

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2010 No. 313**

Issued by the Authority of the Minister for Home Affairs

*Customs Act 1901*

*Customs Amendment Regulations 2010 (No. 3)*

Subsection 270(1) of the *Customs Act 1901* (the Customs Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Customs Act prescribing all matters which by the Customs Act are required or permitted to be prescribed, or as may be necessary or convenient to be prescribed, for giving effect to the Customs Act.

Under Subdivision B of Division 1 of Part XII of the Customs Act (Subdivision B of Part XII), officers of Customs are given various powers in relation to ships reasonably suspected of being involved in a contravention of prescribed Acts in Australia's maritime zones. These include, for example, powers to board and search ships and persons on board, examine goods and examine and copy documents. These powers are contained in sections 184A, 185, 185AA, 185B and 186A of Subdivision B of Part XII of the Customs Act.

Regulation 167 of the *Customs Regulations 1926* (the Principal Regulations) prescribes a number of Acts for the purpose of the provisions contained in Subdivision B of Part XII. Prescribing an Act for a provision of Subdivision B of Part XII permits an officer to exercise the powers contained in the provision to enforce or to gather evidence of a contravention, or attempted contravention, of the prescribed Act.

The amending Regulations update the list of Acts prescribed in regulation 167 of the Principal Regulations for the purposes of sections 184A, 185, 185AA, 185B and 186A of Subdivision B of Part XII of the Customs Act.

Subsection 270(6) of the Customs Act provides that regulations made for the purposes of the powers contained in Subdivision B of Part XII must not prescribe an Act unless the Act deals with a subject matter in relation to which the *United Nations Convention on the Law of the Sea* (UNCLOS) gives Australia jurisdiction. UNCLOS gives Australia certain jurisdiction in relation to foreign ships in Australia's various maritime zones including its territorial sea, contiguous zones, exclusive economic zone, the high seas and safety zones around artificial structures, such as sea installations. This restriction is reflected in the amending Regulations.

An overview of the powers contained in Subdivision B of Part XII of the Customs Act is at [Attachment A](#).

Details of the amending Regulations are at [Attachment B](#).

Customs and Border Protection developed the amendments in consultation with the Office of International Law in the Attorney-General's Department. In addition, Customs and Border Protection has consulted with the members of the Joint Agencies Maritime Advisory Group Maritime Legislation Working Group, including Border Protection Command, the Royal Australian Navy, the Department of Defence, the Australian Maritime Safety Authority, the Department of Agriculture, Fisheries and Forestry, the Australian Fisheries

Management Authority, the Attorney-General's Department, the Australian Government Solicitor, the Australian Federal Police, the Australian Communications and Media Authority, the Department of Foreign Affairs and Trade, the Australian Quarantine and Inspection Service, the Department of the Environment, Water, Heritage and the Arts, the Department of Immigration and Citizenship, the Great Barrier Reef Marine Park Authority, the Department of Resources, Energy and Tourism, the Department of the Prime Minister and Cabinet and the Department of Infrastructure, Transport, Regional Development and Local Government. Customs and Border Protection has also consulted outside of that group with the Australian Transaction Reports and Analysis Centre, the Commonwealth Director of Public Prosecutions and the Department of Health and Ageing.

The amending Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

0608084A

**OVERVIEW OF THE POWERS IN SUBDIVISION B OF DIVISION 1 OF  
PART XII OF THE *CUSTOMS ACT 1901***

**Section 184A**

Section 184A of the *Customs Act 1901* (the Customs Act) permits an officer to board, in certain circumstances, ships that are, will be or have been involved in a contravention, or an attempted contravention, of the Customs Act, section 72.13 of Division 307 of the *Criminal Code Act 1995* (the Criminal Code) or an Act prescribed by the Regulations. However, whether a ship may be boarded for the purpose of enforcing these Acts depends on whether Australia has been given jurisdiction under the *United Nations Convention on the Law of the Sea* (UNCLOS). UNCLOS gives Australia certain jurisdiction in relation to foreign ships in Australia's various maritime zones including its territorial sea, contiguous zones, exclusive economic zone, the high seas and safety zones around artificial structures, such as sea installations.

The circumstances that certain ships involved in a contravention or an attempted contravention of a prescribed Act may be boarded is detailed in the subsections contained in section 184A. Subsection 184A(2) deals with the boarding of a foreign ship in Australian waters, subsection 184(3) deals with the boarding of Australian ships outside territorial seas of other countries, subsection 184A(4) deals with the boarding of a foreign ship in Australia's contiguous zone, subsection 184(4A) deals with the boarding of a foreign ship within 500 metres of an Australian installation or Australian sea installation, subsection 184A(5) deals with the boarding of a mother ship on the high seas which has supported the contravention by another ship of an offence in Australia, subsection 184A(6) deals with the boarding of a foreign ship in Australia's exclusive economic zone, subsection 184A(7) deals with the boarding of a foreign ship on the high seas which has supported the contravention by another ship of an offence in Australia's exclusive economic zone, subsection 184A(8) deals with the boarding of certain foreign ships on high seas and subsection 184A(9) deals with the boarding of ships without nationality on the high seas.

**Section 185**

The powers of officers under subsection 185(2) of the Customs Act includes a power to search a ship and goods on the ship and to require persons onboard to produce documents. Subsection 185(2) also provides power for an officer to arrest a person onboard without a warrant in certain circumstances, the power to secure goods found onboard in certain circumstances and to take copies or extracts of documents found or produced in certain circumstances.

Paragraph 185(2)(d) of the Customs Act specifies the circumstances that an officer may arrest a person onboard a ship without a warrant. The ability to arrest a person without a warrant applies when:

- the person to be arrested is found on a ship that is in Australia and the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of, an offence, either in or outside

Australia, against the Customs Act, section 72.13 or Division 307 of the Criminal Code or an Act prescribed by the regulations (subparagraph 185(2)(d)(i));

- the person to be arrested is found on a ship that is outside Australia and the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of an offence in Australia against the Customs Act, section 72.13 of Division 307 of the Criminal Code or an Act prescribed by the regulations (subsubparagraph 185(2)(d)(ii)(A));
- the person to be arrested is found on a ship that is outside Australia and the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of an offence in Australia's exclusive economic zone against an Act prescribed by the regulations (subsubparagraph 185(2)(d)(ii)(B)).

Paragraph 185(2)(cb) of the Customs Act provides that an officer may take possession of any goods found on a ship which has been boarded and any documents produced by a person found on the ship if the officer has reasonable grounds to believe that the goods or documents may afford evidence of the commission of a relevant offence. Goods found or documents produced will only be considered to afford evidence of the commission of a relevant offence in the following circumstances:

- if the ship is in Australia, the goods or documents afford evidence of the commission of an offence, either in or outside Australia, against the Customs Act, section 72.13 or Division 307 of the Criminal Code or an Act prescribed by the regulations (paragraph 185(7)(a));
- if the ship is outside Australia, the goods or documents afford evidence of the commission of an offence in Australia against the Customs Act, section 72.13 or Division 307 of the Criminal Code (subparagraph 185(7)(b)(i)) or in Australia's exclusive economic zone against an Act prescribed by the regulations (subparagraph 185(7)(b)(ii)).

Subsection 185(3) of the Customs Act further provides an officer with the ability to detain a ship and to bring, or cause it to be brought, to a port or to another place. This power may be exercised when:

- the ship is in Australia and the officer reasonably suspects that the ship is or has been involved in a contravention, either in or outside Australia, of the Customs Act, section 72.13 or Division 307 of the Criminal Code or an Act prescribed by the regulations (paragraph 185(3)(a));
- the ship is an Australian ship that is outside Australia and the officer reasonably suspects that the ship is, will be or has been involved in a contravention, either in or outside Australia, of the Customs Act or any other Act (paragraph 185(3)(b));
- the ship is a foreign ship which is outside Australia and the officer reasonably suspects that the ship is, will be or has been involved in a contravention, in Australia, of the Customs Act, section 72.13 or Division 307 of the Criminal Code or an Act prescribed by the regulations (subparagraph 185(3)(c)(i));
- the ship is a foreign ship that is outside Australia and the officer reasonably suspects that the ship is, will be or has been involved in a contravention in Australia's exclusive economic zone of an Act prescribed by the regulations (subparagraph 185(3)(c)(ii)).

## **Section 185AA**

Section 185AA of the Customs Act permits a person, his or her clothing and property under the immediate control of the person, to be searched without a warrant where the person is found on a ship that has been boarded under paragraph 185(2)(a) or the person has been placed on a ship under subsection 185(3AA). Subsection 185(1A) provides that the purpose of the search is to find out whether the person is carrying, or is hidden on the person, in the clothing or in their property, a weapon or other thing capable of being used to inflict bodily injury or to help the person escape or a document, or other thing, that the person undertaking the search has reasonable grounds to believe may afford evidence of the commission of a relevant offence.

Subsection 185AA(1B) specifies the following as when a document or other thing carried or hidden on a person, in a person's clothing or in a person's property, may afford evidence of the commission of a relevant offence:

- where the person is found on a ship in Australia, the document or other thing may afford evidence of the commission of an offence, either in or outside Australia, against the Customs Act, section 72.13 or Division 307 of the Criminal Code or an Act prescribed by the regulations (paragraph 185AA(1B)(a));
- where the person is found on a ship outside Australia, the document or other thing may afford evidence of the commission of an offence in Australia against the Customs Act, section 72.13 or Division 307 of the Criminal Code or an Act prescribed by the regulations (subparagraph 185AA(1B)(b)(i));
- where the person is found on a ship outside Australia, the document or other thing may afford evidence of the commission of an offence in Australia's exclusive economic zone against an Act prescribed by the regulations (subparagraph 185AA(1B)(b)(ii)).

## **Section 185B**

Section 185B of the Customs Act enables the Chief Executive Officer of Customs to direct an officer to move and/or destroy a ship under certain circumstances. Section 185B applies to:

- a ship that is in Australia and an officer reasonably suspects that the ship is or has been involved in a contravention or an attempted contravention, either in or outside Australia, of the Customs Act, section 72.13 or Division 307 of the Criminal Code or a prescribed Act (subsection 185B(1));
- an Australian ship outside Australia which has been detained under subsection 185(3) of the Customs Act and an officer reasonably suspects it is or has been involved in a contravention or an attempted contravention, either in or outside Australia, of the Customs Act, section 72.13 or Division 307 of the Criminal Code or a prescribed Act (paragraph 185B(2)(b));
- a foreign ship outside Australia which has been detained under subsection 185(3) of the Customs Act and an officer reasonably suspects it is or has been involved in a contravention in Australia of the Customs Act, section 72.13 or Division 307 of the Criminal Code or a prescribed Act (subparagraph 185B(2)(c)(i)); and

- a foreign ship outside Australia which has been detained under subsection 185(3) of the Customs Act and an officer reasonably suspects it is or has been involved in a contravention in Australia's exclusive economic zone of a prescribed Act (subparagraph 185B(2)(c)(ii)).

### **Section 186A**

Under subsection 186A(1)(b)(ii) of the Customs Act, an officer of Customs may make a copy of, or to take an extract of a document examined under section 186 of the Customs Act, if the officer is satisfied that the document or part of the document is relevant to the commission or attempted commission of an offence against the Customs Act or a prescribed Act. Section 186 of the Customs Act provides a general power to examine goods which are subject to Customs control. Section 30 of the Customs Act specifies when goods are subject to Customs control.

## **ATTACHMENT B**

### **DETAILS OF THE *CUSTOMS AMENDMENT REGULATIONS 2010 (No. 3)***

#### **Regulation 1 - Name of Regulations**

This regulation provides that the title of the Regulations is the *Customs Amendment Regulations 2010 (No. 3)*.

#### **Regulation 2 - Commencement**

This regulation provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

#### **Regulation 3 - Amendment of *Customs Regulations 1926***

This regulation provides that the *Customs Regulations 1926* (the Principal Regulations) are amended as set out in Schedule 1 to the Regulations.

### **SCHEDULE 1 - AMENDMENT**

#### **Item [1]**

Item 1 amends the Principal Regulations by substituting regulation 167 of the Principal Regulations. New regulation 167 provides that an Act (other than the *Customs Act 1901* (the Customs Act)) specified in an item of Schedule 1AAD is prescribed firstly for a provision or provisions of the Customs Act specified in the item and secondly to the extent, if any, specified for the item.

#### **Item [2]**

Item 2 amends the Principal Regulations by inserting after Schedule 1AAC to the Principal Regulations a new Schedule 1AAD. New Schedule 1AAD prescribes, for the purposes of new regulation 167, the Acts for the provision or provisions of the Customs Act specified and the extent, if any, that the Acts are prescribed for the provisions.

New Schedule 1AAD prescribes, for the following provisions of the Customs Act, the following Acts:

#### ***Section 184A***

For the purposes of subsections 184A(2), (4) and (5) of the Customs Act, which respectively relate to the boarding of a foreign ship in Australian waters, a foreign ship in Australia's contiguous zone and the mother ship on the high seas which has supported another ship in Australia, the following Acts are prescribed: the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the *Fisheries Management Act 1991* (Fisheries Management Act), the *Migration Act 1958* (Migration Act), the *Quarantine Act 1908* (Quarantine Act) and the *Torres Strait Fisheries Act 1984* (Torres Strait Fisheries Act). The EPBC Act however is only prescribed to the extent to which it deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under

UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their maritime zones.

For the purposes of subsection 184A(4A) of the Customs Act, which relate to the boarding of a foreign ship within 500 metres of an Australian resources installation or Australian sea installation, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act.

However, the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act are only prescribed for subsection 184A(4A) to the extent to which these Acts deal with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because, in respect of the EPBC Act under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in safety zones surrounding resources and sea installations. In respect of the Fisheries Management Act and the Torres Strait Fisheries Act, under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of fisheries laws beyond their exclusive economic zone and in respect of the Migration Act and the Quarantine Act, under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of migration and quarantine laws outside their contiguous zone.

For the purposes of subsections 184A(6) and (7) of the Customs Act, which relate to the boarding of a foreign ship in Australia's exclusive economic zone and the boarding of a foreign ship on the high seas which has supported the contravention by another ship of an offence in Australia's exclusive economic zone, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act and the Torres Strait Fisheries Act. The EPBC Act however is only prescribed to the extent to which it deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their exclusive economic zone.

### ***Section 185***

For the purpose of an officer arresting a person without a warrant in the circumstances covered by subparagraph 185(2)(d)(i) and subsubparagraph 185(2)(d)(ii)(A) of the Customs Act, as outlined in Attachment A, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act.

For the purpose of an officer arresting a person without a warrant in the circumstance covered by subsubparagraph 185(2)(d)(ii)(B) of the Customs Act, as outlined in Attachment A, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act and the Torres Strait Fisheries Act. The EPBC Act however is only prescribed for subparagraph 185(2)(d)(i) and subsubparagraphs 185(2)(d)(ii)(A) and 185(2)(d)(ii)(B) to the extent to which the EPBC Act deals with a subject in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their maritime zones.

For the purposes of determining whether goods found or documents produced may afford evidence of the commission of a relevant offence as outlined in Attachment A, the following Acts are prescribed for paragraph 185(7)(a) and subparagraph 185(7)(b)(i) of the Customs Act:



the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act.

For the purposes of subparagraph 185(7)(b)(ii) of the Customs Act, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act and the Torres Strait Fisheries Act. The EPBC Act however is only prescribed for paragraph 185(7)(a) and subparagraphs 185(7)(b)(i) and 185(7)(b)(ii) to the extent to which the Act deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their maritime zones.

For the purpose of when an officer may detain a ship and bring or cause it to be brought to a port or other place, the following Acts are prescribed for paragraph 185(3)(a) and subparagraph 185(3)(c)(i) of the Customs Act: the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act.

For the purposes of subparagraph 185(3)(c)(ii) of the Customs Act the following Acts are prescribed: the EPBC Act, the Fisheries Management Act and the Torres Strait Fisheries Act. The EPBC Act however is only prescribed for paragraph 185(3)(a) and subparagraphs 185(3)(c)(i) and 185(3)(c)(ii) to the extent to which it deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their maritime zones.

### ***Section 185AA***

For the purposes of the circumstances covered by paragraph 185AA(1B)(a) and subparagraph 185AA(1B)(b)(i) of the Customs Act, as outlined in Attachment A, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act.

For the purposes of the circumstances covered by subparagraph 185AA(1B)(b)(ii) of the Customs Act, as outlined in Attachment A, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act and the Torres Strait Fisheries Act. The EPBC Act however is only prescribed for paragraph 185AA(1B)(a) and subparagraphs 185AA(1B)(b)(i) and 185AA(1B)(b)(ii) to the extent to which it deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their maritime zones.

### ***Section 185B***

For the purposes of subsection 185B(1), paragraph 185B(2)(b) and subparagraph 185B(2)(c)(i), which specify certain circumstances when the CEO may order an officer to move and/or destroy a ship, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act, the Migration Act, the Quarantine Act and the Torres Strait Fisheries Act.

For the circumstances covered by subparagraph 185B(2)(c)(ii) of the Customs Act, the following Acts are prescribed: the EPBC Act, the Fisheries Management Act and the Torres Strait Fisheries Act.

The EPBC Act however is only prescribed for subsection 185B(1) and subparagraphs 185B(2)(c)(i) and (ii) to the extent to which the Act deals with a subject matter in relation to which UNCLOS gives Australia jurisdiction. This is necessary because under UNCLOS, coastal States are limited in the extent to which they can enforce the contraventions of environmental laws in their maritime zones.

***Subparagraph 186A(1)(b)(ii)***

For the purposes of subparagraph 186A(1)(b)(ii) of the Customs Act the following Acts are prescribed: the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Aviation Transport Security Act 2004*, the *Bankruptcy Act 1966*, the *Crimes Act 1914*, the *Crimes (Aviation) Act 1991*, the *Crimes (Hostages) Act 1989*, the *Crimes (Internationally Protected Persons) Act 1976*, the *Crimes (Ships and Fixed Platforms) Act 1992*, the *Crimes (Torture) Act 1988*, the *Criminal Code Act 1995*, the EPBC Act, the *Family Law Act 1975*, the *Financial Transaction Reports Act 1988*, the Fisheries Management Act, the *Geneva Conventions Act 1957*, the Migration Act, the *Proceeds of Crime Act 1987*, the Quarantine Act and the Torres Strait Fisheries Act.

By prescribing these Acts, an officer of Customs may make a copy of, or take an extract of a document examined where the officer is satisfied that the document is relevant to the commission or attempted commission of an offence against one of these prescribed Acts.