

CHAPTER 2

OVERVIEW OF THE BILL

2.1 The purpose of the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006 (the Bill) is to amend the *Customs Act 1901* (the Customs Act) and the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to:

- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences;
- update customs broker licensing arrangements to accommodate current practices in employment arrangements;
- update duty recovery processes and the payments of duty under protest system and allow refunds to be applied against unpaid duty; and
- allow declarations to be made under the new SmartGate system and to make it an offence to make false or misleading declarations under that system.¹

Schedule 1: Search powers on certain ships and aircraft

Part 1: Main amendments

2.2 The main amendments in Part 1 of the Bill will amend Division 1 of Part XII of the Customs Act in relation to certain powers that enable Customs officers to enforce the Customs Act, Division 307 of the *Criminal Code*² or any prescribed Act (the specified Acts). In particular, the amendments will empower Customs and other Commonwealth officers, immediately after boarding a ship or aircraft for an enforcement purpose, to conduct personal searches for, take possession of and retain:

- weapons;
- items that may assist a person to escape detection; and
- evidence of the commission of a relevant offence.³

1 Significant portions of text in this chapter are reproduced from the Explanatory Memorandum (EM) to the Bill and the Second Reading Speech. This brief is intended to provide an overview of the purpose and clauses of the Bill. The EM may be consulted for more detailed explanation of particular clauses.

2 Division 307 of the *Criminal Code* is concerned with serious drug offences.

3 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 7 December 2006, p. 10.

2.3 The EM states that the new powers are required due to recent incidents where Customs officers encountered 'violent resistance from persons on board...ships and attempts to escape custody and dispose of evidentiary material.'⁴

2.4 The Second Reading Speech to the Bill justifies the grant of the new powers as improving the safety of Customs officers and their capacity to obtain and retain evidence and suspects relevant to offences under the specified Acts:

The new powers ensure the personal safety of the officers in exercising their enforcement functions, help prevent the escape of any person detained as a suspect, and help prevent the disposal of evidence.⁵

2.5 The new powers will be complemented by provisions introduced by the Bill that govern the 'proper manner in which such powers may be exercised'.⁶

2.6 In addition, Part 1 of the Bill introduces a number of minor or consequential amendments to other provisions of Division 1 of Part XII of the Customs Act.

Items 1 and 2: definition of frisk search

2.7 The Customs Act currently contains two differently worded definitions of 'frisk search'.

2.8 Subsection 4(1) defines 'frisk search' for the purposes of the Customs Act as:

- (a) a quick search of the person by the rapid and methodical running of hands over the person's outer garments; and
- (b) an examination of anything worn by the person that can be conveniently removed and is voluntarily removed by the person.

2.9 However, subsection 183UA(1) defines frisk search for the purposes of Division 1 of Part XII as:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

2.10 As well as the different form of words used, the two definitions are distinguished by paragraphs 4(1)(c) and (d), which limit the purposes for which a frisk search may be carried out and empower goods to be recovered as part of a search.⁷ A frisk search may be conducted to:

4 p. 5.

5 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 7 December 2006, p. 10.

6 EM, p. 5.

7 EM, pp 6-7.

(c) determine whether:

(i) if the search is conducted in circumstances described in subsection 219L(1) or (1A)—the person is unlawfully carrying any prohibited goods; and

(ii) if the search is conducted in circumstances described in subsection 219L(1B) or (1C)—the person is carrying any weapon or thing capable of being used to inflict bodily injury on a person conducting a search under Division 1 of Part XII; and

(d) recover any such goods.

2.11 Items 1 and 2 of Schedule 1 of the Bill establish a consistent definition of 'frisk search' by replacing the subsection 4(1) definition with that found at subsection 183UA(1), and repealing the definition of 'frisk search' at subsection 183UA(1). The result will be that there is a single definition of 'frisk search' in the Customs Act, thereby removing potential for confusion.⁸ The current subsection 183UA(1) definition is preferred because it is more consistent with that used in other Commonwealth legislation, such as the *Crimes Act 1914*.⁹

2.12 The removal of the limitations at paragraphs 4(1)(c) and (d) allows these matters to be dealt with more appropriately in a substantive provision of the Customs Act, rather than in its definitions section.¹⁰ The limitations on the exercise of the frisk search powers are addressed in the new subsection 219M(1A).

Item 3: Power to take possession of and retain found goods or documents

2.13 Under existing subsection 185(2) of the Customs Act, officers have the power to search a ship or aircraft and any goods on such a ship or aircraft, and to require persons on the ship or aircraft to produce documents. This includes powers to secure goods found and to take copies, or extracts, of documents found or produced.¹¹

2.14 Under existing subsection 185(4A), evidence of the commission of an offence against a law of the Commonwealth, a state or a territory obtained in the exercise of powers under section 185 may be used, or given to another body for use, in investigating or prosecuting an offence.

2.15 However, there is no explicit power in section 185 that allows an officer to take possession of and retain goods found or documents produced where such goods or documents may be evidence of the commission of an offence.¹²

8 EM, p. 7.

9 EM, p. 7.

10 EM, p. 7.

11 EM, p. 7.

12 EM, p. 7.

2.16 Accordingly, Item 3 of Schedule 1 inserts new paragraphs (cb) and (cc) into subsection 185(2). These paragraphs give officers additional powers to take possession of and retain goods found or documents produced under subsection 185(2), where such goods or evidence may afford evidence of the commission of a relevant offence.¹³ The matters that determine whether such goods or documents may afford evidence of the commission of a relevant offence are to be set out in proposed subsection 185(7).

2.17 Item 3 makes explicit Customs' power to take possession of and retain, for the purposes of investigating and prosecuting a relevant offence, evidentiary material found or produced in the exercise of the subsection 185(2) powers.¹⁴ This amendment will align the existing subsection 185(2) powers with the amended personal search power at section 185AA.

Item 6: Circumstances in which goods and documents may be used as evidence

2.18 Proposed subsection 185(7) sets out, for the purposes of new paragraphs 185(2)(cb) and (cc), the circumstances that satisfy the criteria that 'goods found or documents produced on a ship or aircraft may afford evidence of the commission of a relevant offence.'¹⁵

2.19 Under subclause 185(7), where a ship is in Australia, goods or documents may afford evidence of an offence, either inside or outside Australia, against the Customs Act, Division 307 of the *Criminal Code* or an Act prescribed consistently with the United Nations Convention on the Law of the Sea (UNCLOS).¹⁶

2.20 Where a ship is outside Australia, goods or documents may afford evidence only of an offence:

- in Australia against the Customs Act, Division 307 of the *Criminal Code* or an Act prescribed consistently with UNCLOS; and
- in Australia's exclusive economic zone against an Act prescribed consistently with UNCLOS.¹⁷

2.21 Where an aircraft is in Australia, goods or documents may afford evidence of an offence, either inside or outside Australia, against the Customs Act or Division 307 of the *Criminal Code*.¹⁸

13 EM, p. 7. The new paragraphs 185(2)(cb) and (cc) do not apply to narcotic goods. An existing power at paragraph 185(2)(e) allows the seizure without warrant of any narcotic goods found in a search conducted under subsection 185(2).

14 EM, p. 7.

15 EM, p. 8. See discussion of Item 3 above at 1.16.

16 EM, p. 8.

17 EM, p. 8.

18 EM, p. 8.

2.22 The limits on the scope of the power to take possession of and retain evidentiary material prescribed by subclause 185(7) are in accordance with Australia's jurisdiction in the various maritime zones under UNCLOS.¹⁹

Items 8 to 12: Amended search powers under section 185AA

2.23 It is proposed to amend section 185AA to expand the scope of the personal search powers and the circumstances under which they may be exercised.

2.24 Existing section 185AA of the Customs Act allows an officer to search for, take possession of, and retain items on a person, or in that person's immediate control, that could inflict bodily injury or help the person to escape.

2.25 However, these personal search powers can only be exercised where the person is on a detained ship or aircraft, or where the person is on a detained ship or aircraft and is being placed on another ship or aircraft for the purpose of being moved. Further, the existing powers do not allow officers to search for and take possession of potential evidentiary material.

2.26 Proposed subsections 185(1) and (1A) will allow a person that is found on a ship or aircraft boarded under subsection 185(2), or placed on a ship or aircraft under subsection 185(3AA), and any clothing and other property within the immediate control of that person, to be searched for the purposes of finding out if they are carrying or hiding:

- a weapon or thing capable of being used to inflict injury or help the person escape; or
- a document or other thing that may afford evidence of the commission of a relevant offence.²⁰

2.27 New subsection 185AA(1B) sets out the circumstances in which a document or other thing may afford evidence of the commission of a relevant offence. This section effectively limits the scope of the power to search for evidence. The circumstances are the same as those prescribed in subsection 185(7).²¹

2.28 New subsections 185AA(2) and (2A) will allow a person that is found on a ship or aircraft boarded under subsection 185A(2A), and any clothing and other property within the immediate control of that person, to be searched for the purposes

19 Similar limits are placed on the power to arrest a person found on board a ship under paragraph 185(2)(d) and the new power to conduct a personal search for evidentiary material under proposed subsection 185AA(1B).

20 EM, p. 9.

21 EM, p. 9.

of finding out if they are carrying or hiding a weapon or thing capable of being used to inflict injury.²²

Power to examine things found

2.29 New subsection 185AA(3) provides a new power for an officer to examine any thing found in the course of a search under section 185AA. If the thing found is a document, the examination may include reading the document directly or with the help of an electronic device.²³

2.30 Proposed subsection 185AA(3A) allows an officer to do, or arrange for another officer or another person to do, whatever is reasonably necessary to permit the examination of the thing or things being examined.²⁴

2.31 Proposed subsection 185AA(3B) limits the scope of subsection 185AA(3A) by prohibiting an officer from damaging a thing being examined by forcing it, or part of it, open unless:

- the person being searched has been given a reasonable opportunity to open the thing or part of it, or
- it is not reasonably practicable to give the person such an opportunity.²⁵

Power to take possession of weapons and evidence

2.32 Proposed subsection 185AA(3C) allows an officer to take possession of:

- a weapon or other thing capable of being used to inflict injury or help a person escape; or
- a document or other thing that may afford evidence of the commission of a relevant offence,

where the weapon, thing or document is found in the course of a search under new subsection 185AA(1A).²⁶

2.33 Further, new subsection 185AA(3C) allows the retention of the weapon, document or thing for such time as the officer thinks necessary for the purposes of the

22 Under existing section 185A, officers are given the power to board certain foreign ships on the high seas and to establish the identity of a ship and its occupants. Australia has only limited jurisdiction on the high seas, and officers generally have no power to enforce Australian laws. Accordingly, the only purpose for which the personal search power may be used on a ship boarded under section 185A is to search for weapons or potential weapons: EM, p. 10.

23 EM, p. 10.

24 EM, p. 10. A similar power is contained in existing subsection 185(2C) in connection with the power to examine goods granted under paragraph 185(2)(b).

25 EM, p. 10. A similar limitation is contained in subsection 185(3C) in connection with the powers to board, search and examine goods under section 185.

26 EM, pp 10-11.

Customs Act, Division 307 of the *Criminal Code* or an Act prescribed under subsection 185AA(1B) (the specified Acts).²⁷

2.34 Proposed subsection 185AA(3C) also enables an officer:

- to take possession of a weapon or other thing capable of being used to inflict injury that is found in the course of a search under new subsection 185AA(2A); and
- to retain the weapon or other thing for such time as the officer thinks necessary for the purposes of the Customs Act.²⁸

Item 9: Immunity for search conducted in good faith

2.35 Existing subsection 185AA(6) gives immunity against civil or criminal proceedings to a person who conducts a search under section 185AA at the request of an officer. It is required that the person act in good faith and in accordance with subsection 185AA(7).

2.36 Existing subsection 185AA(7) prohibits an officer or other person who conducts a search under section 185AA from using more force, or subjecting a person to greater indignity, than is reasonably necessary to conduct the search.

2.37 Proposed subsection 185AA(6) would retain the current immunity and extend it under the same conditions to an officer who conducts a search under section 185AA.²⁹

Item 10: Evidence able to be used to prosecute offences

2.38 Under proposed subsection 185AA(7A), if an officer, in a search conducted under section 185AA, obtains evidence of the commission of an offence against a law of the Commonwealth, a state or territory, that evidence may be used, or given to another body for use, in investigating or prosecuting the relevant offence. New subsection 185AA(7A) does not override or limit a state's laws of evidence relating to proceedings for an offence against the laws of that state.³⁰

27 EM, p. 11.

28 EM, p. 11.

29 EM, p. 11. Along with subsection 185AA(7), existing subsections 185AA(4) and (5) constrain the scope of the use of the search powers. Subsection 185AA(4) makes it clear that section 185AA does not authorise the removal of a person's clothing or to require a person to remove their clothes, other than the person's outer garments. Subsection 185AA(5) requires that a search of a person or their clothing must be conducted by an officer or person of the same sex.

30 EM, p. 12. Existing subsection 185(4A) is a similar provision; it applies to evidence obtained during the exercise of search powers under section 185.

Item 12: Definition of 'a person found on a ship or aircraft'

2.39 Item 12 of Schedule 1 inserts new subsection 185AA(9), which extends the scope of the phrase 'a person found on a ship or aircraft' in section 185AA to include a person suspected on reasonable grounds by an officer of having landed from, or left, the ship or aircraft.³¹

Item 16: Power to conduct a frisk search

2.40 Existing section 219M establishes the manner in which a frisk search of a person detained under section 219L is to be conducted. The power to conduct a frisk search is implied from a reading of sections 219L and 219M; there is no explicit power in either section to conduct a frisk search.

2.41 Accordingly, Item 16 of Schedule 1 inserts new subsection 219M(1A), which provides the express power for a Customs officer to conduct a frisk search of a person detained under section 219L for the purpose of determining whether they are unlawfully carrying prohibited goods.³²

2.42 New subsection 219M(1A) also establishes a power to recover any prohibited goods found in the course of a frisk search.³³

Schedule 2: Agents and customs brokers

2.43 Division 3 of Part XI of the Customs Act provides for the licensing of customs brokers. Under existing section 183C, where a broker's licence is granted by the CEO of Customs, the CEO shall endorse on the licence:

- the place(s) at which the licence holder may act as a customs broker; and
- the person(s) who is a nominee of the licence holder and the corresponding place(s) at which the nominee acts as a customs broker.³⁴

2.44 Existing section 183CD sets out the conditions that must be fulfilled for a person to be eligible to be a nominee of a customs broker. Under paragraph 183CD(1)(f), a nominee of a customs broker cannot be the nominee of another customs broker. Under paragraph 183CD(1)(j), a nominee of a customs broker cannot

31 EM, p. 12.

32 EM, p. 13. The purpose for which a frisk search is allowed under section 219L is consistent with the allowable purposes under subsections 219L(1) and 219L(1A). These sections allow a frisk search where a detention officer suspects on reasonable grounds a person of carrying prohibited goods.

33 EM, p. 13.

34 EM, p. 15.

be a customs broker at a place other than a place where the first-mentioned customs broker is a customs broker.³⁵

Restrictions on the employment of locum or freelance customs brokers

2.45 The nominees of corporate customs brokers have traditionally been individual customs brokers employed full-time. However, corporate customs brokers are increasingly employing locum or freelance customs brokers as nominees on a part-time basis. Such locum or freelance customs brokers could be employed by a number of different corporate customs brokers at any one time.³⁶

2.46 Existing paragraph 183CD(1)(f) of the Customs Act means that such locum or freelance brokers may not act as nominees for more than one corporate customs broker.³⁷

2.47 Existing paragraph 183CD(1)(j), which requires that a nominee not be a customs broker at another place, further restricts the use of locum or freelance brokers as nominees. Current Customs practice is to specify for the purposes of section 183CE 'all places in the Commonwealth' as the place at which the licence holder may act as a customs broker. This policy renders the condition set out in paragraph 183CD(1)(j) redundant because, being licensed to act as a customs broker at 'all places in the Commonwealth', a locum or freelance broker can never be a customs broker at another place.³⁸

2.48 In recognition of the increasing employment of locum and freelance brokers as nominees by corporate customs brokers, the Bill proposes the repeal of paragraphs 183CD(1)(f) and 183CD(1)(j) of the Customs Act.³⁹

Schedule 3: Recovery of duty

Duty recovery

2.49 Currently, section 153 of the Customs Act makes provision for the recovery of duty by Customs. Further, section 165 of the Customs Act provides a time limit of four years for the recovery of duty by Customs where duty has been short levied or erroneously refunded.

2.50 The High Court has interpreted the time limit in section 165 as only limiting Customs' power to recover duty in situations where the short payment of duty and the overpayment of a refund are the result of a Customs' error. However, as a matter of

35 EM, p. 15.

36 EM, p. 15.

37 EM, p. 15.

38 EM, p. 16.

39 EM, p. 16.

policy, Customs applies the time limit in section 165 of the Customs Act to the recovery of *all* duty, except in cases of fraud.⁴⁰

2.51 Items 1 to 4 of Schedule 3 of the Bill implement Customs' current policy on time limits and the recovery of duty. The Bill amends the Customs Act to consolidate sections 153 and 165 of the Customs Act, and to limit the time for the recovery of customs duty to four years in all cases, except in the case of fraud or evasion where no time limit will apply.⁴¹

Payments under protest

2.52 Under section 167 of the Customs Act, if there is a dispute as to the amount or rate of duty payable on goods, the owner of the goods may pay under protest the sum demanded by a Collector as the duty payable in respect of the goods. If the duty is paid under protest, the sum paid is deemed to be the proper duty payable unless the contrary is determined in an action brought in accordance with section 167.⁴²

2.53 Section 167 also sets out how an owner makes a payment under protest, for both documentary and electronic entries. Both of these processes only allow payments under protest to be made at the time goods are originally entered for home consumption. However, if Customs conducts an audit on an owner's transactions after goods have been entered into home consumption and determines that duty, or additional duty, is payable on goods, there are currently no statutory provisions specially allowing such post-entry payments under protest to be made.⁴³

2.54 Further, there are still provisions in the Customs Act requiring payments under protest with respect to import entries under the COMPILE system to be made by a registered COMPILE user, using COMPILE. As COMPILE is no longer used and people cannot be registered COMPILE users, owners of goods cannot comply with these provisions in making a payment under protest.⁴⁴

2.55 The EM states that, for these reasons, Item 5 of Schedule 3 repeals the existing requirements relating to payments under protest and replaces them with 'requirements that are general in nature and are easier to comply with'.⁴⁵

2.56 New subsection 167(3) sets out the circumstances when a payment is taken to be made under protest, namely:

40 EM, p. 17. Emphasis in original.

41 EM, p. 17.

42 EM, p. 21.

43 EM, p. 22.

44 EM, p. 28.

45 EM, p. 28.

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- where the owner of the goods, or agent of the owner, gives Customs notice, by document or electronically, that the payment is being made under protest; and
 - Customs receives the notice no later than seven days after the day on which the payment is made.

2.57 The requirements for the notice that a payment is being made under protest are set out in new subsection 167(3A), and do not differ substantially from existing requirements.⁴⁶

2.58 Item 7 of Schedule 3 inserts a new subsection 167(3B) into the Customs Act, which provides for a payment under protest to be made under the Accredited Client Program.

2.59 Item 8 of Schedule 3 inserts a new subsection 167(4A) into the Customs Act, which sets out the circumstances in which a person can recover duty which was paid under protest through the Accredited Client Program. Essentially, there is no action for a sum paid through the Accredited Client Program under protest, unless:

- the payment is made as a payment under protest under subsection 167(3B); and
- the action for recovery is brought within the timeframes set out in paragraph 167(4A)(b) (generally six months from when the duty would be payable if the accredited client monthly estimates were not paid).

Schedule 4: Treatment of certain information given to Customs

2.60 As part of the SmartGate process, eligible passengers and crew may be required to answer questions and make declarations electronically to Customs about their accompanied personal and household effects. These answers and declarations will be used to assess a person's eligibility for automated clearance and identify persons who may hold items of interest (such as prohibited imports and dutiable/taxable items) to Customs.⁴⁷

2.61 Existing paragraph 234(1)(d) of the Customs Act makes it an offence to make a false and misleading statement (including an omission), directly or indirectly, to an 'officer of Customs'. Currently, the provisions of the Customs Act mean that passengers and crew who make false and misleading declarations electronically using the SmartGate system would be making false and misleading statements to 'Customs', and not necessarily to an 'officer of Customs'.⁴⁸

46 EM, p. 29.

47 EM, p. 28.

48 EM, p. 28.

2.62 The amendments in the Bill ensure that any false and misleading information provided using the SmartGate system is covered by the existing offence provisions relating to making false and misleading statements to an 'officer of Customs' (Item 1 of Schedule 4).