



Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008

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Law and Bills Digest Section

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Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Home Affairs

Commencement: The formal provisions and Schedules 1, 2 and 15 commence on Royal Assent; Schedules 3 and 5–11, item 1 of Schedule 12, and Schedules 13–14 and 16–17 commence 28 days after Royal Assent; item 2 of Schedule 12 commences immediately after the commencement of Schedules 5–11; and Schedule 4 commences on a single day to be fixed by Proclamation or 6 months after the day after Royal Assent (whichever occurs first).

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 Bill amends the *Customs Act 1901* (the Customs Act, or the Act) to enhance Australia's border protection measures.¹ Particularly, the Bill strengthens the law enforcement and regulatory powers of the Australian Customs Service (Customs), both by introducing new powers in relation to offshore maritime and sea port environments, and by ensuring that existing powers are consistent with other Commonwealth legislation, such as the *Crimes Act 1914* (the Crimes Act).

Background

The Bill contains 17 Schedules of amendments to the Customs Act, which are said to have been developed in consultation with Commonwealth agencies and industry.² Those amendments are not arranged in any logical, or sequential way, but by piecemeal revision

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1. For a copy of the Customs Act, see http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/, accessed on 21 January 2009.
 2. The Hon Bob Debus, Minister for Home Affairs, 'Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008', Second reading speech, *Debates*, House of Representatives, 3 December 2008, p. 12307, <http://www.aph.gov.au/hansard/reprs/dailys/dr031208.pdf>, accessed on 26 January 2009.

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of the existing law. For example, a number of amendments deal with Part XII of the Act, which sets out the powers of Customs officers. However, those amendments do not appear together in the same Schedule, nor do they appear in the Bill in the same order as the provisions to be amended appear in the Act. Further, it cannot be said that the amendments appear in the Bill in some order of importance.

It is therefore of little value to outline the proposed amendments (or even themes) at this point—they are better explained in the Main Provisions section of this Digest in the order in which they appear in the Bill. It is sufficient to foreshadow the fact that many of the amendments deal with patrol and boarding powers, search and seizure powers, and powers of arrest. Some of the amendments bear closer scrutiny, particularly the provisions dealing with warrants in **Schedules 11 and 17**. Other amendments align the powers in the Customs Act with those in other Commonwealth legislation (particularly the Crimes Act) and with Australia's obligations under the United Nations Convention on the Law of the Sea (UNCLOS).

It may assist at this point to provide some detail about UNCLOS and the meaning of the term '*exclusive economic zone*'. Both of these terms are used in the Bill and/or the Customs Act.

The United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS entered into force on 16 November 1994.³ As stated in the preamble to the Convention, the parties to UNCLOS believed:

that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter⁴

As stated on the website of the Department of Agriculture, Fisheries and Forestry (DAFF):

UNCLOS attempts to regulate all aspects of the resources of the sea and uses of the ocean – it covers everything from navigational rights to the conservation and management of living marine resources. One of the most revolutionary features of UNCLOS is the EEZ, which recognises the right of coastal states to jurisdiction over

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3. For the text of the convention, see http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm, accessed on 21 January 2009.
 4. *ibid.*, Preamble.

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all resources in the waters, ocean floor and subsoil of an area extending 200nm from its shore. Australia declared its 200nm EEZ in accordance with UNCLOS in 1979.⁵

Australia's Exclusive Economic Zone (the EEZ)

The term '*exclusive economic zone*', in relation to Australia, is formally defined in subsection 4(1) of the Customs Act to have the same meaning as in the *Seas and Submerged Lands Act 1973*. There, it is defined in subsection 3(1) as having the same meaning as in Articles 55 and 57 of UNCLOS, which provide:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

...

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁶

Committee consideration

At the time of writing, the Bill has not been referred to any committee.⁷

Financial implications

According to the Explanatory Memorandum, the Bill 'has no financial impact'.⁸

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5. DAFF, 'United Nations Convention on the Law of the Sea', in the section 'Legal and arrangements' on the Fisheries homepage, <http://www.daff.gov.au/fisheries/legal-arrangements/un-convention>, accessed on 26 January 2009.
 6. See the Schedule to the *Seas and Submerged Lands Act 1973* at http://www.austlii.edu.au/au/legis/cth/consol_act/sasla1973207/sch1.html, accessed on 22 January 2009.
 7. Selection of Bills Committee, Report No. 17 of 2008, 4 December 2008, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2008/rep1708.pdf, accessed on 29 January 2009.
 8. Explanatory Memorandum, Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008, p. 3.

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Main provisions

Schedule 1—Arrival report and report of stores and prohibited goods

Items 1 and 2 of Schedule 1 amend existing subparagraphs 64AA(3)(a)(i) and 64AAA(3)(a)(i) of the Customs Act by replacing the reference to ‘Sunday or holiday’ with a reference to ‘Saturday, Sunday or holiday’. Subsection 64AA(3) imposes a requirement for an operator of a ship that has travelled to Australia from a place outside Australia to make a report (known as an ‘arrival report’) to Customs within 24 hours of arrival. In calculating the 24 hour period, any time on a ‘Sunday or holiday’ is not counted. The amendment in **item 1** will extend this exception to include Saturdays. Similarly, subsection 64AAA(3) imposes a requirement for the operator of a ship that has arrived in Australia from a place outside Australia to provide particulars of the ship’s stores and ‘of any prohibited goods contained in those stores at the time of arrival’. The report must be made to Customs within 24 hours of arrival, with any time that occurs on a Sunday or holiday not to be counted. The amendment in **item 2** will extend this exception to include Saturdays.

The effect of these amendments is that where a ship arrives in Australia on a Friday evening, or during a weekend, the report can be made on the next business day.

The amendments in **Schedule 1** will apply to arrivals at Australian ports that occur less than 24 hours before, at or after, the day when the Bill receives Royal Assent.

Schedule 2—Infringement notices

Item 1 of Schedule 2 inserts **proposed paragraph 243Z(1)(fa)** into the Customs Act. Section 243Z of the Customs Act sets out the matters to be included in an infringement notice. It appears in Division 5 of Part XII of the Act. That division deals with penalties in lieu of prosecution for certain, minor offences. **Proposed paragraph 243Z(1)(fa)** states that if the person who is served with an infringement notice pays to the CEO of Customs within the specified time the penalty and, in the case of an alleged offence against section 243T, any unpaid duty or any unpaid refund or drawback of duty, the person cannot be prosecuted for the alleged offence and will not be regarded as having been convicted of the offence.⁹

According to the Explanatory Memorandum, this amendment takes up a recommendation by the Senate’s Standing Committee on Regulations and Ordinances (the Committee) following a review of the Infringement Notice Guidelines (2006) (the IN Guidelines)

9. Section 243T contains a strict liability offence that is committed if a person gives a false or misleading statement in relation to particular goods that results in a reduction of duty that would otherwise be assessed as payable on the goods if the person had given true information about the goods.

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issued by the CEO of Customs under section 43XA of the Customs Act.¹⁰ Clause 4.2 of the IN Guidelines sets out the matters which may be included in an infringement notice:

4.2 What else can be included?

An infringement notice may contain any other matters that the CEO considers necessary. Relevant matters that might be considered necessary by a decision-maker include:

- The manner in which payment of the penalty can be made.
- The address or location where payment of the penalty can be made.
- A telephone number or contact address to obtain further information about the alleged offence or how to make representations seeking withdrawal of the notice or request extra time for payment of the penalty.
- A statement that if the penalty is paid within 28 days of the service of the notice that the person can not be prosecuted for the alleged offence and will not be regarded as having been convicted of the offence.
- Reasons for issuing the notice.

The Committee apparently recommended that the statement mentioned in the fourth dot-point should in fact be a mandatory matter to include in the infringement notice.¹¹

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10. Explanatory Memorandum, p. 8, paragraphs 26 and 27. An extensive search of the Parlinfo database did not produce any public record of the recommendation. The IN Guidelines are available at <http://www.customs.gov.au/webdata/resources/files/InfrinNoticeGuidelinesDiv5.pdf>, accessed on 20 January 2009. The Guidelines are 'a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*': subsection 243XA(2). Section 46A of the *Acts Interpretation Act 1901* was in fact repealed by the *Legislative Instruments Act 2003*. However, by virtue of subsection 4(2) of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*, the Guidelines are taken to be 'an instrument referred to in subparagraph 6(d)(i) of the *Legislative Instruments Act 2003*'. For completeness, subparagraph 6(d)(i) states that, subject to several exceptions, '(d) an instrument made in the exercise of a power delegated by the Parliament before the commencing day and, in accordance with a provision of the enabling legislation [that is] ... (i) declared to be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901* as in force at any time before the commencing day' is a '*legislative instrument*'. Thus the IN Guidelines are a legislative instrument that can be the subject of review by the Committee.
11. Explanatory Memorandum, p. 8, paragraph 26.

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Schedule 3—Cargo reports

Item 1 of Schedule 3 to the Bill inserts **proposed subsection 64AB(14A)**, which sets out the circumstances when a ‘*cargo reporter*’ is not liable to be prosecuted for, and cannot be served with an infringement notice under Division 5 of Part XII of the Customs Act for an offence against existing section 64AB.¹²

Section 64AB deals with cargo reports. It provides that where a ship or aircraft is due to arrive in its first port of call in Australia from a place outside Australia, each cargo reporter must report to Customs certain particulars of all goods that have been carried in the journey or flight and are to be unloaded in Australia (except ‘accompanied personal or household effects of a passenger or member of the crew’ and ship’s stores or aircraft’s stores): subsection 64AB(2).

The amendment provides that a cargo reporter is not liable for prosecution if the reporter made a cargo report but failed to do so within the time stipulated in subsection 64AB(8). The time varies depending on whether the cargo is carried on a ship or aircraft, and the type of journey involved. If the cargo is carried on a ship, the cargo report must be made not later than the start of the ‘prescribed period’ (unless the journey is of a particular kind, in which case, a shorter period prescribed in the regulations applies) ‘before the estimated time of arrival’ of the ship or aircraft at the first port in Australia since it last departed from a port outside Australia. If the cargo is carried on an aircraft, the time limit for making the report is two hours, or such other time prescribed by the regulations (unless the journey is of a particular kind, in which case a shorter period prescribed by the regulations applies).¹³

Proposed subsection 64AB(14A) applies only if the reason that the report was not made within the required time frame is that the *actual time of arrival* of the ship or aircraft at the first port or airport in Australia is later than the *estimated time of arrival*: **proposed paragraphs 64AB(14A)(b) and (c)**.

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12. The term ‘*cargo reporter*’ is defined in subsection 4(1) of the Customs Act as the operator or charterer of a ship or aircraft; a slot charterer in respect of the ship; or a freight forwarder in respect of the ship or aircraft.
 13. Regulation 28 of the Customs Regulations 1926 states: ‘For subparagraph 64AB (8) (a) (i) of the Act [which sets out the reporting time for ships], the prescribed period is 48 hours.’ Regulation 29 sets out a different time period for certain kinds of journeys: ‘For subparagraph 64AB (8) (a) (ii) of the Act, the following periods are specified: (a) for a journey that is likely to take 24 hours or more but less than 48 hours -- 24 hours; (b) for a journey that is likely to take less than 24 hours -- 12 hours.’ For the text of the Customs Regulations 1926, see http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1926233/, accessed on 21 January 2009.

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Schedule 4—Missing goods and goods delivered without authority

Item 1 of Schedule 4 to the Bill amends existing paragraphs 35A(1)(b), (1A)(c) and (1B)(b) of the Customs Act. Section 35A provides that certain persons must keep dutiable goods, which are subject to the control of Customs, safely. Such a person must account for the goods to a Collector of Customs when requested to do so. Specifically, subsections 35A(1), (1A) and (1B) state:

(1) Where a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to the control of the Customs:

(a) fails to keep those goods safely; or

(b) when so requested by a Collector, does not account for those goods to the satisfaction of a Collector;

that person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on those goods if they had been entered for home consumption on the day on which the demand was made.

(1A) Where:

(a) dutiable goods subject to the control of the Customs are, in accordance with authority to deal or by authority of a permission given under section 71E, taken from a place for removal to another place;

(b) the goods are not, or part of the goods is not, delivered to that other place; and

(c) when so requested by a Collector, the person who made the entry or to whom the permission was given, as the case may be, does not account for the goods, or for that part of the goods, as the case may be, to the satisfaction of a Collector;

the person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on the goods, or on that part of the goods, as the case may be, if they had been entered for home consumption on the day on which the demand was made.

(1B) Where:

(a) dutiable goods subject to the control of the Customs are, by authority of a permission given under section 71E, removed to a place other than a warehouse; and

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(b) the person to whom the permission was given fails to keep those goods safely or, when so requested by a Collector, does not account for the goods to the satisfaction of a Collector;

the person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on those goods if they had been entered for home consumption on the day on which the demand was made.

The purpose of **item 1** is to require the person, where required to account for the goods to the satisfaction of a Collector of Customs, to do so ‘in accordance with [proposed] section 37’. **Proposed section 37** is inserted by **item 2** of **Schedule 1** to the Bill (see below).

Strict liability?

Item 2 of **Schedule 4** inserts **proposed sections 36 and 37** into the Customs Act.

Proposed section 36 contains new offences of failing to keep goods safely and/or failing to account for goods. It falls within Part III of the Act, which deals with customs control examination and securities generally. There are two separate offences for failure to keep goods safely in **proposed subsections 36(1) and (2)**—both offences are worded identically, but the first offence has a penalty of 500 penalty units, and the second offence has a penalty of 60 penalty units.¹⁴ Apart from the penalty for the two offences, the difference between the two offences is that an offence against subsection 36(2) is stated to be an offence of ‘strict liability’: **proposed subsection 36(3)**. This means that the prosecution does not need to prove any element of fault on the part of the accused person—but the accused can raise a defence of honest and reasonable mistake of fact.¹⁵

In imposing a strict liability offence, the Explanatory Memorandum states that consideration was given to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.¹⁶ Consideration was also given to the Sixth Report of 2002 of the Senate Standing Committee for the Scrutiny of Bills, entitled *Application of Absolute*

14. The term ‘*penalty unit*’ is defined in subsection 4AA(1) of the Crimes Act as \$110 (unless a contrary intention is expressed in an Act). Thus 500 penalty units is \$55 000, and 60 penalty units is \$6 600.

15. See sections 6.1 and 9.2 of the Criminal Code.

16. Attorney-General’s Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers, accessed on 21 January 2009. Note that this version is expressed to be an ‘Interim New Edition’ only, as at December 2007.

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and *Strict Liability Offences in Commonwealth Legislation* (the Senate Committee report).¹⁷

The Explanatory Memorandum also states:

It is considered that imposing strict liability to the new offence contained in subsection 36(2) will ensure the integrity of the regulatory regime which exists so that goods which are being imported or exported from Australia are available to be inspected or examined and dealt with in accordance with the Customs Act and other legislation.¹⁸

Presumably, the fact it should be easier for Customs to prove a strict liability offence than an offence involving a fault element, is intended to ensure persons responsible for keeping goods safely or accounting for goods cannot legally evade such responsibilities through actions that are merely careless or negligent.

Proposed subsections 36(4) and (6) also contain identically-worded offences of failing, when requested by a Collector of Customs, to account for goods in accordance with (proposed) section 37.¹⁹ The offence in **proposed subsection 36(4)** carries a penalty of 500 penalty units, whereas the offence in **proposed subsection 36(6)** carries an offence of 60 penalty units and is stated to be a 'strict liability' offence: see **proposed subsection 36(8)**.

Similarly, **proposed subsections 36(5) and (7)** also contain identically-worded offences of failing, when requested by a Collector of Customs, to account for goods in accordance with (proposed) section 37, where the person has authority to deal with the goods, or is given permission under section 71E in relation to the goods, and the goods are taken, in accordance with the authority to deal or the permission under section 71E from a place for removal to another place.²⁰ The offence in **proposed subsection 36(5)** carries a penalty of 500 penalty units, whereas the offence in **proposed subsection 36(7)** carries a penalty of 60 penalty units and is stated to be a strict liability offence.

17. Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Sixth Report of 2002, 26 June 2002, <http://www.aph.gov.au/senate/committee/scrutiny/bills/2002/b06.pdf>, accessed on 21 January 2009.

18. Explanatory Memorandum, p. 12, paragraph 48.

19. See below for a discussion of **proposed section 37**.

20. Subsection 71E(1) provides: 'Where particular goods, or goods of a particular kind, are, or after their importation will be, subject to Customs control, application may be made to Customs, by document or electronically, in accordance with this section, for permission to move those goods, or goods of that kind, or to move them after their importation, to a place specified in the application.'

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Proposed subsection 36(9) states that if goods are removed ‘to a place other than a warehouse by authority of a permission given to a person under section 71E’, the person is taken to have, or to have been entrusted with the possession, custody or control of the goods for the purposes of the offences in proposed subsections 36(1), (2), (4) and (6).

How does a person account for goods?

Proposed section 37 sets out the test for how a person accounts for goods (or a part of goods) to the satisfaction of a Collector of Customs:

- the Collector must sight the goods, or
- (if the Collector is unable to sight the goods), the person must satisfy the Collector that the goods have been dealt with in accordance with the Customs Act.

Item 3 of Schedule 4 inserts reference to **proposed subsections 36(2), (6) and (7)** in existing subsection 243X(1) as a consequence of the insertion of those provisions into the Customs Act. As mentioned above, section 243X states that Division 5 of Part XIII (which Division deals with penalties in lieu of prosecution for certain offences) applies to certain offences under the Act. As a result of the amendment, Division 5 will also apply to offences under **proposed subsections 36(2), (6) and (7)**.

Schedule 5—Boarding powers and the United Nations Convention on the Law of the Sea

The amendments in **Schedule 5** align the boarding powers of the Customs Service with other powers in Commonwealth legislation and UNCLOS.

Items 1–49 amend section 184A of the Customs Act, which currently contains a general power *to request to board a ship*. That power is being replaced with a general power *to board a ship*, thus giving an ‘officer’ the right to board a ship.²¹

Given the large number of minor amendments to section 184A contained in the Bill, it is not clear why the existing provision was not repealed in its entirety and a whole new section substituted in its place. Many of the amendments do no more than simplify the language used in existing provisions and/or remove the language of ‘request’ from the existing provisions. Some, however, are more substantive, and (for example) align the Customs Act with requirements under UNCLOS. For example, existing subsections

21. The term ‘officer’ is defined in subsection 185(5) of the Customs Act (as amended by **item 61 of Schedule 5**) to include any person who is in command, or a member of the crew, of certain Commonwealth ships or Commonwealth aircraft referred to in (amended) section 184A or an aircraft to which existing section 184D refers; and a police officer or a member of the Australian Defence Force. Section 184D allows the commander of a Commonwealth aircraft to make requests of the pilot of another aircraft to identify its crew, flight path and flight plan, and to request it to land for the purposes of boarding.

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184A(5) and (7) prevent the commander of a Commonwealth ship or aircraft from making a request to board a ‘mother ship’ that is supporting a contravention of the Customs Act (or a prescribed Act) in Australia or the EEZ, if the ship is within 500 metres of an Australian resources installation or Australian sea installation.²² UNCLOS contains no such restriction on ‘mother ships’, and thus **items 18 and 28** remove the reference to the ship being ‘not within 500 metres of an Australian resources installation or Australian sea installation’ to align Australian law with the international convention.

Item 46 amends the definition of ‘commander’ in subsection 184A(14) to include a warrant officer and non-commissioned officer of the Australian Defence Force. Note there is a typographical error in **proposed paragraph 184A(14)(d)**: ‘Australia’ [Defence Force] should read ‘Australian’ [Defence Force]. An example of the practical effect of amending the definition of ‘commander’ is that a non-commissioned officer who is in charge of a small, inflatable boat that has been dispatched from a larger Commonwealth ship or aircraft (that is commanded by a more senior, commissioned officer) can exercise the powers in section 184A (boarding a ship).²³

Items 50–51 amend section 184B of the Customs Act, largely as a consequence of the proposed amendments to section 184A contained in **items 1–49** of **Schedule 5**. Section 184B contains the power to chase foreign ships for boarding. The amendments remove the distinction contained in existing section 184B as to the action that may be taken if a request to board is made or not made. The amendments in **items 1–49** of **Schedule 5** to the Bill make that distinction unnecessary. While not technically part of the Act, the subheading to existing subsection 184B(3), being ‘When foreign ships may be chased without a request being made’, should also be repealed.

Items 52–61 amend existing section 185 of the Customs Act, which contains the power to board and search ships and aircraft. **Items 52–54 and 61** make minor amendments as a consequence of the proposed revision of section 184A (that is, mainly the removal of references to the making of a *request* to board and replacing them with the fact that a ship may be boarded).

Items 55–57 and 59–60 replace references in section 185 to ‘Acts prescribed *consistently with UNCLOS*’ with references to ‘Acts prescribed *for the purposes of this Subdivision*’ (being Subdivision B of Part XII of the Customs Act, which contains general regulatory powers of officers). In a way these amendments may seem a little odd, given that one of the main purposes of the Bill is to align Australian law with UNCLOS, but it should be easier to identify if Acts are prescribed for the purposes of Subdivision B than to identify if they are prescribed consistently with UNCLOS.

22. The term ‘mother ship’ is not actually used in section 184A of the Customs Act—it is only used in two sub-headings in the section. The term is not used elsewhere in the Act, and is not defined in section 4.

23. See, for example, Explanatory Memorandum, p. 24.

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Items 62–64 amend section 185A, which deals with boarding of certain ships on the high seas. Again, the amendments are a consequence of the proposed revision of section 184A. Particularly the amendments:

- make consequential amendments to subsection 185A(1), setting out the ships to which the section applies
- insert **proposed subsection 185(2A)**, which provides that:
 - if requested to do so by the master of the ship, the most senior officer of Customs who boards a ship must produce written evidence of the fact he or she is an ‘officer’, and
 - if no such evidence is produced, no ‘officer’ may remain on board the ship, and
- amend the definition of ‘officer’ in subsection 185A(7) to make it clear that police officers and members of the Australian Defence Force may exercise the powers of ‘officers’ in section 185A.

Items 65–66 amend section 228 of the Customs Act, which deals with types of ships and aircraft which can be forfeited to the Crown. The amendment in **item 65** seems intended to correct any confusion which may arise because of the subsection/paragraph numbering system used in the section. The amendment in **item 66** arises as a consequence of the proposed revision of section 184A.

Item 67 amends section 270 of the Customs Act, which is the regulation-making power in the Act, to include the stipulation that regulations made for the purposes of Subdivision B of Division 1 of Part XII (which, as mentioned above, contains general regulatory powers of officers) must not prescribe an Act, ‘unless the Act deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction’. Under section 184A (as it will appear if the proposed amendments elsewhere in **Schedule 5** to the Bill occur), an officer may board a ship if ‘the boarding would be for the purposes of this Act or an Act prescribed by the regulations for the purposes of this Subdivision’—noting that the existing provision is not all that different (except for the present need to make a request to board the ship, and with the current section referring to Acts prescribed ‘consistently with UNCLOS’).

Regulation 167 of the Customs Regulations 1926 currently prescribes a number of Acts for the purposes of Subdivision B of Division 1 of Part XII (particularly, sections 184A, 185, 185B and 186A): *Fisheries Management Act 1991, Migration Act 1958, Quarantine Act 1908, Torres Strait Fisheries Act 1984, Aviation Transport Security Act 2004, Family Law Act 1975, Crimes Act 1914, Crimes (Aviation) Act 1991, Crimes (Internationally Protected Persons) Act 1976, Criminal Code Act 1995, Proceeds of Crime Act 1987, Financial Transaction Reports Act 1988, Crimes (Hostages) Act 1989, Crimes (Ships and Fixed Platforms) Act 1992, Geneva Conventions Act 1957, Crimes (Torture) Act 1988, and*

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Bankruptcy Act 1966.²⁴ Not all of these Acts are prescribed for all of the purposes in Subdivision B. For example, while an officer may board a ship in the situations described in subsections 184A(2), (4) and (5) of the Customs Act for the purposes of the *Fisheries Management Act 1991*, *Migration Act 1958*, *Quarantine Act 1908*, *Torres Strait Fisheries Act 1984* (in addition to the purposes of the Customs Act itself), the officer may only board a ship in the situations described in subsections 184A(6) and (7) of the Customs Act for the purposes of the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*.

Schedule 6—Impending arrival reports for pleasure craft

Item 1 of Schedule 6 inserts a definition of the term ‘*pleasure craft*’ into section 4 of the Customs Act, which is the interpretation provision for the Act. The term is defined as a ship that, from the time it arrives at a port in Australia until the time it leaves Australia, is used (or intended to be used) wholly for recreational and/or sporting activities; is not used (or intended to be used) for any commercial activity; and is not offered (or intended to be offered) for sale or disposal.

Items 2–4 amend section 64 of the Customs Act, which deals with impending arrival reports. Currently, subsection 64(5) provides:

- (5) A report of the impending arrival of a ship must be made:
 - (a) not earlier than 10 days before the time stated in the report to be the estimated time of arrival of the ship; and
 - (b) not later than:
 - (i) the start of the prescribed period before its estimated time of arrival; or
 - (ii) if the journey is of a kind described in regulations made for the purposes of this subparagraph--the start of the shorter period specified in those regulations before its estimated time of arrival.

The amendments exempt a ‘pleasure craft’ from the operation of subsection 64(5), but impose the specific requirements in **proposed subsection 64(5A)** on such a craft instead. A report of the impending arrival of a pleasure craft will have to be made not earlier than the prescribed number of days before the craft’s estimated time of arrival, but not later than the start of the prescribed period before its estimated time of arrival. The Explanatory Memorandum suggests that the amendment is necessary to address difficulties experienced by some yacht masters (that is, not operators of commercial vessels) who were unable to comply with existing subsection 64(5) due to lack of

24. For the text of regulation 167, see http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1926233/s167.html, accessed on 22 January 2009.

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facilities.²⁵ It also suggests that if a longer, say 3-month, period were to be prescribed (in place of the 10 day requirement that exists at present), the master of a yacht could report the impending arrival of the pleasure craft before setting out on a 6-week journey from a foreign country to Australia.²⁶

It is not clear why the proposed amendment in **item 4** refers only to **proposed paragraph 64(5A)(b)**, given that **proposed paragraph 64(5A)(a)** also refers to a ‘prescribed number of days’—its inclusion seems to be important, given that the difference between existing subsection 64(5) and **proposed subsection 64(5A)** is the fact that instead of a pleasure craft complying with the requirement in existing subsection 64(5)(a) that the report must be made ‘not earlier than 10 days before the time stated in the report to be the estimated time of arrival of the ship’, the operator of a pleasure craft will have to make an impending arrival report ‘not earlier than the prescribed number of days before the time stated in the report to be the estimated time of arrival of the pleasure craft’.

Item 5 deals with the application of the amendments made by **Schedule 6**. The amendments will apply to pleasure craft if the start of the prescribed period referred to in **proposed subparagraphs 64(5A)(b)(i) or (ii)** (whichever applies to the journey in question) is on or after 28 days after the proposed Act receives Royal Assent. As the Explanatory Memorandum notes, if the amendments commence on a Monday, and the prescribed period is 48 hours, then the amendments apply to any pleasure craft which has an estimated time of arrival on Wednesday. However, in any event, the Customs Regulations 1926 will need to be amended before the commencement of the amendments in Schedule 6 in order that **proposed subsection 64(5A)** may operate.²⁷

Schedule 7—Use of devices to stop or impede a ship

Item 1 amends subsection 184B(6) to permit the Commander of a Commonwealth ship or aircraft (that is chasing a *foreign* ship for the purpose of boarding the ship) to use a device designed to stop or impede the ship where necessary. Currently, subsection 186B(6) provides:

(6) Anywhere outside the territorial sea of a foreign country, the commander of a Commonwealth ship or Commonwealth aircraft chasing a ship under this section

25. Explanatory Memorandum, p. 26.

26. *ibid.*, pp. 26–27.

27. Currently, regulations 26 and 27 prescribe the periods applicable to impending arrival reports. In the case of a normal journey (ie not one of a kind that is specified in the regulations), regulation 26 provides that for the purposes of subparagraph 64(5)(b)(i) of the Act, the prescribed period is 96 hours. Applying this information to the requirements in existing subsection 64(5), this means that an impending arrival report for a ship must be made not earlier than 10 days before the estimated time of arrival of the ship in Australia but not later than 96 hours before its estimated time of arrival.

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may use any reasonable means consistent with international law to enable boarding of the chased ship, including:

- (a) using necessary and reasonable force; and
- (b) where necessary and after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding.

According to the Explanatory Memorandum, an example of a device which the Commander could use under **proposed paragraph 184B(6)(c)** is a 'propeller entrapment device'.²⁸ The power of Customs officers to use such a device is consistent with the power of 'officers' (including Customs officers) under subsection 84(1) of the *Fisheries Management Act 1991*, which provides:

- (1) An officer may:
 - (aa) for the purposes of boarding a boat that is at a place where the officer may board it under paragraph (a) or (b):
 - (i) require the master to stop the boat at such a place to allow the officer to board it; and
 - (ii) if the master does not stop the boat as required and the boat is not an Australian-flagged boat, use any reasonable means consistent with international law to stop the boat (including firing at or into the boat after firing a warning shot, and using a device to prevent or impede use of the system for propelling the boat); and

Similarly, **item 2** inserts **proposed paragraph 184C(3)(c)** to permit the Commander of a Commonwealth ship or aircraft (that is chasing an *Australian* ship for the purpose of boarding the ship) to use a device designed to stop or impede the ship where necessary.

Schedule 8—Power to request aircraft to land

Item 1 of **Schedule 8** inserts **proposed paragraph 184D(3)(c)**. As mentioned earlier in a footnote, section 184D allows the commander of a Commonwealth aircraft to make requests of the pilot of another aircraft. Existing subsection 184D(3) provides:

- (3) The commander may request the pilot of the other aircraft to land it at the nearest airport, or at the nearest suitable landing field, in Australia for boarding for the purposes of [the Customs Act] if:
 - (a) the pilot does not comply with a request under subsection (2) [being a request to disclose to the commander the identity of the other aircraft; the identity of all persons on the other aircraft; the flight path of the other aircraft; and the flight plan of the other aircraft]; or

28. Explanatory Memorandum, p. 29, paragraph 133.

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- (b) the commander reasonably suspects that the other aircraft is or has been involved in a contravention, or attempted contravention, of this Act or section 72.13 or Division 307 of the Criminal Code .

Note: Section 185 gives power to board the aircraft and search it once it has landed.²⁹

The proposed amendment provides additional circumstances when the commander may request the pilot of the other aircraft to land, being when the commander reasonably suspects that the other aircraft is carrying goods that:

- are connected (directly or indirectly) with a terrorist act ('whether or not that act has occurred, is occurring or is likely to occur'), and/or
- 'the existence or the shipment of the goods prejudices, or is likely to prejudice, Australia's defence or security or international peace and security'.

Such circumstances would not fall within existing paragraph 184D(3)(b).

The term '*terrorist act*' is defined in subsection 183UA of the Customs Act as follows:

(1) ...

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (4) and does not fall within subsection (4A); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

It is immaterial whether the action or threat, or any part of the action or threat or anyone or anything affected by the action or threat is within or outside Australia.

...

- (4) For the purposes of the definition of terrorist act in subsection (1), action falls within this subsection if it:
 - (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (ba) causes a person's death; or

29. Section 72.13 of the Criminal Code contains an offence of importing or exporting unmarked plastic explosives etc, and Division 307 of the Criminal Code contains import-export offences.

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- (c) endangers a person's life, other than the life of the person taking the action; or
 - (d) creates a serious risk to the health or safety of the public or a section of the public; or
 - (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.
- (4A) For the purposes of the definition of terrorist act in subsection (1), action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.
- (5) In subsections (4) and (4A) :
- (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
 - (b) a reference to the public includes a reference to the public of a country other than Australia.

This definition is substantively identical to the definition of ‘*terrorist act*’ in section 100.1 of the Criminal Code.

Schedule 9—Seizing unaccounted for goods and storing or taking custody of prohibited items

Schedule 9 amends various provisions in existing Part XIIA of the Customs Act, including the heading, to make it clear that the Part deals with *prohibited items* (and not just ‘*prohibited weapons*’). Currently, the term ‘*prohibited weapon*’ is defined in section 227B as ‘a thing that is a firearm, firearm accessory, firearm part, firearm

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magazine or ammunition to which [Part XIIA] applies because of section 227D'. However, after the proposed revisions to Part XIIA contained in **Schedule 9**, a much broader range of goods than firearms will become '*prohibited items*'. Further, a Customs officer will be able to approve a place for the thing to be stored under existing section 227E, and take custody of the prohibited item under existing section 227F if no approval has been given.

Particularly, a thing will be a '*prohibited item*' if revised section 227D (contained in **item 7 of Schedule 9**) applies to it. That is, a thing will be a '*prohibited item*' if:

- the thing is on board a ship or aircraft that is in Australia after arriving in Australia from a place outside Australia,
- the importation of the thing is either prohibited absolutely by the Customs (Prohibited Imports) Regulations 1956, or is prohibited under those regulation unless a licence, permission, consent or other approval has been granted or given, and
- the thing is, or should have been, specified in a report of stores and prohibited goods given by the operator of the ship or aircraft under section 64AAA (unless the thing is part of the personal effects of the crew).

Schedule 10—Powers of arrest

The amendments in **Schedule 10**, particularly the revisions to Subdivision H, tidy up the language (and formatting) used in the existing provisions setting out the powers of arrest of Customs officers in Part XII of the Customs Act. They also align the powers of arrest in the Customs Act with the powers of arrest in the Crimes Act. For example **proposed section 210** of the Customs Act (contained in **item 2 of Schedule 10**) is almost the same as existing section 210, except that it now provides that:

- in addition to arresting a person for a suspected breach of smuggling or importation law, a Customs or police officer may arrest a person for a suspected breach of subsection 33(1) or (5), which deal with persons moving goods that are subject to the control of Customs,
- in addition to believing on reasonable grounds that the person has committed or is committing an offence, the officer must believe on reasonable grounds that 'proceedings by summons' against the person would not achieve one or more of six specified purposes (set out in **proposed subparagraphs 210(1)(b)(i) to (vi)**), and
- the arrested person must be released if the officer in charge of the investigation no longer believes on reasonable grounds that the person committed the offence or that holding the person in custody is necessary to achieve one of the purposes in **proposed paragraph 210(1)(b)**.

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The requirements in the second and third dot-points currently appear in section 3W of the Crimes Act (which sets out the power of arrest without warrant by constables) and section 3Z (which sets out the power of arrest without warrant by other persons).

Similarly **proposed sections 210A** (use of force in making arrest), **210B** (person to be informed of grounds of arrest), **211** (power to conduct a frisk search of an arrested person), **211A** (power to conduct an ordinary search of an arrested person), and **213** (requirement to provide name etc) reflect powers and requirements in the Crimes Act (namely, sections 3ZC, 3ZD, 3ZE, 3ZF and 3V). **Proposed section 212** (how arrested person is to be dealt with) does not have an exact counterpart in the Crimes Act, but is an amalgam of existing section 212 of the Customs Act (which requires that '[e]very person arrested may be detained until such time as he or she can without undue delay be taken before a Justice) and subsections 3Y(2) and 3Z(2) of the Crimes Act (which require that an arrested person must be delivered in to the custody of a magistrate or constable 'as soon as practicable' after the arrest).

With the exception of section 3V of the Crimes Act, the other relevant powers in the Crimes Act have not been amended since they were inserted by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*. It is therefore unnecessary to comment further on the powers contained in either the Crimes Act or Schedule 10 to the Bill.

Item 1 of Schedule 10 inserts a definition of the term '*seizable item*' into subsection 183UA. This term is used in **proposed sections 211 and 211A** (which contain the power to conduct a frisk search, or an ordinary search, of an arrested person), but is not currently defined in the Customs Act.³⁰

Item 4 of Schedule 10 provides that the amendments made by **Schedule 10** will apply to any person arrested before the commencement of the Schedule (28 days after the proposed Act receives Royal Assent). Despite this retrospective operation of **Schedule 10**, it is hard to see how the rights of someone arrested before the commencement of the Schedule will be adversely affected, particularly because subsection 3D(2) of the Crimes Act states:

To avoid any doubt, it is declared that even though another law of the Commonwealth [*such as the Customs Act*] provides power to do one or more of the things referred to in subsection (1) [*which mentions the search of premises; arrest and related matters; the stopping, detaining or searching of conveyances or persons; the seizure of things; and the requesting of information or documents from persons*], a similar power conferred by this Part may be used despite the existence of the power under the other law.

30. The term '*frisk search*' is already defined in section 4 of the Customs Act, and the term '*ordinary search*' is defined in section 183UA.

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In other words, the powers of arrest in the Crimes Act have long existed in parallel with those in the Customs Act. The specific powers which the Bill seeks to include in the Customs Act are already available to appropriate officers instead of, and in addition to, those in the Customs Act.

Schedule 11—Warrants

Item 1 of Schedule 11 amends paragraph (a) of the definition of the term ‘*copy of the warrant*’ in subsection 203G(5) of the Customs Act by removing the phrase ‘*and the seal of the relevant court*’. Section 203G sets out the details of the search or seizure warrant which must be given to an occupier when the warrant is being executed. Currently, paragraph (a) provides:

(a) in relation to a warrant issued under section 198, 203 or 203DA --a copy that includes the signature of the judicial officer who issued the warrant and the seal of the relevant court;

Apparently a number of courts (such as the State courts of Queensland) no longer use court seals.³¹ It is therefore impossible for that part of the requirements in existing paragraph (a) of the definition of ‘*copy of the warrant*’ to be met where the warrant is issued in Queensland.

By comparison, section 3H of the Crimes Act provides that the warrant ‘need not include the signature of the issuing officer or the seal of the relevant court’.³² It is not clear from the explanatory material why a warrant issued under the relevant provisions of the Customs Act must include a signature under the proposed revision, but it could be summarised that at least the signature of the judicial officer who issued the warrant provides greater (immediate) proof to the occupier that the warrant has indeed been issued by the relevant court than the situation under the Crimes Act.

Schedule 12—Commonwealth property in Customs places

Item 1 of Schedule 12 inserts a new offence of obstructing or interfering with Commonwealth property in a Customs place.

Section 29 of the Crimes Act contains an offence that is committed where a person intentionally destroys or damages Commonwealth property.³³ However, it does not apply

31. Explanatory Memorandum, p. 42, paragraph 195.

32. Like section 203G of the Customs Act, section 3H of the Crimes Act sets out the details of a search or seizure warrant that must be given to an occupier.

33. The text of section 29 is available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s29.html, accessed on 26 January 2009.

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where a person engages in behaviour that interferes with, but does not damage or destroy, that property. Thus the offence in **proposed section 33C** of the Customs Act will apply where a person intentionally obstructs, or interferes with, the operation Commonwealth property (such as CCTV cameras) located in a ‘*Customs place*’.

The term ‘*Customs place*’ is already defined in section 183UA of the Customs Act to mean:

- (aa) a place owned or occupied by Customs; or
- (a) a port, airport or wharf that is appointed, and the limits of which are fixed, under section 15; or
- (b) a place that is the subject of a permission under subsection 58(2); or
- (c) a boarding station that is appointed under section 15; or
- (d) a place described in a depot licence that is granted under section 77G; or
- (e) a place described in a licence for warehousing goods that is granted under subsection 79(1); or
- (f) a place that is approved, in writing, by the CEO as a place for the examination of international mail; or
- (g) a place from which a ship or aircraft that is the subject of a permission under section 175 is required to depart, between the grant of that permission and the departure of the ship or aircraft; or
- (h) a place to which a ship or aircraft that is the subject of a permission under section 175 is required to return, while that ship or aircraft remains at that place; or
- (i) a section 234AA place that is not a place, or a part of a place, referred to in paragraph (aa), (a), (b), (c), (d), (g) or (h).

Absolute liability applies to paragraph (1)(b) of the offence, with the effect that the Crown does not need to prove that offender knew that the property belongs to the Commonwealth. Also, under paragraph 6.2(2)(b) of the Criminal Code, the defence of mistake of fact under section 9.2 of the Criminal Code is unavailable in relation to that physical element.

Item 2 includes reference to **proposed section 33C** in **proposed subsection 210(1)(a)** of the Customs Act (see **item 2** of **Schedule 10** above), with the effect that a Customs or police officer may arrest a person without warrant if the officer believes on reasonable grounds that the person is obstructing or interfering with Commonwealth property in a Customs place (provided the officer also believes on reasonable grounds that proceedings by summons would not achieve one of the purposes listed in **proposed paragraph 210(1)(b)**).

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Schedule 13—Power to moor

Item 1 of Schedule 13 amends section 194 of the Customs Act, which currently provides:

The officer in charge for the time being of any ship employed in the service of the Customs may haul any such ship upon any part of the coast or the shores banks or beaches of any port bay harbour lake or river and may moor any such ship thereon and continue such ship so moored as aforesaid for such time as he or she shall deem necessary.

The amendments in **proposed subsection 194(1)** make clear that the officer in charge of a Customs vessel has the authority to moor the vessel to:

- any part of the coast, or the shores, banks or beaches of any port, bay, harbour, lake or river (**proposed subparagraph 194(1)(a)(i)**)
- any man-made structure at those locations (**proposed subparagraph 194(1)(a)(ii)**), and
- any man-made structure in Australian territorial seas, the contiguous zone of Australia and Australia’s EEZ (**proposed subparagraph 194(1)(a)(iii)**).

Proposed subsection 194(2) creates a new offence that is committed if the owner, occupier or operator of any of the places mentioned in **proposed paragraph 194(1)(a)** does not provide ‘all reasonable facilities and assistance that the person is reasonably capable of providing’ to the officer who is exercising, or attempting to exercise, his or her powers under the section. The offence is punishable by a maximum penalty of 30 penalty units (or \$3 300). In some circumstances, the owner, occupier or operator may have to provide assistance to Customs ahead of commercial vessels. According to the Explanatory Memorandum, ‘these circumstances would be extremely rare’,³⁴ but that expectation does not negate the possibility that the owner of land may be liable under a contract to pay compensation to the commercial vessel—it would of course depend on matters such as the terms of the contract, the length of time for which the mooring spot is required for use by Customs, and any alternative arrangements which can be made.

Schedule 14—Facilitation of boarding

Item 1 of Schedule 14 inserts **proposed section 61A**, which creates an offence that is committed if the owner or operator of a port or port facility fails to comply with a request by a Customs officer to facilitate ‘by any reasonable means’ the boarding of a ship in the port or facility by a person authorised under the Customs Act to board the ship. The offence is punishable by a maximum penalty of 30 penalty units (or \$3 300). While existing section 61 obliges the master of a ship (or resources installation etc) to facilitate the boarding of the ship (or installation etc) for the purpose of allowing an officer to

34. Explanatory Memorandum, p. 46, paragraph 215.

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conduct customs and immigration clearance, the master may in fact be unable to facilitate the boarding (which must be carried out by crane operators etc in the port or port facility, but who are not currently obliged by law to facilitate the boarding). The amendment in **Schedule 14** contains such an obligation.

Schedule 15—Entering places other than ports or airports

Item 1 of Schedule 15 updates the old-fashioned, somewhat biblical, language of existing subsection 58(1), which currently provides: ‘The master of a ship or the pilot of any aircraft shall not suffer his or her ship or aircraft to enter any place other than a port or airport unless from stress of weather or other reasonable cause’. It replaces the phrase ‘suffer his or her ship or aircraft to enter any’ with the phrase ‘bring his or her ship or aircraft to a’. According to the Explanatory Memorandum, the amendment is made at the request of industry.³⁵

Schedule 16—Right of access for patrols

Item 1 of Schedule 16 amends existing section 193, which currently provides:

Any officer and any person in his or her aid when on duty may patrol upon and pass freely along and over any part of the coast or any railway or any airport or the shores, banks, or beaches of any port bay harbour lake or river.

The proposed amendments are similar to those made by **item 1 of Schedule 13** in relation to the power to moor in section 194 of the Customs Act, and further comment is unnecessary. It is sufficient to say that the existing power to patrol and pass freely along and over any part of the coast, railway, airport, shores etc, is replaced with a more specific power of entering and remaining upon certain places, including man-made structures on those places.

Schedule 17—Search and seizure warrants

Items 1–3 of Schedule 17 amend sections 198 and 199 (which deal with the making of a warrant to search premises) to allow an officer to conduct an ordinary search or a frisk search of a person at or near the premises, if the executing officer or a person assisting suspects on reasonable grounds that the person has any evidential material or ‘*seizable item*’ in his or her possession.³⁶

Items 5–6 amend section 203 (which deals with when seizure warrants for forfeited goods can be issued) to insert reference to the phrase ‘*relevant evidential material*’. That phrase

35. *ibid.*, p. 49, paragraph 227.

36. See **item 1 of Schedule 10** for the definition of ‘*seizable item*’. The term ‘*premises*’ is defined in subsection 183UA(1) to include ‘a place, a conveyance or a container’.

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is defined in **proposed subsection 203(10)** to mean evidential material ‘in relation to an offence by reason of the commission of which’ goods are believed to be ‘*forfeited goods*’ (of the kind specified in paragraph 203(5)(a)), or ‘*special forfeited goods*’. Subsection 203(5) provides:

- (5) If a judicial officer issues a warrant, the judicial officer is to state in the warrant:
 - (a) a description of the goods to which the warrant relates; and
 - (b) a description of the premises on or in which the goods are believed to be located; and
 - (c) the name of the authorised person who, unless that authorised person inserts the name of another authorised person in the warrant, is to be responsible for executing the warrant; and
 - (d) the time at which the warrant expires (see subsection (5A)); and
 - (e) whether the warrant may be executed at any time or only during particular hours.

The term ‘*special forfeited goods*’ is defined in subsection 183UA(1) as meaning ‘forfeited goods that are referred to in paragraph 229(1)(b) or (n)’. Section 229 sets out the goods that are forfeited to the Crown under the Customs Act. Paragraphs 229(1)(b) and (n) provide as follows:

- (b) All prohibited imports.
- ...
- (n) All prohibited exports put on any ship boat or aircraft for export or brought to any wharf or place for the purpose of export.

Items 7–10 amend section 203A of the Customs Act, which sets out the things that are authorised by seizure warrants for forfeited goods. The amendments permit the conduct of a frisk search or ordinary search if the officer executing the warrant reasonably believes that a person has in his or her possession any ‘*relevant evidential material*’. That phrase is defined in **proposed subsection 203A(7)** to mean evidential material in relation to an offence the commission of which goods are believed to be goods that are the subject of the warrant or ‘*special forfeited goods*’ (see above).

Item 11 inserts **proposed section 203HA** which requires a person to provide his or her name and/or address, if the person is at or near premises where a search or seizure warrant is being executed, and the executing officer reasonably believes that the person may be able to assist the officer. Interestingly, while the power is considered by Customs to be ‘essential’,³⁷ the offence carries a penalty of only 5 penalty units (which, when expressed

37. Explanatory Memorandum, p. 55, paragraph 253.

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as \$550, may seem great to an office worker found guilty of the offence). The person does not commit an offence if he or she has a reasonable excuse (for example, he or she may not hear or understand the request). The ‘designated warrant officer’ also commits an offence if he or she fails to comply with the requirements in **proposed subsection 203HA(4)**, such as providing to the person on request details such as his or her name and/or the address of his or her place of duty, and evidence (if the officer is not in uniform and it is practicable to do so) of the fact the officer is an officer. Again, that offence is punishable by a maximum penalty of 5 penalty units.

Concluding comments

The amendments are designed to ensure the proper functioning of the Australian Customs Service, particularly its role in border control. As discussed above, many of the proposed amendments do no more than align the Customs Act with provisions in other Commonwealth legislation, particularly the Crimes Act, and UNCLOS, to which Australia is party. Some of these powers, while they do not exist specifically in the Customs Act at present, are already available to Customs officers.

This is not to say that none of the amendments is controversial. Indeed the provisions dealing with warrants in **Schedules 11 and 17** bear closer scrutiny and/or explanation—see Main Provisions section above.

Item 46 of **Schedule 5** contains a typographical error that needs to be corrected before the Bill is passed. **Item 46** amends the definition of ‘commander’ in subsection 184A(14) to include a warrant officers and non-commissioner officer of the Australian Defence Force. In **proposed paragraph 184A(14)(d)**, the word ‘Australia’ [Defence Force] should read ‘Australian’ [Defence Force].

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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