oil* or *gazetted use* under subsection 6(1) that was in force before the commencement date.

EXCISE TARIFF AMENDMENT BILL 2020

NOTES ON CLAUSES

Clause 1 – Short Title

1. This clause provides that the short title by which the Act may be cited is the *Excise Tariff Amendment Act 2020*.

Clause 2 – Commencement

2. This clause provides that the Act will commence on the day after receiving the Royal Assent.

Clause 3 – Schedule

3. This clause provides that legislation specified in a Schedule is amended or repealed as set out in the Schedule and other items in the Schedule have effect according to their terms.

SCHEDULE 1

Item 1 – Schedule (table item 15 to subitem 15.4)

4. Item 1 repeals item 15 of the Schedule to the *Excise Tariff Act 1921* (Excise Tariff Act) and substitutes it with an updated item 15. The effect of the amendment is to ensure that diesel, blends of diesel and other products for use as a fuel or that are ordinarily used as a fuel are not subject to excise duty under item 15 but rather are exclusively subject to duty under item 10 of the Schedule unless an exclusion applies.
5. Under the amendments all item 15 lubricant/fluid/oil products (but not fuels) and greases continue to be subject to excise duty at a rate of \$0.085 cents per litre or \$0.085 cents per kilogram for greases.
6. Item 15.1 applies to petroleum based oils that are lubricant/fluid/oil products and the synthetic equivalents of such oils but not greases.
7. Item 15.2 applies to petroleum based oils that are lubricant/fluid/oil products or greases or synthetic equivalents of such oils that are recycled for use as oils that are lubricant/fluid/oil products but not recycled for use as greases.
8. Item 15.3 applies to petroleum based greases and their synthetic equivalents.
9. Item 15.4 applies to petroleum based oils that are lubricant/fluid/oil products or greases and synthetic equivalents of such oils recycled for use as greases.

Item 2 - Application provisions

10. Under subitem 2(1), the amendments to the Excise Tariff Act apply to goods entered for home consumption on or after the day the Bill for the Excise Tariff Amendment Act is introduced into the House of Representatives. This ensures that the *Excise Tariff Amendment Act 2020* applies as soon as practical to clarify the operation of the excise law and remove liability to excise on products such as diesel which were held to be oils under

the PSO Act by the Federal Court and therefore subject to a benefit under the PSO Scheme. This application provision is beneficial to affected parties as it narrows the scope of oils and therefore removes excise duty liability for certain uses of products such as diesel. The amendment is consistent with the original policy intent that diesel is not considered to be an oil and hence was not intended to qualify for a benefit under the PSO Scheme.

11. Subitem 2(2) clarifies that the amendments in Schedule 1 apply to goods entered for home consumption on or after the date of introduction of the Bill despite the operation of subsection 5(2) of the *Excise Tariff Act 1921*.