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Bills Digest  
No. 154 2003–04

## Customs Legislation Amendment (Airport, Port and Cargo Security) Bill 2004

ISSN 1328-8091

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Published by Information and Research Services, Parliamentary Library,  
Department of Parliamentary Services, 2004.

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No. 154 2003–04

Customs Legislation Amendment  
(Airport, Port and Cargo Security) Bill 2004

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Law and Bills Digest Section  
16 June 2004

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# Customs Legislation Amendment (Airport, Port and Cargo Security) Bill 2004

**Date Introduced:** 27 May 2004

**House:** House of Representatives

**Portfolio:** Justice and Customs

**Commencement:** The formal provisions (sections 1 to 4) commence on Royal Assent. Other provisions commence on various dates as set out in the table contained in clause 2 of the Bill and discussed in the Main Provisions section of this Digest.

## Purpose

The Bill amends the *Customs Act 1901* (Cwlth) ('the Customs Act') to permit officers of the Australian Customs Service ('Customs') to detain persons for the purposes of law enforcement cooperation (**Schedule 1**); to permit Customs officers to question passengers and persons found in restricted places (**Schedule 2**); and to stop a 'conveyance' (defined in section 183UA of the Customs Act as 'an aircraft, railway rolling stock, vehicle or vessel of any kind') (**Schedule 4**). The Bill also inserts reporting requirements in relation to information about persons departing Australia by ship or aircraft (**Schedule 3**). Further, it amends the Customs Act to refer to the *Maritime Transport Security Act 2003* ('the Maritime Transport Security Act') in relation to the appointment of a port (**Schedule 5**) and to insert reporting deadlines in relation to Customs' international trade modernisation program (**Schedule 6**).<sup>1</sup>

## Background

In large part, the measures contained in the Bill complement or amend existing provisions in the Customs Act.

### Basis of policy commitment

Airport, port and cargo security form part of the Government's platform on national security and border control. The platform crosses many portfolios, including Attorney-General's, immigration, customs, defence and foreign affairs. It has been the recent subject of various pieces of legislation, including the Maritime Transport Security Act and

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the *Aviation Transport Security Act 2004*. While those Acts have a broad-ranging application, the amendments contained in the present Bill are directed specifically to Customs' border security functions. In this regard, the Government is 'mindful of the need to find a suitable balance between measures which support Australia's border security and the needs of legitimate travellers and commerce'.<sup>2</sup>

On 11 May 2004, referring to the allocation of an extra \$107.6 million in the 2004-05 Budget to Customs, the Minister for Justice and Customs said:

Border protection remains vital in the protection of Australia against drugs, disease, illegal arrivals and other threats, and the Government will continue to allocate suitable resources to this crucial task.<sup>3</sup>

Specifically, the Minister referred to three 'key operational areas' which are the subject of government funding, namely:

- illegal fishing activities in the Southern Ocean (funding of \$84.2 million over two years)
- the ability of Customs officers to board up to 80 per cent of all vessels at their first port of call in Australia (\$2.8 million in 2004-05), and
- better border protection through biometrics (\$3.1 million in 2004-05).<sup>4</sup>

Such funding is part of the package known as 'Investing in Australia's Security' (worth \$754.5 million over the five years from 2003-04). It supplements funding allocated to Customs in previous budgets (particularly the package known as 'A Safer Australia' in the 2003-04 Budget).<sup>5</sup>

Notably, the Bill does not appear to deal with the three 'key operational areas' listed above—although measures contained in the Bill may indirectly affect those areas. The Bill also does not deal with new air cargo scanning technology (due to be trialled at Brisbane Airport in early 2005).<sup>6</sup> Further, the Bill does not deal with border security measures which fall within the portfolio of other government departments, such as transport security measures at regional airports which fall within the bailiwick of the Minister for Transport and Regional Services.<sup>7</sup>

### **Press commentary/ ALP/Australian Democrat/Greens policy position/commitments**

There has been limited press commentary on the Bill. It was mentioned in the Australian Associated Press Financial News Wire on 27 May 2004 (the day the Bill was introduced in the House of Representatives), but the report only summarises the contents of the Bill and comments made by the Attorney-General in the Second Reading Speech.<sup>8</sup>

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While the ALP has not commented directly on the Bill, it has recently criticised the level of government funding for Customs. In a news statement issued on 22 March 2004, Senator Mark Bishop, the Shadow Minister for Veterans Affairs and the Shadow Minister for Customs, noted the blowout in expenditure on a computer system and staff cuts at Customs, saying:

Customs remains crippled and unable to play its part in the rediscovery of shipping and port security as fundamental elements in the war against terror.

... Customs remains the poor cousin when it comes to its role in maritime security.<sup>9</sup>

In a news statement issued on 12 May 2004 (following the announcement of the Budget 2004-05), Senator Bishop again referred to Customs as ‘the poor cousin in the security network’. He referred to budget measures such as expenditure on facial recognition technology and increased ship inspections as ‘marginal’ and having ‘little effect on the need for improved border security’. While welcoming the new airport scanning equipment, Senator Bishop said that it ‘is only another piecemeal investment which misses the bulk of the security risk which is at Australia’s sea ports’. He went on to say:

Australia’s ports remain wide open to exploitation by international criminals. Less than 5% of loaded containers are inspected, and almost a million empties avoid scrutiny completely.<sup>10</sup>

On 25 May 2004, Senator Bishop issued a further news statement in which he again drew attention to the cost of Customs’ new computer system. He also stated that Customs staff ‘are struggling to meet their responsibilities’, saying:

Inability to meet obligations at airport, for ship inspections, and freight examination are the source of continuing complaints from staff.<sup>11</sup>

Neither the Australian Democrats nor the Greens have commented on the Bill.

## Main Provisions

### Schedule 1—Detaining persons for purposes of law enforcement co-operation

**Schedule 1** commences on the day after the Act receives Royal Assent.

**Item 1 of Schedule 1** inserts **proposed Division 1BA** into Part XII of the Customs Act. Part XII deals with powers of Customs’ officers. Proposed Division 1BA deals with the detention and search of persons for the purposes of law enforcement co-operation. It comprises nine proposed sections, as discussed below. Some provisions are similar to the general detention and search powers currently contained in the Customs Act, whereas others are different. It is unclear whether the proposed provisions are intended to ‘cover

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the field' of the detention of persons by Customs officers for the purposes of law enforcement co-operation, or whether existing detention and search powers in the Customs Act will have some effect on the detention of persons for the purposes of law enforcement too.

### **Proposed section 219ZJA**

**Proposed section 219ZJA** inserts definitions of the terms 'Commonwealth offence', 'frisk search', 'ordinary search' and 'serious Commonwealth offence' by cross-reference to definitions of those terms in the Customs Act (namely Division 1 of Part XII, particularly section 183UA) and of the *Crimes Act 1914* (section 15HB and Part 1C—Investigation of Commonwealth offences). None of the definitions seems controversial.

A 'frisk search' essentially involves running the hands over the person's outer garments and examining anything worn or carried by the person that is conveniently and *voluntarily* removed. An 'ordinary search' is slightly wider, permitting the officer conducting the search to *require* the person to remove outer garments (coat/jacket, hat, shoes and gloves) for examination.

### **Proposed section 219ZJB**

**Proposed section 219ZJB** permits a Customs officer to detain a person who is in a 'designated place' and whom the officer suspects on reasonable grounds 'has committed, or is committing, a serious Commonwealth offence'. Currently, under the general detention provisions of the Customs Act, only a class of Customs officers declared by the CEO of Customs may detain a suspect: section 219ZA.

Under **proposed section 219ZJB**, the officer must advise a police officer about the detention 'as soon as practicable' and deliver the detainee into the custody of the police officer 'as soon as practicable'. The Customs officer must release the detainee if the officer ceases to have reasonable grounds to suspect that the person has committed or was committing the offence.

The term 'designated place' is defined in section 4 of the Customs Act by reference to other provisions in that Act. In short, it means a port, airport, wharf or boarding station which the CEO of Customs has appointed and/or delineated and accordingly to which the Customs Act applies. It includes places used by officers for holding or questioning passengers and for examining passengers' baggage: subsection 234AA(1).

### **Proposed section 219ZJC**

**Proposed section 219ZJC** permits a Customs officer to detain a person who is in a designated place if there is a warrant for the arrest of the person in relation to a Commonwealth offence or if the person is on bail for a Commonwealth offence and the

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bail is subject to the condition that the person not leave Australia. The officer must advise a police officer about the detention ‘as soon as practicable’ and deliver the detainee into the custody of the police officer ‘as soon as practicable’.

There is no similar provision in the general detention and search powers of the Customs Act.

### **Proposed section 219ZJD**

**Proposed section 219ZJD** permits a Customs officer to conduct a frisk search or an ordinary search of the person, his or her clothing and any property in the person’s immediate control. The purpose of the search must be to determine if the person has concealed a weapon or other thing ‘capable of being used to inflict bodily injury or to assist the person to escape from detention’ on his or her person or in the person’s clothing or property. Alternatively, if the person has been detained under **proposed section 219ZJB**, the purpose of the detention must be to prevent the ‘concealment, loss or destruction of evidence of, or relating to, the offence concerned’. The provision is similar to section 18B of the *Australian Protective Service Act 1987* which permits protective service officers to stop and search persons.

The provision also stipulates that the search must be conducted ‘as soon as practicable’ after the person is detained and by an officer of the same sex as the detainee. If the officer seizes an item during the search, the officer must deliver it to the police officer when delivering the detained person.

Current sections 219L and 219M of the Customs Act provide for the frisk search and detention of persons suspected of carrying prohibited goods. Subsection 219M(2) provides that the detainee has a right to have the frisk search conducted in a place which provides adequate personal privacy to the detainee. **Proposed section 219ZB** does not contain any similar right.

Sections 219Q and 219R provide for the detention and *external search* of a person who refuses to submit to a frisk search under section 219L or refuses to produce a thing found in the frisk search. An ‘external search’ is defined in section 4 of the Customs Act to mean ‘a search of the body of, and of anything worn by, the person’ to determine if the person is carrying any prohibited goods and to recover any such goods. It does not include an internal examination of the person’s body. In some circumstances a court order is required to enable the search to occur (such as where the detainee is a child or a person under a disability). If required for the protection of the detainee, the detainee’s legal guardian or a person ‘capable of representing the detainee’s interests in relation to the search’ must be present: subsection 219R(5). There are no such rights or protections in **proposed Division 1BA**, but that may be of little consequence, given that **proposed section 219ZJD** permits only a *frisk or ordinary search* to occur, not an *external search* of the body (when the person may be required to remove all of their clothing).

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Further, it is unclear whether existing sections 219Q and 219R would apply to a person who refuses to submit to a frisk or ordinary search under **proposed section 219ZJD** (that is, the person might be subjected to an external search). However, the reference in section 219R to the person being detained under sections 219P and 219L would suggest that it does not apply to **proposed section 219ZJD**.

It is also not clear if a Customs officer may use reasonable and necessary force to frisk search a person who refuses to submit to the search: see the wording of **proposed section 219ZJG(1)**.

### **Proposed section 219ZJE**

**Proposed section 219ZJE** permits the CEO of Customs to give written directions identifying places where an officer may detain a person under **proposed Division 1BA** and specifying ‘such other matters relating to the detention of person under this Division as the CEO considers appropriate’. Such a direction is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*—it must be tabled in both Houses of Parliament within 15 days of the giving of the direction.

### **Proposed section 219ZJF**

**Proposed section 219ZJF** provides that an officer must tell the detained person the reason for the detention, unless the person’s own actions make it impracticable for the officer to inform the person of the reason. The officer must produce identification if the person requests.

The provision is similar to section 219M, which provides for a person detained under the general detention provisions to be informed about the reason for the frisk search. If a person is to be subjected to an external search, subsection 219R(7) provides that the person has a right to communicate with another person, but subsection 219R(8) provides that a Customs officer or a police officer may stop such communication if the officer believes ‘on reasonable grounds’ that it should be stopped in order to ‘safeguard the processes of law enforcement’ or ‘protect the life and safety of any person’. Thus, a person has a limited right to contact a lawyer under section 219R. There is no such right to communicate in **proposed Division 1B**, but again that may be of little consequence given that the person is to be subjected only to a frisk or ordinary search and not an external [body] search. The significance of a right to communicate with a lawyer may depend on the circumstances of any particular case.

The provision is also similar to section 219ZC, which provides that if a Customs officer or a police officer exercises the general detention and search powers under Division 1B, then the officer must produce personal identification of being an officer when requested by the detainee to do so.

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### Proposed section 219ZJG

**Proposed section 219ZJG** provides that in exercising powers under **proposed Division 1BA**, an officer must not ‘use more force, or subject the person to greater indignity’ than is reasonable and necessary. Particularly, the officer may not ‘do an act likely to cause death or grievous bodily harm to the person’ unless that act is necessary to protect life or prevent serious injury to the officer or another person.

There are similar provisions in the Customs Act about the use of force: see sections 219NA and 219ZC. However, no existing provision refers to death or grievous bodily harm.

### Proposed section 219ZJH

**Proposed section 219ZJH** provides that if the detainee is moved during the period of detention and later released, the person must be returned free of charge to the place of first detention. It is almost identical to subsection 219ZE(3), which relates to detention generally.

### Proposed section 219ZJI

**Proposed section 219ZJI** provides that section 219ZD of the Customs Act applies to detentions under **proposed Division 1BA**. Section 219ZD provides that if the detainee is unable to communicate fluently in English, an officer must take reasonable steps to ensure that a competent person is present to act as interpreter.

## Schedule 2—Questioning passengers etc. and persons found in restricted places

**Schedule 2** commences 28 days after the Act receives Royal Assent, unless **item 1 of Schedule 3** commences first (in which case **items 2 and 4 of Schedule 2** will not commence at all) and/or on the same day (in which case **items 3 and 5 of Schedule 2** will not commence at all).

**Item 1 of Schedule 2** inserts **proposed section 195A** into the Customs Act. It empowers a Customs officer to ask a person in a restricted area for the person’s name, the person’s reason for being in the area, and evidence of the person’s identity. (A place is a ‘restricted area’ if it is specified under section 234AA as a place used by officers for holding or questioning passengers and for examining passengers’ baggage; the place may be signposted.) **Proposed section 195A** is not an offence provision, although by virtue of **item 4**, failing to answer a question or produce a document may be an offence under **proposed subsection 243SA(3)**. Section 243SA sets out the offence of failing to answer questions—punishable by up to 30 penalty units (or \$3300); section 243SB sets out the offence of failing to produce documents—punishable by up to 30 penalty units. Self-incrimination, however, is a defence to these offences: section 243SC.

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**Proposed subsection 243SA(3)** also ensures minimal safeguards against misuse of the offence provisions by requiring the officer to inform the person of the officer's authority to ask the question and by requiring the officer to inform the person that it may be an offence not to answer the question: **item 4 or 5 of Schedule 2** (depending on whether Schedule 2 or 3 to the Bill commences first). **Proposed section 195A** is similar to section 18A of the *Australian Protective Service Act 1987*, which empowers protective service officers to question persons.

**Items 2-5** amend existing section 243SA to include reference to **proposed section 195A**.<sup>12</sup>

### Schedule 3—Reports on departing passengers and crew

**Subclause 4(1)** of the Bill provides that the amendments set out in **Schedule 3** do not apply to a ship or aircraft if that vessel is due to depart within 72 hours (or less) of the commencement of the amendments (the date is to be fixed by proclamation).

#### Item 1

**Item 1** inserts **proposed Part VB—Information about persons departing Australia** into the Customs Act. **Proposed sections 106A-106I** stipulate that operators of specified ships or aircraft must provide certain information, including information about the persons who are expected to depart Australia on the ship or aircraft. Such reports about departing persons are not required under the current law. The amendments require certain information to be provided 48 hours before departure and other information 4 hours before departure. It is an offence for an operator not to provide the information sought. The offence is a strict liability offence, which means that the prosecution need not prove a fault element (that is, it need not prove intention, knowledge, recklessness or negligence)—although defences are available to a defendant.

It is not clear what information the operators are to provide, nor how they are to obtain the information. It is also not clear how the operators are to use the information, nor how Customs may use the information. It is therefore not clear if the Bill conforms with the National Privacy Principles (set out in Schedule 3 to the *Privacy Act 1988* and applicable to the private sector since 21 December 2001) or the *Information Privacy Principles* (which apply to Commonwealth and ACT government departments and agencies). (See the **Concluding Comments** section to this Digest for further discussion.)

**Proposed Part VB** specifies how the information is to be provided to Customs (in the first instance, electronically). It also permits a Customs officer to question an operator about the persons on board the vessel and to request the operator to produce documents relating to those persons (**proposed section 106J**).

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**Item 1** commences on a single day to be fixed by Proclamation. If that day is more than six months after the Act receives Royal Assent, then **item 1** commences six months and one day after the date of Royal Assent.

## Item 2

**Item 2** amends paragraph 118(4)(a) of the Customs Act, but subsection 118(4) does not presently appear in any consolidation of the Customs Act. It is, however, contained in the item 62 of Schedule 3 of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* ('the Trade Modernisation Act') and is therefore not due to commence until 21 July 2004.<sup>13</sup>

Subsection 118(4) provides as follows:

The master and the owner of a ship, or the pilot and the owner of an aircraft, that is at a port, airport or other place in Australia must:

- (a) severally answer questions asked by an officer relating to the ship or aircraft and its cargo, crew, passengers, stores and voyage; and
- (b) severally produce documents requested by an officer that relate to the ship or aircraft and its cargo; and
- (c) comply with such requirements (if any) as are prescribed by the regulations.

**Item 2** seeks to remove the words 'crew, passengers' from paragraph 118(4)(a), because if **proposed Part VB** of the Customs Act is enacted, these words will be redundant (see **item 1 of Schedule 3** to the present Bill).

## Item 3

Similarly, **item 3** omits the words 'crew, passengers' from paragraph 119(1)(b) of the Customs Act, because if **proposed Part VB** is enacted, these words will be redundant. Section 119 deals with the requirements for obtaining a certificate of clearance. If item 62 of Schedule 3 to the Trade Modernisation Act commences before, or at the same time as, **item 1 of Schedule 3** to the present Bill (being **proposed sections 106A-106J**), then this item will not commence at all. This is because section 119 has been reworded in the Trade Modernisation Act to deal with the communication of 'outward manifest' to Customs and only refers to goods and not people. (The term 'outward manifest' is not really defined in the Customs Act. It refers to the notification which ship or aircraft masters or operators are required to provide to Customs concerning the export of goods on board the vessel.) Further, **proposed sections 106A-106J** contain far more detailed reporting requirements in relation to passengers and crew than those currently contained in section 119 (as it currently operates).

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### Items 4–7

**Items 4 and 5 of Schedule 3** to the present Bill amend the offence in subsection 243SA(1) by inserting reference to **proposed section 106J** to ensure that it is an offence for the operator of a ship or aircraft to fail to answer questions about persons departing Australia on board the vessel or to produce documents relating to those persons. As mentioned earlier in the context of items 2 and 3 of Schedule 2 to the Bill, the proposed amendments are expressed in slightly different ways depending on the outcome and commencement of other proposed amendments to the provision. **Item 4** operates on the premise that subsection 243SA(1) appears in its present, operational form.

**Item 6** amends existing section 243SA by inserting **proposed subsection 243SA(3)**, making it an offence for operators to fail to answer questions from Customs officers under **proposed section 106J** about persons on board the ship or aircraft. As mentioned earlier, **proposed subsection 243SA(3)** also ensures minimal safeguards against misuse of the offence provisions by requiring the officer to inform the person of the officer's authority to ask the question and by requiring the officer to inform the person that it may be an offence not to answer the question.

**Item 6** commences on a single day to be fixed by Proclamation. If that day is more than six months after the Act receives Royal Assent, then **item 6** commences six months and one day after the date of Royal Assent. That said, **item 6** only commences if **item 4 of Schedule 2** to the present Bill is not in operation. If **item 6** does not commence, **item 7** makes the same amendment to section 243SA, by including reference to both **proposed sections 195A and 106J** in subsection 243SA(3).

### Schedule 4—Stopping conveyances in Customs places

**Items 1-3 of Schedule 4** amend section 197 of the Customs Act, which deals with the power to stop a conveyance about to leave a Customs place. The amendments replace the words 'about to leave' [the Customs place] with the more expansive expression 'in' [the Customs place]. It is not, however, clear why the heading to the section is not the subject of amendment (to reflect the change from 'about to leave' to 'in').

These amendments seem to extend the power of a Customs officer to stop a conveyance and ask questions. They mean that the officer may stop a conveyance as it enters the Customs place or remains at the Customs place. The officer need not wait until the conveyance is 'about to leave' the Customs place in order to ask questions and/or inspect documents and goods.

**Schedule 4** commences 28 days after the Act receives Royal Assent.

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## Schedule 5—Security regulated ports

**Subclause 4(2)** of the Bill provides that the amendment made by **Schedule 5** does not affect the validity of any appointment made before the commencement of Schedule 5. According to the table contained in **clause 2** of the Bill, **Schedule 5** commences on the ‘day after this Act receives the Royal Assent’.

**Item 1** of Schedule 5 amends section 15 of the Customs Act, which deals with the appointment of ports by the CEO of Customs. **Item 1** inserts **proposed subsection 15(1A)** to provide that in deciding whether to appoint a port under subsection 15(1), the CEO may take into account whether the port (or part thereof) is a ‘security regulated port’ within the meaning of the Maritime Transport Security Act. A ‘security regulated port’ comprises an area of a port which the Secretary of the Department of Transport has, ‘by notice published in the *Gazette*, [declared as being] intended for use either wholly or partly in connection with the movement, loading, unloading, maintenance or provisioning of security regulated ships’: subsection 13(1) of the Maritime Transport Security Act.

The CEO may also take account of whether the person designated under that Act as the port operator has a maritime security plan.

These amendments recognise the complementary, regulatory role played by the Department of Transport and associated maritime and shipping industries.

## Schedule 6—Reporting deadlines

### Part 1

**Part 1 of Schedule 6** deals with provisions of the Customs Act which are of effect pending the operation of the international trade modernisation program. Currently, ship operators are required to provide various reports about cargo and persons on board the ship if the ship is arriving in Australia from an international port. If the journey from the last port outside Australia is likely to take more than 48 hours, the report is required 48 hours before the ship arrives in Australia. If the journey from the last port outside Australia is likely to take less than 48 hours, the report is required 24 hours before the ship arrives in Australia.

**Items 1-3** give effect to the Government’s maritime security policy and will require operators to provide the reports further in advance of the ship’s arrival than under the present arrangements. The time limits will be set by regulation. They will apply to ‘impending arrival’ reports relating to cargo (**items 1 and 2**); cargo reports (**item 3**); and passenger reports (**item 4**).

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**Part 1** will commence on a single day to be fixed by proclamation (or 6 months after Royal Assent, whichever occurs first). **Items 1-3** will not commence if item 118 of Schedule 3 to the Trade Modernisation Act commences first, because item 118 already amends sections 64 and 64AB, thus rendering the amendments contained in **items 1-3** meaningless (or redundant) if section 118 commences first.

## Part 2

**Part 2** deals with reporting requirements after the commencement of the international trade modernisation program. **Part 2** commences at the same time as **item 4 of Schedule 6** unless item 118 of Schedule 3 to the Trade Modernisation Act has not commenced by then. In that case, **Part 2** will not commence until item 118 commences. Part 2 therefore assumes that sections 64 and 64AB operate as amended by the Trade Modernisation Act.

The amendments made by **Part 2** are not controversial. They repeal time limits for the doing of certain acts and permit new time limits to be fixed by regulation. They also clarify provisions (for example, the amendments make it clear that a cargo reporter need only provide the requisite reports when arriving at the first port of call in Australia and not at subsequent ports in Australia used by the vessel on the same trip).

## Concluding Comments

### Detention and search powers

The relationship between existing detention and search powers under the Customs Act and the proposed additional powers may require further consideration. For example, **proposed section 219ZJD** (which deals with the search of persons to detect a weapon or preserve evidence) seems, at least in part, to overlap with existing sections 219L and 219M (which deal with the detention and search of persons suspected of carrying prohibited goods). It may be important to ascertain which power of detention and search a Customs officer is exercising—the choice of powers may dictate what occurs if a person refuses to submit to a frisk or ordinary search. It may also affect the person’s right to communicate with another person, particularly a lawyer.

**Proposed section 219ZJD** may require amendment to make it compatible with the right of a person in existing section 219M to have a frisk search conducted in a place which affords adequate personal privacy.

Further, **proposed section 219ZJG** may also require further consideration. The provision permits a Customs officer to use ‘reasonable and necessary’ force in exercising powers under proposed Division 1BA. Specifically, it permits an officer to ‘do an act likely to

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cause death or grievous bodily harm to the person [the detainee] if the officer ‘believes on reasonable grounds that doing the act is necessary to protect life or prevent serious injury to the officer or any other person’. It is not a strictly objective test of whether the use of force is reasonable—it is based on the officer’s belief. There is no similar provision in the Customs Act.

## Privacy considerations

The Explanatory Memorandum to the Bill does not refer to privacy issues, but they are an important consideration in relation to the reports which operators are required to provide under Schedule 3 to the Bill.

Private operators of ships and aircraft must comply with the National Privacy Principles (‘NPPs’) set out in Schedule 3 to the *Privacy Act 1988*. Customs and other government bodies that may collect or possess such information must comply with the Information Privacy Principles (‘IPPs’).

All passengers already provide declarations about themselves to the Department of Immigration when departing Australia. They must show appropriate identification and travel documents. The distinction between that obligation to provide information to the Department of Immigration and the obligation contained in the proposed amendment is really the requirement to provide the information in advance. It may also lie in the fact that a third party (that is, the ship or aircraft operator) must provide the information, rather than the travellers themselves.

It is not clear exactly what information the operators of ships or aircraft are required to report to Customs, nor how the operators are to collect the information. The operators must collect personal information ‘only by lawful and fair means’ and not ‘in an unreasonably intrusive’ way (NPP 1.2). The organisation must not collect personal information ‘unless the information is necessary for one or more of its functions’ (NPP 1.1).

Usually, the operator must inform the person about the intended use or disclosure of the information. For example, the operator should tell the person that he or she will provide the information to Customs. That said, however, the operator may disclose the information to a third party without the consent of the individual concerned if the organisation ‘reasonably believes that the use or disclosure is necessary to lessen or prevent ... serious and imminent threat to an individual’s life, health or safety; or ... a serious threat to public health or public safety (NPP 2.1(e)); if the use or disclosure is required or authorised by or under law (NPP 2.1(g); or if the use or disclosure of the information for the purposes of law enforcement (including prevention, detection, prosecution, punishment) is also an exception (NPP 2.1(h)). Any of these considerations may apply in the case of the information required by Schedule 3 to the present Bill.

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The IPPs applying to Customs are in similar terms. For example, the collection of the information by Customs must be ‘for a purpose that is a lawful purpose directly related to a function or activity of the collector’ (IPP 1). The IPPs also provide similar exceptions to the NPPs for the provision of personal information by one government agency or body to another person, body or agency, or for the purposes of law enforcement (see IPP 11(1)). For example, Customs could provide the information to the Australian Federal Police.

The NPPs and the IPPs stipulate that individuals have the right to correct personal information, but individuals may not be aware what information the organisation (or government agency) is providing to third parties and/or whether it requires correction. For example, the first opportunity for a person to become aware that an operator has provided incorrect information to Customs is when the person is detained under the Customs Act.

A query may be raised as to what constitutes ‘law’ for the purposes of exception NPP 2.1(g) and IPP 11(1)—the requirement to provide the information under Schedule 3 will be contained in an enactment, but the format and method of providing the information is to be set by the CEO of Customs. A query may also be raised as to whether the exceptions can be relied on where the operators are required to provide the information as a matter of routine.

Parliament may wish to consider if the Privacy Commissioner should be consulted about the proposed arrangements.

## Generally

The Bill contains a range of measures which complement and assist the operation of Customs’ border security functions. The Bill is perhaps unnecessarily complicated by the fact that some of the legislation which it is designed to support is not yet operational. Conceptually, this makes the Bill difficult to compare with existing reprints of the Customs Act. It also renders specific provisions of the Bill difficult to comprehend, particularly the commencement provisions.

## Endnotes

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- 1 The international trade modernisation (‘ITM’) program is yet to commence. Largely, it is the subject of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*. According to the CCH looseleaf publication *Australian Customs Law and Practice* (at ¶90-000), the provisions of that Act (which are yet to commence) will ‘significantly amend the import reporting and entry processes’. The program includes measures such as replacing the lodging of hard copy documents (such as reports in relation to cargo) with the requirement that documents be lodged electronically. The developments have

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made it necessary for Customs to introduce a new computer system. That system has been the subject of much recent press commentary because of delays and cost. For an overview, see Brendan Bailey, 'Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Bill 2003', *Bills Digest*, No. 80, Parliamentary Library, Canberra, 2003-04.

- 2 Philip Ruddock, Attorney-General, 'Second reading speech: Customs Legislation Amendment (Airport, Port and Cargo Security) Bill 2004', House of Representatives, *Debates*, 27 May 2004, p. 29 132.
- 3 Senator Christopher Ellison, Minister for Justice and Customs, 'New Customs resources to back up tough border protection policy', Media Release, 11 May 2004 (available at <http://www.law.gov.au/budget>).
- 4 *ibid.*
- 5 'Investing in Australia's Security' in *Budget Paper No. 2* (Budget 2004-05), Part 2: Expense Measures—Attorney-General's Department (available at <http://www.budget.gov.au/2004-05/bp2/html/expense-02.htm>).
- 6 Senator Chris Ellison, Minister for Justice and Customs, 'New Customs resources to back up tough border protection policy', Media Release, 11 May 2004 (available at <http://www.law.gov.au/budget>). See also Attorney-General's Department, *Fact Sheet 1 – A Safer Australia*, Budget 2004-05 (available at <http://www.ag.gov.au/budget>).
- 7 For examples of security measures funded by the Budget which fall within the bailiwick of the Minister for Transport and Regional Services, see 'Overview: Regional Partnerships for Growth and Security', *Ministerial Statements* (Budget 2004-05), Department of Transport and Regional Services at <http://www.budget.gov.au/2004-05/ministerial/html/transport-01.htm>.
- 8 'Australian customs officers' powers beefed up under new laws', *Australian Associated Press Financial News Wire*, 27 May 2004.
- 9 Senator Mark Bishop, Shadow Minister for Veterans Affairs and Shadow Minister for Customs, 'Security Funding—Customs Misses Out', News Statement, 22 March 2004 (available at: <http://www.alp.org.au/media/0304/20007100.html>).
- 10 Senator Mark Bishop, Shadow Minister for Veterans Affairs and Shadow Minister for Customs, 'Customs Budget—Nothing New', News Statement, 12 May 2004 (available at: <http://www.alp.org.au/media/0504/20007451.html>).
- 11 Senator Mark Bishop, Shadow Minister for Veterans Affairs and Shadow Minister for Customs, 'Customs' Budget Still in Trouble', News Statement, 25 May 2004 (available at: <http://www.alp.org.au/media/0504/20007568.html>).
- 12 **Item 3** seems at face value to be the same as **item 2**, but it is different. The amendment contained in **item 2** refers to subsection 243SA(1) as it currently appears and operates. By contrast, the amendment contained in **item 3** refers to subsection 243SA(1) as it will appear when (or if) **proposed section 106J** commences. (Proposed section 106J is contained in **item 1 of Schedule 3** to the present Bill and deals with the power of Customs officers to question vessel operators about departing persons—see below). It is intended that **proposed section 106J** will also be excluded from the operation of subsection 243SA(1).

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- 13 **Item 2 of Schedule 3** to the present Bill will not commence until item 62 of Schedule 3 to the Trade Modernisation Act commences. In the normal course of events, and given no proclamation has been made, item 62 should have commenced on 21 July 2003. However, by virtue of the passage of the *Customs Legislation Amendment Act (No. 1) 2002*, the commencement date has been postponed until 21 July 2004. See item 65 of Schedule 3 to the *Customs Legislation Amendment Act (No. 1) 2002*, which deals with International Trade Modernisation.

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