

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS LEGISLATION AMENDMENT (MODERNISING) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Home Affairs,
the Honourable Bob Debus MP)

CUSTOMS LEGISLATION AMENDMENT (MODERNISING) BILL 2008

OUTLINE

1. The purpose of this Bill is to amend the *Customs Act 1901* (the Customs Act) to:
 - reflect the new Certificate of Origin requirements for the Singapore-Australia Free Trade Agreement;
 - update the broker licensing provisions to recognise the changing environment, including the contractual arrangements that exist between some brokerages and nominees;
 - modernise provisions relating to duty recovery and payments under protest and to allow refunds to be applied against unpaid duty in some circumstances; and
 - make it an offence to make false or misleading declarations in using the new SmartGate automated passenger processing system.

FINANCIAL IMPACT STATEMENT

2. The Bill has no financial impact.

CUSTOMS LEGISLATION AMENDMENT (MODERNISING) BILL 2008

NOTES ON CLAUSES

Clause 1 - Short title

3. This clause provides for the Bill, when enacted, to be cited as the *Customs Legislation Amendment (Modernising) Act 2008*.

Clause 2 - Commencement

4. Subclause (1) provides that each provision of this Act specified in column 1 of the table in that subclause commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table. This subclause also provides that any other statement in column 2 of the table has effect according to its terms.
5. Item 1 of the table provides that sections 1 to 3 and anything in this Act not elsewhere covered by the table will commence on the day on which the Act receives the Royal Assent.
6. Item 2 of the table provides that Schedule 1 either commences on the day after the Act receives Royal Assent or on the day Articles 11 and 12 of Chapter 3 of the Singapore-Australia Free Trade Agreement (the SAFTA), as re-tabled in the House of Representatives on 31 May 2005, (the proposed SAFTA amendments) come into force for Australia, whichever is later.
7. A package of amendments to the SAFTA was agreed to in the first Ministerial Review meeting in July 2004 to incorporate additional measures into the SAFTA. The package of amendments were tabled on 15 March 2005 and 31 May 2005 and referred to the Joint Standing Committee on Treaties (JSCOT). JSCOT subsequently recommended that binding treaty action be taken in respect of the amendments (see Chapter 4 of Report 66 of the Joint Standing Committee on Treaties tabled on 17 August 2005).
8. The proposed SAFTA amendments are part of the agreed package of amendments to the SAFTA. The other amendments in this package did not require legislative amendment and have all entered into force with an exchange of notes between the Government of Singapore and the Government of the Commonwealth of Australia confirming completion of the Parties' respective domestic procedures.
9. The proposed SAFTA amendments will also enter into force with an exchange of notes between the Government of Singapore and the Government of the Commonwealth of Australia confirming completion of the Parties' respective domestic procedures. It is expected that this exchange of notes will occur after the Bill has received the Royal Assent.

10. However, item 2 of the table further provides that Schedule 1 will not commence at all if the proposed SAFTA amendments do not come into force for Australia. This ensures that the Customs Act accurately implements the SAFTA at all times. Furthermore, the Minister for Home Affairs must announce by notice in the Gazette the day on which the proposed SAFTA amendments come into force for Australia.
11. Item 3 of the table provides that Schedule 2 commences on the day after the Act receives the Royal Assent.
12. Item 4 of the table provides that Schedules 3 and 4 commence on the 28th day after the day on which this Act receives the Royal Assent. Schedule 3 modernises provisions relating to duty recovery and payments under protest and allows refunds to be applied against unpaid duty in some circumstances. The commencement of Schedule 3 will allow for new administrative procedures to be implemented and reasonable notice of the new arrangements to be given to industry. Schedule 4 makes changes to offence provisions. The commencement of Schedule 4 reflects Commonwealth policy of commencing changes to offence provisions 28 days after the Royal Assent.
13. Subclause (2) provides that column 3 of the table contains additional information that is not part of the Act.

Clause 3 - Schedule(s)

14. This clause is the formal enabling provision for the Schedule to the Bill, providing that each Act specified in a Schedule is amended in accordance with the applicable items of the Schedule. In this Bill, the Customs Act and the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* are being amended.
15. The clause also provides that the other items of the Schedules have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation.

SCHEDULE 1 - GOODS CLAIMED TO BE PRODUCE OR MANUFACTURE OF SINGAPORE

Customs Act 1901

Background

16. The Singapore-Australia Free Trade Agreement (SAFTA) entered into force for Australia on 28 July 2003. The SAFTA provided for Ministerial review of the SAFTA one year after entry into force and biennially thereafter and allows for the SAFTA to be amended to ensure that the SAFTA remains relevant and able to offer additional benefits to business.
17. The first Ministerial Review meeting took place in July 2004. A package of amendments to the SAFTA was agreed to in that first Ministerial Review meeting to incorporate additional measures into the SAFTA. The package of amendments was tabled on 15 March 2005, and re-tabled on 31 May 2005, and was referred to the Joint Standing Committee on Treaties (JSCOT). JSCOT recommended that binding treaty action be taken in respect of the amendments (see Chapter 4 of Report 66 of the Joint Standing Committee on Treaties tabled in the House of Representatives on 17 August 2005).
18. The purpose of Schedule 2 is to implement the amendments to Articles 11 and 12 of Chapter 3 of the SAFTA to incorporate changes to Certificates of Origin (the proposed amendments).
19. Under the SAFTA, an importer of goods from Singapore into Australia requires a Certificate of Origin (issued by the Government of Singapore) and a Declaration (made by the Singaporean exporter) in order to claim a preferential rate of duty for the goods under the SAFTA. Preferential tariff treatment may be claimed by importers in respect of imported goods that are the produce or manufacture of Singapore under the SAFTA.
20. The Certificate of Origin is the certification by the Government of Singapore that particular goods being exported from Singapore are originating goods for the purposes of the SAFTA. A Certificate of Origin is required to contain a full description of the goods to which the Certificate relates, including the relevant code under the Harmonized Commodity Description and Coding System, and if applicable, product number and brand name.
21. The Declaration is by the Singaporean exporter of goods that the goods are originating goods and must contain, among other things, a statement that the goods being exported are identical to goods specified in a valid Certificate of Origin.

Current documentary requirements under SAFTA

22. Under current Articles 11 and 12 of Chapter 3 of the SAFTA, a Certificate of Origin can be used for multiple shipments of goods to which that Certificate relates within two years of its issue, provided that the first shipment occurs within the first year of issue. By contrast, an accompanying Declaration must be made for every shipment of the relevant goods.
23. Further, both the Certificate of Origin and Declaration must have been issued or made and possessed by the importer before the goods to which these documents relate are exported. Both documents must also be produced by the importer to an officer of Customs upon request.

New documentary requirements under SAFTA

24. The proposed amendments would enable a Certificate of Origin to be used for a single shipment (provided it is used within a year of its issue) or for multiple shipments (provided the shipments occur within two years of its issue and the first shipment occurred within the first year).
25. Where a Certificate of Origin is used for a single shipment of goods, a Declaration is not necessary. Where a Certificate of Origin is used for multiple shipments of goods, a Declaration is not necessary for the first shipment but is required for every subsequent shipment. At a practical level, this would mean that a Declaration would not be required by the importer for the first shipment of goods specified in a Certificate of Origin.
26. The proposed amendments would also require both the Certificate of Origin and Declaration, if required, to be issued and possessed by the importer before the goods to which the documents relate are entered for home consumption in the territory of the importing Party, as opposed to before the goods are exported. This provides more time for the Certificate of Origin and the Declaration to be obtained.
27. The Certificate of Origin and the Declaration, where required, must still be produced to an officer of Customs upon request.

Item 1 - Subsection 153VE(1)

28. This item repeals and substitutes subsection 153VE(1). New subsection 153VE(1) implements the new documentary requirements under the proposed amendments with respect to a claim for preferential tariff treatment for goods imported from Singapore.
29. New subsection 153VE(1) provides that goods claimed to be the produce or manufacture of Singapore (and thereby eligible for preferential tariff treatment under the SAFTA as implemented in the *Customs Tariff Act 1995*) are not the produce or manufacture of Singapore unless:

- a) at the time of entry of the goods, the importer of the goods holds a valid Certificate of Origin relevant to those goods;
 - b) if, at the time of entry of the goods, the importer of the goods has previously used that Certificate of Origin in respect of goods of the same kind — at the time of entry of the goods to which the claim relates the importer of those goods also holds a Declaration relevant to those goods; and
 - c) if an officer requests production of a copy of any document that the importer of the goods is required to hold under paragraph (a) or (b)—a copy of that document is produced to the officer.
30. Paragraph (a) above maintains the requirement on importers to hold a valid Certificate of Origin relevant to goods on which preferential tariff treatment is claimed. Paragraph (a) makes it clear that the importer must possess the Certificate at the time of entry of the goods. This ensures that the Certificate of Origin must be issued before the goods are entered.
31. Paragraph (b) implements the change in the requirement for a Declaration. It provides that a Declaration is required only where the Certificate of Origin has been previously used in respect of goods of the same kind. Therefore, a Declaration is not required when the Certificate of Origin is being used for the first time in respect of goods to which the Certificate relates.
32. Paragraph (b) also makes it clear that, where required, the importer must hold the Declaration at the time of entry of the goods. This ensures that, where required, the exporter must make, and the importer must possess, the Declaration before the relevant goods are entered.
33. Paragraph (c) maintains the requirement on importers to produce the required Certificate of Origin or Declaration or both upon request.

Use of a Certificate of Origin

34. An importer uses a Certificate of Origin when the importer claims the preferential rate of duty under the SAFTA on goods to which the Certificate relates. In practice, a claim for a preferential rate of duty is made as part of the import declaration when entering the relevant goods for home consumption.
35. Further, a Certificate of Origin may be issued in respect of one particular kind of good or may relate to two or more different kinds of goods. Where a Certificate of Origin relates to two or more different kinds of goods, a Declaration in respect of each kind of good specified in the Certificate will not be required on the first time the Certificate is used for that kind of good.

Item 2 - Application

36. Item 2 makes it clear that new subsection 153VE(1) applies only to goods claimed, on or after the commencement of this item, to be the produce or manufacture of Singapore.

SCHEDULE 2 - AGENTS AND CUSTOMS BROKERS

Customs Act 1901

Background

Licensing of customs brokers and eligibility to be nominees

37. Division 3 of Part XI of the Customs Act provides for the licensing of customs brokers. Under section 183CA, an application for a broker's licence by a company or partnership must specify, among other things:
- a) the place(s) at which the applicant proposes to act as a customs broker; and
 - b) the person(s) who, if the licence is granted, is to be a nominee of applicant.
38. Under section 183CE of the Customs Act, where the Chief Executive Officer of Customs (the CEO) grants a broker's licence, the CEO shall endorse on the licence:
- a) the place(s) at which the licence holder may act as a customs broker; and
 - b) the person(s) who is a nominee of the licence holder and the corresponding place(s) at which the nominee acts as a customs broker.
39. Section 183CD of the Customs Act sets out the conditions that must be fulfilled for a person to be eligible to be a nominee of a customs broker. In particular, under this section, a nominee of a customs broker:
- a) cannot be the nominee of another customs broker (paragraph 183CD(1)(f)); and
 - b) cannot be a customs broker at a place other than a place where the first-mentioned customs broker is a customs broker (paragraph 183CD(1)(j)).

Employment of locum or freelance customs brokers restricted

40. The nominees of corporate customs brokers have generally been individual customs brokers employed full-time by the corporate customs brokers (being companies or partnerships). However, corporate customs brokers are increasingly beginning to employ locum or freelance customs brokers to be their nominees on a part-time basis. Such locum or freelance customs brokers can be so employed by a number of different corporate customs brokers at any one time.
41. However, the condition set out in paragraph 183CD(1)(f) of the Customs Act means that such locum or freelance brokers may not act as nominees for more than one corporate customs broker.

42. Further, paragraph 183CD(1)(j) unduly restricts the use of locum or freelance brokers as nominees, since these brokers, by nature, would need to be able to act in a number of different 'places'. In this regard, Customs' current policy is that all broker's licences granted under section 183C by the CEO or his delegate specify, for the purposes of section 183CE, 'all places in the Commonwealth' as the places at which the licence holder may act as a customs broker.
43. This policy renders the condition set out in paragraph 183CD(1)(j) redundant. This is because all corporate customs brokers employing locum or freelance brokers as nominees are currently licensed to act as a customs broker at 'all places in the Commonwealth'. Therefore, the locum and freelance brokers can never be a customs broker at any other place.
44. In recognition of the increasing employment of locum and freelance brokers as nominees by corporate customs brokers, it is proposed to repeal paragraphs 183CD(1)(f) and (j) of the Customs Act. As subsections 183CD(2), (3) and (4) only qualify the operation of paragraphs 183CD(f) and (j), it is proposed to repeal these subsections as well.

Items 1 to 6 - Subsection 183CD

45. Items 3, 5 and 6 of Schedule 2 repeal paragraphs 183CD(1)(f) and (j) and subsections 183CD(2), (3) and (4) of the Customs Act. Items 1, 2 and 4 make technical amendments to the rest of existing subsection 183CD(1) as a consequence of the repeals.

SCHEDULE 3 - DUTY RECOVERY

Part 1 - Amendments

Customs Act 1901

Background

Duty recovery

46. The current position of Customs in relation to the time available to recover customs duty is guided by the decision of the High Court in *Malika Holdings Pty Ltd v Stretton (2001)* 204 CLR 290 (Malika). Prior to Malika, it was considered that the authority to recover customs duty under section 153 of the Customs Act was restricted by section 165 of the Customs Act, such that Customs must demand payment within 1 year of the short payment, or overpayment of a refund, rebate or drawback, of customs duty. If the demand was not made within that timeframe, the debt ceased to be recoverable.
47. However, in Malika, the High Court found that the time limit in section 165 only limited the recovery power under section 153 where the short payment of duty and the overpayment of refund, rebate or drawback are the result of a Customs' error. Therefore, if the short payment of duty, or the overpayment of a refund, rebate or drawback, is not the result of a Customs' error, there is no time limit on recovery of the short payment or overpayment.
48. In 2005, the time limit in section 165 of the Customs Act was extended to 4 years by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (the ITM Act). The basis for this extension of time was that 1 year was not sufficient to undertake post-transaction audits and to follow up on any necessary duty recovery. In addition, as a matter of policy, Customs applies a 4-year time limit to *all* duty recovery other than in cases of fraud, notwithstanding the open-ended recovery period under section 153.
49. The main purpose of the amendments to the Customs Act in items 1 to 4 of Schedule 3 to the Bill is to consolidate current sections 153 and 165 of the Customs Act into a new section 165, and to place a 4-year statutory time limit on *all* duty recovery, other than in cases of fraud or evasion, thereby formalising Customs' current policy. This time frame, and its exceptions, are the same regime that applies to the recovery of indirect tax under section 150-50 of Schedule 1 to the *Taxation Administration Act 1935*.

Item 1 - Section 153

50. This item repeals section 153 as a consequence of new section 165. The new section, which is being inserted by item 4 of Schedule 3, will, amongst other things, incorporate the concepts set out in current section 153.

Item 2 - Subsection 161L(2)

51. This item amends subsection 161L(2) of the Customs Act to delete the wording of current section 165 of the Customs Act that is included in that subsection and substitute the new wording of section 165.
52. Section 161L deals with the review of determinations and other decisions in relation to the valuation of goods. If, as a result of such a review, the amount of duty that was levied is less than the amount that should have been levied, or the amount of duty that was refunded is greater than the amount that should have been refunded, section 165 of the Customs Act applies to the demand for the short levy or overpayment. This amendment will merely substitute the new wording of section 165 (which will remove any reference to Customs or client error) for the current wording of section 165 (which refers to duty short levied and duty erroneously refunded).

Item 3 - Division 3 of Part VIII (heading)

53. This item repeals and substitutes the heading of Division 3 of Part VIII of the Customs Act to more accurately reflect the content of Division 3. The new heading will refer to the "Payment and recovery of deposits, refunds, unpaid duty etc."

Item 4 - Section 165

54. This item, amongst other things, repeals current section 165 of the Customs Act and substitutes new section 165.
55. New subsection 165(1) provides that an amount of duty that is due and payable in respect of goods is:
 - a) a debt due to the Commonwealth; and
 - b) is payable by the owner of the goods.

This new subsection is a restatement of the principles set out in current section 153.

56. New subsection 165(2) provides that an amount of drawback, refund or rebate of duty that is overpaid to a person:
 - a) is a debt due to the Commonwealth; and
 - b) is payable by the person.

Therefore, by contrast with new subsection 165(1), the debt created by the overpayment of a drawback, refund or rebate is payable only by the person to whom the overpayment was made.

57. Both of these new subsections remove any connotation that the debt due to the Commonwealth is the result of any error by either Customs or its clients. This

eliminates any uncertainty as to the existence of the debt and the complexities that currently exist in determining how the debt arises.

58. New subsection 165(3) provides that the CEO may make, in writing, a demand for payment of an amount that is a debt due to the Commonwealth under new subsection (1) or (2). This new subsection is a restatement of the CEO's power to make a demand under current subsections 165(1) and (3).
59. New subsection 165(4) provides that a demand under new subsection 165(3) must specify the amount and include an explanation of how the amount has been calculated. Therefore, the demand must include an actual dollar amount of the duty or overpayment that is being demanded. There is some concern in the importing community that the current provisions allow the time limit to be met by simply demanding that the duty or overpayment be paid or repaid, without including a dollar amount in the demand. This new subsection will put that matter beyond doubt. If the demand does not include the amount and the required explanation, it will not be a valid demand.
60. New subsection 165(5) provides that a demand under new subsection 165(3) must be made within 4 years from:
 - a) if the amount is a debt due to the Commonwealth under new subsection 165(1) - the time the amount was to be paid by under the Customs Act; or
 - b) if the amount is a debt due to the Commonwealth under new subsection 165(2) - the time the amount was paid,

unless the CEO is satisfied that the debt arose as the result of fraud or evasion.

Under paragraph (a), an example of the time an amount of duty was to be paid under the Customs Act is where goods are entered for home consumption under section 71A of the Customs Act. Under section 132AA of the Customs Act, duty is payable at the time of the entry of goods for home consumption. Therefore, a demand in respect of goods entered for home consumption must be made within 4 years of the time at which they were so entered.

61. This provision brings the recovery of customs duty in line with the recovery of GST and other indirect taxes under the *Taxation Administration Act 1953*.
62. New subsection 165(6) provides that an amount that is a debt due to the Commonwealth under subsection 165(1) or (2) may be sued for and recovered in a court of competent jurisdiction by proceedings in the name of the Collector if:
 - a) the CEO has made a demand for payment of the amount in accordance with this section: or
 - b) the CEO is satisfied that the debt arose as a result of fraud or evasion.

This means that if a valid demand is not made with 4 years from the relevant time, the debt will not be able to be recovered. The exception to this is where the CEO is satisfied that the debt arose as a result of fraud or evasion, in which case there will be no time limit on the recovery of the debt.

Item 4 - Section 165

63. This item also inserts new section 165A into the Customs Act.

Background

Limited application of drawback, refund or rebate against duty

64. Sections 163 and 168 of the Customs Act allow for regulations to be made prescribing the circumstances in which a refund or rebate (under section 163) or drawback (under section 168) of duty can be made. The regimes currently require that the duty be paid before a refund, rebate or drawback can be paid.
65. In some circumstances, it is possible that Customs, in conducting an audit of an importer's affairs, may determine that the importer owes customs duty on goods that have already gone into home consumption. It may also be possible that the importer may be entitled to a refund or drawback in respect of the goods had the duty been paid.
66. For example, an owner may use a Tradex order to import goods without the payment of duty. A Tradex order allows for the duty free importation of eligible goods on the understanding that the goods will be subsequently exported. The goods may, as a result of a Customs audit, be found to be not eligible goods for which a Tradex order may be used and hence subject to customs duty. If the goods have been exported, it is possible that the owner of the goods is eligible for a drawback of duty on the goods. However, under the present provisions of the Customs Act, the duty would have to be paid to Customs before the drawback can be paid. This may cause significant cash flow problems for owners, especially if large amounts of duty are involved.
67. New section 165A of the Customs Act addresses this and other similar circumstances by inserting a new regime whereby the CEO may apply the notional amount of refund, rebate or drawback in respect of goods against the duty payable on the same goods.
68. New subsection 165A(1) provides that if:
- a) an amount of duty is payable by a person in respect of goods that have been delivered into home consumption; and
 - b) the person would be entitled to an amount of drawback, refund or rebate in respect of the goods if the amount of duty payable were paid;

then

- c) the CEO may apply the amount of the drawback, refund or rebate against the amount of duty payable; and
- d) the person is taken to have paid, in respect of the goods, an amount of duty equal to the amount of drawback, refund or rebate applied; and
- e) the amount of drawback, refund or rebate applied is taken to have been paid to the person.

If the amount of drawback, refund or rebate of duty on the goods is less than the amount of duty payable on the goods, the balance of the duty payable, once that amount of drawback etc is applied under this new section, will still be a debt due to the Commonwealth. It is possible that the amount of drawback etc will be equal to the amount of duty payable and, in that case, no further payments by either the person or Customs will need to be made.

New subsection 165A(2) provides that if the CEO applies an amount of drawback, refund or rebate against an amount of duty payable, the CEO must give to the person who would have been entitled to receive the amount of drawback, refund or rebate written notice of:

- a) the amount of the drawback, refund or rebate applied; and
- b) if the amount of drawback, refund or rebate applied is less than the amount of duty payable - the amount of duty that is still payable by the person.

This notification requirement will ensure that a person is made fully aware of any outstanding duty liability they may still have in respect of the goods after the application of a drawback, refund or rebate.

Item 5 - Subsections 167(3) and (3A)

Background

Payments under protest

- 69. Under section 167 of the Customs Act, if there is a dispute as to the amount or rate of duty payable on goods, the owner of the goods may pay under protest the sum demanded by a Collector as the duty payable in respect of the goods. If the duty is paid under protest, the sum paid is deemed to be the proper duty payable unless the contrary is determined in an action brought in accordance with section 167.
- 70. Under subsection 167(4), no action lies for the recovery of any sum paid to the Customs as the duty payable on goods unless the duty is paid under protest in accordance with section 167 and the action is commenced within the time frames set out in that subsection. In addition, under section 273GA of the Customs Act, an application to the Administrative Appeals Tribunal for the review of a decision of a Collector to demand an amount of duty can only be made if the duty has been paid

under protest and the application is made within the time frames as set out in subsection 167(4).

71. Section 167 also sets out how an owner makes a payment under protest, for both documentary and electronic entries. Both of these processes only allow payments under protest to be made at the time goods are originally entered for home consumption. However, if Customs conducts an audit on an owner's transactions after goods have been entered into home consumption and determines that duty, or additional duty, is payable on goods, there are currently no statutory provisions specially allowing such post-entry payments under protest to be made. It should be noted, however, that on numerous occasions post-entry demands have been paid under protest and been reviewed by the Administrative Appeals Tribunal. Customs has not challenged the jurisdiction of the Tribunal on these occasions, allowing the dispute to be heard by a relatively low cost forum with technical expertise in Customs matters.
72. In addition, the Integrated Cargo System (the ICS) replaced the COMPILE system in October 2005 as the system for communicating with Customs electronically. However, when the ITM Act made the necessary amendments to the Customs Act to accommodate the ICS, the provisions relating to payments under protest with respect to import entries made under COMPILE were saved and require such payments to still be made by a registered COMPILE user using COMPILE. However, as COMPILE can no longer be used and people cannot be registered COMPILE users, an owner of goods cannot strictly comply with this requirement. As Customs generally conducts post-transaction audits and recovers duty up to 4 years after goods have entered into home consumption, this will be an ongoing problem for the next few years.
73. It is therefore proposed to repeal the existing requirements relating to payments under protest, including the saved COMPILE requirements, and replace them with requirements that are general in nature and are easier to comply with.
74. Item 5 of Schedule 3 to the Bill repeals and substitutes subsections 167(3) and (3A) of the Customs Act.
75. New subsection 167(3) provides that for the purposes of section 167, a payment is taken to be made under protest if, and only if:
 - a) the owner of the goods or the agent of the owner gives Customs notice in accordance with subsection (3A), by document or electronically, that the payment is being made under protest; and
 - b) Customs receives the notice no later than 7 days after the day on which the payment is made.

This new subsection removes the requirement that the payment under protest has to be done in the same medium as the original import entry. Therefore, a documentary

payment under protest can be made in relation to an electronic import entry and vice versa. In addition, the current limitation as to when the payment under protest can be made has been removed. Payments can be made when duty is assessed at the time an import entry is lodged with Customs, or at a later time when Customs undertakes an audit of an owner's activities and demands additional duty. Finally, the notification that a payment is being made under protest does not have to be communicated to Customs at the same time as the payment is actually made. The notification only has to be received by Customs within 7 days of the payment being made.

76. New subsection 167(3A) sets out the requirements for the purposes of a notice given under subsection 167(3). The notice must:
- a) contain the words ***paid under protest***;
 - b) identify the import declaration that covers the goods to which the protest relates;
 - c) if the protest does not relate to all goods covered by an import declaration - describe the goods to which the protest relates;
 - d) include a statement of the grounds on which the protest is made; and
 - e) be signed by the owner or the agent of the owner.

These requirements do not substantially differ from existing requirements. As this new provision does not make specific reference to either COMPILE or the ICS computer system, the provisions of the *Electronic Transactions Act 1999* will operate to allow payment under protest notices to be given to Customs electronically.

Extension to Accredited Client Programme

77. Item 5 also amends section 167 to extend the ability to make a payment of duty under protest to the Accredited Client Programme (the ACP). The ACP is implemented by Subdivision C of Division 4 of Part IV of the Customs Act, which was inserted by the ITM Act.
78. Under the ACP, a person who has met certain audit requirements may enter into an import information contract with Customs. Such a person ("an accredited client") is then able to enter goods that are covered by the contract for home consumption by making a request for cargo release (RCR) in respect of the goods.
79. An accredited client will only need to provide minimum information about the goods in the RCR. The accredited client is then required to provide, for a particular month, one or more periodic declarations containing more detailed but less time-sensitive information on all of the goods entered for home consumption on RCRs during that month.

80. Similar to the import processing charge imposed on the making of a normal import declaration, an RCR processing charge and periodic declaration processing charge are imposed on the making of an RCR and periodic declaration respectively.
81. The payment of duty and processing charges in relation to the ACP is governed by sections 71DG, 71DGA and 71DGB of the Customs Act. In general terms, in any month an accredited client will pay an amount of monthly duty estimate in respect of goods imported in that month. In the following month, the actual duty on goods imported in the previous month will be calculated and reconciled with the monthly duty estimate paid for the previous month. The amount of duty *payable* (emphasis added) will then be reduced by the amount of monthly duty estimate paid. If the monthly duty estimate is equal to, or more than, the actual duty on the goods, no duty will be required to be paid.
82. Therefore, without specific provision, it would not be possible to pay duty under protest under the ACP in the circumstances where no duty is required to be paid. New subsection 167(3B) contains provisions whereby duty will be taken to be paid under protest in these circumstances.
83. New subsection 167(3B) provides that if, under section 71DGA, an accredited client pays an amount of accredited client monthly duty estimate in respect of goods, then for the purposes of section 167, the amount of duty that *would be payable* (emphasis added) in respect of the goods if the amount of accredited client monthly duty estimate *were not paid* (emphasis added) is taken to be paid under protest by the accredited client if, and only if:
- a) the accredited client or the agent of the accredited client gives Customs notice in accordance with subsection 167(3C), by document or electronically, that the payment is made under protest; and
 - b) Customs receives the notice no later than 7 days after the accredited client payment day on which the amount of duty would be payable on the goods under subsection 71DGB(1) if the amount of accredited client monthly duty estimate were not paid.

The accredited client payment day is the 15th day of the month in which the amount of duty would otherwise be payable.

Therefore, under this provision, an amount of duty that is not actually paid (because the liability has been reduced by the payment of an amount of monthly duty estimate) can still be taken to be paid under protest.

84. New subsection 167(3C) sets out the requirements for the purposes of subsection (3B). These requirements are basically the same as those set out in new subsection 167(3A).

Item 6 - After subsection 167(4)

85. This item inserts new subsection 167(4A) into the Customs Act.
86. As previously mentioned, under subsection 167(4) of the Customs Act, no action lies for the recovery of any sum paid to the Customs as the duty payable on goods unless the duty is paid under protest in accordance with section 167 and the action is commenced within the time frames set out in that subsection.
87. New subsection 167(4A) will apply the same restrictions in relation to the recovery of any sum paid to Customs under section 71DGA as an amount of accredited client monthly duty estimate in respect of goods. This subsection will provide that no action lies for the recovery of such a sum unless:
- a) the amount of duty that would be payable in respect of the goods if the amount of accredited client monthly duty estimate were not paid has been taken under subsection (3B) to have been paid under protest; and
 - b) the action is commenced within the following times:
 - (i) if the sum is paid as an estimate of duty payable under any Customs Tariff—within 6 months after the accredited client payment day on which the amount of duty would be payable on the goods under subsection 71DGB(1) if the amount of accredited client monthly duty estimate were not paid; or
 - (ii) if the sum is paid as an estimate of duty payable under a Customs Tariff or Customs Tariff alteration proposed in the Parliament—within 6 months after the Act, by which the Customs Tariff or Customs Tariff alteration proposed in the Parliament is made law, is assented to.

Item 7 - At the end of section 167

88. This item amends section 167 by inserting a new subsection (6) which contains the definitions of **import declaration** and **unamended Customs Act** for the purposes of section 167.
89. **Import declaration** includes an import entry, within the meaning of the unamended Customs Act, that was made under that Act. **Unamended Customs Act** has the meaning given by section 4 of the *Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Act 2004*.
90. The purpose of these two definitions is to ensure that the new payment under protest requirements described above will also apply, for the next few years, to import entries made under the COMPILE computer system. The unamended Customs Act, in this context, is the Customs Act before it was amended by the ITM Act in relation to imports. An import entry made under the unamended Customs Act was made using the COMPILE computer system and the reference to an import declaration in new subsection 167(3A) will include such import entries.

Item 8 - Paragraph 273GA(1)(ja)

91. This item repeals and substitutes paragraph 273GA(1)(ja).
92. Subsection 273GA(1) of the Customs Act sets out the decisions made under the Customs Act in respect of which an application for review may be made to the Administrative Appeals Tribunal. Paragraph 274GA(1)(ja) relates to a decision of the CEO under subsection 165(3). This item substitutes a new paragraph (ja) to take account of the new wording in new section 165.

Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001

Item 9 - Item 45 of Schedule 3

93. This item repeals item 45 of Schedule 3 to the ITM Act.
94. Item 45 of Schedule 3 to the ITM Act sets out the savings provisions for the provisions of the Customs Act relating to the payment under protest on import entries made under COMPILE. These provisions require such payments to still be made by a registered COMPILE user using COMPILE. However, as import entries made using COMPILE will now be covered by the new provisions relating to making payments under protest, this savings provision is no longer required and is being repealed.

Part 2 - Application and transitional provisions

Item 10 - Transitional - item 1

95. This item provides that the repeal of section 153 of the Customs Act made by item 1 of this Schedule does not affect any proceedings brought under that section before the commencement of this item. Therefore, any recovery proceedings brought under section 153 that have been completed, or that have commenced but not been completed, will be unaffected by its repeal.

Item 11 - Transitional - item 4

96. This item applies to a demand made under section 165 of the old law, which is section 165 that was in force before item 4 of Schedule 3 repealed and substituted section 165. This item provides that section 165 of the new law (which is the new version of section 165) has effect, on and after item 4 commences, as if the demand made under the old law were a demand made under, and in accordance with, that section.
97. This means that even though a demand was made under old section 165, proceedings in respect of that demand can be commenced in accordance with new section 165 (now that section 153 will no longer exist). In addition, if a demand under the old section 165 does not include the matters required to be included under

the new section 165 (such as the method of calculation of the sum demanded), it will be taken to include such requirements and be a valid demand.

Item 12 - Application - items 5 to 7

98. This item provides that the amendments made by items 5 to 7 of Schedule 3 apply in relation to payments made on or after the commencement of those items. These items relate to the new payment under protest provisions as they apply to import declarations and to the ACP. These new provisions cannot apply to payments under protest made in relation to import declarations or COMPILE-related import entries that have been made before the provisions commence.

SCHEDULE 4 - TREATMENT OF CERTAIN INFORMATION GIVEN TO CUSTOMS

Customs Act 1901

99. Customs is progressively implementing an automated passenger processing system known as SmartGate. This implementation commenced in 2007 in Brisbane and Cairns - Sydney and Melbourne implementation will occur through 2008 and the remainder of the international airports following that. Arriving air passengers and crew holding eligible ePassports will be able to choose to clear themselves through the immigration control point at the Australian border using the SmartGate system where available. If the choice is not exercised, clearance will occur through the Customs staffed primary line.

Clearance of personal or household goods through SmartGate

100. Under paragraph 68(1)(d) of the Customs Act, goods that are the accompanied or unaccompanied personal or household effects of a passenger or crew of a ship or aircraft are not required to be entered. Such goods are also Subdivision AA goods under section 71AAAA of the Customs Act.
101. However, under section 71AAAB of the Customs Act, the owner of Subdivision AA goods must, in the circumstances specified in the regulations, provide, under section 71, the information specified in the regulations. Such information must be provided at the time and in the manner and form specified in the regulations.
102. For the purposes of section 71AAAB, regulation 41 of the *Customs Regulations 1926* currently sets out the information to be provided under section 71, the relevant circumstances in which such information must be provided, and the time at which, and manner and form in which, such information must be provided.
103. Regulation 41 will be amended to provide for the provision of information under section 71 on Subdivision AA goods to Customs, in the circumstance where the owner of the goods is using the SmartGate system. As part of the SmartGate process, eligible passengers and crew may be required to answer questions and make declarations electronically to Customs about their accompanied personal and household effects. These answers and declarations will be used to assess a person's eligibility for automated clearance and identify persons who may hold items of interest (e.g. prohibited imports and dutiable/taxable items) to Customs.

Offence of making false and misleading statements

104. Existing paragraph 234(1)(d) of the Customs Act makes it an offence to make a false and misleading statement (including an omission), directly or indirectly, to an officer of Customs.
105. Passengers and crew who make false and misleading declarations electronically using the SmartGate system will be making false and misleading statements for the

purposes of paragraph 234(1)(d). However, the false and misleading statements are made to “Customs” for the purposes of section 71, and not necessarily to an “officer of Customs”.

106. Item 1 of Schedule 4 inserts new subsection 234(2BC), which provides that for the purposes of paragraph 234(1)(d), information provided to Customs under section 71 in the circumstances mentioned in section 71AAAB is taken to be a statement made to the CEO.
107. This means that passengers and crew making electronic declarations about their personal or household goods using the SmartGate system are deemed to be making statements to an officer of Customs for the purposes of paragraph 234(1)(d). Consequently, a person making a false or misleading declaration using the SmartGate system may be prosecuted for an offence against paragraph 234(1)(d).
108. New subsection 234(2BC) also applies in relation to any other prescribed circumstance (set out in regulation 41 or any other regulation) where an owner of Subdivision AA goods is required to provide information to Customs under sections 71 and 71AAAB of the Customs Act.
109. Item 3 of Schedule 4 provides that the offence will only apply in relation to information provided to Customs on or after the commencement of Schedule 4.