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Customs Legislation Amendment (Modernising) Bill 2008

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Contents

Purpose 2

Background 2

Changes to Certificate of Origin requirements 3

Changes to customs broker licensing provisions 4

Changes to duty recovery provisions 4

Changes to the treatment of certain information provided to Customs 5

Financial implications 5

Main provisions 5

Schedule 1 – Goods claimed to be produce or manufacture of Singapore 5

Schedule 2 – Agents and customs brokers 7

Schedule 3 – Recovery of duty 7

Schedule 4 – Treatment of certain information given to Customs 8

Customs Legislation Amendment (Modernising) Bill 2008

Date introduced: 20 March 2008

House: House of Representatives

Portfolio: Home Affairs

Commencement: Sections 1 to 3 commence upon Royal Assent. Operational provisions commence on various dates as outlined in the Main Provisions part of this Digest.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

Schedule 1 of the Bill will amend the *Customs Act 1901* (the Customs Act) to reflect the new Certificate of Origin requirements for the Singapore-Australia Free Trade Agreement.

Schedule 2 will amend the Customs Act to update brokers licensing provisions to accommodate locum customs brokers who can then be employed by a number of different corporate customs brokers at any one time.

Schedule 3 of the Bill will make amendments to the Customs Act in response to the decision in *Malika Holdings Pty Ltd v Stretton (2001) 204 CLRL 290* ('Malika') to put the time available to recover customs duty beyond doubt, and modernise the duty recovery provisions.

Schedule 4 amends the Customs Act to provide that a statement or declaration made is taken to be a statement made to the Chief Executive Officer of the Australian Customs Service ('ACS' or 'Customs').

Background

The Customs Legislation Amendment (Modernising) Bill 2008 contains provisions taken from two Bills previously considered by the Commonwealth Parliament. Schedule 1 of the current Bill, relating to Certificates of Origin, is identical to Schedule 2 of the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006 which was referred to the Senate Legal and Constitutional Legislation Committee for inquiry on 22 June 2006. The Committee Report was tabled on 8 August 2006. However,

the second reading of the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006 was adjourned on 21 June 2006.

Schedules 2-4 of the current Bill are also identical to Schedules 2-4 of the Customs Legislation Amendment (Augmenting Offshore Powers and other Measures) Bill 2006 which was referred to the Senate Legal and Constitutional Legislation Committee for inquiry on 7 December 2006. The Committee Report was tabled on 8 February 2007. Similarly, the second reading of the Customs Legislation Amendment (Augmenting Offshore Powers and other Measures) Bill 2006 was adjourned on 1 March 2007.

Selected provisions (as described above) from both of these lapsed Bills are now re-introduced (without alteration) in the Customs Legislation Amendment (Modernising) Bill 2008. This Digest has been prepared using information contained in the two previous Bills Digests that were prepared in respect of the 2006 proposed reforms.[1]

Changes to Certificate of Origin requirements

Rules of Origin identify the nationality of a product. Amongst other things, this ensures that only products originating from a particular country will benefit (such as tariff concessions) as a result of a free trade agreement.

Australia signed a free-trade agreement with Singapore in 2003. Singapore is Australia's sixth largest trading partner with Australian exports valued at $6.38 billion in 2005,[2] principally in services (legal, education and telecommunications) and merchandise (fuel, agricultural and mineral products).[3] According to press reports, the main outcome of the Singapore Australia Free Trade Agreement (SAFTA) has been to cement what was already a productive and friendly economic relationship.[4]

The SAFTA agreement provided for Ministerial review one year after entry into force and every two years thereafter. The first Ministerial review in July 2004[5] led to amendments

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1. Diane Spooner, 'Customs Legislation Amendment (Augmenting Offshore Powers and other Measures) Bill 2006', Bills Digest, no.89, Parliamentary Library, Canberra, 2006-07; Rosemary Bell, 'Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006', Bills Digest, no.12, Parliamentary Library, Canberra, 2006-07.
2. Joint Standing Committee on Treaties, 'Review of amendments to the Singapore-Australia Free Trade Agreement', *Media Alert*, 24 March 2006.
3. Tracy Sutherland, 'A trading impasse where the sky's not the only limit', *Australian Financial Review*, 6 July 2006, p. 14.
4. Andrew Burrell, 'Singapore pact turns out to be small beer', *Australian Financial Review*, 25 March 2004, p. 17.
5. Publicly available information appears to indicate that a second review of SAFTA is yet to occur.

that related to the recognition of law degrees, government procurement, rule of origin certificates, and agreement on food standards and horticultural goods.[6] Three of the four amendments did not require legislative amendment and have 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. Schedule 1 of this Bill amends the Customs Act to implement the SAFTA amendments on rule of origin certificates.

Changes to customs broker licensing provisions

In the case of broker's licences held by corporations or partnerships, such licences must, amongst other things, specify those persons who may act as nominees for the licence holder and the places where the various nominees may act as a customs broker. To be eligible to be a nominee a person cannot be the nominee of another customs broker. According to the Explanatory Memorandum, corporate customs brokers are increasingly employing locum or freelance customs brokers who can be employed by a number of different corporate customs brokers, but such locums cannot act as nominees for more than one corporate broker by virtue of paragraph 183CD(1)(f) of the Customs Act. Accordingly, the paragraph is being repealed.

Existing paragraph 183CD(1)(j) provides that a person is eligible to be the nominee of a customs broker if he is not a customs broker at any other place. To avoid the unduly restrictive nature of this paragraph, the policy has been adopted of declaring 'all places in the Commonwealth' as places where licensed brokers can practise. Accordingly this condition has become obsolete and is being repealed.

Changes to duty recovery provisions

The amendments being made in Schedule 3 of the Bill are to overcome the High Court decision of Malika. That decision held that the 4-year time limit within which Customs may recover customs duty only applied if the under payment of duty or the overpayment of a duty rebate was due to a Customs error. However, as a matter of policy, Customs applies the 4-year time limit to all duty recovery, other than in cases of fraud, whether or not there is a customs error. The proposed amendments seek to bring the Customs Act into line with this policy by placing a 4-year time limit on all duty recovery (other than in cases of fraud or evasion). Further discussion of these amendments and details can be found in the ACS submission to the Committee inquiry into the Customs Legislation Amendment

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6. Joint Standing Committee on Treaties, *Report 66*: *Review of treaties tabled 7 December 2004 (4), 15 March and 11 May 2005*. Chapter 4 'Singapore–Australia Free Trade Agreement Amendments', pp. 29–34.

(Augmenting Offshore Powers and other Measures) Bill 2006 and the Explanatory Memorandum to the current Bill.

Changes to the treatment of certain information provided to Customs

Schedule 4 makes amendments that will effectively broaden the scope of the offence of making a false or misleading statement by providing that information given to Customs under section 71 is taken to be a statement made to the 'CEO'. According to the Explanatory Statement, this is in response to the automated passenger processing system known as SmartGate which was introduced in August 2007 – thus persons entering false or misleading statements into the automated SmartGate system will be committing an offence.[7] The Explanatory Statement[8] also states that consequential amendments are proposed to the Customs Regulations 1926, regulation 41.

Financial implications

The Explanatory Memorandum states that the Bill has no financial impact.

Main provisions

Schedule 1 – Goods claimed to be produce or manufacture of Singapore

Item 1 of **Schedule 1** repeals existing subsection 153VE(1) of the *Customs Act 1901* and substitutes a new subsection. **Proposed subsection 153VE(1)** implements agreed amendments to Articles 11 and 12 of Chapter 3 of SAFTA that deal with the new documentary requirements to apply when an Australian importer claims the preferential rate of duty for goods imported from Singapore. 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.[9]

At present an Australian importer needs a Declaration, issued by the Singapore exporter, and a Certificate of Origin, issued by the Government of Singapore, to claim a preferential rate of customs duty under SAFTA. A Certificate of Origin can be used for multiple shipments within two years of its issue, provided that the first shipment occurs within the

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7. Explanatory Memorandum, Customs Legislation Amendment (Modernising) Bill 2008, p. 23
8. ibid., p. 22.
9. ibid., p. 7.

first year of issue. A Declaration is required for each shipment. Both documents must be issued before the goods are exported from Singapore to Australia. According to ACS:

> Approaches to Australian Customs by both Australian importers and Singaporean exporters raised administrative difficulties with regard to preparation of the Certificate of Origin. For example, before exportation of bulk goods from Singapore, the Certificate of Origin could not be properly prepared to cover all of the goods in a given shipment as the exact volumes were not known until after loading. The problem was exacerbated in circumstances where goods were loaded after-hours or on weekends.[10]

Following the amendments to SAFTA that are to be implemented by this Bill, an Australian importer will be required to have either a Certificate of Origin for each shipment (provided that the Certificate was used within one year of issue) or a Certificate of Origin for multiple shipments (provided that the Certificate was used within two years of the date of issue and the first shipment occurred within the first year) and a Declaration. Where a Certificate of Origin is to be used for multiple shipments, a Declaration would not be required for all subsequent shipments.

The Report of the Joint Standing Committee on Treaties which considered the proposed amendments to SAFTA stated that:

> At a practical level, the changes mean that a Declaration and a Certificate of Origin will not both be required for the initial shipment of goods. Instead, a Certificate of Origin is required for the initial shipment of goods, and for each subsequent shipment, a Declaration is required that states the goods are identical to the first shipment.
>
> Following the changes, importers of goods need only possess a Declaration before the goods enter the territory of the importing country for goods to be afforded preferential treatment. This will give exporters roughly a week of extra time and will reduce delays in situations where it is difficult to determine the quantity of bulk cargo – a requirement for the Declaration – until after the cargo has been loaded onto a vessel.
>
> The revised arrangements relating to Certificates of Origin will facilitate the movement of goods from Singapore to Australia and help to reduce administrative costs for Australian manufacturers.[11]

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10. Australian Customs Service, Submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006, July 2006.
11. Joint Standing Committee on Treaties, *Report 66*: *Review of treaties tabled 7 December 2004 (4), 15 March and 11 May 2005*. Chapter 4 'Singapore–Australia Free Trade Agreement Amendments', p. 32.

Commencement: The amendments contained in Schedule 1 will either commence on the day after the Act receives Royal Assent or on the day the proposed SAFTA amendments come into force for Australia, whichever is later. The proposed amendments to SAFTA will 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 anticipated that this exchange of notes will occur after the Act has received Royal Assent. However, should the SAFTA amendments not come into force for Australia, then Schedule 1 will not commence. The Minister for Home Affairs is required to announce by notice in the Commonwealth Gazette the day on which the proposed SAFTA amendments come into force for Australia. In 2006, the Senate Standing Committee for the Scrutiny of Bills Report noted concerns regarding the uncertain commencement date of Schedule 2 of the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006, which the Minister addresses in his response to the Committee (contained in the Report). In 2008, the Senate Standing Committee for the Scrutiny of Bills expressed similar concerns in its Digest regarding the uncertain commencement date of Schedule 1 of the Customs Legislation Amendment (Modernising) Bill 2008.

Schedule 2 – Agents and customs brokers

In recognition of the increasing employment of locum and freelance brokers as nominees by corporate customs brokers, **Item 3** repeals paragraph 183CD(1)(f) of the Act which provided that locums cannot act as nominees for more than one corporate broker. **Item 5** repeals paragraph 183CD(1)(j) of the Act which provided that 'all places in the Commonwealth' were places where licensed brokers could practise.

Commencement: The amendments contained in Schedule 2 come into force the day after the Act receives Royal Assent.

Schedule 3 – Recovery of duty

Item 1 repeals section 153 of the Act which provides that amounts owed are Crown debts which are payable by the owner of the goods and recoverable at any time in proceedings in the name of the Collector. Section 153 is no longer needed as the provision is replicated in **new section 165,** inserted by **item 4** of the Bill.

Items 4 and 5 repeal and substitute existing section 165 with **new sections 165 and 165A** to ensure that any duty that is due and payable and an amount of drawback, refund or rebate of duty that is overpaid to a person is a debt due to the Commonwealth, and is payable either by the owner of the goods (in the case of any duty) or the person who is overpaid. The concept of error currently in section 165 – see discussion in the background section of this Digest - is removed in the new provisions.

New subsection 165(5) provides that a demand for payment by the CEO must be made within 4 years of the triggering event unless the CEO is satisfied that the debt arose as the result of fraud or evasion.

New subsection 165A allows the CEO to apply a notional amount of refund, rebate or drawback in respect of goods against the duty payable on the same goods. Details of how the provision works can be found in the Explanatory Memorandum.[12]

Items 6 - 8 make various amendments, including technical amendments to the 'payments under protest' regime to replace them with requirements that are general in nature and easier to comply with.

Items 9 - 12 make transitional and application amendments as a consequence of amendments proposed in the Bill.

Commencement: The amendments contained in Schedule 3 come into force 28 days after the Act receives Royal Assent.

Schedule 4 – Treatment of certain information given to Customs

Item 1 of **Schedule 4** amends section 234 of the Customs Act to add **new subsection 234(2BC)** which will have the net effect that, in the circumstances covered by section 71AAAB, information provided to Customs pursuant to section 71 of the Act is taken to have been provided to the CEO of Customs. This means that airline passengers and aircrew making electronic declarations about their personal or household goods using the proposed 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), which carries a maximum penalty of 100 penalty units ($11 000).

Commencement: The amendments contained in Schedule 4 come into force 28 days after the Act receives Royal Assent.

12. Explanatory Memorandum, paragraphs 63 – 68, pp. 14–15.

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