

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Main provisions of the Bill

Schedule 1 – Import controls

2.2 Section 50 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the importation of goods into Australia and that the power may be exercised by prohibiting the importation of goods absolutely or by prohibiting the importation of goods unless specified conditions or restrictions are complied with. Section 51 of the Customs Act provides that goods, the importation of which is prohibited under section 50, are prohibited imports.

2.3 The Customs (Prohibited Imports) Regulations 1956 (PI Regulations) control the importation of the goods specified in the various regulations and the Schedules to the PI Regulations, by prohibiting importation absolutely, or by making importation subject to a permission or licence.

2.4 Paragraph 233(1)(b) of the Customs Act prohibits the importation of any prohibited imports. A contravention of paragraph 233(1)(b) is an offence of strict liability. Currently, all prohibited items under the PI Regulations that are imported into Australia must be seized by Customs under section 203B of the Customs Act, regardless of their perceived threat to the community.¹

2.5 In his second reading speech, Senator the Hon Eric Abetz stated that the Bill will provide Customs officers 'with additional powers to deal efficiently with prescribed prohibited imports that are low value and low risk'.²

2.6 The second reading speech noted further that the Bill:

... will enable Customs to establish a tiered response to sanctions for dealing with prohibited imports. The process will allow for the possible voluntary surrender of the goods, payment of a penalty under an infringement notice, or the seeking of a post-importation permission, rather than automatic seizure of the goods.³

1 Australian Customs Service, *Submission 1*, p. 2.

2 Minister for Fisheries, Forestry and Conservation, *Senate Hansard*, 21 June 2006, p. 1.

3 *Senate Hansard*, 21 June 2006, p. 1.

2.7 Seizure will still be utilised in relation to higher value and more serious prohibited items.⁴

2.8 The aim of the proposed regime is to improve the efficiency of Customs operations at airports by providing sanctions appropriate to the level of threat to the community, and by reducing the time spent by Customs officers on administration and the level of post-seizure claims made on seized items.⁵

Consequential amendments to seizure provisions

2.9 The Explanatory Memorandum (EM) to the Bill explains that, where Customs seizes prohibited imports without warrant, the Customs Act contains provisions that oblige Customs to, among other things:

- issue a seizure notice to the owner of the goods;
- provide the owner with an opportunity to make a claim for return of the goods and,
- except in specified circumstances, return the goods to the owner who has made such a claim.⁶

2.10 Under new Subdivision B of Division 5 of Part XIII (as inserted by Item 36 of Schedule 1 of the Bill), when Customs issues the seizure notice, Customs may also issue an infringement notice at the same time on the owner of the goods in respect of importing prohibited imports. In that event, the provisions of the new infringement notice scheme operate concurrently with the provisions relating to seizure.

2.11 Under new section 243ZK in new Subdivision B, the goods are taken to be condemned as forfeited to the Crown if the following conditions (section 243ZK conditions) are satisfied:

- an infringement notice for an offence in relation to the importation of the goods has been served with the seizure notice; and
- the penalty specified in the infringement notice is paid within the period that, or by the time by which, the penalty is required to be paid; and
- the infringement notice is not withdrawn.

2.12 The EM indicates that this requires the operation of certain seizure provisions in the Customs Act to be 'ceased or modified'.⁷

4 Australian Customs Service, *Submission 1*, p. 2.

5 *Submission 1A*, p. 2.

6 p. 5.

7 p. 5.

Items 6 to 13

2.13 Items 6 to 8 amend section 205A of the Customs Act, which deals with matters to be included in a seizure notice. Item 7 will require a new statement to be included in a seizure notice that a claim for the return of the goods cannot be made if the section 234ZK conditions are satisfied.

2.14 Items 6 and 8 will amend the existing matters to be included in a seizure notice to account for the circumstance where the section 243ZK conditions are satisfied and a claim for the return of goods cannot be made.

2.15 Items 9 and 10 amend section 205B of the Customs Act, which relates to making a claim for the return of goods seized. Item 10 inserts new subsection (1A) to provide that a claim may not be made for the return of goods that have been taken to be condemned as forfeited under new section 243ZK. Item 9 amends subsection (1) so that subsection (1), which provides for an owner of seized goods to make a claim for return, is subject to new subsection (1A).

2.16 Item 11 inserts a new paragraph (ba) into section 205C of the Customs Act, which relates to the treatment of seized goods where no claim of return is made. The new paragraph accounts for the circumstance where the section 243ZK conditions are satisfied and a claim for return of the goods cannot be made. In that event, section 205C will cease to apply.

2.17 Items 12 and 13 amend section 205D of the Customs Act, which deals with the treatment of seized goods for which a claim for return is made. Item 12 inserts new paragraph (aa) into subsection 205D(1) to account for the circumstance where the section 243ZK conditions are satisfied and a claim for return of the goods cannot be made. In that event and where the owner has not made a claim for return, section 205D will cease to apply.

2.18 Item 13 inserts new paragraph (aa) into subsection 205D(2), which provides for the return of the seized goods to the owner except in specified circumstances. The effect of new paragraph (aa) is that goods seized do not have to be returned if they have been condemned as forfeited to the Crown under section 243ZK, that is, the section 243ZK conditions have been satisfied. This applies to the situation where a person makes a claim for return of goods before the section 243ZK conditions are satisfied.

Item 14

2.19 Item 14 inserts new Subdivisions GB (voluntary surrender of prohibited items) and GC (post-importation permission) into Division 1 of Part XII of the Customs Act.

2.20 According to the EM and as indicated in the Second Reading Speech, the new regimes in these two Subdivisions, along with the new infringement notice scheme in new Subdivision B of Division 5 of Part XIII (see Item 36 of Schedule 1), are

designed to reduce the administrative burden involved in seizing prohibited imports that are low value and low risk.⁸

New Subdivision GB – surrender of prescribed prohibited imports

2.21 New Subdivision GB will insert a new regime to allow for the surrender of certain prohibited imports to Customs in specified circumstances. The decision to allow such goods to be surrendered will be exercised in lieu of seizing the goods without a warrant. The consequences of surrendering such goods will be that a person will not be able to be prosecuted for an offence against the Customs Act in relation to the importation of the goods and the title to the goods will immediately vest in the Crown.⁹

2.22 The new surrender regime will not apply to all prohibited imports but only to those prescribed by regulation. However, all prohibited imports, regardless of how they are dealt with, will not be released into the community. The importation of prohibited imports is prohibited under the Customs Act, and this position is not altered by the introduction of these additional measures.¹⁰

2.23 The new surrender regime will only apply in a Customs-controlled area – a section 234AA place¹¹ – and only for those prohibited items that have not been 'concealed' by the passenger.¹² Where a prohibited item has been concealed, surrender of the item will not be an option and an infringement notice will be issued.¹³

2.24 Customs advised the committee that a consent form, which includes the passenger's details, signature and a list of the surrendered items, must be signed at the point of surrender. The signing of this form by the passenger is determined to be the point of surrender, and at this point the title of the goods passes to the Commonwealth. If the owner of the goods surrenders the items, it is deemed that the goods have been surrendered for disposal. A person who surrenders an item will not be liable for an offence under the Customs Act and Customs will have no power to take any further action.¹⁴

8 p. 6.

9 EM, p. 7.

10 EM, p. 7.

11 A section 234AA place is an area at an airport or a port that is set aside for the questioning of passengers and the examination of their personal baggage. According to the EM, most minor contraventions of the PI Regulations occur at airports and ports: p. 8.

12 Note that the scheme does not extend to dutiable goods: Australian Customs Service, *Submission 1*, p. 2.

13 *Submission 1A*, p. 4.

14 *Submission 1*, p. 2.

New section 209M – application of Subdivision GB

2.25 New section 209M provides that new Subdivision GB applies to goods that are prohibited imports of a kind prescribed by regulations made for the purposes of this section.

2.26 The PI Regulations control the importation of certain specified goods, by prohibiting importation absolutely, or by making importation subject to a permission or licence. The EM states that the new surrender regime will not apply to all of the prohibited imports specified in the PI Regulations as it is not considered appropriate that the importation of all prohibited imports should be subject to the regime.¹⁵

2.27 The new regime will only apply to those prohibited imports that are prescribed for its purposes, with the aim of balancing the threat posed to the community by minor contraventions of the PI Regulations against the administrative burden that the seizure regime places on Customs.¹⁶

New section 209N – surrender of goods

2.28 New section 209N sets out the circumstances when the prescribed prohibited imports would be able to be surrendered to an officer of Customs. Subsection 209N(1) provides that an officer of Customs may, instead of seizing the goods under section 203B of the Customs Act, permit the person to surrender the goods to the officer in a section 234AA place if the officer has reasonable grounds to believe that the goods:

- have been imported by the person;
- have not been concealed from Customs by the person;
- are 'accompanied personal or household effects' of the person; and
 - the person has been informed, by the officer in writing, of the available options for dealing with the goods and the consequences of exercising each of these options; and
 - the person has indicated to Customs, in writing, that he or she intends to surrender the goods; and
 - the officer has indicated to the person that the goods may be surrendered to the officer.

2.29 It is proposed that the permission to surrender prescribed prohibited imports will be granted entirely at the discretion of an officer of Customs. If the officer decides that the circumstances of the importation require different action to be taken in respect of the person and the goods, he or she may refuse to permit the goods to be

15 p. 7.

16 p. 7.

surrendered. The EM notes that it may be appropriate to permit the goods to be surrendered for a one-off contravention of the PI Regulations.¹⁷

2.30 Permission to surrender the goods can only be given if the goods have not been concealed from Customs. If, for example, the person indicated on their Incoming Passenger Card (IPC) that they were bringing into Australia a prohibited import and the IPC was presented to Customs, they would not be considered as having concealed the goods from Customs. If, however, they failed to indicate this on the IPC, they would be considered as having concealed the goods from Customs and would not be permitted to surrender the goods. In that circumstance, the goods could either be the subject of an infringement notice under the new regime or be seized by Customs.¹⁸

2.31 Alternatively, under new Subdivision GC (discussed below), a person may also be given the option, at the discretion of an officer of Customs, of seeking a post-importation permission in respect of the goods. The EM states that it is important that a person is aware of the consequences of surrendering the goods and that the person's intention to surrender the goods is clearly indicated. In order to ensure this, all of these actions must be in writing.¹⁹

2.32 Subsection 209N(2) provides that without limiting the meaning of 'concealed' in subparagraph (1)(a)(ii), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with sections 71, 71K or 71L of the Customs Act and the person failed to do so. According to the EM, the purpose of this provision is to make it clear that concealment of goods extends beyond physical concealment to, for example, the failure to declare to Customs in an IPC the fact that a person is bringing into Australia prohibited goods.²⁰

New section 209P – effect of surrender

2.33 New section 209P sets out the effects of the surrender under section 209N on the goods and in relation to the person. This section provides that if the goods are surrendered under section 209N:

- proceedings cannot be brought for an offence against the Customs Act in relation to the importation of the goods; and
- the goods are taken as condemned as forfeited to the Crown, such that title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods and the title cannot be called into question.

2.34 The person will not be able to make a claim for the return of the goods.

17 p. 8.

18 pp 8-9.

19 p. 9.

20 p. 9.

New section 209Q – right of compensation in certain circumstances for goods disposed of or destroyed

2.35 New section 209Q sets out the compensation provisions if surrendered goods were not prohibited imports but have been disposed or destroyed before this is established.

2.36 Subsection 209Q(1) provides that, despite the disposal or destruction of the goods taken to be condemned as forfeited to the Crown because the goods have been surrendered under section 209N, a person may apply to a court of competent jurisdiction under this section for compensation.

2.37 Subsection 209Q(2) provides that a right to compensation exists if:

- the goods were not prohibited imports; and
- the goods were not used or otherwise involved in the commission of an offence; and
- the person establishes, to the satisfaction of the court, that he or she is the rightful owner of the goods.

2.38 Subsection 209Q(3) provides that if a right to compensation exists under subsection (2), the court must order the payment by the Commonwealth to the person of an amount equal to the market value of the goods at the time of their disposal or destruction.

2.39 The EM notes that these provisions are similar to other compensation arrangements in the Customs Act in relation to seized goods that have been disposed of or destroyed, for example, section 205F.²¹

New section 209R – disposal of surrendered goods

2.40 New section 209R provides that all goods surrendered under section 209N must be dealt with and disposed of in accordance with the directions of the Chief Executive Officer (CEO) of Customs. This provision is similar to other provisions dealing with the disposal of goods that have been seized by Customs, for example, section 208D.

New subdivision GC – post-importation permission

2.41 New Subdivision GC of Division 1 of Part XII of the Customs Act will insert a new regime which will allow for the granting or giving of post-importation permissions, licences or other documents, in specified circumstances, in respect of certain goods whose importation is prohibited under the PI Regulations.

2.42 As previously mentioned, the importation of most goods in the PI Regulations is prohibited unless a licence or permission to import the goods is obtained. In some

21 p. 10.

cases, other conditions or restrictions must also be complied with. The EM gives the example of the importation of certain firearms, where a written confirmation is required from the police of the state or territory in which the firearm will be used, to the effect that the importer holds a licence or authorisation according to the law of the state or territory to possess the firearm.²²

2.43 The licence or permission or other document must be obtained prior to the importation of the goods. If it has not been obtained prior to importation, the goods will be prohibited imports in accordance with section 51 of the Customs Act. Prohibited imports are special forfeited goods under the Customs Act and will become subject to the provisions of the Customs Act that apply to such goods, which include the power to seize the goods without a warrant when they are in a Customs place. There are also offences in the Customs Act that apply to the importation of prohibited imports.

2.44 The EM states that, for a variety of reasons, it is not always possible to obtain a licence or permission to import goods before their importation. In some cases, a permit would most likely have been granted if an importer had been aware of the control prior to importing the goods. The EM notes that seizure and forfeiture of the goods in these circumstances, without providing the importer with an opportunity to apply for a permission, is unreasonable where an importer is acting in good faith.²³

2.45 Therefore, the Bill introduces a new regime whereby, in specified circumstances, the owner of prohibited imports may apply for, and the decision-maker may in the exercise of their discretion grant or give, the required permission to import the goods after the goods have been imported. The relevant goods will remain in the custody of Customs at all times until the required permission is granted or given.

2.46 If the required permission is not subsequently granted or given within the specified period, the goods are taken to be seized and the normal seizure process will follow.

New section 209S – definitions

2.47 New section 209S inserts definitions for the purposes of new Subdivision GC.

2.48 Subsection 209S(1) inserts the following definitions:

- 'application period' which for goods that have been detained under new section 209U means the period that, in accordance with new subparagraph 209X(2)(d)(i), is specified in the detention notice identifying the goods.
- 'detention notice' which means a notice of a kind mentioned in new section 209X.

22 p. 10.

23 p. 11.

- 'grant period' which for goods that have been detained under new section 209U means the period that, in accordance with new subparagraph 209X(2)(d)(ii), is specified in the detention notice identifying the goods.

2.49 New subsection 209S(2) provides that if regulations made under section 50 of the Customs Act provide that the importation of goods is prohibited unless a licence, permission, consent, approval or other document (however described) is granted or given, then the licence, permission, consent, approval or other document is a 'required permission to import the goods'. The EM states that this provision will eliminate the need to list all of the different types of licences etcetera each time they are referred to in Subdivision GC.²⁴

New section 209T – application of Subdivision GC

2.50 New section 209T sets out the goods to which new Subdivision GC applies. Similar to new Subdivision GB, Subdivision GC will only apply to goods that are prohibited imports of a kind prescribed by regulation made for the purposes of this section.

2.51 Goods to be prescribed for the purposes of Subdivision GC are only those determined by the agency responsible for the permission or control as being suitable for post-importation consideration.

New section 209U – power to detain goods

2.52 New section 209U sets out the circumstances in which an officer of Customs may allow a person to apply for a required permission to import the goods after the goods have been imported, in lieu of immediately seizing the goods.

2.53 Subsection 209U(1) provides that an officer of Customs may, instead of seizing goods under section 203B, detain the goods if:

- the goods are imported without one or more required permissions to import the goods having been granted or given; and
- any other conditions or restrictions specified in the regulations made under section 50 in respect of the importation have been complied with; and
- the officer has reasonable grounds to believe that:
 - the goods have not been concealed from Customs by the person who imported them; and
 - no application for any of the required permissions to import the goods has previously been refused; and
- if the goods are accompanied personal effects or household effects of the person, the person:

- has been informed, by the officer in writing, of the available options for dealing with the goods and the consequences of exercising each of those options; and
- has indicated to Customs, in writing, that he or she has applied, or intends to apply, for each of the required permissions to import the goods that have not already been granted.

2.54 Under paragraph 209U(1)(b), if there are any other conditions or restrictions which must be complied with prior to the importation of the goods, other than obtaining the required permission to import the goods, and these have not been complied with, the new regime will not apply to the goods.

2.55 Similar to new Subdivision GB, the detention of prescribed prohibited imports in lieu of seizure will be entirely at the discretion of the officer of Customs. If the officer decides that the circumstances of the importation require different action to be taken in respect of the person and the goods, he or she may refuse to detain the goods. In addition, the officer's discretion could only be exercised if no application for any of the required permissions to import the goods had previously been refused.²⁵

2.56 Similar also to new Subdivision GB, detention of the goods in lieu of seizure can only occur if the goods have not been concealed from Customs. If, for example, the person indicated on their IPC that they were bringing into Australia a prohibited import and the IPC was presented to Customs, they would not be considered as having concealed the goods from Customs. If, however, they failed to indicate this on the IPC, they may be considered as having concealed the goods from Customs and would not be permitted to seek the required permission to import the goods. In that circumstance, the goods would either be subject to an infringement notice or be seized by Customs.²⁶

2.57 Again, the EM stresses that it is important that a person is fully aware of the options available to them. If the goods are in a section 234AA place and are the accompanied personal or household effects of the person, a person may also be given the option of surrendering the goods under new Subdivision GB. (The circumstances that trigger the operation of Subdivision GB are the same as those that trigger the operation of Subdivision GC in respect of goods in a section 234AA place that are the accompanied personal or household effects of the person). It is also important that a person is aware of the consequences of seeking the required permission to import the goods and that their intentions in respect of the goods are clearly indicated. In order to ensure this, all of these actions must be in writing.²⁷

25 EM, p. 13.

26 EM, p. 13.

27 EM, p. 13.

2.58 Subsection 209U(2) provides, similar to subsection 209N(2), that without limiting the meaning of 'concealed' in subparagraph (1)(c)(i), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with section 71, 71K or 71L of the Customs Act and the person failed to do so.

New section 209V – detained goods to be secured

2.59 New section 209V set out the procedures for the storage of goods detained under section 209U.

2.60 New subsection 209V(1) provides that in this section, 'approved place', in relation to goods detained under section 209U, means a place approved by a Collector of Customs²⁸ as a place for the storage of goods of that kind.

2.61 New subsection 209V(2) provides that if an officer of Customs detains goods under section 209U, the officer must, as soon as practicable, take the goods to an approved place.

2.62 Depending on the types of prohibited imports that are prescribed for the purposes of new Subdivision GC, there may be more than one approved place approved under section 209V.

New section 209W – requirement to serve detention notice

2.63 New section 209W sets out the requirements in relation to detention notices for goods detained under section 209U.

2.64 Subsection 209W(1) provides that if an officer of Customs detains goods under section 209U, the officer must serve, within 7 days after the day on which the goods were detained, a detention notice on:

- the owner of the goods; or
- if the owner cannot be identified after reasonable inquiry, the person in whose possession or under whose control the goods were when they were detained.

2.65 Subsection 209W(2) provides that the notice must be in writing and must be served:

- personally or by post; or
- if no person of the kind referred to in paragraph (1)(a) or (b) can be identified after reasonable inquiry, by publishing a copy of the notice in a newspaper circulating in the location in which the goods were detained.

28 A Collector of Customs is a reference to the CEO, the Regional Director for a state or territory, or any officer doing duty in the matter in relation to which the expression is used: *Customs Act 1901*, para 8(1)(a).

2.66 Subsection 209W(3) provides that a detention notice may be served on a person who is outside Australia.

2.67 As the detention notice may eventually serve as a seizure notice under new subsection 209Z(3) below, it will be served in the same way that a seizure notice is served under section 205 of the Customs Act.

New section 209X – matters to be dealt with in a detention notice

2.68 New section 209X sets out the matters that will need to be dealt with in a detention notice served under section 209W.

2.69 Subsection 209X(1) provides that a detention notice must set out the following:

- a statement identifying the goods;
- the day on which the goods were detained;
- the ground, or each of the grounds, on which the goods were detained;
- a statement that the goods will be taken to be seized if:
 - written evidence, of the making of an application for each required permission to import the goods that was not granted or given by the time the goods were imported, is not provided to Customs by the end of a specified period (the application period); or
 - not all of the required permissions to import the goods are granted or given by the end of a specified period (the grant period); or
 - during the application period or the grant period, the owner of the goods notifies Customs, in writing, that an application for a required permission to import the goods has been refused;
- a statement that, if the goods are taken to be seized because written evidence is not provided to Customs by the end of the application period, the goods will be taken to be seized on the day after the end of the application period;
- a statement that, if the goods are taken to be seized because not all of the required permissions to import the goods are granted, or given, by the end of the grant period, the goods will be taken to be seized on the day after the end of the grant period;
- a statement that, if the goods are taken to be seized because during the application period or the grant period the owner of the goods notifies Customs, in writing, that an application for a required permission to import the goods has been refused, the goods will be taken to be seized on the day after Customs is so notified;
- the ground, or each of the grounds, on which the goods will be taken to be seized;

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- a statement that, if the goods are taken to be seized and a claim for the return of the goods has not already been made, and is not made within 30 days after the day the goods are taken to be seized, the goods will be taken to be condemned as forfeited to the Crown;
 - if the notice is to be served in a foreign country – a statement that the person served, if that person has not yet made a claim for the return of the goods, may not make such a claim unless he or she has first appointed in writing an agent in Australia with authority to accept service of documents, including process in any proceedings arising out of the matter.

2.70 As this detention notice may also serve as a seizure notice in relation to the goods under 209Z(3) below, it will contain the same details that a seizure notice must contain under section 205A of the Customs Act.

2.71 New subsection 209X(2) provides that the application period specified in a detention notice under subparagraph (1)(d)(i) must be the period that:

- starts on the day that the notice is served; and
- ends 30 days, or such other period as is prescribed by the regulations, after that day.

2.72 New subsection 209X(3) provides that the grant period specified in a detention notice under subparagraph (1)(d)(ii) must be the period that:

- starts on the day written evidence of the making of an application for a required permission to import the goods is first provided to Customs (paragraph 209X(3)(a)); and
- ends 30 days, or such other period as is prescribed by the regulations, after the first day on which written evidence, of the making of an application for all of the required permissions to import the goods that were not granted or given by the time the goods were imported, has been provided to Customs (paragraph 209X(3)(b)).

2.73 The EM explains that the effect of paragraph 209X(3)(a) is that if more than one required permissions to import the goods are required, the grant period will commence when written evidence of one of the applications for that permission is provided to Customs. The effect of paragraph 209X(3)(b) is that the grant period will end 30 days after written evidence of the making of the last application for the required permission is provided to Customs. Therefore, the grant period may be more than 30 days long.²⁹

New section 209Y – effect of detaining goods

2.74 New section 209Y provides that while goods are detained under section 209U:

- an application for a required permission to import the goods may be made (paragraph 209Y(a)); and
- a required permission to import the goods may be granted or given (paragraph 209Y(b)).

2.75 This is despite the goods having already been imported.

2.76 The effect of paragraph 209Y(b) is that the PI Regulations will be overridden to the extent that they would have otherwise prevented a decision-maker granting or giving a required permission to import the goods after the goods had been imported.

New section 209Z – evidence not provided or permission not granted or given

2.77 New section 209Z sets out the consequences of the failure to provide to Customs written evidence of the making of an application for a required permission to import the goods, and the failure to have the permission granted or given, in the specified timeframes.

2.78 Subsection 209Z(1) provides that this section applies if:

- goods have been detained under section 209U (paragraph 209Z(1)(a)); and
- a detention notice identifying the goods has been served (paragraph 209Z(1)(b)); and
- any of the following apply:
 - written evidence, of the making of an application for each required permission to import the goods that was not granted, or given, by the time the goods were imported, has not been provided to Customs by the end of the application period for the goods (that is, within 30 days after the detention notice is served) (subparagraph 209Z(1)(c)(i));
 - not all of the required permissions to import the goods have been granted, or given, by the end of the grant period for the goods (subparagraph 209Z(1)(c)(ii));
 - during the application period, or the grant period, for the goods, the owner of the goods has notified Customs, in writing, that an application for a required permission to import the goods has been refused (subparagraph 209Z(1)(c)(iii)). (In this circumstance, it will not be necessary to wait until the end of the application period or the grant period for this section to operate).

2.79 If one of these circumstances applies, and the goods are at an approved place within the meaning of section 209V, subsection 209Z(2) provides that the goods cease to be detained under section 209U and are taken to be seized under section 203B on:

- if, during the application period, the owner of the goods notified Customs, in writing, that an application for a required permission to import the goods was refused – the day after Customs was so notified; or

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- if paragraph 209Z(1)(a) does not apply and written evidence, of the making of an application for each required permission to import the goods that was not granted or given by the time the goods were imported, was not provided by the end of the application period – the day after the end of the application period; or
 - if paragraphs 209Z(1)(a) and (b) do not apply and, during the grant period, the owner of the goods notified Customs, in writing, that an application for a required permission to import the goods was refused – the day after Customs was so notified; or
 - if paragraphs 209Z(1)(a), (b) and (c) do not apply and not all of the required permissions to import the goods were granted, or given, by the end of the grant period – the day after the end of the grant period.

2.80 The EM states that if a person finds out, either during the application period or the grant period, that the application for a required permission to import the goods was refused, they can inform Customs at that point and the goods will be seized under section 203B on the day after the notification. However, the person may otherwise choose not to tell Customs of this occurrence and simply wait out the application period or the grant period. In that circumstance, the goods will be seized on the day after the end of the relevant period.³⁰

2.81 The EM also points out that the onus at all times is on the person to provide written evidence to Customs, either of the application for the required permission or of its granting or giving, within the specified timeframes.³¹

2.82 Subsection 209Z(3) provides that the detention notice is also taken to be a seizure notice that:

- is in accordance with section 205A; and
- was served:
 - under section 205 by the responsible person; and
 - on the day the goods are taken to be seized.

2.83 The fact that goods are seized by operation of this section means that the provisions of the Customs Act that apply to goods seized under section 203B will now apply to the goods. These provisions are set out in Subdivision G of Division 1 of Part XII of the Customs Act. They include the right for the owner of the goods to make a claim for the return of the goods and provisions indicating when proceedings in respect of offences involving the goods must be commenced.³²

30 p. 17.

31 p. 18.

32 EM, p. 18.

New section 209ZA – evidence provided and permission granted or given

2.84 New section 209ZA sets out the consequences of providing to Customs written evidence of the making of an application for a required permission to import the goods, and having the permission granted or given, in the specified timeframes.

2.85 Subsection 209ZA(1) provides that this section applies if:

- goods have been detained under section 209U; and
- a detention notice identifying the goods has been served; and
- written evidence, of the making of an application for each required permission to import the goods that was not granted, or given, by the time the goods were imported, has been provided to Customs by the end of the application period for the goods; and
- all the required permissions to import the goods have been granted, or given, on or before the end of the grant period for the goods.

2.86 Subsection 209ZA(2) provides that if all the circumstances are satisfied, an officer of Customs must return the goods to the owner.

2.87 Subsection 209ZA(3) provides that at the time the last required permission to import the goods is granted or given, the goods cease to be prohibited imports.

2.88 Subsection 209ZA(4) provides that proceedings cannot be brought for an offence against the Customs Act in relation to the importation of the goods. Therefore, a person will not be able to be prosecuted for the offence of importing a prohibited import.

New section 209ZB – service by post

2.89 New section 209ZB provides that, for the purposes of the application of section 29 of the *Acts Interpretation Act 1901* to the service by post of a detention notice under Subdivision GC on a person, such a notice posted as a letter addressed to that person at the last address of that person known to the sender is taken to be properly addressed. Section 29 of the *Acts Interpretation Act 1901* sets out when the service of a document that is to be served by post is effected and the time at which the service is effected.

New section 209ZC – liability for detention of goods

2.90 New section 209ZC provides that neither the Commonwealth nor an officer or other person is under any liability in relation to the detention of any goods under Subdivision GC for which there was reasonable cause.

Item 19 – before section 243X

2.91 The provisions of current Division 5 of Part XIII (including sections 243X to 243ZE) of the Customs Act deals with the issue of infringement notices in lieu of

prosecution for offences relating to false and misleading statements, cargo reporting and the movement of goods.

2.92 Item 19 of Schedule 1 inserts a new Subdivision A of Division 5 of Part XIII for these provisions. The EM notes that this is to keep these current provisions separate from the new provisions relating to the issue of infringement notices in lieu of prosecution for offences relating to prohibited imports and restricted areas that will be located under new Subdivision B of the Division 5 of Part XIII.³³

Items 20 to 35 – consequential amendments

2.93 Items 20 to 35 contain amendments to provisions in existing Division 5 of Part XIII as a result of the insertion of the new heading for these provisions.

Item 36 – at the end of Division 5 of Part XIII

2.94 Item 36 inserts new Subdivision B of Division 5 of Part XIII. Subdivision B provides a new scheme to enable the issue of infringement notices in lieu of prosecution for offences relating to prohibited imports and restricted Customs areas.

New section 243ZF – application of Subdivision B

2.95 New section 243ZF sets out the offences to which the new infringement notice scheme in Subdivision B applies.

Prescribed prohibited imports

2.96 Paragraph 243ZF(a) provides that Subdivision B will apply to the offence of importing goods that are prohibited imports of a kind prescribed for the purposes of section 243ZF. This is similar to the application of the new surrender and post-importation permissions regimes (see Item 14 of Schedule 1 above).

2.97 The new Subdivision B will allow the issue of an infringement notice in lieu of prosecution for the offence of contravening paragraph 233(1)(b) of the Customs Act, if the offence relates to goods that are prohibited imports prescribed for the purposes of section 243ZF.

2.98 The large range of goods that are controlled under the PI Regulations means that the threat posed to the community of these goods also varies greatly. Together with the new surrender and post-importation permissions regime, this part of the new infringement notice scheme is designed to reduce the administrative burden that is involved in seizing prohibited imports that are low value and low risk. However, in contrast to the new surrender and post-importation permissions regime, the new infringement notice scheme will only apply to prescribed prohibited imports that are concealed from Customs.

2.99 An infringement notice will be issued to those passengers who attempt to import a certain prescribed prohibited item by concealing the item, or have regularly attempted to import prohibited items. Payment of the infringement notice will remove liability for the offence.³⁴

2.100 The passenger must pay the infringement notice before leaving the Customs-controlled area to remove liability for the offence. The proposed model requires the Customs officer to accompany the passenger to the duty collection area while the notice is paid. Customs advised the committee that this is necessary because payment of the notice results in a transfer of title of the goods to the Commonwealth.³⁵ If a passenger chooses not to pay the infringement notice before leaving the Customs-controlled area, the goods will automatically be seized and Customs may prosecute the person for the offence.³⁶

2.101 Customs advised the committee that an infringement notice may also be issued for certain prohibited items imported through the postal system. Surrendering the goods will not be an option available in this environment. The infringement notice will be issued at the same time as the seizure notice. The infringement notice will provide 28 days to pay the notice and the seizure notice provides 30 days to make a claim for return of the goods. However, these time periods will run concurrently.³⁷

Restricted area offences

2.102 Subdivision B will also apply to an offence for a contravention of subsections 234A(1) and 234AB(3) of the Customs Act. These offences relate to restricted areas known as section 234AA places.

2.103 As previously noted, section 234AA of the Customs Act allows a Collector of Customs to display a sign at or near a place that is to be used by officers of Customs for the questioning of ship or aircraft passengers, the examining of the personal baggage of such passengers and as a holding place for such passengers.

2.104 In addition, a Collector of Customs may also display signs at or near that place that indicate that the use of cameras, sound recorders and mobile phones or other electronic forms of communication at the place by unauthorized persons is prohibited.

2.105 It is an offence under subsection 234A(1) of the Customs Act to:

- enter into, or be in, a section 234AA place; or

34 *Submission 1*, p. 3.

35 *Submission 1*, p. 3.

36 *Submission 1*, p. 3.

37 *Submission 1*, p. 3.

- enter into, or be in, a ship, aircraft or wharf at which a ship is berthed, when the personal baggage of a disembarking or embarking passenger is being examined at or in the vicinity of the ship, aircraft or wharf.

2.106 It is an offence under subsection 234AB(3) of the Customs Act to fail to comply with a direction by an officer of Customs not to use a camera, sound recorder or mobile phone or other electronic forms of communication:

- at a section 234AA place; or
- at a place in a ship, aircraft or wharf at which a ship is berthed, when the personal baggage of a disembarking or embarking passenger is being examined at or in the vicinity of that place.

2.107 Subdivision B will allow an infringement notice to be issued in lieu of prosecution for an offence under subsections 234A(1) or 234AB(3). Both subsections are offences of strict liability and are relatively minor offences.

2.108 A person who is issued with an infringement notice under subsection 234AB(3) will have 28 days to pay the notice. Payment of the infringement notice will remove liability for the offence. However, if the person fails to pay the notice within 28 days, customs will prosecute the person for the offence.³⁸

New section 243ZG – guidelines for serving infringement notices

2.109 New section 243ZG provides that the CEO of Customs must make guidelines in respect of the administration of Subdivision B of Division 5 of Part XIII to which the CEO must have regard when exercising powers under Subdivision B.

New section 243ZH – when an infringement notice can be served

2.110 New section 243ZH sets out the circumstances under which an infringement notice can be served, and related matters.

2.111 Under subsection 243ZH(1), if the CEO has reasonable grounds to believe that a person has committed an offence to which Subdivision B applies, the CEO may cause an infringement notice to be served in accordance with this Subdivision. For an offence of importing prohibited imports, the CEO must also have reasonable grounds to believe that the person concealed from Customs the goods to which the offence relates.

2.112 Under subsection 243ZH(2), an infringement notice for the offence of importing prohibited imports does not have any effect unless it is served:

- if the person to be served is in a section 234AA place – before the person leaves the section 234AA place (paragraph 243ZH(2)(a)); or

- if the person to be served is not in a section 234AA place and the goods to which the offence relates have been seized under section 203B – with the seizure notice issued under section 205 in respect of the goods (paragraph 243ZH(2)(b)).

2.113 Paragraph 243ZH(2)(a) relates to where the offence is detected during the examination of the personal baggage of a passenger at the border. In this situation, the infringement notice must be served before the passenger leaves the examination area. This ensures that the offence is dealt with quickly and while the passenger is in contact with Customs.

2.114 Paragraph 243ZH(2)(b) relates to where the offence is detected in respect of goods imported as unaccompanied baggage or through the post. In this situation, Customs would seize the goods and issue the infringement notice at the same time as the seizure notice. This ensures that the time periods in relation to the infringement notice process and the seizure notice process start at the same time, which will facilitate the concurrent operation of both processes and minimise the time taken to deal with the offence.

2.115 Subsection 243ZH(3) provides that an infringement notice for an offence related to subsection 234A(1) or 234AB(3) does not have any effect unless it is served within one year after the day on which the offence is alleged to have been committed.

2.116 Subsection 243ZH(4) provides that, without limiting the meaning of 'concealed' in paragraph 243ZH(1)(b), a person is taken to have concealed goods from Customs if the person was required to give information about the goods to Customs in accordance with section 71, 71K or 71L and the person failed to do so.³⁹

New section 243ZI – matters to be included in an infringement notice

2.117 New section 243ZI lists the matters to be included in an infringement notice served under Subdivision B. Subsection 243ZI(1) provides that such a notice must:

- state the name of the person on whom it is to be served; and
- state that it is being served on behalf of the CEO; and
- state:
 - the nature of the alleged offence; and
 - the time (if known) and date on which, and the place at which, the offence is alleged to have been committed; and
 - the maximum penalty that a court could impose for the alleged offence; and

39 For example, if a passenger fails to declare a prohibited import on an IPC, he or she will be taken to have 'concealed' that prohibited item from Customs.

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- specify that a penalty of 2 penalty units is payable under the notice in respect of the alleged offence; and
 - state that, if the person on whom the notice is served does not wish the matter to be dealt with by a court, the person may pay to the CEO the amount of the penalty specified in the notice:
 - if the notice is served on the person in a section 234AA place and relates to an alleged offence covered by paragraph 243ZF(a) – before the person leaves the place for the first time after the notice is served; or
 - in any other case – within 28 days after the date of service of the notice; and
 - state that compliance with the notice is not an admission of guilt or liability; and
 - if the notice relates to an alleged offence covered by paragraph 243ZF(a) – state that, if the penalty specified in the notice is paid and the notice is not withdrawn, the goods to which the offence relates will be taken to be condemned as forfeited to the Crown such that:
 - the title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question; and
 - a claim for the return of the goods cannot be made; and
 - if the penalty is paid after a claim for the return of the goods is made, the goods cannot be returned; and
 - state that the person may make written representations to the CEO seeking the withdrawal of the notice.

2.118 Under subsection 243ZI(2), an infringement notice served under Subdivision B may contain any other matters that the CEO considers necessary.

New section 243ZJ – withdrawal of infringement notices

2.119 New section 243ZJ provides for matters related to the withdrawal of infringement notices. Subsection 243ZJ(1) enables a person on whom an infringement notice has been served under Subdivision B to make written representations to the CEO seeking the withdrawal of the notice.

2.120 Under subsection 243ZJ(2), the CEO may withdraw the infringement notice served on a person (whether or not the person has made representations) by causing written notice of the withdrawal to be served on the person within the time period given for the payment of the infringement notice penalty.

2.121 Subsection 243ZJ(3) sets out some matters the CEO may have regard to in deciding whether or not to withdraw an infringement notice served under Subdivision B, including:

- whether the person has previously been convicted of an offence for a contravention of the Customs Act;
- the circumstances in which the offence specified in the notice is alleged to have been committed;
- whether the person has previously been served with an infringement notice under Subdivision B in respect of which the person paid the penalty specified in the notice; and
- any written representations made by the person.

2.122 Subsection 243ZJ(4) requires that, where an infringement notice served under Subdivision B on a person is withdrawn after that person has paid the infringement notice penalty, the CEO must refund to that person an amount equal to the amount paid.

New section 243ZK – what happens if the infringement notice penalty is paid

2.123 New section 243ZK deals with the consequences of paying the infringement notice penalty. Under subsection 243ZK(1), this section applies if an infringement notice is served on a person under Subdivision B, the person pays the penalty within the required time, and the notice is not withdrawn. In that event:

- any liability of the person for the offence specified in the notice is discharged (subsection 243ZK(2));
- further proceedings cannot be taken against the person for the offence (subsection 243ZK(3));
- the person is not regarded as having been convicted of the offence (subsection 243ZK(4)); and
- if the notice is for the offence of importing prescribed prohibited imports, the goods are taken to be condemned as forfeited to the Crown, title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question (subsection 243ZK(5)).

2.124 In addition, the operation of the provisions relating to the seizure process will be ceased or modified as a result of the goods being taken to be condemned as forfeited to the Crown. The relevant provisions will be amended to achieve the desired outcome (see Items 6 to 13 of Schedule 1 above).

New section 243ZL – more than one infringement notice may not be served for the same offence

2.125 New section 243ZL clarifies that Subdivision B does not permit the service of more than one infringement notice on a person for the same offence.

New section 243ZM – infringement notice not required to be served

2.126 New section 243ZM clarifies the intended operation of Subdivision B. The section makes it clear that Subdivision B does not:

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- require an infringement notice to be served on a person in relation to an offence; or
 - affect the liability of a person to be prosecuted for an offence if:
 - an infringement notice is not served on the person in relation to the offence; or
 - an infringement notice served on the person in relation to the offence has been withdrawn; or
 - affect the liability of a person to be prosecuted for an offence if the person does not comply with an infringement notice served on the person in relation to the offence; or
 - limit the amount of the penalty that may be imposed by a court on a person convicted of an offence.

New section 243ZN – right of compensation in certain circumstances for goods disposed of or destroyed

2.127 New section 243ZN sets out the compensation provisions if goods taken to be condemned as forfeited under section 243ZK were not prohibited imports but have been disposed of or destroyed before this is established.

2.128 Subsection 243ZN(1) provides that despite the disposal or destruction of the goods taken to be condemned as forfeited to the Crown under section 243ZK, a person may apply to a court of competent jurisdiction under this section for compensation.

2.129 Subsection 243ZN(2) provides that a right to compensation exists if:

- the goods were not prohibited imports; and
- the goods were not used or otherwise involved in the commission of an offence; and
- the person establishes, to the satisfaction of the court, that he or she is the rightful owner of the goods.

2.130 Subsection 243ZN(3) provides that if a right to compensation exists under subsection 243ZN(2), the court must order the payment by the Commonwealth to the person of an amount equal to the market value of the goods at the time of their disposal or destruction.

2.131 These provisions are similar to other compensation arrangements in the Customs Act in relation to seized goods that have been disposed of or destroyed, for example, section 205F.

New section 243ZO – disposal of forfeited goods

2.132 New section 243ZO provides that all goods condemned as forfeited to the Crown under Subdivision B must be dealt with and disposed of in accordance with the directions of the CEO of Customs. This provision is similar to other provisions

dealing with the disposal of goods that have been seized by Customs, for example, section 208D.

Item 37 – application

2.133 Subclause (1) of Item 37 provides that the provisions of new Subdivision GB (relating to surrender of prescribed prohibited imports) and GC (relating to post-importation permissions) of Division 1 of Part XII only apply in relation to goods imported into Australia on or after the commencement of this item.

2.134 Subclause (2) provides that the provisions of new Subdivision B of Division 5 of Part XIII (relating to the infringement notice scheme for offences relating to prohibited imports and restricted areas) only apply to offences alleged to have been committed on or after the commencement of Item 37.

2.135 The EM states that this ensures that the provisions of all three new Subdivisions do not have any retrospective effect.

Schedule 2 - goods claimed to be produce or manufacture of Singapore

2.136 The EM provides the following background information in relation to the Singapore-Australia Free Trade Agreement (SAFTA).

2.137 The 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 it remains relevant and able to offer additional benefits to business.

2.138 The first ministerial review meeting took place in July 2004. A package of amendments to the SAFTA was agreed to at that meeting to incorporate additional measures into the SAFTA. The package of amendments was tabled on 15 March 2005, re-tabled on 31 May 2005, and referred to the Joint Standing Committee on Treaties (JSCOT). JSCOT recommended that binding treaty action be taken in respect of the amendments.

2.139 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.

2.140 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.

2.141 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.

2.142 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

2.143 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.

2.144 Further, both the Certificate of Origin and Declaration must be 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.

2.145 Customs advised the committee that approaches to Australian Customs by both Australian importers and Singaporean exporters have 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.⁴⁰

Proposed documentary requirements under SAFTA

2.146 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).

2.147 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.

2.148 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

40 *Submission 1*, p. 3.

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.

2.149 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)

2.150 Item 1 repeals current subsection 153VE(1) and substitutes a new subsection. 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.

2.151 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:

- at the time of entry of the goods, the importer of the goods holds a valid Certificate of Origin relevant to those goods (paragraph 153VE(1)(a));
- 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 (paragraph 153VE(1)(b)); and
- 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 (paragraph 153VE(1)(c)).

2.152 Paragraph 153VE(1)(a) maintains the requirement on importers to hold a valid Certificate of Origin relevant to goods on which preferential tariff treatment is claimed. Paragraph 153VE(1)(a) makes it clear that the importer must possess the Certificate of Origin at the time of entry of the goods. This ensures that the Certificate of Origin must be issued before the goods are entered.

2.153 Paragraph 153VE(1)(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.

2.154 Paragraph 153VE(1)(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.

2.155 Paragraph 153VE(1)(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

2.156 The EM explains that 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.⁴¹

2.157 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.⁴²

Item 2 – application

2.158 The EM states that Item 2 makes it clear that new subsection 153VE(1) applies only to goods claimed, on or after the commencement of Item 2, to be the produce or manufacture of Singapore.⁴³

41 p. 30.

42 p. 30.

43 p. 31.

