

1998

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CUSTOMS LEGISLATION AMENDMENT BILL (No. 1) 1998

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice and Customs
Senator the Honourable Amanda Vanstone)

CUSTOMS LEGISLATION AMENDMENT BILL (No.1) 1998

OUTLINE

On 2 November 1997, the Prime Minister announced the National Illicit Drugs Strategy (NIDS). As part of this Strategy, this Bill proposes amendments to the *Customs Act 1901* and the *Customs Administration Act 1985* which are designed to augment the powers of the Australian Customs Service (ACS) in relation to the detection of illicit drugs.

This Bill re-introduces the Customs Legislation Amendment Bill (No.1) 1998 which was introduced into the House of Representatives on 2 July 1998 and which lapsed when Parliament was dissolved on 31 August 1998.

The more significant amendments of the Bill are set out below.

Amendments to the *Customs Act 1901* (Customs Act) to:

1. Extend the frisk search powers of officers of Customs to allow the search of persons with access to ships and aircraft. These persons include crew of ships and aircraft and airport and port employees. This extension is being made within the context of the current frisk search regime under the Customs Act, thereby ensuring that the dignity of a person being searched is maintained;
2. Extend the frisk search powers to allow the frisk search of a person on a ship for concealed weapons when a ship is boarded by Customs or when a person boards a Customs vessel. This extension is also being made within the context of the current frisk search regime and is also designed to protect the safety and welfare of Customs officers operating at sea in an isolated environment;
3. Insert a new power to allow officers of Customs to read and copy documents found in baggage and cargo searches. The concept of "documents" is to be expanded to include paper, photographs and computer images;
4. Insert a new power to allow officers of Customs to take into custody firearms which are on ships and aircraft and which, if imported, would be prohibited imports. This power only can be exercised if Customs is not satisfied that there is secure storage for the firearms on board the ship or aircraft. Firearms are to be returned when the ship or aircraft leaves Australia;
5. Limit the circumstances where reasonable force can be used in the conduct of the external search under the detention and search provisions of the Customs Act;
6. Amend section 59 to extend its operation to foreign ships in the contiguous zone. Section 59 sets out the circumstances in which a ship or aircraft can

be boarded by Customs. When a ship or aircraft is boarded in accordance with this section, the powers under section 185 of the Customs Act can be exercised, including the power to search the ship or aircraft and question persons on board.

7. In the case of foreign ships, the power can only be exercised when the ship is in the territorial sea of Australia. It is proposed to extend the operation of section 59 to foreign ships in the contiguous zone in accordance with international law;
8. Extend the operation of section 59 in relation to ships into the waters on the landward side of the territorial sea, including such waters within the limits of a State or Territory. These waters can represent quite considerable bodies of water and it is proposed the ACS have the same powers in respect of ships in these waters as in the territorial sea of Australia;
9. Amend section 175 to insert new offences relating to the transfer of goods at sea. Section 175 makes it an offence, without a Collector's permission, to transfer goods from a ship or aircraft engaging in the coasting trade to a ship or aircraft journey to or from Australia or between places outside Australia. Currently, the offence only applies to the master or owner of the coasting trade ship or pilot or owner of the coasting trade aircraft. It is proposed to extend the offence so that it equally applies to the master or owner of the ship on the international journey and the pilot or owner of the aircraft on the international journey.

Amendments to the Administration Act to:

10. Facilitate access by other law enforcement agencies to Customs' information and intelligence for the purposes of carrying out mutual law enforcement functions, including:
 - Access by State or Territory authorities and law enforcement task forces as necessary; and
 - Access by foreign government agencies and international organisations.

FINANCIAL IMPACT STATEMENT

The amendments proposed in this Bill have no direct financial implications.

CUSTOMS LEGISLATION AMENDMENT BILL (No.1) 1998

NOTES ON CLAUSES

Clause 1 – Short title

This clause provides for the Act to be cited as *the Customs Legislation Amendment Act (No. 1) 1998* (Amendment Act).

Clause 2 - Commencement

This clause provides for the Act to commence on a day or days to be fixed by Proclamation. This is the standard provision which applies if the Act is not proclaimed within a period of six months after the Act receives the Royal Assent, then it shall commence on the first day after that period (subclause (3) refers).

Subclause (1) provides for the machinery provisions of the Bill (short title, commencement and Schedules) to commence upon Royal Assent.

Clause 3 - Schedules

This clause is the formal enabling provision for the Schedule to the Amendment Act, providing that each Act specified in the Schedule is amended in accordance with the applicable items of the Schedule. The clause also provides that the other items of the Schedule have effect according to their terms. This is a standard enabling clause for transitional, savings and application items in amending legislation. There are no such items in this Bill.

SCHEDULE 1 – AMENDMENT OF THE CUSTOMS ACT 1901

Item 1 – Subsection 4(1) (paragraph (b) of the definition of *Australian seabed*)

This item repeals and substitutes paragraph (b) of the definition of *Australian seabed*. This is a technical amendment to condense the current definition. The current paragraph (b) contains three subparagraphs and it is proposed to condense this to two subparagraphs. The substance of the definition is unchanged.

Item 2 – Subsection 4(1)

This item amends section 4 by inserting a new definition of *contiguous zone*, which is defined as the contiguous zone within the meaning of the *Seas and Submerged Lands Act 1973*, which is adjacent to the coast of Australia. This new definition is being inserted for the purposes of proposed amendments to section 59 of the Act made by items 20 and 21 below, which will extend some of the powers under section 59 into the contiguous zone.

Item 3 - Subsection 4(1)

This item amends subsection 4(1) of the Act by introducing the new concept of “designated place” for the purposes of a new search and seizure power under section 203B and extended frisk search powers under Division 1B of the Act (see below for further details). Currently, Customs is only allowed to conduct a frisk search of persons in a place identified under section 234AA of the Act.

The term “designated place” is defined to mean

- (i) the places already covered by paragraphs (a), (b) and (c) of the definition of Customs place in subsection 183UA(1); and
- (ii) a place that is the subject of a section 175 permission (which deals with the movement of goods between certain crafts); and
- (iii) a section 234AA place that is not in or a part of the preceding places covered in this definition (section 234AA provides for places to be used for processing passengers).

Item 4 - (Subsection 4(1) (definition of Documents))

This item amends subsection 4(1) by repealing the definition of “Documents” and substituting a new definition of “document”. The amendment adopts the definition of “document” in section 25 of the *Acts Interpretation Act 1901* with an additional element in paragraph (c) to include “any paper or other material on which a photographic image or any other image is recorded.”

Item 5 - Subsection 4(1) (definition of External search)

This item amends the definition of “external search” by omitting “or in the possession of” from the definition. This amendment is necessary in light of the new subsection 4(19) (see item 10 below) which has the effect of limiting an external search to a search of the body for things carried in or under the clothing or the clothing itself.

Item 6 - Subsection 4(1) (paragraph (c) of the definition of Frisk search)

This item amends subsection 4(1) by repealing paragraph (c) of the definition of “Frisk search” and substituting it with a new paragraph (c). This amendment is relevant to the application of the new frisk search powers proposed in new subsections 219L(1A) and (1B) to persons suspected of carrying prohibited goods in designated places and persons suspected of carrying any weapon or thing capable of inflicting bodily injury on a person conducting a search under Division 1 of Part XII of the Act.

Item 7 - Subsection 4(1) (definition of Goods)

This item amends subsection 4(1) by repealing the definition of “Goods” and substituting it with a new definition to clarify that the term “goods” in the Act clearly includes documents. This amendment reflects the judicial position that the meaning of the term covers “tangible things which can be physically moved” (see *Vickers v Young* (1982) 43 ALR 389 at 401-403) including documents (see *Kanbur Pty Ltd v Adams* (1984) 3 FCR 192 where a Certificate of Title and share certificate were regarded as goods under the Act).

Item 8 - Subsection 4(1)

This item amends subsection 4(1) of the Act by inserting a new definition of the term “section 234AA place” to refer to a place identified under section 234AA as a place of a kind referred to in that section. This term is coined for ease of reference to a place used by Customs officers to question passengers disembarking from or embarking on a ship or aircraft, examining their personal baggage and to hold the passengers. Such a place is usually clearly identified by the display of signs.

Item 9 – Subsection 4(1)

This item amends section 4 by inserting a new definition of *territorial sea*. This is defined, in relation to Australia, as the area whose outer limits are from time to time specified in a Proclamation made by the Governor-General for the purposes of section 7 of the *Seas and Submerged Lands Act 1973*. Similar to the new definition of *contiguous zone*, the definition is being inserted for the purposes of proposed amendments to section 59, 73 and 175 of the Act detailed below.

Item 10 - Subsection 4(19)

This item repeals subsection 4(19) and substitutes it with a new provision to deem, for the purposes of Part XII of the Act, a person to be carrying a thing, including a thing constituting or containing special forfeited goods or prohibited goods, on his or her body if the thing constitutes, or is in or under, clothing worn by the person.

Consequently, the provision would cover the clothing itself, anything in the clothing (for example a thing could be in the pockets of a shirt or trousers) or under the clothing (for example, a thing could be tied or worn around the waist under a shirt).

New subsection 4(19) is relevant in demarcating the application of the frisk and external search provisions from the other search and seizure provisions in sections 203B and 203C of the Act. Any person deemed to be carrying things under subsection 4(19) is liable to attract the application of the frisk and external search provisions (sections 219L, 219Q and 219R).

This item also introduces a new subsection 4(19A) to clarify that the reference to clothing worn by a person in new subsection 4(19) includes a reference to any personal accessory or device that is worn by the person. In frisk and external search situations, Customs encounters a variety of methods and manner of concealment of special forfeited or prohibited goods. It is impossible to exhaustively enumerate and cover them in legislation. Consequently, a wide construction of the word "clothing" is necessary and new subsection (19A) is intended to provide an indication of what it may include. The words "personal accessory and device" would cover, for example, things like belts, shoes, hats, watches, jewellery, wigs, hairpiece, artificial limbs worn by or attached to the body of a person.

Item 11 - Paragraph 4(20)(a)

This item amends paragraph 4(20)(a) to change the age limit of a person who is in need of protection from 17 years to 18 years. This amendment is to ensure that the age limit of such a person in the Act is consistent with the age limit in section 23K of Part 1C of the *Crimes Act 1914*.

Item 12 – Subsections 5B(1), (2) and (4) and paragraph (5)(b)

Subsection 5B(1) of the Act currently provides that a person shall not, without the permission of the Chief Executive Officer of Customs (the CEO), cause an overseas sea installation to be installed in the coastal area. The coastal area coincides with the territorial sea and waters on the landward side of the territorial sea not in a State or Territory. This is a control requirement so that Customs is aware of the existence of such installations and can exercise relevant powers under the Act in respect of them. Under section 5C of the Act, sea installations installed in the coastal area (and presently the adjacent area) are deemed to be part of Australia. Under section 58A of the Act, direct

journeys to and from a sea installation in the coastal area (and presently the adjacent area) are controlled.

It is proposed to amend subsection 5B(1) to extend the permission requirement to sea installations in the *adjacent area*, a defined term equating to the area of waters beyond the territorial sea to the limits of the continental shelf. This extension will make the treatment of sea installations in the adjacent area consistent with the other provisions of the Act which apply to these installations.

The proposed amendments to subsections (2) and (4) and paragraph 5(b) ensure that the whole operation of section 5B, for example the power to impose conditions in a permission, is extended to sea installations in the adjacent area.

Item 13 - Section 32

This item repeals section 32 of the Act. Section 32 becomes unnecessary in light of the new section 186 (see item 47 below) which will be the primary provision in the Act giving Customs the power to examine goods subject to Customs control.

Items 14, 15, 16, 17, 18 and 19 – Amendments to section 58A

As discussed in the clause note in item 12, section 58A of the Act currently controls the movement of persons and goods between external places and sea installations installed in the adjacent area and the coastal area of Australia. In relation to persons, it is an offence to travel between a sea installation and an external place without the person being made available for questioning in Australia for the purposes of the Act (subsections 58A(2) and (4) refer). In relation to goods, it is an offence to move goods between a sea installation and an external place without the goods being made available for examination in Australia for the purposes of this Act (subsections 58A(3) and (5) refer). Under subsection 58A(6), various defences are available to this offence, including that the action is authorised in writing by the CEO.

It is considered that the purpose of the controls over goods and people relating to sea installations set out above is equally applicable to the movement of persons and goods between a resources installation and an external place. Therefore, items 15 and 17 propose to amend subsections 58A(2) and (4) to also include travel by a person between a resources installation attached to the Australian seabed and an external place. Items 16 and 18 propose to amend subsections 58A(3) and (5) to include the movement of goods between a resources installation and an external place.

Items 14 and 19 make technical amendments to subsections 58A(1), (6) and (8) to remove the word “sea” from these subsections as a consequence of the above amendments. The effect of these amendments is that these subsections, one of which contains the defences to the abovementioned offences, will apply to both sea and resources installations.

Item 20 and 21– Subsections 59(1) and 59(2)

Section 59 of the Act sets out the circumstances in which a request can be made to the master of a ship to permit his ship to be boarded by Customs (subsections 59(2) and (3)) or to the pilot of an aircraft to land his aircraft for the boarding for the purposes of the Act (subsection 59(4)). When a ship or aircraft is boarded in accordance with this section, the powers under section 185 of the Customs Act can be exercised, including the power to board and search the ship or aircraft and question persons on board.

In relation to ships, subsections 59(1) and (2) currently apply to Australian ships and foreign ships. In the case of foreign ships, the request power can only be exercised when the ship is in the territorial sea of Australia. In order to strengthen this power, however, it is proposed to extend the operation of section 59 to foreign ships in the contiguous zone. In addition, it is also proposed to extend the operation of subsections 59(1) and (2) in relation to foreign ships into the waters of the sea on the landward side of the territorial sea, including such waters within the limits of a State or Territory. These waters can represent quite considerable bodies of water and it is proposed that Customs have the same powers in respect of foreign ships in these waters as in the territorial sea of Australia.

Items 20 and 21 propose to omit the current wording of paragraph (b) in both subsections 59(1) and (2) and substitute new wording to implement these proposals. In relation to a foreign vessel, the request power will be exercisable in relation to any ship that is within:

- (i) the waters of the sea within the outer limits of the territorial sea of Australia, including such waters within the limits of a State or a internal Territory;
- (ii) the contiguous zone of Australia;
- (iii) 500 metres of an Australian resources installation or an Australian sea installation.

The exercise of this power will be subject to new subsection 59(5A), which is to be inserted by item 25 below.

Item 22 – Subsection 59(3)

This item contains a technical amendment only to remove superfluous words from the subsection.

Item 23 – Subparagraphs 59(4)(b)(ii) and (ia)

This item amends subsection 59(4) to change the reference to the territorial sea of Australia so that it is consistent with the references inserted by items

20 and 21 above. This is a technical amendment only and does not alter the operation of subsection 59(4).

Item 24 – Subsection 59(5)

This item contains a technical amendment only to remove superfluous words from the subsection.

Item 25 – After subsection 59(5)

This item inserts new subsection 59(5A), which qualifies the operation of subsections 59(1) and (2) in relation to a foreign ship in the contiguous zone. International law limits the powers that Australia can exercise over foreign ships in the contiguous zone. As a consequence, the power in subsections 59(1) and (2) can only be exercised based on reasonable cause. New subsection 59(5A) sets out this reasonable cause with the effect that the request to the master of a ship, other than an Australian ship, in the contiguous zone can only be made under subsections 59(1) or (2) if there are reasonable grounds to suspect that the ship:

- (i) has been or is being used, or has been or is otherwise involved in the commission of an offence against the Act; or
- (ii) is about to be so used or to be otherwise so involved.

Item 26 – Subsection 73(1)

Subsection 73(1) prohibits the breaking of bulk cargo of a ship, except with a Collector's permission. This prohibition currently applies only while the ship is in the territorial sea of Australia. It is now proposed to extend its operation to ships within the waters of the sea on the landward side of the territorial sea, including such waters within the limits of the State or Territory. As previously referred to, these waters within the limits of a State or Territory can represent large bodies of water and it is considered that the prohibition should equally apply when a ship is in these waters.

Item 26 amends subsection 73(1) by deleting the current spatial limitation on the operation of the subsection, being the territorial sea. This is to be replaced by a new limitation, being the waters of the sea within the outer limits of the territorial sea, including such waters within the limits of a State or an internal Territory.

Item 27 – At the end of paragraph 73(2)(a)

This is a technical amendment only to insert the word "or" between two paragraphs.

Item 28 – Paragraphs 73(2)(b) and (c)

This item amends paragraphs 73(2)(b) and (c) to change the reference to the territorial sea of Australia so that it is consistent with the reference inserted in subsection 73(1) by item 26 above. This is a technical amendment only and does not alter the operation of paragraphs 73(2)(b) and (c).

Item 29 – Subsection 175(1)

This item amends subsection 175(1) by inserting a new definition of *Australian aircraft*. This is defined as having the same meaning as in the *Civil Aviation Act 1988*. This new definition is for the purposes of the new offences to be inserted in section 175 by item 40 below and is the same definition used to define an Australian aircraft in section 59 of the Act.

Item 30 – Subsection 175(1)

This item amends subsection 175(1) by inserting a new definition of *Australian ship*. This is defined as having the same meaning as in the *Shipping Registration Act 1981*. This new definition is also for the purposes of the new offences to be inserted in section 175 by item 40 below and is the same definition used to define an Australian ship in section 59 of the Act.

Item 31 – Subsection 175(1)

This item amends subsection 175(1) by inserting the definition of *coastal aircraft*. This definition will replace the current definition of *prescribed aircraft* which is to be deleted by item 33 below.

This new definition is in substantially the same terms as the definition of *prescribed aircraft* and is only intended to clarify the coverage of this definition. It will not change the intended effect of the original definition. The new term *coastal aircraft* is also being inserted to remove the confusion with the term *prescribed flight* in section 175.

Item 32 – Subsection 175(1)

This item amends subsection 175(1) by inserting the definition of *coastal ship*. This definition will replace the current definition of *prescribed ship* (meaning “a ship that is not currently engaged in making international voyages”) which is to be deleted by item 34 below.

Similar to item 31 above, this new definition is in substantially the same terms as the definition of *prescribed ship* and is only intended to clarify the coverage of this definition. It will not change the intended effect of the original definition. The new term *coastal ship* is also being inserted to remove the confusion with the term *prescribed voyage* in section 175.

Item 33 – Subsection 175(1) (definition of *prescribed aircraft*)

This item repeals the definition of *prescribed aircraft* for the reasons outlined under item 31 above.

Item 34 – Subsection 175(1) (definition of *prescribed ship*)

This item repeals the definition of *prescribed ship* for the reasons outlined under item 32 above.

Item 35 – Subsection 175(1) (definition of *prescribed voyage*)

This item repeals the current definition of *prescribed voyage* and substitutes a new definition. The terms of the new definition are only intended to clarify the intended coverage of the existing definition which provides that a prescribed voyage is one in the course of which ship travels between places outside Australia and does not call at a place in Australia. The terms of the new definition will also provide that a prescribed voyage is one which a ship travels from a place outside Australia and returns to that same place and does not call at a place in Australia. This clarification will not change the intended effect of the original definition.

Item 36 – Subsection 175(2)

This item amends subsection 175(2) by replacing the current references to "prescribed ship" with "coastal ship". This is a technical amendment as a result of the amendment to replace the term "prescribed ship" with "coastal ship" as explained under item 32 above.

Item 37 – Subsection 175(2) (penalty)

This item converts the penalty under subsection 175(2), which is currently expressed in dollar terms, into penalty units. This is a technical amendment only.

Item 38 – Subsection 175(3)

This item amends subsection 175(3) by replacing the current references to "prescribed aircraft" with "coastal aircraft". This is a technical amendment as a result of the amendment to replace the term "prescribed aircraft" with "coastal aircraft" as explained under item 31 above.

Item 39 – Subsection 175(2) (penalty)

This item converts the penalty under subsection 175(3), which is currently expressed in dollar terms, into penalty units. This is a technical amendment only.

Item 40 – After subsection 175(3)

This item inserts new subsections (3A), (3B) and (3C) into section 175 to insert new offences relating to the transfer of goods at sea.

Section 175 makes it an offence to transfer goods from a ship or aircraft engaging in the coasting trade (the coastal ship or coastal aircraft) to a ship or aircraft on a journey to or from Australia (an international voyage or flight) or between places outside Australia (a prescribed voyage or flight). Currently, the offence only applies to persons on one side of the transfer ie, the master or owner of the coastal ship or pilot or owner of the coastal aircraft. The defences to this offence are that the permission of a Collector has been given for the transfer or the transfer is for the purpose of securing the safety of a ship or aircraft or saving life.

It is proposed to extend the offence so that it equally applies the parties on both sides of the transfer. It will be extended to apply to the master or owner of the ship on an international voyage or prescribed voyage and the pilot or owner of the aircraft on the international flight or prescribed flight. New subsection 175(3A) inserts the new offence as it applies to an Australian ship that is on an international voyage or prescribed voyage and an Australian aircraft on international flight or prescribed flight.

New subsection 175(3B) inserts the new offence as it applies to a ship that is not an Australian ship that is on an international voyage or prescribed voyage and an aircraft that is not Australian aircraft on international flight or prescribed flight. However, under international law, the breadth of this offence is restricted where the ship or aircraft is a foreign ship. The offence can only apply where the transfer takes place in the waters of the sea within the outer limits of the territorial sea of Australia or within the 500 metre safety zone around resources and sea installations.

The same defences as under subsections 175(2) and (3) will also apply to these new offences.

New subsection 175(3C) clarifies that, in all cases where the permission of a Collector is referred to in subsections 175(2), (3), (3A) or (3B), it is a permission that is given to the master or owner of the coastal ship or the pilot or owner of the coastal aircraft. It will not be necessary for the master or owner of the ship on an international voyage or prescribed voyage or the pilot or owner of the aircraft on the international flight or prescribed flight to also obtain the Collector's permission for the transfer.

Item 41 – Subsection 175(4)

This item amends subsection 175(4) by inserting cross references to the new subsections 175(3A) and (3B). This is a technical amendment only.

Item 42 – Subsection 175(7)

This item converts the penalty under subsection 175(4), which is currently expressed in dollar terms, into penalty units. This is a technical amendment only.

Item 43 - Subsection 183UA(1) (paragraph (b) of the definition of container)

This item amends the definition of “container” in subsection 183UA(1) of the Act by repealing paragraph (b) of the definition and substituting new paragraphs (b) and (c). The terms of the existing paragraph (b) are unduly restrictive as they only include baggage that is or could be used for the enclosure of other baggage. The new paragraph (b) simply states “any baggage” so that all types of baggage are covered by the definition.

The new paragraph (c) covers any other things that is or could be used for the carriage of goods whether or not the thing is designed for that purpose. This would cover, for example, things like lunch boxes, briefcases, bags and even a jacket wrapped around an article carried by employees of airports and ports.

Item 44 - Subsection 183UA(1) (at the end of definition of Customs place)

This item amends the definition of “Customs place” in subsection 183UA(1) by adding three additional places described in new paragraphs (g), (h) and (j). Paragraphs (g) and (h) cover a place that is the subject of a permission given under section 175 whilst paragraph (j) covers a section 234AA place that is not a place or part of a place already covered in paragraph (aa), (a), (b), (c), (d), (g) or (h) of the definition. Paragraph (j) is intended to cover a place identified as a section 234AA place for processing passengers in remote areas where Customs does not have a permanent presence.

Item 45 - Subsection 183UA(1)

This item amends subsection 183UA(1) by inserting a new definition of the term “designated container”. The term means, “a container referred to in paragraph (c) of the definition of a container”. This definition is particularly relevant to the scope of the new search and seizure power contained in new paragraph 203B(1)(b) (see below) so that it only applies to designated containers a person at a designated place has in his or her immediate physical possession.

Item 46 – Subsection 185(2)

Subsection 185(2) currently sets out the powers that an officer of Customs can exercise in relation to, inter alia, a ship the master of which has been requested to permit the ship to be boarded under subsection 59(1) or (2). Paragraph 185(2)(d) sets out the power to arrest without warrant any person on the ship in the specified circumstance.

As set out under items 20 and 21 above, it is proposed to extend the power to request a master of a ship to permit his ship to be boarded to foreign ships in the contiguous zone. In accordance with international law, however, the power of arrest in paragraph 185(2)(d) in relation to a person on board a foreign vessel which has been boarded in the contiguous zone is subject to Australia's obligations under international law. In recognition of this, new subsection 185(2A) provides that the power of arrest referred to in subsection 185(2) in the contiguous zone in relation to Australia is subject to the obligations of Australia under international law, including obligations under any treaty or convention or other agreement between Australia and another country or other countries.

Item 47 - Section 186

This item amends section 186 by omitting the words "open packages and examine weigh mark and seal" and substituting them with the words "subject to subsections (2) and (3), examine". The omitted words are no longer necessary as the new subsections 186(2) and (3) clarify the scope of the Customs' examination power.

Item 48 - At the end of section 186

This item proposes to consolidate the power to examine goods subject to Customs control currently contained in sections 32, 186 and 278 into a single provision embodied by section 186.

This item inserts new subsections 186 (2) and (3) to clarify Customs' power to examine goods subject to Customs control. New subsection 186 (2) allows a Customs officer to do whatever is reasonably necessary to permit the examination of goods including arranging for another officer or other person having the necessary experience to do the examination. This means that an expert in any particular field may be used in the examination of goods. New subsection 186(3) provides examples of what a Customs officer may do under new subsection (2). The examples include, among other things, the power to read a document either directly or with the use of an electronic device. The examples are not exhaustive and do not purport to circumscribe the limits of the examination power.

This item also introduces new section 186A to give Customs the power to make copies and take extracts of documents in the circumstances set out in new paragraphs 186A(1)(a) and (b). New subsection 186A(2) sets out the different methods by which a copy of, or an extract from, a document may be taken.

The examination power is accompanied by the requirement that Customs pays compensation for any destruction, loss or damage caused to the documents due to insufficient care being exercised in selecting the person to undertake the copying or being exercised by the person undertaking the copying - new section 186B.

New subsection 186B(2) provides for the compensation to be made payable out of money appropriated by the Parliament for that purpose.

New subsection 186B(3) clarifies that a reference to the loss or destruction of, or damage to a document includes a reference to the erasure or addition of electronic data or corruption of the documents concerned.

Item 49 - At the end of section 197

This item amends section 197 by adding new subsections 197(6) and (7) to create a strict liability offence which carries a penalty of 45 penalty units if a person in charge of a conveyance leaving a Customs place refuses to stop that conveyance when required to do so by an officer of Customs.

Item 50 - Subsection 203B(1)

Section 203B currently provides Customs with the power to search and seize, without warrant, special forfeited goods or evidential material related thereto where an authorised person suspects on reasonable grounds that there are special forfeited goods at a Customs place.

However, as part of the National Illicit Drugs Strategy, Customs is to be given additional power to, without warrant, search any "designated container" (see item 45 for its definition) in the immediate physical possession of a person who is at a "designated place" (see item 3 for its definition) and to seize any goods reasonably suspected of being special forfeited goods. For example, this would include airport and port employees at such a place. However, the exercise of this power is to be subject to certain limitations contained in new paragraph 203B(1)(b) and new subsection 203B(2B).

Consequently, this item amends subsection 203B(1) by repealing and substituting it with a new subsection 203B(1). This new subsection sets out the two circumstances in which the search and seizure power in this section applies.

The first circumstance set out in new paragraph 203B(1)(a) occurs where an authorised person *suspects on reasonable grounds* that there are special forfeited goods:

- (i) at, or in a container at, a Customs place; or
- (ii) in, on, or in a container on, a conveyance at a Customs place.

New paragraph 203B(1)(a) therefore covers the present circumstance contained in subsection 203B(1). However, it excludes a search and seizure of a designated container found in the immediate physical possession of a person to whom subparagraph 203B(1)(b)(i) applies.

The second circumstance is set out in new paragraph 203B(1)(b) and covers a specific situation where a person is at a Customs place that is also a

designated place and has in his immediate physical possession a "designated container" or goods reasonably suspected to be special forfeited goods at a "designated place". However, the designated container or special forfeited goods must not be carried on his or her body within the meaning described in new subsection 4(19) (see item 10 above). As explained earlier in item 10, anything deemed to be carried on the body within the meaning of new subsection 4(19) comes within the purview of sections 219L, 219Q and 219R of the Act.

It is intended that designated containers or goods reasonably suspected to be special forfeited goods are only to be regarded to be in the immediate physical possession of a person if they are carried by the person as an item held in the hand, slung over the shoulders, worn on the back (but not carried on the body within the meaning of subsection 4(19)), simply left standing close to the person so that a person can pick it up (for example, at the foot of or beside the person), pushed or pulled by the person with or without the assistance of a trolley or other method of carriage.

Where the containers or goods are not in the immediate physical possession of a person at Customs place that is a designated place, then a Customs officer is required to form a suspicion on reasonable grounds that there are special forfeited goods in the circumstances described in new paragraph 203B(1)(a) before he or she could exercise the search and seizure power under this section.

Item 51 - Subsection 203B(1) (note)

This item repeals the existing note to subsection 203B(1) and substitutes it with new Note 1, 2 and 3.

Note 1 draws attention to the existence of special definitions for the terms "container" and "designated container".

Note 2 is necessary to make it clear that the meaning of designated container does not include the baggage of a passenger, captain or crew of a vessel or aircraft entering or leaving Australia. This is necessary because the thrust of new paragraph 203B(1)(b) is focused on persons who are not passengers, captain or crews.

Note 3 draws attention to the use of new subsection 4(19) in determining whether a person is carrying on his or her body a designated container or goods reasonably suspected to be special forfeited goods.

Item 52 - Subsection 203B(2)

This item effects a technical amendment to subsection 203B(2) to align the provision with the redrafted subsection (1).

Item 53 - Paragraphs 203B(2)(a) and (b)

This item effects a technical amendment to paragraphs 203B(2)(a) and (b) by omitting "the special forfeited goods" (wherever occurring) and substituting "special forfeited goods".

Item 54 - Subsection 203B(2)

This item amends subsection 203B(2) to clarify that the goods are seized under this section because there is a reasonable suspicion that they are special forfeited goods.

Item 55 - After subsection 203B(2)

This item inserts new subsections 203B(2A), (2B) and (2C).

New subsection 203B(2A) gives an authorised person who is an officer of Customs acting in the circumstance set out in new paragraph 203B(1)(b), the power to search, without warrant, any designated container in the immediate physical possession and to seize any goods reasonably suspected of being special forfeited goods whether or not those goods are found as a result of the search.

New subsection 203B(2B) prohibits an authorised person from exercising the powers under subsection (2A) unless the person having immediate physical possession of the container to be searched is present at the time when the container is searched.

New subsection 203B(2C) is a clarifying provision to state that Customs has the power to seize without warrant any goods that have been produced or discovered as a result of a frisk, external or internal search of a person under Division 1B.

Item 56 - Subsection 203B(3)

This item effects a technical amendment to subsection 203B(3) to make it clear that the power in subsection 203B(3) is only to be exercised in conjunction with a search under subsections (2) and (2A).

Item 57 - Subsection 203B(4)

This item effects a technical amendment to subsection 203B(4) to make it clear that the power in subsection 203B(4) is only to be exercised in conjunction with a search under subsections (2) and (2A).

Item 58 - Subparagraph 203C(1)(a)(ii)

Section 203C gives Customs the power to seize, without warrant, special forfeited goods that are narcotic goods at a place other than a Customs place.

This item amends subsection 203C(1)(a) by repealing subparagraph (ii) and substitute it with a new subparagraphs 203C(1)(a)(ii) and (iii). The terms of

subparagraph (ii) remain the same except that the word "or" replaces the word "and" so that subparagraph (iii) contains an alternative circumstance in which section 203C may apply.

Subparagraph (iii) covers the circumstance where an authorised person suspects on reasonable grounds that there are special forfeited goods that are narcotic goods in a container in the immediate physical possession of, but not carried on the body of, a person at a place other than a Customs place. In such a circumstance and provided paragraph 203C(1)(b) is also satisfied, an authorised person may, without warrant, search and seize any goods he or she reasonably suspects are narcotic goods.

Item 59 - Paragraphs 203C(2)(a) and (b)

This item provides a technical amendment to paragraphs 203C(2)(a) and (b) by omitting "the narcotic goods" (wherever occurring) and substituting "narcotic goods".

Item 60 - After paragraph 203C(2)(b)

This item inserts a new paragraph 203C(2)(c). This provision extends the search and seizure power to allow an authorised person to search, without warrant, the container in the immediate physical possession of a person for narcotic goods.

Item 61 - Subsection 203C(2)

This item provides a technical amendment to subsection 203C(2) by omitting "the goods" and substituting "any goods that the authorised person reasonably suspects are narcotic goods" so that it is clear that the goods referred to in the subsection are goods reasonably suspected to be narcotic goods.

Item 62 - After subsection 203C(2)

This item inserts new subsection 203C(2A) to clarify that the seizure power in section 203C extends to seizure of suspected narcotic goods produced or discovered as a result of a frisk, external or internal search conducted under Division 1B at a place other than Customs place.

Item 63 - Subsection 203C(3)

This item provides a technical amendment to subsection 203C(3) by inserting "under subsection (2)" after "searching" so that it is clear that the power in subsection (3) is to be exercised only in the course of a search under subsection (2).

Item 64 - Subsection 203C(4)

This item effects a technical amendment to subsection 203C(4) by omitting "the search" and substituting "a search conducted under subsection (2)" so that it is clear that the power in subsection (4) is to be exercised only in relation to a search under subsection (2).

Item 65 - Subsection 203D(2)

This item remakes subsection 203D(2) and also provides for the use of necessary and reasonable force in the removal of any container or other goods from a person's physical possession in the circumstance described in subparagraph 203C(1)(a)(iii).

Item 66 - Subdivision G (heading)

This item repeals the existing heading and substitutes a new heading so that subsection 203B(2A) is also included in the heading.

Item 67 - Subsections 205(1) and 205B(1), section 205C, subsections 205D(1), 205E(1), 206(1), (2) and (5) and 207(1), section 208D and subsection 208DA(1) (definition of condemned goods)

This item effects technical amendments to all the provisions mentioned above by inserting "(2A)" after "subsection 203B(2)". These provisions set out the procedure to be followed once goods are seized and extends the operation of these sections to seizures under new subsection 203B(2A).

Item 68 - Subparagraph 219A(2)(c)(i)

This item effects a technical amendment to subparagraph 219A(c)(i) by inserting "or (2A)" after "203B(2)".

Item 69 - Subsection 219L(1)

This item effects a technical amendment to subsection 219L(1) to align the terms of the provision with the new subsection 4(19).

Item 70 - Subsection 219L(1)

This item amends subsection 219L(1) to extend the detention and frisk search powers to apply to a designated place (see definition of "designated place" above) by omitting "a place identified under section 234AA as a place of a kind referred to in that section" and substituting "a designated place".

Item 71 - After subsection 219L(1)

This item amends subsection 219L(1) by inserting new subsections (1A) and (1B) to extend the detention and frisk search powers further to cover situations on board a ship, aircraft or installation.

New subsection 219L(1A) gives Customs officers conducting a search or exercising a power under section 185 or 187 on board a ship, aircraft or installation the power to detain and frisk search a person suspected on reasonable grounds to be unlawfully carrying prohibited goods on his or her body.

New subsection 219L(1B) gives Customs officers conducting a search or exercising a power under section 185 on board a ship or aircraft the power to detain and frisk search a person on board that ship or aircraft or who is about to board a Customs vessel for a purpose connected with the search or the exercise of such other power for any weapon or thing that is capable of being used to inflict bodily injury on an officer. This power may only be exercised if a Customs officer suspects on reasonable grounds that a person is unlawfully carrying on his or her body such a weapon or thing.

Item 72 - Subsection 219L(2)

This item effects a technical amendment to subsection 219L(2) so that it applies to new subsections 219L(1A) and (1B).

Item 73 - Paragraph 219L(2)(e)

This item repeals paragraph 219L(2)(e) and substitutes it with new paragraphs 219L(2)(e), (f) and (g).

New paragraph 219L(2)(e) recasts the existing paragraph (e) so that the appearance of any visible item or baggage of a person is a basis on which a reasonable suspicion may be formed.

New paragraphs 219L(2)(f) and (g) include the answers or documents given or failure or refusal to answer or produce documents to a Customs officer as a basis on which a reasonable suspicion may be formed.

Item 74 - Subsection 219M(2)

This item amends subsection 219M(2) so that the requirements as to the provision of personal privacy contained in the subsection only apply to a person who is detained in a designated place that is also a section 234AA place. This amendment is considered necessary because Customs may not be able to always comply with those requirements in a designated place that is not a section 234AA place. However, Customs will, in such places, endeavour to give the detainee as much privacy as the circumstances of the search allow (see below).

Item 75 - At the end of section 219M

This item inserts new subsections 219M(3) and (4).

New subsection 219M(3) requires a Customs officer conducting a frisk search under section 219L to use his or her best endeavours to give a person

detained at a designated place other than a section 234AA place as much personal privacy as the circumstances of the search allow.

New subsection 219M(4) introduces certain requirements with which a Customs officer must comply before carrying out a frisk search for weapon or thing that is capable of being used to inflict bodily injury on an officer under subsection 219L(2B).

An officer must inform the detainee:

- (a) of the purpose of the detention, that is, to conduct a search for any weapon or thing capable of being used to inflict bodily injury on an officer – new paragraph 219M(4)(a);
- (b) that he must submit to the search and that the officer may take possession of any weapon or such thing found as a result of the search – new sub-paragraphs 219M(4)(b)(i) and (ii); and
- (c) that if he fails to submit to the search or having submitted to the search attempts to prevent an officer taking possession of any thing found, the officer may use reasonable force to conduct the search and take possession of that thing – new sub-paragraph 219M(4)(b)(iii).

Item 76 - Section 219N

This item repeals the existing section 219N and substitutes it with new sections 219N and 219NA.

New section 219N recasts the existing provision to include express references to a frisk search carried out under new subsections 219L(1) or (1A) so that an officer carrying out a search under those subsections may require the production of any thing found as a result of the search in order to determine whether the thing is or contains prohibited goods unlawfully carried by the detainee.

New section 219NA is the empowering provision for a frisk search carried out under new subsection 219L(1B).

New subsection 219NA(1) gives a Customs officer the power to use reasonable force to conduct a frisk search of a person detained under subsection 219L(1B) or to take possession of any weapon or thing found that is capable of being used to inflict bodily injury on an officer conducting a search or exercising a power under section 185 of the Customs Act. This force may be used where the detainee refuses to submit to a frisk search or having submitted, attempts to prevent an officer taking possession of any weapon or thing found as a result of the frisk search.

New subsection 219NA(2) allows a Customs officer who has taken possession of a weapon or thing under subsection (1) to retain it for so long

only as is necessary to permit the conduct of the search or exercise of any other power under section 185 without risk of injury.

New subsection 219NA(3) is a clarifying provision to state that a Customs officer may, under sections 203, 203C or 203M, whichever is applicable at that time, seize any prohibited goods coincidentally found as a result of a frisk search under subsection 219(1B).

Item 77 - Section 219P

This item amends section 219P by omitting "section 219L" and substituting "subsection 219L(1) or (1A)" in its place. This has the effect of allowing section 219R (which deals with the power to conduct an external search) to apply to a person detained under subsections 219L(1) or (1A), but not subsection 219L(1B), in the circumstances where a detainee refuses to submit to a frisk search or, having submitted, refuses to produce a thing required under section 219N. Consequently, a Customs officer may only conduct a frisk search for any weapon or thing under subsection 219L(1B) without recourse to an external search. A frisk search is considered sufficient because new section 219NA already confers Customs with the power to use reasonable force to conduct the frisk search and to take possession of any weapon or thing found.

Item 78 - Subsection 219Q(1)

This item effects a technical amendment to subsection 219Q(1) so that new subsections 4(19) and (19A) apply.

Item 79 - paragraph 219R(1)(b)

This item effects a technical amendment to paragraph 219R(1)(b) to ensure consistency of expression in light of amendment to subsection 219Q(1) above.

Item 80 - Paragraph 219R(1)(d)

This item amends paragraph 219R(1)(d) to implement the Commonwealth Ombudsman recommendation that a detention or police officer must apply to a Justice in the first instance for an external search order unless a circumstance contained in new subsection 219R(1A) occurs (see below). In such a case, an application for the order may be made to an authorised officer instead of a Justice.

Item 81 - After subsection 219R(1)

This item inserts new subsection 219R(1A). This amendment allows a detention or police officer to apply to an authorised officer instead of a Justice in either of two circumstances:

- (a) where a detainee has waived his or her right to have application for an external search order considered by a Justice; or
- (b) where a Justice is not reasonably available to consider such an application (for example where the search is to be conducted in a remote place).

Item 82 - paragraph 219R(12)(d)

This item effects a technical amendment to paragraph 219R(12)(d) to ensure consistency of expression in light of amendment to subsection 219Q(1) above.

Item 83 - After subsection 219ZC(2)

This item inserts new subsection 219ZC(2A). This amendment implements the recommendation of the Commonwealth Ombudsman that reasonable and necessary force may only be used in the conduct of an external search if:

- (a) an external search order has been made by a Justice and the detainee does not submit to the search; or
- (b) an external search order has been made by an authorised officer because a Justice was not reasonably available.

Any force used in the conduct of an external search in circumstances other than those set out above will not be regarded as reasonable and necessary.

Item 84 - After paragraph 219ZE(1)(c)

This item inserts new paragraphs 219ZE(1)(ca) and (cb) to extend the provisions that provide for the cessation of a detention to the new circumstances under subsections 219L(1), (1A) or (1B). A detention under those provisions ceases when no detention officer suspects on reasonable grounds that a detainee is unlawfully carrying prohibited goods or a weapon or thing capable of being used to inflict bodily injury.

Item 85 - Paragraph 219ZE(1)(d)

This item effects a technical amendment to paragraph 219ZE(1)(d) to ensure consistency of expression in light of amendment to subsection 219Q(1) above.

Item 86 - After subsection 219ZL(4)

This item inserts new subsection 219ZL(4A) to provide protection from civil or criminal action for Justices performing a function connected with making an order under section 219R.

Item 87 - After Part XII

This item inserts a new "Part XIIA – Special provisions relating to prohibited weapons".

New section 227A Overview of Part

New section 227A provides an overview of the Part. This Part provides a scheme whereby Customs may take into custody certain weapons on board a ship or an aircraft that is in Australia after arriving in Australia from a place outside Australia if there is no secure place on board the ship or aircraft to keep the weapons for the duration of the ship's or aircraft's stay in Australia.

New section 227B Definition

New section 227B provides definitions for the terms "operator" and "prohibited weapon" so that in this Part "operator" means the owner, master or pilot of a ship or aircraft and "prohibited weapon" means "a thing that is a firearm, firearm accessory, firearm part, firearm magazine or ammunition to which this Part applies because of section 227D."

New section 227C Ships and aircraft to which this Part applies

New section 227C sets out the circumstances in which this Part would apply to a ship or aircraft.

This Part applies to a ship or an aircraft if the ship or aircraft is in Australia after undertaking a voyage to Australia from a place outside Australia and the ship or aircraft is not a ship or an aircraft that is taken to have been imported into Australia under subsection 49A(7) - new subsections 227C(1) and (2).

This part ceases to apply to a ship or an aircraft when the ship or aircraft has departed from its last port or airport in Australia for a place outside Australia or when the ship or aircraft is taken to have been imported into Australia under subsection 49A(7) - new subsections 227C(3) and (4).

New subsections 227C(5) and (6) are inserted to ensure that this Part applies afresh to a ship or an aircraft which has departed from its last port or airport in Australia for a place outside Australia but has returned before completing its voyage to that place outside Australia.

New section 227D Weapons to which this Part applies

New subsection 227D provides for the application of this part to any thing that is a firearm, firearm accessory, firearm part, firearm magazine or ammunition if it:

- a) is on board a ship or an aircraft to which this Part applies; and

- b) falls within column 2 of an item in Part 2 of Schedule 6 to Regulation 4F of the Customs (Prohibited Imports) Regulations ("the Regulations"); and
- c) does not meet the requirements that apply to that thing as specified in column 3 of that item in that Part of that Schedule of the Regulations; and
- d) is, or should have been, specified in a report given by the operator under section 64AA as part of the stores, or personal effects of the crew, of the ship or aircraft.

It should be noted that the firearm, firearm accessory, firearm part, firearm magazine or ammunition covered by this part would be prohibited imports under Regulation 4F of the if they were landed or intended to be landed.

New section 227E Approved storage for prohibited weapons

New section 227E covers matters relating to the approved storage for prohibited weapons.

New subsection 227E(1) gives an officer of Customs the discretion to approve, in writing, a place on board a ship or an aircraft to store prohibited weapons while this part applies to the ship or aircraft.

An officer must not approve a place on board a ship or an aircraft to store prohibited weapons unless he or she is satisfied that only the operator may access the place and the place is otherwise sufficiently secure for the purposes of preventing persons from removing the weapon from the place (new subsection 227E (2)).

New subsection 227E(3) gives an officer the power to place a fastening, or a lock, mark or seal on an approved place for the purposes of preventing persons from accessing that place.

New subsection 227E(4) provides for an approval given under subsection (1) to continue in force, if not revoked at an earlier time, until this Part ceases to apply to the ship or aircraft concerned.

New subsections 227E(5) and (6) create a strict liability offence carrying a penalty of 45 penalty units for a person who interferes in any way with any fastening, lock, mark or seal placed on the approved place by an officer or who remove the weapon from the approved place.

New section 227F Officer may take custody of weapons

This section deals with matters relating to the custody of prohibited weapons under this Part.

New subsection 227F(1) requires an officer to take custody of a prohibited weapon where no approval under section 227E is in force while this Part applies to that weapon.

New subsection 227F(2) requires an officer to give a written notice, within 48 hours after taking custody of a prohibited weapon, to the operator of the ship or aircraft from which the weapon is taken.

New subsections 227F(3) and (4) requires the notice to be in an approved form and to identify the prohibited weapon concerned.

New subsection 227F(5) requires the CEO to ensure that a weapon taken into custody be securely stored and returned to the operator of the ship or aircraft concerned when it is at its last port or airport of call in Australia and after a section 118 Certificate of Clearance has been given or when this Part ceases to apply to the ship or aircraft because it is taken to have been imported into Australia under subsection 49A(7).

New subsection 227F(6) is a clarifying provision to ensure that new subsection 227F(5) does not affect Customs power to seize or otherwise deal with the weapon under the Act when this Part ceases to apply to the ship or aircraft concerned.

New subsection 227F(7) requires an operator to comply with any conditions specified by the CEO in relation to the storage of weapons returned to the operator under subsection (5) before the ship or aircraft leaves Australia.

New Section 227G Compensation for damage etc. to weapons

New section 227G provides for compensation for the loss, destruction or damage to a prohibited weapon taken into custody by Customs to be made to the owner where the loss, destruction or damage is caused by insufficient care being exercised in selecting the persons to undertake an activity in relation to a prohibited weapon taken into custody or insufficient care being exercised by such person undertaking that activity. New section 227G also provides for the compensation to be made payable out of money appropriated by the Parliament.

Item 88 - Section 278

This item repeals section 278 as the examination power is now consolidated in section 186 (see above).

SCHEDULE 2 – AMENDMENT OF THE CUSTOMS ADMINISTRATION ACT 1985

Item 1 – Subsections 16(1), (2) and (3)

This item repeals the existing subsections 16(1), (2) and (3) of the *Customs Administration Act 1985* (which is “the Act” referred to in the clause notes for this Schedule) and substitutes new subsections (1), (1A), (2), (3), (3A), (3B), (3C), (3D), (3E).

Overview

New subsection 16(1) is an overview of the section and setting out its purpose following the insertion of the new provisions.

Definitions

New subsection 16(1A) sets out definitions which will apply in section 16. The existing definitions at Subsection (7) of “AQIS”, “authorised officer of AQIS” and “food” are moved to this subsection and a number of new definitions included.

In relation to the following definitions inserted under the new subsection (1A):

the term “**authorised person**” is intended to identify those persons who under subsection (2) will be subject to the obligation of secrecy and who may be authorised by the Chief Executive Officer of Customs (CEO) or his or her delegate to disclose information or a class or information in accordance with the section. The definition extends to persons who are engaged to provide goods or services to the Commonwealth through the Australian Customs Service e.g. contractors and consultants;

the definition of “**Commonwealth agency**” is inserted into the Act. This alters the current situation in which the term “agency” takes its meaning from that contained in the *Freedom of Information Act 1982*. Inserting this definition eliminates the need to have to look at two Acts to find out what the term means;

the “**duties**” being performed by an “**authorised person**” subject to the secrecy provisions are those duties connected with responsibilities performed on behalf of Customs. The Act’s secrecy provisions do not apply to other responsibilities of a person, for example where a State government employee performs some Customs functions, the secrecy provisions would not extend to those responsibilities concerning the state government;

an “**international organisation**” is defined as one falling within the meaning of the *Diplomatic Privileges & Immunities Act 1967* or as identified as such within regulations made under the Act. This definition is necessary for the disclosure provision at subsection (3D);

the expression "**personal information**" has the same meaning as arises in the Privacy Act 1988. Later new provisions specifically address the disclosure of personal information and it is intended to remain consistent with that Act in the meaning of that expression.

the definition of "**principal officer**" is inserted into the Act. This alters the current situation in which the term "agency" takes its meaning from that contained in the *Freedom of Information Act 1982*. Inserting this definition eliminates the need to have to look at two Acts to find out what the term means;

the "**protected information**", that is, the information the subject of the Act's secrecy provisions is that acquired as a consequence of performing the duties of an authorised person;

"**State**" is defined expressly to include the Northern Territory and the Australian Capital Territory. The existing s.16(1)(c) defines State to include the Northern Territory, but makes no provision for the Australian Capital Territory;

"**State agency**" is a new definition in similar terms to that of "Commonwealth agency". However, as the definition is applicable to the official disclosure provisions at subsection (3B) and (3C) and it is not intended that those provisions be used for disclosures to a municipal corporation or any other local government body, the definition expressly excludes these latter bodies.

Prohibition against disclosure etc. of protected information

New subsection 16(2) is an offence provision, which prohibits a person who is or has been an authorised person making a record or disclosing protected information except if authorised by the Section or as required or authorised by another law or in the course of performing duties. The maximum penalty is imprisonment for two (2) years.

This provision:

- . eliminates the reference in the existing s.16(2) to producing documents and refers solely to making a record or disclosing protected information; and
- . removes the complexity in the existing s.16(2) arising from the need to prove the elements of breach of confidence as part of any prosecution under the provision.

Authorised disclosures under this section

New subsection 16(3) ensures that disclosures under subsections (3A), (3B), (3C) or (3D) are authorised by the Section and that acting in accordance with

those Subsections would constitute a lawful exception to the offence provision at subsection (2). (See paragraph (2)(c)).

- . The authorisation is subject to compliance with particular requirements in relation to personal information proposed in subsections (7), (8), (9) and (10).

CEO's authorisation – Commonwealth agency

New subsection 16(3A) provides that the CEO may authorise in writing the disclosure of information or a class of information by an authorised person to a Commonwealth agency for the purpose of its functions. This provision has a number of features:

- . The disclosure may be made to the principal officer of that agency or a person authorised to act on behalf of that agency. This seeks to correct the existing anomaly that disclosure to a Commonwealth agency under s.16(3)(a)(i) may only be made to the principal officer.
- . The provision provides for the disclosure of a class of information so as to allow a single authorisation in writing to suffice rather than multiple approvals for essentially the same kind of material.
- . This would permit computer transfer of a class of information, subject to conditions which may apply (see also paragraph ((3A)(d)). There is no provision in the existing provision for computer transfer of information.
- . The CEO must be satisfied that the Commonwealth agency has undertaken not to further use or disclose material to be provided except for the purpose given in the authorisation. The material may not otherwise be disclosed except as required or authorised by law. The purpose must be specified in writing (paragraph (3A)(d)) and the CEO may not specify any purpose that is not related to the performance of the functions of the recipient agency concerned (subsection (3E)(a)).
- . The CEO may not authorise a disclosure of personal information under subsection (3A) without complying with the additional requirements set out at subsections (7), (8) and (10).

CEO's authorisation – State agency for Commonwealth purposes

New subsection 16(3B) provides that the CEO may authorise the disclosure of information or a class of information by an authorised person to a State agency for the carrying out of a Commonwealth function by that agency. For example in relation to a State government official performing functions on behalf of Customs in a remote area. This provision is similar in substance to subsection (3A) including in relation to the requiring of an undertaking from the agency (Subsection (3B) (b)) and additional limitations which must be complied with concerning personal information (Subsections (7), (8) and (10)).

The existing provisions (s.16(3)) do not provide for disclosures to a State agency to carry out a Commonwealth function.

The CEO may not authorise disclosure for a purpose under this provision other than for a specified purpose relating to the performance by that State agency of a Commonwealth function (Subsections (3B) (d) and (3E)(b)).

CEO's authorisation – State agency for State purposes

New subsection 16(3C) provides that the CEO may authorise the disclosure of information or a class of information by an authorised person to a State agency for the performance of its **own** functions. Similarly to subsections (3A) and (3B) there is a requirement in relation to the requiring of an undertaking from the State agency (Subsection (3C) (b)) and additional limitations which must be complied with concerning personal information (Subsections (7),(8) and (10)).

The existing provisions (s.16(3)(b)) limit disclosure to the State authorities to where the CEO is satisfied that the information will be used for an investigation whether an offence has been committed under State law. The new provision recognises that there may be circumstances where disclosure to a State agency may be necessary for different purposes including intelligence purposes with law enforcement authorities, revenue matters and so on.

The CEO may not authorise disclosure for a purpose for disclosure under this provision other than for the performance of the functions of the State agency concerned (Subsections (3C)(d) and (3E)(c)).

CEO's authorisation – certain agreements

New subsection 16(3D) provides that the CEO may authorise the disclosure of information or a class of information by an authorised person to a foreign country, an instrumentality or agency of a foreign country or an international organisation.

It recognises that an agreement may be entered into by the Commonwealth or a particular Commonwealth agency (including the Australian Customs Service) which may involve the disclosure of information. For example an agreement with a foreign Customs service or other law enforcement body. Where such an agreement exists, the CEO may under subsection (3D) authorise disclosure subject to an undertaking that the information will not be used or further disclosed except for the purpose for which the disclosure was authorised (Subsection (3D)(b) and (d)).

The existing provision (s.16(3)(c)) provides for disclosure to the government of a foreign country for the purpose of investigating whether an offence has been committed against the law of that country or for investigating whether circumstances exist by reason of which the Minister or CEO may exercise a power under Commonwealth law. The new provision seeks to address the

deficiencies in the provision by recognising the existence of foreign agencies as such (e.g., foreign Customs and law enforcement agencies) as well as international organisations. While the new provision requires that an agreement exist, the authority to disclose is based on the subsection and a distinct decision by the CEO to disclose under the subsection is required.

The CEO may not authorise a disclosure under subsection (3D) unless the purpose is related to the purpose of the agreement concerned (See subsection (3E)(d)).

The CEO may specify the manner of disclosure as well as any conditions under which the disclosure is made (Subsection (3D)(d)). The new provision would permit the disclosure of information or a class of information by computer system if the CEO so specified in the authorisation.

The CEO may not disclose personal information under subsection (3D) unless the additional requirements at subsections (7), (8) and (10) are complied with.

Specified purpose in an authorisation by the CEO

New subsection 16(3E) limits the CEO from authorising a disclosure of information or a class of information under subsections (3A), (3B), (3C) or (3D) as discussed above.

Within those disclosure provisions, at paragraphs (3A)(d), (3B)(d), (3C)(d) or (3D)(d) respectively, the CEO is required to specify a purpose for which the disclosure is authorised to be made. This purpose must be within the limits of a purpose set out in subsection (3E) applicable to that subsection.

Subsection (3E) applies to the any disclosure of information or a class or information under those subsections, irrespective of whether or not personal information is involved

Where personal information is concerned, the requirements of subsection (3E) must be met as well as subsections (7) to (10) (discussed below) before the CEO can authorise a disclosure.

Authorised disclosure because of threat to health or life

New Subsection 16(3F) is inserted in recognition of the fact that there are emergency circumstances in which making a record or disclosing information must take place. Where there are reasonable grounds to believe that a serious and imminent threat to the health or life of a person or persons may exist and it is necessary to act to avert or reduce that threat, then subsection (3F) permits the making of a record, or the disclosure of information to another person.

Subsection (3)(b) ensures that subsection (3F) is considered an authority to make a record or disclose protected information.

Item 2 – Subsection 16(7)

Under this item, subsection 16(7) is repealed. That provision contained definitions placed within the new subsection (1A). New subsections (7), (8), (9) and (10) are substituted for subsection 16(7).

Disclosure of personal information

New subsections 16(7), (8), (9) and (10) impose requirements in relation to an authorisation for disclosure of information which may be or contain personal information. These apply **in addition** to any requirements arising in the authorisation provisions at subsections (3A), (3B), (3C), (3D) or (4).

This reflects a considerable change from the existing s.16(3), which does not expressly mention personal information, though disclosure is subject to the requirements of the Privacy Act 1988. These new requirements are intended to be consistent with that latter Act.

New subsection 16(7) ensures that where personal information is concerned the -provisions under the section do not authorise disclosure unless in the case of:

- . particular information: there is compliance with subsection (8); and
- . a class of information: there is compliance with subsections (8) and (10).

The subsection essentially requires that any authorisation of the CEO for the disclosure of personal information must meet the terms of subsection (8) and conform with one or more of the purposes set out in subsection (9) for that disclosure to be lawful. Where the intended authorisation concerns a class of information, it must also conform with these requirements together with those set out in subsection (10) with respect to the regulations.

New subsection 16(8) applies to any disclosure of particular information or a class of information that contains personal information. It requires the CEO to be satisfied that the disclosure is necessary for one of the purposes at subsection (9) and that the given purpose must be specified in any written authorisation under subsections (3A) to (3D) or otherwise a written approval in relation to subsection (4). It also requires that the actual disclosure be made for that purpose.

New subsection 16(9) specifies the only permissible purposes for which information or a class of information containing personal information may be authorised to be disclosed under the section. They are:

- (a) the administration or enforcement of a law of the Commonwealth, of a Territory or of another country that relates to:
 - (i) criminal law; or
 - (ii) a law imposing a pecuniary penalty or providing for the forfeiture of property;

(b) in relation to a law referred to in paragraph (a), the prevention of crime, or the detection or analysis of criminal conduct, in respect of that law;

(c) the administration or enforcement of a law of a State that relates to:

- (i) criminal law; or
- (ii) a law imposing a pecuniary penalty or providing for the forfeiture of property;

(d) in relation to a law referred to in paragraph (c), the prevention of crime, or the detection or analysis of criminal conduct, in respect of that law;

(e) a purpose relating to the protection of public health, or the prevention or elimination of risks to the life or safety of an individual or a group of individuals;

(f) the collection of the public revenue of the Commonwealth, a Territory or another country;

(g) the collection of the public revenue of a State;

(h) a purpose relating to a law of customs or excise;

(i) a purpose relating to immigration, quarantine or border control between Australia or another country;

(j) the administration of laws with respect to commerce:

- (i) between a State and another State; or
- (ii) between a State and a Territory; or
- (iii) between a Territory and another Territory; or
- (iv) between Australia and another country;

(k) the administration or enforcement of laws with respect to commerce within a State.

New subsection 16(10) is a requirement in addition to subsections (7), (8) and (9) that applies to the situation where a class of information containing personal information may be disclosed. The new subsection (10) requires that the identity of the:

- . Commonwealth agency;
- . State agency;
- . instrumentality or agency of a foreign country; or
- . international organisation,

to which a disclosure is being authorised must first be specified in regulations. It also requires the regulations to specify the class of information that may be disclosed to that agency, country, instrumentality or organisation concerned. These regulations must be in existence before any such authorisation for disclosure is made.

The purpose of the particular disclosure of a class of information containing personal information must be a permissible purpose set out at subsection (9).

Item 3 – After Section 16

New section 16AA is intended to make provision for the purposes of a prosecution for an offence against the secrecy provision at the new subsection 16(2) as well as related offences arising at ss. 5, 6, 7, 7A or 86(1) of the *Crimes Act 1914*. It provides a means of proving the state of mind of a body corporate and individuals in relation to particular conduct as well as to attribute the conduct of a director, employee or agent of a body corporate to that body corporate where the conduct was within actual or apparent authority.

This new section is necessary as the offence provision at subsection 16(2) concerns the conduct of an “authorised person” which can include a director, employee or an agent of a body corporate engaged to provide goods or services to the Commonwealth through the Australian Customs Service (See the definition of “authorised person” at new subsection 16(1A)).

Under consultancies and contracts for the provision of services, such parties may gain access to protected information. Therefore, the same legal responsibility under the new provisions are to apply to these as to officers or employees of the Australian Customs Service.