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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS LEGISLATION (TARIFF CONCESSIONS AND ANTI-DUMPING) AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

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

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CUSTOMS LEGISLATION (TARIFF CONCESSIONS AND ANTI-DUMPING) AMENDMENT BILL 1992

OUTLINE

The Bill is an omnibus measure proposing a series of amendments to the Customs Act 1901, the Anti-Dumping Authority Act 1988, and the Customs Tariff (Miscellaneous Amendments) Act 1987 to:

i) repeal Part XVA of the Customs Act 1901 and substitute a new Part XVA of the Customs Act 1901 to give legislative effect to the Government's response to the Industry Commission's report on the Tariff Concessions System (Report No. 9 of 8 March 1991), announced by the Government on 24 September 1991; and

ii) amend Part XVB of the Customs Act 1901 and the Anti-Dumping Authority Act 1988 to give legislative effect to the Government's review of Australia's anti-dumping and countervailing system, announced by the Government on 5 December 1991.

In particular,

i) the tariff concessions proposals contained in new Part XVA of the Customs Act 1901;

   a) introduce new definitions for the current core criteria for the granting of a tariff concession order (Clause 10 new section 269B, definition of "substitutable goods", and new section 269C, definition of "core criteria", refers),

   b) introduce modified definitions for the phrases 'goods produced in Australia' and 'the ordinary course of business' for the purpose of the core criteria, to remove certain anomalies with those current definitions in their current application (Clause 10, new sections 269 D and E refer),

   c) formalise the link between goods the subject of a tariff concession order and the Customs Tariff Act 1987 Schedule 3 tariff item which applies to those goods (Clause 10, new sections 269F, K, and P refer),

   d) introduce strict time limits both on the processing of applications by the bureaucracy and on the submission of information by the affected parties to such applications, to both streamline the consideration of applications for tariff concession orders or revocations of such orders, and to make the process more transparent (Clause 10, new sections 269H, K, M, P, O, SC and SF refer),

   e) include new powers to enable an applicant to amend an application for a tariff concession order after it has been lodged, and to withdraw an application at any time before a decision is made in relation to it (Clause 10, new sections 269L and G refer),

f) introduce limited and definitive grounds for the revocation of tariff concession orders, to improve accountability and address concerns amongst users of tariff concessions about possible arbitrary revocations (Clause 10, new sections 269SB and SD refer), and

g) confer a right to merits review of all decisions made in the new Part XVA, first through an internal review mechanism, and then via the Administrative Appeals Tribunal (Clause 10, new section 269SH and Clause 19 refer).

ii) the anti-dumping proposals contained in the amendments to Part XVB of the Customs Act 1901 and the amendments to the Anti-Dumping Authority Act 1988;

a) vest a new power in the Anti-Dumping Authority to recommend to the Minister the continuation of anti-dumping measures where it can be demonstrated on review by the Authority that the continued application of the measures is necessary to prevent the continuation or the recurrence of injury by dumped or subsidised imports (Clause 7, new section 8A refers),

b) extend the life of the Anti-Dumping Authority to the year 2001 (Clause 8 refers),

c) allow the Australian Customs Service (ACS) to use information not contained in a dumping application to determine if a prima-facie case exists (Clause 13 refers),

d) reduce the time taken at the prima facie stage from 35 days to 25 days, but ensure applications for relief are properly documented by requiring that such applications strictly comply with the form and information requirements, and vest a new power to effectively restart the clock where an applicant wishes to supplement an application after lodgement (Clauses 12 and 13 refer),

e) extend the period of time during which current anti-dumping measures and undertakings and proposed anti-dumping measures and undertakings are to remain in force, from the current 3 years to 5 years (Clause 17 refers), and

f) clarify the treatment of concurrent dumping and subsidy by permitting anti-dumping or countervailing measures, or both, to be imposed in situations where it is concluded the combined effect of the dumping and subsidisation is causing or threatening material injury to an Australian industry producing like goods (Clause 18, new section 269TJA refers).

Financial Impact Statement

The financial impact of the measures contained in this Bill relating to anti-dumping and tariff concessions involve new staffing costs to process the various applications for measures within the stricter time constraints, to expand the Business Advisory Unit within the Australian Customs Service to assist with dumping applications, and to meet the new merits review reform in the tariff concessions area. In addition, new notice requirements in provisions of the Bill relating to the tariff concessions reforms will involve increased printing costs. The estimated total increased costs are as follows:

i) anti-dumping;

$848,000 for financial year 1992-93,

ii) tariff concessions;

$300,000 for financial year 1992-93.

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NOTES ON CLAUSES

PART 1 - PRELIMINARY

Short title

Clause 1 provides for the Act to be cited as the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act 1992.

Commencement

Clause 2 provides for the Act to commence on the following days:

Subclause (1) provides for the Royal Assent commencement of:

- Part 1, and clauses 3, 9 and 22, which are machinery provisions relating to the short title, the commencement provision, and the Anti-Dumping Authority Act 1988, the Customs Act 1901 and the Customs Tariff (Miscellaneous Amendments) Act 1987 citation provisions; and

- clause 11, which amends section 269T of the Customs Act 1901 to vest the Minister with the power to determine whether or not a processed agricultural good is related closely enough to a raw agricultural good so as to give the producer of the raw agricultural good standing to bring a dumping complaint.

Subclause (2) provides for the Proclamation commencement of clauses 4 to 8 inclusive, clause 10, and clauses 12 to 21 inclusive, relating to the principal tariff concessions and anti-dumping reforms in this Bill. These amendments are to commence by Proclamation in September 1992, primarily to allow various approved forms under the new regimes to be prepared, and, in relation to the tariff concessions provisions, to enable new procedures to be developed for the administration of the revised scheme.

- The Proclamation commencements are subject to the standard "sunset" provision in Acts which are expressed to commence by Proclamation, namely, that if the relevant provisions are not proclaimed within a period of six months after the date on which

the Act receives the Royal Assent, the provisions are deemed to commence on the first day after the period (Subclause (4)).

Subclause (3) provides that Clause 23 is taken to have commenced on 1 January 1988. That Clause is a savings provision which preserves the validity of certain commercial tariff concession orders made after the introduction of the Harmonized Tariff in 1988. The rationale for the provision is explained in greater detail in the notes on Clause 23.

PART 2 - AMENDMENTS OF THE ANTI-DUMPING AUTHORITY ACT 1988

Principal Act

Clause 3 identifies the Anti-Dumping Authority Act 1988 as being the Principal Act being amended by this Part.

Interpretation

Clause 4 amends section 3 of the Principal Act by adding a definition of "approved form", which is a form approved under section 3AA.

Insertion of new section

Clause 5 inserts a new section 3AA into the Principal Act which specifies how an approved form is to be made (new subsection 3AA(1)) and provides that the instrument by which a form is approved is a disallowable instrument in terms of section 46A of the Acts Interpretation Act 1901 (new subsection 3AA(2)).

. Making an approved form a disallowable instrument ensures that what is, in effect, a piece of delegated legislation is subject to parliamentary scrutiny via the tabling and disallowance procedures applicable to regulations under section 48-50 of the Acts Interpretation Act 1901.

Functions

Clause 6 amends section 5 of the Principal Act to specify that the function outlined in clause 7, relating to the recommendation to the Minister that the period of time for which anti-dumping or countervailing measures or undertakings are in place should be extended, is a function of the Anti-Dumping Authority.

Insertion of new section

Clause 7 inserts a new section 8A into the Principal Act.

New section 8A inserts a new scheme into the Principal Act to allow an applicant for an anti-dumping or countervailing measure to seek a review by the Authority which could result in the Authority recommending to the Minister that the period of time for which anti-dumping or countervailing measures or undertakings are in place should be extended.

- The ground for extension will be that the continued application of the measures is necessary to prevent the continuation or recurrence of injury by dumped or subsidised imports.

New subsection 8A(1) provides that not later than 8 months before the expiry of the 5 year period to which an anti-dumping duty, countervailing duty or undertaking relates, the Authority must publish a notice which informs the public of the expiry date (paragraph (a)) and invites interested parties to apply to the Authority for the continuation of the particular measure (paragraph (b)), within 60 days of gazettal of the notice.

New subsection 8A(2) provides that if no application to extend the five year period is received by the Authority within the 60 day period then the particular measure shall expire in accordance with the original notice.

New subsection 8A(3) specifies that an application to have the measures extended must be in writing (paragraph (a)), be in an approved form (paragraph (b)), contain such information as is required by the form (paragraph (c)) and must be signed in a manner specified by the form (paragraph (d)).

New subsection 8A(4) provides that after an application is received for the continuation of a measure, and the Authority is satisfied that the application complies with the time requirements of new subsection 8A(2) and the form requirements of new subsection 8A(3), the Authority must recommend to the Minister whether the particular measure should be continued. This recommendation must be given to the Minister within 120 days after the receipt of the application.

New subsection 8A(5) provides that the Authority may hold an inquiry for the purpose of giving the Minister a report under new subsection 8A(4).

New subsection 8A(6) provides that where the Authority decides to hold an inquiry it must, pursuant to section 23 of the Principal Act, advertise in the Gazette and in a newspaper

circulating in each State or Territory that it intends to hold an inquiry into whether a particular measure should be extended and notify the time when the inquiry is to be commenced. In that notice the Authority must invite submissions from the public on matters relevant to whether or not the measures should be continued.

- The decision whether or not an inquiry is to be held is left to the Authority. This discretion is consistent with all of the other inquiries which the Authority is empowered to conduct under this Act.

New subsection 8A(7) provides that interested parties have 40 days after notification of the inquiry under new subsection 8A(5) within which to lodge submissions with the Authority. If submissions are not received within 40 days the Authority may disregard those submissions.

New subsection 8A(8) provides that the Minister may, after having regard to the Authority's report on the matter, extend the measure, provided the measure has not expired.

- The role of the Authority is still one of being a recommendatory body - it is still up to the Minister whether or not the measures in place are to be extended.

New subsection 8A(9) provides that if the Minister does not extend a measure before its expiry the measure shall expire in accordance with section 269TM of the Customs Act 1901.

New subsection 8A(10) specifies how the Minister provides for the continuation of measures.

- If the particular measure is a dumping duty notice or a countervailing duty notice, the Minister shall determine, in writing, that the notice shall continue in force after the day on which it would have expired if no application for its extension had been made.

- If the particular measure is an undertaking, then the person who gave the undertaking shall extend the undertaking beyond the day it would have expired, or if the person does not agree to extending the undertaking, the Minister shall publish a dumping duty notice or a countervailing duty notice, as the case may be, to take effect from the day after which it would have expired.

New subsection 8A(11) provides that where the Minister extends an anti-dumping measure, that extension is for a period of 5 years after the

day on which the measure would have expired had there been no application for the measure's extension. This 5 year extension is subject to the proviso that if the measure is a dumping duty notice or a countervailing duty notice, the measure may be revoked before the end of the new 5 year period (new paragraph (a)), and if the measure is an undertaking, provision may be made for its earlier expiration (new paragraph (b)).

New subsection 8A(12) defines an anti-dumping measure for the purposes of new section 8A as a dumping duty notice, a countervailing duty notice, or an undertaking given under subsection 269TG(4) or 269TJ(3) of the Customs Act 1901.

Cessation of Act

Clause 8 amends section 35 of the Principal Act to extend the life of the Anti-Dumping Authority to 31 August 2001.

PART 3 - AMENDMENTS OF THE CUSTOMS ACT 1901

Principal Act

Clause 9 identifies the Customs Act 1901 as the Principal Act being amended by this Part.

Repeal and substitution of Part

Clause 10 repeals Part XVA of the Principal Act and substitutes a new Part XVA dealing with Tariff Concession Orders ("TCOs"). The new Part XVA contains 5 Divisions as follows:

Division 1 - Preliminary, which incorporates new sections 269B - 269E dealing with issues of interpretation
Division 2 - Making and processing TCO applications (new sections 269F-269N)
Division 3 - Making and operation of TCOs (new sections 269P-269SA)
Division 4 - Revocation of TCOs (new sections 269SB-SG)
Division 5 - Miscellaneous (new sections 269SH-269SL)

Clause 19 also introduces AAT review for decisions taken under the new Part XVA. A concordance of the old Part XVA provisions with the new appears as an attachment to the Explanatory Memorandum.

PART XVA - TARIFF CONCESSION ORDERS

Division 1 - Preliminary

Interpretation

new section 269B Subsection (1) defines a number of words and phrases for the purposes of the legislation. In particular, subsection (1) defines 'substitutable goods' for the purpose of the core criteria specified in new section 269C as meaning goods produced in Australia that are put to a use that corresponds with a use (including a design use) to which goods the subject of a TCO application, or a TCO, as the case may be, can be put.

This notion of substitutability replaces the "goods serving similar functions" test in the old section 269C of the Act and is central to the issue of whether or not a tariff concessions order ("TCO") should be granted.

In addition "Customs Tariff Act 1987" is defined to include that Act as proposed to be altered by a customs tariff alteration proposed in the Parliament.

Subsection (2) provides that Sundays and public holidays are to be counted for the purposes of computing a period for the purposes of Part XVA, such that time runs according to the calendar rather than "working days". In so providing however, subsection (2) preserves the operation of section 36 of the Acts Interpretation Act 1901.

- Section 36 of the Acts Interpretation Act 1901 provides that time starts to run on the day after the particular day or event prescribed, and allows something to be done on the day after a due date for the lodgement or gazettal etc. where that due date falls on a Saturday, Sunday, public or bank holiday.

Interpretation - Core criteria

new section 269C provides the fundamental test for deciding whether or not a TCO should be granted. It is intimately bound up with new section 269P, under which the Comptroller grants or refuses an application for a TCO and should be read in conjunction with that section.

A TCO application is to be taken to meet the core criteria if.

a) no substitutable goods were produced in

Australia in the ordinary course of business; or

b) substitutable goods were produced in Australia in the ordinary course of business but the granting of the TCO was not likely to have a significant adverse effect on the market for the substitutable goods.

- 'substitutable goods' are defined in new subsection 269B(1) as outlined above.

- the phrases 'goods produced in Australia' and 'the ordinary course of business' are defined in new sections 269D and 269E respectively.

- The new test outlined above will require anyone objecting to the grant of a TCO to establish both substitutability and a significant adverse effect on the market for their goods and replaces the old 'goods serving similar functions' test which included an examination of cross-elasticity of demand for the goods in question. The new section 269C will also require identical goods to meet the market test contained in paragraph (b) of that section since it is intended that all substitutable goods (regardless of their degree of substitutability) which are produced in Australia should meet the same test.

Interpretation - goods produced in Australia

new section 269D defines the phrase 'goods produced in Australia' for the purpose of the core criteria set out in new section 269C. The definition substantially incorporates old subsections 269B(5) and (6) as new subsections 269D(1) and (2); that is,

- goods, other than unmanufactured raw products, are taken to be produced in Australia if:

  a) the goods are wholly or partly manufactured in Australia; and

  b) not less than ¼ of the factory or works cost of the goods is represented by the sum of the value of Australian labour, the value of Australian materials, and the factory overhead expenses incurred in Australia

in respect of the goods (new subsection 269D(1)); and

- goods are to be taken to have been partly manufactured in Australia if at least one substantial process in the manufacture of the goods was carried out in Australia. (new subsection 269D(2)).

  - The Comptroller may direct, by instrument in writing published in the Gazette, that the value of the factors outlined in new paragraph 269D(1)(b) be determined in a specified manner (new subsections 269D(4) and (5)). These provisions repeat the old section 269S.

The significant reform contained in section 269D is that provided for in new section 269D(3), which excludes certain specified operations from being a 'substantial process in the manufacture of the goods'. It is intended that a substantial process be one that provides the goods in question with their essential character. As such, operations which do not constitute such a process are:

- operations to preserve goods during transportation or storage (new paragraph 269D(3)(a));

- operations to improve the packing or labelling or marketable quality of goods (new paragraph 269D(3)(b));

- operations to prepare goods for shipment (new paragraph 269D(3)(c));

- simple assembly operations (new paragraph 269D(3)(d)); and

- operations to mix goods where the resulting product does not have different properties from those of the goods that have been mixed (new paragraph 269D(3)(e)).

Interpretation - the ordinary course of business

new section 269E defines the phrase 'the ordinary course of business' for the purpose of the core criteria set out in new section 269C. The new definition partially incorporates the old test contained in section 269B(7), but essentially replaces it with a series of criteria which must be satisfied before someone can be said to be producing goods in Australia in the ordinary course of business.

The new definition differentiates between substitutable goods which are normal goods and those which are "made-to-order capital equipment". Subsection 269E(1) makes provision for the former whilst subsection 269E(2) makes provision for the latter.

- 'Made-to-order capital equipment' is defined in subsection 269E(3) as meaning capital equipment that is made in Australia to meet a specific order rather than being the subject of regular or intermittent production.

Subsection (1) provides that for the purposes of this Part, other than section 269Q, goods (other than made-to-order capital equipment) are taken to be produced in Australia in the ordinary course of business if:

- they have been produced in Australia in the 2 years before the application was lodged (paragraph (1)(a));
- they have been produced, and are held in stock, in Australia (paragraph (1)(b)); or
- they are produced in Australia on an intermittent basis and have been so produced in the 5 years before the application was lodged (paragraph (1)(c)); and
- a producer in Australia is prepared to accept an order to supply them.

  - the last point is the test contained in the old section 269B(7).
  - The new definition of 'ordinary course of business' in section 269E excludes from its operation section 269Q which provides for the making of TCOs in respect of goods requiring repair. The reason for that exclusion is that the latter provision contains its own definition of 'ordinary course of business' for the purposes of goods requiring repair.

Subsection (2) provides that for the purpose of this Part goods that are substitutable goods (paragraph (2)(a)) and are made-to-order capital equipment (paragraph (2)(b)) are taken to be produced in Australia in the ordinary course of business if a producer in Australia.

- has made goods requiring the same labour skills, technology and design expertise in

the 2 years before the application was lodged (subparagraph (2)(c)(i));

- could produce the substitutable goods with existing facilities (subparagraph (2)(c)(ii)); and
- is prepared to accept an order to supply the substitutable goods (paragraph (2)(d)).
  - as for subsection (1), the last point is the test contained in old subsection 269B(7).
  - The separate test for made-to-order capital equipment is intended to cover producers who have the proven capability to manufacture substitutable goods, even though the market for such goods does not require on-going production.

Division 2 - Making and processing TCO applications

Making a TCO application

New section 269F outlines how someone wishing to obtain the benefit of concessional entry for the importation of their goods goes about applying for a TCO. It provides that a person may apply to the Comptroller for a TCO (subsection (1)).

- The procedure outlined in this section is equally applicable to applications for a standard TCO to be made under section 269P or for a TCO for goods sent overseas for repair to be made under section 269Q.

The new section essentially remakes old section 269G, with the additional requirements that the application be in an approved form containing such information as the form requires (subsection (2)) and that the day on which the application is lodged must be recorded on the application (subsection (5)).

- as the application must be in an "approved form", the form must comply with the tabling and disallowance procedures provided for in section 46A of the Acts Interpretation Act 1901 (section 4A of the Principal Act refers).

In addition to the information required in the approved form, all applications must contain a full description of the goods to which the application relates and the tariff classification that in the opinion of the

applicant refers to those goods (new subsection (3)).

. The inclusion of the suggested tariff classification will help the Comptroller to better identify the goods the subject of the application and to form an opinion as to the tariff classification of the goods for the purposes of publishing an application under new subsection 269K(1) and making a TCO under new paragraph 269P(3)(a).

A TCO application may be lodged with Customs

- personally, by leaving it at a place allocated for lodgement of TCO applications at Customs House, Canberra; or
- by prepaid post; or
- by facsimile

and it is taken to have been lodged for the purposes of the new processing time limits when it is first received by an officer of Customs (subsection (4)), who must record the day of lodgement on the application when it is received (subsection (5)).

. This is crucial to the operation of the new regime as once a TCO is made under new section 269P it is taken to have come into force 28 days before the day on which the TCO application was lodged (new subsection 269S(1) refers). Additionally, it marks the point in time from which the Comptroller has 28 days in which to screen the application under new section 269H.

. It should be noted that for the purposes of processing time limits set out in new sections 269H,K,L,N,P and Q, time begins to run from the day after the time of first receipt by an officer of Customs, rather than from when it is received in the processing area. This is the result of the amended definition of "days" in new subsection 269B(2), and the operation of subsection 36(1) of the Acts Interpretation Act 1901 to which it refers.

Withdrawing a TCO application

new section 269G provides a mechanism by which an applicant for a TCO may formally withdraw a TCO application made under new section 269F, at any time before a decision on the application is made under new section 269P or 269Q (subsection (1)).

. Whilst it is considered that withdrawals of

TCO applications have always been possible, this provision adds some certainty and formality to the process.

The withdrawal must be in writing and lodged with Customs in the same manner as provided for TCO applications in new subsection 269F(4) and takes effect from the day of its lodgement (subsection (2)).

If formal publication of the application under new section 269K has occurred before the application is withdrawn, the Comptroller must publish a notice in the Gazette to the effect that the TCO application has been withdrawn, describing the goods to which it related and stating the date on which it was withdrawn (subsection (3)), thereby alerting any potential objectors to the TCO being made.

Screening the application

new section 269H is a provision intended to make the TCO scheme more efficient by helping to ensure the information provided in an application is complete and adequate. It provides that the Comptroller has 28 days from the date of lodgement of a TCO application to decide if the application meets the requirements of new section 269F and notify the applicant of his or her acceptance or rejection of the application (subsection (1)).

. The 28 day period in subsection (1) has been inserted to allow sufficient time for the formal tariff link between the goods the subject of a TCO application and the Customs Tariff Act 1987 Schedule 3 tariff item which applies to those goods to be settled. This is a technical exercise, which is more than simply checking that all the boxes on a form are filled out.

If the Comptroller fails to accept or reject the application within 28 days of lodgement, it is deemed to have been accepted as a valid application (subsection (2)).

. A decision to reject an application made under this provision is subject to review by the Administrative Appeals Tribunal (Clause 19 refers).

Applications taken to be lodged in certain circumstances

new section 269J is modelled on the old section 269J and provides that if the Comptroller decides that it is desirable to consider the making of a TCO, despite the fact that a TCO application

has not been lodged, the Comptroller may make a declaration in writing (subsection (1)) and that declaration must include a proposal for the issue of a TCO for the goods described in the declaration (subsection (2)).

Such a declaration is treated as a TCO application lodged on the day the declaration is made and the standard provisions for processing an application under the Part will apply (subsection (3).

. It is considered that this provision picks up both subsections of the old section 269J, since in a sense old subsection 269J(1) is a subset of 269J(2).

Processing a valid application

new section 269K provides that the Comptroller must publish a notice in the Gazette as soon as practicable after accepting a TCO application under new section 269H. The Gazette notice must state that the application has been lodged; describe the goods to which the application relates; and include the Customs tariff classification which in the Comptroller's opinion applies to the goods.

The notice must also invite any person who objects to the making of a TCO in respect of the goods described, to lodge a submission with the Comptroller within 50 days of the gazettal of the notice (subsection (1)).

. The information received in such submissions is one of the main sources of information (along with the information in the TCO application) on which the Comptroller will make a decision under new section 269P as to whether the core criteria are met, and thus whether a TCO should issue.

As for a TCO application, a submission outlining reasons why the TCO should not be made must be in writing; be in an approved form; contain such information as the form requires; and be signed in the manner indicated in the form (subsection (2)).

Subsection (3) allows such submissions to be lodged with Customs either personally, by prepaid post, or by facsimile, in the same manner as for TCO applications under subsection 269F(4).

If such a submission is lodged after the expiration of the 50 day time limit and the

Comptroller has not invited that submission under new section 269M, the Comptroller must not take the submission into account in determining whether to make a TCO (subsection (4)).

. This prohibition imposes the corresponding discipline on objectors to TCO applications that processing time limits places on the bureaucracy. It will effectively stop the drip feed submission process that inevitably lengthens any final decision.

Amendment of TCO applications

New section 269L provides for the amendment of a TCO application by the applicant where submissions objecting to the making of a TCO have been received by the Comptroller within 50 days from the gazettal of the application under new section 269K, and the applicant feels that by amending the wording to take account of those objections, the likelihood of the TCO being made is greater.

This reform in favour of an applicant is however, subject to the qualification that any such amendment not go beyond the scope of the original application as outlined in the notes to subsection (3).

Subsection (1) provides that the Comptroller must, within 14 days after the end of the 50 day objection period, notify the applicant in writing of the names and addresses of any objectors and the nature of the grounds of their objections.

Subsection (2) allows the applicant 14 days from the receipt of a notice under subsection (1) to notify the Comptroller of his or her proposed amendment to the description of goods in the application. Such an amendment cannot result in the description being changed to the extent that the goods concerned would be covered by a different tariff classification to that notified in the Gazette under new section 269K (Subsection (3)).

. This limitation ensures that the range of substitutable goods to be looked at in relation to the amended application is no wider than that which resulted from the initial description of goods published in the Gazette.

Paragraph (4)(a) provides that if an application is amended, the amended application is to be dealt with as if it had always contained the amended description of goods.

- This ensures that the applicant for the TCO (who still in fact wants duty free entry of the same goods as initially applied for, but now proposes a narrower wording in response to the objections of a local manufacturer whose goods were also covered by the initial wider description) maintains the date of operation which attached to his original application. (See new section 269S in relation to the date of operation).

The Comptroller must notify objectors to the original application of the proposed amendment within 14 days of receiving it from the applicant (paragraph (4)(b)).

An objector then has 14 days to advise the Comptroller in writing whether he or she still objects to the TCO application (subsection (5)).

If an objector advises that he or she no longer objects, then his or her submission is taken to have been withdrawn (subsection (5)), and therefore can no longer be considered by the Comptroller when making a decision under new subsection 269P(1).

If the objector does not notify the Comptroller to that effect, then his or her original submission will be treated as a submission in relation to the amended application (subsection (6)).

Customs may invite submissions or seek other information or documents

New section 269M provides the Comptroller with investigative powers, which allow him or her to go beyond the information provided in the initial TCO application and submissions in response to the Gazettal of that application, in order to decide whether or not he or she is satisfied that the application meets the core criteria.

Subsection (1) allows the Comptroller to invite a person he or she considers may have reason to oppose the making of a TCO, to lodge a written submission within a period specified in the invitation, notwithstanding that the person did not lodge a submission within 50 days of the invitation in the Gazette.

- This is not a means by which the principal processing time limit can be avoided, as the date which the Comptroller may set for return of such a submission cannot be later

than 150 days after gazettal under section 269K.

Similar to a TCO application or submission objecting to a TCO application in response to the Gazette notice, a submission at the invitation of the Comptroller under this section must be in an approved form (subsection (2)), and may be lodged personally, by prepaid post or by facsimile (subsection (3)).

Subsection (4) provides that the Comptroller may request in writing the supply of further information from any person (including the applicant or an objector) or the production of a document or material which he or she considers might be relevant to the application, and the Comptroller may set a time limit for the supply of that information, or the production of that document or material.

- As for subsection (1), the date set for supply or production under this provision cannot be later than 150 days after gazettal under section 269K.

If information sought under subsection (1) or a document or material requested under subsection (4) is not produced within the period specified in the request, the Comptroller must not take that submission, information, material or document into account when deciding whether to make a TCO (subsection (5)).

- This is similar to the restriciton in subsection 269K(4).

Reprocessing of TCO applications

new section 269N provides that the processing of a TCO application must recommence, in situations where the Comptroller is satisfied that:

- because of an amendment of a Customs Tariff; or
- with regard to a decision of a court or the Administrative Appeals Tribunal; or
- with regard to advice from the Attorney-General's Department;

the tariff classification originally stated in the gazette notice under new section 269K no longer applies to the goods the subject of the application (subsection (1)).

Subsection (2) provides that an application must be reprocessed if the Comptroller is

satisfied that there was a transcription error in the description of goods or the tariff classification, when the Comptroller published the notice in the Gazette under new section 269K.

When the Comptroller is required to reprocess an application under new subsection (1) or (2), he or she must notify the applicant, and any persons from whom submissions have been received or sought, that it is necessary to reprocess the application and a new notice of the application will be published in the Gazette (Subsection (3)).

The Comptroller must then publish in the Gazette a new notice under 269K(1) in relation to the TCO application to substitute for the original notice (subsection (4));

- any objector may lodge a submission within 50 days of this new notice and a person who has lodged a submission in respect of the original notice has 50 days to advise the Comptroller whether he or she wishes the submission in relation to that notice, or a modified version of that submission, to be treated as a submission in relation to the substituted notice (subsection (5)).

Subsection (6) provides for the date of operation of any TCO made in respect of a reprocessed application to be unaffected by the reprocessing.

- The applicant for the TCO is therefore not prejudiced as a result of the processing time being extended.

Division 3 - Making and operation of TCOs

The making of a standard TCO

new section 269P provides that the Comptroller must, within 150 days from gazettal of a valid application under new section 269K, come to a decision whether or not he or she is satisfied that the application meets the core criteria (as defined in new section 269C). In making that decision the Comptroller must have regard to:

- the application;
- all submissions from objectors (ie. those in response to the Gazetted invitation under Section 269K and those in response to a notice under subsection 269M(1)); and
- all information, documents and material provided in accordance with a subsection 269M(4) request.

If the Comptroller fails to make a decision within 150 days, then he or she is taken to have decided that the application does not meet the core criteria (subsection (2)).

- This deeming provision crystallises the applicant's right to seek review of the decision at day 150, from which the time limit to exercise his or her right to review will run.

- A decision of the Comptroller under this section is subject to review by the Administrative Appeals Tribunal (Clause 19 refers).

Subsection (3) provides that if the Comptroller is satisfied that the core criteria are met, then he or she must make a tariff concession order declaring that the goods are goods to which a prescribed item applies (as defined in section 269B). That order must include a description of the goods the subject of the order, the tariff classification that the Comptroller consider applies to the goods, and the date of operation of the TCO (subsection (4)). If a short-term TCO under new section 269SA is being made, the order must also include a statement of the day on which the TCO ceases to be in force (paragraph (4)c)).

The making of a TCO for goods requiring repair

new section 269O remakes old subsection 269C(1A). Old subsection 269C(1B) has not been retained since it is considered redundant. The new provision provides that if a TCO application for goods sent out of Australia for repair has been accepted as a valid application under section 269H, the Comptroller must, within 150 days, decide whether he or she is satisfied that no one in Australia is capable of repairing those goods in the ordinary course of business (subsection (1)). As for a standard TCO, in making that decision the Comptroller must have regard to:

- the TCO application;
- all submissions lodged before the last day for submissions (as defined in section 269B); and
- any information, documents, and material provided in response to an invitation under subsection 269M(4)

A similar deeming provision to that for standard TCOs applies should the Comptroller fail to make a decision by day 150 (subsection (2)), the effect of which is to reject the applicaiton.

- A decision of the Comptroller under this section is subject to review by the Administrative Appeals Tribunal (Clause 19 refers).

Subsection (3) provides that if the Comptroller is satisfied that no-one in Australia is capable of repairing those goods, he or she must make a TCO declaring that the goods are goods to which a prescribed item applies.

As for a standard TCO, the order must set out;

- a description of the goods
- the tariff classification which in the opinion of the Comptroller applies to the goods; and
- the date on which the TCO is taken to have come into operation. (subsection (4)).

Subsection (5) defines 'ordinary course of business' for the purposes of TCOs for repair. It provides that a person is capable of repairing goods in the ordinary course of business if that person is prepared to accept orders to repair those goods.

. This definition is not as strict as the standard definition of 'ordinary course of business' in new section 269E because of the focus on repair rather than the goods themselves.

Notification of TCO decisions

New section 269R provides that as soon as practicable after the Comptroller decides whether or not he is satisfied that a TCO should be made, the Comptroller must inform the applicant in writing of the decision and publish a notice in the Gazette informing interested parties of the decision (subsection (1))

. The date of publication of the decision in the Gazette is important, as it is the date from which time runs for the purposes of internal appeal rights under new section 269SH.

Subsection (2) provides that if the decision resulted in the making of a TCO the Gazette

notice and the notice given to the applicant must include the full particulars of the TCO.

The validity of the TCO itself is not affected by a failure to comply with the notification requirements in subsections (1) and (2) (subsection (3)).

. The provision largely remakes old section 269M.

Operation of TCOs

New section 269S provides that TCOs (other than those covered by subsection 269SA(2)) are taken to come into operation 28 days before the day on which the TCO application was lodged. Essentially, this maintains the provision in the old section 269N, and caters essentially for "recent" importations of goods (subsection (1)).

If more than one person lodges an application in respect of the same goods, the TCO will be taken to have come into operation 28 days before the day on which the earliest application was lodged (paragraph (1)(b)).

The TCO will apply to goods described in the TCO that are entered for home consumption on or after the day on which the TCO comes into force (subsection (2)).

. importers of goods the subject of the TCO which have been entered for home consumption during the time when the TCO application was being processed will be able to apply for refunds of any duty paid on those goods.

A TCO (other than a TCO to which subsection 269SA(1) applies) then remains in operation for the use of all importers of those goods until it is revoked under section 269SC or section 269SD (subsection (3)).

Consequence of commencement or cessation of production before TCO decision

New section 269SA provides for a variation to the date of operation of a TCO in circumstances where the production of substitutable goods either commences or ceases before the Comptroller makes a decision under section 269P. The provision therefore reflects old subsections 269(3A) and (3B).

Subsection (1) provides that if the Comptroller is satisfied that the application meets the core criteria (ie. on a day 28 days before the TCO application was lodged); and

- that on a day after 28 days before lodgement but before a decision is made, substitutable goods commenced to be produced; and

- if those substitutable goods had been in production 28 days before lodgement the core criteria would not have been met;

the TCO under section 269P only operates during the period from 28 days before lodgement until the day production started.

Subsection (2) provides that if the Comptroller is satisfied that the application does not meet the core criteria (because substitutable goods were produced on a day 28 days before lodgement of the application), and that on a day before a decision under section 269P is made that the production of the substitutable goods but for which the core criteria would have been met has ceased, the Comptroller must make a TCO under section 269P which only operates from the date that production of the substitutable goods ceased.

- The new subsections are intended to make it clear that in making a so called "short-term" TCO or a "late start" TCO the Comptroller is required to only look at whether or not the core criteria are met on the day on which production commenced or ceased, not on every other day during that period.

A decision of the Comptroller under this section is subject to merits review by the Administrative Appeals Tribunal (Clause 19 refers).

Division 4 - Revocation of TCOs

Request for revocation of TCOs

new section 269SB prescribes how a request for revocation of an existing TCO may be made and is to be distinguished from new section 269SD which is a Customs driven process. This section reflects an applicant driven process.

Persons who claim to be producers in Australia of substitutable goods (as those terms are defined in new sections 269D and 269B respectively), in relation to goods the subject of an existing TCO, may request the revocation of that TCO where they are of the view that if an application were now to be made for that TCO,it would not be granted (subsection (1)).

Such a request for revocation must be in writing in an approved form and contain the information required by the form (subsection (2))

- as the request is required to be in an 'approved form', it must comply with the tabling and disallowance procedures provided for in section 46A of the Acts Interpretation Act 1901 (section 4A of the Principal Act refers).

- The requirement for a formal request is a departure from the old section 269P(1) which is essentially a Customs initiated process, with a discretion to revoke vested in the Comptroller-General. The reform is intended to overcome some of the concerns expressed by current users of TCOs as to the arbitrary nature of the present system of revocation.

Subsection (3) provides 3 methods by which a request for revocation may be lodged with Customs:

- manually, by leaving it at a place allocated for the lodgement of TCO applications at Customs House, Canberra (paragraph (3)(a));
- by pre-paid post (paragraph (3)(b)); or
- by facsimile (paragraph (3)(c)).

The request will be taken to have been lodged when the request is first received by an officer of Customs and the day of that lodgement must be recorded on the request (subsection (4)).

- It should be noted that for the purposes of the processing time limits set out in new section 269SB, time begins to run from the day after the time of first receipt by an officer of Customs rather than from when it is received in the processing area. This is similar to the note for new section 269F.

- The lodgement process in subsection (3) is consistent with the lodgement process for TCO applications, provided for in new subsection 269F(4).

Processing request for revocations of TCOs

new section 269SC essentially repeals and remakes the procedural parts of the old section 269P; replacing the old scheme of revocation with one that is intended to be more transparent. The new scheme introduces time limits and public notifications into the process.

Subsection (1) remakes the old subsection 269P(1) by retaining the underlying basis for revocation but also reforms it by imposing time limits on the decision-making process. It provides that no later than 60 days after lodgement of a request for revocation of a TCO the Comptroller must decide whether or not he or she is satisfied that:

a) on the day the request was lodged, the person requesting revocation is a producer in Australia of substitutable goods (as defined in new sections 269D and 269B) in relation to the TCO goods; and

b) if an application for that TCO were now to be made, it would not be granted.

The processing of the request for revocation then proceeds as follows:

If the Comptroller is satisfied of the matters in subsection (1):

- he or she must make an order revoking the TCO (subsection (3)); and

- the order revoking the TCO comes into force on the day on which the request for revocation was lodged (subsection (6));

If the Comptroller is not satisfied as to the matters in subsection (1) he or she must refuse the request (subsection (5)).

- Notification of decisions to revoke or not

revoke a TCO are dealt with in new section 269SE.

The procedures outlined above in respect of decisions refusing a request for revocation are deemed to come into effect if a decision in respect of such a request is not made within the stipulated 60 day decision-making period (subsection (2)).

Whilst the Comptroller can grant or refuse a request for revocation he or she can also grant a TCO with a narrower scope rather than simply revoking it in its entirety. The new scheme thus retains a provision similar to the old subsection 269P(10) as follows:

Subsection (4) provides the Comptroller with a power to issue a new, more narrowly framed TCO, which maintains protection for relevant locally manufactured goods whilst allowing concessional entry for those goods not produced in Australia. The subsection provides that where the Comptroller-General is satisfied that a narrower TCO can be made, he or she must revoke the existing TCO and make, in its place, such a narrower TCO.

Subsection (7) provides that a narrower TCO comes into force from the date of effect of the revocation of the other TCO as if the narrower TCO had itself been made under new section 269P (the making of a standard TCO).

- A decision of the Comptroller under subsection (1) or (4) is reviewable by the Administrative Appeals Tribunal (Clause 19 refers).

Revocation at the initiative of Customs

new section 269SD provides the Comptroller with the power to revoke TCOs without a request having been lodged, but circumscribes that power by strictly limiting its exercise to the circumstances specified within the section. In particular, the Comptroller may make an order revoking the TCO only where:

- the TCO is no longer required because the general tariff rate in respect of the goods the subject of the order has been reduced to "Free" (subsection (1));

  - This provision replaces the old subsection 269P(2A) which refers to 'obsolete' TCOs and is intended to spell out exactly why a TCO would generally become obsolete.

- The revocation takes effect from the day the tariff rate was so reduced;

. the Comptroller is satisfied that the tariff classification specified in a TCO to apply to goods has not, with effect from a particular day, applied to those goods (subsection (2)). This provision, which partially remakes the old subsections 269P(2B) and (2C), requires that the power to revoke be exercised by reference to 3 criteria:

a) because of an amendment of a Customs tariff;

b) a decision of a court or the Administrative Appeals Tribunal; or

c) a written advice given by an appropriate officer of the Attorney-General's Department.

- The inclusion of 3 criteria to govern the exercise of the power is a departure from the arguably open-ended discretion which previously existed with the use of the phrase 'or otherwise' in the old subsection 269(2B).

This particular revocation requires that the Comptroller also make a new TCO in respect of the goods (with the correct tariff classification applicable), with effect from the revocation,

. there has been a transcription error, in the description of goods (including the tariff classification) the subject of the TCO (subsection (3)). In such a case the Comptroller may make an order revoking the TCO with effect from the day it came into force and replace it with a new TCO that corrects the error with effect from that revocation.

A decision of the Comptroller under subsections (1) or (2) is reviewable by the Administrative Appeals Tribunal (Clause 19 refers).

Notification of revocation decisions

new section 269SE remakes the old subsections 269P(4) and (5) and is consistent with notification elsewhere in the new scheme (eg. section 269R).

Subsection (1) requires that as soon as practicable after the Comptroller makes a decision that he or she is or is not satisfied of the matters in new subsection 269C(1), he or she must:

a) inform the applicant by notice in writing, and

b) inform all other interested persons by notice published in the Gazette.

Subsection (2) requires publication of a notice in the Gazette as soon as practicable after a decision under subsection 269SD(1) or (2).

. This subsection does not require personal notification because it is a Customs generated revocation, not a request by an applicant.

Subsection (3) provides that if the decision led to the making of an order revoking a TCO or both to the making of such an order and the making of a new TCO (the 'narrower TCO' circumstance), the notice of that decision given to the applicant and published in the Gazette must include full particulars of the order or orders.

Subsection (4) repeats the old subsection 269P(5) in providing that a failure to exercise the notice requirements will not invalidate the revocation concerned.

Customs may seek information, documents or material relating to revocation

new section 269SF provides a power to the Comptroller to request further and better particulars in respect of requests for revocation similar to the power in new subsection 269M(4) for TCO applications. The information, documents or material must be supplied within the period specified in the notice or in any case by the end of the decision-making period (60 days) (subsection (1)). If the information, documents or material are not supplied within the specified period, the Comptroller is precluded from taking that information, document or material into account in determining whether or not to revoke a TCO (subsection (3)).

Effect of revocation upon goods in transit and capital equipment on order

new section 269SG repeats old subsections 269P(8) and (9) in subsections (2) and (3) and introduces an in-transit provision for capital equipment in subsection (4). Thus, despite the revocation of a TCO under new subsection 269SC(3), that TCO continues to apply to:

- goods that were imported into Australia on or before the day on which the revocation came into effect and are entered for home consumption, before, on, or within 28 days of that day; and

- goods that were in transit on the day of revocation and are entered for home consumption, before, on, or within 28 days after, the day on which they were imported into Australia.

Goods are taken to be in transit to Australia if they have left for direct shipment to Australia from a place of manufacture, or a warehouse, in the country from which they are being exported.

In relation to capital equipment (as defined in new section 269B), where the Comptroller is satisfied that, before the revocation of a TCO but after its commencement, a firm order had been placed for the purchase of such equipment, the TCO continues to apply in relation to the importation of that equipment.

- The reference in subsection (4) to "before revocation, but after its commencement" is to ensure that capital equipment which had been contracted for before the TCO was in force can not get the benefit of the extended in transit provisions.

Division 5 - Miscellaneous

Internal review

new section 269SH implements the internal review component of the new merits review process for decisions taken under Part XVA of the Principal Act and is one of 2 major review reforms to the tariff concession system.

The old scheme of tariff concessions only allowed persons aggrieved by a decision under Part XVA to obtain review at the discretion of the Comptroller under subsection 269K(2) of the Principal Act or judicial review via an

application to a court under the Administrative Decisions (Judicial Review) Act 1977, which, as regards the latter was costly and time-consuming and is limited to errors of law.

The initiatives contained in this new provision, coupled with the amendments contained in Clause 19 below, introduce a new merits review process which allows review on the facts of a case and does not just examine the legal issues.

The new process is two-tiered, in the sense that it involves firstly internal review and then review by the Administrative Appeals Tribunal ("AAT").

. The internal review in new section 269SH is a mandatory precondition to AAT review, (new subsection 273GA(6A) in Clause 19 of the Bill refers).

The internal review process operates as follows:

. Any "affected person" (as defined in subsection (13)), who objects to the making of a decision may apply to the Comptroller for reconsideration within 28 days of gazettal of that decision (subsection (1)).

. The application for reconsideration must:

  - be in writing and include the grounds on which the person objects to the decision (whether or not those grounds had been previously considered) (subsection (2));

  - be lodged in the same manner as is specified in new section 269P, and is taken to be lodged on the same day as is specified in new section 269P for TCO applications and accordingly must have the day of its lodgement recorded (subsection (3))

. In respect of the reconsideration of decisions made on TCO applications (subsection (4)) and on requests for revocation (subsection (5)) the Comptroller must decide within a stipulated period and having regard to specified submissions, information, documents and materials whether to affirm the original decision or to substitute any other decision that the Comptroller might

have made. The stipulated period is 90 days for TCO application decisions and 60 days for requests for revocation decisions.

- Paragraphs (4)(c) and (5)(c) allow the Comptroller to have regard to any new material produced for the reconsideration other than material that is not produced within the 28 day "application for consideration" period subsection (1). This latter prohibition is specifically outlined in subsection (7).

Subsection (6) is a deeming provision that provides that if the Comptroller fails to make a decision under subsections (4) or (5) within the stipulated periods, he or she is taken, for the purposes of reconsideration to have affirmed the original decision.

Subsections (8) and (9) outline the effects of a decision on reconsideration which substitutes a new decision for the original decision:

- The substituted decision is taken to have been made when the original decision was made (This emphasizes the merits review nature of internal review); and

- if the substituted decision involves the making of either a TCO or an order revoking a TCO, that order comes into force on the day on which any original decision making either order would have come into force.

New subsections (10),(11) and (12) repeat the notification requirements specified in new section 269R previously, but in relation to the reconsideration decision.

Subsection (13) defines "affected person" for the purposes of the section as follows:

- In relation to a decision on a TCO application;

  i) the applicant for the TCO;
  ii) any person who lodged a submission before the last day for submissions in relation to the TCO application, or
  iii) any person who, in the opinion of the Comptroller was not reasonably able to lodge a submission within 50 days of gazettal day.

    - The category of persons in (iii)

is intended to overcome any criticisms of inequity because someone does not put in a submission due to a genuine inability.

. In relation to a decision on a request for revocation;

i) the person requesting the revocation, or
ii) any other person whose interests are affected by the decision

- The persons specified in (ii) would cover for example, importers who may have been bringing goods into Australia under the concession which has now been revoked.

TCOs not to apply to prescribed goods

new section 269SJ remakes the old section 269D and is an overriding prohibition against making TCOs in respect of goods declared by the regulations to be goods in respect of which a TCO cannot be made (subsection (1)).

. These goods are prescribed in regulation 185 and Schedule 2 of the Customs Regulations.

Where a regulation does specify goods in respect of which a TCO cannot be made, any TCO affected by the regulation must be taken, to the extent that it covers those goods, to have been revoked by the Comptroller on the day those regulations came into effect (subsection (2)).

. The effect of this subsection is that effectively, a narrower TCO is taken to have been made in respect of goods in the original TCO which are not affected by the regulation.

Subsection (3) provides a Gazete notice requirement in the event a TCO is taken to have been revoked under subsection (2).

TCOs not to contravene international agreements

new section 269SK repeats the old section 269F and prohibits the Comptroller from making any TCO that would result in a contravention of Australia's obligations under any international agreement.

TCOs not to be statutory rules

new section 269SL repeats old section 269Q and provides that a TCO shall not be deemed to be a statutory rule.

Interpretation

Clause 11 amends section 269T of the Principal Act so as vest the Minister with the power to determine whether or not a processed agricultural good (eg. frozen orange juice) is related closely enough to a raw agricultural good (eg. oranges) so as to give the producer of the raw agricultural good standing to bring a dumping complaint.

- Subsection 269T(4)(4A),(4B) and (4C) were inserted into the Principal Act on 26 June 1991 by Act No. 82 of 1991 to provide for anti-dumping or countervailing remedies for agricultural/horticultural producers affected by the dumping or subsidisation of imports of processed agricultural products. This reform was in accordance with the Government's changes to the anti-dumping/countervailing regime announced in the 1991 March Industry Statement.

At present, this determination is left to the Comptroller. To ensure that the Anti-Dumping Authority can review the Comptroller's decision of whether the primary producer has standing to bring a dumping complaint, it is considered appropriate to change the reference to "Comptroller" in subsection 269T(4B) to "Minister" (paragraph 11(a)) and similarly in subsection 269T(4C) (paragraph 11(b)), which will enable the Authority under subsection 11(1) of the Anti-Dumping Authority Act 1988 to recommend to the Minister whether the Minister ought to be satisfied that the primary producer does or does not have standing to bring a dumping complaint.

Application for action under Anti-Dumping Act

Clause 12 amends section 269TB of the Principal Act to provide, in conjunction with clause 13, changes to the Anti-Dumping regime to ensure the speedy processing of applications at the prima facie stage. To enable a reduction in time for processing applications at the prima facie stage it is considered necessary to amend the present scheme to provide for a more precise method of applying for relief via anti-dumping or countervailing measures. In particular, because of the reduction in the time period within which

the prima facie case is decided, as effected by clause 13, it is considered necessary to specify exactly when the 25 day period of consideration is to begin.

- paragraph 12(1)(a) amends subsection 269TB(1) to change the way in which an application is to be received by Customs, by specifying that it is to be lodged with Customs in accordance with a precise procedure specified in new subsection 269TB(5).

- paragraph 12(1)(b) provides for an identical amendment to subsection 269TB(2) as paragraph 12(1) provides for subsection 269TB(1).

- paragraph 12(1)(c) inserts three new subsections as follows:

  new subsection 269TB(3) provides that an applicant may withdraw an application by notice in writing in accordance, with the procedure specified in new subsection 269TB(5).

  - the application can be withdrawn at any time before a preliminary finding is made under section 269TD of the Principal Act.

- new subsection 269TB(4) ensures this section is consistent with other provisions in the Principal Act which utilise an approved form mechanism (Clause 10, new section 269F refers).

- new subsection 269TB(5) specifies how an application or a notice withdrawing an application may be lodged with Customs. It provides that the application can be lodged in 3 ways:

  a) by giving it to an officer doing duty in relation to dumping applications; or

  b) by posting it to Customs to a postal address specified in the application; or

  c) by giving it to Customs by a facsimile as specified in the application.

  The applications or the notice of a withdrawal of an application is then taken to have been received by Customs when it is first received by an officer doing duty in relation to dumping applications.

subclause 12(2) inserts a transitional provision to ensure that these amendments to section 269TB only affect applications lodged with Customs after the commencement of this section.

Consideration of application

Clause 13 amends section 269TC of the Principal Act to:

- reduce the time taken to process applications to the prima facie stage from 35 days to 25 days;
- allow the Australian Customs Service to use information not contained in the application to determine if a prima facie case exists,
- ensure that applications received by the Australian Customs Service are presented in such a way so as to facilitate their rapid processing at the prima facie stage.

paragraph 13(a) amends subsection 269TC(1) of the Principal Act to provide that the Comptroller after receiving an application for a dumping duty notice or a countervailing duty notice, has 25 days to examine that application to decide whether the application should be rejected. In deciding whether to reject an application the Comptroller may have regard to matters contained in the application and to any other matters the Comptroller considers relevant.

- This amendment will enable the Australian Customs Service to overcome difficulties put forward by the Federal Court in Swan Portland Cement v Comptroller-General of Customs (1989) 90 ALR 280, where the Court held that in deciding whether to reject an application under subsection S269TC(1), the Comptroller could not investigate whether the matters set out in the application were factually correct. This precludes the Comptroller from using information available to him or her but which is not included in the application. This amendment will allow the Comptroller to use other information available to him or her in order to reject, or not to reject, an application.
  - The Comptroller is still limited, in considering how much extra information he or she will consider, by the 25 day time limit for a prima facie decision.
- this reduction in time from 35 days to 25 days is contingent upon paragraph 13(b) which amends section 269TC(1) to ensure that

there is strict compliance with the approved form (the application).

paragraph 13(c) inserts a new paragraph 269TC(1)(c) to provide that if the Comptroller is not satisfied, after having regard to the application and to any other matters which the Comptroller considers to be relevant, that there appear to be reasonable grounds for the publication of a dumping duty notice or a countervailing duty notice, then the Comptroller shall reject the application and inform the applicant in writing.

paragraph 13(d) provides for an amendment to subsection 269TC(2) to mirror the amendment effected by paragraph 13(a).

paragraph 13(e) provides for an amendment to subsection 269TC(2) to mirror the amendment effected by paragraph 13(b).

paragraph 13(f) provides for an amendment to subsection 269TC(2) to mirror the amendment effected by paragraph 13(c).

paragraph (g) amends the Principal Act by inserting a new subsection 269TC(2A) which specifies the method by which an applicant (ie. a person who has lodged an application under section 269TB) can give further information to Customs in support of the application without having been requested to do so.

- The information may be lodged as if it were an application under section 269TB (new paragraph 269TC(2A)(a)).

- The information is taken to be received as if it were an application under section 269TB (new paragraph 269TC(2A)(b)).

Upon receipt of the new information, the 25 day period for the Comptroller's consideration of the application shall recommence, and the Comptroller shall consider the further information as if it was part of the application (new paragraph 269TC(2A)(c)).

Comptroller to have regard to same considerations as Minister in certain circumstances

Clause 14 provides for a consequential amendment to section 269TE of the Principal Act as a result of the reforms introduced by Clause 18 of this Act and by Clauses 3 and 4 of the Customs Tariff (Anti-Dumping) Amendment Bill 1992 which clarify the treatment of concurrent dumping and subsidy.

Dumping duties

Clause 15 clarifies section 269TG of the Principal Act by removing the word "indefinitely" from paragraph 269TG(4)(b) and inserting a new subsection 269TG(4A) which specifies that where the Minister accepts an undertaking by an exporter, the suspending of the Minister's consideration of the exportation continues only until such time as the Minister considers that his or her consideration should be resumed.

- A resumption of consideration might occur if circumstances relating to the acceptance of the undertaking have changed or because the Minister has reason to believe the undertaking has been breached.

Countervailing duties

Clause 16 clarifies section 269TJ of the Principal Act, in a similar way to clause 12, by removing the word "indefinitely" from paragraph 269TJ(3)(b) and inserting a new subsection 269TJ(3A) which specifies that where the Minister accepts an undertaking by an exporter, or by the government of the country of origin, or the country of export of the goods, the suspending of the Minister's consideration of the exportation continues only until such time as the Minister considers that his or her consideration should be resumed.

- A resumption of consideration might occur if circumstances relating to the acceptance of the undertaking have changed or because the Minister has reason to believe the undertaking has been reached.

Periods during which certain notices and undertakings to remain in force

Clause 17 amends section 269TM of the Principal Act to extend the period of time for which a dumping duty notice, or countervailing duty notice or an undertaking from 3 years to 5 years.

paragraph 17(a) and paragraph 17(b) amend subsection 269TM(1) to provide that where a dumping duty notice or a countervailing duty notice is published after the commencement of this section, then that notice shall remain in force for 5 years from the day on which it was published unless it is revoked before the end of that period.

paragraph 17(c) and paragraph 17(d) amend subsection 269TM(2) to provide that where an undertaking is entered into after the

commencement of this section, then that undertaking shall remain in place for 5 years from the day on which it was entered into unless provision is made for its earlier expiration.

paragraph 17(e) inserts 3 new subsections into the Act as follows:

- new subsection 269TM(3) provides that if there is a dumping duty notice or a countervailing duty notice in force on the commencement of this section then that notice's expiry date shall extend for an extra two years unless it is sooner revoked, resulting in a total time for the notice being in force of 5 years.

- new subsection 269TM(3A) provides that where an undertaking was entered into before the commencement of this section and is still in force on the commencement of this section, then the Minister shall give the person who entered into the undertaking the opportunity to extend the undertaking so it will be effective for 5 years from the date it was entered into.

- new subsection 269TM(3B) provides that where an undertaking is in existence at the time of commencement of this section and the person who gave the undertaking does not extend it, then the Minister may publish a dumping duty notice or a countervailing duty notice to take effect from the day after the undertaking expires or will expire, and that notice expires 2 years after that day unless it is sooner revoked.

Insertion of new section

Clause 18 inserts a new section 269TJA into the Principal Act, which together with clauses 3 and 4 of the Customs Tariff (Anti-Dumping) Amendment Bill, 1992, is intended to clarify the treatment of concurrent dumping and subsidisation.

- Under the present legislation, while the Minister can be fully satisfied in a given case that the dumping and subsidisation of goods are jointly causing material injury, the Minister might not be able to apply either dumping or countervailing duties. This is because, under the provisions of subsections 269TG(1) and (2) of the Principal Act, and section 8 of the Customs Tariff (Anti-Dumping) Act 1975 (the Anti-Dumping Act), the Minister may only take anti-dumping action when he or she is satisfied that the dumping, of itself, is

causing material injury, and similarly, under the provisions of subsections 269TJ(1) and (2) of the Principal Act, and section 10 of the Anti-Dumping Act, the Minister may only take countervailing action when he or she is satisfied that subsidisation, of itself, is causing material injury. It may well be impossible, however, for the Minister to be satisfied on each of these separate questions.

- Thus, for example, it may be established that goods are both dumped and subsidised, and the Minister may be satisfied;

  . that the price of the goods is causing material injury, and,

  . that that price is affected by the dumping and subsidisation, and, therefore,

  . that the dumping and subsidisation are jointly causing material injury.

- On such a finding, the proposed amendments will now permit the application of dumping or countervailing measures, or both, without the need to quantify how much of the injury is the result of one or the other. Rather, by force of the amendment, the legislation will countenance an assumption that dumping has caused material injury, and, similarly, that subsidisation has caused material injury.

New subsection 269TJA(1) provides that where the Minister is satisfied that goods which have been exported to Australia,have been dumped, and that a subsidy has been paid on those goods, and that the dumping and subsidisation are jointly causing material injury, then the Minister may publish:

. a dumping duty notice under subsection 269TG(1);

. a countervailing duty notice under subsection 269TJ(1), or

notices under both subsections 269TG(1) and 269TJ(1) at the same time in respect of the same goods.

New subsection 269TJA(2) provides the Minister with the same discretion as new subsection

269TJA(1) for goods which are yet to be exported to Australia, provided like goods have been dumped, have had a subsidy paid on them, and the dumping and subsidy have jointly caused or threatened material injury.

New subsection 269TJA(3) provides that where the Minister is considering whether to publish notices under new subsections 269TJA(1) or (2), the Minister may suspend consideration of the consignment if he or she is given and accepts undertakings in respect of those goods by the relevant exporter or country of origin (in the case of a subsidy paid by another country).

New subsection 269TJA(4) provides that if the Minister accepts undertakings referred in new subsection 269TJA(3), the Minister must be satisfied that the combined effect of the undertakings is not greater than is necessary to prevent material injury to the Australian industry.

New subsection 269TJA(5) defines subsidy for the purposes of this section adopting the words in section 269TJ of the Principal Act.

- the description in 269TJ are the conditions necessary for a countervailing duty to be imposed.

Review of decisions

Clause 19 amends section 273GA of the Principal Act, relating to decisions under the Act which are reviewable by the Administrative Appeals Tribunal (AAT).

Paragraph (1)(a) omits current paragraphs (1)(m) and (n), which refer to certain decisions made under current Part XVA (see subsection (2) below in relation to savings provisions in relation to those paragraphs), and substitutes seven new paragraphs (m) to (s) which provide for review rights of decisions made in relation to the new Part XVA, Tariff Concessions regime inserted by Clause 10 as follows.

- new paragraph 273GA(1)(m) provides for review by the AAT of a decision of the Comptroller to reject an applicant's application for a TCO on the basis that it does not comply with the requirements of section 269F (new paragraph 269H(1)(b) refers);

- new paragraph 273GA(1)(n) provides for review by the AAT of a decision of the Comptroller as to whether or not he or she

is satisfied that an application for a standard TCO meets the core criteria (new subsection 269P(1) refers);

- new paragraph 273GA(1)(o) provides for review by the AAT of a decision of the Comptroller as to whether or not he or she is satisfied, in relation to an application for a TCO for goods which have been sent out of Australia for repair, that there is no one in Australia capable of repairing the goods in the ordinary course of business (new subsection 269P(1) refers);

- new paragraph 273GA(1)(p) provides for review by the AAT of a decision of the Comptroller under new subsection 269S(1) or (2) in relation to the commencement or cessation of the production of substitutable goods;

- new paragraph 273GA(1)(q) provides for review by the AAT of a decision of the Comptroller as to whether or not he or she is satisfied that the conditions precedent to the revocation of a TCO have been proved (new subsection 269SB(1) refers);

- new paragraph 273GA(1)(r) provides for review by the AAT of a decision of the Comptroller to make a narrower TCO when considering a request for revocation of a TCO (new subsection 269SB(4) refers); and

- new paragraph 273GA(1)(s) provides for review by the AAT of a decision by the Comptroller to revoke a TCO because the general tariff rate has been reduced to "free" (new subsection 269SC(1) refers), or because he or she is satisfied that, because of a Customs tariff amendment or a decision of a court or the AAT, the tariff classification that is stated in a TCO no longer applies to the goods the subject of the TCO (new subsection 269SC(2) refers).

paragraph (1)(b) inserts a new subsection (6A) into section 273GA of the Principal Act to provide that internal review is a mandatory precondition to an application for review by the AAT of decisions to grant or refuse an application for a TCO or decisions to grant or refuse a request for revocation.

Subclause (2) is a savings provision which preserves the appeal rights of a person who is affected by a decision of the Comptroller under current subsection 269N(4) despite the repeal of

that section and of paragraphs 273GA(1)(m) and (n) (subclause (1) refers).

Decisions made before the repeal of Part XVA or which are taken to be made under that Part after its repeal may still be reviewed and any review already applied for can continue as though Part XVA and paragraphs 273GA(1)(m) and (n) had not been repealed.

Transitional

Clause 20 provides a standard transitional savings provision which preserves existing Commercial Tariff Concession Orders ("CTCOs") made under the old Part XVA of the Principal Act, despite the repeal and substitution of many of the old provisions.

The effect of the clause is that the old Part XVA continues in force in relation to each CTCO made before the commencement of the new scheme, subject to qualifications outlined in the succeeding subclause (4) relating to the old subsection 269K(2) (Subclause (1))

Subclause (2) provides that if an application for a CTCO had been lodged, but not finally determined under the old Part XVA before its repeal, the application is to be determined under the provisions of the old scheme, not later than 150 days after commencement of the new scheme; otherwise the decision is deemed to be a refusal of the CTCO applied for, which preserves the person's right to seek review under the old subsection 269K(2) before its expiry on day 178 after commencement of the new scheme (subclause (3)).

Subclause (4) provides a qualification to the general rule that the provisions of the old Part XVA continue in force in relation to existing CTCO's as at the commencement of the new scheme. It provides that the review power in old subsection 269K(2) ceases in accordance with sub-clauses (4), (5) and (6) unless:

a) the Comptroller had begun to exercise that power before the repeal; or

b) in respect of applications determined under the provisions of the old scheme within 28 days of the commencement of the new scheme - a request is made for review within 28 days after commencement of the new scheme; or

c) in respect of applications determined under subclause (2) - a request is made within 28 days after that determination.

The maximum time within which a request for review under the old subsection 269K(2) can be made is therefore 178 days after commencement of the new scheme, after which time subsection 269K(2) is extinguished for the purposes of seeking a review of existing CTCO's.

Subclause (5) provides that the old subsection 269K(2) review power (as opposed to seeking review) must be exercised by the Comptroller within 60 days of commencement of the new scheme or within 60 days of a request for review, whichever last occurs. If the power of review is not exercised within the stipulated 60 day period, the Comptroller is deemed to have made a decision to affirm the original decision.

The overall affect of Clause 19 is that the old Part XVA will only continue in force as far as revocations of old CTCOs are concerned. Everything else, after the transitional period finishes, will be dealt with under the new scheme.

Savings

Clause 21 ensures that the anti-dumping amendments proposed to sections 269TB and 269TC do not apply to applications lodged with Customs before those amendments commence. Applications lodged before the amendments to sections 269TB and 269TC commence will be subject to the present regime.

PART 4 - AMENDMENT OF THE CUSTOMS TARIFF (MISCELLANEOUS AMENDMENTS) ACT 1987

Principal Act

Clause 22 identifies the Customs Tariff (Miscellaneous Amendments) Act 1987 as the Principal Act being amended by this Part.

Transitional

Clause 23 amends section 8 of the Principal Act by inserting a new subsection (2A) to overcome a defect in the transitional provisions in the Principal Act as follows:

The Customs Tariff Act 1987 commenced on 1 January 1988. Prior to that date the definition of prescribed item in old section 269B related to an item in the 1982 Tariff. On 1 January 1988 the 1982 Tariff was repealed and certain transitional arrangements were put into place by the Principal Act.

However, any CTCO's made under the old section 269C with an operative date earlier than 1 January 1988 are of no effect in relation to any part of those orders purporting to commence before that date. The existing transitional provision in subsection 8(2) of the Principal Act preserved concession orders in force as at 1 January 1988, but did not allow concession orders granted in respect of applications undetermined at that date to be backdated beyond 1 January 1988. The new subsection 8(2A) overcomes this unintended consequence.

Attachment

CONCORDANCE

Current Legislation	*Proposed Legislation*
269B Interpretation	Remade as 269B & 269D(1)-(3)
269C Commercial Tariff Concession Orders	Remade as 269C, 269P & 269Q
269D Concession orders not to apply to prescribed goods	Remade as 269SJ
269E Comptroller may refuse to make certain concession orders	Repealed
269F Concession orders not to contravene international agreements	Remade as 269SK
269G Applications for concession orders	Remade as 269F
269H Notice of applications	Repealed
269J Applications deemed to be made	Remade as 269J
269K Refusal of application	Remade 269R
269L Orders not to be made without notice of application	Remade as 269K
269M Publication of concession orders	Remade as 269R
269N Application of concession orders	Remade as 269N(6), 269S, 269SA, 269SC(7), & 269SH(9)
269P Revocation of concession orders	Remade as 269SB, 269SC, 269SD, 269SE & SG(1),(2) & (3)
269Q Concession orders not to be Statutory Rules	Remade as 269SL
269R Matters may be referred to Industries Assistance Commission	Repealed
269S Factory and works costs	Remade as 269D(4) & (5)
	269E - New provision - Interpretation - the ordinary course of business

Current Legislation	*Proposed Legislation*
	269G - New provision - Withdrawing a TCO application
	269H - New provision - Screening the application
	269L - New provision - Amendment of TCO applications
	269M - New provision - Customs may invite submissions or seek other information, documents or material
	269N - New provision - Reprocessing of TCO applications
	269SF - New provision - Customs may seek information, documents or material relating to revocation
	269SG(4) - New provision - Effect of revocation upon ... capital equipment on order
	269SH - New provision - Internal review
	Clause 19 - amends section 273GA to introduce review of decisions in relation to tariff concessions by the Administrative Appeals Tribunal.