



## Customs Amendment (Strengthening Border Controls) Bill 2008

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### Contents

Purpose . . . . .	2
Background . . . . .	2
Changes to import controls . . . . .	3
Post-importation permissions . . . . .	4
Infringement notice scheme . . . . .	5
Search and seizure powers of customs officers in the offshore environment . . . . .	6
Financial implications . . . . .	8
Main provisions . . . . .	8
Schedule 1 – Import controls . . . . .	8
Surrender of prescribed prohibited imports . . . . .	8
Post-Importation Permission . . . . .	10
Infringement notice scheme . . . . .	10
Schedule 2 - Search powers on certain ships and aircraft . . . . .	10
Acknowledgements . . . . .	13

## Customs Amendment (Strengthening Border Controls) Bill 2008

**Date introduced:** 20 March 2008

**House:** House of Representatives

**Portfolio:** Home Affairs

**Commencement:** Sections 1 to 3 commence upon Royal Assent. Schedule 1 will commence on a day to be fixed by Proclamation, or, failing that, it will commence 6 months after the date of Royal Assent. Schedule 2 commences on the 28<sup>th</sup> day after Royal Assent.

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

### Purpose

The Customs Amendment (Strengthening Border Controls) Bill 2008 (the Bill) will amend the *Customs Act 1901* to:

- allow a person to surrender certain prohibited imports that have not been concealed
- allow for the granting of post-importation permissions for certain prohibited imports
- allow infringement notices to be served for certain offences including importing certain prohibited imports, and border security related offences
- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences.

Schedule 1 of the Bill amends the *Customs Act 1901* (the Customs Act) to allow for a tiered approach to the importation of prohibited imports. The Schedule will provide for the surrender of unconcealed prohibited imports, a post-importation permission scheme and an infringement notice scheme.

Schedule 2 of the Bill also amends the Customs Act to provide search and seizure powers of customs officers in the offshore environment.

### Background

The Customs Legislation Amendment (Strengthening Border Controls) Bill 2008 (the Bill) contains provisions taken from two earlier Bills. The import control measures are identical to the Customs Legislation Amendment (Augmenting Offshore Powers and other

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Measures) Bill 2006 which was referred to the Senate Legal and Constitutional Legislation Committee for inquiry on 22 June 2006. The Committee Report was tabled on 8 August 2006, however the Bill lapsed with the proroguing of Parliament. The Committee concurred with the broad purposes of the Bills and noted the merit in streamlining procedures dealing with the importation of low-end prohibited items to reduce the administrative burden for Customs. The Committee put forward seven recommendations.<sup>1</sup> The recommendations relating to the drafting of the provisions have been adopted.

Selected text (as described above) from the lapsed Bill is now re-introduced (without alteration) in this Bill, while the remaining provisions from the Customs Legislation Amendment (Augmenting Offshore Powers and other Measures) Bill 2006 have been re-introduced in the Customs Amendment (Modernising) Bill 2008 (also introduced on 20 March 2008).

## Changes to import controls

The Commonwealth Government controls the import of certain goods into Australia. Control is exercised through the Customs (Prohibited Import) Regulations 1956 made under section 50 of the Customs Act. The regulations provide that the importation of certain goods is prohibited absolutely, while other goods may only be imported when specified conditions or restrictions are complied with. The Customs website provides an outline of what goods are prohibited or restricted imports. There is a wide range of items controlled under the regulations, from high risk goods such as narcotic drugs, child abuse material and military style weapons, to lower risk community and consumer protection related items such as flick knives, blow pipes and toys with a painted coating that exceeds legislated standards for heavy metals content.<sup>2</sup>

A restricted good that is imported contrary to the relevant restrictions or conditions becomes a prohibited import for the purposes of the Customs Act. Prohibited imports are defined as 'special forfeited goods' under the Customs Act and become subject to seizure without warrant. There are also offences in the Customs Act that apply to the importation of prohibited goods. At present, section 203B of the Customs Act requires Customs officers to seize all prohibited imports to prevent the entry of these goods into the community. When Customs seizes prohibited imports without warrant, the Customs Act

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1. [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/customs\\_import\\_controls/report/b01.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/customs_import_controls/report/b01.pdf)

2. Australian Customs Service, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006, July 2006.

The Customs website can be found at <http://www.customs.gov.au>

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contains provisions that oblige the Customs officer to issue a seizure notice to the owner of the goods, hold the goods for thirty days to provide the owner with an opportunity to make a claim for return of the goods, and, except in specified circumstances, either return the goods to the owner who has made such a claim, or destroy them. According to the Australian Customs Service, '[d]ue to the low value of many of the goods, applications for their return are rarely made and the goods are destroyed'.<sup>3</sup>

The amendments proposed by this Bill will provide Customs officers with three alternatives to automatic seizure, but only for certain prohibited goods which are considered to be of low value and low risk. New regulations will be made to specify the goods to which the new approach will apply. The three alternatives are:

- allowing a person to surrender certain prohibited imports that have not been concealed
- allowing the granting of post-importation permission for certain prohibited imports, and
- allowing infringement notices to be served for certain offences, including importing certain prohibited imports and restricted area offences.

Customs officers will be given discretion to choose when to apply the first two alternatives to seizure, but only for goods that have not been concealed. In the Bill, the definition of concealment extends beyond physically concealing the goods, and includes failing to declare them to Customs. The Explanatory Memorandum says that, if, for example, a person indicated on the Incoming Passenger Card that they were bringing a prohibited import into Australia, then they would not be considered to have concealed the goods from Customs.<sup>4</sup> However, if the passenger failed to declare the goods on the Incoming Passenger Card, then they would be considered to have concealed the goods from Customs, and would not be permitted to surrender them. In those circumstances, the goods would either be seized by Customs, or be subject to an infringement notice under the proposed new regime to be introduced by this Bill. In contrast to the new surrender and post-importation permissions regime, the new infringement notice scheme will only apply to prescribed prohibited imports that have been concealed from Customs.

### Post-importation permissions

The importation of most goods in the Prohibited Imports Regulations is prohibited unless a licence or permission to import the goods is obtained. In some cases, other conditions or

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3. Australian Customs Service, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006, July 2006.
  4. Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p.7.

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restrictions must also be complied with. The explanatory memorandum provides an example in relation to the importation of certain firearms. 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.<sup>5</sup>

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.

Because it is not always possible to obtain a licence or permission to import goods before their importation, it is proposed to introduce a new regime whereby, in specified circumstances, the owner of prohibited imports may apply for the required permission to import the goods after the goods have been imported. It is a discretionary power whether to grant or give the required permission. The relevant goods will remain in the custody of Customs at all times until the required permission is granted or given.

### Infringement notice scheme

Another aspect of the tiered response to sanctions for dealing with prohibited imports is the establishment of an infringement notice scheme. The new infringement notice scheme will apply to an offence under paragraph 233(1)(b) of the Customs Act (prohibition on the importation of any prohibited import). An infringement notice can be issued in lieu of prosecution for the offence, if the offence relates to goods that are prohibited imports prescribed for the purposes of section 243ZF. The Explanatory Memorandum notes that the large range of goods that are controlled under the Prohibited Imports Regulations means that the threat posed to the community by these goods also varies greatly.<sup>6</sup> Appropriate prohibited imports will be prescribed, which will balance the threat posed to the community against the administrative burden the seizure of such items places on Customs.

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5. Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 9.
  6. Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 19.

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## Search and seizure powers of customs officers in the offshore environment.

The Australian Customs Service (ACS) provided a submission to the Senate Standing Committee on Legal and Constitutional Affairs on the rationale for the extension of search and seizure powers. In response to a question by Senator Ludwig on the general nature of search and seizure powers under the Act, the ACS responded in writing that:

The amendments in this [now lapsed] Bill are to powers available to an officer in the unique circumstances that occur in the offshore environment after making a request to board a ship under section 184A or to land for boarding an aircraft under section 184D of the Customs Act. This usually occurs where the commander of a Commonwealth ship or aircraft has formed a view that there is a suspected contravention of an offence under the Customs Act, Division 307 of the Criminal Code or another Act.<sup>7</sup>

In its written submissions to the Committee,<sup>8</sup> the ACS documented recent examples of escalations in the level of resistance encountered when Customs have boarded vessels ‘suspected of contraventions of the Customs Act’ or other legislation. The ACS submission outlines the concerns for officer safety and the risk of evidence being destroyed as the main driving factors for these amendments:

... an incident occurred during a boarding of an Indonesian fishing vessel located inside the Australian Exclusive Economic Zone. The team began to conduct an investigative boarding to determine if there was evidence of any offences. *As a decision had not been made to detain the vessel*, physical pat down searches were unable to be conducted. During the search of the vessel an Indonesian crew member produced a weapon and physically threatened the boarding team. A tactical withdrawal occurred to avoid physical injury to any Customs officers.

During another recent boarding of an Indonesian fishing vessel, the Customs boarding team identified sufficient evidence for the vessel to be detained and escorted to port for further enquiries. A subsequent pat down search of the crew located a concealed Global Positioning Satellite in the trousers of a crew member. There was potential for this piece of evidentiary material to be disposed of from the time of boarding until the search finally took place once the vessel had been detained. *If no other evidence of suspected offences had been identified, it would not have been possible to detain the vessel and conduct the searches and the GPS would not have been located.* [emphasis added]

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7. Question on Notice to the Australia Customs Service, answer to question 2, p. 2. [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/customs\\_offshore\\_powers/submissions/sub2a.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/customs_offshore_powers/submissions/sub2a.pdf) accessed 23 May 2008.

8. Australian Customs Service, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Customs Legislation Amendment (Augmenting offshore powers and other Measures) Bill 2006, January 2007, paragraph 4, p.2.

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Currently, there are a number of requirements that must be satisfied before a 'pat down' search of persons can take place. These are: that the ship may be boarded under subsection 185(1) or that the ship may be detained under subsection 185(3).

In the case of Australian ships, there appears to be no requirement that the ship is suspected of a contravention of Australian law before it can be boarded: see paragraph 185(1)(c). Once boarded, an Australian or foreign ship can only be detained under subsection 185(3) if there is a reasonable suspicion of a contravention of Australian law. The proposed amendments will, amongst other things, do away with the requirement to detain a ship before searches can be made under section 185AA. Thus they will allow any person on an Australian ship that is boarded to be subject to a personal search, notwithstanding that there may be no reasonable suspicion of the ship being involved in a contravention or that the person themselves has been involved in a contravention. ACS goes on to note:

It is recognised that the proposed personal search powers are wider in scope than other personal search powers under Commonwealth legislation. This is due to the remote locations in which offshore patrols are conducted and the unique circumstances facing officers when conducting personal searches in confined spaces.<sup>9</sup>

The Senate Standing Committee for the Scrutiny of Bills reported on Entry Search and Seizure Provisions in Commonwealth Legislation in 2006. The Twelfth Report, 2006, discusses the 'national security' justification for these measures and notes that the powers are consistent with other national security law. The discussion is in the framework of the *Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004* and the Report notes:

The Minister advised that the purpose of the powers is to protect Customs officers and prevent the destruction of evidence when a person is suspected of having committed a serious Commonwealth offence, is the subject of a Commonwealth arrest warrant, or is on bail where a condition of the bail is that a person not depart Australia. The Minister also advised that Customs officers already have broad personal search powers under the *Customs Act 1901* and receive extensive training in relation to this aspect of their operational activity.

The Explanatory Memorandum<sup>10</sup> has further background on the proposed provisions and according to the description of the amending provisions, the ship being boarded is a ship *suspected of being involved in offences* against specified Acts. It states that the amendments ensure the safety of Customs officers from possible attack while

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9. Australian Customs Service, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Customs Legislation Amendment (Augmenting offshore Powers and other Measures) Bill 2006, January 2007, paragraph 9, p. 3.

10. <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/ems/Linked/07120614.pdf>

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investigating ships ‘suspected of offences’ against the specified Acts as well as preventing the possibility of evidence of an offence being thrown overboard.

The Senate Standing Committee accepted the Australian Customs Service’ evidence that the powers are necessary as an adjunct to the proposed search and seizure powers and that the retaining of evidence ‘was not likely to occur where no suspicion of the commission of an offence was present prior to a search being conducted.’

## Financial implications

The Explanatory Memorandum notes that the bill has no financial impact.

## Main provisions

### Schedule 1 – Import controls

The main provisions used to set up the new regime of alternatives to automatic seizure of certain prohibited imports are included in **item 14** and **item 36**. **Item 14** sets up a surrender of goods mechanism under **proposed section 209N** and a detention of goods arrangement pending the granting of post-importation permissions under **proposed section 209U**. The third alternative, an infringement notice scheme to deal with concealed goods, is set up under **proposed section 243ZH (item 36)**.

### Surrender of prescribed prohibited imports

**Proposed Subdivision GB** of Division 1 of Part XII of the Customs Act inserts a new regime that will allow for the surrender of certain prohibited imports to Customs in specified circumstances. **Proposed section 209N** sets out the circumstances when the prescribed prohibited imports would be able to be surrendered to a Customs officer. **Proposed 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:

- (a) the officer has reasonable grounds to believe that the goods:
  - (i) have been imported by the person, and
  - (ii) have not been concealed from Customs by the person, and
  - (iii) are accompanied personal or household effects of the person, and

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- (b) 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
- (c) the person has indicated to Customs, in writing, that he or she intends to surrender the goods, and
- (d) the officer has indicated to the person that the goods may be surrendered to the officer.

The surrender of goods may only take place at airports or ports in a place that is set aside for the questioning of passengers and the examination of their baggage.<sup>11</sup> It therefore does not apply to goods which arrive by post or in containers. According to the Explanatory Memorandum, it is proposed that the permission to surrender prescribed imported goods will be granted 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 permit the goods to be surrendered’.<sup>12</sup>

It is also at the discretion of the Customs officer to give the person the option of seeking a post-importation permission in respect of the goods.<sup>13</sup> The ACS has said that it will be developing guidelines for the exercise of discretion by Customs officers in order to provide for consistent application of the new regime.

**Proposed section 209P** sets out the effects of the surrender on the goods – a person will not be able to be prosecuted for the offence of importing a prohibited import but they will also lose all title to the surrendered goods if they are indeed prescribed prohibited imports. The person will not be able to make a claim for the return of the goods. However, if in fact the surrendered goods were not prohibited goods but have been disposed of or destroyed by the Commonwealth, proposed subsections allows the owner of the goods to seek compensation from a court. **Proposed subsection 209Q(3)** provides that if a right to compensation exists, 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. According to the Explanatory Memorandum, these provisions are similar to

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- 11. The regime will only apply in a section 234AA area. There are the places at airports and ports that are set aside for the questioning of passengers and the examination of their personal baggage: Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 7.
  - 12. Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 7.
  - 13. **Proposed section 209U**, Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 12.

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other compensation arrangements in the Customs Act in relation to seized goods that have been disposed of or destroyed.<sup>14</sup>

### Post-Importation Permission

**Proposed Subdivision GC** of Division 1 of Part XII of the Customs Act will insert a new regime that will allow for the granting or giving of post-importation permissions, licences or other documents in respect of certain goods whose importation is prohibited in specified circumstances under the regulations. Under the new arrangements, the owner of certain prohibited imports (yet to be defined in regulations) may apply for the required permission to import the goods after the goods have been imported. **Proposed section 209U** sets out the circumstances in which an officer of Customs may allow a person to apply for a required permission in lieu of seizing the goods. This decision will be entirely at the discretion of the Customs officer. The goods will remain in the custody of the Customs officer at all times until the required permission is granted or given (**proposed section 209V**). A detention notice is required to be served for all goods detained under section 209U (**proposed section 209W**). If the required permission is not subsequently granted or given within the specified period, then the goods are taken to be seized and the normal seizure process will follow.

### Infringement notice scheme

**Item 36** inserts **proposed Subdivision B** of Division 5 of Part XIII. (Part XIII includes the penal provisions of the Customs Act and Division 5 deals with penalties in lieu of prosecution for certain offences.) **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.

### Schedule 2 - Search powers on certain ships and aircraft

**Items 1 and 2** make amendments to the definition of 'frisk search' by repealing the existing definition in section 4 of the Act and replacing it with the definition in existing subsection 183UA(1). Subsection 183UA (1) is repealed and the new definition in section 4 will apply to the whole of the Act. A frisk search will be a search of a person conducted by quickly running the hands over the person's outer garments, and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person (being searched). This definition is the same definition found in the *Crimes Act 1914*.

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14. Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 9.

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Existing section 185 of the Act sets out officers' powers to board and search a ship or aircraft in the circumstances set out in the provision and allows officers to do such things as secure goods, require person to answer questions and produce documents, make copies of documents, and make an arrest, without warrant, of any person on the ship or an aircraft if there is a reasonable suspicion that an offence has been committed or may be committed by that person. **Item 3** inserts **new paragraphs 185(2)(cb)** and expands the powers by providing that officers may take possession of any goods found, and documents produced, and retain such goods or documents. **New subsection 185(7)** inserted by **item 6** sets out the circumstances when the goods or documents found or produced under **new subsections 185(2)(cb)** 'may afford evidence of the commission of a relevant offence'.

**Item 8** repeals existing subsections 185AA(1),(2), and (3) and inserts **new subsections 185AA(1)-(3C)**. The key amendment is that the existing requirement that the ship or aircraft firstly has to be detained before the search powers can be exercised has been removed (in conjunction with the amendments in **items 13 and 14**, below).

The amendments also change the circumstances under which the powers may be exercised. **New subsections 185AA(3), (3A), (3B) and (3C)** empower officers (and in some cases non-officers) to examine things or documents found, and to take possession of and retain weapons, documents or things that are found.

**Item 9** repeals and substitutes a new version of **subsection 184AA(6)** to extend the existing immunity from civil or criminal suit for a person who exercises powers at the request of an officer under section 185AA, to now also include an officer who conducts a search under the section, if the person or officer act in good faith and does not breach existing subsection 185AA(7) (use of force and maintaining a person's dignity).

**Item 10** inserts a new provision, **subsection 185AA(7A)** to make clear that evidence obtained under section 185AA can be used for the investigation and/or prosecution of a Commonwealth, State or territory offence. However, any possible use of such evidence would still be subject to any State law regarding evidence in proceedings for an offence against the law of the relevant State.

**Item 11** extends the definition of 'officer' in **new subsection 185AA(8)** to reflect that the new search powers apply in respect of vessels and/or aircraft boarded under either section 185 or section 185A, rather than just under existing section 185.

**Item 12** extends the meaning of a 'person found on a ship or aircraft' to include a person suspected on reasonable grounds to have landed from or left the ship or aircraft. As section 185AA relates only to searches of people it does not need to also include 'goods' as in the similar provisions in section 185(6) and on which this clause is based.

**Item 13** inserts a new section 185AAA which sets out the circumstances in which Customs can retain, or be required to return, a relevant item where possession of the item has been taken under new paragraph 185(2)(cb) or new subsection 185AA(3C). Such a

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circumstance might be where Customs no longer has a reason to retain the item (if it is not to be used in evidence), or a 60 day period has lapsed since Customs took possession of the item.

**Items 14 and 15** repeal subsections 219L(1B) and (1C). These provisions currently require the detention of a person before a frisk search can be undertaken in the circumstances of a ship or aircraft being boarded under the powers contained in section 185. The current provisions allow an officer to search for, take possession of and retain items on a person, or in that person's immediate control. Items 8 to 12 amend section 185AA to expand the scope of the personal search powers and the circumstances under which these powers may be exercised. The new provisions **subsections 185AA(1) and (1A)** allow for a wider search than a frisk search (removal of garments for example) and also cover the same circumstances of the subsection to be repealed and therefore make the subsections obsolete. The effect of the amendments will be that section 219L will only provide for the frisk search of a person who has been detained. The amendment in **item 17 new subsection 219M(1A)** puts back the requirements that if a person is detained, an officer of customs may carry out a frisk search 'to determine whether the person is unlawfully carrying prohibited goods' and to recover any goods found which are to be removed from the definition of 'frisk search' in **items 1 and 2**.

The Explanatory Memorandum also points out that section 219L and 219M do not have an explicit power to conduct a frisk search, so one of the purposes of **new subsection 219M(1A)** is to provide for an express power for a Customs officer to conduct such a search. This raises the issue whether convictions to date based on these provisions and evidence obtained there under could be in doubt.

**Item 16** inserts **new subsection 219M(1A)** to provide an explicit power to conduct a frisk search under section 219M. The rationale for this amendment is set out in the Explanatory Memorandum:

Existing section 219M sets out the manner in which a frisk search of a person detained under section 219L is to be conducted. However, although the power to conduct such a search is implied on the reading of section 219L and 219M, there is no explicit power in either section to conduct a frisk search. Item 16 inserts new subsection 219M(1A). New subsection 219M(1A) provides an express power for a Customs officer to conduct a frisk search on a person detained under section 219L for [the] purpose of determining if the person is unlawfully carrying prohibited goods.<sup>15</sup>

Currently, the apparent purpose of a section 219M frisk search is to search for weapons or anything that could be used to inflict bodily injury: paragraph 219M(4)(a). However, this

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15. Explanatory Memorandum, Customs Amendment (Strengthening Border Controls) Bill 2008, p. 36.

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paragraph is being repealed by **item 17**. **Item 16** inserts a new purpose which, as mentioned above, focuses on prohibited goods.

## **Acknowledgements**

The author wishes to acknowledge the assistance of Ms Diane Spooner, who wrote the Digest for an earlier version of this Bill.

The author remains responsible for any errors and omissions.

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