

9. MONITORING AND EXPORT EXAMINATION POWERS

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KEY MESSAGES

- The amendments to the Customs Act introduce new monitoring powers, which replace the current audit powers in the Customs Act.
- The monitoring powers apply to a broader class of premises, not just to importers or exporters.
- There also will be powers for the examination of goods for export, which are distinct from monitoring powers.
- Only authorised officers may exercise the monitoring powers and examination powers of goods for export.
- The occupier must give consent before a monitoring officer can enter premises and exercise monitoring powers. For monitoring powers, if the occupier does not give consent, or later withdraws consent, Customs must obtain a monitoring warrant to enter the premises. There is no recourse to a monitoring warrant for examination powers of goods for export where consent is refused or later withdrawn.
- The monitoring powers and examination powers of goods for export are designed to help industry to comply with its obligations under the Customs Act – they do not confer powers to search for evidence of offences.

THE LEGISLATION

The key new provisions of the Customs Act relating to monitoring powers are listed below.

4B: What is a Customs-related law

4C: Identity cards

The monitoring powers

214AA: Occupier of premises

214AB: What are the monitoring powers

214AC: Monitoring officers

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

214AD: Notice of proposal to exercise monitoring powers

214AE: Exercise of monitoring powers with consent

214AF: Exercise of monitoring powers under a warrant

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

214AH: Monitoring officer may ask questions

214AI: Monitoring officer may ask for assistance

214AJ: Compensation for damage to electronic equipment

The export examination powers

122F: Object of Division

122G: Occupier of premises

122H: Consent required to enter premises and examine goods for export

122J: Officer must leave premises if consent withdrawn

122K: Power to search premises for export goods

122L: Power to examine export goods

122M: Power to examine documents relating to export goods

122N: Power to question occupier about export goods

122P: Power to bring equipment to the premises

122Q: Compensation

122R: Powers in this Division are additional to other powers

The following sections of the Customs Act have been repealed:

67EN, 67EO, 67EP, 67EQ, 67ER, 67ES, 67ET, 67EU

214AA

214AB

214AC

INTRODUCTION

Part 5 of Schedule 1 of the Trade Modernisation Act introduces into the Customs Act new monitoring powers, which will replace the audit powers contained in sections 214AA, 214AB and 214AC of the Customs Act as well as the monitoring powers that apply to special reporters under the High Volume Low Value provisions in Division 3 of Part IV of the Customs Act. Part 3 of Schedule 1 of the Trade Modernisation Act introduces into the Customs Act examination powers relating to goods for export that are not yet subject to Customs control. The Trade Modernisation Act does not alter or amend the powers of officers contained in Divisions 1A and 1B of Part XII of the Customs Act, which remain in force.

The new provisions have been introduced to provide a modernised legislative framework for monitoring compliance with the Customs Act and with Customs-related laws, and to ensure that the ability to monitor is carried out in accordance with government policy.

There will be two discrete powers in the Customs Act which will enable Customs officers to enter premises for the purpose of monitoring or examination:

1. the monitoring powers (by consent or warrant, for monitoring compliance only)
2. the export examination powers (by consent only, for examining goods, and documents relating to goods, for export not yet subject to Customs control – the authorised officer must believe on reasonable grounds that there are or have been in the premises goods that the officer reasonably believes are intended to be for export.).

Monitoring powers

Key aspects of the monitoring powers

The key aspects of the monitoring powers are:

- the nature of Customs access to premises
- the broad application of the power to audit for compliance.

Access to premises

Customs can enter premises, with the consent of the occupier, to exercise monitoring powers. 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. If the occupier does not grant consent, Customs must obtain a monitoring warrant to enter the premises and exercise monitoring powers. A Customs officer may give the occupier written notice of the wish to enter premises and exercise monitoring powers.

Auditing for compliance

The monitoring powers apply to anyone involved in the importation or exportation of goods. The powers aim to help industry to comply with their obligations under the Customs Act by allowing Customs to verify that the systems and procedures in use enable people to comply.

When exercising the monitoring powers, Customs officers are auditing for compliance, not searching for evidence of commission of an offence. If evidence of the commission of an offence is discovered, monitoring officers may secure that evidence for 72 hours but not remove it, pending the issuing of a warrant to seize the thing.

Export examination powers

The export examination powers allow Customs to examine goods for export that are not under Customs control (that is, they have not been delivered to a place for export). The authorised officer must believe on reasonable grounds that there are or have been in the premises goods that the officer reasonably believes are intended to be for export. These powers allow goods to be examined before they are packaged for export and remove the time constraints inherent in examination at a place for export.

These examination powers can only be exercised with the consent of the occupier of the premises at which the goods are located.

MONITORING POWERS**Meaning of ‘Customs-related law’**

Section 4B provides a broad definition of ‘Customs-related law’. Customs-related law means the Customs Act and its regulations, the *Excise Act 1901* and its regulations, and any other Act or regulations that relate to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition or restriction or is subject to any tax, duty, levy or charge.

This definition acknowledges the fact that Customs performs import and export-related compliance monitoring on behalf of other Commonwealth agencies, such as AQIS, the ATO and other permit-issuing agencies.

What are the monitoring powers?

Section 214AB lists the monitoring powers as the power to:

- search premises
- take photographs or video recordings or make sketches
- inspect, examine, count, measure, weigh, gauge, test or analyse, and take samples of anything at the premises
- inspect documents or records
- take extracts from or copy documents and records

- take equipment or material onto the premises to exercise the monitoring powers
- test and operate record-keeping, accounting, computing or other operating systems
- secure things
- operate equipment to check information
- copy information found by operating any equipment.

Audit trail for compliance

Monitoring powers can be exercised at any premises, with the consent of the occupier, for the purposes of assessing:

- whether a person is complying with a Customs related law
- 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
- the correctness of information communicated by a person to Customs (whether in documentary or other form).

This provides Customs with an audit trail to more accurately determine where any breakdown in compliance occurs.

Who is a monitoring officer?

A monitoring officer is an officer authorised by the CEO of Customs to enter premises and exercise monitoring powers (section 214AC). An officer may be authorised only if the CEO is satisfied that the officer is suitably qualified, because of their abilities and experience, to exercise these powers.

Monitoring officers must be issued with identity cards (section 4C) and the officer must produce this card to the occupier before entering premises or exercising any monitoring power (subsection 214AE(6)).

Access to premises

A monitoring officer must obtain the consent, in writing, of the occupier before entering premises and exercising the monitoring powers, and must leave the premises if consent is withdrawn in writing (section 214AE). An occupier may give consent only for a particular period if they choose.

If the occupier does not give consent, the monitoring officer may apply to a magistrate for a monitoring warrant (section 214AF) to access the premises. The monitoring officer may also apply for a monitoring warrant where consent is withdrawn, or without first seeking consent.

Monitoring officer may ask questions

A monitoring officer, who has entered the premises with the consent of the occupier, can ask the occupier to answer any questions they choose but the occupier is not obliged to answer them (section 214AH). However, if the monitoring officer has entered the premises under a monitoring warrant, the officer can require any person on the premises to answer any questions if the occupier of the premises, or a representative previously nominated to Customs by the occupier, is unavailable to do so or is absent from the premises. Failure to answer in these circumstances is an offence against section 243SA (see [Topic 10: Penalty Administration](#)). This is subject to the privilege against self-incrimination (section 243SC).

Monitoring officer may ask for assistance

A monitoring officer who has entered premises with the occupier's consent may ask the occupier to provide reasonable assistance to the officer but the occupier is not obliged to do so (section 214AI).

However, if the officer has entered the premises under a monitoring warrant, the officer may require the occupier to provide reasonable assistance and the occupier is obliged to do so (subsection 214AI(2)).

Compensation for damage to electronic equipment

If equipment operated during the exercise of monitoring powers is damaged, or data or programs are damaged or corrupted, the Commonwealth is liable to pay compensation to the owner of the equipment or the user of the data or programs.

EXPORT EXAMINATION POWERS

The nature of the export examination powers

Section 122F in Division 3A of the Customs Act will allow authorised officers to enter premises and examine goods that are reasonably believed to be intended for export. The powers in this division can only be exercised before the goods come under Customs control. The powers allow Customs to assess whether the goods meet the requirements relating to exports.

The export examination powers include the power to:

- search premises for export goods and documents relating to them (section 122K)
- examine export goods and take samples (section 122L)
- examine, take extracts and make copies of documents relating to export goods (section 122M)
- question the occupier about export goods and request that occupier to produce documents (section 122N)
- bring equipment to the premises (section 122P).

Authorised officers

Only officers, who are suitably qualified because of their abilities and experience, can be authorised by the CEO (subsection 122F(4)). The officer must produce an identity card to the occupier before entering the premises (subsection 122H(6)).

Consent required

The export examination powers can be exercised only with the consent, in writing, of the occupier of the premises (subsection 122H(4)) and the officer must leave the premises if consent is withdrawn in writing (section 122J). There is no ability to seek a warrant in these circumstances.

Compensation

Customs is liable to pay reasonable compensation for any damage to property occurring as a result of the exercise of the export examination power.