

## Chapter 2

### The proposed amendments

2.1 This chapter considers in turn each of the amendments proposed in the Bill. References to 'Items' are references to Items in Schedule 1 to the Bill, which contains all proposed amendments.

#### *Allowing class-based authorisations*

2.2 Subsection 4(1) of the Act currently allows the Chief Executive Officer of the Australian Customs and Border Protection Service (Customs) to authorise in writing any officer of Customs to exercise the powers or perform the functions of an 'authorised officer' under a section of the Act. Authorised officers have powers, for example, to ask questions, inspect goods and enter premises in certain circumstances. Authorisations can be made in relation to specified individuals or to a class of offices or positions.

2.3 The EM explains that, whilst delegations made by the CEO of his/her powers to classes of offices or positions would apply to offices or positions that come into existence after the delegation is made by virtue of section 34AA of the *Acts Interpretation Act 1901*,<sup>1</sup> there is currently no such provision relating to authorisations.<sup>2</sup> It is unclear, therefore, whether an authorisation made by the CEO would extend to an office or position within an authorised class that comes into existence after the authorisation is given.<sup>3</sup> In the absence of legislative clarification, the EM states that Customs presently proceeds on the assumption that it does not so extend.<sup>4</sup>

2.4 Item 4 seeks to remedy this issue by inserting a new subsection 4(1A) to clarify that, if the CEO of Customs gives an authorisation under subsection 4(1) that applies to Customs officers who hold certain offices or positions, the authorisation extends to offices or positions of the kind described in the authorisation that come into existence after the authorisation is given. Item 1 makes a related consequential amendment.

---

1 Section 34AA provides that, '[w]here an Act confers power to delegate a function, duty or power, then the power of delegation shall not be construed as being limited to delegating the function, duty or power to a specified person but shall be construed as including a power to delegate the function, duty or power to any person from time to time holding, occupying, or performing the duties of, a specified office or position, *even if the office or position does not come into existence until after the delegation is given*'.

2 EM, p. 8.

3 EM, p. 8.

4 EM, p. 8.

### *Extending Customs controls to new places*

2.5 Section 31 of the Act currently provides as follows:

All goods on board any ship or aircraft from a place outside Australia shall also be subject to the control of the Customs whilst the ship or aircraft is within the limits of any port or airport in Australia.

2.6 The concept of being 'subject to the control of the Customs' is one that is used throughout the Act to define the start and end points of certain powers that Customs has over goods. Section 30 defines when goods that are being imported into or exported from Australia are subject to the control of the Customs. Goods that are so subject may, in certain circumstances, be examined,<sup>5</sup> seized,<sup>6</sup> forfeited,<sup>7</sup> or held pending the giving of security.<sup>8</sup>

2.7 Section 31 currently applies only to goods aboard a ship or aircraft from outside Australia 'whilst the ship or aircraft is within the limits of any port or airport in Australia'. However, under section 58, the master of a ship or the pilot of an aircraft may bring the ship or aircraft to a place other than a port or airport if forced to do so because of poor weather or some other reasonable cause,<sup>9</sup> or if permission has been granted to bring the ship or aircraft to some other place.<sup>10</sup> In either of these circumstances, section 31 would not presently apply and the goods aboard such a ship or aircraft would not be subject to the control of the Customs.

2.8 Customs explained why this poses an increasing problem as follows:

The growth in offshore resource activities and the cruise ship industry increasingly requires ships to arrive from a place outside Australia direct to a place that is not a proclaimed port. In these instances, permission is currently sought from [Customs] in accordance with section 58 of the Act. Given that unloading and loading of goods and the disembarking of travellers also occur in these places, border risks and intervention activities must be managed appropriately.<sup>11</sup>

2.9 The EM argues that, as goods aboard such ships or aircraft pose the same border risks as those that are on a ship or aircraft within a port or airport, Customs should have the same powers over them to manage such risks.<sup>12</sup> Hence Items 2, 3, 5, 25 and 26 provide for the following:

---

<sup>5</sup> *Customs Act 1901*, section 186.

<sup>6</sup> *Customs Act*, Part XIII, Division 1, Subdivision D.

<sup>7</sup> *Customs Act*, sections 203T, 229.

<sup>8</sup> *Customs Act*, section 42.

<sup>9</sup> *Customs Act 1901*, subsection 58(1).

<sup>10</sup> *Customs Act 1901*, subsection 58(2).

<sup>11</sup> *Submission 1*, p. 1.

<sup>12</sup> EM, p. 9.

- Item 5 repeals section 31 (see above) and replaces it with a new section 31 that would make goods in the situations contemplated by section 58 of the Act subject to the control of the Customs;
- Item 2 amends the definition of 'designated place' in subsection 4(1) to include a place to which a ship or aircraft has been brought because of poor weather or some other reasonable cause (for so long as the ship or aircraft remains at that place), so as to extend certain seizure, detention and search powers under the Act to such a place;<sup>13</sup>
- Item 3 makes a consequential amendment to the definition of 'designated place' in subsection 4(1) of the Act;
- Item 25 amends the definition of 'Customs place' in subsection 183UA(1) to include, in a similar vein to Item 2, a place to which a ship or aircraft has been brought because of poor weather or some other reasonable cause (for so long as the ship or aircraft remains at that place), so as to extend certain seizure, movement, examination and disposal powers to such a place;<sup>14</sup> and
- Item 26 makes a consequential amendment to the definition of 'Customs place' in subsection 183UA(1) of the Act.

2.10 Items 2, 3, 25 and 26 do not refer to a place to which a ship or aircraft has been granted permission to be brought because the provisions that those Items amend already make reference to such places.

### ***Amending time periods for the reporting of arrivals and stores***

2.11 When a ship or aircraft arrives at a port or airport in Australia from a place outside Australia, section 64AA of the Act requires the operator of the ship or aircraft to report certain matters about the arrival to Customs. The report must be made before the issuance of a Certificate of Clearance or within 24 hours (in the case of a ship) or three hours (in the case of an aircraft), whichever is earlier. Section 64AAA requires the operator of the ship or aircraft to report certain matters about the stores and any prohibited goods therein to Customs within the same timeframe. As Customs explained:

Details in these reports are necessary for [Customs] to assess the risks of items that may be on board and to plan resources to deal with them, i.e. firearms, weapons and narcotics that may be required to be detained or managed to minimise detriment to the Australian community.<sup>15</sup>

2.12 The EM notes that the timeframes imposed by sections 64AA and 64AAA can pose difficulties in the case of certain ships and aircraft.<sup>16</sup> It explains that it would be more convenient, in some circumstances, for Customs to be notified prior to the

---

13 See *Customs Act 1901*, sections 203B, 219L, 219M, 219ZJB and 219ZJC.

14 See *Customs Act 1901*, sections 197, 198, 203, 203B, 203C, 209 and 218A.

15 *Submission 1*, p. 2.

16 EM, p. 9.

arrival of the ship or aircraft.<sup>17</sup> Items 6 to 11 provide for the amendment of the timeframes as follows:

- Item 7 inserts a new subsection 64AA(3A), which would allow the CEO of Customs to determine, by legislative instrument, that 'reports for specified ships, or specified aircraft, in specified circumstances must be made before a specified time or before the occurrence of a specified event';
- Item 10 inserts a new subsection 64AAA(3A), which is identical in terms to the proposed new subsection 64AA(3A); and
- Items 6, 8, 9 and 11 make consequential amendments.

2.13 As Customs further explained:

These proposed amendments will ensure that [Customs] has the ability to require these reports for specified ships or aircraft or in specified circumstances at a time that would be more appropriate to minimise impacts on the master or owner of the ship or pilot or owner of the aircraft.

Dealing with the information in these reports at a more convenient time will also allow earlier assessment and enable deployment of [Customs] resources to be prioritised more efficiently. An outcome of improved risk assessment and intervention targeting may be increased detections at the border.<sup>18</sup>

***Amending application processes for Clearance Certificates***

2.14 Subsection 118(1) of the Act provides that '[t]he master of a ship or the pilot of an aircraft must not depart with the ship or aircraft from any port, airport or other place in Australia without receiving from the Collector [of Customs] a Certificate of Clearance in respect of the ship or aircraft'. Subsection (2) provides that the master of a ship or the pilot of an aircraft may apply for a Certificate of Clearance and subsection (3) requires that an application for a Certificate of Clearance 'must be in writing and must contain such information as is prescribed by the regulations'. If the Certificate of Clearance has not been given within 24 hours of the application, subsection 118(5) allows for an application to be made to the CEO of Customs for a Certificate of Clearance.

2.15 Customs Regulations 1926 set out the requirements referred to in subsection 118(3) but, as the EM explains, 'this method of prescribing particulars is inconsistent with other application and reporting requirements under the Act, where details are set out in an approved form'.<sup>19</sup>

2.16 To this end, Items 12-16 seek to amend the procedures described above to conform with those provided for elsewhere in the Act:

- Item 14 repeals subsection 118(3);

---

17 EM, p. 9.

18 *Submission 1*, p. 2.

19 EM, p 11.

- 
- Item 16 inserts new subsections 118(8) and 118(9). The former would require that applications under subsections (2) or (5) must be in writing, must be in an approved form, must contain such information as the form requires, and must be signed in the manner indicated on the form. The latter would allow the CEO of Customs to approve different forms that would apply to different circumstances; and
  - Items 12, 13 and 15 make consequential amendments.

***Amending application processes relating to the movement of stores***

2.17 'Stores' are the goods on a ship or aircraft for the use of the passengers or crew, or for the service of the ship or aircraft.<sup>20</sup> Part VII of the Act makes provision for dealing with stores; for example, section 130 provides that stores are not liable to Customs duties (except as provided for in the regulations).

2.18 Section 127 requires that stores may not be unshipped, unloaded or used before the departure of the ship or aircraft from its last port of departure in Australia (otherwise than for the use of passengers or crew, or for the service of the ship or aircraft) unless a Collector of Customs consents. As noted by the EM, section 127 'does not specify how and in what form an application for consent should be made, or whether the consent can be subject to conditions (if necessary) or consequences for failing to comply any such conditions'.<sup>21</sup> A similar lacuna exists in section 129, which prohibits stores from being taken on board a ship or aircraft without the approval of a Collector of Customs, but which does not explain how such approval should be sought.<sup>22</sup>

2.19 Items 17-21 of the Bill seek to rectify these issues by replacing the nonspecific system of consent in section 127 with a more detailed system of approval, and by providing for the manner in which approval should be sought in sections 127 and 129. This would be achieved as follows:

- Item 18 inserts new subsections 127(4)-(9), which would establish an application process for the seeking and granting of approval to unship, unload or use stores. The application process would be virtually identical to that provided for in Item 16 in respect of Certificates of Clearance, but includes provision for such conditions being placed on the approval as, 'in the opinion of the Collector, are necessary for the protection of the revenue of the Customs or for the purpose of ensuring compliance with the Customs Acts'. New subsection 127(9) inserts a strict liability offence (punishable by 60 penalty units) for a person who breaches such conditions;
- Item 21 inserts new subsections 129(5) and 129(6) to specify a process by which approval provided for by subsection 129(1) may be sought. Again, the

---

20 *Customs Act 1901*, s 130C.

21 EM, p. 12.

22 EM, p. 13.

application process is virtually identical to that provided for in Item 16 in respect of Certificates of Clearance; and

- Items 17, 19 and 20 make consequential amendments.

### ***Amending application processes relating to the transfer of goods between certain vessels***

2.20 Section 175 of the Act prohibits the transfer of goods between ships and aircraft that are not currently making an international or prescribed journey and those that are. The prohibition does not apply where a Collector of Customs gives permission for the transfer to occur but, as with other provisions considered in this report, no procedures for the seeking of permission are set out in the Act.

2.21 Item 22 inserts new subsections 175(3D)-(3G), which insert a procedure for applying for approval to transfer goods. The procedure is virtually identical to that inserted by Item 16. Items 23 and 24 make consequential amendments.

### ***Extending powers of examination***

2.22 It is common for domestic cargo and domestic passengers (and their personal effects) to make purely domestic trips on the domestic leg of international flights or voyages. When this occurs, passengers access Customs controlled areas in ports and airports and mingle with international passengers before, during and after the voyage or flight. This gives rise to a risk described as follows by Customs:

Mingling of international and domestic travellers presents a border risk that dutiable and prohibited goods can be transferred between international and domestic travellers to evade detection by [Customs].<sup>23</sup>

2.23 At present, such cargo and personal effects are not subject to the control of the Customs as they do not fall within any of the categories set out in section 30 of the Act. The primary impact of this perceived shortcoming identified in the EM is that the general powers to examine goods contained in section 186 of the Act cannot be exercised in relation to these types of cargo and personal effects.<sup>24</sup>

2.24 In order to address this shortcoming, Item 27 inserts a new section 186AA to follow immediately after section 186. Section 186AA would allow goods carried on the domestic legs of international flights or voyages to be examined by a Customs officer. The key features of the proposed section 186AA are as follows:

- subsection (1) specifies that the section only applies to ships and aircraft making international voyages and flights;
- subsection (2) provides for the examination power that applies to goods that have not yet been loaded onto the ship or aircraft. The power is activated if a Customs officer has reason to believe that goods are to be loaded onto the ship or aircraft at an examinable place and if they are to be unloaded at another examinable place. ('Examinable place' is defined in subsection (8) to mean a

---

23 *Submission 1*, p. 3.

24 EM, p. 14.

---

port or airport in Australia, a place to which a ship or aircraft has been brought because of poor weather or some other reasonable cause, or a place to which a ship or aircraft has been permitted to be brought.) When the power is activated, the Customs officer may examine the goods, which become subject to the control of the Customs for the duration of the examination;

- subsection (3) provides for the examination power that applies to goods that have been loaded onto the ship or aircraft at an examinable place and unloaded from the ship or aircraft at another examinable place on the same voyage or flight. When the power is activated (that is, when the goods have been unloaded), the Customs officer may examine the goods, which become subject to the control of the Customs for the duration of the examination;
- subsection (4) provides that the expense of any examination is to be borne by the owner of the goods. A similar provision exists in subsection 186(1) (which contains the '[g]eneral powers of examination of goods subject to Customs control') and, the EM explains, '[i]t is expected that this would mainly be applicable in the cargo environment as opposed to the traveller's environment';<sup>25</sup>
- subsection (5) provides that, in the course of an examination, 'an officer may do, or arrange for another officer or other person having the necessary experience to do, whatever is reasonably necessary to permit the examination of the goods'. This is similar in terms to existing subsection 186(2);
- subsection (6) gives a non-exhaustive list of actions that may be taken under subsection (5). This is similar in terms to existing subsection 186(3);
- subsection (7) provides that new section 186AA does not limit any other provision of the Act that provides for the examination of goods or describes when goods are subject to the control of the Customs; and
- subsection (8) defines 'examinable place', as described above.

#### 2.25 The EM explains that:

If the examination of goods under new section 186AA discovers [sic] that the goods are purely domestic goods, [Customs] will have no further powers in relation to the goods. However, if as a consequence of the examination of the goods, a Customs officer detects that a possible offence under Commonwealth, Territory or State laws has been committed, information relating to this potential offence may be disclosed to the relevant Commonwealth or State Government agency for further action in accordance with section 16 of the *Customs Administration Act 1985*.

2.26 Item 28 makes a consequential amendment by providing that the power in section 186A to take a copy of or extract from certain documents examined under section 186 also applies to documents examined under section 186AA.

---

25 EM, p. 15.

---

***Enhancing the interaction between the Infringement Notice Scheme and the claims process***

2.27 In February 2014, a new Infringement Notice Scheme in Division 5 of Part XIII of the Act commenced. Section 243X provides for the issuance of an infringement notice in relation to certain strict and absolute liability offences. Such a notice allows the person alleged to have committed the offence to pay to the Commonwealth the penalty specified in the notice as an alternative to prosecution.

2.28 One of the offences to which the scheme applies is importing a prohibited import.

2.29 In addition to being subject to the Infringement Notice Scheme, prohibited imports may also be seized under the Act. If goods have been seized, subsection 205(1) requires a seizure notice to be issued within seven days. Seizure triggers the process in Division 1 of Part XII whereby the owner of the goods can claim to have them returned.

2.30 Since the commencement of the Infringement Notice Scheme, a technical problem has come to light concerning its interaction with the claims process insofar as it relates to prohibited imports.<sup>26</sup> The problem arises as a result of the interaction between the following provisions:

- under the Infringement Notice Scheme, prohibited imports of a certain kind are taken to be condemned as forfeited to the Crown if a person pays an infringement notice penalty and the infringement notice has not been withdrawn: subsection 243Y(1);
- under the claims process, if a seizure notice is served and a claim for the goods may be made but has not been made within 30 days of the service of the notice, the goods will be condemned as forfeited to the Crown: section 205C; and
- under the claims process, a claim for goods may not be made if goods are taken to be condemned as forfeited to the Crown by operation of the Infringement Notice Scheme (subsection 243Y(1)): subsection 205B(1A).

2.31 It is possible, therefore, for a seizure notice and an infringement notice to be issued in relation to certain prohibited imports. If the penalty on the infringement notice is paid, the prohibited imports are condemned as forfeited. If the infringement notice is subsequently withdrawn and the withdrawal takes place more than thirty days after the service of the seizure notice, the person would never have been entitled to make a claim for the return of the goods and the goods could not be taken to be condemned.

2.32 Items 29 to 41 of the Bill seek to deal with this issue as follows:

---

26 EM, pp. 16-17.



- Item 41 inserts a new subsection 243Y(4) that provides that, if an infringement notice is withdrawn, the goods are no longer taken to be condemned as forfeited;
- Item 35 adds a new subsection 205C(2) that provides that, if the penalty specified in an infringement notice is paid on time and the goods are forfeited but the infringement notice is subsequently withdrawn, the thirty-day period to make a claim resets at the time that notice was given of the withdrawal of the infringement notice;
- Item 37 inserts a new subsection 205D(2A) that provides that, if an infringement notice is withdrawn, the previous condemnation of the goods under the Infringement Notice Scheme is not a bar to the return of the goods under the claims process if a claim has been validly made; and
- Items 29, 30, 31, 32, 33, 34, 36, 38, 39 and 40 make consequential amendments.

***Application and transitional provisions***

- 2.33 Item 42 sets out the application and transitional provisions.

