

# **Customs Act 1901**

## **Act No. 6 of 1901 as amended**

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**Volume 2** includes: Table of Contents  
Sections 183UA – 269SL

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section



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# Contents

<b>Part XII—Officers</b>	1
<b>Division 1—Powers of Officers</b>	1
<b>Subdivision A—Preliminary</b>	1
183UA Definitions	1
183UB Law relating to legal professional privilege not affected	7
183UC CEO may give directions concerning the exercise of powers under this Division	7
183UD Judges who may issue seizure warrants for goods in transit	7
<b>Subdivision B—General regulatory powers</b>	8
184A Request to board a ship	8
184B Power to chase foreign ships for boarding	12
184C Power to chase Australian ships for boarding	14
184D Identifying an aircraft and requesting it to land for boarding	14
185 Power to board and search etc. ships and aircraft	16
185A Boarding of certain ships on the high seas	23
185AA Searches of people on certain ships or aircraft	26
185AB Returning persons to ships	27
185B Moving or destroying hazardous ships etc.	27
186 General powers of examination of goods subject to Customs control	29
186A Power to make copies of, and take extracts from, documents in certain circumstances	30
186B Compensation for damage caused by copying	31
187 Power to board and search	31
188 Boarding	32
189 Searching	32
189A Officers may carry arms in certain circumstances	32
190 Securing goods	34
191 Seals etc. not to be broken	34
192 Seals etc. on ship or aircraft in port bound to another port within Commonwealth	35
193 Officers may patrol coasts etc.	35
194 Ships on service may be moored in any place	35
195 Power to question passengers etc.	36
195A Power to question persons found in restricted areas	36
196C Power to question persons claiming packages	36
197 Power to stop conveyances about to leave a Customs place	37
<b>Subdivision C—Search warrants in respect of things believed to                 be evidential material</b>	38
198 When search warrants can be issued	38

---

199	The things that are authorised by a search warrant .....	40
200	Use of equipment to examine or process things .....	42
201	Use of electronic equipment on or in premises .....	43
201A	Person with knowledge of a computer or a computer system to assist access etc. ....	45
201B	Accessing data held on other premises—notification to occupier of that premises .....	46
202	Compensation for damage to equipment or data .....	46
202A	Copies of seized things to be provided .....	47
<b>Subdivision D—Seizure of goods believed to be forfeited goods</b>		47
203	When seizure warrants for forfeited goods can be issued [see Note 3] .....	47
203A	The things that are authorised by seizure warrants for forfeited goods.....	49
203B	Seizure without warrant of special forfeited goods, or of evidential material relating to special forfeited goods, at a Customs place.....	50
203C	Seizure without warrant of narcotic goods or of evidential material relating to narcotic goods at other places.....	52
203CA	Seizure without warrant of certain goods on ship or aircraft in the Protected Zone.....	54
203CB	Seizure without warrant of certain other goods in the Protected Zone.....	55
203D	How an authorised person is to exercise certain powers.....	56
<b>Subdivision DA—Seizure of certain goods in transit</b>		56
203DA	When seizure warrants for goods in transit can be issued.....	56
203DB	The things that are authorised by seizure warrants for goods in transit.....	58
<b>Subdivision E—Provisions applicable both to search and seizure warrants</b>		59
203E	Conduct of ordinary searches and frisk searches .....	59
203F	Announcement before entry .....	59
203G	Details of warrant to be given to occupier .....	59
203H	Occupier entitled to be present during search or seizure .....	60
203J	Availability of assistance and use of force in executing a warrant.....	60
203K	Specific powers available to executing officers.....	61
203L	Use of animals in executing a warrant .....	61
203M	Warrants by telephone or other electronic means .....	62
203N	Receipts for things seized under warrant .....	63
203P	Offence for making false statements in warrants.....	63
203Q	Offences relating to telephone warrants .....	64
<b>Subdivision F—Dealing with things seized as evidential material</b>		64
203R	Retention of things seized as evidential material.....	64

---

---

203S	Magistrate may permit a thing seized as evidential material to be retained .....	65
<b>Subdivision G—Dealing with goods seized as forfeited goods</b>		66
203SA	Subdivision does not apply to seized transit goods.....	66
203T	Seizure of protected objects.....	66
204	Seized goods to be secured .....	67
205	Requirement to serve seizure notices.....	68
205A	Matters to be dealt with in seizure notices.....	68
205B	Claim for return of goods seized .....	69
205C	Treatment of goods seized if no claim for return is made.....	70
205D	Treatment of goods seized if a claim for return is made.....	70
205E	Magistrate may permit goods seized to be retained .....	73
205F	Right of compensation in certain circumstances for goods disposed of or destroyed .....	73
205G	Effect of forfeiture .....	74
206	Immediate disposal of certain goods .....	74
207	Immediate disposal of narcotic goods .....	76
208	Release of goods on security .....	77
208C	Service by post .....	78
208D	Disposal of forfeited goods.....	78
208DA	Disposal of narcotic-related goods other than narcotic goods .....	78
208E	Sales subject to conditions.....	80
209	Power to impound certain forfeited goods and release them on payment of duty and penalty.....	80
209A	Destruction or concealment of evidential material or forfeited goods.....	82
<b>Subdivision GA—Dealing with goods in transit seized under a section 203DA warrant</b>		83
209B	Subdivision applies to seized transit goods .....	83
209C	Seized goods to be secured .....	83
209D	Requirement to serve seizure notices.....	83
209E	Matters to be dealt with in seizure notices.....	84
209F	Application for return of seized goods.....	84
209G	Status of goods seized if no application for return is made .....	84
209H	Right of compensation for certain goods disposed of or destroyed .....	85
209I	Effect of forfeiture .....	85
209J	Immediate disposal of unsafe goods .....	86
209K	Disposal of forfeited goods.....	87
209L	Service by post .....	87
<b>Subdivision H—Powers of arrest</b>		87
210	Persons suspected of smuggling etc.....	87
212	Arrested persons to go before Justices.....	88

---

---

213	Powers of Justices with offenders.....	88
<b>Subdivision HA—Information about people working in restricted areas or issued with security identification cards</b>		
213A	Providing Customs with information about people working in restricted areas.....	89
213B	Providing Customs with information about people issued with security identification cards.....	90
<b>Subdivision J—General powers to monitor and audit</b>		
214AA	Occupier of premises.....	91
214AB	What are <i>monitoring powers</i> ?.....	91
214AC	Monitoring officers.....	93
214ACA	Monitoring officer to notify occupier of premises of the occupier’s rights and obligations.....	94
214AD	Notice of proposal to exercise monitoring powers.....	94
214AE	Exercise of monitoring powers with consent.....	95
214AF	Exercise of monitoring powers under a warrant.....	96
214AG	Warrants may be granted by telephone or other electronic means.....	97
214AH	Monitoring officer may ask questions.....	98
214AI	Monitoring officer may ask for assistance.....	98
214AJ	Compensation for damage to electronic equipment.....	99
214B	Powers of officers for purposes of <i>Customs Tariff (Anti-Dumping) Act 1975</i> .....	100
<b>Subdivision JA—Powers to monitor and audit—Australia-United States Free Trade Agreement</b>		
214BAA	Simplified outline.....	101
214BAB	Definitions.....	102
214BAC	AUSFTA verification powers.....	103
214BAD	Appointment of verification officers.....	104
214BAE	Verification officers may enter premises and exercise AUSFTA verification powers with consent.....	105
214BAF	US customs officials may accompany verification officers.....	107
214BAG	Availability of assistance in exercising AUSFTA verification powers.....	107
214BAH	Verification officer may ask questions.....	107
214BAI	Verification officer may ask for assistance.....	108
214BAJ	Verification officer may disclose information to US.....	108
214BAK	Operation of electronic equipment at premises.....	108
214BAL	Compensation for damage to electronic equipment.....	108
<b>Subdivision K—Miscellaneous</b>		
214BA	Nature of functions of magistrate under sections 203S and 205E.....	109
215	Collector may impound documents.....	110
217	Translations of foreign invoices.....	110

---

---

218	Customs samples .....	110
218A	Disposal of certain abandoned goods .....	110
219	General power of Collector .....	111
<b>Division 1B—Detention and search of suspects</b>		112
<b>Subdivision A—Detention and frisk search of suspects</b>		112
219L	Detention for frisk search .....	112
219M	Frisk search .....	114
219N	Power to require the production of things.....	115
219NA	Use of reasonable force, and consequent powers, in particular circumstances .....	115
219P	Persons to whom section 219R applies.....	116
<b>Subdivision B—Detention and external search of suspects</b>		116
219Q	Detention for external search.....	116
219R	External search .....	116
219RAA	Videotape record may be made of external search .....	119
219RAB	Use of prescribed equipment for external search.....	120
219RAC	Prescribing equipment for use in external searches .....	121
219RAD	Authorising officers to use prescribed equipment for external search.....	122
219RAE	Giving a record of invitation and consent or of order.....	122
219RAF	Records of results of external search .....	122
<b>Subdivision C—Detention and internal search of persons suspected of internally concealing substances etc.</b>		124
219RA	Certain Judges and Magistrates eligible to give orders under this Subdivision .....	124
219S	Initial detention.....	124
219T	Initial order for detention.....	124
219U	Renewal of order for detention .....	125
219V	Arrangement for internal search .....	126
219W	Detention under this Subdivision.....	128
219X	Detainee becoming in need of protection .....	129
219Y	Applications for orders under this Subdivision.....	130
219Z	Internal search .....	131
<b>Subdivision D—Detention generally</b>		132
219ZA	Detention officers .....	132
219ZB	Detention places .....	132
219ZC	Detention under this Division.....	132
219ZD	Detainees not fluent in English.....	133
219ZE	Release from, or cessation of, detention .....	134
<b>Subdivision E—Medical practitioners</b>		135
219ZF	Conduct of internal search.....	135

---

---

219ZG	Medical practitioner may take action to preserve detainee's life .....	135
219ZH	Medical practitioner to answer questions and prepare report.....	136
219ZJ	Proceedings against medical practitioners .....	136
<b>Division 1BA—Detention and search of persons for purposes of law enforcement co-operation</b>		137
<b>Subdivision A—Preliminary</b>		137
219ZJA	Definitions .....	137
219ZJAA	Prescribed State or Territory offences.....	137
<b>Subdivision B—Powers to detain</b>		138
219ZJB	Detention of person suspected of committing serious Commonwealth offence or prescribed State or Territory offence.....	138
219ZJC	Detention of person subject to warrant or bail condition .....	139
<b>Subdivision C—Matters affecting detention generally</b>		140
219ZJD	Search of person detained under this Division.....	140
219ZJE	CEO must give directions about detaining persons under this Division .....	141
219ZJF	Detainees to be given reasons for detention and shown identification on request .....	141
219ZJG	Use of force in relation to detention .....	141
219ZJH	Moving detained persons.....	142
219ZJI	Detainees not fluent in English.....	142
219ZJJ	Detention of minors .....	142
<b>Division 1C—Judges and Magistrates</b>		144
219ZK	Nature of functions of Judge or Magistrate .....	144
219ZL	Protection of Judge or Magistrate.....	144
<b>Division 2—Protection to officers</b>		146
220	Reasonable cause for seizure a bar to action.....	146
221	Notice of action to be given.....	146
222	Defect in notice not to invalidate.....	146
223	No evidence to be produced but that contained in notice .....	147
224	Officer may tender amends.....	147
225	Commencement of proceedings against officers .....	147
226	Time for commencing action.....	147
227	Security may be required.....	148
<b>Division 3—Evidence</b>		149
227AA	Evidence may be used in prosecutions etc.....	149
<b>Part XIA—Special provisions relating to prohibited weapons</b>		150
227A	Overview of Part .....	150
227B	Definitions.....	150

---



---

227C	Ships and aircraft to which this Part applies .....	150
227D	Weapons to which this Part applies .....	151
227E	Approved storage for prohibited weapons .....	152
227F	Officer may take custody of weapons.....	153
227G	Compensation for damage etc. to weapons.....	154
<b>Part XIII—Penal Provisions</b>		<b>155</b>
<b>Division 1—Forfeitures</b>		<b>155</b>
228	Forfeited ships and aircraft .....	155
228A	Forfeited resources installations .....	155
228B	Forfeited sea installations .....	155
229	Forfeited goods.....	156
229A	Proceeds of drug trafficking liable to forfeiture.....	157
230	Forfeited packages and goods.....	160
<b>Division 2—Penalties</b>		<b>161</b>
231	Assembly for unlawful purposes .....	161
232A	Rescuing goods and assaulting officers .....	161
233	Smuggling and unlawful importation and exportation.....	161
233A	Master not to use or allow use of ship for smuggling etc. ....	163
233AB	Penalties for offences against sections 233 and 233A .....	163
233BAA	Special offence relating to tier 1 goods.....	164
233BAB	Special offence relating to tier 2 goods.....	166
233BAC	Evidence relating to approval for import or export.....	169
233BA	Evidence of Analyst .....	170
234	Customs offences.....	171
234AA	Places set aside for purposes of Act.....	175
234A	Unauthorised entry to places and on ships, aircraft or wharves.....	176
234AB	Unauthorised use of cameras and sound recorders .....	177
234ABA	Officers may direct unauthorised persons to leave restricted areas.....	178
236	Aiders and abettors .....	179
237	Attempts .....	179
239	Penalties in addition to forfeitures .....	179
240	Commercial documents to be kept.....	179
240AA	Authorised officer may require person to produce commercial documents .....	182
240AB	Verifying communications to Customs .....	183
240AC	Authorised officer may require person to produce record .....	185
<b>Division 3—Recovery of pecuniary penalties for dealings in narcotic goods</b>		<b>186</b>
243A	Interpretation .....	186
243AB	Effective control of property .....	189

---

---

243B	Pecuniary penalties.....	189
243C	Assessment of pecuniary penalty.....	191
243CA	Court may lift corporate veil etc.....	193
243D	Presumption of illegality of importation.....	194
243E	Court may make restraining order against property.....	195
243F	Court may make further orders.....	198
243G	Official Trustee to discharge pecuniary penalty.....	201
243H	Revocation of order under section 243E.....	204
243J	Pecuniary penalty a charge on property.....	205
243K	Contravention of restraining orders.....	207
243L	Sale of property before bankruptcy.....	207
243M	Duties of the Official Trustee after receiving notice of presentation of creditor's petition etc.....	208
243N	Protection of Official Trustee from personal liability in certain cases.....	209
243NA	Indemnification of Official Trustee.....	210
243NB	Indemnification of Official Receivers etc.....	211
243P	Costs etc. payable to Official Trustee.....	211
243Q	Notices.....	212
243R	Reduction of pecuniary penalty.....	212
243S	Jurisdiction of the Court.....	213
<b>Division 4—Provisions relating to certain strict liability offences</b>		214
243SA	Failure to answer questions.....	214
243SB	Failure to produce documents or records.....	214
243SC	Preservation of the privilege against self-incrimination.....	215
243T	False or misleading statements resulting in loss of duty.....	215
243U	False or misleading statements not resulting in loss of duty.....	218
243V	False or misleading statements in cargo reports or outturn reports.....	220
243W	Electronic communications to Customs to be treated as statements to CEO.....	221
<b>Division 5—Penalties in lieu of prosecution for certain offences</b>		222
243X	Application of Division.....	222
243XA	Guidelines for serving infringement notices.....	222
243Y	When an infringement notice can be served.....	222
243Z	Matters to be included in an infringement notice.....	223
243ZA	Withdrawal of infringement notice.....	224
243ZB	What happens if unpaid duty or unrepaid refund or drawback and penalty are paid.....	225
243ZC	More than one infringement notice may not be served for the same offence.....	226
243ZD	Infringement notice not required to be served.....	226
243ZE	CEO may extend period for payment of penalty.....	226

---

---

<b>Part XIV—Customs prosecutions</b>	227
244	Meaning of <i>Customs prosecution</i> ..... 227
245	Institution of prosecutions ..... 227
247	Prosecutions in accordance with practice rules..... 227
248	State Court practice ..... 228
249	Commencement of prosecutions..... 228
250	Information to be valid if in words of Act ..... 228
250A	Property in goods subject to control of Customs ..... 228
251	No objection for informality ..... 229
252	Conviction not to be quashed ..... 229
253	Protection to witnesses ..... 229
254	Defendant competent witness ..... 229
255	Averment of prosecutor sufficient ..... 230
256	Proof of proclamation etc. .... 230
257	Conduct by directors, servants or agents ..... 230
259	Collector may levy on goods in his possession..... 232
261	Imprisonment not to release penalty ..... 232
263	Parties may recover costs ..... 232
264	Application of penalties ..... 232
<b>Part XV—Tenders for rights to enter goods for home consumption at concessional rates</b>	233
265	Interpretation ..... 233
266	Tender schemes ..... 233
267	Undertakings relating to tenders ..... 234
268	Transfers of rights to enter goods for home consumption at concessional rates of duty..... 235
269	Revocation or variation of undertaking ..... 237
269A	Recovery of penalties ..... 237
<b>Part XVA—Tariff concession orders</b>	238
<b>Division 1—Preliminary</b>	238
269B	Interpretation ..... 238
269C	Interpretation—core criteria ..... 240
269D	Interpretation—goods produced in Australia..... 240
269E	Interpretation—the ordinary course of business ..... 241
<b>Division 2—Making and processing TCO applications</b>	243
269F	Making a TCO application ..... 243
269FA	The applicant’s obligation ..... 244
269G	Withdrawing a TCO application..... 244
269H	Screening the application..... 245
269HA	CEO may reject a TCO application in relation to goods referred to in section 269SJ ..... 245

---

---

269J	Applications taken to be lodged in certain circumstances .....	246
269K	Processing a valid application .....	246
269L	Amendment of TCO applications .....	247
269M	Customs may invite submissions or seek other information, documents or material .....	249
269N	Reprocessing of TCO applications .....	250
<b>Division 3—Making and operation of TCOs</b>		<b>252</b>
269P	The making of a standard TCO .....	252
269Q	The making of a TCO for goods requiring repair .....	253
269R	Notification of TCO decisions .....	253
269S	Operation of TCOs .....	254
269SA	Consequence of commencement or cessation of production before TCO decision.....	254
<b>Division 4—Revocation of TCOs</b>		<b>256</b>
269SB	Request for revocation of TCOs .....	256
269SC	Processing requests for revocation of TCOs.....	256
269SD	Revocation at the initiative of Customs .....	258
269SE	Notification of revocation decisions .....	260
269SF	Customs may seek information, documents or material relating to revocation .....	260
269SG	Effect of revocation on goods in transit and capital equipment on order.....	261
<b>Division 5—Miscellaneous</b>		<b>263</b>
269SH	Internal review.....	263
269SHA	Administrative Appeals Tribunal Review of reconsideration decisions .....	265
269SJ	TCOs not to apply to goods described by reference to their end use or certain goods .....	267
269SK	TCOs not to contravene international agreements .....	267
269SL	TCOs not to be statutory rules .....	268

## Part XII—Officers

### Division 1—Powers of Officers

#### Subdivision A—Preliminary

##### 183UA Definitions

- (1) In this Division, unless the contrary intention appears:

*authorised person* means:

- (a) in relation to an application for, or for the execution of, a search warrant—an officer of Customs; and
- (b) in relation to an application for, or for the execution of, a seizure warrant in respect of goods referred to in paragraph (a) of the definition of *forfeited goods*:
  - (i) an officer of Customs; or
  - (ii) an officer of police; or
  - (iii) a member of the Defence Force; and
- (c) in relation to an application for, or for the execution of, a seizure warrant in respect of goods referred to in paragraph (c) of the definition of *forfeited goods*—an officer of Customs; and
- (d) in relation to the exercise of powers under section 203B or 203C:
  - (i) an officer of Customs; or
  - (ii) an officer of police; or
  - (iii) a member of the Defence Force; and
- (f) in relation to the exercise of powers under section 203CA or 203CB—an officer as defined by subsection 185(5); and
- (e) in relation to an application for, or the execution of, a seizure warrant under section 203DA—an officer of Customs.

*baggage* means goods:

- (a) that are carried by or for a traveller, including the captain and crew members, on board the same ship or aircraft as the traveller; or
- (b) that a traveller intended to be so carried.

Section T183UAT

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**container** includes:

- (a) a trailer or other like receptacle, whether with or without wheels, that is used for the movement of goods from one place to another; and
- (b) any baggage; and
- (c) any other thing that is or could be used for the carriage of goods, whether or not designed for that purpose.

**conveyance** means an aircraft, railway rolling stock, vehicle or vessel of any kind.

**Customs place** means:

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

Note: Subsection (2) provides for parliamentary disallowance of an instrument approving a place under paragraph (f) of the definition.

**data held in a computer** includes:

- (a) data held in any removable data storage device for the time being held in a computer; or

- (b) data held in a data storage device on a computer network of which the computer forms a part.

***data storage device*** means a thing containing, or designed to contain, data for use by a computer.

***designated container*** means a container referred to in paragraph (c) of the definition of ***container***.

***evidential material***, in relation to an offence, whether the offence is indictable or summary, means a thing relevant to the offence, including such a thing in electronic form.

***executing officer***, in relation to a search warrant or to a seizure warrant, means:

- (a) an authorised person named in the warrant by the judicial officer issuing it as being responsible for executing the warrant; or
- (b) if that authorised person does not intend to be present at the execution of the warrant—any authorised person whose name has been written in the warrant by the authorised person so named; or
- (c) another authorised person whose name has been written in the warrant by the authorised person last named in the warrant.

***forfeited goods*** means goods described as forfeited to the Crown under:

- (a) section 228, 228A, 228B, 229, 229A or 230 of this Act; or
- (c) section 7, 10, 11 or 13 of the *Commerce (Trade Descriptions) Act 1905*.

***frisk search*** means:

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

***judicial officer*** means:

- (a) in relation to a search warrant, or to a seizure warrant under section 203:
  - (i) a magistrate; or

Section T183UAT

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- (ii) a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants; or
- (b) in relation to a seizure warrant under section 203DA:
  - (i) a Judge of the Federal Court of Australia or of the Supreme Court of the Australian Capital Territory in relation to whom a consent under subsection 183UD(1), and a nomination under subsection 183UD(2), are in force; or
  - (ii) a Judge of the Supreme Court of a State in respect of whom an appropriate arrangement in force under section 11 is applicable; or
  - (iii) a Judge of the Supreme Court of the Northern Territory who is not a Judge referred to in subparagraph (i) and in respect of whom an appropriate arrangement in force under section 11 is applicable.

**magistrate** means a magistrate who is remunerated by salary or otherwise.

**occupier**, in relation to premises that are a conveyance or a container, means the person having charge of the conveyance or container.

**offence** means:

- (a) an offence against this Act; or
- (b) an offence against the *Commerce (Trade Descriptions) Act 1905*; or
- (c) an offence against Division 307 of the *Criminal Code*.

**ordinary search** means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes or hat; and
- (b) an examination of those items.

**person assisting**, in relation to a search warrant or to a seizure warrant, means:

- (a) a person who is an authorised person and who is assisting in the execution of the warrant; or



Section T183UAT

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- (b) a person who is not an authorised person and who has been authorised by the CEO or by a Regional Director for a State or Territory to assist in executing the warrant.

*premises* includes a place, a conveyance or a container.

*search warrant* means a warrant issued under section 198.

*seizure notice* means:

- (a) in relation to Subdivision G—a notice of the kind mentioned in section 205A; and
- (b) in relation to Subdivision GA—a notice of the kind mentioned in section 209E.

*seizure warrant* means a warrant issued under section 203 or 203DA.

*special forfeited goods* means forfeited goods that are referred to in paragraph 229(1)(b) or (n).

*terrorist act* means an action or threat of action where:

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

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

*warrant premises* means premises in relation to which a search warrant or a seizure warrant is in force.

- (2) An instrument of approval of a place as a place for the examination of international mail is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Section T183UAT

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- (2A) For the purposes of this Part, an offence against section 6 of the *Crimes Act 1914* that relates to an offence against Division 307 of the *Criminal Code* is taken to be an offence against that Division.
- (3) For the purposes of this Part:
- (a) an offence against section 141.1, 142.1, 142.2 or 149.1 of the *Criminal Code* that relates to this Act is taken to be an offence against this Act; and
  - (b) an offence against section 141.1, 142.1, 142.2 or 149.1 of the *Criminal Code* that relates to Division 307 of the *Criminal Code* is taken to be an offence against that Division.
- (4) For the purposes of the definition of **terrorist act** in subsection (1), action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
  - (b) causes serious damage to property; or
  - (ba) causes a person's death; or
  - (c) endangers a person's life, other than the life of the person taking the action; or
  - (d) creates a serious risk to the health or safety of the public or a section of the public; or
  - (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
    - (i) an information system; or
    - (ii) a telecommunications system; or
    - (iii) a financial system; or
    - (iv) a system used for the delivery of essential government services; or
    - (v) a system used for, or by, an essential public utility; or
    - (vi) a system used for, or by, a transport system.
- (4A) For the purposes of the definition of **terrorist act** in subsection (1), action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
  - (b) is not intended:
    - (i) to cause serious harm that is physical harm to a person; or
    - (ii) to cause a person's death; or
    - (iii) to endanger the life of a person, other than the person taking the action; or

- (iv) to create a serious risk to the health or safety of the public or a section of the public.
- (5) In subsections (4) and (4A):
  - (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
  - (b) a reference to the public includes a reference to the public of a country other than Australia.

**183UB Law relating to legal professional privilege not affected**

This Division does not affect the law relating to legal professional privilege.

**183UC CEO may give directions concerning the exercise of powers under this Division**

- (1) Without limiting the generality of the power conferred on the CEO under subsection 4(4) of the *Customs Administration Act 1985*, the CEO may give directions in writing under that subsection concerning:
  - (a) the circumstances in which the powers in this Division may be exercised; and
  - (b) the officers of Customs who are entitled to exercise those powers; and
  - (c) the manner and frequency of reporting to the CEO concerning the exercise of those powers.
- (2) A direction given for the purposes of subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

**183UD Judges who may issue seizure warrants for goods in transit**

- (1) A Judge of the Federal Court of Australia or of the Supreme Court of the Australian Capital Territory may, by writing, consent to be nominated by the Minister under subsection (2).
- (2) The Minister may, by writing, nominate a Judge of a court referred to in subsection (1) in relation to whom a consent is in force under that subsection to be a judicial officer for the purposes of

Section T184AT

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paragraph (b) of the definition of *judicial officer* in subsection 183UA(1).

**Subdivision B—General regulatory powers**

**184A Request to board a ship**

*General power to request to board*

- (1) In the circumstances described in subsection (2), (3), (4), (5), (6), (7), (8) or (9), the commander of a Commonwealth ship or Commonwealth aircraft may request the master of a ship to permit the commander, a member of the commander's crew or an officer to board the master's ship.

Note: Sections 185 and 185A give power to board the master's ship if a request is made under this section.

*Foreign ships in Australian waters*

- (2) The commander may make the request if:
- (a) the master's ship is a foreign ship; and
  - (b) the master's ship is on the landward side of the outer edge of Australia's territorial sea; and
  - (c) either:
    - (i) the commander makes the request for the purposes of this Act or an Act prescribed by the regulations consistently with UNCLOS, or for the purposes of determining whether a contravention, or an attempted contravention, in Australia of Division 307 of the *Criminal Code* is occurring; or
    - (ii) the commander reasonably suspects that the master's ship is, will be or has been involved in a contravention, or an attempted contravention, in Australia of Division 307 of the *Criminal Code*.

*Australian ships outside territorial seas of other countries*

- (3) The commander may make the request if:
- (a) the master's ship is an Australian ship; and
  - (b) the master's ship is outside the territorial sea of any foreign country.

Section T184AT

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The commander must not make the request under this subsection if it may be made under subsection (9).

*Foreign ships in contiguous zone or near installations*

- (4) The commander may make the request if:
- (a) the master's ship is a foreign ship; and
  - (b) the master's ship is either:
    - (i) in the contiguous zone of Australia; or
    - (ii) within 500 metres of an Australian resources installation or Australian sea installation; and
  - (c) the commander:
    - (i) wishes to establish the identity of the master's ship; or
    - (ii) reasonably suspects that the master's ship is, will be or has been involved in a contravention, or an attempted contravention, in Australia of this Act, Division 307 of the *Criminal Code* or an Act prescribed by the regulations consistently with UNCLOS.

*Mother ships on high seas supporting contraventions in Australia*

- (5) The commander may make the request if:
- (a) the master's ship is a foreign ship; and
  - (b) the master's ship is:
    - (i) outside the outer edge of the contiguous zone of Australia; and
    - (ii) not within 500 metres of an Australian resources installation or Australian sea installation; and
    - (iii) outside the territorial sea of a foreign country; and
  - (c) the commander reasonably suspects that the master's ship is being or was used in direct support of, or in preparation for, a contravention in Australia of this Act, Division 307 of the *Criminal Code* or an Act prescribed by the regulations consistently with UNCLOS, where the contravention involves another ship (whether a foreign ship or an Australian ship); and
  - (d) the request is made as soon as practicable after the contravention happens.

Section T184A

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*Suspicious foreign ships in EEZ*

- (6) The commander may make the request if:
- (a) the master's ship is a foreign ship; and
  - (b) the master's ship is in the exclusive economic zone of Australia; and
  - (c) the commander reasonably suspects that the master's ship is, will be or has been involved in a contravention, or an attempted contravention, in Australia's exclusive economic zone of an Act prescribed by the regulations consistently with UNCLOS.

*Mother ships on high seas supporting contraventions in EEZ*

- (7) The commander may make the request if:
- (a) the master's ship is a foreign ship; and
  - (b) the master's ship is:
    - (i) outside the outer edge of the exclusive economic zone of Australia; and
    - (ii) not within 500 metres of an Australian resources installation or Australian sea installation; and
    - (iii) outside the territorial sea of a foreign country; and
  - (c) the commander reasonably suspects that the master's ship is being or was used in direct support of, or in preparation for, a contravention in Australia's exclusive economic zone of an Act prescribed by the regulations consistently with UNCLOS, where the contravention involves another ship (whether a foreign ship or an Australian ship); and
  - (d) the request is made as soon as practicable after the contravention happens.

*Foreign ships on high seas and covered by an agreement etc.*

- (8) The commander may make the request if:
- (a) the master's ship is:
    - (i) outside the outer edge of the contiguous zone of Australia; and
    - (ii) outside the territorial sea of a foreign country; and
  - (b) the commander reasonably suspects that the master's ship is a foreign ship that is entitled to fly the flag of a country; and

Section T184AT

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- (c) Australia has an agreement or arrangement with that country which enables the exercise of Australian jurisdiction over ships of that country.

The commander must not make the request under this subsection if it may be made under subsection (5), (6) or (7).

*Ships without nationality on high seas*

- (9) The commander may make the request if:
  - (a) the master's ship is:
    - (i) outside the outer edge of the contiguous zone of Australia; and
    - (ii) outside the territorial sea of a foreign country; and
  - (b) any of the following applies:
    - (i) the master's ship is not flying a flag of a country;
    - (ii) the master's ship is flying a flag of a country and the commander reasonably suspects that the master's ship is not entitled to fly that flag;
    - (iii) the commander reasonably suspects that the master's ship is not entitled to fly the flag of a country or has been flying the flag of more than one country; and
  - (c) the Commander wishes to establish the identity of the master's ship.

The commander must not make the request under this subsection if it may be made under subsection (5), (6), (7) or (8).

*Means of making request*

- (10) The commander of a Commonwealth ship or Commonwealth aircraft may use any reasonable means to make a request under this section.

*Request still made even if no master on the ship etc.*

- (11) To avoid doubt, a request is still made under this section even if:
  - (a) there was no master on board the ship to receive the request;  
or
  - (b) the master did not receive or understand the request.

Section T184BT

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*Master must comply with request*

- (12) The master of a ship must comply with a request made under this section (other than subsection (9)).

Penalty: Imprisonment for 2 years.

Note: The master's ship can still be boarded under section 185 or 185A even though the master has not complied with a request to board under this section.

- (13) Subsection (12) does not apply if the master has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (13) (see subsection 13.3(3) of the *Criminal Code*).

- (14) In this section:

***commander***, in relation to a Commonwealth ship or Commonwealth aircraft, includes a reference to the following:

- (a) a commissioned officer of the Australian Defence Force;
- (b) the most senior officer of Customs on board the ship or aircraft.

***commissioned officer of the Australian Defence Force*** means an officer within the meaning of the *Defence Act 1903*.

***member of the commander's crew*** includes, in relation to a commander of a Commonwealth ship or Commonwealth aircraft who is a commissioned officer of the Australian Defence Force, a person acting under the command of the commissioned officer.

### **184B Power to chase foreign ships for boarding**

*Generally, foreign ships may be chased if request to board is made*

- (1) To enable the boarding of a foreign ship whose master has not complied with a request to board under section 184A (other than subsection 184A(9)), the commander of a Commonwealth ship or Commonwealth aircraft may use it to chase, or continue the chase of, the master's ship to any place outside the territorial sea of a foreign country.

Note: Subsection 184A(9) is about requests to board ships without nationality that are on the high seas. Section 185A allows those ships



Section T184BT

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to be boarded, even though the master of the ship has not complied with the request to board.

*Using different Commonwealth ships or aircraft to continue chase*

- (2) To avoid doubt, a Commonwealth ship or Commonwealth aircraft may be used in the chase even if its commander did not make the request under section 184A.

*When foreign ships may be chased without a request being made*

- (3) The commander of a Commonwealth ship or Commonwealth aircraft may use it to chase, or continue the chase of, a foreign ship to a place outside the territorial sea of a foreign country to enable the boarding of the foreign ship if, immediately before the start of the chase, the commander could have made a request to board the foreign ship under subsection 184A(5) or (7).

*Chase may continue even if the foreign ship is out of sight*

- (4) A chase under this section may continue even if the crew of all of the Commonwealth ships and Commonwealth aircraft involved in the chase lose sight of the chased ship or lose trace of it from radar or other sensing devices.

*Chase may not continue after interruption*

- (5) The commander of a Commonwealth ship or Commonwealth aircraft must not use it to chase, or continue the chase of, a foreign ship under this section if the chase is interrupted (within the meaning of Article 111 of UNCLOS) at a place outside the outer edge of the contiguous zone. This subsection has effect despite subsections (1), (3) and (4).

*Means that may be used to enable boarding of the foreign ship*

- (6) Anywhere outside the territorial sea of a foreign country, the commander of a Commonwealth ship or Commonwealth aircraft chasing a ship under this section may use any reasonable means consistent with international law to enable boarding of the chased ship, including:
- (a) using necessary and reasonable force; and

Section T184CT

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

**184C Power to chase Australian ships for boarding**

*Australian ships may be chased*

- (1) To enable the boarding of an Australian ship, the commander of a Commonwealth ship or Commonwealth aircraft may use it to chase, or continue the chase of, the Australian ship to any place outside the territorial sea of a foreign country.

*Chase may continue even if the Australian ship is out of sight*

- (2) A chase under this section may continue even if the crew of all of the Commonwealth ships and Commonwealth aircraft involved in the chase lose sight of the chased ship or lose trace of it from radar or other sensing devices.

*Means that may be used to enable boarding of the Australian ship*

- (3) Anywhere outside the territorial sea of a foreign country, the commander of a Commonwealth ship or Commonwealth aircraft chasing a ship under this section may use any reasonable means to enable boarding of the chased ship, including:
  - (a) using necessary and reasonable force; and
  - (b) where necessary and after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding.

**184D Identifying an aircraft and requesting it to land for boarding**

*Application of section*

- (1) This section allows the commander of a Commonwealth aircraft to make requests of the pilot of another aircraft that:
  - (a) if the other aircraft is an Australian aircraft—is over anywhere except a foreign country; and
  - (b) if the other aircraft is not an Australian aircraft—is over Australia.

Section T184DT

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*Requesting information to identify an aircraft*

- (2) If the commander cannot identify the other aircraft, the commander may:
- (a) use his or her aircraft to intercept the other aircraft in accordance with the practices recommended in Annex 2 (headed “Rules of the Air”) to the Convention on International Civil Aviation done at Chicago on 7 December 1944 (that was adopted in accordance with that Convention); and
  - (b) request the pilot of the other aircraft to disclose to the commander:
    - (i) the identity of the other aircraft; and
    - (ii) the identity of all persons on the other aircraft; and
    - (iii) the flight path of the other aircraft; and
    - (iv) the flight plan of the other aircraft.

*Requesting aircraft to land for boarding*

- (3) The commander may request the pilot of the other aircraft to land it at the nearest airport, or at the nearest suitable landing field, in Australia for boarding for the purposes of this Act if:
- (a) the pilot does not comply with a request under subsection (2); or
  - (b) the commander reasonably suspects that the other aircraft is or has been involved in a contravention, or attempted contravention, of this Act or Division 307 of the *Criminal Code*.

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

*Means of making request*

- (4) Any reasonable means may be used to make a request under this section.

*Request still made even if pilot did not receive etc. request*

- (5) To avoid doubt, a request is still made under this section even if the pilot did not receive or understand the request.

Section T185T

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*Pilot must comply with request*

- (6) The pilot of the other aircraft must comply with a request made under this section.

Penalty: Imprisonment for 2 years.

- (6A) Subsection (6) does not apply if the pilot of the other aircraft has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6A) (see subsection 13.3(3) of the *Criminal Code*).

*Definition*

- (7) In this section, ***Australian aircraft*** means an aircraft that:
- (a) is an Australian aircraft as defined in the *Civil Aviation Act 1988*; or
  - (b) is not registered under the law of a foreign country and is either wholly owned by, or solely operated by:
    - (i) one or more residents of Australia; or
    - (ii) one or more Australian nationals; or
    - (iii) one or more residents of Australia and one or more Australian nationals.

For the purposes of this definition, ***Australian national*** and ***resident of Australia*** have the same meanings as in the *Shipping Registration Act 1981*.

## 185 Power to board and search etc. ships and aircraft

*Application of section to ships*

- (1) This section applies to a ship that is outside the territorial sea of a foreign country if:
- (a) a request to board the ship has been made under section 184A; or
  - (b) the ship is a foreign ship described in subsection 184B(3) (which allows foreign ships on the high seas to be chased); or
  - (c) the ship is an Australian ship.

However, this section does not apply to a ship if a request to board the ship has been made under subsection 184A(8) or (9) (certain ships on the high seas), unless an officer is satisfied under subsection 185A(3) that the ship is an Australian ship.

Section T185T

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Note: Section 185A deals with the boarding of ships where a request has been made under subsection 184A(8) or (9).

*Application to aircraft*

- (1A) This section applies to an aircraft that has landed in Australia for boarding as a result of a request made under section 184D.

*Officer's powers*

- (2) An officer may:
- (a) board and search the ship or aircraft; and
  - (b) search and examine any goods found on the ship or aircraft; and
  - (ba) secure any goods found on the ship or aircraft; and
  - (c) require all persons found on the ship or aircraft to answer questions, and produce any documents in their possession, in relation to the following:
    - (i) the ship or aircraft, its voyage or flight and its cargo, stores, crew and passengers;
    - (ii) the identity and presence of those persons on the ship or aircraft;
    - (iii) a contravention, an attempted contravention or an involvement in a contravention or attempted contravention, either in or outside Australia, of this Act or Division 307 of the *Criminal Code*; and
  - (ca) copy, or take extracts from, any document:
    - (i) found on the ship or aircraft; or
    - (ii) produced by a person found on the ship or aircraft as required under paragraph (c); and
  - (d) arrest without warrant any person found on the ship or aircraft if:
    - (i) in the case of a person found on a ship that is in Australia—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 this Act, Division 307 of the *Criminal Code* or an Act prescribed by the regulations consistently with UNCLOS; or
    - (ii) in the case of a person found on a ship that is outside Australia—the officer reasonably suspects that the

Section T185T

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person has committed, is committing or attempting to commit, or is involved in the commission of:

- (A) an offence in Australia against this Act, Division 307 of the *Criminal Code* or an Act prescribed by the regulations consistently with UNCLOS; or
  - (B) an offence in Australia's exclusive economic zone against an Act prescribed by the regulations consistently with UNCLOS; or
  - (iii) in the case of a person found on an aircraft that is in Australia—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 this Act or Division 307 of the *Criminal Code*; and
- (e) seize without warrant any narcotic goods found on the ship or aircraft.

- (2A) Any exercise of the power of arrest referred to in subsection (2) in the contiguous zone in relation to Australia is subject to the obligations of Australia under international law, including obligations under any treaty, convention or other agreement or arrangement between Australia and another country or other countries.

*Help to search*

- (2B) Without limiting the generality of paragraph (2)(a), an officer may use a dog to assist in searching the ship or aircraft.

*Help to examine goods*

- (2C) In the exercise of the power under paragraph (2)(b) to examine goods, the officer may do, or arrange for another officer or other person having the necessary experience to do, whatever is reasonably necessary to permit the examination of the goods.

*Examples of examining goods*

- (2D) Without limiting the generality of subsection (2C), examples of what may be done in the examination of goods include the following:

Section T185T

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- (a) opening any package in which goods are or may be contained;
- (b) using a device, such as an X-ray machine or ion scanning equipment, on the goods;
- (c) testing or analysing the goods;
- (d) measuring or counting the goods;
- (e) if the goods are a document—reading the document either directly or with the use of an electronic device;
- (f) using a dog to assist in examining the goods.

*Power to detain and move ship or aircraft*

- (3) An officer may detain the ship or aircraft and bring it, or cause it to be brought, to a port or airport, or to another place (including, in relation to a ship, a place within the territorial sea or the contiguous zone in relation to Australia), that he or she considers appropriate if:
  - (a) in the case of a ship that is in Australia—the officer reasonably suspects that the ship is or has been involved in a contravention, either in or outside Australia, of this Act, Division 307 of the *Criminal Code* or an Act prescribed consistently with UNCLOS; and
  - (b) in the case of an Australian ship that is outside Australia—the officer reasonably suspects that the ship is, will be or has been involved in a contravention, either in or outside Australia, of this Act or any other Act; and
  - (c) in the case of a foreign ship that is outside Australia—the officer reasonably suspects that the ship is, will be or has been involved in a contravention:
    - (i) in Australia of this Act, Division 307 of the *Criminal Code* or an Act prescribed consistently with UNCLOS; or
    - (ii) in Australia’s exclusive economic zone of an Act prescribed consistently with UNCLOS; and
  - (d) in the case of an aircraft that is in Australia—the officer reasonably suspects that the aircraft is or has been involved in a contravention, either in or outside Australia, of this Act or Division 307 of the *Criminal Code*.

However, a ship need not be brought to a port or other place if the CEO makes a direction in relation to the ship under section 185B.

Section T185T

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*Moving ship on the high seas*

- (3AAAA) To avoid doubt, subsection (3) allows an officer to bring a ship, or cause it to be brought, to a place even if it is necessary for the ship to travel on the high seas to reach the place.

*People on detained ships or aircraft*

- (3AAA) If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft.

*Jurisdiction of High Court*

- (3AAB) Nothing in subsection (3AAA) is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

*Powers of officers in respect of people found on detained ships or aircraft*

- (3A) If an officer detains a ship or aircraft under this section, the officer may:
- (a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone (within the meaning of the *Migration Act 1958*); or
  - (b) take the person, or cause the person to be taken, to a place outside Australia.

The definition of *place outside Australia* in subsection 4(1) does not apply for the purposes of paragraph (b).

*Powers to move people*

- (3AA) For the purpose of moving a person under subsection (3A), an officer may, within or outside Australia:
- (a) place the person on a ship or aircraft; or
  - (b) restrain the person on a ship or aircraft; or
  - (c) remove the person from a ship or aircraft.



*Protection if officers etc. act in good faith*

- (3AB) Proceedings, whether civil or criminal, may not be instituted or continued, in respect of any action taken under subsection (3AA), against the Commonwealth, an officer or any person assisting an officer if the officer or person who took the action acted in good faith and used no more force than was authorised by subsection (3B).

*Use of necessary and reasonable force*

- (3B) An officer may use such force as is necessary and reasonable in the exercise of a power under this section.

*Limit on use of force to board and search ships or aircraft*

- (3C) In boarding and searching the ship or aircraft and searching or examining goods found on the ship or aircraft, an officer must not damage the ship, aircraft or goods by forcing open a part of the ship, aircraft or goods unless:
- (a) the person (if any) apparently in charge of the ship or aircraft has been given a reasonable opportunity to open that part or the goods; or
  - (b) it is not reasonably practicable to give that person such an opportunity.

This subsection has effect despite paragraphs (2)(a) and (b) and subsection (3B).

*Limit on use of force to arrest or detain person on ships or aircraft*

- (3D) In arresting or detaining a person found on the ship or aircraft, an officer:
- (a) must not use more force, or subject the person to greater indignity, than is necessary and reasonable to make the arrest or detention or to prevent the person escaping after the arrest or detention; and
  - (b) must not do anything likely to cause the person grievous bodily harm unless the officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person (including the officer).

Section T185T

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This subsection has effect despite paragraph (2)(d) and subsection (3B).

*Limit on use of force to arrest fleeing person*

(3E) In arresting a person found on the ship or aircraft who is fleeing to escape arrest, an officer must not do anything likely to cause the person grievous bodily harm unless:

- (a) the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be apprehended in any other way; or
- (b) the officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person (including the officer).

This subsection applies in addition to subsection (3D) and has effect despite paragraph (2)(d) and subsection (3B).

*If ship covered by agreement, officer may exercise other powers*

(3F) If:

- (a) an officer is satisfied that the ship is a foreign ship that is entitled to fly the flag of a country; and
- (b) Australia has an agreement or arrangement with that country which enables the exercise of Australian jurisdiction over ships of that country;

then the officer may exercise any powers prescribed by the regulations consistently with the agreement or arrangement in relation to the ship or persons found on the ship.

*Complying with requirement by officer*

(4) A person shall not refuse or fail to comply with a requirement made by an officer under this section.

Penalty: 100 penalty units.

*Reasonable excuse for non-compliance*

(4AA) Subsection (4) does not apply if the person has a reasonable excuse.

*Evidence may be used in prosecutions etc.*

- (4A) To avoid doubt, if, when exercising powers under this section, an officer obtains evidence of the commission of an offence against a law of the Commonwealth, a State or a Territory, then that evidence may be used, or given to another body for use, in:
- (a) investigating the offence; or
  - (b) proceedings for the prosecution for the offence.

However, this subsection does not override or limit the operation of a law of a State about the evidence that may be used in proceedings for the prosecution for an offence against a law of that State.

*Definition of officer*

- (5) In this section, **officer** means an officer within the meaning of subsection 4(1), and includes:
- (a) any person who is in command, or a member of the crew, of:
    - (i) the ship or aircraft from which the relevant request under section 184A or 184D was made; or
    - (ii) a ship or aircraft that was used under section 184B or 184C to chase the ship in relation to which this section applies; and
  - (b) a police officer or a member of the Australian Defence Force.

*Interpretation*

- (6) In this section:
- (a) a reference to a person found on the ship or aircraft includes a reference to a person suspected on reasonable grounds by an officer of having landed from or left the ship or aircraft; and
  - (b) a reference to goods found on the ship or aircraft includes a reference to goods suspected on reasonable grounds by an officer of having been removed from the ship or aircraft.

## **185A Boarding of certain ships on the high seas**

*Application of section*

- (1) This section applies to a ship if:

Section T185AT

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- (a) a request has been made under:
  - (i) subsection 184A(8) (request to board a ship of a country with which Australia has an agreement); or
  - (ii) subsection 184A(9) (request to board a ship without nationality); and
- (b) the ship is:
  - (i) outside the outer edge of the contiguous zone of Australia; and
  - (ii) outside the territorial sea of any country (including Australia).

*Powers to establish the identity of the ship*

- (2) An officer may:
  - (a) board the ship; and
  - (b) ask all persons found on the ship questions about:
    - (i) the identity of the ship; and
    - (ii) the voyage of the ship; and
  - (c) require all persons found on the ship to produce documents relevant to:
    - (i) finding out the identity of the ship; or
    - (ii) the voyage of the ship; and
  - (d) require the master or a member of the master's crew to show the commander or a member of the commander's crew readings of the ship's navigation instruments relating to the voyage of the ship.

*Officer discovers that the ship is an Australian ship*

- (3) If, after exercising the powers in subsection (2), the officer is satisfied that the ship is an Australian ship, then section 185 applies to the ship.

Note: If section 185 applies to a ship, then the officer will be able to exercise all of the powers under that section in relation to the ship.

*Officer confirms that the ship is covered by an agreement etc.*

- (4) If:
  - (a) after exercising the powers in subsection (2), the officer is satisfied that the ship is a foreign ship that is entitled to fly the flag of a country; and

Section T185AT

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- (b) Australia has an agreement or arrangement with that country which enables the exercise of Australian jurisdiction over ships of that country;

then the officer may exercise the powers prescribed by the regulations consistently with that agreement or arrangement.

*Officer discovers that the ship is not covered by an agreement etc.*

(5) If:

- (a) after exercising the powers in subsection (2), the officer is satisfied that the ship is a foreign ship that is entitled to fly the flag of a country; and
- (b) Australia does not have an agreement or arrangement with that country which enables the exercise of Australian jurisdiction over ships of that country;

then the officer must leave the ship as soon as is practicable.

*Officer confirms that the ship is without nationality*

(6) If, after exercising the powers in subsection (2), the officer is satisfied that the ship is a foreign ship that:

- (a) is not entitled to fly the flag of a country; or
- (b) has been flying the flag of a country that it is not entitled to fly; or
- (c) has been flying the flag of more than one country;

then the officer may search the ship and seize without warrant any narcotic goods found on the ship.

*Definition of officer*

(7) In this section, **officer** has the meaning given by subsection 4(1), and includes any person who is in command, or a member of the crew, of:

- (a) the ship from which the relevant request under section 184A was made; or
- (b) a ship that was used under section 184B to chase the ship in relation to which this section applies.

Section T185AAT

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**185AA Searches of people on certain ships or aircraft**

- (1) For the purposes set out in subsection (2), a person, and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched if the person:
- (a) is on a ship or aircraft that has been detained under subsection 185(3); or
  - (b) has been placed on a ship or aircraft under subsection 185(3AA).

- (2) The purpose for which a person, and the person's clothing and any property under the immediate control of the person, may be searched under this section is to find out whether the person is carrying, or there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape.

Note: Division 1B of Part XII provides search powers in respect of certain persons suspected of unlawfully carrying prohibited goods.

- (3) If, in the course of a search under this section, a weapon or other thing referred to in subsection (2) is found, an officer:
- (a) may take possession of the weapon or other thing; and
  - (b) may retain the weapon or other thing for such time as he or she thinks necessary for the purposes of this Act.
- (4) This section does not authorise an officer, or another person conducting a search pursuant to subsection (5), to remove any of the person's clothing, or to require a person to remove any of his or her clothing, except the person's outer garments (including but not limited to the person's overcoat, coat, jacket, gloves, shoes and head covering).
- (5) A search under this section of a person, and the person's clothing, must be conducted by:
- (a) an officer of the same sex as the person; or
  - (b) in a case where an officer of the same sex as the person is not available to conduct the search—any other person who is of the same sex and:
    - (i) is requested by an officer; and
    - (ii) agrees;  
to conduct the search.

Section T185ABT

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- (6) An action or proceeding, whether civil or criminal, does not lie against a person who, at the request of an officer, conducts a search under this section if the person acts in good faith and does not contravene subsection (7).
- (7) An officer or other person who conducts a search under this section must not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.
- (8) In this section, *officer* has the same meaning as it has in section 185.

### **185AB Returning persons to ships**

- (1) An officer, or a person assisting an officer, may return to a ship that is detained under section 185 a person who:
  - (a) was on the ship when it was initially detained under section 185; and
  - (b) later leaves the ship.For this purpose, reasonable means, including reasonable force, may be used by the officer or another person.
- (2) A person may only be returned to a ship under subsection (1) if the officer or person assisting is satisfied that it is safe to return the person to the ship.
- (3) In this section, *officer* has the same meaning as it has in section 185.

### **185B Moving or destroying hazardous ships etc.**

#### *Application of section to ships in Australia*

- (1) This section applies to a ship that is in Australia and that an officer reasonably suspects is or has been involved in a contravention or an attempted contravention, either in or outside Australia, of this Act, Division 307 of the *Criminal Code* or a prescribed Act.

#### *Application of section to ships outside Australia*

- (2) This section also applies to a ship that is outside Australia if:
  - (a) an officer has detained it under subsection 185(3); and

Section T185BT

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- (b) in the case of an Australian ship—the officer reasonably suspects it is or has been involved in a contravention or an attempted contravention, either in or outside Australia, of this Act, Division 307 of the *Criminal Code* or a prescribed Act; and
- (c) in the case of a foreign ship—the officer reasonably suspects it is or has been involved in a contravention:
  - (i) in Australia of this Act, Division 307 of the *Criminal Code* or a prescribed Act; or
  - (ii) in Australia’s exclusive economic zone of a prescribed Act.

*When ship may be destroyed or moved*

- (3) The CEO may direct an officer to move, destroy, or move and destroy the ship, or cause such thing to be done, if the CEO has reasonable grounds to believe any of the following:
  - (a) that the ship is unseaworthy;
  - (b) that the ship poses a serious risk to navigation, quarantine, safety or public health;
  - (c) that the ship poses a serious risk of damage to property or the environment.
- (4) The CEO may direct an officer to destroy, or move and destroy, the ship, or cause such thing to be done, if the CEO has reasonable grounds to believe that the ship is in such poor condition that its custody or maintenance by the Commonwealth would involve an expense that would be likely to be greater than its value.

*Giving of notice after the ship has been destroyed*

- (5) As soon as practicable, but not later than 7 days after the ship has been destroyed, the CEO must give a written notice to:
  - (a) the owner of the ship; or
  - (b) if the owner cannot be identified after reasonable inquiry—the person in whose possession or under whose control the ship was when it was detained or located.
- (6) The notice must state:
  - (a) that the ship has been destroyed under subsection (3) or (4); and
  - (b) the reason for the destruction; and



(c) that compensation may be payable under section 4AB.

Note: A person may be paid compensation under section 4AB if the destruction of the ship results in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution).

*Failure to give notice not to affect validity*

(7) A failure to give a notice under this section does not affect the validity of the ship's destruction.

*Section to override certain other provisions*

(8) This section applies despite Subdivisions D, G and GA (other than sections 205G and 209I) of Division 1 of Part XII.

(9) In this section, *officer* includes a member of the Australian Defence Force.

### **186 General powers of examination of goods subject to Customs control**

- (1) Any officer may, subject to subsections (2) and (3), examine any goods subject to the control of the Customs, and the expense of the examination including the cost of removal to the place of examination shall be borne by the owner.
- (2) In the exercise of the power to examine goods, the officer of Customs may do, or arrange for another officer of Customs or other person having the necessary experience to do, whatever is reasonably necessary to permit the examination of the goods concerned.
- (3) Without limiting the generality of subsection (2), examples of what may be done in the examination of goods include the following:
  - (a) opening any package in which goods are or may be contained;
  - (b) using a device, such as an X-ray machine or ion scanning equipment, on the goods;
  - (c) testing or analysing the goods;
  - (d) measuring or counting the goods;
  - (e) if the goods are a document—reading the document either directly or with the use of an electronic device;
  - (f) using dogs to assist in examining the goods.

Section T186AT

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- (4) Goods that are subject to the control of Customs under section 31 do not cease to be subject to the control of Customs merely because they are removed from a ship or aircraft in the course of an examination under this section.

**186A Power to make copies of, and take extracts from, documents in certain circumstances**

- (1) If:
- (a) a document is examined under section 186; and
  - (b) as a result of that examination, an officer of Customs is satisfied that the document or part of the document may contain information relevant to:
    - (i) an importation or exportation, or to a proposed importation or exportation, of prohibited goods; or
    - (ii) the commission or attempted commission of any other offence against this Act or of any offence against a prescribed Act; or
    - (iii) the performance of functions under section 17 of the *Australian Security Intelligence Organisation Act 1979*; or
    - (iv) the performance of functions under section 6 of the *Intelligence Services Act 2001*; or
    - (v) security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);

the officer of Customs may make a copy of, or take an extract from, the document, or arrange for another officer of Customs or other person having the necessary experience, to make such a copy or take such an extract.

- (2) Without limiting the generality of subsection (1), a copy may be made of, or an extract taken from, a document:
- (a) by photocopying the document or a part of the document; or
  - (b) by photographing the document or a part of the document; or
  - (c) by electronically scanning the document or a part of the document; or
  - (d) by making an electronic copy of information contained in the document or a part of the document; or

- (e) by making a written copy of information contained in the document or a part of the document.

### **186B Compensation for damage caused by copying**

- (1) If an activity undertaken in relation to the copying of a document, or the taking of an extract from a document, causes its loss or destruction or causes damage to the document, and the loss or destruction or the damage occurred wholly or partly as a result of:
  - (a) insufficient care being exercised in selecting the person to undertake the activity; or
  - (b) insufficient care being exercised by the person undertaking the activity;compensation for the damage is payable to the owner of the documents concerned.
- (2) Compensation is payable out of money appropriated by the Parliament for the purpose.
- (3) In this section, a reference either to the loss or destruction of a document, or to damage to a document, includes a reference to the erasure or addition of electronic data or the corruption of such data.

### **187 Power to board and search**

- (1) An officer may:
  - (a) board any ship or aircraft;
  - (b) board any Australian resources installation:
    - (i) that is subject to the control of the Customs;
    - (ii) at which there is a ship or aircraft that has come to the installation from a place outside Australia; or
    - (iii) on which an officer has reasonable grounds to believe there are goods that are subject to the control of the Customs;
  - (c) board a resources installation (other than an Australian resources installation) in respect of which permission under section 5A has been granted;
  - (d) board any Australian sea installation:
    - (i) that is subject to the control of Customs;
    - (ii) at which there is a ship or aircraft that has come to the installation from parts beyond the seas; or

Section T188T

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- (iii) on which an officer has reasonable grounds to believe there are goods that are subject to the control of the Customs;
  - (e) board a sea installation (other than an Australian sea installation) in respect of which permission under section 5B has been granted;
  - (f) search any ship or aircraft or an installation of the kind referred to in paragraph (b), (c), (d) or (e); or
  - (g) secure any goods on any ship or aircraft or on any installation of the kind referred to in paragraph (b), (c), (d) or (e).
- (2) A reference in subsection (1) to a ship or aircraft is a reference to a ship or aircraft to which section 185 does not apply.

### 188 Boarding

- (1) The power of an officer to board shall extend to staying on board any ship, aircraft or installation and the Collector may station an officer on board any ship, aircraft or installation, and the master or pilot shall provide sleeping accommodation in the cabin and suitable and sufficient food for such officer.

Penalty: 5 penalty units.

- (2) Subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 189 Searching

The power of an officer to search shall extend to every part of any ship, aircraft or installation, and shall authorize the opening of any package, locker, or place and the examination of all goods.

### 189A Officers may carry arms in certain circumstances

- (1) Subject to any directions from the CEO, an authorised arms issuing officer:
- (a) may issue approved firearms and other approved items of personal defence equipment to officers authorised to carry arms, for the purpose of:

Section T189AT

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- (i) enabling the use, by such officers, of a firearm in the circumstances set out in subsection 184B(6) or 184C(3); or
    - (ii) enabling the safe exercise, by such officers, of powers conferred on them under this Act or any other Act; and
  - (b) must take all reasonable steps to ensure that approved firearms, and other approved items of personal defence equipment, that are available for issue under paragraph (a), are kept in secure storage at all times when not required for use.
- (2) Without limiting the matters that may be the subject of directions under subsection 4(4) of the *Customs Administration Act 1985* as modified by section 183UC, the CEO may give directions under that modified subsection relating to the deployment of approved firearms and other approved items of personal defence equipment under this section. The directions may deal with:
- (a) the circumstances in which approved firearms and other approved items of personal defence equipment may be issued; and
  - (b) the circumstances in which such firearms and other items of equipment are to be recalled; and
  - (c) the circumstances in which such firearms and other items of equipment can be used and the manner of their use; and
  - (d) the nature of the secure storage of such firearms and other items of equipment when recalled; and
  - (e) any other matters relating to the deployment of such firearms and other items of equipment the CEO thinks appropriate.
- (3) An officer is not required under, or by reason of, a law of a State or Territory:
- (a) to obtain a licence or permission for the possession or use of an approved firearm or approved item of personal defence equipment; or
  - (b) to register such a firearm or other item of equipment.
- (4) Nothing in this section affects the operation of any other provision of, or of the regulations under, this Act to the extent that that provision relates to the use of firearms in circumstances other than the circumstances referred to in this section.

Section T190T

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(5) In this section:

***approved firearm*** means a firearm of a kind declared by the regulations to be an approved firearm for the purposes of this section.

***approved item of personal defence equipment*** means an extendable baton, an oleoresin capsicum spray or anti-ballistic clothing, and includes any other item that is declared by the regulations to be an approved item of personal defence equipment for the purposes of this section.

***authorised arms issuing officer*** means an officer of Customs authorised, in writing, by the CEO to exercise the powers or perform the functions of an authorised arms issuing officer under this section.

***officer authorised to carry arms*** means an officer of Customs who is authorised, in writing, by the CEO to use approved firearms and approved items of personal defence equipment issued by an authorised arms issuing officer for either or both of the purposes specified in subparagraphs (1)(a)(i) and (ii) of this section.

## 190 Securing goods

The power of an officer to secure any goods shall extend to fastening down hatchways and other openings into the hold and locking up, sealing, marking or otherwise securing any goods.

## 191 Seals etc. not to be broken

(1) No fastening, lock, mark, or seal placed by an officer upon any goods or upon any door hatchway opening or place upon any ship, aircraft or installation shall be opened, altered, broken or erased whilst the goods upon which the fastening, lock, mark, or seal is placed or which are intended to be secured thereby shall remain subject to the control of the Customs.

Penalty: 50 penalty units.

(2) Subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

- (3) Subsection (1) does not apply to an opening, alteration, breaking or erasure by authority.

Note: For *by authority*, see subsection 4(1).

### **192 Seals etc. on ship or aircraft in port bound to another port within Commonwealth**

- (1) No fastening, lock, mark, or seal placed by an officer upon any goods or upon any door, hatchway, opening, or place for the purpose of securing any stores upon any ship or aircraft which has arrived in any port or airport from parts beyond the seas and which is bound to any other port or airport within the Commonwealth shall be opened, altered, broken, or erased; and if any ship or aircraft enters any port or airport with any such fastening, lock, mark, or seal opened, altered, broken, or erased contrary to this section, the master or pilot shall be guilty of an offence against this Act.

Penalty: 50 penalty units.

- (2) Subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) Subsection (1) does not apply to an opening, alteration, breaking or erasure by authority.

Note: For *by authority*, see subsection 4(1).

### **193 Officers may patrol coasts etc.**

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

### **194 Ships on service may be moored in any place**

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

Section T195T

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**195 Power to question passengers etc.**

- (1) An officer of Customs may question:
- (a) any person who is on board a ship or an aircraft or an installation of the kind referred to in paragraph 187(b), (c), (d) or (e);
  - (b) any person who has, or who the officer has reason to believe has, got off a ship or out of an aircraft; or
  - (c) any person who the officer has reason to believe is about to board a ship or an aircraft;
- as to whether that person or any child or other person accompanying him has on his person, in his baggage or otherwise with him any:
- (d) dutiable goods;
  - (e) excisable goods; or
  - (f) prohibited goods.
- (2) A person shall answer questions put to him in pursuance of subsection (1).

Penalty: 10 penalty units.

- (3) Subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**195A Power to question persons found in restricted areas**

If a person is in a section 234AA place, an officer may ask the person for, and require the person to provide:

- (a) the person's name; and
- (b) the person's reason for being in the section 234AA place; and
- (c) evidence of the person's identity.

Note: Failing to answer a question or produce a document when required to do so by an officer may be an offence (see sections 243SA and 243SB). However, a person does not have to answer if doing so would tend to incriminate the person (see section 243SC).

**196C Power to question persons claiming packages**

- (1) Before an officer of Customs decides whether or not to authorise the delivery into home consumption of goods referred to in section 71, the officer may:



Section T197T

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- (a) request the person to state his full name and residential address;
  - (b) ask the person whether he is the owner of the goods;
  - (c) where the person states that he is not the owner of the goods, request the person to state the full name and residential address of the owner of the goods; and
  - (d) request the person to produce evidence of the correctness of the information given by him in compliance with a request made of him in pursuance of paragraph (a) or (c).
- (2) A person shall not refuse or fail to comply with a request made of him, or to answer a question put to him, in pursuance of subsection (1).
- Penalty: 10 penalty units.
- (2A) Subsection (2) does not apply if the person has a reasonable excuse.
- (3) Where a person refuses or fails to comply with a request made of him, or to answer a question put to him, by an officer of Customs in pursuance of subsection (1), the officer may:
- (a) detain the person for the purposes of establishing his identity; or
  - (b) if the officer believes on reasonable grounds that there is no reasonable excuse for the person refusing or failing to so comply, detain the person and take him, without undue delay, before a magistrate to be charged with an offence against subsection (2).
- (4) In this section, *owner*, in relation to goods, means a person who has an interest in the goods.

**197 Power to stop conveyances about to leave a Customs place**

- (1) If a conveyance is in a Customs place, an officer of Customs may:
- (a) require the conveyance to stop; and
  - (b) check to establish that there is appropriate documentation authorising the movement of any goods in or on the conveyance that are subject to the control of Customs within the meaning of section 30.

Section T198T

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- (2) For the purposes of subsection (1), an officer of Customs may question the person apparently in charge of the conveyance about any goods in, on, or in a container on, the conveyance.
- (3) The power in paragraph (1)(b) includes a power to give directions relating to:
  - (a) the unloading of any goods from the conveyance; or
  - (b) their movement to a particular part of the Customs place for further examination.
- (4) If a direction under subsection (3) is not complied with, an officer of Customs may do what is necessary to give effect to the direction or to arrange for it to be done.
- (5) An officer of Customs must not detain a conveyance under this section for longer than is necessary and reasonable to exercise the powers conferred by this section.
- (6) A person in charge of a conveyance is guilty of an offence if:
  - (a) the conveyance is in a Customs place; and
  - (b) an officer of Customs requires the conveyance to stop; and
  - (c) the person does not stop the conveyance as so required.

Penalty: 45 penalty units.
- (7) This offence is an offence of strict liability.

**Subdivision C—Search warrants in respect of things believed to be evidential material**

**198 When search warrants can be issued**

- (1) A judicial officer may issue a warrant to search premises if the judicial officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or within the next 72 hours there will be, any evidential material, other than evidential material that is also a forfeited good, on or in the premises.
  - (2) If:
    - (a) the person applying for the warrant has, at any time previously, applied for a warrant relating to the search of, or the seizure of goods that are on or in, the same premises; and
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Section T198T

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- (b) the premises are not a Customs place;  
the person must state particulars of those applications and their  
outcome in the information.
- (3) If a judicial officer issues a warrant, the judicial officer is to state  
in the warrant:
- (a) the offence to which the warrant relates; and
  - (b) a description of the premises to which the warrant relates;  
and
  - (c) the kind of evidential material that is to be searched for under  
the warrant; and
  - (d) the name of the authorised person who, unless he or she  
inserts the name of another authorised person in the warrant,  
is to be responsible for executing the warrant; and
  - (e) the time at which the warrant expires (see subsection (3A));  
and
  - (f) whether the warrant may be executed at any time or only  
during particular hours.
- (3A) The time stated in the warrant under paragraph (3)(e) as the time at  
which the warrant expires must be a time that is not later than the  
end of the seventh day after the day on which the warrant is issued.
- Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified  
must not be later than midnight on Monday in the following week.
- (4) The judicial officer is also to state in the warrant:
- (a) that it authorises the seizure of things (other than evidential  
material of the kind referred to in paragraph (3)(c)) found on  
or in the premises in the course of the search that the  
executing officer or a person assisting believes on reasonable  
grounds:
    - (i) to be evidential material in relation to an offence to  
which the warrant relates or to another offence, or to be  
evidential material (within the meaning of the *Proceeds  
of Crime Act 2002*) or tainted property (within the  
meaning of that Act); and
    - (ii) not to be forfeited goods;if the executing officer or person assisting believes on  
reasonable grounds that seizure of the things is necessary to  
prevent their concealment, loss or destruction or their use in  
committing an offence; and

Section T199T

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- (b) whether the warrant authorises an ordinary search or a frisk search of a person who is at or near the premises when the warrant is executed, if the executing officer or a person assisting suspects on reasonable grounds that the person has any evidential material in his or her possession.
- (5) Paragraph (3)(e) and subsection (3A) do not prevent the issue of successive warrants in relation to the same premises.
- (6) If the application for the warrant is made under section 203M, this section (other than subsection (3A)) applies as if:
  - (a) subsection (1) referred to 48 hours rather than 72 hours; and
  - (b) paragraph (3)(e) required the judicial officer to state in the warrant the period for which the warrant is to remain in force, which must not be more than 48 hours.
- (7) A judicial officer of a particular State or Territory may issue a warrant in respect of the search of premises in another State or Territory.
- (8) This section is not to be taken to limit any power of search granted to an officer of Customs under any other provision of a law of Customs within the meaning of the *Customs Administration Act 1985*.

**199 The things that are authorised by a search warrant**

- (1) A search warrant that is in force in relation to premises authorises the executing officer or a person assisting:
  - (a) to enter the warrant premises; and
  - (b) to search for and to record fingerprints found on or in the premises, and take samples of things (other than human biological fluid or tissue) found on or in the premises for forensic purposes; and
  - (c) to search the premises for the kind of evidential material specified in the warrant, and to seize things of that kind found on or in the premises; and
  - (d) to seize other things found on or in the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds:
    - (i) to be evidential material in relation to an offence to which the warrant relates or to another offence, or to be

Section T199 T

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evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act); and

(ii) not to be forfeited goods;

if the executing officer or person assisting believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and

(e) if the warrant so allows:

(i) to conduct an ordinary search or a frisk search of a person at or near the premises if the executing officer or a person assisting suspects on reasonable grounds that the person has any evidential material in his or her possession; and

(ii) to seize any such material found in the course of the search.

- (2) Without limiting the generality of the powers conferred by a warrant issued in respect of premises that are not a conveyance or a container, the warrant extends to every conveyance or container on the premises.
- (3) Without limiting the generality of the powers conferred by a warrant issued in respect of premises that are a conveyance, the warrant:
- (a) permits entry of the conveyance, wherever it is; and
- (b) extends to every container on the conveyance.
- (4) A warrant issued in respect of premises that are a container permits entry of the container, wherever it is, to the extent that it is of a size permitting entry.
- (5) If the warrant states that it may be executed only during particular hours, the warrant must not be executed outside those hours.
- (6) If the warrant authorises an ordinary search or a frisk search of a person, a search of the person different to that so authorised must not be done under the warrant.

**200 Use of equipment to examine or process things**

- (1) The executing officer or a person assisting may bring to the warrant premises any equipment reasonably necessary for the examination or processing of a thing found on or in the premises in order to determine whether it is a thing that may be seized under the warrant.
- (2) A thing found at the premises may be moved to another place for examination or processing in order to determine whether it may be seized under a warrant if:
  - (a) both of the following apply:
    - (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance;
    - (ii) there are reasonable grounds to believe that the thing contains or constitutes evidential material; or
  - (b) the occupier of the premises consents in writing.
- (3) If a thing is moved to another place for the purpose of examination or processing under subsection (2), the executing officer must, if it is practicable to do so:
  - (a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and
  - (b) allow the occupier or his or her representative to be present during the examination or processing.
- (3A) The thing may be moved to another place for examination or processing for no longer than 72 hours.
- (3B) An executing officer may apply to a judicial officer for one or more extensions of that time if the executing officer believes on reasonable grounds that the thing cannot be examined or processed within 72 hours or that time as previously extended.
- (3C) The executing officer must give notice of the application to the occupier of the premises, and the occupier is entitled to be heard in relation to the application.
- (4) The executing officer or a person assisting may operate equipment already on or in the warrant premises to carry out the examination

or processing of a thing found on or in the premises in order to determine whether it is a thing that may be seized under the warrant if the executing officer or person assisting believes on reasonable grounds that:

- (a) the equipment is suitable for the examination or processing; and
- (b) the examination or processing can be carried out without damage to the equipment or the thing.

## **201 Use of electronic equipment on or in premises**

(1) The executing officer or a person assisting may operate electronic equipment at the warrant premises to access data (including data not held at the premises) if he or she believes on reasonable grounds that:

- (a) the data might constitute evidential material; and
- (b) the equipment can be operated without damaging it.

Note: An executing officer can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance: see section 201A.

(1A) If the executing officer or person assisting believes on reasonable grounds that any data accessed by operating the electronic equipment might constitute evidential material, he or she may:

- (a) copy the data to a disk, tape or other associated device brought to the premises; or
- (b) if the occupier of the premises agrees in writing—copy the data to a disk, tape or other associated device at the premises; and take the device from the premises.

(1B) If:

- (a) the executing officer or person assisting takes the device from the premises; and
- (b) the CEO is satisfied that the data is not required (or is no longer required) for:
  - (i) investigating an offence against the law of the Commonwealth, a State or a Territory; or
  - (ii) judicial proceedings or administrative review proceedings; or
  - (iii) investigating or resolving a complaint under the *Ombudsman Act 1976* or the *Privacy Act 1988*;

Section T201T

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the CEO must arrange for:

- (c) the removal of the data from any device in the control of Customs; and
  - (d) the destruction of any other reproduction of the data in the control of Customs.
- (2) If the executing officer or a person assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she may:
- (a) seize the equipment and any disk, tape or other associated device; or
  - (b) if the material can, by using facilities on or in the premises, be put in documentary form—operate the facilities to put the material in that form and seize the documents so produced.
- (3) The executing officer or a person assisting may seize equipment under paragraph (2)(a) only if it is not practicable to copy the material as mentioned in subsection (1A) or to put the material in documentary form as mentioned in paragraph (2)(b).
- (4) If the executing officer or a person assisting believes on reasonable grounds that:
- (a) evidential material may be accessible by operating electronic equipment on or in the premises; and
  - (b) expert assistance is required to operate the equipment; and
  - (c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;
- he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.
- (5) The executing officer or a person assisting must give notice to the occupier of the premises of his or her intention to secure equipment and of the fact that the equipment may be secured for up to 24 hours.
- (6) The equipment may be secured:
- (a) for a period not exceeding 24 hours; or
  - (b) until the equipment has been operated by the expert;
- whichever first occurs.



Section T201AT

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- (7) If the executing officer or a person assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to a judicial officer for an extension of that period.
- (8) The executing officer or a person assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.
- (9) The provisions of this Subdivision relating to the issue of warrants apply, with such modifications as are necessary, to the issuing of an extension.

**201A Person with knowledge of a computer or a computer system to assist access etc.**

- (1) An executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the officer to do one or more of the following:
  - (a) access data held in, or accessible from, a computer that is on warrant premises;
  - (b) copy the data to a data storage device;
  - (c) convert the data into documentary form.
- (2) The magistrate may grant the order if the magistrate is satisfied that:
  - (a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer; and
  - (b) the specified person is:
    - (i) reasonably suspected of having committed the offence stated in the relevant warrant; or
    - (ii) the owner or lessee of the computer; or
    - (iii) an employee of the owner or lessee of the computer; and
  - (c) the specified person has relevant knowledge of:
    - (i) the computer or a computer network of which the computer forms a part; or
    - (ii) measures applied to protect data held in, or accessible from, the computer.

Section T201BT

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- (3) A person commits an offence if the person fails to comply with the order.

Penalty: 6 months imprisonment.

**201B Accessing data held on other premises—notification to occupier of that premises**

- (1) If:
- (a) data that is held on premises other than the warrant premises is accessed under subsection 201(1); and
  - (b) it is practicable to notify the occupier of the other premises that the data has been accessed under a warrant;
- the executing officer must:
- (c) do so as soon as practicable; and
  - (d) if the executing officer has arranged, or intends to arrange, for continued access to the data under subsection 201(1A) or (2)—include that information in the notification.
- (2) A notification under subsection (1) must include sufficient information to allow the occupier of the other premises to contact the executing officer.

**202 Compensation for damage to equipment or data**

- (1) If:
- (a) damage is caused to equipment as a result of it being operated as mentioned in section 200 or 201; or
  - (b) the data recorded on or accessible from the equipment is damaged;
- and the damage was caused as a result of:
- (c) insufficient care being exercised in selecting the person who was to operate the equipment; or
  - (d) insufficient care being exercised by the person operating the equipment;
- compensation for the damage is payable to the owner of the equipment or the user of the data concerned.
- (2) For the purposes of subsection (1), damage to data includes damage by erasure of data or addition of other data.

- (3) Compensation is payable out of money appropriated by the Parliament for the purpose.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises and his or her employees and agents, if they were available at the time, had provided any warning or guidance as to the operation of the equipment that was appropriate in the circumstances.

### **202A Copies of seized things to be provided**

- (1) Subject to subsection (2), if the executing officer or a person assisting seizes, under a warrant relating to premises:
  - (a) a document, film, computer file or other thing that can be readily copied; or
  - (b) a storage device, the information in which can be readily copied;the executing officer or person assisting must, if requested to do so by the occupier of the premises or another person who apparently represents the occupier and who is present when the warrant is executed, give a copy of the document, film, computer file, thing or information to that person as soon as practicable after the seizure.
- (2) Subsection (1) does not apply if:
  - (a) the thing that has been seized was seized under subsection 201(1A) or paragraph 201(2)(b); or
  - (b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

### **Subdivision D—Seizure of goods believed to be forfeited goods**

#### **203 When seizure warrants for forfeited goods can be issued**

[see Note 3]

- (1) A judicial officer may issue a warrant to seize goods on or in particular premises if the judicial officer is satisfied by information on oath that an authorised person:
  - (a) has reasonable grounds for suspecting that the goods:
    - (i) are forfeited goods; and
    - (ii) are, or within the next 72 hours will be, on or in the premises; and

Section T203T

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- (b) has demonstrated the necessity, in all the circumstances, for seizure of the goods.
- (2) Subsection (1) does not apply to the seizure of goods under section 203B, 203C, 203CA or 203CB.
- (3) In considering whether the authorised person has demonstrated the necessity, in all the circumstances, for seizure of the goods, the judicial officer may have regard to, but is not limited to, consideration of the following factors:
  - (a) the seriousness or otherwise of any offence by reason of the commission of which the goods are believed to be forfeited goods;
  - (b) the circumstances in which any such offence is believed to have been committed;
  - (c) the pecuniary or other penalty that might be imposed for any such offence;
  - (d) the nature, quality, quantity and estimated value of the goods;
  - (f) the inconvenience or cost to any person having a legal or equitable interest in the goods if they were seized.
- (4) If:
  - (a) the person applying for the warrant has, at any time previously, applied for a warrant relating to the search of, or seizure of goods that are on or in, the same premises; and
  - (b) the premises are not a Customs place;the person must state particulars of those applications and their outcome in the information.
- (5) If a judicial officer issues a warrant, the judicial officer is to state in the warrant:
  - (a) a description of the goods to which the warrant relates; and
  - (b) a description of the premises on or in which the goods are believed to be located; and
  - (c) the name of the authorised person who, unless that authorised person inserts the name of another authorised person in the warrant, is to be responsible for executing the warrant; and
  - (d) the time at which the warrant expires (see subsection (5A)); and
  - (e) whether the warrant may be executed at any time or only during particular hours.

Section T203AT

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- (5A) The time stated in the warrant under paragraph (5)(d) as the time at which the warrant expires must be a time that is not later than the end of the seventh day after the day on which the warrant is issued.

Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified must not be later than midnight on Monday in the following week.

- (6) The judicial officer is also to state in the warrant:
- (a) that it authorises the seizure of goods (other than forfeited goods of the kind referred to in paragraph (5)(a)) found on or in the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be special forfeited goods; and
  - (b) whether the warrant authorises an ordinary search or a frisk search of a person who is at or near the premises when the warrant is executed, if the executing officer or a person assisting suspects on reasonable grounds that the person has any forfeited goods of the kind referred to in paragraph (5)(a) or any special forfeited goods in his or her possession.
- (7) Paragraph (5)(d) and subsection (5A) do not prevent the issue of successive warrants in relation to the same premises.
- (8) If the application for the warrant is made under section 203M, this section (other than subsection (5A)) applies as if:
- (a) subsection (1) referred to 48 hours rather than 72 hours; and
  - (b) paragraph (5)(d) required the judicial officer to state in the warrant the period for which the warrant is to remain in force, which must not be more than 48 hours.
- (9) A judicial officer of a particular State or Territory may issue a warrant in respect of the seizure of goods on or in premises in another State or Territory.

**203A The things that are authorised by seizure warrants for forfeited goods**

- (1) A seizure warrant that is in force under section 203 in relation to premises authorises the executing officer or a person assisting:
- (a) to enter the warrant premises; and
  - (b) to search for the goods described in the warrant; and
  - (c) to seize the goods described in the warrant; and
  - (d) to seize other goods:

Section T203BT

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- (i) that are found on or in the premises in the course of searching for the goods the subject of the warrant; and
- (ii) that the executing officer or a person assisting believes on reasonable grounds to be special forfeited goods; and
- (e) if the warrant so allows:
  - (i) to conduct an ordinary search or a frisk search of a person at or near the premises if the executing officer or a person assisting suspects on reasonable grounds that the person has any goods that are goods the subject of the warrant or special forfeited goods in his or her possession; and
  - (ii) to seize any such goods found in the course of that search.
- (2) Without limiting the generality of the powers conferred by a warrant issued in respect of premises that are not a conveyance or a container, the warrant extends to every conveyance or container on the premises.
- (3) Without limiting the generality of the powers conferred by a warrant issued in respect of premises that are a conveyance, the warrant:
  - (a) permits entry of the conveyance, wherever it is; and
  - (b) extends to every container on the conveyance.
- (4) A warrant issued in respect of premises that are a container permits entry of the container, wherever it is, to the extent that it is of a size permitting entry.
- (5) If the warrant states that it may be executed only during particular hours, the warrant must not be executed outside those hours.
- (6) If the warrant authorises an ordinary search or a frisk search of a person, a search of the person different to that so authorised must not be done under the warrant.

**203B Seizure without warrant of special forfeited goods, or of evidential material relating to special forfeited goods, at a Customs place**

- (1) This section applies in 2 circumstances, namely:

Section T203BT

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- (a) in a circumstance where an authorised person suspects on reasonable grounds that there are special forfeited goods:
  - (i) at, or in a container (other than a designated container in the immediate physical possession of a person to whom subparagraph (b)(i) applies) at, a Customs place; or
  - (ii) in, on, or in a container (other than a designated container in the immediate physical possession of a person to whom subparagraph (b)(i) applies) on, a conveyance at a Customs place; or
- (b) in a circumstance where a person:
  - (i) is at a Customs place that is also a designated place; and
  - (ii) has a designated container, or has goods reasonably suspected by an authorised person to be special forfeited goods, in his or her immediate physical possession; but
  - (iii) is not carrying that container or those goods on his or her body.

Note 1: *Container* and *designated container* have special definitions for the purposes only of this Division.

Note 2: The baggage of a passenger entering or leaving Australia or of the captain or crew of a vessel or aircraft so entering or leaving is not a designated container.

Note 3: To determine the question whether a person is carrying a designated container, or goods reasonably suspected of being special forfeited goods, on his or her body, see subsection 4(19).

- (2) In the circumstance referred to in paragraph (1)(a), the authorised person may, without warrant:
  - (a) search the Customs place, or the container at that place, for special forfeited goods; or
  - (b) stop and detain at the Customs place the conveyance and search it and any container on it for special forfeited goods; as the case requires, and seize any goods that the authorised person reasonably suspects are special forfeited goods if the authorised person finds them there.
- (2A) In the circumstance referred to in paragraph (1)(b), an authorised person who is an officer of Customs may, without warrant:
  - (a) search any designated container in the immediate physical possession of the person to whom that paragraph applies; and

Section T203CT

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- (b) seize any goods reasonably suspected by the authorised person of being special forfeited goods (whether or not those goods are found as a result of such a search).
- (2B) An authorised person must not exercise the powers referred to in 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.
- (2C) For the avoidance of doubt, the power of the authorised person under subsection (2) to seize, without warrant, goods found as a result of a search of, or at, a Customs place that are reasonably suspected of being special forfeited goods includes the power to seize, without warrant, any goods that:
  - (a) have been produced as a result of a frisk search of a person; or
  - (b) have been discovered on the body of a person as a result of an external search or an internal search of the person;if the search is conducted under Division 1B at the Customs place and the goods are reasonably so suspected.
- (3) If, in the course of searching under subsection (2) or (2A) for special forfeited goods, an authorised person finds a thing that the authorised person believes on reasonable grounds is evidential material relating to an offence committed in respect of those special forfeited goods, the authorised person may, without warrant, seize that thing whether or not the authorised person has found any such special forfeited goods.
- (4) For the purposes of a search conducted under subsection (2) or (2A), the authorised person may question any person apparently in charge of the place, conveyance or container about any goods or thing at the place, in or on the conveyance, or in the container.
- (5) The authorised person must exercise his or her powers subject to section 203D.

**203C Seizure without warrant of narcotic goods or of evidential material relating to narcotic goods at other places**

- (1) This section applies if:
    - (a) an authorised person suspects on reasonable grounds that there are special forfeited goods that are narcotic goods:
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Section T203CT

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- (i) at, or in a container at, a place other than a Customs place; or
  - (ii) in, on, or in a container on, a conveyance at a place other than a Customs place; or
  - (iii) 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; and
- (b) it is necessary to exercise a power under this section in order to prevent such goods from being concealed, lost or destroyed.

Note: Container has a special definition for the purposes only of this Division.

- (2) The authorised person may, without warrant:
- (a) search the place or any container at the place for narcotic goods; or
  - (b) stop and detain the conveyance about to leave the place, and search it and any container on it for narcotic goods; or
  - (c) search the container in the immediate physical possession of the person for narcotic goods;
- as the case requires, and seize any goods that the authorised person reasonably suspects are narcotic goods if the authorised person finds them there.
- (2A) For the avoidance of doubt, the power of the authorised person to seize, without warrant, goods found at a place other than a Customs place that are reasonably suspected of being narcotic goods includes the power to seize, without warrant, any goods that:
- (a) have been produced as a result of a frisk search of a person; or
  - (b) have been discovered on the body of a person as a result of an external search or an internal search of the person;
- if the search is conducted under Division 1B at a place other than a Customs place and the goods are reasonably so suspected.
- (3) If, in the course of searching under subsection (2) for special forfeited goods that are narcotic goods, an authorised person finds a thing that the authorised person believes on reasonable grounds is evidential material relating to an offence committed in respect of those goods, the authorised person may, without warrant, seize that thing whether or not the authorised person has found those goods.

Section T203CAT

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- (4) For the purposes of a search conducted under subsection (2), the authorised person may question any person apparently in charge of the place, conveyance or container about any goods or thing at the place, in or on the conveyance, or in the container.
- (5) The authorised person must exercise his or her powers subject to section 203D.

**203CA Seizure without warrant of certain goods on ship or aircraft in the Protected Zone**

- (1) This section applies to a ship if:
  - (a) section 185 applies to the ship; and
  - (b) the ship is exempt from any provision of the Customs Acts under subsection 30A(3) or the voyage of the ship is exempt from any such provision under subsection 30A(5).

Note: Section 30A gives effect to provisions of the Torres Strait Treaty in relation to certain traditional activities.

- (2) This section applies to an aircraft if:
  - (a) section 185 applies to the aircraft; and
  - (b) the flight of the aircraft is exempt from any provision of the Customs Acts under subsection 30A(5).

Note: Section 30A gives effect to provisions of the Torres Strait Treaty in relation to certain traditional activities.

- (3) An authorised person may seize without warrant any goods (other than narcotic goods) on the ship or aircraft that the authorised person reasonably suspects are special forfeited goods.

Note: For seizure of narcotic goods without warrant, see paragraph 185(2)(e) and section 203C.

- (4) If, in the course of searching the ship or aircraft under section 185, an authorised person finds a thing that he or she believes on reasonable grounds is evidential material relating to an offence committed in respect of special forfeited goods, the authorised person may, without warrant, seize that thing.
- (5) The authorised person must exercise his or her powers subject to section 203D.

**203CB Seizure without warrant of certain other goods in the Protected Zone**

- (1) This section applies if an authorised person suspects on reasonable grounds that:
- (a) goods are:
    - (i) at, or in a container at, a place that is near a ship or aircraft to which paragraph 203CA(1)(b) or (2)(b) applies; or
    - (ii) in, on, or in a container on, a conveyance at such a place; or
    - (iii) in a container in the immediate physical possession of, but not carried on the body of, a person at such a place; and
  - (b) the goods:
    - (i) in the case of an arriving ship or aircraft—have been unloaded from that ship or aircraft; or
    - (ii) in the case of a leaving ship or aircraft—will be loaded onto that ship or aircraft; and
  - (c) the goods are special forfeited goods (other than narcotic goods).
- (2) The authorised person may, without warrant:
- (a) search the place or any container at the place for special forfeited goods (other than narcotic goods); or
  - (b) stop and detain the conveyance about to leave the place, and search it and any container on it for such goods; or
  - (c) search the container in the immediate physical possession of the person for such goods;
- as the case requires, and seize any goods that the authorised person reasonably suspects are special forfeited goods (other than narcotic goods) if the authorised person finds them there.
- Note: For seizure of narcotic goods without warrant, see paragraph 185(2)(e) and section 203C.
- (3) If, in the course of searching under subsection (2) for special forfeited goods, an authorised person finds a thing that he or she believes on reasonable grounds is evidential material relating to an offence committed in respect of those goods, the authorised person may, without warrant, seize that thing whether or not the authorised person has found those goods.

Section T203DT

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- (4) For the purposes of a search conducted under subsection (2), the authorised person may question any person apparently in charge of the place, conveyance or container about any goods or thing at the place, in or on the conveyance, or in the container.
- (5) The authorised person must exercise his or her powers subject to section 203D.

**203D How an authorised person is to exercise certain powers**

- (1) An authorised person who exercises powers under section 203B, 203C, 203CA or 203CB in relation to a conveyance must not detain the conveyance for longer than is necessary and reasonable to exercise those powers.
- (2) An authorised person exercising powers under section 203B, 203C, 203CA or 203CB may use such force as is necessary and reasonable in the circumstances, but must not:
  - (a) forcibly remove any container or other goods from a person's physical possession; or
  - (b) damage any place, conveyance, container or other goods of which the person is apparently in charge;unless:
  - (c) the person has been given a reasonable opportunity to facilitate the the exercise of the powers by providing access to the place, conveyance, container or goods or by opening the conveyance or container; or
  - (d) it is not possible to give that person such an opportunity.

**Subdivision DA—Seizure of certain goods in transit**

**203DA When seizure warrants for goods in transit can be issued**

- (1) A judicial officer may issue a warrant to seize goods on or in particular premises if the judicial officer is satisfied by information on oath that the Minister has reasonable grounds for suspecting that:
  - (a) the goods are, or within the next 72 hours will be, on or in the premises; and
  - (b) the goods have been or will be brought into Australia on a ship or aircraft and are intended to be kept on board the ship or aircraft for shipment on to a place outside Australia,

without being imported into Australia or exported from Australia; and

- (c) the goods satisfy either or both of the following subparagraphs:
- (i) the goods are connected, whether directly or indirectly, with the carrying out of a terrorist act, whether a terrorist act has occurred, is occurring or is likely to occur;
  - (ii) the existence or the shipment of the goods prejudices, or is likely to prejudice, Australia's defence or security or international peace and security.
- (2) If a judicial officer issues a warrant, the judicial officer is to state in the warrant:
- (a) a description of the goods to which the warrant relates; and
  - (b) a description of the premises on or in which the goods are believed to be located; and
  - (c) the name of the authorised person who, unless that authorised person inserts the name of another authorised person in the warrant, is to be responsible for executing the warrant; and
  - (d) the time at which the warrant expires (see subsection (3)); and
  - (e) whether the warrant may be executed at any time or only during particular hours.
- (3) The time stated in the warrant under paragraph (2)(d) as the time at which the warrant expires must be a time that is not later than the end of the seventh day after the day on which the warrant is issued.
- Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified must not be later than midnight on Monday in the following week.
- (4) The judicial officer is also to state in the warrant that it authorises the seizure of goods found on or in the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be special forfeited goods.
- (5) Paragraph (2)(d) and subsection (3) do not prevent the issue of successive warrants in relation to the same premises.
- (6) If the application for the warrant is made under section 203M, this section (other than subsection (3)) applies as if:
- (a) subsection (1) referred to 48 hours rather than 72 hours; and

Section T203DBT

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- (b) paragraph (2)(d) required the judicial officer to state in the warrant the period for which the warrant is to remain in force, which must not be more than 48 hours.
- (7) A judicial officer of a particular State or Territory may issue a warrant in respect of the seizure of goods on or in premises in another State or Territory.

**203DB The things that are authorised by seizure warrants for goods in transit**

- (1) A seizure warrant that is in force under section 203DA in relation to premises authorises the executing officer or a person assisting:
  - (a) to enter the warrant premises; and
  - (b) to search for the goods described in the warrant; and
  - (c) to seize the goods described in the warrant; and
  - (d) to seize other goods:
    - (i) that are found on or in the premises in the course of searching for the goods the subject of the warrant; and
    - (ii) that the executing officer or a person assisting believes on reasonable grounds to be special forfeited goods.
- (2) Without limiting the generality of the powers conferred by a warrant issued in respect of premises that are not a conveyance or a container, the warrant extends to every conveyance or container on the premises.
- (3) Without limiting the generality of the powers conferred by a warrant issued in respect of premises that are a conveyance, the warrant:
  - (a) permits entry of the conveyance, wherever it is; and
  - (b) extends to every container on the conveyance.
- (4) A warrant issued in respect of premises that are a container permits entry of the container, wherever it is, to the extent that it is of a size permitting entry.
- (5) If the warrant states that it may be executed only during particular hours, the warrant must not be executed outside those hours.

## **Subdivision E—Provisions applicable both to search and seizure warrants**

### **203E Conduct of ordinary searches and frisk searches**

An ordinary search or a frisk search of a person under this Division must, if practicable, be conducted by a person of the same sex as the person being searched.

### **203F Announcement before entry**

- (1) The executing officer must, before any person enters premises under a search warrant or a seizure warrant:
  - (a) announce that he or she is authorised to enter the premises; and
  - (b) give any person at the premises an opportunity to allow entry to the premises.
- (2) The executing officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure:
  - (a) the safety of a person (including the executing officer); or
  - (b) that the effective execution of the warrant is not frustrated.

### **203G Details of warrant to be given to occupier**

- (1) If a search warrant or a seizure warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the place where the warrant is executed, the executing officer or a person assisting must make available to that person a copy of the warrant.
- (2) If a person is searched under a warrant in relation to premises, the executing officer or a person assisting must show the person a copy of the warrant.
- (3) The executing officer must identify himself or herself to the person at the place where the warrant is executed.
- (4) At the time of executing the warrant, the executing officer or a person assisting:

Section T203HT

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- (a) is not required to have in his or her possession or under his or her immediate control the original warrant; but
  - (b) must have in his or her possession or under his or her immediate control a copy of the warrant.
- (5) In this section:

*a copy of the warrant* means:

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

**203H Occupier entitled to be present during search or seizure**

- (1) If a search warrant or a seizure warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the place where the warrant is executed, the person is, subject to Part IC of the *Crimes Act 1914*, entitled to observe the search or seizure being conducted.
- (2) The right to observe the search or seizure being conducted ceases if the person impedes the search or seizure.
- (3) This section does not prevent 2 or more areas of the premises being searched at the same time.

**203J Availability of assistance and use of force in executing a warrant**

In executing a search warrant or a seizure warrant:

- (a) the executing officer may obtain such assistance; and
  - (b) the executing officer, or a person who is an authorised person and who is assisting in executing the warrant, may use such force against persons and things;
- as is necessary and reasonable in the circumstances.



### **203K Specific powers available to executing officers**

- (1) In executing a search warrant or a seizure warrant in relation to premises, the executing officer or a person assisting may:
  - (a) for a purpose incidental to the execution of the warrant; or
  - (b) if the occupier of the premises consents in writing;take photographs or video recordings of the premises or of things on or in the premises.
- (2) If a search warrant or a seizure warrant in relation to premises is being executed, the executing officer and the persons assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises:
  - (a) for not more than one hour; or
  - (b) for a longer period if the occupier of the premises consents in writing.
- (3) If:
  - (a) the execution of a search warrant or of a seizure warrant is stopped by an order of a court; and
  - (b) the order is later revoked or reversed on appeal; and
  - (c) the warrant is still in force;the execution of the warrant may be completed.
- (4) If:
  - (a) the execution of a search warrant or of a seizure warrant is stopped by an order of a court; and
  - (b) the order is later revoked or reversed on appeal; and
  - (c) the warrant has ceased to be in force;the court revoking or reversing the order may reissue the warrant for a further period not exceeding 7 days.
- (5) The court must not exercise the power under subsection (4) unless it is satisfied of the matters set out in subsection 198(1), 203(1) or 203DA(1).

### **203L Use of animals in executing a warrant**

In executing a search warrant or a seizure warrant in relation to premises, the executing officer or a person assisting may bring to

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Section T203MT

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the premises any animals reasonably necessary for locating things the subject of the warrant.

**203M Warrants by telephone or other electronic means**

- (1) An authorised person may apply to a judicial officer for a search warrant or for a seizure warrant by telephone, telex, facsimile or other electronic means:
  - (a) in an urgent case; or
  - (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (2) The judicial officer:
  - (a) may require communication by voice to the extent that it is practicable in the circumstances; and
  - (b) may make a recording of the whole or any part of any such communication by voice.
- (3) An application under this section must include all information required to be provided in an ordinary application for a search warrant or for a seizure warrant, but the application may, if necessary, be made before the information is sworn.
- (4) If an application is made to a judicial officer under this section and the judicial officer, after considering the information and having received and considered such further information (if any) as the judicial officer required, is satisfied that:
  - (a) a search warrant or a seizure warrant in the terms of the application should be issued urgently; or
  - (b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant;the judicial officer may complete and sign the same form of warrant that would be issued under section 198, 203 or 203DA.
- (5) If the judicial officer decides to issue the warrant, the judicial officer is to inform the applicant, by telephone, telex, facsimile or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.
- (6) The applicant must then complete a form of warrant in terms substantially corresponding to those given by the judicial officer,

Section T203NT

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stating on the form the name of the judicial officer and the day on which and the time at which the warrant was signed.

- (7) The applicant must, not later than the day after:
- (a) the day of expiry of the warrant; or
  - (b) the day on which the warrant was executed;
- whichever is the earlier, give or transmit to the judicial officer the form of warrant completed by the applicant and, if the information referred to in subsection (3) was not sworn, that information duly sworn.
- (8) The judicial officer must:
- (a) attach to the documents provided under subsection (7) the form of warrant signed by the judicial officer; and
  - (b) give or transmit to the applicant the attached documents.
- (9) If:
- (a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a warrant issued under this section was duly authorised; and
  - (b) the form of warrant signed by the judicial officer is not produced in evidence;
- the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

### **203N Receipts for things seized under warrant**

- (1) If a thing is seized under a search warrant or a seizure warrant, the executing officer or a person assisting must provide a receipt for the thing.
- (2) If 2 or more things are seized, they may be covered in the one receipt.

### **203P Offence for making false statements in warrants**

A person must not make, in an application for a search warrant or for a seizure warrant, a statement that the person knows to be false or misleading in a material particular.

Penalty: Imprisonment for 2 years.

Section T203QT

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**203Q Offences relating to telephone warrants**

- (1) A person must not:
- (a) state in a document that purports to be a form of warrant under section 203M the name of a judicial officer; or
  - (b) state on a form of warrant under that section a matter that, to the person's knowledge, departs in a material particular from the form authorised by the judicial officer; or
  - (c) purport to execute, or present to a person, a document that purports to be a form of warrant under that section that the person knows:
    - (i) has not been approved by a judicial officer under that section; or
    - (ii) departs in a material particular from the terms authorised by a judicial officer under that section; or
  - (d) give to a judicial officer a form of warrant under that section that is not the form of warrant that the person purported to execute.

Penalty: Imprisonment for 2 years.

- (2) Paragraph (1)(a) does not apply if the judicial officer named in the warrant issued it.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

**Subdivision F—Dealing with things seized as evidential material**

**203R Retention of things seized as evidential material**

- (1) Subject to any law of the Commonwealth, a State or a Territory permitting the retention, destruction or disposal of a thing seized as evidential material by an officer of Customs under a search warrant or by an authorised person under subsection 203B(3), 203C(3), 203CA(4) or 203CB(3), the officer or authorised person must return it if:
- (a) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or
  - (b) 120 days after its seizure:

Section T203ST

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- (i) proceedings in respect of which the thing may afford evidence have not been started; and
  - (ii) an order permitting the thing to be retained has not been made under section 203S; and
  - (iii) an order of a court of the Commonwealth or of a State or Territory permitting the retention, destruction or disposal of the thing has not been made;
- whichever first occurs.
- (2) For the purposes of this section, the return of a thing requires its return to the person reasonably believed to be the owner of the thing in a condition as near as practicable to the condition in which it was seized.

**203S Magistrate may permit a thing seized as evidential material to be retained**

- (1) If a thing is seized as evidential material by an officer of Customs under a search warrant, or by an authorised person under subsection 203B(3), 203C(3), 203CA(4) or 203CB(3), and:
- (a) before the end of 120 days after the seizure; or
  - (b) before the end of a period previously specified in a magistrate's order under this section;
- proceedings in respect of which the thing may afford evidence have not been started:
- (c) if the thing is seized by an officer of Customs under a search warrant—an officer of Customs may apply to a magistrate for an order that the thing be retained; or
  - (d) if the thing is seized by an authorised person under subsection 203B(3), 203C(3), 203CA(4) or 203CB(3)—an authorised person may apply to a magistrate for an order that the thing be retained.
- (2) If the magistrate is satisfied:
- (a) that it is necessary for the retention of the thing be continued:
    - (i) for the purposes of an investigation as to whether an offence has been committed; or
    - (ii) to enable evidence of an offence to be assembled for the purposes of a prosecution; and

Section T203SAT

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- (b) that there has been no avoidable delay in conducting the investigation or assembling the evidence concerned; the magistrate may order that the thing be retained for a period specified in the order.
- (3) Before making the application, the officer of Customs or the authorised person must:
  - (a) take reasonable steps to discover who has an interest in the retention of the thing; and
  - (b) if it is practicable to do so, notify each person who the officer believes to have such an interest of the proposed application.

**Subdivision G—Dealing with goods seized as forfeited goods**

**203SA Subdivision does not apply to seized transit goods**

This Subdivision does not apply to goods that have been seized under a seizure warrant under section 203DA, except for goods seized under paragraph 203DB(1)(d) (which covers goods suspected of being special forfeited goods).

Note: For seized transit goods, see Subdivision GA.

**203T Seizure of protected objects**

- (1) In this section:

*inspector* has the same meaning as in the Act.

*Minister* means the Minister administering the Act.

*the Act* means the *Protection of Movable Cultural Heritage Act 1986*.

- (2) Where:

- (a) the Minister is of the opinion that a particular object may become forfeited by virtue of section 9 of the Act; or
- (b) a foreign country has requested the return of a particular object exported from that country and the Minister is of the opinion that the object may become liable to forfeiture by virtue of section 14 of the Act;

the Minister may issue a notice in writing to the Comptroller to that effect.

- (3) An officer may seize a protected object or any object that the officer believes on reasonable grounds is a protected object, being an object that is subject to the control of the Customs.
- (4) Where an officer seizes an object under subsection (3), the officer shall forthwith deliver the object into the custody of an inspector.

## 204 Seized goods to be secured

- (1) In this section:

*approved place*, in relation to goods, means a place approved by a Collector as a place for the storage of goods of that kind.

- (2) If an officer of Customs seizes any goods other than narcotic-related goods under a seizure warrant or under section 203B, 203CA or 203CB, the officer must, as soon as practicable, take those goods to an approved place.
- (3) If a person other than an officer of Customs seizes any goods other than narcotic-related goods under a seizure warrant or under section 203B, 203CA or 203CB, the person must, as soon as practicable, deliver the goods into the custody of an officer of Customs.
- (4) If a person other than a member of the Australian Federal Police seizes:
  - (a) any narcotic-related goods under a seizure warrant or under section 203B, 203CA or 203CB; or
  - (b) any narcotic goods under section 203C;the person must, as soon as practicable, deliver the goods into the custody of a member of the Australian Federal Police.
- (5) If goods are delivered to an officer of Customs under subsection (3), the officer must:
  - (a) if paragraph (b) does not apply—as soon as practicable, deliver the goods to an approved place; or
  - (b) if the goods are delivered to the officer at an approved place—leave the goods at that place.

## 205 Requirement to serve seizure notices

- (1) After goods have been seized under a seizure warrant or under subsection 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2), the responsible person must serve, within 7 days after the seizure, a seizure notice on the owner of the goods or, if the owner cannot be identified after reasonable inquiry, on the person in whose possession or under whose control the goods were when they were seized.
- (2) Subsection (1) applies whether or not a claim for the return of the goods seized has been made under section 205B.
- (3) The notice must be in writing and must be served:
  - (a) personally or by post; or
  - (b) if no person of the kind referred to in subsection (1) can be identified after reasonable inquiry—by publishing a copy of the notice in a newspaper circulating in the location in which the goods were seized.
- (4) A seizure notice may be served on a person who is outside Australia.
- (5) In this section:

*responsible person* means:

  - (a) in relation to goods other than narcotic-related goods—the officer of Customs who seized the goods or to whom the goods were delivered under subsection 204(3); or
  - (b) in relation to narcotic-related goods—the member of the Australian Federal Police who seized the goods or to whom the goods were delivered under subsection 204(4).

## 205A Matters to be dealt with in seizure notices

A seizure notice must set out the following:

- (a) a statement identifying the goods;
- (b) the day on which they were seized;
- (c) the ground, or each of the grounds, on which they were seized;
- (d) a statement that, if a claim for the return of the goods has not already been made, and is not made within 30 days after the



day the notice is served, the goods will be taken to be condemned as forfeited to the Crown;

- (e) if the notice is to be served in a foreign country—a statement that the person served, if that person has not yet made such a claim, may not make such a claim unless he or she has first appointed in writing an agent in Australia with authority to accept service of documents, including process in any proceedings arising out of the matter.

### **205B Claim for return of goods seized**

- (1) If goods are seized under a seizure warrant or under subsection 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2), the owner of the goods may, whether or not a seizure notice has yet been served on the owner, make a claim to the appropriate person for the return of the goods.
- (2) A claim:
  - (a) must be in writing in an approved form; and
  - (b) must specify the grounds on which the claim is made; and
  - (c) if it is made by a person who does not reside or have a place of business in Australia, must:
    - (i) appoint an agent in Australia with authority to accept service of documents, including process in any proceedings, arising out of the matter; and
    - (ii) specify the address of the agent for service; and
    - (iii) be accompanied by the written consent of the agent signed by the agent, agreeing to act as agent.
- (3) In this section:  
*appropriate person* means:
  - (a) in relation to goods other than narcotic-related goods:
    - (i) the CEO; or
    - (ii) a Regional Director for a State or Territory; and
  - (b) in relation to narcotic-related goods:
    - (i) the Commissioner of Police; or
    - (ii) a Deputy Commissioner of Police.

**205C Treatment of goods seized if no claim for return is made**

If:

- (a) goods have been seized under a seizure warrant or under subsection 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2); and
- (b) a seizure notice has been served; and
- (c) at the end of 30 days after the day the notice was served, no claim has been made for return of the goods;

the goods are taken to be condemned as forfeited to the Crown.

**205D Treatment of goods seized if a claim for return is made**

(1) This section applies if:

- (a) goods are seized under a seizure warrant or under subsection 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2); and
- (b) not later than 30 days after the day the seizure notice was served, a claim is made under section 205B for return of the goods.

(2) The authorised person who seized the goods must, subject to any law of the Commonwealth, a State or a Territory permitting their retention, destruction or disposal, return the goods unless:

- (a) the goods have been dealt with under section 206 or 207; or
- (b) not later than 120 days after the claim for their return is made, proceedings in respect of an offence involving the goods have been commenced and, on completion of the proceedings, a court has made an order for condemnation of the goods as forfeited to the Crown; or
- (c) not later than 120 days after the claim for their return is made:
  - (i) an order permitting the goods to be retained for a specified period has been made under section 205E; and
  - (ii) before the end of that specified period, proceedings in respect of an offence involving the goods have been commenced and, on completion of the proceedings, a court has made an order for condemnation of the goods as forfeited to the Crown; or
- (d) not later than 120 days after the claim for their return is made:

Section T205DT

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- (i) an order permitting the goods to be retained for a specified period has been made under section 205E; and
  - (ii) before the end of that specified period proceedings have been commenced before a court of summary jurisdiction for a declaration that the goods are special forfeited goods and, on completion of the proceedings, a court has made an order for condemnation of the goods as forfeited to the Crown; or
- (e) if the goods were seized as special forfeited goods—not later than 120 days after the claim for their return is made, proceedings before a court of summary jurisdiction for a declaration that the goods are special forfeited goods have been commenced and, on completion of the proceedings, a court has made an order for condemnation of the goods as forfeited to the Crown.

Note: Subsection (9) gives special forfeited goods a wider meaning for the purposes of this section.

- (3) If:
- (a) goods seized otherwise than as special forfeited goods have not been dealt with under section 206; and
  - (b) proceedings of the kind referred to in paragraph (2)(b) or (c) are commenced in respect of an offence involving the goods; and
  - (c) on completion of the proceedings, the court:
    - (i) finds that the offence is proved; and
    - (ii) is satisfied, in all the circumstances of the case, that it is appropriate that an order be made for condemnation of the goods as forfeited to the Crown;

the court must make an order to that effect.

Note: Subsection (9) gives special forfeited goods a wider meaning for the purposes of this section.

- (4) If:
- (a) goods seized as special forfeited goods have not been dealt with under section 206 or 207; and
  - (b) proceedings of the kind referred to in paragraph (2)(b) or (c) are commenced in respect of an offence involving the goods; and

Section T205DT

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(c) on completion of the proceedings, the court is satisfied that the goods are special forfeited goods;

the court must make an order for condemnation of the goods as forfeited to the Crown, whether or not the court finds the offence proved.

Note: Subsection (9) gives special forfeited goods a wider meaning for the purposes of this section.

(5) Subject to subsection (6) if:

(a) goods seized as special forfeited goods have not been dealt with under section 206 or 207; and

(b) proceedings of the kind referred to in paragraph (2)(d) or (e) are commenced in respect of the goods; and

(c) on completion of the proceedings, the court is satisfied that the goods are special forfeited goods;

the court must declare the goods to be special forfeited goods and make an order for condemnation of the goods as forfeited to the Crown.

Note: Subsection (9) gives special forfeited goods a wider meaning for the purposes of this section.

(6) A court must not make an order for condemnation of goods under subsection (5) if proceedings for an offence involving the goods have been commenced.

(7) If the finding of a court in proceedings under paragraph (2)(b), (c), (d) or (e) in respect of goods that have not been dealt with under section 206 or 207 may be taken on appeal to another court, the goods are not to be returned under subsection (2), or disposed of under section 208D or 208DA, while that appeal may be made, or, if it is made, until the completion of that appeal.

(8) For the purposes of this section, the return of goods requires their return to the person reasonably believed to be the owner of the goods in a condition as near as practicable to the condition in which they were seized.

(9) In this section:

*offence* means an offence against any law of the Commonwealth, a State or a Territory.

*special forfeited goods* includes goods that are forfeited under section 7, 10, 11 or 13 of the *Commerce (Trade Descriptions) Act 1905*.

- (10) In this section, a reference to completion of proceedings includes a reference to completion of any appeal process arising from those proceedings.

### **205E Magistrate may permit goods seized to be retained**

- (1) If goods are seized under a seizure warrant or under subsection 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2) and:
- (a) before the end of 120 days after the making of a claim for their return; or
  - (b) before the end of the period previously specified in a magistrate's order under this section;
- proceedings of the kind referred to in paragraph 205D(2)(b) have not been started, an authorised person may apply to a magistrate for an order that the goods be retained.
- (2) If the magistrate is satisfied that it is necessary:
- (a) that the retention of the goods continue while evidence of the offence to which the proceedings referred to in paragraph 205D(2)(b) relate is assembled; and
  - (b) that there has been no avoidable delay in assembling that evidence;
- the magistrate may order that the goods be retained for a period specified in the order.
- (3) Before making the application, the authorised person must:
- (a) take reasonable steps to discover who has an interest in the retention of the goods; and
  - (b) if it is practicable to do so, notify each person who the officer believes to have such an interest of the proposed application.

### **205F Right of compensation in certain circumstances for goods disposed of or destroyed**

- (1) Despite the disposal or destruction of goods taken to be condemned as forfeited to the Crown because no claim for their return was made, a person may apply to a court of competent jurisdiction under this section for compensation.

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**Section T205GT**

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- (2) A right to compensation exists if:
- (a) the goods are not special forfeited goods within the meaning of section 205D; and
  - (b) the goods were not used or otherwise involved in the commission of an offence; and
  - (c) the person establishes, to the satisfaction of the court:
    - (i) that he or she is the rightful owner of the goods; and
    - (ii) that there were circumstances providing a reasonable excuse for the failure to claim the goods not later than 30 days after the day the seizure notice was served.
- (3) If a right to compensation exists under subsection (2), the court must order the payment by the Commonwealth to the person of an amount equal to:
- (a) if the goods have been sold—the proceeds of the sale; and
  - (b) if the goods have been destroyed—the market value of the goods at the time of their destruction.

**205G Effect of forfeiture**

When goods are, or are taken to be, condemned as forfeited to the Crown, the title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question.

**206 Immediate disposal of certain goods**

- (1) If:
- (a) goods are seized under a seizure warrant or under subsection 203B(2) or (2A), 203CA(3) or 203CB(2); and
  - (b) the goods are perishable goods or live animals; and
  - (c) the CEO or a Regional Director for a State or Territory is satisfied that the retention of the goods would constitute:
    - (i) a danger to public health; or
    - (ii) if the goods are live animals—a danger to the health of other animals or a danger to plants or to agricultural produce;
- the CEO or Regional Director concerned may cause the goods to be dealt with in such manner as he or she considers appropriate (including the destruction of the goods).

- (2) If:
- (a) goods are seized under a seizure warrant or under subsection 203B(2) or (2A), 203CA(3) or 203CB(2); and
  - (b) the goods are a vessel in the possession of an officer of Customs; and
  - (c) the CEO or a Regional Director for a State or Territory is satisfied that the vessel is so unseaworthy that its custody or maintenance is impracticable;
- the CEO or Regional Director concerned may cause the goods to be dealt with in such manner as he or she considers appropriate (including the destruction of the goods).
- (3) As soon as practicable, but not later than 7 days after the goods referred to in subsection (1) or (2) have been dealt with, the CEO or Regional Director concerned must give or publish a notice in accordance with subsection (5).
- (4) The notice must be in writing and must be served:
- (a) personally or by post on the owner of the goods or, if the owner cannot be identified after reasonable inquiry, on the person in whose possession or under whose control the goods were when they were seized; or
  - (b) if no person of the kind referred to in paragraph (a) can be identified after reasonable inquiry—by publishing a copy of the notice in a newspaper circulating in the location in which the goods were seized.
- (5) The notice must:
- (a) identify the goods; and
  - (b) state that the goods have been seized under a seizure warrant or under subsection 203B(2) or (2A), 203CA(3) or 203CB(2) and give the reason for the seizure; and
  - (c) state that the goods have been dealt with under subsection (1) or (2) and specify the manner in which they have been so dealt with and the reason for doing so; and
  - (d) set out the terms of subsection (6).
- (6) If goods are dealt with in accordance with subsection (1) or (2), the owner of the goods may bring an action against the Commonwealth in a court of competent jurisdiction for the recovery of the market value of the goods at the time they were so dealt with.
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Section T207T

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- (7) A right to recover the market value of the goods at the time they were dealt with in accordance with subsection (1) or (2) exists if:
- (a) the goods are not special forfeited goods within the meaning of section 205D; and
  - (b) the goods were not used or otherwise involved in the commission of an offence; and
  - (c) the owner of the goods establishes, to the satisfaction of the Court, that the circumstances for them to be so dealt with did not exist.
- (8) If a person establishes a right to recover the market value of the goods at the time they were dealt with, the Court must order the payment by the Commonwealth of an amount equal to that value at that time.

**207 Immediate disposal of narcotic goods**

- (1) If:
- (a) goods are seized under a seizure warrant or under subsection 185(2), 185A(6), 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2); and
  - (b) the goods are reasonably believed by the Commissioner of Police or a Deputy Commissioner of Police to be special forfeited goods that are narcotic goods;
- the Commissioner or Deputy Commissioner may cause the goods to be dealt with in such manner as he or she considers appropriate (including the destruction of the goods).
- (2) If goods are dealt with in accordance with subsection (1), the owner of the goods may bring an action against the Commonwealth in a court of competent jurisdiction for the recovery of the market value of the goods at the time they were so dealt with.
- (3) A right to recover the market value of the goods at the time they were dealt with in accordance with subsection (1) exists if:
- (a) the goods are not special forfeited goods; and
  - (b) the goods were not used or otherwise involved in the commission of an offence; and



- (c) the owner of the goods establishes, to the satisfaction of the Court, that the circumstances for them to be so dealt with did not exist.
- (4) If a person establishes a right to recover the market value of the goods at the time they were dealt with in accordance with subsection (1) or (2), the Court must order the payment by the Commonwealth of an amount equal to that value at that time.

## **208 Release of goods on security**

- (1) This section applies to goods:
  - (a) that have been seized under a seizure warrant; and
  - (b) that are not special forfeited goods; and
  - (c) that are not taken to be forfeited to the Crown under section 205C; and
  - (d) in respect of which proceedings have not yet been brought by the Commonwealth under section 205D.
- (2) The owner of the goods may apply to a court of summary jurisdiction for an order that the goods be released to the owner on provision to the CEO of security for an amount determined by the court in accordance with subsection (4).
- (3) In determining whether or not to order the release of the goods on provision of a security, the court may have regard to:
  - (a) the impact that the continued retention of the goods would have on the economic interests of third parties; and
  - (b) whether the continued retention of the goods would prevent the provision of services by third parties which would place at risk the health, safety or welfare of the community; and
  - (c) any other like matters that the court considers relevant.
- (4) For the purposes of this section, the security to be provided in respect of the goods is security for an amount determined by the court that does not exceed the sum of:
  - (a) the market value of the goods at the time when the order is made; and
  - (b) the costs incurred by Customs for storage of the goods from the time of their seizure until the time of their release under this section;reduced by the amount of any duty that has been paid on the goods.

Section T208CT

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- (5) If the security is given, the CEO is to release the goods to the applicant.

**208C Service by post**

For the purposes of the application of section 29 of the *Acts Interpretation Act 1901* to the service by post of a seizure notice under section 205 or a notice under subsection 206(3) on a person, such a notice posted as a letter addressed to that person at the last address of that person known to the sender shall be deemed to be properly addressed.

**208D Disposal of forfeited goods**

All goods seized under a seizure warrant or under subsection 185(2), 185A(6), 203B(2) or (2A), 203C(2), 203CA(3) or 203CB(2) that are taken to be condemned as forfeited to the Crown under section 205C or that are so condemned under section 205D shall be dealt with and disposed of in accordance with:

- (a) in the case of goods other than narcotic-related goods—the directions of the CEO; or
- (b) in the case of narcotic goods—the directions of the Commissioner of Police or a Deputy Commissioner of Police; or
- (c) in the case of narcotic-related goods other than narcotic goods—in accordance with section 208DA.

**208DA Disposal of narcotic-related goods other than narcotic goods**

- (1) In this section:

***condemned goods*** means goods seized under a seizure warrant or under subsection 203B(2) or 2A, 203C(2), 203CA(3) or 203CB(2):

- (a) that are taken to be condemned as forfeited to the Crown under section 205C; or
- (b) that are so condemned under section 205D.

***Official Trustee*** means the Official Trustee in Bankruptcy.

***prescribed officer*** means an SES employee, or acting SES employee, in the Attorney-General's Department.

Section T208DAT

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- (2) All condemned goods that are narcotic-related goods (other than narcotic goods) must, subject to any direction given under subsection (4) in relation to those goods, be transferred to the Official Trustee to be dealt with under subsection (3).
- (3) Where goods are transferred to the Official Trustee under subsection (2), the Official Trustee must, as soon as practicable:
  - (a) if the goods are money—credit the amount of the money to the Confiscated Assets Account as required by section 296 of the *Proceeds of Crime Act 2002*; and
  - (b) if the goods are not money:
    - (i) sell or otherwise dispose of the goods; and
    - (ii) apply the proceeds of the sale or disposition in accordance with subsection (3A); and
    - (iii) credit an amount equal to the remainder of those proceeds to the Confiscated Assets Account as required by section 296 of the *Proceeds of Crime Act 2002*.
- (3A) The proceeds of the sale or disposition of condemned goods transferred to the Official Trustee under subsection (2) must be applied in payment of:
  - (a) the Official Trustee's remuneration; and
  - (b) the other costs, charges and expenses of the kind referred to in section 243P that are payable to, or incurred by, the Official Trustee in connection with the sale or disposition; and
  - (c) if the goods were seized by, or delivered into the custody of, a member of the Australian Federal Police under a seizure warrant, or under section 203B, 203C, 203CA, 203CB or 204—the costs, charges and expenses incurred by, or on behalf of, the Commonwealth in connection with the transportation, storage, custody and control of the goods before their transferral to the Official Trustee.
- (4) If condemned goods consist of, or include, narcotic-related goods (other than narcotic goods), the Attorney-General, or a prescribed officer authorised by the Attorney-General for the purposes of this section, may, at any time before the condemned goods are sold or otherwise disposed of under subsection (2), direct that those narcotic-related goods be disposed of, or otherwise dealt with, as specified in the direction.

### **208E Sales subject to conditions**

Where a ship or aircraft is sold under section 206 or sold or otherwise disposed of under section 208D, the ship or aircraft may be sold or disposed of subject to conditions, including, without limiting the generality of the foregoing:

- (a) a condition that, before the expiration of a period specified in the condition, the ship or aircraft is to be exported from Australia; or
- (b) a condition that, before the expiration of a period specified in the condition, the ship or aircraft is to be broken up.

### **209 Power to impound certain forfeited goods and release them on payment of duty and penalty**

- (1) This section applies to dutiable goods that are forfeited by virtue of paragraph 229(1)(a), (g), (o), (p), (q) or (qa) (including forfeited by virtue of the operation of any of those paragraphs and section 230), other than goods that are prohibited imports.
- (2) Subject to subsection (3), an officer may impound goods instead of obtaining a seizure warrant to seize them if:
  - (a) the goods are in a Customs place; and
  - (b) either:
    - (i) the goods are goods to which this section applies; or
    - (ii) the officer has reason to believe that the goods are goods to which this section applies.
- (3) An officer must not exercise the power to impound goods under subsection (2) if, in the opinion of the officer, the amount of duty sought to be evaded in respect of the goods exceeds \$5,000.
- (4) Goods impounded under this section shall be taken to such place of security as the Collector directs.
- (5) Where an officer impounds goods under this section, he shall as soon as is practicable, but not later than 7 days after the day on which the goods were impounded, serve on the owner of the goods, either personally or by post, a notice in writing:
  - (a) identifying:
    - (i) if the goods are an article—the article; or

Section T209 T

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- (ii) if the goods consist of separate articles—each of those articles; or
  - (iii) in any other case—the goods;  
and stating that the article, articles or goods have been impounded under subsection (2); and
  - (b) setting out the amount of duty demanded in respect of the article, each of the articles, or the goods, identified in the notice; and
  - (c) setting out the date on which the goods were impounded; and
  - (d) setting out the terms of, or adequate particulars of the provisions of, subsections (6) and (7); and
  - (e) specifying the address at which payment under subsection (6) may be made in respect of the goods.
- (6) Where the owner of an article or goods identified in a notice served under subsection (5) pays to the Collector, at the address for payment shown in the notice and within 21 days after the day on which the notice was served, the duty demanded in respect of the article or goods (not being a payment under protest in accordance with section 167) together with an amount of penalty equal to:
- (a) if the goods were found in the course of a search of the baggage of a person who has arrived in Australia from a place outside Australia—an amount specified in the notice, being an amount equal to the amount of that duty that, in the opinion of the officer issuing the notice, the owner has sought to evade; or
  - (b) if paragraph (a) does not apply to the goods—an amount specified in the notice, being an amount equal to twice the amount of that duty that, in the opinion of the officer issuing the notice, the owner has sought to evade;
- the following provisions apply:
- (c) the Collector shall authorize the delivery of the article or goods to the owner;
  - (d) the article ceases, or the goods cease, to be forfeited; and
  - (e) proceedings shall not be brought for an offence against this Act in relation to the importation of the article or goods.

Section T209AT

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- (7) Where the owner of an article or goods identified in a notice served under subsection (5) does not pay duty and penalty in respect of the article or goods in accordance with subsection (6), the article or goods are taken:
  - (a) to have been seized under a seizure warrant at the end of 21 days after the notice is served; and
  - (b) to have been so seized by the officer who served the notice under subsection (5).
- (9) Neither the Commonwealth nor an officer or other person is under any liability in relation to the impounding of any goods under this section for which there was reasonable cause.
- (10) For the purpose of the application of section 29 of the *Acts Interpretation Act 1901* to the service by post on the owner of goods of a notice under subsection (5), such a notice posted as a letter addressed to the owner at his last address known to the officer required to serve the notice shall be deemed to be properly addressed.
- (11) A reference in this section to the baggage of a person who has arrived in Australia shall be read as including a reference to goods on his person or otherwise with him.
- (12) A reference in this section to a search of the baggage of a person shall be read as including a reference to a search of such part of the baggage of a person as is available for search at a particular time.

**209A Destruction or concealment of evidential material or forfeited goods**

A person must not:

- (a) destroy, or render incapable of identification, a document or thing that is, or may be, evidential material or a forfeited good; or
- (b) render illegible or indecipherable such a document or thing; or
- (c) place or conceal on his or her body, or in any clothing worn by the person, such a document or thing;

with the intention of preventing it from being seized by an authorised person in the exercise of the person's powers under a

search warrant, a seizure warrant or section 203B, 203C, 203CA or 203CB.

Penalty: Imprisonment for 2 years.

### **Subdivision GA—Dealing with goods in transit seized under a section 203DA warrant**

#### **209B Subdivision applies to seized transit goods**

This Subdivision applies to goods that have been seized under a seizure warrant under section 203DA, except for goods seized under paragraph 203DB(1)(d) (which covers goods suspected of being special forfeited goods).

Note: For other kinds of seized goods, see Subdivision G.

#### **209C Seized goods to be secured**

An officer of Customs who seizes any goods to which this Subdivision applies must, as soon as practicable, take the goods to a place approved by a Collector as a place for the storage of goods of that kind.

#### **209D Requirement to serve seizure notices**

- (1) The officer must serve, within 7 days after the seizure, a seizure notice on the owner of the goods or, if the owner cannot be identified after reasonable inquiry, on the person in whose possession or under whose control the goods were when they were seized.
- (2) Subsection (1) applies whether or not an application for the return of the goods seized has been made under section 209F.
- (3) The notice must be in writing and must be served:
  - (a) personally or by post; or
  - (b) if no person of the kind referred to in subsection (1) can be identified after reasonable inquiry—by publishing a copy of the notice in a newspaper circulating in the location in which the goods were seized.
- (4) A seizure notice may be served on a person who is outside Australia.

**209E Matters to be dealt with in seizure notices**

A seizure notice must set out the following:

- (a) a statement identifying the goods;
- (b) the day on which they were seized;
- (c) the ground, or each of the grounds, on which they were seized;
- (d) a statement that, if an application for the return of the goods has not already been made, and is not made within 30 days after the day the notice is served, the goods will be taken to be condemned as forfeited to the Crown.

**209F Application for return of seized goods**

- (1) The owner of the goods may, whether or not a seizure notice has yet been served on the owner, apply to a court of competent jurisdiction for the return of the goods.
- (2) An application must be made no later than 30 days after a seizure notice is issued in respect of the goods.
- (3) If the court finds that:
  - (a) the goods are not goods of the kind mentioned in subsection 203DA(1); and
  - (b) the goods were not used or otherwise involved in the commission of an offence against any law of the Commonwealth, a State or a Territory; and
  - (c) the person is the rightful owner of the goods;the court must order that the goods be returned to the owner.
- (4) Goods required to be so returned are required to be returned in a condition as near as practicable to the condition in which they were seized.
- (5) If the court finds otherwise than as mentioned in subsection (3), the goods are condemned as forfeited to the Crown.

**209G Status of goods seized if no application for return is made**

If:

- (a) a seizure notice has been served; and



(b) at the end of 30 days after the day on which the notice was served, no application has been made for return of the goods; the goods are condemned as forfeited to the Crown.

### **209H Right of compensation for certain goods disposed of or destroyed**

- (1) Despite the disposal or destruction of goods taken to be condemned as forfeited to the Crown because no application for their return was made, a person may apply to a court of competent jurisdiction under this section for compensation.
- (2) A right to compensation exists if:
  - (a) the goods are not goods of the kind mentioned in subsection 203DA(1); and
  - (b) the goods were not used or otherwise involved in the commission of an offence against any law of the Commonwealth, a State or a Territory; and
  - (c) the person establishes, to the satisfaction of the court:
    - (i) that he or she is the rightful owner of the goods; and
    - (ii) that there were circumstances providing a reasonable excuse for the failure to apply for the return of the goods not later than 30 days after the day the seizure notice was served.
- (3) If a right to compensation exists under subsection (2), the court must order the payment by the Commonwealth to the person of an amount equal to:
  - (a) if the goods have been sold—the proceeds of the sale; and
  - (b) if the goods have been destroyed or otherwise disposed of—the goods' market value at the time of their destruction or disposal.

### **209I Effect of forfeiture**

When goods are condemned as forfeited to the Crown under this Subdivision, the title to the goods immediately vests in the Commonwealth to the exclusion of all other interests in the goods, and the title cannot be called into question.

**209J Immediate disposal of unsafe goods**

- (1) If the CEO or a Regional Director for a State or Territory is satisfied that the retention of goods seized would constitute a danger to public health or safety, the CEO or Regional Director may cause the goods to be dealt with in such manner as he or she considers appropriate (including the destruction of the goods).
- (2) As soon as practicable, but not later than 7 days after the goods have been dealt with, the CEO or Regional Director concerned must give or publish a notice in accordance with subsection (4).
- (3) The notice must be in writing and must be served:
  - (a) personally or by post on the owner of the goods or, if the owner cannot be identified after reasonable inquiry, on the person in whose possession or under whose control the goods were when they were seized; or
  - (b) if no person of the kind referred to in paragraph (a) can be identified after reasonable inquiry—by publishing a copy of the notice in a newspaper circulating in the location in which the goods were seized.
- (4) The notice must:
  - (a) identify the goods; and
  - (b) state that the goods have been seized under a seizure warrant under section 203DA and give the reason for the seizure; and
  - (c) state that the goods have been dealt with under subsection (1) and specify the manner in which they have been so dealt with and the reason for doing so; and
  - (d) set out the terms of subsection (5).
- (5) If goods are dealt with in accordance with subsection (1), the owner of the goods may bring an action against the Commonwealth in a court of competent jurisdiction for the recovery of the market value of the goods at the time they were so dealt with.
- (6) A right to recover the market value of the goods at the time they were dealt with in accordance with subsection (1) exists if:
  - (a) the goods were not goods of the kind mentioned in subsection 203DA(1); and

Section T209KT

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- (b) the goods were not used or otherwise involved in the commission of an offence against any law of the Commonwealth, a State or a Territory; and
  - (c) the owner of the goods establishes, to the satisfaction of the Court, that the circumstances for them to be so dealt with did not exist.
- (7) If a person establishes a right to recover the market value of the goods at the time they were dealt with, the Court must order the payment by the Commonwealth of an amount equal to that value at that time.

**209K Disposal of forfeited goods**

- (1) All goods that are condemned as forfeited to the Crown under this Subdivision must be dealt with and disposed of in accordance with the directions of the CEO.
- (2) In particular, the CEO may direct that the goods be given to a relevant authority of a foreign country in order that the goods be used in an investigation or prosecution under the laws of that country.
- (3) Subsection (2) does not limit the generality of subsection (1).

**209L Service by post**

For the purposes of the application of section 29 of the *Acts Interpretation Act 1901* to the service by post of a seizure notice under section 209D or a notice under subsection 209J(3) on a person, such a notice posted as a letter addressed to that person at the last address of that person known to the sender is taken to be properly addressed.

**Subdivision H—Powers of arrest**

**210 Persons suspected of smuggling etc.**

- (1) An officer of Customs or police may without warrant arrest any person who he has reasonable grounds to believe is guilty of:
  - (a) committing an offence against section 231 or 233; or
  - (b) committing an offence against subsection 233BAA(4) or (5) or 233BAB(5) or (6); or

Section T212T

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- (c) committing an offence against Division 307 of the *Criminal Code*; or
  - (d) committing an offence against section 308.2 of the *Criminal Code* where the substance involved in the offence is reasonably suspected of:
    - (i) having been imported into Australia in contravention of this Act; or
    - (ii) being intended for export from Australia in contravention of this Act.
- (1A) An officer of Customs or police may, without warrant, arrest a person if he has reasonable ground for believing that the person has committed an offence against section 147.1, 147.2 or 149.1 of the *Criminal Code* in relation to a Customs Officer.
- (2) No person shall resist, obstruct, or prevent the arrest of any person in pursuance of this section.

Penalty: 10 penalty units.

## 212 Arrested persons to go before Justices

Every person arrested may be detained until such time as he can without undue delay be taken before a Justice.

## 213 Powers of Justices with offenders

Any Justice before whom any person is brought under this Act may:

- (1) Commit such person to gaol until he can be brought before Justices to be dealt with according to law; or
- (2) Admit him to bail upon his giving sufficient security for his appearance before Justices at the time and place appointed for the hearing of the charge.

**Subdivision HA—Information about people working in restricted areas or issued with security identification cards**

**213A Providing Customs with information about people working in restricted areas**

- (1) A person who employs or engages a restricted area employee must, within 7 days after doing so, provide to an authorised officer the required identity information in respect of the employee.
- (2) If a person (the *employer*):
  - (a) employs or engages another person after the commencement of this section; and
  - (b) at a later time the other person becomes a restricted area employee of the employer;the employer must, within 7 days after that later time, provide to an authorised officer the required identity information in respect of the employee.
- (3) If:
  - (a) a person (the *employer*) employed or engaged another person before the commencement of this section; and
  - (b) the other person is a restricted area employee of the employer; and
  - (c) an authorised officer suspects on reasonable grounds that the other person has committed, or is likely to commit, an offence against a law of the Commonwealth;the authorised officer may, in writing, request the employer to provide to the authorised officer, within 7 days after receiving the request, the required identity information in respect of the employee. The employer must comply with the request.
- (4) A person does not comply with an obligation under subsection (1), (2) or (3) to provide information unless the person provides the information:
  - (a) in writing; or
  - (b) in such other form as the CEO determines in writing.
- (5) A person commits an offence if the person fails to comply with subsection (1), (2) or (3).

Section T213B

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Penalty: 30 penalty units.

- (6) Subsection (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (7) In this section:

***required identity information***, in relation to a person, means any one or more of the following:

- (a) the name and address of the person;
- (b) the person's date and place of birth;
- (c) any other information prescribed by the regulations.

***restricted area employee*** means a person whose duties include working in an area covered by a notice under subsection 234AA(3), but does not include a person who is issued with a security identification card.

***security identification card*** means a card of a kind specified in the regulations.

**213B Providing Customs with information about people issued with security identification cards**

- (1) A person who issues a security identification card to another person in respect of an airport appointed under section 15 must, within 7 days after doing so, provide to an authorised officer the required identity information in respect of the person.
- (2) If:
- (a) before the commencement of this section, a person issued a security identification card to another person in respect of an airport appointed under section 15; and
  - (b) an authorised officer suspects on reasonable grounds that the other person has committed, or is likely to commit, an offence against a law of the Commonwealth;
- the authorised officer may, in writing, request the person who issued the card to provide to the authorised officer, within 7 days after receiving the request, the required identity information in respect of the other person. The person so requested must comply with the request.

- (3) A person does not comply with an obligation under subsection (1) or (2) to provide information unless the person provides the information:
- (a) in writing; or
  - (b) in such other form as the CEO determines in writing.

- (4) In this section:

*required identity information* has the meaning given by section 213A.

*security identification card* has the meaning given by section 213A.

## Subdivision J—General powers to monitor and audit

### 214AA Occupier of premises

In this Subdivision:

*occupier* of premises includes a person who is apparently in charge of the premises.

### 214AB What are *monitoring powers*?

*Monitoring powers*

- (1) For the purposes of this Subdivision, the following are *monitoring powers*:
- (a) the power to search premises;
  - (b) the power to take photographs (including a video recording), or make sketches, of premises or anything at premises;
  - (c) the power to inspect, examine, count, measure, weigh, gauge, test or analyse, and take samples of, anything in or on premises;
  - (d) the power to inspect any document or record in or on premises;
  - (e) the power to take extracts from, or make copies of, any document or record in or on premises;
  - (f) the power to take into or onto premises any equipment or material reasonably necessary for the purpose of exercising a power under paragraph (a), (b), (c), (d) or (e);

Section T214ABT

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- (g) the power to test and operate record-keeping, accounting, computing or other operating systems of any kind that are at premises and may be used to generate or record information or documents of a kind that may be communicated to Customs;
- (h) the power to secure a thing that:
  - (i) is found during a search of premises; and
  - (ii) a monitoring officer believes on reasonable grounds affords evidence of the commission of an offence against a Customs-related law and may be lost, destroyed or tampered with;until a warrant is obtained to seize the thing or 72 hours elapses after the securing of the thing, whichever first occurs;
- (i) the powers in subsections (2) and (3).

*Power to operate equipment to check information*

- (2) For the purposes of this Subdivision, **monitoring powers** include the power to operate equipment at premises to see whether:
  - (a) the equipment; or
  - (b) a disk, tape or other storage device that:
    - (i) is at the premises; and
    - (ii) can be used with the equipment or is associated with it;contains information that is relevant to assessing:
  - (c) whether a person is complying with a Customs-related law; or
  - (d) whether a person's record-keeping, accounting, computing or other operating systems of any kind accurately record and generate information to enable compliance with a Customs-related law; or
  - (e) the correctness of information communicated by a person to Customs (whether in documentary or other form).

*Power to copy information found by operating equipment*

- (3) For the purposes of this Subdivision, **monitoring powers** include the following powers in relation to information described in subsection (2) that is found in the exercise of the power under that subsection:



- (a) the power to operate facilities at the premises to put the information in documentary form and copy the documents so produced;
- (b) the power to operate facilities at the premises to transfer the information to a disk, tape or other storage device:
  - (i) that is brought to the premises for the exercise of the power; or
  - (ii) that is at the premises and the use of which for the purpose has been agreed in writing by the occupier of the premises;
- (c) the power to remove from the premises a disk, tape or other storage device to which the information has been transferred in exercise of the power under paragraph (b).

### 214AC Monitoring officers

*Who is a monitoring officer?*

- (1) A **monitoring officer** is an officer who is authorised by the CEO under this section to enter premises and exercise monitoring powers (whether the authorisation applies generally, during a specified period or in or on specified premises).

*Who may be authorised to be a monitoring officer*

- (2) The CEO must not authorise an officer to enter premises and exercise monitoring powers unless the CEO is satisfied that the officer is suitably qualified, because of the officer's abilities and experience, to exercise those powers.

*Authorising officers to exercise monitoring powers*

- (3) The CEO may authorise in writing an officer to enter premises and exercise monitoring powers:
  - (a) generally; or
  - (b) during a specified period; or
  - (c) in or on specified premises; or
  - (d) during a specified period in or on specified premises.

Section T214ACAT

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*Availability of assistance and use of force in exercising monitoring powers*

- (4) In entering premises and exercising monitoring powers:
- (a) a monitoring officer may obtain such assistance; and
  - (b) a monitoring officer or a person assisting a monitoring officer may use such force against things;
- as is necessary and reasonable in the circumstances.

*Monitoring powers to be used only as authorised*

- (5) This Subdivision does not allow:
- (a) an officer who is authorised to enter premises and exercise monitoring powers during a specified period to enter the premises or exercise the powers at a time outside that period; or
  - (b) an officer who is authorised to enter, and exercise monitoring powers in or on, specified premises to enter, or to exercise the powers in or on, other premises.

**214ACA Monitoring officer to notify occupier of premises of the occupier's rights and obligations**

Before exercising monitoring powers in respect of premises, a monitoring officer must give to the occupier of the premises a written notice setting out the occupier's rights and obligations under this Subdivision.

**214AD Notice of proposal to exercise monitoring powers**

Before seeking consent under section 214AE to enter premises and exercise monitoring powers there, a monitoring officer may give to the occupier of the premises written notice stating that the officer wishes to enter the premises and exercise monitoring powers and specifying the period from the giving of the notice during which the officer wishes to exercise the powers.

Note: If the occupier had, before a notice is given under section 214AD, made to Customs a statement that was false or misleading, a voluntary notification made by the occupier after the notice is given is not a defence to a prosecution for an offence against section 243T or 243U in respect of the statement.

### **214AE Exercise of monitoring powers with consent**

- (1) A monitoring officer may enter, and exercise monitoring powers in or on, premises to the extent that it is reasonably necessary for the purpose of assessing:
  - (a) whether a person is complying with a Customs-related law; or
  - (b) whether a person's record-keeping, accounting, computing or other operating systems of any kind accurately record and generate information to enable compliance with a Customs-related law; or
  - (c) the correctness of information communicated by a person to Customs (whether in documentary or other form).
- (2) However, a monitoring officer must not enter premises under this section unless the occupier of the premises has consented to the monitoring officer entering, and exercising monitoring powers in or on, the premises.
- (3) Before obtaining such a consent, a monitoring officer must tell the occupier of the premises that he or she can refuse consent.
- (4) A consent may be expressed to be limited to entry to, and the exercise of monitoring powers in or on, the premises to which the consent relates during a particular period unless the consent is withdrawn before the end of that period.
- (5) A consent that is not limited as mentioned in subsection (4) has effect in relation to any entry to, and any exercise of monitoring powers in or on, the premises to which the consent relates until the consent is withdrawn.
- (6) Before a monitoring officer enters premises or exercises any monitoring powers, he or she must produce his or her identity card to the occupier.
- (7) A monitoring officer must leave the premises if the occupier withdraws the consent.
- (8) A consent, or a withdrawal of consent, does not have effect unless the consent or withdrawal is in writing.

**214AF Exercise of monitoring powers under a warrant**

- (1) A monitoring officer may apply to a magistrate for a warrant under this section in relation to particular premises.
- (2) The magistrate must issue a warrant if satisfied, by information on oath or affirmation, that it is reasonably necessary that the monitoring officer should have access to the premises for the purpose of assessing:
  - (a) whether a person is complying with a Customs-related law; or
  - (b) whether a person's record-keeping, accounting, computing or other operating systems of any kind accurately record and generate information to enable compliance with a Customs-related law; or
  - (c) the correctness of information communicated by a person to Customs (whether in documentary or other form).
- (3) If the magistrate requires further information about the grounds on which the issue of the warrant is applied for, he or she must not issue the warrant until the monitoring officer or someone else has given the magistrate the further information, either orally (on oath or affirmation) or by affidavit.
- (4) The warrant must:
  - (a) state the purpose for which the warrant is issued; and
  - (b) identify the premises to which the warrant relates; and
  - (c) name the monitoring officer who is responsible for executing the warrant; and
  - (d) authorise any monitoring officer named in the warrant to enter the premises and exercise monitoring powers from time to time while the warrant remains in force, with such assistance, and using such force against things, as are necessary and reasonable; and
  - (e) state the hours during which entry under the warrant is authorised to be made; and
  - (f) specify the day (not more than 6 months after the day of issue of the warrant) on which the warrant ceases to have effect.
- (5) A magistrate in a particular State or Territory may issue a warrant in respect of premises in another State or Territory.

**214AG Warrants may be granted by telephone or other electronic means**

- (1) A monitoring officer may apply to a magistrate for a warrant in relation to premises by telephone, telex, fax or other electronic means (of any kind):
  - (a) in an urgent case; or
  - (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (2) The magistrate may require communication by voice to the extent that is practicable in the circumstances.
- (3) An application under this section must include all information required to be provided in an application for a warrant under section 214AF but the application may, if necessary, be made before the information is sworn.
- (4) The magistrate must complete and sign the same form of warrant used under section 214AF as soon as he or she:
  - (a) has considered the information included in the application under this section, and the further information (if any) required by him or her; and
  - (b) is satisfied that:
    - (i) a warrant in the terms of the application should be issued urgently; or
    - (ii) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (5) If the magistrate decides to issue the warrant, the magistrate is to tell the applicant, by telephone, telex, fax or other electronic means, of the terms of the warrant and the day and time when it was signed.
- (6) The applicant must then complete a form of warrant in terms substantially corresponding to those given by the magistrate, stating on the form the name of the magistrate and the day and time when the warrant was signed.
- (7) The applicant must give or send to the magistrate the form of warrant completed by the applicant and, if the information referred to in subsection (3) was not sworn, that information duly sworn.

Section T214AHT

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The applicant must do so not later than the day after the earlier of the following days:

- (a) the day of expiry of the warrant;
  - (b) the day on which the warrant was first executed.
- (8) The magistrate is to attach to the documents provided under subsection (7) the form of warrant completed by the magistrate.
- (9) If:
- (a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a warrant issued under this section was duly authorised; and
  - (b) the form of warrant signed by the magistrate is not produced in evidence;
- the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

**214AH Monitoring officer may ask questions**

- (1) If a monitoring officer is in or on premises that he or she entered with the consent of the occupier of the premises, the officer may request the occupier to answer any questions put by the monitoring officer, but the occupier is not obliged to comply with the request.
- (2) If a monitoring officer is in or on premises that he or she has entered under a warrant issued under section 214AF or 214AG, the officer may require any person on the premises to answer any questions put by the monitoring officer.

Note: Failure to answer a question put under this subsection may be an offence. See section 243SA.

**214AI Monitoring officer may ask for assistance**

- (1) If a monitoring officer is in or on premises that he or she entered with the consent of the occupier of the premises under section 214AE, the officer may request the occupier to provide reasonable assistance to the officer at any time while the officer is entitled to remain in or on the premises, but the occupier is not obliged to comply with the request.
- (2) If a monitoring officer is in or on premises that he or she entered under a warrant issued under section 214AF or 214AG, the officer

may require the occupier to provide reasonable assistance to the officer at any time while the officer is entitled to remain on the premises.

- (3) The monitoring officer may request or require the assistance for the purpose of the exercise of monitoring powers by the officer in relation to the premises.
- (4) A person must not fail to comply with a requirement made of the person under subsection (2).

Penalty: 30 penalty units.

- (5) An offence against subsection (4) is an offence of strict liability.

### **214AJ Compensation for damage to electronic equipment**

- (1) This section applies if:
  - (a) damage is caused to equipment as a result of it being operated as mentioned in subsection 214AB(2); or
  - (b) the data recorded on the equipment is damaged or programs associated with its use are damaged or corrupted;because:
  - (c) insufficient care was exercised in selecting the person who was to operate the equipment; or
  - (d) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay to the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as they agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings against the Commonwealth in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises or the occupier's employees and agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.

Section T214BT

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- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1), *damage to data* includes damage by erasure of data or addition of other data.

**214B Powers of officers for purposes of *Customs Tariff (Anti-Dumping) Act 1975***

- (1) For the purposes of the *Customs Tariff (Anti-Dumping) Act 1975* an authorized officer may, at all reasonable times, enter premises where there are kept any accounts, books or other records relating to goods exported to Australia or manufactured or produced, or sold, in Australia and may inspect any such accounts, books, documents or other records and make and retain copies of, or take and retain extracts from, any such accounts, books, documents or other records.
- (2) Where an authorized officer proposes to enter any premises under subsection (1), he shall, if requested to do so by the occupier or person in charge of the premises, produce for inspection written evidence of the fact that he is an authorized officer and, if he fails to do so, he is not authorized to enter the premises.
- (3) The occupier or person in charge of premises referred to in subsection (1) shall provide the authorized officer with all reasonable facilities and assistance for the effective exercise of his powers under subsection (1).

Penalty: 10 penalty units.

- (4) An authorized officer may, by notice signed by him, require a person whom he believes to be capable of giving information that is relevant to the operation of the *Customs Tariff (Anti-Dumping) Act 1975* and relates to goods exported to Australia or manufactured or produced, or sold, in Australia to attend before him at the time and place specified in the notice and there to answer questions and produce to him such accounts, books, documents or other records in relation to goods exported to Australia or manufactured or produced, or sold, in Australia as are referred to in the notice.



Section T214BAAT

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- (5) An authorized officer may make and retain copies of, or take and retain extracts from, any accounts, books, documents or other records produced in pursuance of subsection (4).
- (6) A person is not excused from answering a question or producing any accounts, books, documents or other records when required to do so under subsection (4) on the grounds that the answer to the question, or the production of the accounts, books, documents or other records, might tend to incriminate him or make him liable to a penalty, but his answer to any such question or the production by him of any such accounts, books, documents or other records is not admissible in evidence against him in proceedings other than proceedings for an offence against this section or proceedings in respect of the falsity of any such answer.
- (7) An authorized officer may examine, on oath or affirmation, a person attending before him in pursuance of subsection (4) and, for that purpose, may administer an oath or affirmation to that person.
- (8) The oath or affirmation to be made by a person for the purposes of subsection (7) is an oath or affirmation that the answers he will give to questions asked him will be true.
- (9) A person shall not refuse or fail:
  - (a) to attend before an authorized officer;
  - (b) to make an oath or an affirmation; or
  - (c) to answer a question or produce an account, book, document or other record;when so required in pursuance of this section.  
  
Penalty: 10 penalty units.
- (10) Subsection (9) does not apply if the person has a reasonable excuse.

**Subdivision JA—Powers to monitor and audit—  
Australia-United States Free Trade Agreement**

**214BAA Simplified outline**

The following is a simplified outline of this Subdivision:

Section T214BABT

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- This Subdivision allows certain officers (*verification officers*) to enter premises, and to exercise certain powers (*AUSFTA verification powers*) in or on the premises, for the purpose of verifying information relating to the export, production or transportation of textile and clothing goods that are exported to the US.
- However, verification officers may only enter premises under this Subdivision with the occupier's consent.
- In entering premises and exercising AUSFTA verification powers, verification officers may be accompanied by US customs officials, but only with the occupier's consent.

### 214BAB Definitions

In this Subdivision:

**Agreement** means the Australia-United States Free Trade Agreement done at Washington DC on 18 May 2004, as amended from time to time.

Note: In 2004 the text of the Agreement was accessible on the Internet through the web site of the Department of Foreign Affairs and Trade.

**AUSFTA verification powers** has the meaning given by section 214BAC.

**Harmonized System** has the same meaning as in section 153YA.

**occupier** of premises includes a person who is apparently in charge of the premises.

**textile and clothing goods** means goods that are classified to:

- (a) subheading 4202.12, 4202.22, 4202.32 or 4202.92 of Chapter 42 of the Harmonized System; or
- (b) any of Chapters 50 to 63 of the Harmonized System; or
- (c) heading 7019 of Chapter 70 of the Harmonized System; or
- (d) subheading 9409.90 of Chapter 94 of the Harmonized System.

**US** means the United States of America.

*US customs official* means a person representing the customs administration of the US.

*verification officer* means a person authorised under section 214BAD to enter premises and to exercise AUSFTA verification powers.

### 214BAC AUSFTA verification powers

- (1) For the purposes of this Subdivision, the following are the *AUSFTA verification powers*:
  - (a) the power to search premises;
  - (b) the power to take photographs (including a video recording), or make sketches, of premises or anything at premises;
  - (c) the power to inspect, examine, count, measure, weigh, gauge, test or analyse, and take samples of, anything in or on premises;
  - (d) the power to inspect any document or record in or on premises;
  - (e) the power to take extracts from, or make copies of, any document or record in or on premises;
  - (f) the power to take into or onto premises any equipment or material reasonably necessary for the purpose of exercising a power under paragraph (a), (b), (c), (d) or (e);
  - (g) the power to test and operate record-keeping, accounting, computing or other operating systems of any kind that are at premises and may be used to generate or record information or documents of a kind that may be communicated to Customs;
  - (h) the powers in subsections (2) and (3).

#### *Operation of equipment*

- (2) For the purposes of this Subdivision, the *AUSFTA verification powers* include the power to operate equipment at premises to see whether:
  - (a) the equipment; or
  - (b) a disk, tape or other storage device that:
    - (i) is at the premises; and
    - (ii) can be used with the equipment or is associated with it;

Section T214BADT

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contains information that is relevant to the verification of information relating to the export, production or transportation of textile and clothing goods that are exported to the US.

*Removing documents and disks etc.*

- (3) For the purposes of this Subdivision, the **AUSFTA verification powers** include the following powers in relation to information described in subsection (2) that is found in the exercise of the power under that subsection:
- (a) the power to operate equipment or other facilities at the premises to put the information in documentary form and remove the documents so produced;
  - (b) the power to operate equipment or other facilities at the premises to transfer the information to a disk, tape or other storage device:
    - (i) that is brought to the premises for the exercise of the power; or
    - (ii) that is at the premises and the use of which for the purpose has been agreed in writing by the occupier of the premises;and to remove the disk, tape or other storage device from the premises.

**214BAD Appointment of verification officers**

- (1) The CEO may, by writing, authorise an officer to enter premises, and to exercise AUSFTA verification powers in or on premises, for the purposes of this Subdivision.

*Who may be authorised to be a verification officer*

- (2) The CEO must not do so unless the CEO is satisfied that the officer is suitably qualified, because of the officer's abilities and experience, to exercise AUSFTA verification powers.

*Form of authorisation*

- (3) An authorisation may apply:
- (a) generally; or
  - (b) during a specified period; or
  - (c) in or on specified premises; or

(d) during a specified period in or on specified premises.

*AUSFTA verification powers to be used only as authorised*

- (4) This Subdivision does not allow:
- (a) an officer who is authorised to enter premises and exercise AUSFTA verification powers during a specified period to enter the premises or exercise the powers at a time outside that period; or
  - (b) an officer who is authorised to enter specified premises and to exercise AUSFTA verification powers in or on the premises to enter other premises or to exercise the powers in or on the other premises.

**214BAE Verification officers may enter premises and exercise AUSFTA verification powers with consent**

- (1) A verification officer may enter premises, and exercise AUSFTA verification powers in or on the premises, to the extent that it is reasonably necessary for the purpose of verifying information relating to the export, production or transportation of textile and clothing goods that are exported to the US.

*Occupier's consent required*

- (2) However, a verification officer must not enter premises under this section unless the occupier of the premises consents to the officer entering the premises and exercising AUSFTA verification powers in or on the premises.
- (3) Before obtaining a consent under subsection (2), a verification officer must give to the occupier of the premises a written notice stating:
- (a) that the officer wishes to enter the premises and exercise AUSFTA verification powers in or on the premises; and
  - (b) the period during which the officer wishes to exercise the powers; and
  - (c) the name of any US customs official who the officer proposes will accompany the officer.

Section T214BAET

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- (4) Before obtaining a consent under subsection (2), a verification officer must tell the occupier of the premises that the occupier may refuse consent.
- (5) An occupier of premises may express a consent to be limited to entry to the premises, and to the exercise of AUSFTA verification powers in or on the premises, during a particular period unless the occupier withdraws the consent before the end of that period.
- (6) An occupier's consent that is not so limited has effect in relation to any entry to the premises, and to any exercise of AUSFTA verification powers in or on the premises, until the occupier withdraws the consent.

*Verification officer must leave premises if consent withdrawn*

- (7) A verification officer must leave the premises if the occupier withdraws the consent.

*Consent to be voluntary*

- (8) A consent of a person does not have effect for the purposes of this section unless it is voluntary.

*Consent, or withdrawal of consent, to be in writing*

- (9) A consent of a person, or a withdrawal of consent by a person, does not have effect for the purposes of this section unless it is in writing.

*Notice setting out the occupier's rights and obligations*

- (10) Before exercising AUSFTA verification powers in respect of premises, a verification officer must give to the occupier of the premises a written notice setting out the occupier's rights and obligations under this Subdivision.

*Production of identity card*

- (11) Before a verification officer enters premises or exercises any AUSFTA verification powers, he or she must produce his or her identity card to the occupier.

**214BAF US customs officials may accompany verification officers**

*Occupier's consent required*

- (1) In entering premises and exercising AUSFTA verification powers, a verification officer may be accompanied by one or more US customs officials, but only if the officer obtains the consent of the occupier of the premises to those officials accompanying the officer.
- (2) Before obtaining such a consent, a verification officer must tell the occupier of the premises that the occupier may refuse consent.

*US customs officials must leave premises if consent withdrawn*

- (3) The US customs officials must leave the premises if the occupier withdraws the consent.

*Consent to be voluntary*

- (4) A consent of a person does not have effect for the purposes of this section unless it is voluntary.

*Consent, or withdrawal of consent, to be in writing*

- (5) A consent of a person, or a withdrawal of consent by a person, does not have effect for the purposes of this section unless it is in writing.

**214BAG Availability of assistance in exercising AUSFTA verification powers**

In entering premises and exercising AUSFTA verification powers, a verification officer may obtain such assistance as is necessary and reasonable in the circumstances.

**214BAH Verification officer may ask questions**

- (1) If a verification officer is in or on premises that he or she entered under this Subdivision, the officer may request the occupier to answer any questions put by the officer.
- (2) The occupier is not obliged to comply with the request.

Section T214BAIT

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**214BAI Verification officer may ask for assistance**

- (1) If a verification officer is in or on premises that he or she entered under this Subdivision, then, while the officer is entitled to remain in or on the premises, the officer may request the occupier to provide reasonable assistance to the officer for the purpose of the officer's exercise of AUSFTA verification powers in or on the premises.
- (2) The occupier is not obliged to comply with the request.

**214BAJ Verification officer may disclose information to US**

A verification officer may disclose any information obtained in exercising AUSFTA verification powers to a US customs official for the purpose of a matter covered by Article 4.3 of the Agreement.

**214BAK Operation of electronic equipment at premises**

A person may operate electronic equipment at premises in order to exercise a power under this Subdivision only if he or she believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

**214BAL Compensation for damage to electronic equipment**

- (1) This section applies if:
  - (a) as a result of equipment being operated as mentioned in section 214BAC:
    - (i) damage is caused to the equipment; or
    - (ii) the data recorded on the equipment is damaged; or
    - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
  - (b) the damage or corruption occurs because:
    - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
    - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the



Section T214BAT

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damage or corruption as the Commonwealth and the owner or user agree on.

- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees and agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):

*damage*, in relation to data, includes damage by erasure of data or addition of other data.

### **Subdivision K—Miscellaneous**

#### **214BA Nature of functions of magistrate under sections 203S and 205E**

- (1) A function of making an order conferred on a magistrate by section 203S or 205E is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (2) Without limiting the generality of subsection (1), an order made by a magistrate under section 203S or 205E has effect only by virtue of this Act and is not taken, by implication, to be made by a court.
- (3) A magistrate performing a function of, or connected with, making an order under section 203S or 205E has the same protection and immunity as if he or she were performing that function as, or as a member of, a court (being the court of which the magistrate is a member).
- (4) The Governor-General may make arrangements with the Governor of a State, the Chief Minister of the Australian Capital Territory, the Administrator of the Northern Territory or the Administrator of

Section T215T

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Norfolk Island for the performance, by all or any of the persons who from time to time hold office as magistrates in that State or Territory, of the function of making orders under section 203S or 205E.

**215 Collector may impound documents**

The Collector may impound or retain any document presented in connexion with any entry or required to be produced under this Act, but the person otherwise entitled to such document shall in lieu thereof be entitled to a copy certified as correct by the Collector and such certified copy shall be received in all courts as evidence and of equal validity with the original.

**217 Translations of foreign invoices**

If any document in a foreign language be presented to any officer for any purpose connected with Customs business, the Collector may require to be supplied with an English translation to be made at the expense of the owner by such person as the Collector may approve or to be verified as he may require.

**218 Customs samples**

Samples of any goods under the control of the Customs may for any purpose deemed necessary by the Collector be taken utilized and disposed of by any officer in manner prescribed.

**218A Disposal of certain abandoned goods**

- (1) If a Collector has reason to believe that goods found at a Customs place:
  - (a) are not required to be, or are not able to be, entered for home consumption; and
  - (b) have been abandoned by their owner;the Collector may take steps to dispose of the goods in any manner he or she thinks appropriate.
- (2) For the purposes of subsection (1), a Collector is be taken to have reason to believe that goods found at a Customs place have been abandoned if a period prescribed for the purposes of this subsection, not exceeding 120 days, has passed since the goods

were found at that place and no person has claimed ownership of the goods.

- (3) If the Collector sells the goods, any expenses incurred by the Customs in collecting and housing them and ultimately arranging for their disposal may be offset against any money realised on their sale.
- (4) Nothing in this provision prevents a person, at any time after the end of the prescribed period in relation to particular goods found at a Customs place, from seeking compensation for those goods in accordance with section 4AB.
- (5) For the purposes of this section, the Collector must ensure that there is created and maintained a record, in writing, specifying, in respect of particular goods found at a Customs place:
  - (a) the date on which and place at which the goods were found; and
  - (b) if the goods are subsequently disposed of—the date and manner of their disposal; and
  - (c) if the goods are sold—the amount realised on their sale and any amount offset against that amount in accordance with subsection (3).

## **219 General power of Collector**

In all cases not herein otherwise provided for the Collector may exercise any power exercisable by the Customs.

## **Division 1B—Detention and search of suspects**

### **Subdivision A—Detention and frisk search of suspects**

#### **219L Detention for frisk search**

- (1) Where a detention officer suspects on reasonable grounds that a person is unlawfully carrying any prohibited goods on his or her body, an officer of Customs may, while a person is at a designated place, detain the person at the place for the purposes of being searched under this Subdivision.

(1A) If:

- (a) officers have boarded a ship, aircraft or installation under section 185 or 187 for the purpose of conducting a search, or exercising any other power, under that section, in relation to that ship, aircraft or installation; and
- (b) a detention officer suspects on reasonable grounds that a person who is on board the ship, aircraft or installation is unlawfully carrying prohibited goods on his or her body; and
- (c) in the case where the person is on board a ship—the ship:
  - (i) is an Australian ship that is outside the territorial sea of a foreign country; or
  - (ii) is a foreign ship that is on the landward side of the outer edge of Australia's territorial sea;

the detention officer may detain the person for the purpose of being searched under this Subdivision.

(1B) If:

- (a) officers have boarded a ship or aircraft under section 185 for the purpose of conducting a search, or exercising any other power, under that section, in relation to that ship or aircraft; and
- (b) a detention officer suspects on reasonable grounds that a person who is on board the ship or aircraft is carrying on his or her body any weapon or thing that is capable of being used to inflict bodily injury on an officer conducting that search or exercising that other power; and
- (c) in the case where the person is on board a ship—the ship:

- (i) is an Australian ship that is outside the territorial sea of a foreign country; or
- (ii) is a foreign ship that is on the landward side of the outer edge of Australia's territorial sea;

the detention officer may detain the person for the purpose of being searched under this Subdivision.

(1C) If:

- (a) a person has boarded a Customs vessel or Commonwealth ship for a purpose connected with the conduct of a search or the exercise of any other power under section 185; and
- (b) a detention officer suspects on reasonable grounds that the person is carrying on his or her body any weapon or thing that is capable or being used to inflict bodily injury on an officer conducting that search or exercising that other power;

the detention officer may detain the person for the purpose of being searched under this Subdivision.

(2) Without limiting the generality of subsection (1), (1A), (1B) or (1C), a suspicion on reasonable grounds for the purposes of that subsection includes a suspicion reasonably formed on the basis of any of the following:

- (a) the person's travel itinerary, including plans in relation to places that have been visited or are intended to be visited by the person;
- (b) declarations or statements made under a law of the Commonwealth by the person in the course of arriving in or departing from Australia;
- (c) documents in the person's possession, including passports, visas or tickets;
- (d) unusual behaviour of the person observed by or reported to an officer of Customs;
- (e) the contents of or appearance of any visible item carried by the person or, if the person has baggage, of the person's baggage, whether or not carried by the person;
- (f) the answers given by the person in relation to questions asked by an officer of Customs in the exercise of powers under this Act, or the refusal or failure of the person to answer such questions;

Section T219MT

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- (g) the documents produced by the person in compliance with an obligation under this Act, or the refusal or failure of the person to produce such documents.

**219M Frisk search**

- (1) A frisk search of a person detained under section 219L is not to be carried out unless it is carried out:
  - (a) as soon as practicable after the detainee is detained; and
  - (b) by an officer of Customs who is of the same sex as the detainee.
- (2) Before carrying out the frisk search of a person who is detained in a designated place that is a section 234AA place, the officer of Customs must:
  - (a) advise the detainee of the detainee's right to request that the search be carried out in an area of the place of detention that would, in the CEO's opinion, provide adequate personal privacy to the detainee during the search; and
  - (b) if the detainee so requests, take the detainee to such an area.
- (3) If the detainee is detained at a designated place other than a section 234AA place, then, in the conduct of a frisk search of the detainee, the officer conducting the search must use his or her best endeavours to give the detainee as much personal privacy as the circumstances of the search allow.
- (4) Before carrying out the frisk search of a person who is detained under subsection 219L(1B) or (1C), the officer of Customs must:
  - (a) inform the person that the person is being detained so that a search for any weapon or thing capable of being used to inflict bodily injury on an officer can be conducted; and
  - (b) inform the person:
    - (i) that the person must submit to the search; and
    - (ii) that if, as a result of the search, an officer of Customs finds any thing, the officer may take possession of the thing so found; and
    - (iii) that if the person fails to submit to the search, or, having submitted to the search, attempts to prevent an officer of Customs taking possession of any thing found as a result of the search, an officer of Customs may use

reasonable force to conduct the search and to take possession of that thing.

### **219N Power to require the production of things**

The officer of Customs carrying out a frisk search of a person detained in the circumstances referred to in subsection 219L(1) or (1A) may require the production of any thing found, as a result of that search, to be carried on the body of the detainee in order to determine whether it is, or contains, prohibited goods unlawfully carried by the detainee.

### **219NA Use of reasonable force, and consequent powers, in particular circumstances**

- (1) If a person detained in the circumstances set out in subsection 219L(1B) or (1C):
  - (a) refuses to submit to a frisk search by an officer of Customs under this Subdivision; or
  - (b) having submitted to a frisk search, attempts to prevent an officer of Customs taking possession of any thing found as a result of that search that might be used to inflict bodily injury on an officer conducting a search, or exercising any other power, under section 185;the officer of Customs detaining the person may use reasonable force to conduct that search or to take possession of that thing, as the case requires.
- (2) The officer of Customs who has taken possession of a thing under subsection (1) may retain custody of the thing for so long only as is necessary to permit the conduct of the search, or the exercise of that other power, under section 185, without risk of injury.
- (3) For the avoidance of doubt, an officer of Customs may, under section 203C or 203CA, or under a warrant granted under section 203 or 203M, seize any prohibited goods:
  - (a) that the officer would be authorised to seize under those sections or that warrant; and
  - (b) that, in the course of carrying out a frisk search of a person, are found by the officer to be carried on the person's body; even though the person was detained for the purposes of the search in the circumstances set out in subsection 219L(1B) or (1C).

Section T219PT

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**219P Persons to whom section 219R applies**

Section 219R applies to a person detained under subsection 219L(1) or (1A) if:

- (a) the detainee refuses to submit to a frisk search under this Subdivision; or
- (b) the detainee, having submitted to the frisk search, refuses to produce a thing that he or she is required to produce under section 219N.

**Subdivision B—Detention and external search of suspects**

**219Q Detention for external search**

- (1) Where a detention officer or police officer suspects on reasonable grounds that a person is unlawfully carrying any prohibited goods on his or her body, an officer of Customs or police officer may detain the person for the purposes of being searched under this Subdivision.
- (2) Where a person is so detained, an officer of Customs or police officer must, as soon as practicable, take the person to:
  - (a) a detention place that the officer considers suitable for the detention of the person for the purposes of this Subdivision; or
  - (b) a place (other than a detention place):
    - (i) if the person is detained by a detention officer—that, in the CEO's opinion, affords adequate personal privacy to the person; or
    - (ii) if the person is detained by a police officer—that, in the police officer's opinion, affords adequate personal privacy to the person.

**219R External search**

- (1) Where:
  - (a) by force of section 219P, this section applies to a person detained under section 219L; or



Section T219RT

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- (b) a detention officer or police officer suspects on reasonable grounds that a person detained under section 219Q is unlawfully carrying prohibited goods on his or her body;
- then:
- (c) if:
- (i) there are reasonable grounds to believe that the detainee is not in need of protection; and
  - (ii) the detainee consents to be searched; and
  - (iii) the requirements of section 219RAA are met in respect of that consent;
- an officer of Customs or police officer must, as soon as practicable, carry out an external search of the detainee; or
- (d) in any other case, the detention officer or police officer must, as soon as practicable, apply to a Justice or, in the circumstances set out in subsection (1A), to an authorised officer, for an order for an external search of the detainee.
- (1A) The detention officer or police officer may apply to an authorised officer only if:
- (a) the detainee has waived his or her right to have the application for an order considered by a Justice; or
  - (b) a Justice is not reasonably available to consider such an application.
- (2) Subject to subsection (3), the person to whom an application is made may order that an external search of the detainee be carried out.
- (3) The person must not make such an order unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is unlawfully carrying prohibited goods.
- (4) Where the person does not make such an order, he or she must order that the detainee be released immediately.
- (5) If an external search of the detainee is ordered and the person making the order is satisfied that the detainee is in need of protection, the person must order that the search be carried out in the presence of:
- (a) the detainee's legal guardian; or

Section T219RT

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- (b) a specified person (not being an officer of Customs or a police officer) who is capable of representing the detainee's interests in relation to the search.
- (6) So far as is practicable, a person mentioned in an order under subsection (5) as the person in whose presence an external search is to be carried out must be acceptable to the detainee.
- (7) Subject to subsection (8), the detainee may at any time communicate with another person.
- (8) An officer of Customs or police officer may stop the detainee from communicating with another person if the officer believes on reasonable grounds that such communication should be stopped in order to:
  - (a) safeguard the processes of law enforcement; or
  - (b) protect the life and safety of any person.
- (9) Where:
  - (a) an external search of the detainee is ordered; and
  - (b) a detention officer or police officer still suspects on reasonable grounds that the detainee is unlawfully carrying prohibited goods;the detention officer or police officer must ensure that an external search of the detainee is carried out as soon as practicable.
- (10) The search must be carried out:
  - (a) by an officer of Customs or a police officer; and
  - (b) in accordance with the order and this section.
- (11) An external search of the detainee is to be carried out by a person who is of the same sex as the detainee.
- (11A) Prescribed equipment may be used in carrying out the external search if, and only if, consent to the use of the equipment in carrying out the search has been given by the detainee and the requirements of section 219RAB are met.

Note: Section 219RAC deals with regulations prescribing equipment.
- (11B) If use of the prescribed equipment involves samples from the detainee's body, the equipment may be used in the search only with samples from the outer surface of the detainee's hand.

Section T219RAAT

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- (11C) To avoid doubt, the search may be continued without the use of the prescribed equipment if the use of the equipment produces an indication that the detainee is or may be carrying prohibited goods.
- (12) While:
- (a) a person is detained under section 219L and, by force of section 219P, this section applies to the person; or
  - (b) a person is detained under section 219Q;
- a detention officer or police officer may question the person:
- (c) for the purpose of carrying out an external search of the person under this section; or
  - (d) concerning any prohibited goods found to have been illegally carried by the person on his or her body as a result of the carrying out of an external search of the person under this section.
- (13) The detention officer or police officer must not question the detainee under subsection (12) unless the detention officer or police officer has informed the detainee:
- (a) that the detainee is not obliged to answer any questions asked of him or her; and
  - (b) that anything said by him or her may be used in evidence; and
  - (c) of his or her right to communicate with another person.
- (14) In this section:
- authorised officer*** means an officer of Customs who is a member of a class of officers of Customs declared by the CEO to be authorised officers in relation to particular circumstances or places.

### **219RAA Videotape record may be made of external search**

- (1) In inviting a detainee to consent to an external search, an officer of Customs must have told the detainee:
- (a) that, at the discretion of the Customs, a videotape or other electronic record may be made of the external search; and
  - (b) that, if such a record is made, the record could be used in evidence against the detainee in a court; and
  - (c) that, if such a record is made, a copy of the record will be provided to the detainee; and

Section T219RABT

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- (d) that the invitation, and any giving of consent, was being or would be itself recorded by audiotape, videotape or other electronic means or in writing.
- (2) The invitation to consent and any giving of consent must have been recorded by audiotape, videotape or other electronic means or in writing.
- (3) The officer making the videotape or other electronic record must be of the same sex as the detainee.
- (4) If, in the absence of consent by the detainee to an external search, an application is made for an order under subsection 219R(2) for an external search, that order may authorise the making of a videotape or other electronic record of the external search.
- (5) If, in the course of carrying out an external search, an officer of Customs or a police officer finds evidence that the detainee is unlawfully carrying prohibited goods, that officer may, without the further consent of the detainee, take a photograph of the prohibited goods on the detainee.

**219RAB Use of prescribed equipment for external search**

- (1) In inviting a detainee to consent to the use of prescribed equipment in an external search, an officer of Customs must have told the detainee:
  - (a) what the prescribed equipment is; and
  - (b) the purpose for which the prescribed equipment would be used; and
  - (c) that use of the prescribed equipment could produce evidence against the detainee that could be used in a court; and
  - (d) what known risk (if any) would be posed to the detainee's health by use of the prescribed equipment; and
  - (e) the procedure for the use of the prescribed equipment; and
  - (f) that the prescribed equipment would be used by an officer of Customs authorised to use the equipment; and
  - (g) that the search would be continued without the use of the prescribed equipment should use of the equipment indicate that the detainee was or might be carrying prohibited goods; and

Section T219RACT

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- (h) that the invitation, and any giving of consent, was being or would be recorded by audiotape, videotape or other electronic means or in writing; and
  - (i) that the detainee is entitled to a copy of that record.
- (2) The invitation to consent and any consent must have been recorded by audiotape, videotape or other electronic means or in writing.
  - (3) The prescribed equipment must be operated by an authorised officer who is of the same sex as the detainee.

Note: Section 219RAD deals with authorisation of an officer to operate equipment.

### **219RAC Prescribing equipment for use in external searches**

- (1) For the purposes of subsection 219R(11A), the regulations may prescribe only equipment that can produce an indication that a person is or may be carrying prohibited goods on his or her body.
- (2) Before the Governor-General makes a regulation prescribing equipment for the purposes of subsection 219R(11A), the Minister must obtain from the CEO a statement that:
  - (a) the equipment can safely be used to detect prohibited goods; and
  - (b) use of the equipment poses no risk, or minimal risk, to the health of a person whom the equipment is used to search; and
  - (c) a person does not require professional qualifications to operate the equipment.
- (3) Before making a statement described in subsection (2), the CEO must consult the Commonwealth authorities (if any) that have expertise or responsibilities relevant to the matters addressed by the statement.
- (4) If, before making a statement of the kind described in subsection (2), the CEO consults with Commonwealth authorities in accordance with subsection (3), the CEO must lay a copy of any advice received from those authorities in the course of that consultation before each House of the Parliament within 7 sitting days of that House after the day on which the statement is given to the Minister.

**219AD Authorising officers to use prescribed equipment for external search**

The CEO may authorise an officer of Customs for the purposes of subsection 219AB(3) to use prescribed equipment only if the officer has successfully completed the training specified in an approved statement describing training in the operation of the equipment.

**219AE Giving a record of invitation and consent or of order**

- (1) If a detainee who is invited to consent:
  - (a) to an external search under section 219R; or
  - (b) to the use of prescribed equipment in the conduct of that external search;requests it, an officer of Customs must give the detainee, as soon as reasonably practicable:
  - (c) a copy of the record of the invitation; and
  - (d) if the detainee gave consent—a copy of the record of the detainee's consent.
- (2) If an order for the external search of a detainee is made under subsection 219R(2), a copy of the order is to be given, as soon as reasonably practicable:
  - (a) unless paragraph (b) applies—to the detainee; or
  - (b) if the detainee is in need of protection—to the person in whose presence the external search is to be carried out.

**219AF Records of results of external search**

- (1) This section applies to any of the following produced in the course of an external search of a detainee under section 219R:
  - (a) a videotape or other electronic record of the external search;
  - (b) a photograph taken in the circumstances described in subsection 219AA(5);
  - (c) any other photograph or image of the detainee's body taken using prescribed equipment the subject of a consent under section 219R;
  - (d) a sample from the outer surface of the detainee's hand taken using such prescribed equipment.

- (2) The videotape or other electronic record of the external search, and any photograph, image or sample referred to in paragraph (1)(b), (c) or (d), must be destroyed as soon as practicable if:
  - (a) a period of 12 months has elapsed since the record was made, or the photograph, image or sample was produced; and
  - (b) relevant proceedings have not been instituted or have been discontinued.
- (3) For the purposes of subsection (2), *relevant proceedings* are proceedings:
  - (a) against the detainee; and
  - (b) relating to prohibited goods; and
  - (c) in respect of which the record, photograph, image or sample is relevant.
- (4) On application by an officer of Customs or the Director of Public Prosecutions, a magistrate may extend the period of 12 months (or that period as previously extended under this subsection) in relation to the videotape or other electronic record of the external search or to a particular photograph, image or sample, if the magistrate is satisfied that there are special reasons for doing so.
- (5) The videotape or other electronic record, and any photograph, image or sample must be destroyed as soon as practicable if:
  - (a) the detainee is found to have committed a relevant offence but no conviction is recorded; or
  - (b) the detainee is acquitted of a relevant offence and:
    - (i) no appeal is lodged against the acquittal; or
    - (ii) an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn;unless there is pending an investigation into another relevant offence or a proceeding against the detainee for another relevant offence.
- (6) For the purpose of subsection (5), an offence is a *relevant offence* if:
  - (a) it relates to prohibited goods; and
  - (b) the videotape or other electronic record, or the photograph, image or sample, relates to the offence.
- (7) The regulations must make provision in relation to the secure storage of any videotape or other electronic record of an external

Section 219A

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search, and of any photograph, image or sample referred to in paragraph (1)(b), (c) or (d) pending its ultimate destruction.

**Subdivision C—Detention and internal search of persons suspected of internally concealing substances etc.**

**219A Certain Judges and Magistrates eligible to give orders under this Subdivision**

- (1) A Judge of the Federal Court of Australia, of the Supreme Court of the Australian Capital Territory or of the Family Court of Australia may, by writing, consent to be nominated by the Minister under subsection (2).
- (2) The Minister may, by writing, nominate a Judge of a court referred to in subsection (1) in relation to whom a consent is in force under that subsection to be a Division 1B Judge.

**219S Initial detention**

- (1) Where a detention officer or police officer suspects on reasonable grounds that a person is internally concealing a suspicious substance, an officer of Customs or police officer may detain the person for the purposes of enabling an application for an order for the detention of the person under section 219T to be made.
- (2) If the person is so detained, an officer of Customs or police officer:
  - (a) must, as soon as practicable, take the person to the nearest detention place that the officer considers suitable for the detention of the person for the purposes of this Subdivision; and
  - (b) may, subject to subsections 219Z(3), (4), (5) and (6), detain the person at that place for those purposes.

**219T Initial order for detention**

- (1) Where a person is detained under section 219S and subsection 219V(2) does not apply, the CEO or a police officer must, as soon as practicable, apply:
  - (a) if there are reasonable grounds to suspect that the person is in need of protection—to a Division 1B Judge; or



- (b) in any other case—to a Division 1B Judge or a Division 1B Magistrate;  
for an order that the detainee be detained.
- (2) Subject to subsection (3), the Judge or Magistrate may order that the detainee be detained under this section for a period of 48 hours from:
- (a) the time at which the detention began; or
  - (b) the time at which the order is made;
- as the Judge or Magistrate thinks fit.
- (3) The Judge or Magistrate must not make such an order unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance.
- (4) Where the Judge or Magistrate does not make such an order, he or she must order that the detainee be released immediately.
- (5) Where:
- (a) a Judge or Magistrate orders that a detainee be detained under this section; and
  - (b) the Judge or Magistrate is satisfied that the detainee is in need of protection;
- the Judge or Magistrate must appoint a person (not being an officer of Customs or police officer) to represent the detainee's interests in relation to this Division until the detainee is no longer in need of protection.
- (6) So far as is practicable, a person so appointed must be acceptable to the detainee.

### **219U Renewal of order for detention**

- (1) Where:
- (a) a person is being detained under an order under section 219T; and
  - (b) a detention officer or police officer decides that a further period of detention is necessary in order to determine whether the person is internally concealing a suspicious substance;
- the CEO or a police officer may apply:

Section T219VT

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- (c) if there are reasonable grounds to suspect that the detainee is in need of protection—to a Division 1B Judge; or
  - (d) in any other case—to a Division 1B Judge or a Division 1B Magistrate;
- for an order that the detainee be further detained.
- (2) Subject to subsection (3), the Judge or Magistrate may order that the detainee be further detained under this section for a period of 48 hours from the end of the period for which the unexpired order is in force.
  - (3) The Judge or Magistrate must not make such an order unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance.
  - (4) Where the Judge or Magistrate does not make such an order, he or she must order that, at the end of the period for which the unexpired order is in force, the detainee be released immediately.

**219V Arrangement for internal search**

- (1) This section applies only so long as a detention officer or police officer suspects on reasonable grounds that the detainee is internally concealing a suspicious substance.
- (2) If:
  - (a) there are no reasonable grounds to believe that the detainee is in need of protection; and
  - (b) the detainee signs a written consent to be internally searched; an officer of Customs or police officer must, as soon as practicable, arrange for an internal search of the detainee.
- (3) If:
  - (a) there are no reasonable grounds to believe that the detainee is in need of protection; and
  - (b) the detainee has been detained under section 219U; and
  - (c) the detainee has not signed a written consent to be internally searched;the CEO or a police officer must, before the end of the period of detention under that section, apply to a Division 1B Judge for an order for an internal search of the detainee.

Section T219VT

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- (4) If there are reasonable grounds to believe that the detainee is in need of protection, the CEO or a police officer must:
- (a) if a person has been appointed under subsection 219T(5) or 219X(3) to represent the detainee's interests in relation to this Division and that person consents to the detainee being internally searched—as soon as practicable after the consent is given; or
  - (b) if paragraph (a) does not apply, and the detainee has been detained under section 219U—before the end of the period of that detention;
- apply to a Division 1B Judge for an order for an internal search of the detainee.
- (5) After the end of a period of detention under section 219S, 219T or 219U, the detainee may be further detained by force of this subsection:
- (a) if subsection (2) applies—until the internal search is completed; or
  - (b) if subsection (3) or (4) applies—until an order under this section is granted.
- (6) Subject to subsections (9) and (10), the Judge may order that the detainee:
- (a) be internally searched, the search to start:
    - (i) if consent to the search has been given under paragraph (4)(a)—as soon as practicable after the order is made and no later than a time specified in the order; or
    - (ii) in any other case—no sooner than the end of the period of detention under section 219U, but as soon as practicable after the end of that period and no later than a time specified in the order; and
  - (b) be detained for so long as is reasonably necessary for the internal search to be completed.
- (7) Where the Judge does not make such an order, he or she must order that the detainee be released immediately.
- (8) Subject to subsections (9) and (10), on an application made by the CEO or a police officer within the time specified in an order under paragraph (6)(a), or the time as extended under this subsection, the Judge may extend that time.
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Section T219WT

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- (9) The Judge must not make an order under subsection (6), or grant an extension of time under subsection (8), unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance.
- (10) Subject to subsection (11), the time specified in an order under paragraph (6)(a), including that time as extended under subsection (8), must not be later than 48 hours after:
  - (a) if the detainee is being detained under section 219S, 219T or 219U—the end of the period of that detention; or
  - (b) if the detainee is being detained under subsection (5)—the time when that detention began.
- (11) If the Judge is satisfied that the detainee will refuse, or has refused, to submit to an internal search in spite of an order having been made under subsection (6), the time specified in the order under paragraph (6)(a), including that time as extended under subsection (8), is to be such time as the Judge considers appropriate in order to allow an internal search to be carried out.

**219W Detention under this Subdivision**

- (1) A person detained under this Subdivision may at any time:
  - (a) consult a lawyer; or
  - (b) subject to subsection (3), communicate with another person.
- (2) Where a person detained under this Subdivision wishes to consult a lawyer, an officer of Customs or police officer must arrange for the person to consult a lawyer of the person's choice.
- (3) An officer of Customs or police officer may stop a person so detained from communicating with another person if the officer believes on reasonable grounds that such communication should be stopped in order to:
  - (a) safeguard the processes of law enforcement; or
  - (b) protect the life and safety of any person.
- (4) While a person is being detained under an order under this Subdivision, or has consented to an internal search under this Subdivision, a detention officer or police officer may ask the person such questions as are reasonable:

- (a) to determine whether the person is internally concealing a suspicious substance; or
  - (b) concerning any such substance found to have been internally concealed by the person.
- (5) The detention officer or police officer must not question the detainee under subsection (4) unless the detention officer or police officer has informed the detainee:
- (a) that the detainee is not obliged to answer any questions asked of him or her; and
  - (b) that anything said by him or her may be used in evidence; and
  - (c) of his or her right to consult a lawyer or communicate with another person.
- (6) While the person is detained under an order made under this Subdivision:
- (a) subject to section 219ZG, the person is to be detained at a detention place; and
  - (b) the detention is to be conducted with such medical supervision as is specified in an order relating to the person's detention under this Subdivision; and
  - (c) the detainee, his or her representative or (where applicable) a person appointed under subsection 219T(5) or 219X(3) to represent the detainee's interests in relation to this Division may at any time apply to:
    - (i) if the order was made by a Judge—a Division 1B Judge; or
    - (ii) if the order was made by a Magistrate—a Division 1B Judge or a Division 1B Magistrate;for the order to be revoked.

### **219X Detainee becoming in need of protection**

- (1) If:
- (a) at any time while a person is being detained under this Subdivision, there are reasonable grounds to believe that the detainee has become in need of protection; and

Section T219YT

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- (b) until that time, the detainee has not been treated under this Subdivision as being in need of protection;  
the CEO or a police officer must, as soon as practicable, apply for an order under this section.
- (2) The application is to be made:
- (a) if the person is being detained under an order made by a Division 1B Judge or Division 1B Magistrate—to such a Judge or Magistrate, as the case may be; or
  - (b) if not—to a Division 1B Judge.
- (3) The Judge or Magistrate must, if satisfied that the detainee is in need of protection, appoint a person (not being an officer of Customs or a police officer) to represent the detainee's interests in relation to this Division until the detainee is no longer in need of protection.
- (4) So far as is practicable, a person so appointed must be a person acceptable to the detainee.

**219Y Applications for orders under this Subdivision**

- (1) A detainee must be given adequate opportunity to obtain legal advice and legal representation in relation to an application for an order under this Subdivision.
- (2) An application under this Subdivision may be made orally or in writing and, subject to subsection (5), must be made in person, and on oath or affirmation, at a hearing before the relevant Judge or Magistrate.
- (3) Subject to subsection (4), the detainee has the right to be present at, to make submissions to, and to be represented before, any hearing before the Judge or Magistrate.
- (4) The Judge or Magistrate, to the extent that he or she thinks necessary to:
- (a) safeguard the processes of law enforcement; or
  - (b) protect the life and safety of any person;
- may:
- (c) restrict the rights under subsection (3) of the detainee to hear or have access to evidence presented by or on behalf of the CEO or a police officer; or

- (d) order that a witness not be required to answer a question or to produce a document.
- (5) Where it is not practicable to make an application under this Subdivision in person, the application may be made by telephone or any other appropriate method of communication, and:
  - (a) if the Judge or Magistrate so requires—the detainee or the detainee’s representative is to be given an opportunity to make submissions to the Judge or Magistrate by the same method of communication; and
  - (b) as soon as practicable after making the application, the CEO or a police officer must give the Judge or Magistrate a statutory declaration setting out the facts and reasons supporting the application.

### **219Z Internal search**

- (1) An internal search is to be carried out by a medical practitioner.
- (2) Where the detainee is in need of protection, the search is to be carried out in the presence of the person appointed under subsection 219T(5) or 219X(3).
- (3) Subject to subsection (5), the search is to be carried out at a place that:
  - (a) is specified in regulations made for the purposes of this subsection; or
  - (b) is provided with the technical, paramedical and other services prescribed for the purposes of this subsection.
- (4) If the person is not being detained at such a place, an officer of Customs or police officer must, as soon as practicable:
  - (a) take the person to the nearest such place that the officer considers, on reasonable grounds, to be suitable for the search; and
  - (b) continue the person’s detention at that place.
- (5) The recovery, during the search, of a substance or thing internally concealed by the detainee is to be carried out at a place that:
  - (a) is specified in regulations made for the purposes of this subsection; or

Section T219ZAT

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- (b) is provided with the technical, paramedical and other services prescribed for the purposes of this subsection.
- (6) If the person is not being detained at such a place, an officer of Customs or police officer must:
  - (a) take the person to the nearest such place that the officer considers, on reasonable grounds, to be suitable for the recovery; and
  - (b) continue the person's detention at that place.

**Subdivision D—Detention generally**

**219ZA Detention officers**

- (1) The CEO may, by signed instrument, declare a class of officers of Customs to be detention officers for the purposes of Subdivision A.
- (2) The CEO may, by signed instrument, declare a class of officers of Customs to be detention officers for the purposes of Subdivision B.
- (3) The CEO may, by signed instrument, declare a class of officers of Customs to be detention officers for the purposes of Subdivision C.

**219ZB Detention places**

- (1) A place that is:
  - (a) prescribed for the purposes of this subsection; or
  - (b) provided with amenities that satisfy standards prescribed for the purposes of this subsection;is a detention place for the purposes of Subdivision B.
- (2) A place that is:
  - (a) prescribed for the purposes of this subsection; or
  - (b) provided with amenities that satisfy standards prescribed for the purposes of this subsection;is a detention place for the purposes of Subdivision C.

**219ZC Detention under this Division**

- (1) An officer of Customs or police officer exercising powers under this Division in relation to a person must produce identification as such an officer when requested by the person to do so.



- (2) An officer of Customs or police officer exercising powers under this Division in relation to a person must not use more force, or subject the person to greater indignity, than is reasonable and necessary.
- (2A) Without otherwise limiting the application of subsection (2), the use of force in actually conducting an external search of a detainee will be regarded as reasonable and necessary:
  - (a) if an order has been made by a Justice under section 219R and the detainee does not submit to the search; or
  - (b) if an order has been made under that section by an authorised officer because a Justice was not reasonably available and the detainee does not submit to the search.
- (3) While a person is being taken to a particular place under this Division (except under subsection 219ZE(3)) the person is regarded as being detained under this Division.
- (4) While a person is being detained under this Division, the person is regarded as being in the custody of:
  - (a) if the person is being detained by an officer of Customs—the CEO; or
  - (b) if the person is being detained by a member of the Australian Federal Police—the Commissioner of Police; or
  - (c) if the person is being detained by a member of the Police Force of a State or Territory—the person who holds, in relation to that Police Force, the same office as the Commissioner of Police holds in relation to the Australian Federal Police.

### **219ZD Detainees not fluent in English**

- (1) Where an officer of Customs or police officer detaining a person under this Division has reasonable cause to believe that the person is unable, because of inadequate knowledge of the English language or for any other reason, to communicate orally with reasonable fluency in the English language, the officer must take all reasonable steps to ensure that, at all times during the person's detention when communication with or by the person is to take place, a person competent to act as an interpreter is present and acts as interpreter for the purposes of the communication.

Section T219ZET

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- (2) Subsection (1) does not apply if the person detained and the person with whom he or she is communicating are able:
- (a) to communicate in a language other than the English language with reasonable fluency; or
  - (b) to communicate satisfactorily by any other means.

**219ZE Release from, or cessation of, detention**

- (1) In spite of any other provision of this Division, but subject to subsection (2) and section 219ZG, where a person is detained under this Division and:
- (a) an order is made under this Division that the person be released; or
  - (b) an order for the detention of the person is revoked; or
  - (c) an order for the detention of the person has ended and subsection 219V (5) does not apply; or
  - (ca) if the detention is under Subdivision A in the circumstances referred to in subsection 219L(1) or (1A)—no detention officer suspects on reasonable grounds that the person is unlawfully carrying prohibited goods on his or her body; or
  - (cb) if the detention is under Subdivision A in the circumstances referred to in subsection 219L(1B) or 219L(1C)—no detention officer suspects on reasonable grounds that the person is carrying on his or her body a weapon or thing capable of being used to inflict bodily injury on an officer of Customs; or
  - (d) if the detention is under Subdivision B—no detention officer suspects on reasonable grounds that the person is unlawfully carrying prohibited goods on his or her body; or
  - (e) if the detention is under Subdivision C—no detention officer suspects on reasonable grounds that the person is internally concealing a suspicious substance; or
  - (f) an internal search of the person is completed;
- the detention, and any search, of the person under this Division must cease immediately.
- (2) Subsection (1) does not prevent a further application of this Division, or the detention of the person under any law other than this Division.

- (3) If:
- (a) the detainee is released at any place other than the place at which he or she was first detained; and
  - (b) the detainee so requests;
- the detainee must immediately be returned free of charge to the place of the first detention.

### **Subdivision E—Medical practitioners**

#### **219ZF Conduct of internal search**

- (1) Subject to subsection (2), a medical practitioner may, in carrying out an internal search of a detainee under section 219Z, use any medical procedure or apparatus that the medical practitioner considers to be reasonably safe in the circumstances.
- (2) The medical practitioner must not use any medical procedure involving surgical incision unless he or she considers it necessary to do so because the detainee's life is at risk.
- (3) If the medical practitioner:
  - (a) suspects on reasonable grounds during the internal search that the detainee is internally concealing a substance or thing; and
  - (b) lacks sufficient expertise to recover it;he or she must, as soon as practicable, arrange for another medical practitioner having that expertise to do so.

#### **219ZG Medical practitioner may take action to preserve detainee's life**

- (1) A medical practitioner may take such measures in relation to a detainee, including removal to another place, as the medical practitioner considers necessary because the detainee's life is at risk, including measures involving surgical incision or exploration.
- (2) While the detainee is being so removed to a place, and while he or she is at that place:
  - (a) he or she may be detained under this subsection; and
  - (b) time is not to be taken to run under an order made under Subdivision C.

Section T219ZHT

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**219ZH Medical practitioner to answer questions and prepare report**

- (1) Subject to subsection (4), at any time during the period during which a medical practitioner is involved in doing anything under this Division, an officer of Customs or police officer may ask the medical practitioner questions relating to whether an internal search of the detainee should be carried out, the manner in which such a search is being carried out or the results of such a search, and the medical practitioner must answer those questions to the best of his or her ability.
- (2) As soon as practicable after completing anything done under this Division, the medical practitioner or medical practitioners involved must give to the chief officer of the person who detained the detainee a written report under subsection (3).
- (3) The report is to be in accordance with directions given by the chief officer concerned.
- (4) Subsections (1), (2) and (3) are not limited by any law relating to privilege or confidentiality.
- (5) A report prepared under subsection (3) and given to a chief officer under subsection (2) is, in any proceedings under this Act, *prima facie* evidence of the facts stated in the report.
- (6) In this section:  
*chief officer* means:
  - (a) in relation to an officer of Customs—the CEO; or
  - (b) in relation to a member of the Australian Federal Police—the Commissioner of Police; or
  - (c) in relation to a member of the Police Force of a State or Territory—the person who holds, in relation to that Police Force, the same office as the Commissioner of Police holds in relation to the Australian Federal Police.

**219ZJ Proceedings against medical practitioners**

Proceedings, other than proceedings concerning negligently causing injury, do not lie against a medical practitioner, or any person assisting or providing facilities to a medical practitioner, in respect of anything done by the medical practitioner under this Division.

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## **Division 1BA—Detention and search of persons for purposes of law enforcement co-operation**

### **Subdivision A—Preliminary**

#### **219ZJA Definitions**

In this Division, unless the contrary intention appears:

*Commonwealth offence* has the same meaning as in Part 1C of the *Crimes Act 1914*.

*frisk search* has the same meaning as in Division 1 of Part XII.

*ordinary search* has the same meaning as in Division 1 of Part XII.

*prescribed State or Territory offence* means an offence prescribed for the purposes of section 219ZJAA.

*serious Commonwealth offence* has the same meaning as in section 15HB of the *Crimes Act 1914*.

#### **219ZJAA Prescribed State or Territory offences**

- (1) The regulations may prescribe offences against the laws of a State or a Territory that are punishable on conviction by imprisonment for a term of at least 3 years.
- (2) An offence against a law of a State or Territory must not be prescribed unless:
  - (a) the Attorney-General of that State or Territory and the Minister (*Police Minister*) responsible for the administration of that State's or Territory's police force have jointly requested the Minister that the offence be prescribed for the purposes of this Division; or
  - (b) if the Attorney-General of the State or Territory is also the Police Minister of the State or Territory—the Attorney-General has requested the Minister that the offence be prescribed for the purposes of this Division.

Section T219ZJB T

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**Subdivision B—Powers to detain**

**219ZJB Detention of person suspected of committing serious Commonwealth offence or prescribed State or Territory offence**

- (1) An officer may detain a person if:
  - (a) the person is in a designated place; and
  - (b) the officer has reasonable grounds to suspect that the person has committed, or is committing, a serious Commonwealth offence or a prescribed State or Territory offence.
- (2) The officer must advise a police officer of the person's detention as soon as practicable after detaining the person.
- (3) An officer who is detaining a person under this section must ensure that the person is delivered, as soon as practicable, into the custody of a police officer to be dealt with according to law.
- (4) If an officer who is detaining a person under this section ceases to have reasonable grounds to suspect that the person has committed, or was committing, a serious Commonwealth offence or a prescribed State or Territory offence, the officer must release the person from detention immediately.
- (5) Subject to subsection (7), if a person is detained under this section for a period of greater than 45 minutes, an officer who is detaining the person under this section must inform the person of the right of the person to have a family member or another person notified of the person's detention.
- (6) Where a person detained under this section wishes to have a family member or another person notified of the person's detention, the officer must take all reasonable steps to notify the family member or another person.
- (7) An officer who is detaining the person under this section may refuse to notify a family member or another person of the person's detention if the officer believes on reasonable grounds that such notification should not be made in order to:
  - (a) safeguard the processes of law enforcement; or
  - (b) protect the life and safety of any person.

### **219ZJC Detention of person subject to warrant or bail condition**

- (1) An officer may detain a person if:
  - (a) the person is in a designated place; and
  - (b) the officer has reasonable grounds to suspect that the person intends to leave the designated place; and
  - (c) either:
    - (i) there is a warrant for the arrest of the person in relation to a Commonwealth offence or a prescribed State or Territory offence; or
    - (ii) the person is on bail in relation to a Commonwealth offence or a prescribed State or Territory offence and subject to a bail condition (however expressed) that, if complied with, prevents the person from leaving Australia.
- (2) The officer must advise a police officer of the person's detention as soon as practicable after detaining the person.
- (3) An officer who is detaining a person under this section must ensure that the person is delivered, as soon as practicable, into the custody of a police officer to be dealt with according to law.
- (4) Subject to subsection (6), if a person is detained under this section for a period of greater than 45 minutes, an officer who is detaining the person under this section must inform the person of the right of the person to have a family member or another person notified of the person's detention.
- (5) Where a person detained under this section wishes to have a family member or another person notified of the person's detention, the officer must take all reasonable steps to notify the family member or another person.
- (6) An officer who is detaining the person under this section may refuse to notify a family member or another person of the person's detention if the officer believes on reasonable grounds that such notification should not be made in order to:
  - (a) safeguard the processes of law enforcement; or
  - (b) protect the life and safety of any person.

Section T219ZJDT

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**Subdivision C—Matters affecting detention generally**

**219ZJD Search of person detained under this Division**

- (1) An officer may, in relation to a person detained under this Division:
  - (a) conduct a frisk search or an ordinary search of the person; and
  - (b) search the clothing that the person is wearing and any property under the person's immediate control, if the officer believes on reasonable grounds that it is necessary to do so; for the purposes of:
    - (c) determining whether there is concealed on the person, or in the person's clothing or property, a weapon or other thing capable of being used to inflict bodily injury or to assist the person to escape from detention; or
    - (d) in the case of a person detained under section 219ZJB—preventing the concealment, loss or destruction of evidence of, or relating to, the offence concerned.
- (2) A search under this section must be conducted:
  - (a) as soon as practicable after the person is detained; and
  - (b) by an officer of the same sex as the detained person.
- (3) An officer who conducts a search under this section may seize:
  - (a) any weapon or thing mentioned in paragraph (1)(c); and
  - (b) anything the officer has reasonable grounds to believe is a thing:
    - (i) with respect to which an offence has been committed; or
    - (ii) that will afford evidence of the commission of an offence; or
    - (iii) that was used, or intended to be used, for the purpose of committing an offence.
- (4) An officer who seizes a weapon or other thing under subsection (3) must ensure that it is delivered to the police officer into whose custody the person is delivered under subsection 219ZJB(3) or 219ZJC(3).



**219ZJE CEO must give directions about detaining persons under this Division**

- (1) Without limiting subsection 4(4) of the *Customs Administration Act 1985*, the CEO must give directions in writing under that subsection:
  - (a) identifying places at which an officer is permitted to detain a person under this Division (whether by their character under this Act, the amenities available at the places or any other matters); and
  - (b) specifying such other matters relating to the detention of persons under this Division as the CEO considers appropriate.
- (2) A direction given for the purposes of subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

**219ZJF Detainees to be given reasons for detention and shown identification on request**

- (1) An officer who detains a person under this Division must inform the person, at the time the officer detains the person, of the reason for the person's detention.
- (2) Subsection (1) does not apply if the person, by the person's own actions, makes it impracticable for the officer to inform the person of the reason.
- (3) An officer exercising powers under this Division in relation to a person must produce identification that he or she is an officer when requested by the person to do so.

**219ZJG Use of force in relation to detention**

- (1) An officer exercising powers under this Division in relation to a person must not use more force, or subject the person to greater indignity, than is reasonable and necessary.
- (2) Without limiting the generality of subsection (1), an officer must not, in detaining or attempting to detain a person under this Division, or preventing or attempting to prevent a detained person from escaping from detention under this Division, do an act likely

Section T219ZJHT

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to cause death or grievous bodily harm to the person, unless the officer believes on reasonable grounds that doing the act is necessary to protect life or prevent serious injury to the officer or any other person.

**219ZJH Moving detained persons**

- (1) While a person is being taken to a particular place under this Division (except under subsection (2)), the person is regarded as being detained under this Division.
- (2) If:
  - (a) a person detained under this Division is released at any place other than the place at which he or she was first detained; and
  - (b) the person so requests;the person must immediately be returned free of charge to the place of the first detention.

**219ZJI Detainees not fluent in English**

Section 219ZD applies to an officer detaining a person under this Division as if the detention under this Division were detention under Division 1B of this Part.

Note: Section 219ZD requires the officer to take reasonable steps to ensure that a competent interpreter is available for the purposes of communication.

**219ZJJ Detention of minors**

- (1) Subject to subsection (2), an officer who under this Division detains a person who is known or believed to be a minor must:
  - (a) inform the minor of the right for a parent or guardian or person described in paragraph (c) to be notified of the minor's detention; and
  - (b) upon the request of the minor, take all reasonable steps to notify such person and inform them of:
    - (i) the fact that the minor has been detained; and
    - (ii) the place in which the minor is being held; and
    - (iii) the place to which the minor is to be transferred by police, if that place is known at the time of contacting the minor's parent or guardian; and

Section T219ZJIT

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- (iv) the reason for the minor's detention; and
  - (c) if a parent or guardian is not acceptable to the detained minor under this subsection, the detained minor may request that another person who is capable of representing the interests of the minor be notified.
- (2) An officer who under this Division detains a person who is known or believed to be a minor may refuse to notify a parent or guardian or person described in paragraph (1)(c) of the person's detention if the officer believes on reasonable grounds that such notification should not be made in order to:
- (a) safeguard the processes of law enforcement; or
  - (b) protect the life and safety of any person.
- (3) If at the time of notifying the parent or guardian, the officer is not aware of the place referred to in subparagraph (1)(b)(iii), the officer must:
- (a) contact the parent or guardian or other person described in paragraph (1)(c) immediately after that place becomes known to the officer; and
  - (b) inform the parent or guardian of that place.
- (4) An officer who under this Division detains a person who is known or believed to be a minor must, at the time of advising a police officer of the minor's detention in accordance with subsection 219ZJB(2) or 219ZJC(2), advise the police officer of the fact that the detained person is a minor, or is believed to be a minor.
- (5) For the purposes of this section, a minor is considered to be any person under the age of 18 years.

## **Division 1C—Judges and Magistrates**

### **219ZK Nature of functions of Judge or Magistrate**

- (1) Where this Part confers on a Judge or Magistrate the function of issuing a warrant or giving an order, the function is so conferred on the Judge or Magistrate in a personal capacity and not as a court or a member of a court.
- (2) Without limiting the generality of subsection (1), a warrant or order issued or given by a Judge or Magistrate under this Part has effect only by virtue of this Act and is not to be taken by implication to be issued or given by a court.

### **219ZL Protection of Judge or Magistrate**

- (1) A Judge of the Federal Court of Australia, of the Supreme Court of the Australian Capital Territory or of the Family Court of Australia has, in performing a function of, or connected with, issuing a warrant or giving an order under this Part, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.
- (2) A Judge of the Supreme Court of a State, or a Judge of the Supreme Court of the Northern Territory who is not a Judge referred to in subsection (1), has, in performing a function of, or connected with, issuing a warrant or giving an order under this Part, the same protection and immunity as if he or she were performing that function as that Supreme Court or as a member of that Supreme Court.
- (3) A Magistrate performing a function of, or connected with, issuing a warrant or giving an order under this Part has the same protection and immunity as if he or she were performing that function as a Magistrates Court or as a member of a Magistrates Court.
- (4) A nominated AAT member has, in performing a function of, or connected with, issuing a warrant under section 219B, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

Section T219ZLT

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(4A) No civil or criminal action is to be brought against a Justice in respect of anything done, or omitted to be done, in performing the function of, or a function connected with, making an order under section 219R.

(5) In this section:

***nominated AAT member*** means a member of the Administrative Appeals Tribunal in respect of whom a nomination is in force under section 219AB to issue warrants under section 219B for use of listening devices.

## **Division 2—Protection to officers**

### **220 Reasonable cause for seizure a bar to action**

No person shall be liable for any seizure under this Act for which there shall have been reasonable cause, and when any claimant recovers any ship aircraft or goods seized or any proceeds thereof and at the same time reasonable cause for the seizure is found such finding shall bar all proceedings against all persons concerned in the seizing.

### **221 Notice of action to be given**

No proceedings shall be commenced against any officer for anything done in execution of or by reason of his office until one month next after notice in writing shall have been delivered to him or left at his usual place of abode by the plaintiff his attorney or agent in which notice shall be clearly stated the cause and nature of the proceeding and the court in which the same is intended to be instituted, the name and place of abode of the plaintiff and the name and place of business of such attorney or agent unless the Supreme Court of a State, the Supreme Court of the Australian Capital Territory or the Supreme Court of the Northern Territory of Australia has granted leave to the plaintiff to proceed without notice, which leave the Court may grant on such terms as it thinks just.

### **222 Defect in notice not to invalidate**

No notice under the last preceding section shall be deemed invalid by reason of any defect or inaccuracy therein unless the Court is of opinion that the defect or inaccuracy would prejudice the defendant in his defence and the Court may give leave to amend such notice as it thinks just.

**223 No evidence to be produced but that contained in notice**

Upon any proceeding instituted in pursuance of such notice the plaintiff shall not be at liberty to advance any evidence of any cause of action except such as has been distinctly stated in such notice nor shall the plaintiff be entitled to a verdict without proving on the trial that such notice has been duly served.

**224 Officer may tender amends**

It shall be lawful for any officer to whom notice of proceeding shall have been given at any time within one month after such notice to tender amends to the plaintiff his attorney or agent and in case such amends be not accepted to plead such tender in defence either alone or with other defences and if the amends tendered shall be found to have been sufficient no costs shall be recovered against an officer and he shall be entitled to costs if he shall have brought the amount into court when entering his defence.

**225 Commencement of proceedings against officers**

Every proceeding against any officer shall except as mentioned in the next section be commenced within 6 months after its cause shall have arisen and not afterwards and the venue shall be local and the defendant may plead the general issue and give any special matter in evidence.

**226 Time for commencing action**

- (1) No proceeding whether against an officer or otherwise for anything done for the protection of the revenue in relation to any Customs Tariff or Customs Tariff alteration proposed in the Parliament shall except as mentioned in the next section be commenced before the close of the session in which such Tariff or Tariff alteration is proposed or before the expiration of 12 months after such Tariff or Tariff alteration is proposed, whichever first happens.

Section T227T

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- (2) No proceeding, whether against an officer or otherwise, for anything done for the protection of the revenue in relation to a Customs Tariff or Customs Tariff alteration that is intended to be proposed in accordance with a notice under section 273EA shall, except as provided in the next succeeding section, be commenced before:
- (a) the seventh sitting day of the House of Representatives after the date of publication of the notice, or the day on which the period of 6 months from the date of publication of the notice expires, whichever is the earlier day; or
  - (b) where, on or before the earlier of the days referred to in the last preceding paragraph, a Customs Tariff or Customs Tariff alteration that would validate the thing so done is proposed in the Parliament—the close of the session in which the Customs Tariff or Customs Tariff alteration is so proposed, or the expiration of 12 months after the Customs Tariff or Customs Tariff alteration is so proposed, whichever first happens.

**227 Security may be required**

The Supreme Court of a State, the Supreme Court of the Australian Capital Territory or the Supreme Court of the Northern Territory of Australia on the application of any person who desires to commence any proceeding mentioned in the last section against an officer may require the officer to give security to the satisfaction of the Court to abide the result of the proceeding and in default of the giving of such security may sanction the immediate commencement of the proceeding.



## Division 3—Evidence

### 227AA Evidence may be used in prosecutions etc.

To avoid doubt, if, when exercising powers under this Act, an officer obtains evidence of the commission of an offence against Part 9.1 of the *Criminal Code*, then that evidence may be used, or given to another body for use, in:

- (a) investigating the offence; or
- (b) proceedings for the prosecution for the offence.

## Part XIIA—Special provisions relating to prohibited weapons

### 227A Overview of Part

This Part deals with certain weapons on board a ship or an aircraft that is in Australia after arriving in Australia from a place outside Australia. The Part empowers an officer, under certain circumstances:

- (a) to approve a storage place on the ship or aircraft for the purpose of safekeeping the weapon; or
- (b) to take the weapon into custody;

for a period that ends when the ship or aircraft departs from Australia or otherwise ceases to be subject to this Part.

### 227B Definitions

In this Part:

*operator* means:

- (a) in relation to a ship—the owner or master of the ship; and
- (b) in relation to an aircraft—the owner or pilot of the aircraft.

*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.

### 227C Ships and aircraft to which this Part applies

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

- (b) the aircraft is not an aircraft that is taken to have been imported into Australia under subsection 49A(7).
- (3) This Part ceases to apply to a ship when:
  - (a) the ship has departed from its last port in Australia for a place outside Australia; or
  - (b) the ship is taken to have been imported into Australia under subsection 49A(7).
- (4) This Part ceases to apply to an aircraft when:
  - (a) the aircraft has departed from its last airport in Australia for a place outside Australia; or
  - (b) the aircraft is taken to have been imported into Australia under subsection 49A(7).
- (5) If:
  - (a) this Part ceased to apply to a ship because the ship has departed from its last port in Australia as mentioned in paragraph (3)(a); but
  - (b) the ship returns to Australia before completing a voyage to a place outside Australia;then, subject to paragraph (1)(b) and subsection (3), this Part applies to the ship after it has so returned as if it has just undertaken a voyage to Australia from a place outside Australia.
- (6) If:
  - (a) this Part ceased to apply to an aircraft because the aircraft has departed from its last airport in Australia as mentioned in paragraph (4)(a); but
  - (b) the aircraft returns to Australia before completing a flight to a place outside Australia;then, subject to paragraph (2)(b) and subsection (4), this Part applies to the aircraft after it has been so returned as if it has just undertaken a flight to Australia from a place outside Australia.

### **227D Weapons to which this Part applies**

This Part applies to any thing that is a firearm, firearm accessory, firearm part, firearm magazine or ammunition if:

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

Section T227ET

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- (b) it falls within column 2 of an item in Part 2 of Schedule 6 to Regulation 4F of the Customs (Prohibited Imports) Regulations; and
- (c) it does not meet the requirements that apply to that thing as specified in column 3 of that item in that Part of that Schedule; and
- (d) it 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.

**227E Approved storage for prohibited weapons**

- (1) An officer may, in writing, approve a place on board a ship or an aircraft to which this Part applies as a place in which a prohibited weapon on board that ship or aircraft must be stored while this Part applies to the ship or aircraft.
- (2) An officer must not give the approval unless the officer is satisfied that:
  - (a) only the operator concerned may access the place; and
  - (b) the place is otherwise sufficiently secure for the purposes of preventing persons from removing the weapon from the place.

Example: If a safe on board a ship is sought to be approved under subsection (1), the approval may not be given if a person other than the operator of the ship holds a key to the safe.

- (3) An officer may place a fastening, or a lock, mark or seal on an approved place for the purposes of preventing persons from accessing that place.
- (4) If an approval under subsection (1) is not revoked at an earlier time, it continues to be in force until this Part ceases to apply to the ship or aircraft concerned.
- (5) While an approval under subsection (1) is in force in relation to a prohibited weapon, a person must not:
  - (a) interfere in any way with any fastening, lock, mark or seal placed on the approved place by an officer; or
  - (b) remove the weapon from the approved place.

Penalty: 45 penalty units.

- (6) An offence against subsection (5) is an offence of strict liability.
- (7) Subsection (5) does not apply if the person has the written permission of an officer for the interference or removal.

### **227F Officer may take custody of weapons**

- (1) If:
  - (a) this Part applies to a prohibited weapon on board a ship or aircraft; and
  - (b) no approval under section 227E is in force in relation to a place on board that ship or aircraft as the place for storing that weapon;an officer must take custody of that weapon.
- (2) Within 48 hours after taking custody of the weapon, an officer must give a written notice to the operator of the ship or aircraft under this section.
- (3) The notice must be in an approved form.
- (4) Without limiting subsection (3), the notice must identify the prohibited weapon concerned.
- (5) The CEO must ensure that a weapon taken into custody under this section is:
  - (a) securely stored while it is in custody under this section; and
  - (b) returned to the operator of the ship or aircraft concerned:
    - (i) if subparagraph (ii) does not apply—when the ship is at its last port of call in Australia, or when the aircraft is at its last airport of call in Australia, and after a Certificate of Clearance referred to in section 118 has been granted in relation to the departure of that ship from that port, or the departure of the aircraft from that airport (as the case requires); or
    - (ii) 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).
- (6) To avoid doubt, subsection (5) does not affect the power of an officer to seize or otherwise deal with the weapon under this Act (including provisions in this Act relating to prohibited goods) when this Part ceases to apply to the ship or aircraft concerned.

Section T227GT

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- (7) After a weapon is returned to the operator under subsection (5) and before the ship or aircraft leaves Australia, the operator concerned must comply with any conditions specified by the CEO in relation to the storage of that weapon.

**T227G Compensation for damage etc. to weapons**

- (1) If:

(a) an activity undertaken by or on behalf of Customs in relation to a prohibited weapon taken into custody under this Part causes the loss or destruction of, or damage to, that weapon; and

(b) the loss, destruction or damage occurred wholly or partly as a result of:

(i) insufficient care being exercised in selecting the persons to undertake the activity; or

(ii) insufficient care being exercised by the person undertaking that activity;

compensation for the loss, destruction or damage is payable to the owner of the weapon concerned.

- (2) Compensation is payable out of money appropriated by the Parliament for the purpose.

## **Part XIII—Penal Provisions**

### **Division 1—Forfeitures**

#### **228 Forfeited ships and aircraft**

- (1) The following ships, boats and aircraft shall be forfeited to the Crown:
  - (1) Any ship or aircraft used in smuggling, or knowingly used in the unlawful importation, exportation, or conveyance of any prohibited imports or prohibited exports.
  - (2) Any ship the master of which has refused to permit his or her ship to be boarded following a request properly made of him or her under subsection 184A(2) or (3).
  - (3) Any aircraft failing to land at an airport or landing field for boarding upon its pilot being properly requested under section 184D to land the aircraft.
  - (4) Any ship or aircraft from which goods are thrown overboard staved or destroyed to prevent seizure by the Customs.
  - (5) Any ship or aircraft found within any port or airport with cargo on board and afterwards found light or in ballast or with the cargo deficient and the master or pilot of which is unable to lawfully account for the difference.
  - (6) Any ship or aircraft which on being boarded is found to be constructed, adapted, altered or fitted in any manner for the purpose of concealing goods.

#### **228A Forfeited resources installations**

Any overseas resources installation that becomes attached to the Australian seabed without the permission of the CEO given under subsection 5A(2) shall be forfeited to the Crown.

#### **228B Forfeited sea installations**

Any overseas sea installation that becomes installed in a coastal area without the permission of the CEO given under subsection 5B(2) shall be forfeited to the Crown.

## 229 Forfeited goods

- (1) The following goods shall be forfeited to the Crown:
  - (a) All goods (not being objects forfeited, or liable to forfeiture, under the *Protection of Movable Cultural Heritage Act 1986*) which are smuggled, or unlawfully imported, exported, or conveyed.
  - (b) All prohibited imports.
  - (ba) All goods the importation of which has been prohibited unless a licence or permission containing conditions or requirements has been granted and those conditions or requirements have not been complied with.
  - (bb) Any goods sold under section 206 or 209J or sold or otherwise disposed of under section 208D or 209K subject to a condition that has not been complied with.
  - (c) All goods imported or exported in any ship boat or aircraft in which goods are prohibited to be imported or exported.
  - (d) All dutiable goods found on any ship boat or aircraft being unlawfully in any place.
  - (e) All goods found on any ship or aircraft after arrival in any port or airport and not being specified or referred to in the cargo report made under section 64AB and not being baggage belonging to the crew or passengers and not being satisfactorily accounted for.
  - (f) All goods in respect of which bulk is unlawfully broken.
  - (g) All goods subject to the control of the Customs that are moved, altered or interfered with except as authorized by this Act.
  - (h) All goods which by this Act are required to be moved or dealt with in any way and which shall not be moved or dealt with accordingly.
  - (j) Any carriage or animal used in smuggling or in the unlawful importation, exportation, or conveyance of any goods.
  - (m) All goods not being passengers' baggage found on any ship or aircraft after clearance and not specified or referred to in the Outward Manifest and not accounted for to the satisfaction of the Collector.
  - (n) All prohibited exports put on any ship boat or aircraft for export or brought to any wharf or place for the purpose of export.



Section T229A T

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- (o) All dutiable goods concealed in any manner.
  - (p) Any package having concealed therein goods not enumerated in the entry or being so packed as to deceive the officer.
  - (q) All dutiable goods found in the possession or in the baggage of any person who has got out of, landed from or gone on board any ship boat or aircraft and who has denied that he has any dutiable goods in his possession, or who when questioned by an officer has not fully disclosed that such goods are in his possession or baggage.
  - (qa) If unaccompanied personal or household effects of a person are imported into Australia—all dutiable goods that are found among those effects, where the person has denied that there are any dutiable goods among the effects, or after having been questioned by an officer has not fully disclosed that there are such goods among the effects.
  - (r) All goods offered for sale on the pretence that the same are prohibited or smuggled goods.
- (1A) In spite of subsection (1), goods are not forfeited to the Crown merely because they are imported or exported in contravention of the *Motor Vehicle Standards Act 1989*.
- (2) Notwithstanding section 228, this section applies in relation to ships, boats and aircraft as well as other goods.
- (3) In spite of subsection (1), goods are not forfeited to the Crown merely because they are imported or exported in contravention of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

**229A Proceeds of drug trafficking liable to forfeiture**

- (1) In this section, unless the contrary intention appears:

*cheque* includes a bill, promissory note or other security for money.

*goods* includes cheques, but does not include moneys in the form of cash.

*moneys* means moneys in the form of cash.

Section 229A

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(2) This section applies to:

- (a) moneys or goods in the possession or under the control of a person, being moneys or goods that came into his possession or under his control by reason of:
  - (i) his selling or otherwise dealing in, or his agreeing to sell or otherwise deal in, narcotic goods imported into Australia in contravention of this Act;
  - (ii) his importing, or his agreeing to import, narcotic goods into Australia in contravention of this Act;
  - (iii) his exporting, or his agreeing to export, narcotic goods from Australia in contravention of this Act;
  - (iv) his keeping or having kept, or his agreeing to keep, in his possession narcotic goods imported into Australia in contravention of this Act;
  - (v) his conspiring with another person or other persons to import any narcotic goods into Australia in contravention of this Act or to export any narcotic goods from Australia in contravention of this Act; or
  - (vi) his aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the sale of, or other dealing in, narcotic goods imported into Australia in contravention of this Act, the importation of narcotic goods into Australia in contravention of this Act, the exportation of narcotic goods from Australia in contravention of this Act or the keeping in the possession of any person of narcotic goods imported into Australia in contravention of this Act;
- (b) moneys in the possession or under the control of a person that were paid to him for the sale of goods that were, immediately before the sale, goods to which this section applied; and
- (c) goods in the possession or under the control of a person that were purchased or otherwise acquired by him with or out of moneys to which this section applied.

Note: Goods are imported or exported in contravention of this Act if they are imported or exported in breach of a prohibition under this Act: see subsection 4(4A).

(3) Where a person who obtained possession or control of a cheque, or was paid moneys by a cheque, in any of the circumstances set out in paragraph (2)(a) or (b) receives, in respect of the cheque,

Section T229AT

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moneys in the form of cash, the moneys so received shall, for the purposes of subsection (2), be deemed to be moneys that came into his possession or under his control, or were paid to him, in the circumstances in which he obtained possession or control of the cheque, or was paid the moneys by the cheque.

- (4) Where a person who purchases or otherwise acquires goods pays the whole or substantially the whole of the amount paid by him for the goods by means of a cheque that came into his possession or under his control as set out in paragraph (2)(a), the goods shall, for the purposes of subsection (2), be deemed to have come into his possession or under his control in the circumstances in which the cheque came into his possession or under his control.
- (5) For the purposes of paragraph (2)(c), goods shall not be taken to have been purchased with or out of moneys to which this section applied unless the whole, or substantially the whole, of the moneys paid for the goods were moneys to which this section applied.
- (6) For the purposes of section 203, moneys or goods to which this section applies shall be deemed to be forfeited goods and, upon moneys or goods to which this section applies being seized under a seizure warrant, they shall, for the purposes of sections 204 to 208E (inclusive) and Part XIV, be deemed to be forfeited goods, and those provisions apply accordingly.
- (7) Where, in any proceedings for the condemnation or recovery of moneys or goods to which this section applies and which have been seized under a seizure warrant, the Court is satisfied that the relevant narcotic goods are goods reasonably suspected of having been imported into Australia in contravention of this Act, the Court shall, for the purposes of the proceedings, treat the narcotic goods as narcotic goods which have been imported into Australia in contravention of this Act unless it is established to the satisfaction of the Court that the narcotic goods were not imported into Australia or were not imported into Australia in contravention of this Act.
- (8) Without limiting any powers that are conferred on a Court by the provisions of this Act specified in subsection (6) and notwithstanding any other provision of this Act:
  - (a) where moneys or goods in the possession or under the control of a person are seized under a seizure warrant, a Court in

**Section 230**

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which proceedings are brought for the condemnation or recovery of the moneys or goods shall, if it is satisfied that the moneys or goods were, at the time when they were so seized, owned by another person who, when he became the owner of the moneys or goods, did not know, and had no reason to suspect, that the moneys or goods had come into the possession or under the control of the first-mentioned person in circumstances referred to in subsection (2), direct that the moneys or goods be delivered to that other person; and

- (b) where moneys or goods in the possession or under the control of the licensee of a warehouse are seized under a seizure warrant, a Court in which proceedings are brought for the condemnation or recovery of the moneys or goods shall direct that the moneys or goods be delivered to the licensee if it is satisfied that:
- (i) the moneys came into the possession or under the control of the licensee by reason of his storing in the warehouse narcotic goods imported into Australia in contravention of this Act or by reason of his selling goods that were acquired by him with or out of any such moneys; or
  - (ii) the goods were purchased or otherwise acquired by him out of moneys that so came into his possession or under his control;

as the case may be, and is also satisfied that the licensee did not know that the goods stored in the warehouse were narcotic goods or that they had been imported into Australia in contravention of this Act.

**230 Forfeited packages and goods**

The forfeiture of any goods shall extend to the forfeiture of the packages in which the goods are contained and the forfeiture of any package under section 229 shall extend to all goods packed or contained in the package.

## Division 2—Penalties

### 231 Assembly for unlawful purposes

- (1) All persons to the number of 2 or more assembled with the intention of:
  - (a) importing prohibited imports; or
  - (b) smuggling; or
  - (c) preventing the seizure, or rescuing after seizure, of any prohibited imports or smuggled goods;shall be guilty of an offence punishable upon conviction by imprisonment for a period not exceeding 2 years.
- (2) This section does not apply to, or in relation to, narcotic goods.
- (3) An offence against this section is punishable upon summary conviction.

Note: Most offences dealing with the importation and exportation of narcotic goods are located in Part 9.1 of the *Criminal Code*.

### 232A Rescuing goods and assaulting officers

Whoever:

- (a) rescues any goods which have been seized, or, before or at or after seizure, staves, breaks or destroys any goods or documents relating thereto with the intention of preventing the seizure thereof or the securing of the same or the proof of any offence; or
- (b) assaults, resists, molests, obstructs or endeavours to intimidate any person assisting an officer in the execution of the officer's duty;

shall be guilty of an offence and shall be liable, upon summary conviction, to a fine not exceeding 5 penalty units or to imprisonment for any period not exceeding 2 years.

### 233 Smuggling and unlawful importation and exportation

- (1) A person shall not:
  - (a) smuggle any goods; or
  - (b) import any prohibited imports; or

Section T233T

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- (c) export any prohibited exports; or
  - (d) unlawfully convey or have in his possession any smuggled goods or prohibited imports or prohibited exports.
- (1AA) A person who contravenes subsection (1) is guilty of an offence punishable upon conviction:
- (a) in the case of an offence against paragraph (1)(a) or an offence against paragraph (1)(d) in relation to smuggled goods—as provided by subsection 233AB(1); or
  - (b) in any other case—as provided by subsection 233AB(2).
- (1AB) Subsection (1AA) is an offence of strict liability, to the extent that it relates to paragraphs (1)(b), (c) and (d).
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) It shall not be lawful for any person to convey or have in his possession without reasonable excuse (proof whereof shall lie upon him) any smuggled goods or prohibited imports.
  - (3) It shall not be lawful for any person to convey or have in his possession any prohibited exports with intent to export them or knowing that they are intended to be unlawfully exported.
- (3A) A Customs officer who, in the course of duty, possesses or conveys, or facilitates the conveyance of, prohibited imports, prohibited exports or smuggled goods is not criminally responsible for an offence against a law of the Commonwealth or of a State or Territory relating to the possession, conveyance or facilitation of the conveyance of such goods.
- (3B) A person who:
- (a) possesses or conveys, or facilitates the conveyance of, prohibited imports, prohibited exports or smuggled goods; and
  - (b) in doing so is acting in accordance with written instructions referring to this section issued by a Customs officer acting in the course of duty;
- is not criminally responsible for an offence against a law of the Commonwealth or of a State or Territory relating to the possession, conveyance or facilitation of the conveyance of such goods.
- (4) Merchandise on board a ship or aircraft calling at any port or airport in Australia, but intended for and consigned to some port or

airport or place outside Australia, shall not be deemed to be unlawfully imported into Australia if the goods are specified on the ship's or aircraft's manifest and are not transhipped or landed in Australia or are transhipped or landed by authority.

- (5) This section does not apply to, or in relation to, narcotic goods.
- (6) The Minister must lay before each House of the Parliament, not later than the first sitting day of that House after 1 October each year, a report about any conduct by Customs officers that, apart from subsection (3A), would constitute an offence against a law of the Commonwealth or of a State or Territory relating to the possession or conveyance, or facilitation of the conveyance, of prohibited imports, prohibited exports or smuggled goods.

### **233A Master not to use or allow use of ship for smuggling etc.**

- (1) The master of a ship or the pilot of an aircraft shall not intentionally use his ship or aircraft, or intentionally suffer her to be used, in smuggling, or in the importation of any goods in contravention of this Act, or in the exportation or conveyance of any goods in contravention of this Act.
- (1A) Subsection (1) does not apply if the goods smuggled, imported, exported or conveyed are narcotic goods.
  - Note: Most offences dealing with the importation and exportation of narcotic goods are located in Part 9.1 of the *Criminal Code*.
- (2) A person who contravenes subsection (1) is guilty of an offence punishable upon conviction:
  - (b) in the case of an offence committed in relation to the smuggling of goods—as provided by subsection 233AB(1);  
or
  - (c) in any other case—as provided by subsection 233AB(2).

### **233AB Penalties for offences against sections 233 and 233A**

- (1) Where an offence is punishable as provided by this subsection, the penalty applicable to the offence is:
  - (a) where the Court can determine the amount of the duty that would have been payable on the smuggled goods to which the offence relates if those goods had been entered for home consumption on:

Section T233BAAT

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- (i) where the date on which the offence was committed is known to the Court—that date; or
    - (ii) where that date is not known to the Court—the date on which the prosecution for the offence was instituted; a penalty not exceeding 5 times the amount of that duty; or
  - (b) where the Court cannot determine the amount of that duty, a penalty not exceeding 1,000 penalty units.
- (2) Where an offence is punishable as provided by this subsection, the penalty applicable to the offence is:
- (a) where the Court can determine the value of the goods to which the offence relates, a penalty not exceeding:
    - (i) 3 times the value of those goods; or
    - (ii) 1,000 penalty units;whichever is the greater; or
  - (b) where the Court cannot determine the value of those goods—a penalty not exceeding 1,000 penalty units.

**233BAA Special offence relating to tier 1 goods**

- (1) Subject to subsection (3), the regulations may provide that:
  - (a) specified performance enhancing drugs; and
  - (b) specified non-narcotic drugs; and
  - (c) other specified goods;constitute tier 1 goods.
- (2) The regulations must not specify an item for the purposes of subsection (1) unless:
  - (a) its importation is prohibited, either absolutely or on condition, by the Customs (Prohibited Imports) Regulations; or
  - (b) its exportation is prohibited, either absolutely or on condition, by the Customs (Prohibited Exports) Regulations.
- (3) If the regulations made for the purposes of subsection (1) prescribe a quantity of a drug specified for those purposes to be the critical quantity, the specified drug does not constitute tier 1 goods unless it is of a quantity that exceeds the critical quantity.
- (4) A person is guilty of an offence against this subsection if:
  - (a) the person intentionally imported goods; and



Section T233BAAT

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- (b) the goods were tier 1 goods and the person was reckless as to that fact; and
- (c) their importation:
  - (i) was prohibited under this Act absolutely; or
  - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

Maximum penalty: A fine not exceeding 1,000 penalty units or imprisonment for 5 years, or both.

- (4A) Subject to subsection (4B), absolute liability applies to paragraph (4)(c).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

- (4B) For the purposes of an offence against subsection (4), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (4)(c)(ii) had not been obtained at the time of the importation.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (5) A person is guilty of an offence against this subsection if:
- (a) the person intentionally exported goods; and
  - (b) the goods were tier 1 goods and the person was reckless as to that fact; and
  - (c) their exportation:
    - (i) was prohibited under this Act absolutely; or
    - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the exportation, that approval had not been obtained.

Maximum penalty: A fine not exceeding 1,000 penalty units or imprisonment for 5 years, or both.

- (5A) Subject to subsection (5B), absolute liability applies to paragraph (5)(c).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

- (5B) For the purposes of an offence against subsection (5), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (5)(c)(ii) had not been obtained at the time of the exportation.

Section T233BAB T

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Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (6) A person convicted or acquitted of an offence against subsection (4) or (5) in respect of particular conduct is not liable to any proceeding under section 233 in respect of that conduct.

**233BAB Special offence relating to tier 2 goods**

- (1) The regulations may provide that:
- (a) specified firearms, munitions and military warfare items of any kind including combat vests and body armour; and
  - (b) specified knives, daggers and other like goods; and
  - (c) specified chemical compounds; and
  - (d) specified anti-personnel sprays and gases; and
  - (e) specified fissionable or radioactive substances; and
  - (f) specified human body tissue; and
  - (g) specified human body fluids; and
  - (h) items of child pornography or of child abuse material; and
  - (i) counterfeit credit, debit and charge cards; and
  - (j) other specified goods;
- constitute tier 2 goods.
- (2) The regulations must not specify an item for the purposes of subsection (1) unless:
- (a) its importation is prohibited, either absolutely or on condition, by the Customs (Prohibited Imports) Regulations; or
  - (b) its exportation is prohibited, either absolutely or on condition, by the Customs (Prohibited Exports) Regulations.
- (3) For the purposes of subsection (1) an item is taken to be an item of child pornography if it is a document or other goods:
- (a) that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
    - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
    - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;

Section T233BABT

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and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

- (b) the dominant characteristic of which is the depiction, for a sexual purpose, of:
- (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
  - (ii) a representation of such a sexual organ or anal region; or
  - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;

in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

- (c) that describes a person who is, or is implied to be, under 18 years of age and who:
- (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
  - (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

- (d) that describes:
- (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
  - (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

- (4) For the purposes of subsection (1), an item is taken to be an item of child abuse material if it is a document or other goods:

- (a) that depicts a person, or a representation of a person, who:
- (i) is, or appears to be, under 18 years of age; and
  - (ii) is, or appears to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

Section T233BABT

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- (b) that describes a person who:
  - (i) is, or is implied to be, under 18 years of age; and
  - (ii) is, or is implied to be, a victim of torture, cruelty or physical abuse;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.
- (4A) The matters to be taken into account in deciding for the purposes of subsections (3) and (4) whether reasonable persons would regard a particular document or other goods as being, in all the circumstances, offensive, include:
  - (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
  - (b) the literary, artistic or educational merit (if any) of the material; and
  - (c) the general character of the material (including whether it is of a medical, legal or scientific character).
- (5) A person is guilty of an offence against this subsection if:
  - (a) the person intentionally imported goods; and
  - (b) the goods were tier 2 goods and the person was reckless as to that fact; and
  - (c) their importation:
    - (i) was prohibited under this Act absolutely; or
    - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

Maximum penalty: A fine not exceeding 2,500 penalty units or imprisonment for 10 years, or both.

- (5A) Subject to subsection (5B), absolute liability applies to paragraph (5)(c).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

- (5B) For the purposes of an offence against subsection (5), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (5)(c)(ii) had not been obtained at the time of the importation.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section T233BACT

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- (6) A person is guilty of an offence against this subsection if:
- (a) the person intentionally exported goods; and
  - (b) the goods were tier 2 goods and the person was reckless as to that fact; and
  - (c) their exportation:
    - (i) was prohibited under this Act absolutely; or
    - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the exportation, that approval had not been obtained.

Maximum penalty: A fine not exceeding 2,500 penalty units or imprisonment for 10 years, or both.

- (6A) Subject to subsection (6B), absolute liability applies to paragraph (6)(c).

Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

- (6B) For the purposes of an offence against subsection (6), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (6)(c)(ii) had not been obtained at the time of the exportation.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (7) A person convicted or acquitted of an offence against subsection (5) or (6) in respect of particular conduct is not liable to proceedings under section 233 in respect of that conduct.

**233BAC Evidence relating to approval for import or export**

- (1) In proceedings for an offence against subsection 233BAA(4) or (5) or 233BAB(5) or (6), a certificate of an authorised officer to the effect that the person charged with the offence had not obtained, as at the time of the import or export of the goods in respect of which the offence is alleged to have been committed, approval for the import or export is admissible as prima facie evidence that that approval had not been so obtained.
- (2) For the purposes of this section, a document purporting to be a certificate referred to in subsection (1) is, unless the contrary is established, to be taken to be such a certificate and to have been duly given.

Section T233BAT

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- (3) A certificate is not to be admitted in evidence under subsection (1) in proceedings for an offence unless the person charged with the offence or a solicitor who has appeared for the person in those proceedings has, at least 14 days before the certificate is sought to be so admitted, been given a copy of the certificate, together with reasonable notice of the intention to produce the certificate as evidence in the proceedings.

**233BA Evidence of Analyst**

- (1) The CEO may appoint a person to be an analyst for the purposes of this Act or Part 9.1 of the *Criminal Code*.
- (2) Subject to subsection (4), in any proceedings for an offence against section 233BAA or Part 9.1 of the *Criminal Code*, or in any proceedings for an offence against section 233BAB in so far as that section relates to specified anti-personnel sprays or gases, radioactive substances, human body tissue or human body fluid, a certificate of an analyst in an approved form stating, in respect of a substance in relation to which the offence is alleged to have been committed:
- (a) that the analyst signing the certificate is appointed under subsection (1); and
  - (b) when and from whom the substance was received; and
  - (c) what, if any, labels or other means of identifying the substance accompanied it when it was received; and
  - (d) what container or containers the substance was contained in when it was received; and
  - (e) a description, and the weight, of the substance received; and
  - (f) when the substance, or a portion of it, was analysed; and
  - (g) a description of the method of analysis; and
  - (h) the results of the analysis; and
  - (j) how the substance was dealt with after handling by the analyst, including details of:
    - (i) the quantity retained; and
    - (ii) the name of the person, if any, to whom any retained quantity was given; and
    - (iii) measures taken to secure any retained quantity;
- is admissible as *prima facie* evidence of the matters in the certificate and of the correctness of the result of the analysis.

- (3) For the purposes of this section, a document purporting to be a certificate referred to in subsection (2) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.
- (4) A certificate shall not be admitted in evidence under subsection (2) in proceedings for an offence unless the person charged with the offence or a solicitor who has appeared for the person in those proceedings has, at least 14 days before the certificate is sought to be so admitted, been given a copy of the certificate together with reasonable notice of the intention to produce the certificate as evidence in the proceedings.
- (5) Subject to subsection (6), where, under subsection (2), a certificate of an analyst is admitted in evidence in a proceeding for an offence, the person charged with the offence may require the analyst to be called as a witness for the prosecution and the analyst may be cross-examined as if he or she had given evidence of the matters stated in the certificate.
- (6) Subsection (5) does not entitle a person to require an analyst to be called as a witness for the prosecution unless:
  - (a) the prosecutor has been given at least 4 days notice of the person's intention to require the analyst to be so called; or
  - (b) the Court, by order, allows the person to require the analyst to be so called.

### **234 Customs offences**

- (1) A person shall not:
  - (a) Evade payment of any duty which is payable;
  - (b) Obtain any drawback, refund, rebate or remission which is not payable;
  - (d) do any of the following:
    - (i) intentionally make or cause to be made a statement to an officer, reckless as to the fact that the statement is false or misleading in a material particular;
    - (ii) intentionally omit or cause to be omitted from a statement made to an officer any matter or thing, reckless as to the fact that without the matter or thing the statement is misleading in a material particular;

Section 234

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- (iii) intentionally give information to another person, knowing that the information is false or misleading in a material particular and that the other person or someone else will include the information in a statement to an officer;
  - (iv) intentionally give information to another person, knowing that the information is misleading in a material particular because of the omission of other information that the person has and that the other person or someone else will include the information in a statement to an officer;
  - (h) Sell or offer for sale, any goods upon the pretence that such goods are prohibited imports or smuggled goods.
- (2) A person who contravenes subsection (1) is guilty of an offence punishable upon conviction:
- (a) in the case of an offence against paragraph (1)(a), by:
    - (i) where the Court can determine the amount of the duty on goods the payment of which would have been evaded by the commission of the offence if the goods had been entered for home consumption on:
      - (A) where the date on which the offence was committed is known to the Court—that date; or
      - (B) where that date is not known to the Court—the date on which prosecution for the offence was instituted;a penalty not exceeding 5 times the amount of that duty and not less than 2 times that amount; or
    - (ii) where the Court cannot determine the amount of that duty, a penalty not exceeding 500 penalty units;
  - (b) in the case of an offence against paragraph (1)(b), by a penalty not exceeding 5 times the amount of drawback, refund, rebate or remission that was obtained by the commission of the offence and not less than 2 times that amount;
  - (c) subject to subsection (3), in the case of an offence against paragraph (1)(d), by a penalty not exceeding 100 penalty units; or
  - (d) in the case of an offence against paragraph (1)(h), by a penalty not exceeding 10 penalty units.



Section T234 T

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- (2A) Where an export entry, a submanifest, an outward manifest or a withdrawal of such an entry, submanifest or manifest is taken, under section 119D, to have been communicated to Customs, then, for the purposes of paragraph (1)(d), the part of the communication constituting the transmission to Customs is treated as a statement made to the CEO.
- (2B) Where an import entry, a withdrawal of such an entry, or a return for the purposes of subsection 69(5) or 70(7) is taken, under section 71L, to have been communicated to Customs, then, for the purposes of paragraph (1) (d), the part of the communication constituting the transmission to Customs is treated as a statement made to the CEO.
- (2BA) If an application for a refund, rebate or remission of duty is taken, under regulations made for the purposes of subsection 163(1AB), to have been communicated to Customs, then, for the purposes of paragraph (1)(d), the part of the communication constituting the transmission to Customs is treated as a statement made to the CEO.
- (2BB) An application communicated by computer under section 162AA to Customs is taken for the purposes of paragraph (1)(d) to be a statement to the CEO.
- (2C) Nothing in subsection (2A), (2B), (2BA) or (2BB) is to be taken to affect the operation of any of the provisions of section 183.
- (3) Where a person is convicted of an offence against paragraph (1)(d) in relation to a statement made, or an omission from a statement made, in respect of the amount of duty payable on particular goods, a Court may, in relation to that offence, impose a penalty not exceeding the sum of 50 penalty units and twice the amount of the duty payable on those goods.
- (4A) A person is guilty of an offence if the person intentionally enters designated fuel for home consumption as clean fuel, reckless as to the fact that it is designated fuel.
- Penalty: 10 times the amount of customs duty that would have been applicable to the fuel if it had been fuel of a kind classified to subheading 2710.00.29 of Schedule 3 to the Customs Tariff or 500 penalty units, whichever is the greater.

Section T234T

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- (5) A person is guilty of an offence if the person intentionally enters clean fuel for home consumption as designated fuel, reckless as to the fact that it is clean fuel.

Penalty: 10 times the amount of customs duty that would have been applicable to the fuel if it had been fuel of a kind classified to subheading 2710.00.29 of Schedule 3 to the Customs Tariff or 500 penalty units, whichever is the greater.

- (6) A person is guilty of an offence if the person enters designated fuel for home consumption as clean fuel.

Penalty: 2 times the amount of customs duty that would have been applicable to the fuel if it had been fuel of a kind classified to subheading 2710.00.29 of Schedule 3 to the Customs Tariff or 100 penalty units, whichever is the greater.

- (6A) Subsection (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (7) A person is guilty of an offence if the person enters clean fuel for home consumption as designated fuel.

Penalty: 2 times the amount of customs duty that would have been applicable to the fuel if it had been fuel of a kind classified to subheading 2710.00.29 of Schedule 3 to the Customs Tariff or 100 penalty units, whichever is the greater.

- (7A) Subsection (7) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (8) For the purposes of subsections (4A) to (7), fuel is ***entered for home consumption*** when:

- (a) the entry of the fuel (other than fuel to which paragraph (b) or (c) applies) for home consumption under section 71A or 71DB of this Act is communicated to Customs within the meaning of this Act; or
- (b) the fuel is delivered into home consumption in accordance with a permission granted under section 69 of this Act.

### **234AA Places set aside for purposes of Act**

- (1) Where a place:
  - (a) is to be used by officers:
    - (i) for questioning, for the purposes of this Act or of any other law of the Commonwealth, passengers disembarking from or embarking on a ship or aircraft; or
    - (ii) for examining, for such purposes, the personal baggage of such passengers; or
    - (iii) as a holding place for such passengers; or
  - (b) is covered by a notice under subsection (3);

a Collector, or a person authorized by a Collector to do so, may cause signs to be displayed at or near the place that identify the place and state that entry into it by unauthorized persons is prohibited by this Act.
- (2) Where a sign is displayed in relation to a place under subsection (1), a Collector, or a person authorized by a Collector to do so, may cause signs to be displayed at or near the place that identify the place and indicate (whether in words or images) that the use of:
  - (a) cameras or sound recorders; or
  - (b) mobile phones or other electronic forms of communication;at the place by unauthorized persons is prohibited by this Act.
- (3) The CEO may publish a notice in the *Gazette* specifying, as an area to which this section applies, an area of an airport appointed under section 15.
- (4) An area specified in such a notice must comprise one or more of the following areas:
  - (a) areas that are used by, or frequented by, passengers who have arrived in Australia until they have passed through the last point at which they or their baggage are normally subject to processing by officers;
  - (b) areas that are used by, or frequented by, passengers who are about to depart Australia after they have passed through the first point at which they are normally subject to processing by officers;

Section T234A T

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- (c) areas that are in the vicinity of areas referred to in paragraph (a) or (b).

**234A Unauthorised entry to places and on ships, aircraft or wharves**

(1) A person shall not:

- (a) enter into, or be in, a place in relation to which a sign is displayed under subsection 234AA(1); or

- (b) enter on or be in or on:

- (i) a ship;

- (ii) an aircraft;

- (iii) the wharf at which, or the part of a wharf adjacent to which, a ship is berthed;

at a time when goods being the personal baggage of passengers disembarking from, or embarking on that ship or aircraft are being examined, for the purposes of this Act, at or in the vicinity of the ship, aircraft, wharf or part of a wharf.

Penalty: 50 penalty units.

(1AA) Subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(1A) Subsection (1) does not apply if the person:

- (a) enters into or is in the place, by authority; or

- (ab) is a holder of a security identification card (within the meaning of section 213A) who enters into or is in the place for the purposes of his or her employment; or

- (b) enters on or is in or on, the ship, aircraft, wharf or the part of a wharf, by authority; or

- (c) is a member of a crew disembarking from, or embarking on, a ship or aircraft; or

- (d) is a passenger disembarking from, or embarking on, a ship or aircraft; or

- (e) is included in a class of persons whom the CEO determines, in writing, to be exempt from this section.

(2) Subsection (1) does not prohibit a person:

- (a) who has, or is a member of an authority which has, the management or control of a wharf or wharves or an airport or airports; or

- (b) who is employed in connexion with the management or control of a wharf or wharves or an airport or airports; from entering on, or being in or on, a place, ship, aircraft, wharf or part of a wharf for the purposes of that management or control.
- (3) In any proceedings for the prosecution of a person for an offence against subsection (1), evidence that a sign stating that entry into a place is prohibited by this Act was displayed at or near that place is *prima facie* evidence that the sign was so displayed in accordance with subsection 234AA(1).

### **234AB Unauthorised use of cameras and sound recorders**

- (1) An officer may direct a person, including a passenger disembarking from, or embarking on, a ship or aircraft:
  - (a) not to use:
    - (i) a camera or sound recorder; or
    - (ii) a mobile phone or other electronic form of communication;at a place in relation to which a sign is displayed under subsection 234AA(2); or
  - (b) not to operate a camera, or use an appliance to record or transmit sound, at a place (being a place that is part of a ship, of an aircraft or of a wharf) at a time when the personal baggage of passengers disembarking from, or embarking on, a ship or aircraft, is being examined, for the purposes of this Act, at or in the vicinity of that place.
- (2) Where an officer gives to a person a direction under subsection (1), the officer shall inform that person that failure to comply with that direction is an offence under this Act.
- (3) A person shall not fail to comply with a direction given to that person by an officer in accordance with subsection (1).

Penalty: 10 penalty units.

- (3A) Subsection (3) does not apply if the person has a reasonable excuse.
- (3B) Subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Section T234ABAT

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- (4) In any proceedings for the prosecution of a person for an offence against subsection (3), evidence that a sign indicating that the use of:
- (a) cameras or sound recorders; or
  - (b) mobile phones or other electronic forms of communication;
- at a place is prohibited by this Act was displayed at or near that place is prima facie evidence that the sign was so displayed in accordance with subsection 234AA(2).
- (5) In this section, *camera* includes any device for making or transmitting, or designed for use in the making or transmission of, images of objects.
- (6) For the purposes of this section, a person shall be taken to use an appliance to transmit sound at a place if, and only if, the person uses the appliance to transmit sound, other than sound coming from the appliance, from the place to another place.

**234ABA Officers may direct unauthorised persons to leave restricted areas**

- (1) An officer may direct a person to leave a place in relation to which a sign is displayed under subsection 234AA(1) if the officer reasonably believes that the person is in that place in contravention of section 234A.
- (2) The officer may, either acting alone or with the assistance of one or more other officers or protective service officers, use reasonable force to remove the person from the area if the person refuses to leave when so directed.
- (3) However, in removing the person, the officer (and the persons assisting) must not use more force, or subject him or her to greater indignity, than is necessary or reasonable.

- (4) In this section:

*protective service officer* means a protective service officer within the meaning of the *Australian Federal Police Act 1979*.

### **236 Aiders and abettors**

For the purposes of a Customs prosecution (within the meaning of section 244), whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly concerned in the commission of any offence against this Act shall be deemed to have committed such offence and shall be punishable accordingly.

### **237 Attempts**

For the purposes of a Customs prosecution (within the meaning of section 244), any attempt to commit an offence against this Act shall be an offence against this Act punishable as if the offence had been committed.

### **239 Penalties in addition to forfeitures**

All penalties shall be in addition to any forfeiture.

### **240 Commercial documents to be kept**

- (1) A person who is the owner of goods imported into Australia shall keep all the relevant commercial documents relating to the goods that came into that person's possession or control before, or come into that person's possession or control on or after, the entry of those goods for any purpose, being documents that are necessary to enable a Collector to enable a Collector to satisfy himself or herself of the correctness of the particulars shown in the entry until:
  - (a) if the goods are not ultimately entered for home consumption—the goods cease to be subject to the control of Customs; and
  - (b) if the goods are entered, or ultimately entered, for home consumption—the expiration of the period of 5 years after the goods are so entered.

Penalty: 30 penalty units.

- (1AA) A person who is the owner of goods imported into Australia must keep all the relevant commercial documents relating to the goods:
  - (a) that come into the person's possession or control before, or come into the person's possession or control on or after, a return is given to Customs under section 69 or 70 in relation to those goods; and

**Section 240**

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(b) that are necessary to enable a Collector to satisfy himself or herself of the correctness of the particulars shown in the return;

until the end of the period of 5 years after the giving of the return.

Penalty: 30 penalty units.

(1A) A person who is the owner of goods exported from Australia must keep all the relevant commercial documents relating to the goods that:

(a) come into the person's possession or control at any time; and

(b) are necessary to enable a Collector to satisfy himself or herself as to the correctness of information communicated by, or on behalf of, the person to Customs (whether in documentary or other form);

for the period of 5 years after the time when the goods were exported from Australia.

Penalty: 30 penalty units.

(1B) A person who, in Australia:

(a) causes goods to be imported into, or exported from, Australia; or

(b) receives goods that have been imported into, or are to be exported from, Australia;

must keep all the relevant commercial documents that come into the person's possession or control at any time and relate to the goods concerned or to their carriage to or from Australia, being documents that are necessary to enable a Collector to satisfy himself or herself:

(c) whether the person is complying with a Customs-related law; or

(d) as to the correctness of information communicated by, or on behalf of, the person to Customs (whether in documentary or other form);

for the period of 5 years from the time when the goods were imported into, or exported from, Australia.

Penalty: 30 penalty units.

(2) Where, in accordance with the requirement of any law of the Commonwealth or of a State or Territory or with ordinary



commercial practice a document that would, but for this subsection, be required to be kept in accordance with subsection (1), (1AA), (1A) or (1B), is required by that law or practice to be surrendered to another person, this section shall be taken to be complied with if, at all times after the document is so surrendered and during the period that the document would have been required to be kept, a true copy of the document, certified in accordance with subsection (3), is kept in its stead.

- (3) Where a person is required to surrender a commercial document referred to in subsection (1), (1AA), (1A) or (1B) to another person for a reason set out in subsection (2), the first-mentioned person may make a true copy of the document and, if the first-mentioned person does so, and attaches to the copy a certificate, signed by the first-mentioned person:
- (a) to the effect:
    - (i) that the copy is a true copy of the original document; and
    - (ii) that the original document has been surrendered to that other person for that reason; and
  - (b) providing particulars of the reason referred to in subparagraph (a)(ii);
- the certified copy shall be treated by the CEO or a Collector, and shall be admissible in all courts, as if it were the original document.
- (4) A person who is required by this section to keep a commercial document relating to particular goods may keep the document at any place (which may be a place outside Australia) and, subject to subsection (5), may keep the document in any form or store it in any manner.
- (5) A person referred to in subsection (4) must:
- (a) keep the document in such a manner as will enable a Collector readily to ascertain whether the goods have been properly described for the purpose of importation or exportation, as the case requires, and, in the case of goods entered for home consumption, properly valued or rated for duty; and
  - (b) if the document is in a language other than the English language—keep the document in such a way that a translation of the document into the English language can readily be made; or

**Section 240A**

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- (c) if the document is a record of information kept by a mechanical, electronic or other device—keep the record in such a way that a document setting out in the English language the information recorded or stored can be readily produced.

Penalty: 30 penalty units.

- (6) An authorised officer may, by written notice given to a person who is required under this section to keep a commercial document, require the person to inform the officer within a reasonable period, and in a manner specified in the notice, of the whereabouts of the document.

(6A) If:

- (a) a notice is given to a person under subsection (6); and
- (b) the person fails to comply with the notice;

the person commits an offence punishable, on conviction, by a penalty not exceeding 30 penalty units.

- (6B) A person who is required to keep a commercial document must not alter or deface the document.

Penalty: 30 penalty units.

- (6C) A document is not taken to be altered or defaced for the purposes of subsection (6B) merely because a notation or marking is made on it in accordance with ordinary commercial practice.

(7) This section shall not require the keeping of any commercial documents:

- (a) by a company that has gone into liquidation and that has been dissolved;
- (b) by a class of persons that is declared by the regulations to be a class to which this section does not apply; or
- (c) of a kind declared by the regulations to be commercial documents to which this section does not apply.

**240AA Authorised officer may require person to produce commercial documents**

- (1) An authorised officer may, by written notice given to a person who is required under section 240 to keep a commercial document,

Section T240AB

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require the person to produce, either at the business premises in Australia of the person or at a place in Australia specified in the notice, and within a period specified in the notice, for inspection by an authorised officer:

- (a) if the document is in writing—the document; or
- (b) if the document is a record of information kept by a mechanical, electronic or other device—the information.

Note 1: A person who keeps a record of information by means of a mechanical, electronic or other device must comply with a requirement made under subsection (1) by producing the information in a document setting out the information in a form the authorised officer can understand. See section 25A of the *Acts Interpretation Act 1901*.

Note 2: Failure to produce a commercial document following a requirement made under subsection (1) is an offence. See section 243SB.

- (2) The period that may be specified in a notice given under subsection (1) must not be less than 14 days after the notice is given.

### **240AB Verifying communications to Customs**

- (1) This section applies to a person who makes a communication (however described) to Customs under this Act or gives someone else information for inclusion in such a communication.
- (1A) The regulations may provide that specified communications, or specified kinds of communications, are exempt from this section.
- (2) The purpose of this section is to help officers of Customs to verify the content of communications made to Customs and to trace information included in communications made to Customs to its source.
- (3) If the person makes the communication to Customs, the person must keep, in accordance with this section, for the period of one year after the communication is made, a record that verifies the contents of the communication.

Penalty: 30 penalty units

- (3A) If the person (the *giver*) gives information to another person (the *recipient*) for the recipient or someone else to include in a communication to Customs, the giver must keep, in accordance

**Section T240ABT**

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with this section, for one year after the information is given, one or more records that:

- (a) either verify the information or, if the giver was given the information by someone else, verify that the giver was given that information and identify the person who gave it to the giver; and
- (b) verify the fact that the giver gave the information to the recipient; and
- (c) identify the recipient.

Penalty: 30 penalty units.

- (4) A person who is required by this section to keep a record may keep the record at any place (which may be a place outside Australia) and, subject to subsection (5), may keep the record in any form or store it in any manner.
- (5) A person referred to in subsection (4) must:
  - (a) if the record is in a language other than the English language—keep the record in such a way that a translation of the record into the English language can readily be made; or
  - (b) if the record is kept by a mechanical, electronic or other device—keep the record in such a way that a document setting out in the English language the information recorded or stored can be readily produced.
- (6) An authorised officer may, by written notice given to a person who is required under this section to keep a record, require the person to inform the officer within a reasonable period, and in a manner specified in the notice, of the whereabouts of the record.
- (7) If:
  - (a) a notice is given to a person under subsection (6); and
  - (b) the person fails to comply with the notice;the person commits an offence punishable, on conviction, by a penalty not exceeding 30 penalty units.
- (8) To avoid doubt, this section does not affect the operation of section 240.

Note: Section 240 requires owners of imported or exported goods, and certain persons who deal with such goods, to keep for 5 years relevant commercial documents relating to the goods.

**240AC Authorised officer may require person to produce record**

(1) An authorised officer may, by written notice given to a person who is required under section 240AB to keep a record, require the person to produce, either at the business premises in Australia of the person or at a place in Australia specified in the notice, and within a period specified in the notice, for inspection by an authorised officer:

- (a) if the record is in writing—the record; or
- (b) if the record is kept by a mechanical, electronic or other device—the information contained in the record.

Note 1: A person who keeps a record of information by means of a mechanical, electronic or other device must comply with a requirement made under subsection (1) by producing the information in a document setting out the information in a form the authorised officer can understand. See section 25A of the *Acts Interpretation Act 1901*.

Note 2: Failure to produce a record following a requirement made under subsection (1) is an offence. See section 243SB.

(2) The period that may be specified in a notice given under subsection (1) must not be less than 14 days after the notice is given.

## **Division 3—Recovery of pecuniary penalties for dealings in narcotic goods**

### **243A Interpretation**

- (1) In this Division, unless the contrary intention appears:

*benefit* includes service or advantage.

*cheque* includes a bill, promissory note or other security for money.

*Court* means the Federal Court of Australia.

*dealing*, in relation to property of a person, includes:

- (a) if a debt is owed to that person—making a payment to any person in reduction of the amount of the debt;
- (b) removing the property from Australia; and
- (c) receiving or making a gift of the property.

*effective control*, in relation to property, or an interest in property, has the meaning given by section 243AB.

*interest*, in relation to property, means:

- (a) a legal or equitable estate or interest in the property; or
  - (b) a right, power or privilege in connection with the property;
- whether present or future and whether vested or contingent.

*moneys* means moneys in the form of cash.

*Official Trustee* means the Official Trustee in Bankruptcy.

*pecuniary penalty* means a pecuniary penalty referred to in section 243B.

*penalty amount*, in relation to an order under section 243B against a person, means the amount that the person is liable to pay the Commonwealth under the order.

*petition* means a petition under the *Bankruptcy Act 1966*.

***police officer*** means:

- (a) a member or special member of the Australian Federal Police; or
- (b) a member of the police force of a State or Territory.

***property*** means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible and includes an interest in any such real or personal property.

***restraining order*** means an order made under paragraph 243E(2)(c).

***trustee in bankruptcy*** means:

- (a) in relation to a bankruptcy—the trustee of the estate of the bankrupt; or
  - (b) in relation to a composition or scheme of arrangement under Division 6 of Part IV of the *Bankruptcy Act 1966*—the trustee of the composition or scheme of arrangement; or
  - (c) in relation to a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*—the trustee of the agreement; or
  - (d) in relation to the estate of a deceased person in respect of which an order has been made under Part XI of the *Bankruptcy Act 1966*—the trustee of the estate.
- (2) Where a person who has obtained possession or control of a cheque, or was paid moneys by a cheque, in any of the circumstances set out in subsection (3), receives, in respect of the cheque, moneys in the form of cash, the moneys so received shall, for the purposes of this Division, be deemed to be moneys that came into his possession or under his control, or were paid to him, in the circumstances in which he obtained possession or control of the cheque, or was paid the moneys by the cheque.
- (3) For the purposes of this Division, a person shall be taken to engage in a prescribed narcotics dealing if:
- (a) he sells or otherwise deals in, or agrees to sell or otherwise deal in, narcotic goods imported into Australia in contravention of this Act;
  - (b) he imports, or agrees to import, narcotic goods into Australia in contravention of this Act;

Section T243AT

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- (c) he exports, or agrees to export, narcotic goods from Australia in contravention of this Act;
- (d) he keeps, or agrees to keep, in his possession narcotic goods imported into Australia in contravention of this Act;
- (e) he conspires with another person or other persons to import any narcotic goods into Australia, or to export any narcotic goods from Australia, in contravention of this Act; or
- (f) he aids, abets, counsels or procures, or is in any way knowingly concerned in, the sale of, or other dealing in, narcotic goods imported into Australia in contravention of this Act, the importation of narcotic goods into Australia, or the exportation of narcotic goods from Australia, in contravention of this Act, or the keeping in the possession of any person of narcotic goods imported into Australia in contravention of this Act.

Note: Goods are imported or exported in contravention of this Act if they are imported or exported in breach of a prohibition under this Act: see subsection 4(4A).

- (4) A reference in this Division to a benefit derived by a person includes a reference to:
  - (a) a benefit derived, directly or indirectly, by the person; and
  - (b) a benefit derived, directly or indirectly, by another person at the request or direction of the first person.
- (4A) A reference in this Division to the property of a person includes a reference to property in respect of which the person has a beneficial interest.
- (5) Where, upon application being made to the Court under subsection 243E(1) and supported by an affidavit made by a police officer or an officer of Customs stating that he believes that any property is the property of a person, the Court makes a restraining order against that property, for the purposes of this Division, the property shall, while that order applies to the property, be deemed to be the property of that person.
- (6) A reference in this Division to a proceeding for the recovery of a pecuniary penalty shall be read as a reference to a proceeding instituted under section 243B for an order under subsection (1) of that section.



### **243AB Effective control of property**

- (1) Property, or an interest in property, may be subject to the effective control of a person within the meaning of this Division whether or not the person has:
  - (a) a legal or equitable estate or interest in the property; or
  - (b) a right, power or privilege in connection with the property.
- (2) Without limiting the generality of any other provision of this Division, in determining:
  - (a) whether or not property, or an interest in property, is subject to the effective control of a person; or
  - (b) whether or not there are reasonable grounds to believe that property, or an interest in property, is subject to the effective control of a person;  
regard may be had to:
    - (c) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property;
    - (d) a trust that has a relationship to the property; and
    - (e) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (c) or trusts of the kind referred to in paragraph (d), and other persons.

### **243B Pecuniary penalties**

- (1) Subject to subsection (7), the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions may institute a proceeding in the Court, on behalf of the Commonwealth, for an order that a person pay a pecuniary penalty to the Commonwealth in respect of:
  - (a) a particular prescribed narcotics dealing engaged in by him;  
or
  - (b) prescribed narcotics dealings engaged in by him during a particular period.
- (2) If, in a proceeding instituted under subsection (1), the Court is satisfied that the person in relation to whom the order is sought:
  - (a) has engaged in a particular prescribed narcotics dealing; or

Section T243B T

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- (b) has, during a particular period, engaged in prescribed narcotics dealings;
- the Court shall assess, in accordance with section 243C, the value of the benefits derived by the person by reason of his having engaged in that dealing, or in prescribed narcotics dealings during that period, as the case may be, and order the person to pay to the Commonwealth a pecuniary penalty equal to the value as so assessed.
- (3) The Court may order a person to pay a pecuniary penalty under subsection (2) in relation to a particular prescribed narcotics dealing, or prescribed narcotics dealings during a particular period, whether or not the person has been convicted of an offence, or proceedings have been instituted in respect of any offence, committed in relation to that dealing or any of those dealings and whether or not any moneys or other goods have been seized under section 229A in relation to that dealing or any of those dealings.
- (4) An amount payable by a person to the Commonwealth in accordance with an order made under subsection (2) shall, for all purposes, be deemed to be a civil debt due by the person to the Commonwealth.
- (5) An order made by the Court under subsection (2) may be enforced as if it were an order made by the Court in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.
- (6) This section applies to and in relation to moneys that come, or other property that comes, into the possession or under the control of a person either within or outside Australia, and to benefits that are provided for a person either within or outside Australia.
- (7) A proceeding under subsection (1) may be commenced:
- (a) if the proceeding relates to a particular prescribed narcotics dealing engaged in by a person after the commencement of this section—within 6 years after that dealing took place; or
  - (b) if the proceeding relates to prescribed narcotics dealings during a particular period, being a period that commenced after the commencement of this section—within 6 years after the end of that period.

### 243C Assessment of pecuniary penalty

- (1) In this section, a reference to the defendant in relation to a proceeding under section 243B shall be read as a reference to a person against whom an order is sought in that proceeding.
- (2) In a proceeding under section 243B, the value of the benefits derived by the defendant by reason of his having engaged in a particular prescribed narcotics dealing, or in prescribed narcotics dealings during a particular period shall be assessed by the Court having regard to the evidence before the Court concerning all or any of the following matters:
  - (a) the moneys, or the value of the property other than moneys, that came into the possession or under the control of:
    - (i) the defendant; or
    - (ii) another person at the request or by the direction of the defendant;by reason of the defendant's having engaged in that dealing or in prescribed narcotics dealings during that period;
  - (b) the value of any benefit, other than a benefit of the kind referred to in paragraph (a) that was provided for:
    - (i) the defendant; or
    - (ii) another person at the request or by the direction of the defendant;by reason of the defendant's having engaged in that dealing or in prescribed narcotics dealings during that period;
  - (c) in the case of a prescribed narcotics dealing that consisted of selling or otherwise dealing in narcotic goods—the market value, at the time of the dealing, of similar or substantially similar narcotic goods;
  - (d) in the case of a prescribed narcotics dealing that consisted of the doing of any act or thing other than selling or otherwise dealing in narcotic goods—the amount that was, or the range of amounts that were, at the time the dealing occurred, ordinarily paid for the doing of a similar or substantially similar act or thing;
  - (e) the value of the defendant's property before, during and after he engaged in that dealing, or before, during and after that period, as the case may be; and

Section T243CT

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- (f) the defendant's income and expenditure before, during and after he or she engaged in that dealing, or before, during and after that period, as the case may be.
- (3) Where evidence is given in a proceeding under section 243B that the value of the defendant's property during or after the defendant engaged in a particular prescribed narcotics dealing, or during, or after the end of, a particular period during which he engaged in prescribed narcotics dealings, exceeded the value of the defendant's property before he engaged in that dealing, or before the commencement of that period, then, for the purposes of subsection (2) of that section, the Court shall, subject to subsection (4), treat the value of benefits derived by the defendant by reasons of his having engaged in that dealing or in prescribed narcotics dealings during that period as being not less than the amount of the greatest excess.
- (4) Where, after evidence has been given in a proceeding under section 243B that the value of the defendant's property during or after the defendant engaged in a particular prescribed narcotics dealing, or during, or after the end of, a particular period, exceeded the value of the defendant's property before he engaged in that dealing, or before the commencement of that period, the defendant satisfies the Court that the whole or a part of the excess was due to certain causes, being causes unrelated to his having engaged in that prescribed narcotics dealing, or in prescribed narcotics dealings during that period, as the case may be:
- (a) if the defendant so satisfies the Court in respect of the whole of the excess—subsection (3) does not apply to the excess; or
  - (b) if the defendant so satisfies the Court in respect of a part of the excess—subsection (3) applies to and in relation to the excess as if it were reduced by the amount of that part.
- (5) In a proceeding under section 243B, a police officer or an officer of Customs who is experienced in the investigation of narcotics offences may testify:
- (a) with respect to the amount that, to the best of his information, knowledge and belief, was the market value of narcotic goods at a particular time or during a particular period; or
  - (b) with respect to the amount, or the range of amounts, that, to the best of his information, knowledge and belief, was the amount, or range of amounts, ordinarily paid at a particular

Section T243CAT

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time or during a particular period for the doing of an act or thing (not being the selling or other dealing in narcotic goods) comprising a prescribed narcotics dealing; notwithstanding any rule of law or practice relating to hearsay evidence, and his testimony is *prima facie* evidence of the matters testified to.

- (6) In calculating, for the purposes of a proceeding under section 243B, the value of benefits derived by the defendant by reason of his having engaged in a particular prescribed narcotics dealing, or in prescribed narcotics dealings during a particular period, any expenses or outgoings of the defendant in connection with that dealing, or those dealings, shall be disregarded.
- (7) The Court, in quantifying the value of a benefit for the purposes of this section, may treat as the value of the benefit the value that the benefit would have had if derived at the time when the valuation is being made and, without limiting this, may have regard to any decline in the purchasing power of money between the time when the benefit was derived and the time when the valuation is being made.
- (8) For the purposes of this section, where property of a person vests in a trustee in bankruptcy, the property shall be taken to continue to be the property of the person.

**243CA Court may lift corporate veil etc.**

- (1) Where the Court is assessing the value of benefits derived by a person (in this section called *the defendant*) because of engaging in a particular prescribed narcotics dealing, or in prescribed narcotics dealings during a particular period, the Court may treat as property of the defendant any property that, in the opinion of the Court, is subject to the effective control of the defendant.
- (2) Where the Court makes, or has made, an order (in this section called *a pecuniary penalty order*) that the defendant pay a pecuniary penalty under section 243B, the Court may:
  - (a) on application by the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions; and

Section T243DT

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- (b) if the Court is of the opinion that particular property is subject to the effective control of the defendant; make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.
- (3) Where the Court declares that property is available to satisfy a pecuniary penalty order:
- (a) the order may be enforced against the property as if it were the defendant's; and
  - (b) a restraining order may be made in respect of the property as if it were the defendant's property.
- (4) Where the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions makes an application for an order under subsection (2) that property is available to satisfy a pecuniary penalty order against the defendant:
- (a) the person (in this paragraph called *the applicant*) who makes the application shall give written notice of the application to the defendant and to any person who the applicant has reason to believe may have an interest in the property; and
  - (b) the defendant and any person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

**243D Presumption of illegality of importation**

Where, in a proceeding under section 243B against a person, the Court is satisfied that the narcotic goods in relation to which the person is alleged to have engaged in a prescribed narcotics dealing or in prescribed narcotics dealings are goods reasonably suspected of having been imported into Australia in contravention of this Act, the Court shall, for the purposes of the proceeding, treat the narcotic goods as narcotic goods which have been imported into Australia in contravention of this Act unless it is established to the satisfaction of the Court that the narcotic goods were not imported into Australia or were not imported into Australia in contravention of this Act.

**243E Court may make restraining order against property**

- (1) Where the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions has instituted a proceeding under section 243B for an order that a person (in this section referred to as the *defendant*) pay a pecuniary penalty in relation to a particular prescribed narcotics dealing, or in relation to prescribed narcotics dealings during a particular period, the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions may make application to the Court, *ex parte*, for an order under paragraph (2)(c) against one or more of the following:
- (a) specified property of the defendant;
  - (b) all the property of the defendant (including property acquired after the making of the order);
  - (d) all the property of the defendant (including property acquired after the making of the order) other than specified property;
  - (e) specified property of a person other than the defendant.
- (1A) The application under subsection (1) may be made:
- (a) where the Court makes the order under section 243B—at any time before the liability of the defendant in respect of the pecuniary penalty has been discharged; or
  - (b) in any other case—at any time before the proceeding under section 243B is finally disposed of.
- (2) Where:
- (a) an application under subsection (1) is supported by:
    - (i) an affidavit of a police officer or an officer of Customs stating that he believes that:
      - (A) the defendant has engaged in the prescribed narcotics dealing to which the proceeding under section 243B relates, or in prescribed narcotics dealings during the period to which that proceeding relates; and
      - (B) benefits were derived by the defendant by reason of the defendant's having engaged in that prescribed narcotics dealing, or in prescribed narcotics dealings during that period, as the case may be;
- and setting out the grounds on which he holds those beliefs; and

Section 243E

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- (ii) if the application seeks an order against specified property of the defendant—an affidavit of a police officer or an officer of Customs stating that he or she believes that the property is the property of the defendant and setting out the grounds on which he or she holds that belief; and
  - (b) the Court considers that, having regard to the matters contained in that affidavit or those affidavits, there are reasonable grounds for holding those beliefs;
- the Court:
- (c) shall, subject to subsection (2A), make an order:
    - (i) directing that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order; and
    - (ii) if the Court is satisfied that the circumstances so require—direct the Official Trustee to take custody and control of the property, or such part of the property as is specified in the order; and
  - (d) may, subject to subsection (3), include in the order such provision (if any) in relation to the operation of the order as the Court thinks fit.
- (2A) Where an application under subsection (1) seeks an order under paragraph (2)(c) against specified property of a person other than the defendant, the Court shall not make the order unless:
- (a) the application is supported by an affidavit of a police officer or an officer of Customs stating that the officer believes that the property is subject to the effective control of the defendant; and
  - (b) the Court considers that, having regard to the matters contained in that affidavit, there are reasonable grounds for holding that belief.
- (3) Paragraph (2)(d) does not authorize the Court to include in the order a provision postponing the operation of the order.
- (4) Without limiting the power of the Court under paragraph (2)(d), the order against property:



- (a) may set out conditions subject to which the order is to apply to all of that property, or to a specified part of that property;
  - (b) may make provision for a review of the operation of the order by the Court; and
  - (c) may make provision for meeting the reasonable living and business expenses of the defendant out of that property, or out of a specified part of that property.
- (4A) The Court shall not make provision of the kind referred to in paragraph (4)(c) unless it is satisfied that the defendant cannot meet the expenses concerned out of property that is not subject to the order.
- (5) The Court may refuse to make the order if the Commonwealth refuses or fails to give to the Court such undertakings as the Court deems appropriate with respect to the payment of damages or costs, or both, in relation to the making and operation of the order.
- (6) For the purposes of an application under subsection (1), the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions may, on behalf of the Commonwealth, give to the Court such undertakings with respect to the payment of damages or costs, or both, as are required by the Court.
- (7) Notwithstanding anything contained in the *Bankruptcy Act 1966*, moneys that have come into the possession, or under the control, of the Official Trustee in accordance with an order made under subsection (2) shall not be paid into the Common Investment Fund established in pursuance of section 20B of that Act.
- (8) Where the Official Trustee is given a direction under subparagraph (2)(c)(ii) in relation to property, the Official Trustee may do anything that is reasonably necessary for the purpose of preserving the property including, without limiting the generality of this:
- (a) becoming a party to any civil proceedings affecting the property;
  - (b) ensuring that the property is insured;
  - (c) if the property consists, wholly or partly, of securities or investments—realising or otherwise dealing with the securities or investments; and
  - (d) if the property consists, wholly or partly, of a business:

Section T243FT

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- (i) employing, or terminating the employment of, persons in the business; and
  - (ii) doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis.
- (9) Where the Official Trustee is given a direction under subparagraph (2)(c)(ii) in relation to shares in a company, the Official Trustee is entitled:
- (a) to exercise the rights attaching to the shares as if it were the registered holder of the shares; and
  - (b) to do so to the exclusion of the registered holder.
- (10) Neither paragraph (8)(c) nor subsection (9) limits the generality of the other.
- (11) In proceedings dealing with an application for an order under paragraph (2)(c), a witness shall not be required to answer a question or to produce a document if the Court is satisfied that the answering of the question or the production of the document may prejudice the investigation of, or the prosecution of a person for, an offence.

**243F Court may make further orders**

(1AA) In this section:

*defendant* has the same meaning as in section 243E.

- (1) Where the Court makes, or has made, a restraining order (in this section called the *original order*) against property of a person (in this section called the *owner*), the Court may, at the time it makes the original order or at any subsequent time, make such orders in relation to that property as the Court considers just and, without limiting the power so conferred on the Court, the Court may, at any time or from time to time, make an order:
- (a) varying the original order in respect of the property to which it relates or any provision included in the original order by virtue of paragraph 243E(2)(d);
  - (b) regulating the manner in which the Official Trustee may exercise its powers or perform its duties under the original order;
  - (c) determining any question relating to the property to which the original order relates, including any question relating to

the liabilities of the owner, and the exercise of the powers, or the performance of the duties, of the Official Trustee, with respect to the property to which the original order relates;

- (d) directing:
    - (i) the owner; or
    - (ii) if the owner is not the defendant—the defendant; or
    - (iii) if the owner or the defendant is a body corporate—a director of the body corporate specified by the Court; to give to the Minister, the Commissioner of Police, the CEO, the Director of Public Prosecutions or the Official Trustee, within a period specified in the order, a statement verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, of the owner or defendant as the Court thinks proper;
  - (e) for the examination on oath before the Court or Registrar of the Court of any person, including:
    - (i) the owner; or
    - (ii) the defendant;about the affairs (including the nature and location of any property) of:
    - (iii) anyone else who is either the owner or the defendant, or both; and
    - (iv) if the person to be examined is either the owner or defendant, or both—that person;
  - (ea) directing the owner or another person to do any act or thing necessary or convenient to be done to enable the Official Trustee to take custody and control of the property in accordance with the original order; or
  - (f) with respect to the carrying out of any undertaking with respect to the payment of damages or costs given by the Commonwealth in connection with the making of the original order.
- (2) An application for an order under subsection (1) may be made:
- (a) by the Official Trustee;
  - (b) by the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions;
  - (c) by the owner; or
  - (d) with the leave of the Court, by any other person.

Section T243FT

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(2A) Where:

- (a) the Court made the original order against the property in reliance on the engaging by a person (in this subsection called the *defendant*) in a prescribed narcotics dealing or prescribed narcotics dealings during a particular period; and
- (b) another person having an interest in the property applies to the Court for a variation of the order to exclude the interest from the order;

the Court shall grant the application if satisfied that the interest is not subject to the effective control of the defendant.

(3) Where:

- (a) a person is examined before the Court, or the Registrar of the Court, under an order made under subsection (1); or
- (b) an order made under subsection (1) directs a person to furnish a statement to the Minister, the Commissioner of Police, the CEO, the Director of Public Prosecutions or the Official Trustee;

the person is not excused from:

- (c) answering a question when required to do so by the Court, or by the Registrar of the Court; or
- (d) furnishing the statement, or setting out particulars in the statement;

as the case may be, on the ground that the answer to the question, or the statement or particulars, might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(3A) Where a person:

- (a) is examined before the Court, or the Registrar of the Court; or
- (b) furnishes a statement to the Minister, the Commissioner of Police, the CEO, the Director of Public Prosecutions or the Official Trustee;

under an order made under subsection (1), then:

- (c) a statement or disclosure made by the person in answer to a question put in the course of the examination; or
- (d) the statement so furnished;

as the case may be, and any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure referred to in paragraph (c), or of the statement referred

to in paragraph (d), is not admissible against the person in any civil or criminal proceeding except:

- (e) a proceeding for giving false testimony in the course of the examination, or in respect of the falsity of the statement, as the case may be; or
  - (f) a proceeding for the recovery of a pecuniary penalty, for the purpose only of facilitating the assessment of the amount of the pecuniary penalty.
- (4) In this section, unless the contrary intention appears:
- (a) references to the original order shall be read as including references to the original order as varied under this section; and
  - (b) references to the Registrar of the Court shall be read as including references to a Deputy Registrar of the Court, a District Registrar of the Court and a Deputy District Registrar of the Court.
- (5) In proceedings dealing with an application for an order under subsection (1), a witness is not required to answer a question or to produce a document if the Court is satisfied that the answering of the question or the production of the document may prejudice the investigation of, or the prosecution of a person for, an offence.

### **243G Official Trustee to discharge pecuniary penalty**

- (1) Where:
- (a) the Court makes an order under section 243B that a person pay a pecuniary penalty in relation to a particular prescribed narcotics dealing or in relation to prescribed narcotics dealings during a particular period; and
  - (b) at the time when the order is made, property is subject to a restraining order made, in reliance on the prescribed narcotics dealing or prescribed narcotics dealings, against:
    - (i) property of the person; or
    - (ii) property of another person in relation to which an order under subsection 243CA(2) is made;
- the Court may include in the order under section 243B a direction to the Official Trustee to pay the Commonwealth, in accordance with this section, an amount equal to the penalty amount out of that property.

Section T243GT

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## (2) Where:

(a) the Court makes an order under section 243B for a person to pay a pecuniary penalty in relation to a prescribed narcotics dealing or prescribed narcotics dealings during a particular period; and

(b) a restraining order is subsequently made against:

(i) property of the person; or

(ii) property of another person in relation to which an order under subsection 243CA(2) is made;

in reliance on the prescribed narcotics dealing or prescribed narcotics dealings;

the Court may include in the restraining order a direction to the Official Trustee to pay the Commonwealth, in accordance with this section, an amount equal to the penalty amount out of that property.

## (2A) If:

(a) the Court has made an order under section 243B that a person pay a pecuniary penalty in relation to a prescribed narcotics dealing or prescribed narcotics dealings during a particular period; and

(b) a restraining order is in force against:

(i) property of the person; or

(ii) property of another person in relation to which an order under subsection 243CA(2) is in force;

the Court may, on application by the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions, direct the Official Trustee to pay the Commonwealth, in accordance with this section, an amount equal to the penalty amount out of the property.

(3) For the purposes of enabling the Official Trustee to comply with a direction given by the Court under subsection (1), (2) or (2A), the Court may, in the order in which the direction is given or by a subsequent order:

(a) direct the Official Trustee to sell or otherwise dispose of such of the property that is subject to the restraining order as the Court specifies; and

(b) appoint an officer of the Court or any other person to execute any deed or instrument in the name of a person who owns or

has an estate, interest or right in the property and to do any act or thing necessary to give validity and operation to the deed or instrument.

- (4) The execution of the deed or instrument by the person appointed by an order under subsection (3) has the same force and validity as if the deed or instrument had been executed by the person who owned or had the estate, interest or right in the property.
- (5) Where the Official Trustee is given a direction under subsection (1), (2) or (2A) in relation to property, the Official Trustee shall not:
  - (a) if the property is money—apply the money in accordance with subsection (6) until the end of the appeal period; and
  - (b) if the property is not money—sell or otherwise dispose of the property until the end of the appeal period.
- (6) Where the Official Trustee is given a direction under subsection (1), (2) or (2A) in relation to property, the Official Trustee shall, as soon as practicable after the end of the appeal period:
  - (a) if the property is money:
    - (i) apply the money in payment of the costs, charges, expenses and remuneration, of the kind referred to in subsection 243P(1), incurred or payable in connection with the restraining order and payable to the Official Trustee under the regulations; and
    - (ii) subject to subsection (7), credit an amount equal to the remainder of the money to the Confiscated Assets Account as required by section 296 of the *Proceeds of Crime Act 2002*; and
  - (b) if the property is not money:
    - (i) sell or otherwise dispose of the property;
    - (ii) apply the proceeds of the sale or disposition in payment of the costs, charges, expenses and remuneration of the kind referred to in subsection 243P(1), incurred or payable in connection with the restraining order or the sale or disposition and payable to the Official Trustee under the regulations; and
    - (iii) subject to subsection (7), credit an amount equal to the remainder of those proceeds to the Confiscated Assets

Section T243HT

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Account as required by section 296 of the *Proceeds of Crime Act 2002*.

- (7) Where the amounts to which subparagraph (6)(a)(ii) or (b)(iii) applies exceeds the penalty amount, the Official Trustee must:
- (a) credit to the Confiscated Assets Account as required by section 296 of the *Proceeds of Crime Act 2002* an amount equal to the penalty amount; and
  - (b) pay the balance to the person whose property was subject to the restraining order.
- (8) Where the Official Trustee credits, in accordance with a direction under this section, an amount to the Confiscated Assets Account as required by section 296 of the *Proceeds of Crime Act 2002* in satisfaction of a person's liability under an order under section 243B, the person's liability under the order shall, to the extent of the payment be deemed to be discharged.
- (9) Where:
- (a) a restraining order is made against property in reliance on a particular prescribed narcotics dealing engaged in by the person or prescribed narcotics dealings engaged in by the person during a particular period; and
  - (b) before or after the restraining order is made, an order under section 243B has been or is made against the person in reliance on the prescribed narcotics dealing or prescribed narcotics dealings;
- the appeal period in respect of the property is the period ending:
- (c) if the period provided for the lodging of an appeal against the making of the order under section 243B has ended without such an appeal having been lodged—at the end of that period; or
  - (d) if an appeal against the making of the order under section 243B has been lodged—when the appeal lapses or is finally determined.

**T243H Revocation of order under section 243E**

- (1) Where, after a restraining order has been made in relation to a proceeding for the recovery of a pecuniary penalty:
- (a) no pecuniary penalty is imposed upon the determination of that proceeding;
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Section T243JT

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- (b) the pecuniary penalty imposed upon the determination of that proceeding is paid; or
  - (c) the Court is satisfied that it is, in all the circumstances, proper to do so;
- the Court may, upon application being made to it by a person authorized to make an application under section 243F, revoke that order.
- (2) The revocation of a restraining order that was made in relation to a proceeding for the recovery of a pecuniary penalty does not prevent the Court from making a further restraining order in relation to that proceeding.
  - (3) Without limiting the powers of the Court to make an order under subsection (1), the Court may revoke a restraining order upon the applicant:
    - (a) giving security satisfactory to the Court for the payment of any pecuniary penalty that may be imposed on him in the relevant proceeding; or
    - (b) giving undertakings satisfactory to the Court concerning the property of the applicant.
  - (4) Where the Court revokes or has revoked a restraining order, the Court may make such order or orders as it deems proper for or in relation to the discharge of the Official Trustee concerned from all liability in respect of the exercise by it of the powers conferred on it, and the performance by it of the duties imposed on it, under this Division in respect of the property of the person to whom the restraining order related.

### **243J Pecuniary penalty a charge on property**

- (1) Where the Court makes, in relation to a proceeding (in this section referred to as the *relevant proceeding*) for the recovery of a pecuniary penalty from a person, a restraining order against property, upon the making of the order, there is created, by force of this section, a charge, on all the property to which the order relates, to secure the payment to the Commonwealth of any pecuniary penalty that the person may be ordered to pay in the relevant proceeding.

Section T243JT

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- (2) Where a charge is created by subsection (1) on any property of a person upon the making of a restraining order, the charge ceases to have effect in respect of the property:
- (a) upon the order ceasing to apply to the property by reason of the variation or revocation of the order;
  - (b) upon the determination of the relevant proceeding by way of the refusal of the Court to make an order for the payment of a pecuniary penalty by the person;
  - (c) upon payment by the person of any pecuniary penalty that he has been ordered to pay in the relevant proceeding;
  - (d) upon the person becoming a bankrupt;
  - (e) upon the sale or other disposition of the property:
    - (i) in pursuance of a direction of the Court under section 243G; or
    - (ii) by the owner of the property with the consent of the Court or of the Official Trustee; or
  - (f) upon the sale of the property to a *bona fide* purchaser for value who, at the time of purchase, has no notice of the charge;
- whichever first occurs.
- (3) The charge created on property by subsection (1):
- (a) is subject to every charge or encumbrance to which the property was subject immediately before the order was made;
  - (b) has priority over all other encumbrances whatsoever; and
  - (c) subject to subsection (2), is not affected by any change of ownership of the property.
- (4) Where a charge is created by subsection (1) on property of a particular kind and the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind, the Official Trustee or the person who applied for the restraining order against that property may cause the charge so created to be registered under the provisions of that law and, if the Official Trustee or the person who applied for the restraining order, as the case may be, does so, a person who purchases or otherwise acquires the property after the registration of the charge shall, for the purposes of subsection (2), be deemed to have notice of the charge.

### **243K Contravention of restraining orders**

- (1) A person who intentionally contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order is guilty of an offence.

Penalty: Imprisonment for 5 years.

- (2) Where:
- (a) a restraining order is made against property;
  - (b) the property is disposed of, or otherwise dealt with, in contravention of the restraining order; and
  - (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith;

the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions may apply to the Court for an order that the disposition or dealing be set aside.

- (3) Where an application is made under subsection (2) in relation to a disposition or dealing, the Court may make an order:
- (a) setting the disposition or dealing aside as from the day on which it took place; or
  - (b) setting the disposition or dealing aside as from the day of the order under this subsection and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order under this subsection.

### **243L Sale of property before bankruptcy**

- (1) Where:
- (a) the Commonwealth has, within 6 months before the presentation of a petition, or after the presentation of a petition, against a person, received moneys from the Official Trustee or an Official Receiver in pursuance of a direction under section 243G in relation to the liability of the person to pay a pecuniary penalty; and
  - (b) the person subsequently becomes a bankrupt on, or by virtue of the presentation of, the petition;

the Commonwealth shall pay to the trustee in the bankruptcy an amount equal to the amount paid to the Commonwealth in

Section T243MT

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accordance with the direction, less the taxed costs of the Minister, the Commissioner of Police, the CEO or the Director of Public Prosecutions in respect of the making of the direction under section 243G.

- (2) Where the Commonwealth has paid to the trustee in bankruptcy an amount in accordance with subsection (1), the Commonwealth may prove in the bankruptcy for its debt as an unsecured creditor as if the order under section 243G had not been made.
- (3) Notwithstanding anything contained in the *Bankruptcy Act 1966*, a person who purchases in good faith, property of a person who, after the purchase, becomes a bankrupt, under a sale of the property in pursuance of a direction given under section 243G acquires a good title to it as against the trustee in the bankruptcy.

**243M Duties of the Official Trustee after receiving notice of presentation of creditor's petition etc.**

- (1) Where, after the Official Trustee has been directed under subsection 243G(1) or (2) to pay an amount to the Commonwealth in relation to the liability of a person to pay a pecuniary penalty, notice in writing of the presentation of a creditor's petition against the person is given to the Official Trustee, the Official Trustee:
  - (a) shall refrain from taking action to sell property of the person in pursuance of any direction to do so contained in an order under that section; and
  - (b) shall not pay any moneys in pursuance of the direction to do so contained in the first-mentioned order;until the petition has been dealt with by a bankruptcy court or has lapsed.
- (2) Where, after the Official Trustee has been directed under subsection 243G(1) or (2) to pay an amount to the Commonwealth in relation to the liability of a person to pay a pecuniary penalty, notice in writing of the reference to a bankruptcy court of a debtor's petition against the person is given to the Official Trustee, the Official Trustee:
  - (a) shall refrain from taking action to sell property of the person in pursuance of any direction to do so contained in an order under that section; and

- (b) shall not pay any moneys in pursuance of the direction to do so contained in the first-mentioned order;  
until a bankruptcy court has dealt with the petition.
- (3) Where a person who is liable to pay a pecuniary penalty becomes a bankrupt (whether on a creditor's petition or otherwise), any property of the person in the possession, or under the control, of the Official Trustee in accordance with an order made under this Division shall be deemed to be in the possession, or under the control, of the Official Trustee as, or on behalf of, the trustee of the estate of the bankrupt, and not otherwise.
- (4) In this section, *bankruptcy court* means a court having jurisdiction in bankruptcy under the *Bankruptcy Act 1966*.

**243N Protection of Official Trustee from personal liability in certain cases**

- (1) Where:
- (a) the Court has made a restraining order directing the Official Trustee to take custody and control of property of a person;
  - (b) the Official Trustee has taken custody and control of any property in the possession, or on the premises, of the person without notice of any claim by another person in respect of that property; and
  - (c) the person did not, at the date of the order, have any beneficial interest in the property referred to in paragraph (b);
- the Official Trustee is not personally liable for any loss or damage arising from its having taken custody and control of the property sustained by a person claiming the property or an interest in the property, or for the cost of proceedings taken to establish a claim to the property or to an interest in the property, unless the court in which the claim is made is of the opinion that the Official Trustee has been guilty of negligence in respect of the taking of custody and control of the property.
- (2) Where the Official Trustee has, in accordance with a restraining order, taken custody and control of property of a person specified in the order, the Official Trustee is not personally liable for any loss or damage arising from its having taken custody and control of the property (being loss or damage sustained by some other person claiming the property or an interest in the property), or for the cost

Section T243 NAT

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of proceedings taken to establish a claim to the property, or to an interest in the property, unless the court in which the claim is made is of the opinion that the Official Trustee has been guilty of negligence in respect of the taking of custody and control of the property.

- (3) The Official Trustee is not personally liable for any rates, land tax or municipal or other statutory charges imposed by or under a law of the Commonwealth or of a State or Territory upon or in respect of property of which it has been directed by a restraining order to take custody and control, being rates, land tax or municipal or other statutory charges that fall due on or after the date of that order, except to the extent, if any, of the rents and profits received by the Official Trustee in respect of that property on or after the date of that order.
- (4) Where the Official Trustee who has been directed by a restraining order to take custody and control of a business carried on by a person carries on that business, the Official Trustee is not personally liable for any payment in respect of long service leave for which the person was liable or for any payment in respect of long service leave to which a person employed by the Official Trustee in its capacity of manager of the business, or the legal personal representative of such a person, becomes entitled after the date of that order.

**243NA Indemnification of Official Trustee**

- (1) The Commonwealth is by force of this subsection liable to indemnify the Official Trustee against any personal liability (including any personal liability as to costs) incurred by it for any act done, or omitted to be done, by it in the exercise, or purported exercise, of its powers and duties under this Division.
  - (2) Nothing in subsection (1) affects:
    - (a) any right that the Official Trustee has, apart from that subsection, to be indemnified in respect of any personal liability referred to in that subsection; or
    - (b) any other indemnity given to the Official Trustee in respect of any such personal liability.
  - (3) Where the Commonwealth makes a payment in accordance with the indemnity referred to in subsection (1), the Commonwealth has
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the same right of reimbursement in respect of the payment (including reimbursement under another indemnity given to the Official Trustee) as the Official Trustee would have if the Official Trustee had made the payment.

**243NB Indemnification of Official Receivers etc.**

- (1) The Commonwealth shall indemnify a person to whom this subsection applies against any liability incurred by the person:
  - (a) for any act done negligently, or negligently omitted to be done, by the person in the performance of the person's duties in relation to this Division; or
  - (b) for any act done by the person in good faith in the purported performance of the person's duties in relation to this Division.
- (2) Subsection (1) applies to:
  - (a) persons who are Official Receivers under the *Bankruptcy Act 1966*;
  - (b) persons who perform any of the duties of such an Official Receiver in relation to this Division; or
  - (c) persons who assist such an Official Receiver in the performance of the Official Receiver's duties in relation to this Division.

**243P Costs etc. payable to Official Trustee**

- (1) The regulations may make provision for or in relation to:
  - (a) the costs, charges and expenses incurred in connection with;  
and
  - (b) the Official Trustee's remuneration in respect of;  
the performance or exercise by the Official Trustee of functions, duties or powers under this Division.
- (2) An amount equal to each amount of remuneration that the Official Trustee receives under the regulations shall be paid to the Commonwealth.
- (3) Where there are no regulations in relation to a matter referred to in subsection (1):

Section T243QT

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- (a) the regulations referred to in section 288 of the *Proceeds of Crime Act 2002* shall apply, so far as they are applicable, and with appropriate changes, in relation to the matter; and
- (b) a reference in this Division (other than in this subsection) to regulations in relation to the matter shall be taken to be a reference to the regulations referred to in section 288 of the *Proceeds of Crime Act 2002*.

**243Q Notices**

- (1) Subject to subsection (2), where the Court makes a restraining order, or an order under section 243CA or 243F, against a person's property, the person who applied for the order (in this section called the *applicant*) shall give the person written notice of the order.
- (2) Where:
  - (a) the Court makes a restraining order against a person's property; and
  - (b) the Court is satisfied that it would be in the public interest to delay giving notice of the order to the person;the Court may order that giving the person notice of the order be delayed for such period as is specified in the order under this subsection and the applicant shall give the person notice of the restraining order as soon as practicable after the end of the period specified.

**243R Reduction of pecuniary penalty**

- (1) Where, before the Court makes an order directing a person to pay a pecuniary penalty in respect of a particular prescribed narcotics dealing engaged in by him, or of prescribed narcotics dealings engaged in by him during a particular period, any property of the person to which section 229A applied by reason of that prescribed narcotics dealing, or of a prescribed narcotics dealing during that period, had been seized as forfeited goods:
  - (a) if, before the imposition of the penalty, the property had been condemned or was deemed to have been condemned—the penalty shall be deemed to be reduced by an amount equal to the value of the property at the time when it was seized;



- (b) if, after the imposition of the penalty and before the penalty is paid, the property is condemned or is deemed to be condemned or the person consents to the forfeiture of the property—the liability of the person in respect of the penalty shall be deemed to be reduced by an amount equal to the value of the property at the time when it was seized; and
  - (c) if the penalty is paid before the property is condemned or is to be deemed to be condemned—the Commonwealth is liable to pay to the person an amount equal to the value of the property at the date of its seizure.
- (2) After a pecuniary penalty is imposed on a person in respect of a particular prescribed narcotics dealing engaged in by the person, or of prescribed narcotics dealings engaged in by him during a particular period, property of the person to which section 229A applies by virtue of that dealing, or of such a dealing during that period, shall not be seized as forfeited goods.
- (3) The Court may make an order, in respect of property to which section 229A applies, being property that has been seized as forfeited goods, determining the value, at the time when it was seized, of that property for the purposes of this section.

### **243S Jurisdiction of the Court**

Jurisdiction is conferred on the Court to hear and determine applications under this Division.

## **Division 4—Provisions relating to certain strict liability offences**

### **243SA Failure to answer questions**

- (1) A person must not fail to answer a question that an officer, pursuant to a power conferred on the officer by this Act (other than section 106J or 195A or subsection 214AH(2)), requires the person to answer.

Penalty: 30 penalty units.

- (2) A person must not fail to answer a question that a monitoring officer, pursuant to subsection 214AH(2), requires the person to answer, if:

- (a) the person is the occupier of the relevant premises, or a representative of the occupier whom the occupier has nominated to Customs to answer questions under that subsection; or
- (b) the person is not covered by paragraph (a) and no other person of the kind mentioned in that paragraph is present at the premises and available to answer questions put by the monitoring officer.

Penalty: 30 penalty units.

- (3) If:

- (a) an officer requires a person to answer a question under section 106J or 195A; and
- (b) the officer informs the person of the officer's authority to ask the question; and
- (c) the officer informs the person that it may be an offence not to answer the question;

the person must not fail to answer the question.

Penalty: 30 penalty units.

### **243SB Failure to produce documents or records**

A person must not fail to produce a document or record that an officer, pursuant to a power conferred on the officer by this Act

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other than a power conferred by section 71AAAO, 71DA, 71DL, 114A or 118, requires the person to produce.

Penalty: 30 penalty units.

### **243SC Preservation of the privilege against self-incrimination**

- (1) Subject to subsection (2), a person who would, apart from this subsection, be required to:
  - (a) answer a question under section 243SA; or
  - (b) produce a document or record under section 243SB;  
need not comply with the requirement if so complying would:
    - (c) tend to incriminate the person; or
    - (d) result in further attempts to obtain evidence that would tend to incriminate the person.
- (2) Subsection (1) does not apply, and the person must comply with the requirement, if the person has waived his or her rights under that subsection.

### **243T False or misleading statements resulting in loss of duty**

- (1) If:
  - (a) a person:
    - (i) makes to an officer a statement (other than a statement in a cargo report or an outturn report), in respect of particular goods, that is false or misleading in a material particular; or
    - (ii) omits from a statement (other than a statement in a cargo report or an outturn report), in respect of particular goods, made to an officer any matter or thing without which the statement is false or misleading in a material particular; and
  - (b) either of the following applies:
    - (i) the amount of duty properly payable on the goods exceeds the amount of duty that would have been payable if the amount of duty were determined on the basis that the statement was not false or misleading;
    - (ii) the amount that would have been payable as a refund or drawback of duty on the goods if that amount had been determined on the basis that the statement was not false

Section T243 T T

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- or misleading exceeds the amount of refund or drawback properly payable (which may be nil);  
the owner of the goods (not being a person who is to be treated as the owner of the goods because that person is an agent of the owner) commits an offence.
- (2) An offence against subsection (1) is an offence of strict liability.
- (3) The penalty for a conviction for an offence against subsection (1) is an amount not more than the excess.
- (4) Subsection (1) does not apply if:
- (a) a person (other than an officer) voluntarily gives written notice (an *error notice*) to an officer doing duty in relation to the matter to which the statement relates, indicating that:
    - (i) the statement is false or misleading in a material particular; or
    - (ii) the statement is false or misleading in a material particular because of the omission of a matter or thing; and
  - (b) between the making of the statement and the person giving the error notice, a notice under section 214AD had not been given to:
    - (i) the owner of the goods (other than an agent in relation to the goods); or
    - (ii) if the statement was made by an agent of the owner—the agent who made the statement; and
  - (c) if subparagraph (1)(b)(i) would apply apart from this subsection—the duty properly payable on the goods is paid in full before either of the following happens:
    - (i) an infringement notice is served under Division 5 on the owner of the goods for an offence against subsection (1);
    - (ii) proceedings are commenced against the owner of the goods for an offence against subsection (1); and
  - (d) if subparagraph (1)(b)(ii) would apply apart from this subsection and an amount of refund or drawback exceeding the amount (if any) properly payable has been paid before the time either of the following happens:

- (i) an infringement notice is served under Division 5 on the owner of the goods for an offence against subsection (1);
  - (ii) proceedings are commenced against the owner of the goods for an offence against subsection (1);  
the excess has been repaid before that time.
- (4A) For the purposes of paragraph (4)(a), the error notice is taken not to be given voluntarily if it is given after:
- (a) an officer exercises a power under a Customs-related law to verify information in the statement; or
  - (b) an infringement notice is served under Division 5 on the owner of the goods for an offence against subsection (1); or
  - (c) proceedings are commenced against the owner of the goods for an offence against subsection (1).
- (5) Subsection (1) does not apply to a statement made by a person to an officer if:
- (a) the statement specifies that the person is uncertain about information included in the statement, and considers that, as a result of including that information, the statement might be false or misleading in a material particular; and
  - (b) the statement identifies the information whose inclusion might make the statement false or misleading in a material particular; and
  - (c) the statement sets out the reasons why the person is uncertain about the identified information.
- (6) Subsection (1) does not apply to a statement made by a person to an officer if:
- (a) the statement specifies that the person is uncertain whether, as a result of omitting information from the statement, the statement might be false or misleading in a material particular; and
  - (b) the statement identifies the omission of information that might make the statement false or misleading in a material particular; and
  - (c) the statement sets out the reasons for the person's uncertainty about the effect of omitting the information.

Section T243 U

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**243U False or misleading statements not resulting in loss of duty**

- (1) A person commits an offence if:
  - (a) the person:
    - (i) makes, or causes to be made, to an officer a statement (other than a statement in a cargo report or an outturn report) that is false or misleading in a material particular; or
    - (ii) omits, or causes to be omitted, from a statement (other than a statement in a cargo report or an outturn report) made to an officer any matter or thing without which the statement is false or misleading in a material particular; and
  - (b) neither of the following applies:
    - (i) the amount of duty properly payable on particular goods exceeds the amount of duty that would have been payable if the amount of duty were determined on the basis that the statement was not false or misleading;
    - (ii) the amount that would have been payable as a refund or drawback of duty on the goods if that amount had been determined on the basis that the statement was not false or misleading exceeds the amount of refund or drawback properly payable (which may be nil).
- (2) An offence against subsection (1) is an offence of strict liability.
- (3) The penalty for a conviction for an offence against subsection (1) is an amount not exceeding 50 penalty units for each statement that is found by the court to be false or misleading.
- (3A) For the purposes of this section, a person is taken to cause to be made a statement (other than a statement in a cargo report or outturn report) that is false or misleading in a material particular if:
  - (a) the person gives information that is false or misleading in a material particular to another person for inclusion in a statement (other than a statement in a cargo report or outturn report) by the other person or someone else to an officer; and
  - (b) the other person or someone else makes such a statement including the information to an officer.

This subsection does not limit the ways in which a person may cause such a statement to be made.

(3B) For the purposes of this section, a person is taken to cause to be made an omission (a *punishable omission*) from a statement (other than a statement in a cargo report or outturn report) of a matter or thing without which the statement is false or misleading in a material particular, if:

- (a) the person gives to another person, for inclusion in a statement (other than a statement in a cargo report or an outturn report) by the other person or someone else to an officer, information that is false or misleading in a material particular because of an omission of other information that the person has; and
- (b) the other person or someone else makes such a statement including the information to an officer.

This subsection does not limit the ways in which a person may cause a punishable omission to be made.

(4) Subsection (1) does not apply to a statement if:

- (a) a person (other than an officer) voluntarily gives written notice (an *error notice*) to an officer doing duty in relation to the matter to which the statement relates, indicating that:
  - (i) the statement is false or misleading in a material particular; or
  - (ii) the statement is false or misleading in a material particular because of the omission of a matter or thing; and
- (b) between the making of the statement and the person giving the error notice, a notice under section 214AD had not been given to either of the following:
  - (i) a person who made the statement or caused it to be made;
  - (ii) a person who omitted, or caused to be omitted, from the statement a matter or thing without which the statement was false or misleading.

(4A) For the purposes of paragraph (4)(a), the error notice is taken not to be given voluntarily if it is given after:

- (a) an officer exercises a power under a Customs-related law to verify information in the statement; or
- (b) an infringement notice for an offence against subsection (1) is served under Division 5 on:

Section T243VT

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- (i) a person who made the statement or caused it to be made; or
  - (ii) a person who omitted, or caused to be omitted, from the statement a matter or thing without which the statement was false or misleading; or
  - (c) proceedings are commenced against a person described in subparagraph (b)(i) or (ii) of this subsection for an offence against subsection (1).
- (5) In this section:
- statement* does not include:
- (a) a statement made under Part XVA or XVB; or
  - (b) a statement that a person who is or was a passenger on, or a member of the crew of, a ship or aircraft made in relation to his or her accompanied personal or household effects that were carried on the ship or aircraft.

**243V False or misleading statements in cargo reports or outturn reports**

- (1) A person commits an offence if the person:
  - (a) makes, or causes to be made, to an officer a statement, in a cargo report or an outturn report, that is false or misleading in a material particular; or
  - (b) omits, or causes to be omitted, from a statement, in a cargo report or an outturn report, made to an officer any matter or thing without which the statement is false or misleading in a material particular.
- (2) An offence against subsection (1) is an offence of strict liability.
- (3) The penalty for a conviction for an offence against subsection (1) is an amount not exceeding 50 penalty units.
- (4) For the purposes of subsection (1), a person is taken to cause to be made a statement described in paragraph (1)(a) if:
  - (a) the person gives information that is false or misleading in a material particular to another person for inclusion in a statement, in a cargo report or an outturn report, by the other person or someone else to an officer; and



- (b) the other person or someone else makes a statement including the information to an officer, in a cargo report or an outturn report.

This subsection does not limit the ways in which a person may cause to be made a statement described in paragraph (1)(a).

- (5) For the purposes of subsection (1), a person is taken to cause an omission described in paragraph (1)(b) to be made if:
  - (a) the person gives to another person, for inclusion in a statement, in a cargo report or an outturn report, by the other person or someone else to an officer, information that is false or misleading in a material particular because of an omission of other information that the person has; and
  - (b) the other person or someone else makes a statement including the information to an officer, in a cargo report or an outturn report.

This subsection does not limit the ways in which a person may cause an omission described in paragraph (1)(b) to be made.

**243W Electronic communications to Customs to be treated as statements to CEO**

For the purposes of this Division, any electronic communication to Customs is taken to be a statement made to the CEO.

## **Division 5—Penalties in lieu of prosecution for certain offences**

### **243X Application of Division**

- (1) This Division applies to an offence against, or an offence for a contravention of, subsection 33(2), (3) or (6), 64(13), 64AA(10), 64AAB(7), 64AAC(6), 64AB(10), 64ABAA(9), 71AAAQ(1), 71G(1), 74(6), 99(3), 102A(4), 113(1), 114B(7), 114E(1), 114F(2), 115(1), 116(2), 117AA(1), (2), (3) or (4), 117A(1), 118(1), 119(3), 243T(1), 243U(1) or 243V(1).
- (2) A reference in subsection (1) to a subsection of a section of this Act is a reference to:
  - (a) the subsection as inserted, substituted or amended by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*; or
  - (b) if the subsection so inserted, substituted or amended is amended or replaced by a later Act—the subsection as so amended or replaced; or
  - (c) the subsection as inserted, substituted or amended by a later Act.

### **243XA Guidelines for serving infringement notices**

- (1) The CEO must develop written guidelines in respect of the administration of this Division to which he or she must have regard when exercising powers under this Division.
- (2) The guidelines are a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

### **243Y When an infringement notice can be served**

- (1) If the CEO has reasonable grounds to believe that a person has committed an offence, the CEO may cause an infringement notice to be served on the person in accordance with this Division.
  - (2) Subject to subsection (3), an infringement notice does not have any effect unless it is served within one year after the day on which the offence is alleged to have been committed.
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- (3) An infringement notice for an offence against subsection 243T(1) or 243U(1) that was detected as a result of the exercise of monitoring powers does not have any effect unless it is served within:
- (a) 4 years after the day on which the false or misleading statement was made; or
  - (b) one year after the day on which the offence was detected; whichever period ends first.

### **243Z Matters to be included in an infringement notice**

- (1) An infringement notice must:
- (a) state the name of the person on whom it is to be served; and
  - (b) state that it is being served on behalf of the CEO; and
  - (c) state:
    - (i) the nature of the alleged offence; and
    - (ii) the time (if known) and date on which, and the place at which, the offence is alleged to have been committed; and
    - (iii) the maximum penalty that a court could impose for the alleged offence; and
  - (d) if the alleged offence is an offence against section 243T and there is still any unpaid duty or any unrepaid refund or drawback of duty—state that the obligation to pay the duty or repay the refund or drawback continues despite the service of the infringement notice; and
  - (e) specify a penalty that is payable under the notice in respect of the alleged offence; and
  - (f) state that, if the person on whom the notice is served:
    - (i) does not wish the matter to be dealt with by a court; and
    - (ii) in the case of an alleged offence against section 243T—has paid any unpaid duty or any unrepaid refund or drawback of duty within the period of 28 days after the date of service of the notice;the person may pay to the CEO, within the period of 28 days after the date of service of the notice, the amount of the penalty specified in the notice; and

Section T243ZAT

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- (g) state that the person may make written representations to the CEO seeking the withdrawal of the notice.

Note: The CEO has power to extend periods stated in notices given under paragraph (1)(f) (see section 243ZE).

- (2) If:
- (a) an infringement notice is served on a person in accordance with this Division in respect of an alleged offence for a contravention of subsection 243T(1) in respect of goods; and
  - (b) the person applies under subsection 273GA(2) for review of the decision as to the amount of duty payable on the goods; the period beginning on the making of the application and ending on the final determination of the amount of duty by a tribunal, or by a court on appeal from a tribunal, is not to be taken into account in working out the period of 28 days referred to in paragraph (1)(f).
- (3) An infringement notice may contain any other matters that the CEO considers necessary.
- (4) The penalty to be specified in an infringement notice under paragraph (1)(e) is:
- (a) if the infringement notice is given in respect of an alleged offence under subsection 243U(1)—the lesser of the following amounts:
    - (i) 10 penalty units;
    - (ii)  $\frac{1}{2}$  penalty unit for each material particular that is alleged to be false or misleading or each matter or thing that is alleged to have been omitted, as the case may be; or
  - (b) otherwise—one-fifth of the maximum amount of the penalty that a court could impose for the offence.

**243ZA Withdrawal of infringement notice**

- (1) A person on whom an infringement notice has been served may make written representations to the CEO seeking the withdrawal of the notice.
- (2) The CEO may withdraw an infringement notice served on a person (whether or not the person has made representations seeking the withdrawal) by causing written notice of the withdrawal to be
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served on the person within the period within which the penalty specified in the infringement notice is required to be paid.

- (3) The matters to which the CEO may have regard in deciding whether or not to withdraw an infringement notice include, but are not limited to, the following:
- (a) whether the person has previously been convicted of an offence for a contravention of this Act;
  - (b) the circumstances in which the offence specified in the notice is alleged to have been committed;
  - (c) whether the person has previously been served with an infringement notice in respect of which the person paid the penalty specified in the notice;
  - (d) any written representations made by the person.
- (4) If:
- (a) the person pays the penalty specified in the infringement notice within the period within which the penalty is required to be paid; and
  - (b) the notice is withdrawn after the person pays the penalty;
- the CEO must refund to the person, out of money appropriated by the Parliament, an amount equal to the amount paid.

**243ZB What happens if unpaid duty or unrepaid refund or drawback and penalty are paid**

- (1) This section applies if:
- (a) an infringement notice is served on a person; and
  - (b) the person pays the penalty specified in the notice before the end of the period referred to in paragraph 243Z(1)(f); and
  - (c) where the alleged offence is an offence against section 243T—the person pays any unpaid duty, or any unrepaid refund or drawback, before the end of that period; and
  - (d) the infringement notice is not withdrawn.
- (2) Any liability of the person for the offence specified in the notice is taken to be discharged.
- (3) Further proceedings cannot be taken against the person for the offence.

Section T243ZCT

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- (4) The person is not regarded as having been convicted of the offence.

**243ZC More than one infringement notice may not be served for the same offence**

This Division does not permit the service of more than one infringement notice on a person for the same offence.

**243ZD Infringement notice not required to be served**

This Division does not:

- (a) require an infringement notice to be served on a person in relation to an offence; or
- (b) affect the liability of a person to be prosecuted for an offence if:
  - (i) an infringement notice is not served on the person in relation to the offence; or
  - (ii) an infringement notice served on the person in relation to the offence has been withdrawn; or
- (c) affect the liability of a person to be prosecuted for an offence if the person does not comply with an infringement notice served on the person in relation to the offence; or
- (d) limit the amount of the penalty that may be imposed by a court on a person convicted of an offence.

**243ZE CEO may extend period for payment of penalty**

- (1) The CEO may, by writing, extend, in relation to a particular person, the period referred to in paragraph 243Z(1)(f).
- (2) The power of the CEO under subsection (1) to extend the period may be exercised before or after the end of the period.
- (3) If the CEO extends a period under subsection (1), a reference in this Division, or in a notice or other instrument under this Division, to the period is taken, in relation to the person, to be a reference to the period as so extended.

## Part XIV—Customs prosecutions

### 244 Meaning of *Customs prosecution*

*Customs prosecutions* are proceedings by the Customs:

- (a) for the recovery of penalties under this Act, other than pecuniary penalties referred to in section 243B; or
- (b) for the condemnation of ships, aircraft or goods seized as forfeited.

### 245 Institution of prosecutions

- (1) Customs prosecutions may be instituted by the CEO in the name of the office of the CEO by action, information or other appropriate proceeding:
  - (a) in the Supreme Court of a State;
  - (b) in the Supreme Court of the Australian Capital Territory;
  - (c) in the Supreme Court of the Northern Territory;
  - (d) in a County Court or District Court of a State;
  - (e) in a Local Court, being a Local Court of full jurisdiction, of South Australia or of the Northern Territory; or
  - (f) in a court of summary jurisdiction of a State, of the Australian Capital Territory or of the Northern Territory.
- (2) Where a Customs prosecution for a pecuniary penalty that, but for this section, would exceed 400 penalty units is instituted in a Court referred to in paragraph (1)(d) or (e), the amount of that penalty that exceeds 400 penalty units shall be taken to have been abandoned.
- (4) Where a Customs prosecution for a pecuniary penalty that, but for this subsection, would exceed 200 penalty units is instituted in a court referred to in paragraph (1)(f), the amount of that penalty that exceeds 200 penalty units shall be taken to have been abandoned.

### 247 Prosecutions in accordance with practice rules

Every Customs prosecution in a court referred to in subsection 245(1) may be commenced prosecuted and proceeded with in

Section T248T

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accordance with any rules of practice (if any) established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge.

**248 State Court practice**

Subject to the provisions of this Act the provisions of the law relating to summary proceedings in force in the State or Territory where the proceedings are instituted shall apply to all Customs prosecutions before a Court of summary jurisdiction in a State or Territory, and an appeal shall lie from any conviction order for condemnation or order of dismissal to the Court and in the manner provided by the law of the State or Territory where such conviction or order is made for appeals from convictions or orders of dismissal, and notwithstanding anything to the contrary in the law of the State or Territory, an appeal shall lie from an order of dismissal to any court to which and in the manner in which an appeal lies from a conviction.

**249 Commencement of prosecutions**

Customs prosecutions may be instituted at any time within 5 years after the cause thereof.

**250 Information to be valid if in words of Act**

All informations summonses other originating processes convictions condemnations and warrants shall suffice if the offence or forfeiture is set forth as nearly as may be in the words of this Act.

**250A Property in goods subject to control of Customs**

Where in any proceedings on behalf of the Customs in relation to any goods subject to the control of the Customs it is necessary to allege any property in the goods, the goods may be alleged to be the property of the Collector without mentioning his name.



### **251 No objection for informality**

No objection shall be taken or allowed to any information, summons or other originating process for any alleged defect therein in substance or in form or for any variance between such information, summons or other originating process and the evidence adduced at the hearing in support thereof, and the Court shall at all times make any amendment necessary to determine the real question in dispute or which may appear desirable, and if any such defect or variance shall appear to the Court to be such that the defendant has been thereby deceived or misled it shall be lawful for the Court upon such terms as it may think just to adjourn the hearing of the case to some future day.

### **252 Conviction not to be quashed**

No conviction warrant of commitment or condemnation order or other proceeding matter or thing done or transacted in relation to the execution or carrying out of any Customs Act shall be held void quashed or set aside by reason of any defect therein or want of form and no party shall be entitled to be discharged out of custody on account of such defect.

### **253 Protection to witnesses**

No witness on behalf of the Minister, CEO or Collector in any Customs prosecution shall be compelled to disclose the fact that he received any information or the nature thereof or the name of the person who gave such information, and no officer appearing as a witness shall be compelled to produce any reports made or received by him confidentially in his official capacity or containing confidential information.

### **254 Defendant competent witness**

- (1) In every Customs prosecution the defendant shall be competent to give evidence.
- (2) In every Customs prosecution except for an indictable offence or for an offence directly punishable by imprisonment the defendant shall be compellable to give evidence.

### **255 Averment of prosecutor sufficient**

- (1) In any Customs prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred.
- (2) This section shall apply to any matters so averred although:
  - (a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
  - (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only.
- (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.
- (4) The foregoing provisions of this section shall not apply to:
  - (a) an averment of the intent of the defendant; or
  - (b) proceedings for an indictable offence or an offence directly punishable by imprisonment.
- (5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant.

### **256 Proof of proclamation etc.**

The production of the *Gazette* containing any proclamation, gazette notice or regulation appearing to have been issued or made under this Act or the production of any document certified by the CEO or the Regional Director for a State or Territory to be a true copy of, or extract from any such proclamation, gazette notice, or regulation issued or made under this Act shall be *prima facie* evidence of the issue or making of such proclamation, gazette notice, or regulation, and that the same is in force.

### **257 Conduct by directors, servants or agents**

- (1) Where, in a Customs prosecution in respect of any conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a

Section T257T

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director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority, had that state of mind.

- (2) Any conduct engaged in on behalf of a body corporate:
- (a) by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of such direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;
- shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.
- (3) Where, in a Customs prosecution in respect of any conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority, had that state of mind.
- (4) Any conduct engaged in on behalf of a person other than a body corporate:
- (a) by a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, where the giving of such direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;
- shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.
- (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for his or her intention, opinion, belief or purpose.

### **259 Collector may levy on goods in his possession**

When any pecuniary penalty adjudged against any person is unpaid the Collector may levy the same by sale of any goods belonging to such person which may then or thereafter be subject to the control of the Customs.

### **261 Imprisonment not to release penalty**

No person shall be twice imprisoned upon the same conviction but the suffering of imprisonment for non-payment of a penalty shall not release the penalty or affect the right of the Customs to collect the amount in any manner provided by this Act other than by imprisonment of the person convicted.

### **263 Parties may recover costs**

In a Customs prosecution, whether commenced before or after the commencement of this section, a court may award costs against a party, and, where an amount of costs is awarded against a party other than the prosecutor, section 259 and any provision of a law of a State or Territory that, by virtue of an Act other than this Act, applies in relation to the recovery of pecuniary penalties under this Act apply in relation to the recovery of the amount of costs so awarded as if it were a pecuniary penalty adjudged to be paid by the party under this Act.

### **264 Application of penalties**

- (1) All penalties and forfeitures recovered under any Customs Act shall be applied to such purposes and in such proportions as the CEO may direct.
- (2) This section does not apply to:
  - (a) penalties recovered in proceedings under subsection 243B(1);
  - (b) penalties recovered in proceedings instituted by a member of the Australian Federal Police; or
  - (c) forfeitures of narcotic-related goods.

## **Part XV—Tenders for rights to enter goods for home consumption at concessional rates**

### **265 Interpretation**

- (1) In this Part:

*determined*, in relation to a quantity or a value, means determined in accordance with a tender.

*item of a Customs Tariff* and *proposed item of a Customs Tariff* have the same respective meanings as in Part XVI.

*particular goods* includes goods included in a particular class or kind of goods.

*scheme* means a scheme formulated by the Minister under section 266.

### **266 Tender schemes**

- (1) The Minister may, by instrument in writing, formulate a scheme for calling, and dealing with, tenders for the right to enter for home consumption during a period, or each of a number of periods, a determined quantity of particular goods, or particular goods of a determined value, at concessional rates of duty.
- (2) A call for tenders that relates to determined quantities of particular goods shall include a statement that, for the purposes of the application of the *Customs Undertakings (Penalties) Act 1981* and the *Customs Securities (Penalties) Act 1981* in relation to the particular goods the subject of the call, the value of the goods is to be calculated by reference to a value set out in the statement as the value of an appropriate unit of the goods.
- (3) In determining the value of an appropriate unit of particular goods to be set out in a statement referred to in subsection (2), the Minister shall have regard to the average value of the corresponding unit in relation to goods of the same kind that were imported into Australia and entered for home consumption during

Section T267T

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the financial year that ended on the 30 June immediately preceding the date on which the call for tenders is made.

- (4) A call for tenders shall include a statement that, for the purposes of the application of the *Customs Undertakings (Penalties) Act 1981* and the *Customs Securities (Penalties) Act 1981* in relation to the particular goods the subject of the call, the prescribed percentage of the value of the goods is to be the percentage set out in the statement.

**267 Undertakings relating to tenders**

- (1) Where, in accordance with a call for tenders made under a scheme, a person furnishes a tender for the right to enter for home consumption during a period, or each of a number of periods, a quantity to be determined in accordance with that tender of particular goods, or particular goods of a value to be determined in accordance with that tender, at rates of duty to be determined in accordance with that tender, that tender shall not be considered unless it is accompanied by an undertaking in writing by that person, in terms satisfactory to the CEO, that, if that tender is accepted and:

- (a) the *Customs Tariff Act 1995* is so altered or proposed to be so altered that rates of duty determined in accordance with that tender are set out in items, or proposed items, of a Customs Tariff that are expressed to apply to goods as prescribed by by-law; and
- (b) the CEO makes a determination under section 273 by virtue of which those items or proposed items apply to the quantity determined in accordance with that tender of those goods, or the quantity of those goods having the value determined in accordance with that tender, to be entered for home consumption by that person during that period, or each of those periods, as the case may be;

the person will, during that period, or each of those periods, as the case may be, enter for home consumption under:

- (c) any of those items, or proposed items; or

- (d) any appropriate item, or proposed item, of a Customs Tariff that is not expressed to apply to goods as prescribed by by-law;
- that quantity of those goods, or the quantity of those goods having that value.
- (2) An undertaking referred to in subsection (1) that relates to a determined quantity of goods shall include a statement acknowledging that, for the purposes of the application of the *Customs Undertakings (Penalties) Act 1981* and the *Customs Securities (Penalties) Act 1981* in relation to the goods to which the undertaking relates, the value of those goods is to be calculated by reference to the value per unit of those goods as set out in the statement, being the value per unit set out in the statement included, in accordance with subsection 266(2), in the relevant call for tenders.
- (3) An undertaking referred to in subsection (1) shall include a statement acknowledging that, for the purposes of the application of the *Customs Undertakings (Penalties) Act 1981* and the *Customs Securities (Penalties) Act 1981* in relation to the goods to which the undertaking relates, the prescribed percentage of the value of the goods is to be the percentage set out in the statement, being the percentage set out in the statement included, in accordance with subsection 266(4), in the relevant call for tenders.
- (4) In this section, a reference to the relevant call for tenders in relation to an undertaking, shall be read as a reference to the call for tenders in accordance with which the tender to which the undertaking relates was furnished.

## **268 Transfers of rights to enter goods for home consumption at concessional rates of duty**

- (1) A scheme may provide for the transfer, with the approval of the CEO, from one person to another of a right to enter for home consumption during a period, or each of a number of periods, a specified quantity of particular goods, or particular goods of a specified value, at concessional rates of duty.
- (2) The CEO shall not give an approval to a transfer under a scheme of a right to enter for home consumption a specified quantity of

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Section 268

particular goods, or particular goods of a specified value, unless the transferee:

- (a) gives an undertaking, in writing, in terms satisfactory to the CEO, that, if by virtue of a determination under section 273 the items, or proposed items, of a Customs Tariff to which the undertaking given by the transferor in relation to the goods related were to apply to goods entered for home consumption by the transferee in the exercise of the right, the transferee will, in the exercise of that right, enter for home consumption those goods, or the quantity of those goods having that value, under any of those items or proposed items or under any appropriate item, or proposed item, of a Customs Tariff that is not expressed to apply to goods as prescribed by by-law; and
  - (b) if so required by a Collector, gives a security for payment of any penalty in connection with the undertaking that the transferee may become liable to pay to the Commonwealth under the *Customs Undertakings (Penalties) Act 1981*.
- (3) An undertaking referred to in subsection (2) that relates to a specified quantity of goods shall include a statement acknowledging that, for the purposes of the application of the *Customs Undertakings (Penalties) Act 1981* in relation to the goods to which the undertaking relates, the value of those goods is to be calculated by reference to the value per unit of those goods as set out in the statement, being a value per unit that was set out in the corresponding statement in the undertaking given by the transferor in relation to those goods.
- (4) An undertaking referred to in subsection (2) shall include a statement acknowledging that, for the purposes of the application of the *Customs Undertakings (Penalties) Act 1981* in relation to the goods to which the undertaking relates, the prescribed percentage of the value of the goods is to be the percentage set out in the statement, being the percentage set out in the corresponding statement in the undertaking given by the transferor in relation to those goods.



## **269 Revocation or variation of undertaking**

A person who has given an undertaking in accordance with section 267 or 268 may, with the approval of the CEO, revoke or vary that undertaking.

### **269A Recovery of penalties**

A penalty payable by a person under the *Customs Undertakings (Penalties) Act 1981* or the *Customs Securities (Penalties) Act 1981* is a debt due to the Commonwealth, and the Commonwealth may recover the amount of the penalty by action in a court of competent jurisdiction.

## Part XVA—Tariff concession orders

### Division 1—Preliminary

#### 269B Interpretation

- (1) In this Part, unless the contrary intention appears:

*capital equipment* means goods, which if imported into Australia, would be goods to which Chapters 84, 85, 86, 87, 89 or 90 of Schedule 3 to the *Customs Tariff Act 1995* would apply.

*Customs Tariff Act 1995* includes that Act as proposed to be altered by a Customs Tariff alteration proposed, or intended to be proposed, in the Parliament.

*gazettal day*, in relation to a TCO application, means:

- (a) unless paragraph (b) applies—the day on which the CEO publishes a notice in respect of the application in the *Gazette* under subsection 269K(1); or
- (b) if, in accordance with section 269N, the CEO publishes a notice in respect of the application in the *Gazette* under subsection 269K(1) in substitution for an earlier notice—the day on which the CEO publishes that substituted notice.

*goods produced in Australia* has the meaning given by section 269D.

*last day for submission* means:

- (a) in relation to an original TCO application:
  - (i) so far as concerns a person invited by the CEO under section 269M to lodge a submission in respect of the TCO application—the day fixed in the notice inviting that submission; and
  - (ii) so far as concerns any other person—the day occurring 50 days after the gazettal day; and
- (b) in relation to an amended TCO application:
  - (i) so far as concerns a person invited under paragraph 269L(4B)(a) to lodge a further submission in respect of

the amended TCO application—the day occurring 14 days after the notification containing that invitation; and

- (ii) so far as concerns any other person—the day occurring 14 days after publication of a notice under paragraph 269L(4B)(b) inviting submissions in relation to the amended application.

**lodged**, in relation to a TCO application, includes taken to be lodged because of the operation of section 269J.

**ordinary course of business** has the meaning given by section 269E.

**prescribed item** means an item in Schedule 4 to the *Customs Tariff Act 1995* that is expressed to apply to goods that a TCO declares are goods to which the item applies.

**repair**, in relation to goods, includes renovate.

**substitutable goods**, in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put, or are capable of being put, to a use that corresponds with a use (including a design use) to which the goods the subject of the application or of the TCO can be put.

**TCO** means a tariff concession order made under section 269P or 269Q or taken to be made under section 269P or 269Q because of the operation of section 269SC.

**TCO application** means:

- (a) an application for a TCO under section 269F; or
  - (b) an application for a TCO under section 269F as amended under section 269L; or
  - (c) a proposal for the issue of a TCO that is to be taken under section 269J to be a TCO application.
- (2) Despite the definition of **days** in section 4, Sundays and public holidays are counted as days for the purpose of computing a period for the purposes of this Part but nothing in this subsection derogates from the operation of section 36 of the *Acts Interpretation Act 1901*.
- (3) In determining whether goods produced in Australia are put, or are capable of being put, to a use corresponding to a use to which

Section T269CT

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goods the subject of a TCO, or of an application for a TCO, can be put, it is irrelevant whether or not the first-mentioned goods compete with the second-mentioned goods in any market.

**269C Interpretation—core criteria**

For the purposes of this Part, a TCO application is taken to meet the core criteria if, on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business.

**269D Interpretation—goods produced in Australia**

- (1) For the purposes of this Part, goods, other than unmanufactured raw products, are taken to be produced in Australia if:
  - (a) the goods are wholly or partly manufactured in Australia; and
  - (b) not less than  $\frac{1}{4}$  of the factory or works costs of the goods is represented by the sum of:
    - (i) the value of Australian labour; and
    - (ii) the value of Australian materials; and
    - (iii) the factory overhead expenses incurred in Australia in respect of the goods.
- (2) For the purposes of this Part, goods are to be taken to have been partly manufactured in Australia if at least one substantial process in the manufacture of the goods was carried out in Australia.
- (3) Without limiting the meaning of the expression *substantial process in the manufacture of the goods*, any of the following operations or any combination of those operations does not constitute such a process:
  - (a) operations to preserve goods during transportation or storage;
  - (b) operations to improve the packing or labelling or marketable quality of goods;
  - (c) operations to prepare goods for shipment;
  - (d) simple assembly operations;
  - (e) operations to mix goods where the resulting product does not have different properties from those of the goods that have been mixed.

- (4) For the purposes of this section, the CEO may, by instrument in writing published in the *Gazette*:
- (a) direct that the factory or works cost of goods is to be determined in a specified manner; and
  - (b) direct that the value of Australian labour, the value of Australian materials or the factory overhead expenses incurred in Australia in respect of goods is to be determined in a specified manner;
- and those directions have effect accordingly.
- (5) The provisions of sections 48 (other than paragraphs (1)(a) and (b) and subsection (2)), 48A, 48B, 49A and 50 of the *Acts Interpretation Act 1901* apply in relation to directions given under subsection (4) as if:
- (a) references in those provisions to regulations were references to directions; and
  - (b) references in those provisions to the repeal of a regulation were references to the revocation of a direction.

#### **269E Interpretation—the ordinary course of business**

- (1) For the purposes of this Part, other than section 269Q, goods (other than made-to-order capital equipment) that are substitutable goods in relation to goods the subject of a TCO application are taken to be produced in Australia in the ordinary course of business if:
- (a) they have been produced in Australia in the 2 years before the application was lodged; or
  - (b) they have been produced, and are held in stock, in Australia; or
  - (c) they are produced in Australia on an intermittent basis and have been so produced in the 5 years before the application was lodged;
- and a producer in Australia is prepared to accept an order to supply them.
- (2) For the purposes of this Part, goods that:
- (a) are substitutable goods in relation to goods the subject of a TCO application; and
  - (b) are made-to-order capital equipment;
- are taken to be produced in Australia in the ordinary course of business if:

Section T269ET

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- (c) a producer in Australia:
    - (i) has made goods requiring the same labour skills, technology and design expertise as the substitutable goods in the 2 years before the application was lodged; and
    - (ii) could produce the substitutable goods with existing facilities; and
  - (d) the producer is prepared to accept an order to supply the substitutable goods.
- (3) In this section:
- made-to-order capital equipment*** means a particular item of capital equipment:
- (a) that is made in Australia on a one-off basis to meet a specific order rather than being the subject of regular or intermittent production; and
  - (b) that is not produced in quantities indicative of a production run.

## **Division 2—Making and processing TCO applications**

### **269F Making a TCO application**

- (1) A person may apply to the CEO for a tariff concession order in respect of goods.
- (2) An application must:
  - (a) be in writing; and
  - (b) be in an approved form; and
  - (c) contain such information as the form requires; and
  - (d) be signed in the manner indicated in the form.
- (3) Without limiting the generality of paragraph (2)(c), a TCO application must contain:
  - (a) a full description of the goods to which the application relates; and
  - (b) a statement of the tariff classification that, in the opinion of the applicant, applies to the goods; and
  - (c) if the applicant is not proposing to make use of the TCO to import the goods to which the application relates into Australia on the applicant's own behalf—the identity of the importer for whom the applicant is acting; and
  - (d) particulars of all the inquiries made by the applicant (including inquiries made of prescribed organisations) to assist in establishing that there were reasonable grounds for believing that, on the day on which the application was lodged, there were no producers in Australia of substitutable goods.
- (4) A TCO application may be lodged with Customs:
  - (a) by leaving it at a place that has been allocated for lodgement of TCO applications at Customs House in Canberra; or
  - (b) by posting it by prepaid post to a postal address specified in the approved form; or

Section T269FAT

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- (c) by sending it by electronic facsimile to a facsimile number specified in the approved form;  
and the application is taken to have been lodged when the application, or a facsimile of the application, is first received by an officer of Customs.
- (5) The day on which an application is taken to have been lodged must be recorded on the application.

**269FA The applicant's obligation**

It is the responsibility of an applicant for a TCO to establish, to the satisfaction of the CEO, that, on the basis of:

- (a) all information that the applicant has, or can reasonably be expected to have; and
  - (b) all inquiries that the applicant has made, or can reasonably be expected to make;
- there are reasonable grounds for asserting that the application meets the core criteria.

**269G Withdrawing a TCO application**

- (1) A person who has lodged a TCO application under section 269F may withdraw the application at any time before a decision is made under section 269P or 269Q in relation to that application.
- (2) A withdrawal of a TCO application:
  - (a) must be in writing; and
  - (b) must be lodged with the CEO in the same manner, and is taken to be lodged on the same day, as is specified in relation to a TCO application; and
  - (c) must have the day of its lodgement recorded.
- (3) If a notice informing of the lodgement of a TCO application is published in the *Gazette* before that application is withdrawn, the CEO must publish in the *Gazette*, as soon as practicable after the withdrawal is lodged, a notice:
  - (a) stating that the TCO application has been withdrawn; and
  - (b) describing the goods to which the TCO application related;  
and



- (c) specifying the *Gazette* number and date of the previous notice relating to the TCO application; and
- (d) specifying the date of withdrawal of the TCO application.

### **269H Screening the application**

- (1) Not later than 28 days after a TCO application is lodged, the CEO must:
  - (a) if he or she is satisfied:
    - (i) that the application complies with section 269F; and
    - (ii) that, having regard to the information disclosed in the application and to the particulars of the inquiries made by the applicant, there are reasonable grounds for believing that the applicant has discharged the responsibility referred to in section 269FA; and
  - (b) if he or she is not aware of any producer in Australia of substitutable goods;  
by notice in writing given to the applicant, inform the applicant that the application is accepted as a valid application; and
  - (c) if he or she is not so satisfied; or
  - (d) if he or she is aware of such a producer;  
by notice in writing given to the applicant, inform the applicant that the application is rejected and of the reasons for the rejection.
- (2) If the CEO has not, within that period, accepted or rejected the application, this Part has effect as if the CEO had, immediately before the end of that period, informed the applicant, by notice in writing, that the application is accepted as a valid application.

### **269HA CEO may reject a TCO application in relation to goods referred to in section 269SJ**

- (1) If, at any time during the period starting from the receipt of a TCO application and ending with the making of a TCO, the CEO becomes satisfied that the goods to which the application relates are goods in respect of which, under subsection 269SJ(1), the CEO is prevented from making a TCO, the CEO must:
  - (a) reject the application; and
  - (b) by notice in writing given to the applicant, inform the applicant that the application is rejected and of the reason for the rejection.

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**Section T269JT**

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- (2) If, at any time after the publication of a notice in the *Gazette* under subsection 269K(1), the CEO rejects the application to which the notice relates under subsection (1), the CEO must, as soon as practicable after rejecting the application, publish a notice in the *Gazette* stating that the application has been rejected and giving the reason for the rejection.

**269J Applications taken to be lodged in certain circumstances**

- (1) If the CEO decides that it is desirable to consider making a TCO despite the absence of a TCO application, the CEO may declare, in writing, that he or she has so decided.
- (2) A declaration under subsection (1) must include a proposal for the issue of the TCO in respect of the goods referred to in the declaration.
- (3) If the CEO makes a declaration under this section, this Part has effect as if:
- (a) the proposal contained in the declaration were a TCO application lodged under section 269F on the day on which the declaration is made; and
  - (b) the application had been accepted under section 269H as a valid application on that day.

**269K Processing a valid application**

- (1) As soon as practicable after accepting a TCO application as a valid application, the CEO must publish a notice in the *Gazette*:
- (a) stating that the application has been lodged; and
  - (aa) identifying the applicant; and
  - (ab) if the applicant is not proposing to make use of the TCO to import the goods to which the application relates into Australia on the applicant's own behalf—identifying the importer for whom the applicant is acting; and
  - (b) providing a description of the goods to which the application relates including a reference to the Customs tariff classification that, in the opinion of the CEO, applies to the goods; and
  - (c) inviting any persons who consider that there are reasons why the TCO should not be made to lodge a submission with the CEO not later than 50 days after the gazettal day.
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- (2) A submission must:
  - (a) be in writing; and
  - (b) be in an approved form; and
  - (c) contain such information as the form requires; and
  - (d) be signed in the manner indicated in the form.
- (3) A submission:
  - (a) must be lodged with the CEO in the same manner, and is taken to be lodged on the same day, as is specified in relation to a TCO application; and
  - (b) must have the day of its lodgement recorded.
- (4) If a person lodges a submission later than 50 days after the gazettal day in respect of a TCO application without being invited by the CEO to do so under section 269M, the CEO must not take the submission into account in determining whether to make a TCO.

### **269L Amendment of TCO applications**

- (1) If a person lodges a submission in respect of a TCO application within 50 days after the gazettal day, the CEO must, within 14 days after the end of that 50 day period, give the applicant for the TCO a notice in writing setting out:
  - (a) the name and address of each person who has lodged a submission within that period; and
  - (b) a short statement of the grounds on which each submission is based.
- (2) The applicant may, within 28 days of receiving a notice under subsection (1) and having regard to the grounds on which each submission was made, notify the CEO, in writing, that he or she proposes to amend the application by altering the description of the goods the subject of the application, and set out in that notice the proposed amendment.
- (3) The applicant must not, under subsection (2), propose an amendment of an application:
  - (a) that would cause the goods to which the application relates to be covered by a different Customs tariff classification to the one notified by the CEO in the *Gazette* under section 296K; or

Section T269LT

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- (b) that would do otherwise than narrow the description of the goods as set out in the application.
- (4) As soon as practicable after, but not more than 7 days after, a proposed amendment of a TCO application was notified to the CEO, the CEO must consider the proposed amendment and:
  - (a) if the CEO is satisfied that the proposed amendment does not contravene subsection (3)—the CEO must inform the applicant that he or she is so satisfied and that subsection (4B) applies accordingly; or
  - (b) if the CEO is not so satisfied—the CEO must inform the applicant that he or she is not so satisfied and of the reasons for not being so satisfied.
- (4A) If the CEO is not satisfied that a proposed amendment of a TCO does not contravene subsection (3), the CEO must continue to consider the application as it was originally made.
- (4B) If the CEO is satisfied that the proposed amendment does not contravene the requirements of subsection (3), the CEO must, within 14 days after becoming so satisfied:
  - (a) notify the proposed amendment to each person who lodged a submission referred to in subsection (1) and, subject to the operation of subsections (5) and (6), invite that person, if he or she considers there are reasons not dealt with in the original submission why the TCO as proposed to be amended should not be made, to lodge a further submission within 14 days after being so notified; and
  - (b) publish a notice in the *Gazette* setting out the amended description in relation to the application and inviting persons who consider that there are reasons why the TCO as proposed to be amended should not be made to lodge a submission with the CEO no later than 14 days after the publication of that notice.
- (4C) The notification and subsequent publication of an amendment of a TCO application does not affect the gazettal day in relation to the application or any time limits calculated by reference to that gazettal day.
- (5) If a person who lodged a submission referred to in subsection (1) notifies the CEO, in writing, within 14 days after being notified of

a proposed amendment, that he or she no longer objects to the TCO application, the submission is taken to have been withdrawn.

- (6) If a person who lodged a submission referred to in subsection (1) does not so notify the CEO, he or she is taken to wish to proceed with the submission as if it were a submission made in respect of the amended application.

**269M Customs may invite submissions or seek other information, documents or material**

- (1) If the CEO considers that, in relation to a particular TCO application, a person may have reason to oppose the making of the TCO to which the application relates, he or she may, by notice in writing, invite the person to lodge a written submission with the CEO within a period specified in the notice ending not later than 150 days after the gazettal day.
- (2) A submission must:
- (a) be in writing; and
  - (b) be in an approved form; and
  - (c) contain such information as the form requires; and
  - (d) be signed in the manner indicated in the form.
- (3) A submission:
- (a) must be lodged with the CEO in the same manner, and is taken to be lodged on the same day, as is specified in relation to a TCO application; and
  - (b) must have the day of its lodgement recorded.
- (4) If the CEO considers that, in relation to a particular TCO application, any person (including the applicant or a person who has lodged a submission with the CEO) may be able to supply information or produce a document or material relevant to the consideration of the application, the CEO may, by notice in writing, request the supply of the information in writing or the production of the document or material within a period specified in the notice and ending not later than 150 days after the gazettal day.
- (5) If a person refuses or fails to lodge a submission under subsection (1) or to supply information or produce a document or material under subsection (4) within the period allowed but

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**Section T269NT**

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subsequently lodges that submission, supplies the information or produces the document or material, the CEO must not take that submission, information, document or material into account in determining whether to make a TCO.

- (6) At any time during the period of 150 days starting on the gazettal day, the CEO may, for the purpose of dealing with a TCO application, and despite section 16 of the *Customs Administration Act 1985*, give a copy of all, or of a part, of the application to a prescribed organisation with a view to obtaining the advice of the organisation in relation to the question whether there are producers in Australia of substitutable goods.

**269N Reprocessing of TCO applications**

- (1) If, after gazettal day in respect of a TCO application but before a decision is made on the application, the CEO is satisfied that:
- (a) because of an amendment of a Customs Tariff; or
  - (b) having regard to a decision of a court or of the Administrative Appeals Tribunal; or
  - (c) having regard to written advice on the matter given by an officer of Customs;

the tariff classification that was stated in the notice published in the *Gazette* under section 269K to apply to the goods the subject of the application has not, with effect from the gazettal day or a later day, applied to the goods, the CEO must take action to reprocess the application.

- (2) If the CEO is satisfied that, in publishing a notice in the *Gazette* under section 269K in relation to a TCO application, there has been a transcription error in the description of the goods the subject of the application including the tariff classification that is stated to apply to the goods, the CEO must take action to reprocess the application.
- (3) Where the CEO is required to take action under subsection (1) or (2), he or she must, as soon as practicable after becoming so required, notify:
- (a) the applicant; and
  - (b) all persons from whom submissions in relation to the application have been received; and

- (c) all persons from whom submissions in relation to the application have been sought;  
that, for the reasons specified in subsection (1) or (2), it is necessary to reprocess the application and that a new notice of the application will be published in the *Gazette* for that purpose.
- (4) As soon as practicable after giving a notice under subsection (3), the CEO must publish in the *Gazette* a new notice under subsection 269K(1) in relation to the TCO application in substitution for the notice previously published.
- (5) A person who had lodged a submission in relation to the original notice published under section 269K in respect of a TCO application may notify the CEO in writing, not later than 50 days after the day of publication of the substituted notice under that section, that he or she wishes to proceed with the submission, or wishes to proceed with it subject to stated modifications, as if it had been provided in response to the substituted notice and, where the CEO is so notified, the submission is to be treated as if it had been so provided on the day of that notification.
- (6) If a TCO is made in respect of a TCO application that is reprocessed in accordance with this section, the day on which the TCO is to be taken to come into force is unaffected by the decision to reprocess that application.

## Division 3—Making and operation of TCOs

### 269P The making of a standard TCO

- (1) If a TCO application in respect of goods, other than goods sent out of Australia for repair, has been accepted as a valid application under section 269H, the CEO must decide, not later than 150 days after the gazettal day, whether or not he or she is satisfied, having regard to:
  - (a) the application; and
  - (b) all submissions lodged with the CEO before the last day for submissions; and
  - (c) all information supplied and documents and material produced to the CEO in accordance with a notice under subsection 269M(4); and
  - (d) any inquiries made by the CEO;that the application meets the core criteria.
- (2) If the CEO fails to make a decision under subsection (1) in respect of a TCO application within 150 days after the gazettal day, the CEO is taken, for the purposes of subsection (1), at the end of that period, to have made a decision that he or she is not satisfied that the application meets the core criteria.
- (3) If the CEO is satisfied that the application meets the core criteria, he or she must make a written order declaring that the goods the subject of the TCO application are goods to which a prescribed item specified in the order applies.
- (4) The TCO must include:
  - (a) a description of the goods the subject of the order including a reference to the Customs tariff classification that, in the opinion of the CEO, applies to the goods; and
  - (b) a statement of the day on which the TCO is to be taken to have come into force; and
  - (c) if subsection 269SA(1) applies in relation to the TCO—a statement of the day on which it ceases to be in force.



### **269Q The making of a TCO for goods requiring repair**

- (1) If a TCO application in respect of goods sent out of Australia for repair has been accepted as a valid application under section 269H, the CEO must decide, not later than 150 days after the gazettal day, whether or not he or she is satisfied, having regard to:
  - (a) the application; and
  - (b) all submissions lodged with the CEO before the last day for submissions; and
  - (c) all information supplied and documents and material produced to the CEO in accordance with a notice under subsection 269M(4);that there is no one in Australia capable of repairing those goods in the ordinary course of business.
- (2) If the CEO fails to make a decision under subsection (1) in respect of a TCO application within 150 days after the gazettal day, the CEO is taken, for the purposes of subsection (1), at the end of that period, to have made a decision that he or she is not satisfied of the matters referred to in that subsection in relation to the application.
- (3) If the CEO is satisfied of the matters referred to in subsection (1) in relation to the application, he or she must make a written order declaring that the goods the subject of the TCO application are goods to which a prescribed item specified in the order applies.
- (4) The TCO must include:
  - (a) a description of the goods the subject of the order including a reference to the Customs tariff classification that, in the opinion of the CEO, applies to the goods; and
  - (b) a statement of the day on which the TCO is to be taken to have come into force.
- (5) For the purposes of this section, a person is taken to be capable of repairing goods in the ordinary course of business if, in the ordinary course of business, the person is prepared to accept orders to repair those goods.

### **269R Notification of TCO decisions**

- (1) As soon as practicable after the CEO makes a decision under subsection 269P(1) or 269Q(1), the CEO must:

Section T269ST

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- (a) by notice in writing, inform the applicant of the decision; and
  - (b) by notice published in the *Gazette*, inform all other interested persons of the decision.
- (2) If the decision has led to the making of a TCO, the notice given to the applicant and published in the *Gazette* must include full particulars of the TCO.
- (3) A failure to comply with subsection (1) or (2) does not affect the validity of the TCO concerned.

**269S Operation of TCOs**

- (1) Subject to the operation of subsection 269SA(2), a TCO is to be taken to have come into force on:
- (a) unless paragraph (b) applies—the day on which the application for the TCO was lodged; or
  - (b) if there was more than one application for the TCO—the day on which the earliest application for the TCO was lodged.
- (2) Subject to section 269SG, a TCO applies in relation to the goods the subject of the TCO that were or are first entered for home consumption on or after the day on which the TCO is taken to have come into force.
- (3) Subject to the operation of subsection 269SA(1), a TCO continues in force until it is revoked under section 269SC or 269SD.

**269SA Consequence of commencement or cessation of production before TCO decision**

- (1) If the CEO is satisfied, in relation to a TCO application:
- (a) that the application meets the core criteria; and
  - (b) that on a day (the *production start-up day*) occurring later than the day on which the application was lodged but before the making of the decision on the application, substitutable goods in relation to the goods the subject of the application commenced to be produced in Australia; and

- (c) that if the production start-up day had occurred on the day on which the application was lodged, the CEO would not have been satisfied that the application met the core criteria; the TCO that the CEO makes continues in force only until the production start-up day.
- (2) If the CEO is satisfied, in relation to a TCO application:
  - (a) that the application does not meet the core criteria; and
  - (b) that on a day (the *production close-down day*) occurring later than the day on which the application was lodged but before the making of the decision on the application, substitutable goods in relation to the goods the subject of the application ceased to be produced in Australia; and
  - (c) that if the production close-down day had occurred on the day on which the application was lodged the CEO would have been satisfied that the application met the core criteria; the CEO must make a TCO in accordance with section 269P, but the TCO is in force only from the production close-down day.

## Division 4—Revocation of TCOs

### 269SB Request for revocation of TCOs

- (1) If:
  - (a) a TCO is in force on a particular day; and
  - (b) a person claiming to be a producer in Australia of substitutable goods in relation to the goods covered by the order is of the view that if:
    - (i) the TCO were not in force on that particular day; and
    - (ii) that particular day were the day on which the TCO application was lodged;the TCO would not have been made;the person may request the CEO to revoke the order.
- (2) A request must:
  - (a) be in writing; and
  - (b) be in an approved form; and
  - (c) contain such information as the form requires; and
  - (d) be signed in the manner indicated in the form.
- (3) A request for revocation may be lodged with Customs:
  - (a) by leaving it at a place that has been allocated for the lodgement of TCO applications at Customs House, Canberra; or
  - (b) by posting it by prepaid post to a postal address specified in the approved form; or
  - (c) by sending it by electronic facsimile to a facsimile number specified in the approved form;and the request is taken to have been lodged when the request, or a facsimile of the request, is first received by an officer of Customs.
- (4) The day on which the request is to be taken to be lodged, must be recorded on the request.

### 269SC Processing requests for revocation of TCOs

- (1) Not later than 60 days after lodgement of a request for revocation of a TCO, and after having regard to the request and to any other

information, document or material given to the CEO under section 269SF, the CEO must decide whether or not he or she is satisfied:

- (a) that, on the day of lodgement of the request, the person requesting the revocation of the TCO is a producer in Australia of goods that are substitutable goods in relation to the goods the subject of the order; and
  - (b) that, if the TCO were not in force on that day but that day were the day on which the application for that TCO was lodged, the CEO would not have made the TCO.
- (1A) As soon as practicable after receiving a request for revocation of a TCO, the CEO must publish a *Gazette* notice stating:
- (a) that the request has been lodged; and
  - (b) the date that the request was lodged; and
  - (c) the full particulars of the TCO to which the request relates.
- (2) If the CEO fails to make a decision in respect of a request for the revocation of a TCO within 60 days after lodgement of the request, the CEO is taken, for the purposes of subsection (1), at the end of that period, to have decided that he or she is not satisfied of the matters referred to in that subsection in relation to the request.
- (3) If the CEO is satisfied of the matters referred to in subsection (1) in relation to a request for revocation of a TCO, the CEO must make an order revoking the TCO.
- (4) If the CEO is satisfied of the matters referred to in subsection (1) in relation to a request for revocation of a TCO but is also satisfied that if:
- (a) the TCO were not in force on the day of lodgement of the request; and
  - (b) that day were the day of lodgment of an application for another TCO (the *narrower TCO*) in respect only of goods covered by the TCO that are not produced in Australia by the person making the request;
- the CEO would have made such a narrower TCO, he or she must:
- (c) revoke the TCO; and
  - (d) make, in its place, such a narrower TCO.

Section T269SDT

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- (5) If the CEO is not satisfied of the matters referred to in subsection (1) in relation to a request for revocation of a TCO, the CEO must refuse the request.
- (6) An order under subsection (3) or (4) revoking a TCO comes into force on the day on which the request to revoke the TCO was lodged.
- (7) If a narrower TCO is made in place of another TCO that is revoked in subsection (4), that narrower TCO comes into force, for the purposes of this Part, from the date of effect of the revocation of the other TCO, as if it had been made under section 269P or 269Q.
- (8) Subsections 269SC(6) and (7) have effect despite section 12 of the *Legislative Instruments Act 2003*.

**269SD Revocation at the initiative of Customs**

(1AA) If:

- (a) a TCO is in force on a particular day; and
- (b) the CEO believes that if:
  - (i) the TCO were not in force on that day; and
  - (ii) that day were the day on which the application for the TCO was lodged;the CEO would not have made the TCO;

the CEO may, not later than 14 days after that day, publish a notice in the *Gazette*:

- (c) declaring his or her intention, subject to subsection (1AB), to make an order revoking the TCO with effect from that particular day (the *intended revocation day*); and
- (d) inviting any person who might be affected by the revocation of that TCO to give a written submission to the CEO within 28 days of the notice concerning the proposed revocation.

(1AB) Within 60 days after the date of publication of the notice referred to in subsection (1AA), the CEO must, after consideration of the matters raised in any submissions made in response to the invitation and of any other relevant matters:

- (a) decide whether or not he or she is satisfied of the matters referred to in paragraph (1AA)(b); and
- (b) if the CEO is so satisfied—make an order revoking the TCO with effect from the intended revocation day.

Section T269SDT

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- (1) If the CEO is satisfied that a TCO is no longer required because the general tariff rate in respect of the goods the subject of the order has been reduced to “Free”, the CEO may make an order revoking the TCO with effect from the day the tariff rate was so reduced.
  - (1A) If the CEO is satisfied on any day that a TCO is no longer required because, in the 2 years preceding that day, the TCO has not been quoted in an import entry to secure a concessional rate of duty, the CEO may make an order revoking the TCO with effect from that day.
  - (2) If the CEO is satisfied that:
    - (a) because of an amendment of a Customs tariff; or
    - (b) having regard to a decision of a court or of the Administrative Appeals Tribunal; or
    - (c) having regard to written advice on the matter given by an officer of Customs;the tariff classification that is stated in a TCO to apply to the goods the subject of the TCO has not, with effect from a particular day, applied to those goods, the CEO must:
    - (d) make an order revoking the TCO with effect from that day; and
    - (e) make a new TCO in respect of the goods with effect from the revocation.
  - (3) If the CEO is satisfied that, in making a TCO, there has been a transcription error in the description of goods the subject of the TCO including the tariff classification that is stated in the TCO to apply to the goods, the CEO may:
    - (a) make an order revoking the TCO with effect from the day the TCO came into force; and
    - (b) make a new TCO in respect of goods that corrects the error with effect from the revocation.
  - (4) The particular day referred to in subsection (2) may be the day on which the TCO that is revoked came into force or a later day.
  - (5) If the CEO is satisfied that a TCO contains a description of the goods the subject of the order in terms of their intended end use, the CEO may make an order revoking the TCO with effect from the revocation.
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Section T269SET

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- (6) This section has effect despite section 12 of the *Legislative Instruments Act 2003*.

**269SE Notification of revocation decisions**

- (1) As soon as practicable after the CEO makes a decision under subsection 269SC(1), the CEO must:
- (a) by notice in writing, inform the applicant of the decision; and
  - (b) by notice published in the *Gazette*, inform all other interested persons of the decision.
- (2) As soon as practicable after the CEO makes a decision to make an order under subsection 269SD(1AB), (1) or (1A), (2) or (5), the CEO must, by notice published in the *Gazette*, inform all interested persons of the decision.
- (3) If the decision referred to in subsection (1) or (2) has led to the making of an order revoking a TCO or both to the making of an order revoking a TCO and the making of a new TCO, the notice of that decision given to the applicant and published in the *Gazette* must include full particulars of the order or orders.
- (4) A failure to comply with subsection (1), (2) or (3) does not affect the validity of the decision concerned or of any order or orders to which it has led.

**269SF Customs may seek information, documents or material relating to revocation**

- (1) If the CEO considers that, in relation to a request for revocation of a TCO, any person (including the person who made the request) may be able to supply information or produce a document or material relevant to the consideration of the request, the CEO may, by notice in writing, request the supply of the information or the production of the document or material within a period specified in the notice and ending not later than 60 days after receiving the request.
- (2) Any information provided in satisfaction of a request under subsection (1) must be provided in writing.
- (3) If a person refuses or fails to supply information or produce a document or material under subsection (1) within the period



allowed but subsequently supplies the information or produces the document or material, the CEO must not take that information, document or material into account in determining whether to revoke a TCO.

**269SG Effect of revocation on goods in transit and capital equipment on order**

- (1) Subject to subsection (2), if a TCO is revoked under subsection 269SC(3) or (4) or 269SD(1AB) or (1A), the TCO ceases to apply in relation to goods entered for home consumption on or after the day on which the revocation comes into effect.
- (2) Despite the revocation of a TCO under subsection 269SC(3) or (4) or 269SD(1AB) or (1A) in respect of goods, the TCO continues to apply in relation to:
  - (a) goods that:
    - (i) were imported into Australia on or before the day on which the revocation came into effect; and
    - (ii) are entered for home consumption, before, on, or within 28 days after, that day; and
  - (b) goods that:
    - (i) were in transit to Australia on that day; and
    - (ii) are entered for home consumption before, on, or within 28 days after, the day on which they were imported into Australia.
- (3) For the purposes of subparagraph (2)(b)(i), goods shall be taken to be in transit to Australia if, and only if, they have left for direct shipment to Australia from a place of manufacture, or a warehouse, in the country from which they are being exported.
- (4) Where an officer of Customs is satisfied that, after a TCO in relation to made-to-order capital equipment comes into force but before its revocation under subsection 269SC(3) or (4) or 269SD(1AB) or (1A), a firm order had been placed for the purchase of any such equipment, the TCO continues to apply in relation to the importation into Australia of that capital equipment.

Section T269SGT

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(5) In this section:

*made-to-order capital equipment* means a particular item of capital equipment:

- (a) that is made on a one-off basis to meet a specific order rather than being the subject of regular or intermittent production; and
- (b) that is not produced in quantities indicative of a production run.

## Division 5—Miscellaneous

### 269SH Internal review

- (1) Not later than 28 days after gazettal of a decision (the *original decision*) on a TCO application or on a request for revocation of a TCO, any affected person within the meaning of subsection (13) who objects to the making of the decision may apply to the CEO for its reconsideration.
- (2) An application for reconsideration must:
  - (a) be in writing; and
  - (b) include the grounds on which the person objects to the decision (whether or not those grounds had previously been considered).
- (3) An application for reconsideration:
  - (a) must be lodged with the CEO in the same manner, and is taken to be lodged on the same day, as is specified in relation to a TCO application; and
  - (b) must have the day of its lodgement recorded.
- (3A) As soon as practicable after receiving a request for reconsideration of a decision that leads to the making of a TCO or that refuses to revoke a TCO, the CEO must publish a *Gazette* notice stating:
  - (a) that the request has been lodged; and
  - (b) the date that the request was lodged; and
  - (c) the full particulars of the TCO to which the request relates.
- (4) Where application is made for reconsideration of a decision made on a TCO application, the CEO, having regard to:
  - (a) the TCO application; and
  - (b) the submissions, information, documents and materials which the CEO was entitled to take into account in considering the TCO application; and
  - (c) any new matter produced to the CEO by the applicant for reconsideration which, under subsection (7), the CEO is not prevented from taking into account for that purpose;must decide, not later than 90 days after the last day for lodgement of the application for reconsideration, whether to affirm the

Section T269SHT

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original decision or to substitute any other decision that the CEO might have made.

- (5) Where application is made for reconsideration of a decision on a request for revocation, the CEO, having regard to:
- (a) the request for revocation; and
  - (b) the information, documents and materials which the CEO was entitled to take into account in considering the request; and
  - (c) any new matter produced to the CEO by the applicant for reconsideration which, under subsection (7), the CEO is not prevented from taking into account for that purpose;
- must decide, not later than 60 days after the last day for lodgement of the application for reconsideration, whether to affirm the original decision or to substitute any other decision that the CEO might have made.
- (6) If the CEO fails to make a decision under subsection (4) or (5) within the period referred to in that subsection, the CEO is taken, for the purposes of the reconsideration, at the end of that period, to have made a decision to affirm the original decision.
- (7) For the purposes of subsections (4) and (5), the CEO must not take into account any new material that is not produced to him or her by the applicant for reconsideration of an original decision within the period of 28 days after notification of the original decision in the *Gazette*.
- (8) Where the CEO, on reconsidering an original decision, decides to substitute for that decision any decision that he or she might have made, the substituted decision is to be taken to have been made when the original decision was made.
- (9) If the substituted decision involves the making of a TCO, or of an order revoking a TCO, that TCO or revocation order comes into force on the day on which, if the original decision had involved making the TCO or order revoking a TCO, that TCO or order would have come into force.
- (10) As soon as practicable after the CEO makes a decision under subsection (4) or (5) on an application for reconsideration, the CEO must:
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- (a) by notice in writing inform the applicant for reconsideration of the decision made on the reconsideration; and
  - (b) by notice published in the *Gazette*, inform all other interested persons of the decision made on that reconsideration.
- (11) If the decision on an application for reconsideration has led to the making of an order or orders, the notice of the decision given to the applicant for reconsideration and published in the *Gazette* must include full particulars of the order or orders.
- (12) A failure to comply with subsection (10) does not affect the validity of any decision on a reconsideration or of any order or orders to which it has led.
- (13) In subsection (1):

***affected person*** means:

- (a) in relation to a decision on a TCO application:
  - (i) the applicant for the TCO; or
  - (ii) any person who lodged a submission before the last day for submissions in relation to the TCO application; or
  - (iii) any person who, in the opinion of the CEO, was not reasonably able to lodge a submission in relation to the TCO application within 50 days of the gazettal day; and
- (b) in relation to a decision on a request for revocation:
  - (i) the person requesting the revocation; or
  - (ii) any other person whose interests are affected by the decision made on the request.

### **269SHA Administrative Appeals Tribunal Review of reconsideration decisions**

- (1) For the purpose of an application to the Administrative Appeals Tribunal under section 273GA for review of a decision under subsection 269SH(1) or (4) (a ***reconsideration decision***), application may be made by any person who is an affected person in relation to that decision within the meaning of subsection 269SH(13).
- (2) If an affected person applies to the Tribunal for review of a reconsideration decision, the CEO must, as soon as practicable

Section T269SHAT

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after being notified of the application or of the first such application, publish in the *Gazette*:

- (a) particulars of the decision (including any relevant TCO number or TCO application number) in respect of which such an application for review has been made; and
  - (b) the name of the person who made such an application; and
  - (c) sufficient particulars to identify the review proceedings before the Tribunal.
- (3) Any person who had not applied under section 273GA for review of a reconsideration decision but whose interests are affected by the decision (whether or not that person is an affected person within the meaning of subsection 269SH(13)) may apply under subsection 30(1A) of the *Administrative Appeals Tribunal Act 1975* to be made a party to the proceedings within 60 days of the publication under subsection (2) or within such further period as the Tribunal allows.
- (4) The Tribunal must not grant a person applying to be joined as a party to proceedings for review of a reconsideration decision an extension of the period of 60 days referred to in subsection (3) unless it is satisfied that the person was not reasonably able to apply within the period.
- (5) Any document on which a party to proceedings for review of a reconsideration decision before the Administrative Appeals Tribunal intends to rely must, subject to the provisions of the *Administrative Appeals Tribunal Act 1975*:
  - (a) be filed with the Tribunal; and
  - (b) be served on the other parties to the proceeding; not less than 28 days before the date set for hearing, unless the Tribunal makes an order permitting the document to be filed and served within a lesser period or to be introduced at the hearing without being so filed or served.
- (6) In deciding whether to make such an order, the Tribunal must have regard to whether there is any reasonable cause for the document not being made available at least 28 days before the date of the hearing.

**269SJ TCOs not to apply to goods described by reference to their end use or certain goods**

- (1) The CEO must not make a TCO in respect of goods:
  - (aa) described in terms other than generic terms; or
  - (a) described in terms of their intended end use; or
  - (b) declared by the regulations to be goods to which a TCO should not extend.
- (1A) Without limiting the meaning of the reference in paragraph (1)(aa) to goods described in generic terms, goods are taken not to be so described if their description, either directly or by implication, indicates that they are goods of a particular brand or model, or that a particular part number applies to the goods.
- (2) If a regulation is made for the purposes of paragraph (1)(b) in respect of goods to which a TCO applies, that TCO must be taken, to the extent that it covers those goods, to have been revoked by the CEO on the day those regulations came into effect.
- (3) Where a TCO is taken to have been revoked under subsection (2) to the extent that it covers goods the subject of a regulation made for the purposes of paragraph (1)(b), the CEO must, as soon as practicable after the making of the regulation, by notice published in the *Gazette*, inform interested persons:
  - (a) of the fact that the regulation has been made; and
  - (b) of its effect on the TCO; and
  - (c) of the day on which the TCO is taken to have been so revoked.

**269SK TCOs not to contravene international agreements**

If the CEO is satisfied that, in accordance with the obligations of Australia under an agreement (including a treaty or convention) between Australia and another country or other countries, the rate of duty attaching to the importation of goods (whether or not the produce of a particular country) is not to be less than a particular minimum rate, the CEO must not make a TCO that would result in a contravention of those obligations.

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TDivision 5T MiscellaneousT

Section T269SLT

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**269SL TCOs not to be statutory rules**

A TCO is not to be taken to be a statutory rule within the meaning of the *Statutory Rules Publication Act 1903*.