

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 29, 2014**

Issued by the Authority of the Minister for Immigration and Border Protection

*Customs Act 1901*

*Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014*

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

The *Maritime Powers (Consequential Amendments) Act 2013* (the Consequential Amendments Act), will amend the Act to deal with consequential matters arising from the enactment of the *Maritime Powers Act 2013* (MPA). The MPA will consolidate and harmonise the Commonwealth's existing maritime enforcement regime and provide a single framework for use by our on-water enforcement agencies including the Department of Immigration and Border Protection, the Department of Defence, the Australian Federal Police and the Department of Agriculture. The Consequential Amendments Act will repeal all of the maritime powers in the Act which overlap with those contained in the MPA, and make other necessary consequential amendments to the Act. Both the MPA and the Consequential Amendments Act will commence on 27 March 2014.

In part, the Consequential Amendments Act will amend section 228 of the Act which currently sets out the circumstances in which a ship will be forfeited to the Crown. One such circumstance is where the master of either a foreign ship or an Australian ship has failed to facilitate, by all reasonable means, boarding of the ship by officers of Customs under current subsections 184A(2) or (3) of the Act. Subsection 184A(2) of the Act provides the circumstances in which officers of Customs can board a foreign ship in Australian waters and subsection 184A(3) of the Act provides the circumstances in which officers of Customs can board Australian ships outside territorial seas of other countries.

Given that section 184A of the Act will be repealed by the Consequential Amendments Act and boarding of ships will now occur under the MPA, new circumstances will be inserted into section 228 of the Act by the Consequential Amendments Act to set out when a foreign or an Australian ship will be forfeited to the Crown for failure to facilitate boarding.

New subsection 228(2) of the Act will specify the circumstances in which a foreign ship will be forfeited to the Crown where the master of the ship has failed to facilitate boarding, by all reasonable means, under the MPA. This includes a requirement that the boarding be for a purpose of an Act prescribed by the regulations. This boarding cannot be arbitrary but must be, for example, for the purposes of ensuring compliance with, or investigating a contravention of, the *Fisheries Management Act 1991* (which is one of the Acts that is prescribed for this subsection).

Similarly, new subsection 228(3) of the Act will provide the circumstances in which an Australian ship will be forfeited to the Crown when the master of the ship has failed to facilitate boarding, by all reasonable means, under the MPA. This also includes a requirement that the boarding be for a purpose of an Act prescribed by the regulations.

The purpose of the Regulation is to amend the Principal Regulations to prescribe the *Fisheries Management Act 1991*, the *Environment Protection and Biodiversity Conservation Act 1999*, and the *Torres Strait Fisheries Act 1984* for the purposes of new subsection 228(2) of the Act and the *Maritime Powers Act 2013* for the purposes of new subsection 228(3) of the Act. The Regulation also removes references in the Principal Regulations to provisions in the Act which will be repealed by the Consequential Amendments Act.

Sections 1 to 4 of the Regulation commence on the day after the Regulation is registered. Schedule 1 to the Regulation commences immediately after the commencement of Schedule 1 to the Consequential Amendments Act. This will commence on 27 March 2014.

The Regulation is minor or machinery in nature and does not substantially alter existing arrangements and therefore no formal consultation was undertaken in relation to the amendments.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**Details of the Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014**

**Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014*.

**Section 2 – Commencement**

This section provides that sections 1 to 4 of the Regulation commence the day after the Regulation is registered and Schedule 1 of the Regulation commences immediately after the commencement of Schedule 1 to the *Maritime Powers (Consequential Amendments) Act 2013*. This will commence on 27 March 2014.

**Section 3 – Authority**

This section provides the Regulation is made under the *Customs Act 1901*.

**Section 4 – Schedule(s)**

This section provides that each instrument specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned and that any other item in a Schedule to this instrument has effect according to its terms.

**SCHEDULE 1 - AMENDMENTS**

***Customs Regulations 1926***

**Item 1**

Item 1 inserts, after regulation 178, a new regulation 178A (Forfeited ships – prescribed Acts).

Subclause 178A(1) prescribes the following Acts for the purposes of new paragraph 228(2)(c) of the *Customs Act 1901* (the Act):

- (a) the *Fisheries Management Act 1991*;
- (b) the *Environment Protection and Biodiversity Conservation Act 1999*; and
- (c) the *Torres Strait Fisheries Act 1984*.

Paragraph 228(2)(c) of the Act will provide the circumstances in which a foreign ship will be forfeited to the Crown, where the master of the ship has failed to facilitate boarding, by all reasonable means, under the *Maritime Powers Act 2013* (MPA). The circumstances are:

- (a) the ship must be a foreign ship; and

- (b) the ship is on the landward side of the outer edge of Australia’s territorial sea; and
- (c) the boarding is for the purposes of the *Customs Act 1901* or an Act prescribed by the regulations, or for the purposes of determining whether a contravention, or an attempted contravention, in Australia of section 72.13 or Division 307 of the *Criminal Code* is occurring.

Subclause 178A(2) prescribes the *Maritime Powers Act 2013* for the purposes of new paragraph 228(3)(c) of the Act.

Paragraph 228(3)(c) of the Act will provide the circumstances in which an Australian ship will be forfeited to the Crown, where the master of the ship has failed to facilitate boarding, by all reasonable means, under the MPA. The circumstances are:

- (a) the ship must be an Australian ship; and
- (b) the ship is outside the territorial sea of any foreign country; and
- (c) the boarding is for the purposes of the *Customs Act 1901* or an Act prescribed by the regulations, or for the purposes of determining whether a contravention, or an attempted contravention, in Australia of section 72.13 or Division 307 of the *Criminal Code* is occurring.

## **Item 2**

Item 2 omits “paragraph 185B(2)(b)” from table item 11A in Schedule 1AAD of the *Customs Regulations 1926* (the Regulations).

## **Item 3**

Item 3 repeals items 11B and 14 from the table in Schedule 1AAD of the Regulations.

## **Item 4**

Item 4 repeals the cell at table item 14A of Schedule 1AAD of the Regulations, column headed “is prescribed for this provision or these provisions of the Customs Act 1901...” and replaces it with “subparagraph 186A(1)(b)(ii)”.

## **Item 5**

Item 5 repeals item 16 from the table in Schedule 1AAD of the Regulations.

## **Item 6**

Item 6 repeals the cell at table item 16A of Schedule 1AAD of the Regulations, column headed “is prescribed for this provision or these provisions of the Customs Act 1901...” and replaces it with “subparagraph 186A(1)(b)(ii)”.

**Item 7**

Item 7 repeals item 18 from the table in Schedule 1AAD of the Regulations.

**Item 8**

Item 8 repeals the cell at table item 18A of Schedule 1AAD of the Regulations, column headed “is prescribed for this provision or these provisions of the Customs Act 1901...” and replaces it with “subparagraph 186A(1)(b)(ii)”.

**Item 9**

Item 9 repeals item 19 from the table in Schedule 1AAD of the Regulations.

**Item 10**

Item 10 repeals the cell at table item 19A of Schedule 1AAD of the Regulations, column headed “is prescribed for this provision or these provisions of the Customs Act 1901...” and replaces it with “subparagraph 186A(1)(b)(ii)”.

Items 2 to 10 of Schedule 1 to the Regulation amend various items of Schedule 1AAD to the Act. The items in Schedule 1AAD contain references to sections 184A, 185, 185AA and 185B of the Act. These sections of the Act will be repealed by the *Maritime Powers (Consequential Amendments) Act 2014* therefore the references to these sections in Schedule 1AAD are redundant.

## Statement of Compatibility with Human Rights

(Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*)

### ***Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014***

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### *Overview of the Regulation*

The *Maritime Powers (Consequential Amendments) Act 2013* (the Consequential Amendments Act), contains consequential amendments to the *Customs Act 1901* (the Act) arising from the enactment of the *Maritime Powers Act 2013* (MPA). The MPA consolidates and harmonises the Commonwealth's existing maritime enforcement regime and provides a single framework for use by our on-water enforcement agencies including the Department of Immigration and Border Protection, the Department of Defence, the Australian Federal Police and the Department of Agriculture.

The Consequential Amendments Act will repeal all of the maritime powers in the Act which overlap with those now contained in the MPA, and make other necessary consequential amendments to the Act.

Both the MPA and the Consequential Amendments Act commence on 27 March 2014.

In part, the Consequential Amendments Act will amend section 228 of the Act which currently sets out the circumstances in which a ship will be forfeited to the Crown, including where the master of either a foreign ship or an Australian ship has failed to facilitate boarding of the ship, by all reasonable means, under section 184A of the Act.

Given that s184A of the Act will be repealed by the Consequential Amendments Act and boarding will now occur under the MPA, new circumstances will be inserted into section 228 of the Act by the Consequential Amendments Act to set out when a foreign or an Australian ship will be forfeited to the Crown for failure to facilitate boarding. This includes a requirement that the boarding be for a purpose of an Act prescribed by the *Customs Regulations 1926* (the Customs Regulations).

The *Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014* (the Regulation) prescribes Acts for the purposes of section 228 of the Act. The Regulation also removes redundant references in the

Customs Regulations to provisions in the Act which will be repealed by the Consequential Amendments Act.

Sections 1 to 4 of the Regulation commence on the day after the Regulation is registered. Schedule 1 to the Regulation commences immediately after the commencement of Schedule 1 to the Consequential Amendments Act. This will commence on 27 March 2014.

*Human Rights implications*

This legislative instrument does not engage, impact on or limit in any way, the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

*Conclusion*

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Minister for Immigration and Border Protection**