1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS AMENDMENT BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Industry, Science and Tourism, the Honourable John Moore, MP)

77791 Cat. No. 96 4571 3 ISBN 0644 43263

CUSTOMS AMENDMENT BILL 1996

OUTLINE

The purpose of this Bill is to introduce changes to Part XVA of the *Customs Act 1901* (the Act) in relation to the Tariff Concession System and to by-laws and determinations relating to certain Policy By-Law items under sections 271 and 273 of the Act. This Bill is part of a legislative package which modifies the concessional treatment of goods imported under both the Tariff Concession System and the Policy By-Law System, in line with the Government's proposals announced on 8 May 1996. The other Bill in this package, the Customs Tariff Amendment Bill 1996, proposes the customs duty rate changes to apply to instruments made under each of the Schemes.

The principal changes contained in this Bill relate to:

A) Tariff Concession System (TCS) changes

(i) the removal of the market test from the core criteria, leaving the only test to be satisfied for the granting of a tariff concession order (TCO) that there are no substitutable goods produced in Australia in the ordinary course of business (item 4 of this Bill refers);

(ii) an amendment to the definition of "substitutable goods" to ensure a de-facto market test is not implied into that definition (item 3 of this Bill refers);

(iii) the introduction of two new revocation grounds at the initiative of Customs; the first, where the concession instrument has not been used in the preceding 2 years (item 25 of this Bill refers), and the second, where there are Australian producers of substitutable goods (items 24 and 38 of this Bill refer), with Administrative Appeals Tribunal (AAT) review of decisions on these new grounds (item 35 of this Bill refers);

(iv) the imposition of a statutory obligation on applicants for a TCO to undertake research as to the existence of possible Australian producers of substitutable goods, prior to the lodgement with Customs of the TCO application (item 7 of this Bill refers), with Customs able to reject an application where this has not been done, (item 8 of this Bill refers), with this latter decision once again subject to AAT review (item 34 of this Bill refers);

(v) the alteration of the commencement provision for TCOs, to provide that concession orders are now only operative from the date of lodgement of an application, and not 28 days before lodgement (items 16 to 23 of this Bill refer);

(vi) the tightening of the definition of "made-to-order capital equipment", to allow concessions only for such equipment made on a one-off basis to meet a specific order, and which are not made as a result of a production run (items 5 and 30 of this Bill refer); and

(vii) the introduction of two new criteria for AAT review proceedings; the first to require those persons wishing to be joined as parties to an AAT review application to apply to be joined within 60 days of the gazettal of an AAT review application and, the second, to require that a party intending to rely on a document at a hearing must file that document with the AAT and serve it on the other parties to the proceedings not less than 28 days before the hearing date (item 31 of this Bill refers),

(B) Policy By-Law System changes

(i) the revocation of policy by-law instruments (either by-laws made under Section 271 of the Customs Act or determinations made under Section 273 of the Customs Act) made in relation to 5 of the 9 "policy" Tariff items in Schedule 4 to the Customs Tariff Act 1995 (item 42 of this Bill refers);

(ii) the treatment of requests for concessions under those 5 items which are still outstanding at the time this Bill commences as if they were requests received at the commencement of this Bill (item 42 of this Bill refers); and

(iii) transition provisions to preserve access to a revoked instrument made for these 5 items for:

- goods which have been imported on or before the date of revocation, provided they are entered within 28 days of the date of the revocation of the concession instrument; or

- goods on direct shipment to Australia before the date of revocation of the concession instrument provided they are entered within 28 days of importation; or

- goods which are made-to-order capital equipment (as defined for the Tariff Concession System and amended by this Legislation), provided such goods are imported and entered under one of these items by 15 February 1997 (item 43 of this Bill refers).

FINANCIAL IMPACT STATEMENT

The amendments proposed in this Bill will result in the following savings to revenue:

A) TARIFF CONCESSION SYSTEM CHANGES

The proposed changes to the Tariff Concession System in Part XVA of the Customs Act, and in particular the removal of the market test from the core criteria and the revocation facility for existing Tariff Concession Orders and Commercial Tariff Concession Orders, will result in revenue savings of:

1996-97	1997-98	1998-99	1999-00
$92M	$105M	$119M	$131M

B) POLICY BY-LAW SYSTEM CHANGES

The proposed revocation of the 5 Policy By-Law items and the introduction of the revised criteria against which requests for concessions under these items will be considered will result in revenue savings of:

1996-97	1997-98	1998-99	1999-00
$29M	$32M	$34M	$37M

CUSTOMS AMENDMENT BILL 1996

NOTES ON CLAUSES

Clause 1 - Short Title

This clause provides for the Bill to be cited as the *Customs Amendment Bill 1996.*

Clause 2 - Commencement

This clause provides for the commencement day of the Bill to be fixed by Proclamation at a time after the time that the Customs Tariff (Miscellaneous Amendments) Bill 1996 commences. The Miscellaneous Amendments Bill is taken to commence on 1 July 1996, immediately after the commencement on that same day of the Customs Tariff Act 1995. The requirement that this Bill not commence before the commencement of the Miscellaneous Amendments Bill is necessary because the transitional arrangements set out in Part 2 of Schedule 1 of this Bill are dependant on the technical amendments in the first mentioned Bill already being in place. In particular, the Miscellaneous Amendments Bill preserves the effect of many Customs instruments (such as by-laws and tariff concession orders) which have references to the 1987 Tariff Act. Those references are, in effect, deemed to be references to the 1995 Tariff Act via the savings and transitional provisions contained in the Miscellaneous Amendments Bill. In the absence of that Bill, all these instruments would lapse on the commencement of the 1995 Tariff Act on 1 July 1996, because the 1987 Tariff Act to which the instruments refer is repealed with effect from that date.

This commencement is subject to the standard provision that if no Proclamation has been made for commencement within 6 months of the Act receiving the Royal Assent, the Bill will commence automatically on the first day after the end of that 6 month period (subclause 2(2) refers).

Clause 3 - Schedule(s)

This clause is the formal enabling provision for the Schedule to this Bill, providing that each Act specified in the Schedule is amended in accordance with the applicable items of the Schedule. The items in Part 1 of Schedule 1 to the Bill amend the *Customs Act 1901* (the Customs Act).

The clause also provides that the other items of the Schedule have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation, which are set out in Part 2 of Schedule 1 to this Bill. In particular, transitional provisions to apply at the time this Bill commences relate to :

- applications for TCOs on hand but not yet determined before the commencing time (item 37 refers);

  requests for revocation on hand but not yet determined before the commencing time (item 38 refers);

  applications for internal, AAT and Federal and High Court review arising out of decisions in relation to TCO applications, or requests for revocation of TCOs, lodged before, but not finally determined before, the commencing time (items 39, 40, and 41 refer);

  the statutory revocation of certain by-laws and determinations with effect from the commencing time (item 42 refers);

  certain requests for by-laws and determinations on hand but not yet determined before the commencing time (item 42 refers); and

  goods the subject of certain revoked TCOs, by-laws and determinations that are already in transit to Australia, or on firm order (item 43 refers).

Schedule 1 - Amendment of the Customs Act 1901

Part 1 - The Amendments

Item 1 - Subsection 269B(1) (definition of *last day for submissions)*

This item amends the definiton of "last day for submissions" to include a reference to the new provision dealing with the expanded opportunity for submissions objecting to the making of a Tariff Concession Order (TCO) proposed in item 11 of Schedule 1 to the Bill. The term "last day for submissions" is used in sections 269P, 269Q and 269SH of the *Customs Act 1901*(the Customs Act) as a short hand way of referring to the various time limits within which objectors to the making of TCOs must lodge their submissions with Customs. The amendment to the definition incorporates a reference to the proposed 14 day time limit from the gazettal of proposed amended wording for a TCO that new or existing objectors have to lodge additional submissions with Customs under section 269L of the Customs Act (item 11 refers).

Item 2 - Subsection 269B (definition of *substitutable goods*)

This item amends the definition of "substitutable goods" for the purposes of the Tariff Concession System (TCS) to include the uses to which goods manufactured in Australia are "capable of being put" in the category of uses to be taken into consideration when determining whether those goods are substitutable for the goods the subject of the TCO application.

This amendment is consequential upon the amendment to section 269C (item 4 below refers) to remove market considerations from the test for TCO eligibility.

Item 3 - At the end of section 269B

This item inserts a new subsection (3) at the end of section 269B of the Customs Act which further qualifies the definition of "substitutable goods". The new subsection provides that in determining whether the uses of goods the subject of a TCO application and Australian produced goods correspond, it is irrelevant whether or not the goods compete in a market.

This amendment is intended to prevent the so-called "market test", which is to be removed from the TCS core criteria (item 4 below refers), from making its way into considerations of TCO eligibility. The qualification is intended to prevent argument that evidence of direct competition in a market largely establishes whether locally made and imported goods are put to corresponding uses, and are therefore substitutable. Market competition is irrelevant for the test of substitutability.

Item 4 - Section 269C

This item omits current section 269C of the Customs Act and substitutes a new section 269C to specify the core criteria for TCO eligibility. The proposed new core criteria no longer confers TCO eligibility where substitutable goods are produced in Australia but the granting of a TCO is not likely to have a significant adverse effect on the market for the locally produced goods. The new core criteria will only allow a TCO to be made for imported goods where no substitutable goods are produced in Australia in the ordinary course of business.

The removal of the market test is proposed as it has proven not to have had its intended effect. The market test was intended to be a practical test of the likely impact a TCO would have on actual competition in the market place between goods to be imported under a TCO and the Australian produced substitutable goods. In practice, the application of the market test has proven to be a contentious and highly technical exercise. The test requires local manufacturers to establish prospectively that a TCO would have a significant adverse effect on the market for their goods. Without costly economic and financial analysis, this test has proven to be almost impossible to establish for many Australian manufacturers of goods which compete directly with imported goods in the market. This is particularly the case for small and medium enterprises.

This amendment is intended to make the TCS more evenly balanced between importers and local manufacturers by making the fact of Australian production of substitutable goods the only relevant consideration for TCO eligibility.

Proposed section 269C also changes the time for application of the core criteria test from 28 days before an application for a TCO is lodged to the day on which the application is lodged. This amendment is consequential upon the amendment proposed in item 16 below to make the date of effect of TCOs the date on which the application is lodged with Customs

Item 5 - Subsection 269E(3) (definition of *made-to-order capital equipment)*

This item repeals the existing definition of "made-to-order"capital equipment" and substitutes a new definition which makes clear that the term only applies to "one-off" items that are not produced in quantities indicative of production runs. The amendments is intended to limit the application of the special definition in subsection 269E(2) of produced in Australia in the "ordinary course of business" to large special-order items such as generators for power stations, railway equipment and ships. It is not intended to cover such things as washing machines and televisions which also fall within the Tariff chapters for "capital equipment" by virtue of the definition of that term for the purposes of the TCS in Section 269B of the Customs Act.

Item 6 - At the end of subsection 269F(3)

This item amends subsection 269F(3) of the Customs Act to add 2 additional requirements which must be addressed in a TCO application before it will be accepted for processing by Customs. (Subsection 269F(3) currently requires that all TCO applications must include a full description of the goods to which the application relates and the tariff classification that the applicant considers applies to the goods.)

The first of the new requirements for valid TCO applications is the inclusion of the identity of the importer for whom the applicant is acting if the applicant is not proposing to make use of the TCO to import the goods on his or her own behalf (new paragraph 269F(3)(c) refers). This amendment, in combination with the publication of the applicant's and intending importer's identity proposed in item 9, is intended to more evenly balance the positions of the interested parties in the TCO application process.

The legislation currently requires Customs to notify applicants of the names of any objectors to TCO applications, but does not allow Customs to reveal to persons claiming to be Australian producers of substitutable goods the identity of the TCO applicant. In many case the person named as the applicant is a Customs broker or an agent of the intending importer and the Australian producer is put in the position of not knowing who will in fact be importing possibly competing goods.

The second of the new requirements for valid TCO applications is the inclusion of particulars of all the inquiries made by the applicant to assist in establishing that there are reasonable grounds for believing that there were no producers in Australia of substitutable goods (new paragraph 269F(3)(d) refers). This amendment, in combination with those proposed in items 7 and 8 below, is intended to place an "up-front" obligation on TCO applicants to demonstrate that there are reasonable grounds for believing that substitutable goods are not produced in Australia. It is intended to prevent the situation which regularly arises at the moment where, after importing the relevant goods, TCO applicants lodge applications with Customs which are technically complete (and therefore must be processed to completion) but have little information of substance. These applications do nothing more than fix a commencement date for a concession in the event the gamble that no local manufacturers object proves to be the case.

The amendment, in combination with Customs power to reject an application where reasonable inquiries have not been made, proposed in item 8, is intended to ensure that applicants only lodge TCO applications where reasonable efforts to establish the non existence of Australian producers of substitutable goods have already been made.

The new requirement includes a reference to prescribed organisations as appropriate places to make inquiries that might be sufficient to discharge this obligation. It is intended to amend the Customs Regulations to prescribe such

organisations as the State Industrial Supplies Offices, industry associations and various chambers of commerce.

Item 7 - After section 269F

This item inserts new section 269FA into the Customs Act which is a statutory statement of the obligation that a TCO applicant has to discharge in order to have an application accepted for processing by Customs.

It will be the responsibility of the applicant to establish on the basis of:

(a) all information that he or she can reasonably be expected to have; and
(b) all inquiries that he or she can reasonable be expected to make;

that there are reasonable grounds for asserting that the there are no substitutable goods produced in Australia.

This obligation must be discharged to the satisfaction of Customs in order for the application to be accepted as a valid application (see new paragraph 269H(1)(a) proposed in item 8).

Item 8 - Paragraphs 269H(1)(a) and (b)

This item amends section 269H of the Customs Act by repealing existing paragraphs (a) and (b) which require the CEO to accept for processing TCO applications which meet the form requirements of section 269F.

In addition to being satisfied that the form requirements of section 269F have been met, the proposed amendment to section 269H now requires the CEO to also be satisfied that, after taking into account the information in the application and the particulars of the inquiries made by the applicant, there are reasonable grounds for believing that the TCO applicant has discharged the statutory responsibility proposed in item 7 (new subparagraph 269H(1)(a)(i) refers).

In addition to being satisfied that the form requirements have been met and the applicant's obligation has been discharged, new paragraph 269H(1)(b) also requires the CEO to be unaware of any Australian producer of substitutable goods.

If the CEO is not satisfied of one of the above elements or is aware of an Australian producer of substitutable goods, he or she must reject the application, and give the applicant written reasons for the rejection. A decision to reject an application under this section is subject to review by the Administrative Appeals Tribunal (AAT) (item 34 refers).

Item 9 - After paragraph 269K(1)(a)

This item amends section 269K of the Customs Act to require the notice published in the *Gazette* under this section setting out the particulars of a valid application to also identify the TCO applicant and the person for whom the applicant is acting if the applicant is not proposing to make use of the TCO to import the goods on his or her own behalf.

This amendment, in combination with the requirement that the actual intending importer be identified in a TCO application proposed in item 6, is intended to more evenly balance the positions of the interested parties in the TCO application process.

The legislation currently requires Customs to notify applicants of the names of any objectors to TCO applications, but does not allow Customs to reveal to persons claiming to be Australian producers of substitutable goods the identity of the TCO applicant. In many case the person named as the applicant is a Customs broker or an agent of the intending importer and the Australian producer is put in the position of not knowing who will in fact be importing possibly competing goods.

Items 10 and 11 - Subsections 269L(2), (3) and (4)

These items modify the process for processing proposed amendments to the wording of TCO in section 269L of the Customs Act. At present, after being notified that objections to the making of a TCO have been received from persons claiming to be producers of substitutable goods and the grounds on which each of those objections is based, a TCO applicant has 14 days to notify the CEO of any proposed amendments to the description of goods to which the application relates.

It is acknowledged that 14 days is insufficient time to negotiate a new description with objectors before notifying the CEO of the amended description. The amendment proposed to subsection 269L(2) in item 10 increases that time to 28 days.

Proposed new subsection 269L(3) restricts any proposed amendments to TCO descriptions to:

> the same tariff classification as that originally notified in the Gazette; and to descriptions that "narrow" the original description.

The CEO is given the power to reject proposed amendments to TCO descriptions which do not comply with these restrictions (new subsection 269L(4) refers). Any decision of the CEO to reject a proposed amended wording is subject to review by the AAT (item 34 refers).

If the proposed amendment is rejected by the CEO then new subsection 269L(4A) provides that the CEO must continue to consider the TCO application as originally made.

New subsection 269L(4B), in addition to the existing requirement to notify existing objectors of the proposed amendment to the TCO description, requires the CEO to publish the amended description in the *Gazette* and invite any additional persons objecting to the making of a TCO with the amended description to lodge a submission with Customs within 14 days of publication of the notice (new paragraph 269L(4B)(b) refers).

Those objectors who lodged submissions with the CEO during the 50 days following the initial gazettal of the TCO application have 14 days from being notified of the amended wording to:

> lodge a further submission objecting to the making of the amended TCO (new paragraph 269L(4B)(a) refers); or
> withdraw their objection to the TCO (existing subsection 269L(5) refers); or
> do nothing - in which case they are taken to wish to proceed with their original objection (existing subsection 269L(6) refers).

New subsection 269L(4C) is a technical amendment to clarify that the republication of the proposed amended wording (new paragraph 269L(4B)(a) refers) does not start the clock running again for the purposes of calculating time limits for the CEO to make a decision on a TCO application.

Item 12 - At the end of section 269M

This item adds a new subsection (6) at the end of section 269M of the Customs Act to provide that the CEO may give a copy of all or part of a TCO application to a prescribed organisation without breaching the confidentiality provisions of section 16 of the *Customs Administration Act 1985*. The introduction of "prescribed organisations" is discussed in item 6.

The release of the application is limited. The purpose of release is for obtaining the advice of the prescribed organisation as to the existence of producers of substitutable goods in Australia. This proposed power recognises that an applicant may have made sufficient inquiries to discharge the statutory obligation in new section 269FA (item 7 refers) in order to have a TCO application accepted as valid, but there may be Australian producers of substitutable goods, who are also unknown to Customs, that those inquiries did not uncover.

This amendment, in combination with that proposed in item 15, is intended to give Customs access to the broadest possible range of information sources in becoming satisfied that no Australian producers of substitutable goods exist.

Item 13 - Paragraph 269N(1)(c)

This item amends subsection 269N(1) of the Customs Act. That subsection specifies the 3 circumstances where the CEO must reprocess an application after becoming satisfied that the tariff classification published in the *Gazette* as applying to the goods the subject of the application, does not in fact apply.

The circumstance in paragraph 269N(1)(c) currently requires the written advice of a barrister or solicitor employed in the Attorney-General's Department. New paragraph 269N(1)(c) provides for this advice to be given by an officer of Customs, in recognition of the fact that tariff classification expertise in Australia lies within the Australian Customs Service.

Item 14 - At the end of paragraph 269P(1)(c)

This is a technical drafting amendment to add the word "and" at the end of paragraph 269P(1)(c) to facilitate the addition of new paragraph (d) by item 15.

Item 15 - After paragraph 269P(1)(c)

This item inserts a new paragraph (d) into subsection 269P(1) of the Customs Act which will allow the CEO, in addition to information formally provided by the applicant and by any objectors, to take into account any inquiries he or she has made in relation to the particular TCO application. This amendment, in combination with that proposed in item 12, is intended to give Customs access to the broadest possible range of information sources in becoming satisfied that no Australian producers of substitutable goods exist.

Item 16 - Subsection 269S(1)

This item amends section 269S of the Customs Act by omitting the words "28 days before" and substituting the word "on". Section 269S currently provides that the date of effect of any TCO made after consideration of an application is the day 28 days before the day on which the application for that TCO was lodged with Customs.

The proposed amendment makes the date of effect of a TCO which is made after the consideration of an application the date on which the application was lodged with Customs. The purpose of this amendment is to require importers to have sought a TCO (and consequently to have made inquiries of possible Australian manufacturers as part of the TCO application process) before importing goods the subject of the TCO. This is in contrast to what is often the case under the present Scheme where importers import goods from overseas suppliers without regard to possible local manufacturers and only after the importation of those goods seek concessional duty treatment via a TCO.

Items 17,18, 19 and 20 - Paragraphs 269SA(1)(b) and (c) and 269SA(2)(b) and (c)

These items effect technical amendments to section 269SA (which provides for TCOs to have modified commencement dates in certain circumstances) to remove all references to the core criteria being met "28 days before" an application for a TCO is lodged. These amendments are consequential on the substantive amendments, to sections 269C (item 4 refers) and 269S (item 16 refers) to provide that the date of effect of any TCO that might be made after consideration of an application is the day on which the application for that TCO was lodged.

Items 21, 22 and 23 - Sections 269SB and 269SC

These items effect technical amendments to the revocation of TCO provisions in sections 269SB and 269SC of the Customs Act to remove all references to the core criteria being met "28 days before" an application for a TCO is lodged. These amendments are consequential on the substantive amendments to sections 269C (item 4 refers) and 269S (item 16 refers) to provide that the date of effect of any TCO that might be made after consideration of an application is the day on which the application for that TCO was lodged.

Item 24 - Before subsection 269SD(1)

This item inserts new subsections (1AA) and (1AB) into section 269SD of the Customs Act. The new subsections empower the CEO to revoke existing TCOs at his or her own initiative on the basis that if an application were now received for that TCO it would not be granted. It is expected that this power will be used by Customs to revoke TCOs which were granted on the basis of the market test (ie. substitutable goods were produced in Australia but it was not possible to show that the granting of the TCO would not be likely to have a significant adverse effect on the market for those substitutable goods). The rationale for this new revocation ground is that if the TCO was applied for after the commencement of this Bill, then with the absence of the market test (which is removed in item 4) the application would no longer satisfy the core criteria, and therefore a TCO would not be granted.

Before the CEO can exercise this new power of revocation, a notice of intention must be published in the *Gazette* declaring the CEO's intention to revoke a particular TCO and invite any interested party to lodge a written submission concerning the proposed revocation within 28 days of the notification (new subsection 269SD(1AA) refers).

The CEO must then decide within 60 days of publication of the *Gazette* notice whether or not to revoke the TCO. If he or she does decide to revoke the TCO, the revocation will take effect from the date of publication of the notice of intention in the *Gazette* (new subsection 269SD(1AB) refers.

Decisions to revoke TCOs under this new power must be notified in the Gazette in accordance with section 269SE of the Customs Act (item 27 refers) and are subject to merits review by the AAT (item 35 refers).

This new power of revocation at the initiative of the CEO will also apply to Commercial Tariff Concession Orders (CTCOs) made under the pre-November 1992 Part XVA of the Customs Act (the transitional provision set out in subitem 38(1) of this Bill refers)

Item 25- After section 269SD(1)

This item inserts new subsection (1A) into section 269SD of the Customs Act which empowers the CEO to revoke obsolete TCOs. TCOs will be considered to be obsolete if they have not been quoted in an import entry to secure a concessional rate of duty in the preceding 2 years. It is expected that this power will be used to revoke approximately 2000 TCOs granted since 1992 which have become obsolete as a result of technology changes, shifts in consumer preferences, errors in the applicant's original description or because a broader TCO has been made which encompasses the scope of another TCO.

Decisions to revoke TCOs under this new power must be notified in the Gazette in accordance with section 269SE of the Customs Act (item 27 refers) and are subject to merits review by the AAT (item 35 refers).

This new power of revocation at the initiative of the CEO will also apply to Commercial Tariff Concession Orders (CTCOs) made under the pre-November 1992 Part XVA of the Customs Act (the transitional provision set out in subitem 38(1) of this Bill refers)

Item 26 - Paragraph 269SD(2)(c)

This item amends paragraph 269SD(2)(c) of the Customs Act, to provide that for the purposes of revoking TCOs with incorrect tariff classifications, advice on tariff classification is to be given to the CEO by an officer of Customs instead of barristers or solicitors employed in the Attorney-General's Department. This amendment is identical to that proposed in item 13, and recognises the fact that tariff classification expertise in Australia lies within the Australian Customs Service.

Item 27 - Subsection 269SE(2)

This item effects a technical amendment to subsection 269SE(2) of the Customs Act to require publication in the *Gazette* of decisions to revoke TCOs under new subsections 269SD(1AB) and (1A) (items 24 and 25 refer).

Item 28 - Subsections 269SG(1), (2) and (4)

This item effects technical amendments to subsections 269SG(1), (2) and (4) of the Customs Act to ensure that the "goods in transit" and "made-to-order capital equipment on firm order" provisions in those subsections apply to TCOs revoked under new subsections 269SD(1AB) and (1A) (items 24 and 25 refer).

Item 29 - Subsection 269SG(4)

This item amends subsection 269SG(4) of the Customs Act to provide that in order for a revoked TCO to continue to apply in relation to capital equipment after the time of its revocation, that capital equipment must be "made-to-order capital equipment" (as defined by new subsection 269SG(5) - item 30 refers).

Item 30 - At the end of section 269SG

This item inserts a definition of "made-to-order capital equipment" for the purposes of the savings provision concerning such equipment following the revocation of a TCO relating to that equipment. The new definition provides that the term only applies to "one-off" items that are not produced in quantities indicative of production runs. The amendment is intended to limit the benefit of the extended application of revoked TCOs to large special-order items such as generators for power stations, railway equipment and ships. It is not intended to cover such things as washing machines and televisions which also fall within the Tariff chapters by which "capital equipment" is defined for the purposes of the TCS.

Item 31- After section 269SH

This item inserts new section 269SHA into the Customs Act to qualify the circumstances in which a person can seek AAT merits review of TCO decisions which have been subject to internal review under section 269SH by Customs. The conditions proposed in the new section are intended to ensure that the AAT review process is not subject to unreasonable delay and excessive costs.

Persons who can apply to the AAT for review of internal review decisions must be persons within the meaning of "affected person" in subsection 269SH(13), ie a person who had standing to seek internal review (new subsection 269SHA(1) refers).

The CEO is required to publish a notice in the *Gazette* setting out particulars of any application for review made to the AAT (new subsection 269SHA(2) refers).

Any person wishing to be joined as a party to the proceedings must apply under subsection 30(1A) of the *Administrative Appeals Tribunal Act 1975* within 60 days of the gazettal or within such further time as the AAT allows. It

is not necessary for any such person to be an "affected person" within the definition in section 269SH (new subsection 269SHA(3) refers).

The AAT must not grant an extension of time under subsection 269SHA(3) unless satisfied that the person seeking to be joined as a party was not reasonably able to apply within the initial 60 days after gazettal (new subsection 269SHA(4) refers.

New subsection 269SHA(5) provides that any document on which a party intends to rely at the hearing must be filed with the AAT and served on the other party not less than 28 days before the date set for the hearing, unless the AAT otherwise orders. New subsection 269SHA(6) provides that in deciding whether to make an order permitting the document to be filed and served within a shorter period, or to be introduced at the hearing, the AAT must have regard to whether there is any reasonable cause for the material not being available 28 days before the hearing.

Items 32 - Before paragraph 269SJ(1)(a)

This item amends subsection 269SJ(1) to insert a new paragraph (aa) which provides that the CEO must not make a TCO which describes goods in other than generic terms. The amendment, in combination with the clarification proposed in item 33, is intended to prevent TCOs being made which apply to particular products of a manufacturer, rather than goods of that description generally.

The current provisions of section 269HA of the Customs Act will allow the CEO to reject an application at any stage of processing if it becomes apparent that goods are described in non-generic terms. Decisions of the CEO under that section of the Customs Act are reviewable by the AAT under existing paragraph 273GA(1)(ma).

Item 33 - After subsection 269SJ(1)

This item inserts new subsection 269SJ(1A) into the Customs Act to provide examples of descriptions of goods which will not be acceptable under new paragraph 269SJ(1)(aa) proposed in item 32. If a description, either directly or by implication, indicates that the goods are of a particular brand or model, or of a particular part number, it will not be considered to be in generic terms.

For example, a TCO application which describes goods as "starter motors manufactured by XYZ Company" would not be acceptable. An example of an offensive description which by implication indicates that the goods are of a particular brand would be "washing machines of 5kg capacity, having 6 wash cycles chosen by a black and chrome knob, 3 temperature combinations selected by red plastic switches, stainless steel tub with 450 water holes, nylon lint filter which measures 3.5 x 10cm attached to a molded green plastic frame, etc" would be a description of goods which goes to such specificity as to imply that it can only be a washing machine model ABC of XYZ Company.

It m 34 - Paragraph 273GA(1)(m)

This item omits existing paragraph 273GA(1)(m) of the Customs Act and substitutes 2 new paragraphs to make subject to AAT review decisions of the CEO to:

- reject an application at the screening stage under subsection 269H(1) as amended by item 8 (new paragraph 273GA(1)(m) refers); and

- reject an applicant's proposed amendment to a description of goods under new subsection 269L(4) inserted by item 11 (new paragraph 273 GA(1)(maa) refers).

Item 35 - Paragraph 273GA(1)(s)

This item inserts a reference to decisions under new subsections 269SD (1AA) and (1A) (inserted by items 24 and 25) into paragraph 273GA(1)(s) of the Customs Act. This amendment makes decisions of the CEO under the new revocation at the initiative of Customs powers subject to AAT review.

Schedule 1 - Amendment of the Customs Act 1901

Part 2 - Transitional and savings provisions

Item 36 - Definitions

This item defines certain abbreviations for the purposes of the transitional and savings provisions set out in this Part of Schedule 1. In particular ***commencing time*** is defined to mean the time that this Bill commences.

Item 37 - Applications made, but not decided, before the commencing time

This item provides that TCO applications received by the CEO before the ***commencing time*** but not yet decided at the ***commencing time*** are to be considered by the CEO against the pre-amendment core criteria (ie. including the market test) (subitem (1) refers).

If the CEO decides to grant a TCO because he or she was satisfied that the application met the old core criteria on the basis that there were no substitutable goods produced in Australia, then any resulting TCO will take effect 28 days before the relevant application was lodged, and it will continue to operate after the ***commencing time*** (subitem (2) refers).

If, however, the CEO decides that the TCO application is successful because it meets the market test element of the core criteria (ie. even though there is an Australian producer of substitutable goods, it is considered the granting of the TCO is not likely to have a significant adverse effect on the market for those substitutable goods), any resulting TCO will only operate 28 days before the relevant application was lodged until the ***commencing time***, at which point it will be taken to have been revoked (subitem (3) refers).

Item 38 - Revocation of CTCOs and TCOs made before the commencing time

Subitem (1) of this item provides that after the ***commencing time*** the revocation of CTCOs made under Part XVA of the Customs Act before November 1992, is to be decided under Part XVA as amended by this Act. That is, for the purposes of revocation at the request of a local manufacturer or at the initiative of Customs, CTCOs are to be treated as TCOs under sections 269SC and 269SD, respectively. This means that decisions to revoke CTCOs will also be subject to the gazettal and AAT review provisions of the Customs Act as in force after the ***commencing time.***

Subitem (2) makes it clear that TCOs made before the ***commencing time*** are subject to revocation against the amended core criteria after the ***commencing time***, either at the initiative of Customs or upon the request of a local producer of substitutable goods.

Subitems (3), (4) and (5) set out special conditions to apply to those requests for revocation on hand, but not yet decided, at the time the new core criteria comes into force. Such requests are first to be decided against the pre-***commencing time*** core-criteria (ie including the market test), and, if successful, the revocation will take effect from the time the request was lodged with Customs.

If the CEO would not revoke a TCO against the pre-***commencing time*** core criteria, he or she must then consider the request against the amended (no market test) core criteria. If the CEO would revoke the TCO against the new criteria, then that revocation will take effect from the ***commencing time***.

Items 39 and 40 - Internal and AAT review

These items provide that applications for internal or AAT review of decisions resulting from TCO applications and requests for revocation lodged before the ***commencing time***, but not finally determined before that time, or determined after that time, are to be considered under the Customs Act as in force immediately before the ***commencing time***.

Any TCOs or revocations resulting from decisions on internal review or AAT review will, however, be subject to the same modified dates of operation as initial decisions of the CEO under items 37 and 38 above.

Item 41 - Pending proceedings in the Federal Court or High Court

This item provides that if proceedings have been brought in the High Court or the Federal Court in relation to an application for a TCO or a request for revocation of a TCO lodged before the ***commencing time***, the pre-***commencing time*** law applies for the purposes of those proceedings.

Item 42 - Revocation of certain by-laws and determinations

This item implements the Policy By-law changes arising from the Governments' 8 May 1996 proposals. The change applies to five of the nine Policy By-law items (items 43, 45, 46, 52 and 56 of Schedule 4 of the Customs Tariff Act 1995), and in particular, to any by-laws made under Section 271 of the Customs Act to those Tariff items, or any determinations made under Section 273 of the Customs Act to those items (sub-item (1) refers).

Sub-item (2) effectively revokes those by-laws or determinations, with effect from the ***commencing time***.

Sub-items (3) and (4) provide that requests for by-laws or determinations lodged with the CEO before the ***commencing time***, but not finally determined before that time, are to be regarded as if they were requests lodged after the ***commencing time***. It is thus intended to make those requests subject to the new criteria applicable to concessions written to those Tariff items.

Item 43 - Effect of revocation on goods in transit and capital equipment on order

This item preserves access to a TCO revoked under items 37, 39 or 40, or a Policy By-law or determination revoked under item 42, for goods in transit or capital equipment on order after the ***commencing time***, in the following circumstances;

goods which have been imported on or before the date of revocation, provided they are entered within 28 days of the ***commencing time*** (paragraph 3(a) refers);

goods on direct shipment to Australia before the ***commencing time*** provided they are entered within 28 days of importation (paragraph 3(b) refers); and

goods which are made-to-order capital equipment (as defined for the Tariff Concession System and amended by this Legislation), provided

- if the instrument relating to the capital equipment is a by-law or determination (item 42 refers), the equipment is entered for home consumption or before 15 February 1997 (paragraph 5(a) refers);

- if the instrument is a TCO, the instrument continues to apply in relation to the importation into Australia of that equipment (paragraph 5(b) refers).

Printed by Authority by the Commonwealth Government Printer


9 780644 436267