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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

**Reference: Customs Legislation Amendment (Augmenting Offshore Powers and
Other Measures) Bill 2006**

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Monday, 22 January 2007

Members: Senator Payne (*Chair*), Senator Crossin (*Deputy Chair*), Senators Bartlett, Brandis, Kirk, Ludwig, Scullion and Trood

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Kirk, Ludwig, Payne and Trood

Terms of reference for the inquiry:

Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006

WITNESSES

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**NEIL, Ms Alison Margaret, Acting Director, Compliance Policy and Licensing,
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WHOWELL, Mr Peter, Manager, Legislation, Australian Federal Police 2

Committee met at 2.03 pm

CHAIR (Senator Payne)—This is the hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the provisions of the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006. The inquiry was referred to the committee by the Senate on 7 December 2006 for report by 8 February 2007. The bill proposes to enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences. It also updates Customs broker licensing arrangements and duty recovery processes and introduces provisions governing the making of declarations under the SmartGate system.

The committee has received five submissions for this inquiry, which have been authorised for publication and are available on the committee's website. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist upon an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits any questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of departments are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out that basis for the claim. I now welcome witnesses from the Australian Federal Police and from the Australian Customs Service.

[2.06 pm]

BROPHY, Ms Ellen, Manager, Passenger Compliance, Passenger Operations Branch, Australian Customs Service

HURRELL, Mr Brian Geoffrey, Acting National Director, Enforcement and Investigation, Australian Customs Service

NEIL, Ms Alison Margaret, Acting Director, Compliance Policy and Licensing, Australian Customs Service

NYAKUENGAMA, Ms Sharon Anne, Acting National Director, Compliance, Australian Customs Service

WHOWELL, Mr Peter, Manager, Legislation, Australian Federal Police

CHAIR—The Australian Customs Service has lodged a submission with the committee, which we have numbered 2. Do you need to make any amendments or alterations to that submission?

Mr Whowell—No, thank you.

CHAIR—I ask you to make an opening statement and we will go to questions at the end of that from members of the committee. For my own clarification, obviously ACS will make an opening statement, but, Mr Whowell, do you also wish to make an opening statement?

Mr Hurrell—No.

CHAIR—ACS, please go ahead.

Mr Hurrell—We do not wish to make an opening statement.

CHAIR—Okay. We will start with Senator Ludwig.

Senator LUDWIG—Could you outline the search powers on certain ships and aircraft? I understand the ships that you have referred to may or may not be those used in the interception of boats that might be people-smuggling or that might have immigration issues more broadly. Can you explain how the operational requirements would come into play in the decision-making process that would lead to the search of an aircraft?

Mr Hurrell—That would be more in a circumstance in which an aircraft landed in a remote location or there was an unscheduled arrival than in the way we would tend to process them through a normal proclaimed airport. That is an essential difference. The airport procedures are pretty much covered there. As with a vessel, if an aircraft landed without notice, illegally, in Australia and it was intercepted by Customs and/or police then we would need to deal with that aircraft. We are making the same point about that as we are making about the vessels: that it is more of an unknown situation.

Senator LUDWIG—Is the legislation as proposed only limited to that type of aircraft? Could it also apply to a regular passenger transport flight?

Mr Hurrell—I think the legislation is crafted in a way in which it would apply to that. I might hand over to one of the experts.

Ms Brophy—An RPT service would come into a designated airport under the Airports Act, whereas this is to allow for these provisions to extend to those undesignated airports where there is an unscheduled arrival.

Senator LUDWIG—What powers do you currently have in designated airports in terms of Customs' ability to search?

Ms Brophy—Unfortunately I cannot provide you with that now.

Senator LUDWIG—I am trying to draw a comparison between the existing powers that Customs have in regular public transport aircraft in designated areas, such as Sydney and Brisbane airports, and the power that you seek in undesignated airports for the search by Customs of aircraft. That is so I can see what extension you are now seeking in respect of this power—if it is an extension. It may be that you already have that power and are seeking to extend the power that you currently have from one thing to another, or it may be a complete extension. I think you understand the issue I am trying to explore.

Ms Brophy—I understand the question you are asking, but unfortunately I am not in a position where I can—

Mr Hurrell—Within a designated airport and a scheduled arrival of a commercial aircraft, we have exactly the same powers as we would have in the maritime environment—that is, it is in a designated port. In this case it is an airport, which is what you are asking about. We have the power to search the aircraft. We have the power to detain the aircraft if necessary, if an offence has been committed. In most cases the passengers and the other persons on that aircraft would be dealt with in the passenger hall in the designated area. The requirements that would have to be met would be the requirements under section 219 as it stands—that is, being able to have cause, as we do now, to search somebody through designated airports. So there is an essential difference. As has been pointed out, the focus here is on the remote areas, the not designated airports where an itinerant aircraft could land where we had very little, if any, prior notice.

Senator LUDWIG—What I am trying to hone in on is the extension of the power. In effect, under the 234AA area you would need to have reasonable suspicion before you could do a frisk search.

Mr Hurrell—I am not sure that that is the correct—

Senator LUDWIG—No, and that is what I am trying to establish: what the current position is in those airports with the designated areas, the 234AA areas, and this power. We can agree it is a different power, but what I want to know is how different? I think it is a reasonable question. What I want to know is what is the extension of the power, and how much more power do you seek under this bill than what you currently have?

Mr Hurrell—The main difference that we are seeking is the circumstances in which we can apply the power rather than the power itself.

Senator LUDWIG—Perhaps you can elaborate on that so I can understand it.

Mr Hurrell—My particular area of expertise is the maritime area. I can comment in broad terms on the air—

Senator LUDWIG—Is there anyone at the table now who can?

Mr Hurrell—Sorry?

Senator LUDWIG—Is there anyone at the table now who can answer my question specifically with respect to aircraft rather than in the broad?

Mr Hurrell—The same applies to aircraft as applies to vessels—that is, we aim to deal with them in a way that does not require us to detain the vessel or aircraft before we ensure that the situation is safe and that the evidentiary issues are covered. In other words, there is not an opportunity for people to destroy or remove evidence before we can obtain it. So the two circumstances are the same. Where the aircraft are coming in through a proclaimed or designated airport, the way we would deal with that does not change, and that is not what is contemplated by this amendment.

Senator LUDWIG—The point I am trying to get to is that this bill and the EM state that the new powers required are due to recent incidents where Customs officers ‘encountered violent resistance from persons on board the ships and attempts to escape custody and dispose of evidentiary material’. I will explore the nature of that with you shortly. Then you have the frisk search and the use of that power, and it will complement the provisions introduced by the bill. It is also proposed to:

... amend section 185AA to expand the scope of the personal search powers and the circumstances under which these powers may be exercised.

It will also apply to aircraft; it will apply to both ships and aircraft. There might be a different way, but for the definition of a person found on a ship or aircraft it inserts a new section, 185AA(9):

... which extends the scope of the phrase “a person found on a ship or aircraft” ... to include a person suspected on reasonable grounds by an officer of having landed from, or left, the ship or aircraft.

What I am trying to gain from you in an exact way is what power do you have now—I will explore ships later; I thought I would deal with aircraft now because it might be the easier one, but that does not seem to be the case now—in designated areas in ordinary airports where the public generally are found, and airports themselves and regular public transport? What will this bill do? Will it impact upon that area? If it does not, what area will it impact upon? And how is it different? Is it an extension of the power, and in what form?

Ms Neil—Section 219M deals with the frisk search in the designated airport environment, which is the 234AA places. The only change to the frisk search power for the airport environment is to actually delete a few parts of it, as they are now dealt with by the amended 185AA. So that 185AA power does not apply in a 234AA place.

Senator LUDWIG—Yes, so all you are doing in terms of the airport designed areas, the 234AA places, is rationalising the way your frisk search works?

Ms Neil—There is no change to the frisk search power in the 234AA place.

Senator LUDWIG—Yes, that was the answer I was trying to get to.

Ms Neil—Sorry; I just took a little while to find the bit, read it and give you the answer.

Senator LUDWIG—And these new search powers do not apply to 234AA?

Ms Neil—No.

Senator LUDWIG—That is what I wanted to know. In terms of the undesignated areas, if that is the phrase you would use, will the same power apply to both ships and aircraft—where you might have an aircraft that penetrates our air space unauthorised and lands, you might want to detain and search the people on board as well, because it is not an authorised flight?

Ms Neil—Yes, it can cover the scenario where an aircraft is requested to land by Customs because it is one that we do not know about—those sorts of situations.

Senator LUDWIG—Precisely. And in that instance it is like a boat—there could be people-smuggling or other matters going on?

Ms Neil—Correct.

Senator LUDWIG—Is it the intention to have the same power for both ships and aircraft?

Ms Neil—Yes.

Senator LUDWIG—Can you explain in layman's terms the extent of the use of that power?

Mr Hurrell—In simple terms, it means that we can exercise the power immediately on boarding a ship or aircraft, mainly to ensure the safety of officers—that is the primary purpose—but secondly to ensure that evidence is not destroyed, tampered with or got rid of, the essential difference being that the present legislation requires us to either formally detain the vessel or the aircraft or form a view under section 219 that a person may be carrying a weapon or something like that. The experience we have had that has led to this has been where we have boarded a vessel and, in the course of commencing our questions or search of the vessel, a weapon has been produced and officers have been threatened. That has happened on several occasions. So it covers all circumstances. Senator, you asked earlier about people-smuggling. Yes, it covers any circumstance—illegal fishing vessels, vessels that we might encounter in the Southern Ocean patrols as well where there is a lot more crew on board and a lot more opportunity for things such as weapons to be secreted.

Senator LUDWIG—Does it also clarify that in respect of a hot pursuit without detaining the vessel you can then, if you pursue it outside our exclusive economic zone, board and search those on board?

Mr Hurrell—No. There are specific provisions about boarding outside of the Australian territorial sea and then the economic zone.

Ms Neil—There is a new note in section 185A about boarding ships on high seas which clarifies that 185AA gives the power to search a person on a ship that has been boarded under 185A(2)(a), and that is the power to board a ship on the high seas.

Mr Hurrell—But on the high seas we have to meet other requirements before we board.

Senator LUDWIG—Yes, there are other requirements to meet—

Mr Hurrell—Yes, flag state approval in some cases.

Senator LUDWIG—But more broadly the point I think you were falling into, which I think was not right, was that you can in fact have a hot pursuit, board a vessel and exercise these powers outside of our EEC.

Mr Hurrell—Hot pursuit certainly applies. If we believe an offence has occurred within our economic zone and we commence hot pursuit—as envisaged under UNCLOS—then, yes, these provisions would apply if we boarded.

Senator LUDWIG—Yes. It was unclear whether they applied before.

Mr Hurrell—Yes, it was unclear.

Senator LUDWIG—So what you are doing is clarifying that, in terms of a hot pursuit, these powers will then apply.

Mr Hurrell—Yes.

Senator LUDWIG—Regarding the justification for the extension to aircraft as well, have you had any experience of problems with aircraft?

Mr Hurrell—In my recollection, there have been no specific problems. We do not encounter that many itinerant or illegal landing attempts by aircraft—and have not for some time—but we thought it was sensible to expand the same provisions to aircraft.

Senator LUDWIG—In terms of the power itself, what protection is provided to an individual who is subjected to this, especially where they may not speak English? Do you have usual procedures that you require them to go through to ensure that their rights are protected?

Mr Hurrell—They are normally handed a rights card. If this legislation is approved by the parliament then we will have to amend what we give them now. Currently, when they are subjected to a personal search, they certainly receive a rights card. I understand that the normal practice at airports, where this is much more usual—it is a daily occurrence—is that they make sure it is in a language they are able to understand.

Senator LUDWIG—This would not apply to ships in passenger terminals, would it? They would be 234AA areas.

Mr Hurrell—That is correct.

Senator LUDWIG—What about passenger ships that land in non-designated areas—where they pull up and let boats go but they are within sight of land? They might be pulling up next to a natural wonder, I guess.

Mr Hurrell—They get special approval under another section of the Customs Act, section 58, to go into non-proclaimed ports. It is mainly the cruise industry that does that. They would be dealt with in the same way. We would not generally agree to one of those vessels coming in to one of those places on its first port of call in Australia.

Senator LUDWIG—No. But on the way out?

Mr Hurrell—On the way out we would also expect it to go through a designated point so that we could deal with any Migration and Customs issues that we had to deal with. So, whilst it might call in other places—

Senator LUDWIG—While it is transiting it might do that.

Mr Hurrell—Yes.

Senator LUDWIG—So would this bill apply when it is transiting, in terms of the new arrangements, or would it be the existing arrangements?

Ms Neil—For a passenger ship, we can establish a 234AA place just by putting the signs up. It would then be dealt with under the 234AA place search arrangements, if need be.

Senator LUDWIG—Let us look at the scenario of a cruise liner, transiting between Cairns and Brisbane, which seeks approval to stop somewhere along the way to, say, disembark passengers to view coral. It may not be necessary to declare it a 234AA place because it might simply be a coordinate in the middle of nowhere. What happens then? If it stops, is there a requirement for it to be a designated area?

Mr Hurrell—They have to seek approval to go to non-proclaimed ports.

Senator LUDWIG—I understand the approval process. Does the approval process involve them being made a 234AA place?

Mr Hurrell—No. But, as Ms Neil outlined, it can be made a 234AA place.

Senator LUDWIG—So it is possible for a passenger ship, transiting, to gain approval, pull up and then be subject to these provisions because it has not been declared a 234AA place?

Mr Hurrell—If they went to a place without approval—

Senator LUDWIG—No, even with approval. Because you said that, even with approval, they do not require a 234AA.

Ms Neil—Can I clarify. We would not be making a request to board the vessel under section 185 or section 185AA in the event that we had already given approval to stop. In order to exercise the powers of search under those sections, we have to have made a request to board the vessel under section 185 or section 185AA. It is a sequential process where you follow along. In order to make a request to board, you have to have a suspected contravention.

Senator LUDWIG—But you might. You might have criminal intelligence. Someone might ring up and you might get a tip-off that there are drugs on board a particular ship. It might be part of one of those controlled operations.

CHAIR—An endless controlled operation, yes!

Ms Neil—Can I suggest that we might then exercise those powers where we would make the request to board and then we would be on the section 185 or section 185AA path. In the event that they ask to make a stop to disembark some passengers or something, that is not the sort of circumstance that would cause a Customs vessel to make a request to board and then exercise the powers that flow from that.

Senator LUDWIG—What I am trying to establish is whether it is possible—not whether you would or would not—under the legislation as drafted, under this bill.

Ms Neil—In that case if the commander of the ship or aircraft had a reasonable suspicion that there was a contravention of an offence under the Customs Act or another act, satisfied

those criteria and caused the ship or aircraft to stop so that they could make a request to board and then board, those powers are available immediately upon boarding.

Senator LUDWIG—Is that appropriate for a passenger vessel.

Mr Hurrell—I have to say, Senator, that I could never see the situation that you are proposing occurring. We would have dealt with the vessel when it came to its first port in Australia. It would be a most unusual circumstance that the master and other people in charge of the vessel would be noncompliant in any way, shape or form. For us to make that request it would have to be a most unusual situation, which in the general course of business I do not see occurring. Certainly the powers would be available, as outlined. But, if something happened between that first port and the designated last port, we would in all probability deal with the situation when it came alongside or we would be boarding at the request of the people operating the vessel, because some circumstance had occurred on the vessel.

Senator LUDWIG—And you say that is appropriate?

Mr Hurrell—I think it is appropriate if we got to a situation such as you are proposing—where we have information that something has occurred and the only way we can deal with it is to issue a request to board under section 185 and the other things that flow in sequence from that. I do think that is appropriate.

Senator LUDWIG—So your usual powers of search are not sufficient in that instance and you say that you need the special power? I really need a justification for why you would want the special power.

Mr Hurrell—I think that it would be most unusual that we would bring those powers into play for a passenger vessel that we have already dealt with at its first port. It would be a most unusual circumstance.

Senator LUDWIG—I guess I can only deal with what the legislation might permit. The bill, on my reading—and, it appears, on your understanding too—permits that to occur. No matter how hypothetical it might be or how impossible you might say it is or what your view is about these things, does the legislation permit it? The answer is yes.

Mr Hurrell—It does, yes.

Senator LUDWIG—Is it appropriate? You say it is. I ask why you cannot use the ordinary search provisions in those circumstances.

Mr Hurrell—In all probability we would. But if it were so serious that we had to make a request to board, the same issues arise that arise with any other vessel, regardless of whether it is an Indonesian fishing vessel with four people on board or a large vessel with a lot of people on board.

Senator LUDWIG—In terms of the nature of the power itself, does the Australian Federal Police have a view about whether the Australian Customs Service should be able to exercise this power? Just to give you some background, the reason I ask that is that in many instances the Australian Federal Police has appeared before this committee and indicated its view about the use of search warrants, the comparison with the Criminal Code and the usual circumstances that might surround it.

The Australian Federal Police, from my understanding, are always concerned about the use of force in searches of any nature, and usually—these are my words—that falls squarely within the preserve of the Australian Federal Police or other police bodies, especially in searches of the type and nature that they might be called upon to do. So do the Australian Federal Police have a view about this extension that the Customs Service is seeking?

Mr Whowell—The Australian Federal Police were consulted in the development of this power. First, to deal with your general points about the use of force, if I may—yes, I agree; your assessment of our view about the use of force is correct. I think, as we have said before, it is about people being appropriately trained and appropriately certified and those sorts of issues. My personal understanding of the way that Customs go about their business with training is that they meet those requirements. I have not turned my mind to this particular set of powers, on that particular issue, but in their use of force in similar contexts it would be the same. When we looked at this power, when it was brought to us at the proposal stage, it seemed appropriate to us as something that was needed by Customs to maintain their role in border security, which is the sort of context that we are talking about. I know that you are teasing out the more extreme potential cases where the power might be used, but that would be a matter for Customs to judge. But, in summary, the AFP did not have any concerns about this power on a use-of-force ground.

Senator TROOD—Are the search powers about the safety of officers; is that largely the case? Could you just outline for the committee what particular operational circumstances have occurred which would justify or require that sort of power?

Mr Hurrell—There have been a couple of cases, which we have put in our submission; there have been a number. The most recent one was where we boarded a vessel: initially, the crew appeared to be complying with our request, then one of them produced a weapon, which was a large blade, from a hiding place on the vessel, and threatened our officers with it. In those particular circumstances, we chose to make a tactical withdrawal rather than confront the crew, until we could settle them down. I guess that also goes to the use-of-force issue. We operate the same rule about the use of force as all Australian policing agencies do—that is, the use of least force to contain a situation. So in that situation we withdrew. There was another occasion where, again, evidence was destroyed; so that was a secondary issue. If we had not been able to retrieve the GPS, that would perhaps have impacted upon our ability to conduct the proper investigation and prosecution.

There have been other situations where knives have been pulled—more often, bladed weapons. I have to say we have yet to come across circumstances where firearms have been produced to threaten officers on board, but there was at least one occasion in the last six months where a firearm was located on board, but it was not in a loaded state and was not being used to threaten officers. That alerted us to the fact that this was becoming more of an issue. We have had a number of situations where, indeed, we have not been able to get on board the vessel because the opposition to our attempting to board has been so strong that, again, in the interests of officer safety as well as the safety of the people on the vessel we have been forced to back off and perhaps try again a little later. The Royal Australian Navy have had similar situations when they have boarded vessels, particularly foreign fishing vessels.

Senator TROOD—So you are now proposing that you will proceed to boarding where you are allowed onto a vessel—and then what? Would you, as a matter of routine, undertake a search so that you can satisfy yourself that officers are not likely to be under threat from some kind of weapon?

Mr Hurrell—That is correct. Immediately upon boarding—either with the approval of the person in charge of the vessel or as a forced boarding, which has limitations—we need to make sure that the situation is secure for a proper search, the collection of evidence and the interviewing of persons on the vessel. It is in that initial, difficult phase of getting aboard, sometimes in high seas, that we need to quickly assure ourselves that officer safety is assured by securing any possible weapons. The secondary thing is, as I said, the evidentiary requirements that something does not get thrown over the side of the vessel and other things of that nature.

Senator TROOD—You do not expect these powers to help you in getting on board, do you?

Mr Hurrell—No. That is another issue.

Senator TROOD—If you are precluded from that course then these powers are not going to help you.

Mr Hurrell—At the moment, if the opposition is such that we make the assessment—and it is the assessment of the commanding officer—that we would be taking an unnecessary level of risk, we would back off. The government has indicated that it wishes us to look at those circumstances and to consider how we might have a regime of training—it is not legislative thing; it is an officer safety issue and a training issue—and how far we are prepared to go in putting that at the higher end of the risk level.

Senator LUDWIG—Just to make sure that the record is clear on this: after you have explained to the crew the use of the power under this bill, which facilitates the ability to do a search, at what point is it dictated by operational requirements if a person resists?

Mr Hurrell—Once we are on board?

Senator LUDWIG—Yes. The example which I suspect highlights the area you are talking about is that of illegal fishing vessels. You have boarded the vessel and you want to exercise this power under the bill.

Mr Hurrell—In the circumstance that I outlined where a weapon was produced and we withdrew, there is an argument that we could have pushed that to the point where, if clearly the crew member was not going to place the weapon down when requested to do so, despite interaction, we could then proceed through the various levels of dealing with that person, if that person can be isolated from the rest of the group. There are a whole lot of tactical operational decisions that people have to make.

In this circumstance, it was a smaller vessel. There were only two officers on board and I think the crew numbered four or five. So a tactical withdrawal seemed the most sensible course of action because there were more people in the crew than we had to deal with them. In considering the use of force, the officers are trained to proceed through a series of options from, as I said, the point of least force through to a point of self-protection. Officers are

equipped with batons and capsicum spray, but their training is such that an attempt to contain is always done by firstly trying to talk the person around, secondly by dealing with them in an open-handed situation and then by proceeding through the various levels. It really depends on the reaction of the individual that you are dealing with. In the circumstances outlined, the legislation that is currently before the committee does not provide the officers with any additional powers to subdue the situation.

Senator LUDWIG—I thought it was helpful to make it plain on the record that there was not an additional power; it was just what could occur as a corollary to the use of the power. It seems that other measures take up a significant part of the bill. But in dealing with some of the issues that the CBFCA raised, I note that in your submission you have attached an appendix which outlines your response. In terms of the consultative process, though, I do not see an answer to that in the table. The CBFCA raised the issue—I can go to the provision but I am sure you can recollect it—that they were not consulted in respect of particular provisions.

Ms Nyakuengama—It was on the broker licensing change.

Senator LUDWIG—Yes.

CHAIR—They asked to be consulted and I think Customs indicated that they would be consulted.

Senator LUDWIG—They indicated that they were not consulted.

CHAIR—Yes, they were not.

Senator LUDWIG—I am looking for the answer in attachment A. The heading is, ‘Customs response to submissions from Customs Brokers and Forwarders Council of Australia Inc’. I do not see the answer to the consultative question. I see an answer to a definition of ‘owner’. I see an answer to the question of the period for the recovery of duty. I see ‘identify the employer of a part-time customs broker or a locum broker’. I do not see an answer to: why didn’t you consult?

Ms Nyakuengama—I was not responsible for this policy when the amendments were developed but I am now. I am advised that the correspondence that the CBFCA refers to left an open invitation to the CBFCA to come back to Customs with concerns, and that never happened.

CHAIR—Are they mind readers? How were they supposed to know the detail of what was being developed?

Ms Nyakuengama—If you look at the nature of the amendment, all it does is repeal two paragraphs and three subsections of the act in relation to individual nominee customs brokers. It removes the requirement that they not work for another customs broker and that they only be allowed to work at one place. And those requirements were what restricted the locum and freelance practices that already exist. So it was really a case of removing a current—

Senator LUDWIG—I understand what you did. The question remains: why did you not consult?

CHAIR—As their submission says:

Suffice to say that the first the CBFCA was aware of any further activity in relation to the proposed amendments was the tabling of the Bill.

Senator LUDWIG—The reason I raise this issue—and I expect it is the reason the chair raises it—is that it seems to be par for the course for a number of organisations, including yours, not to consult. When you change legislation you do not go back to the community which is going to have to administer it or whom it affects. You simply do not consult until they see the bill. And time and time again we have a hearing and we get this refrain in submissions that they were not consulted and that the first they heard about it was when the bill hit the deck. And in looking at your attachment A we can see that you have answered some of the issues that the CBFCA have raised, but you did not answer the primary one, which, had you done so, may not have required the CBFCA to put a submission in and soak up the time of this committee and cause me to ask you why you did not consult. Had you consulted some of these issues at first blush they may have been dealt with. It is not my role—and the committee might have a similar view—to be the consultative process. That is not the role of this committee. The role of this committee is to have a look at the legislation to see—

Ms Nyakuengama—I realise that, Senator. The CBFCA and other interested parties had exposure drafts of the provisions of the bill in relation to duty recovery, and their comments were taken into account. We made some amendments as a result of those comments.

Senator LUDWIG—I congratulate you on doing that.

Ms Nyakuengama—In relation to that provision in particular, I expect it was considered that it put in place a request of the CBFCA as a result of continuing representations over many years. It was minor and, as I said, it was not my responsibility at the time.

Senator LUDWIG—They did raise particularly good points.

Ms Nyakuengama—I know that the CEO of Customs has given an undertaking to industry stakeholders that, as a general rule, in the future Customs will seek approval to issue to affected parties exposure drafts of proposed legislation. That will always be subject to, for example, the nature of some of the powers of the enforcement side.

Senator LUDWIG—Where possible.

Ms Nyakuengama—You would not be wanting to let people know where holes in powers are.

Senator LUDWIG—I think there is always a general caveat, depending on the nature of the legislation, where that is possible. But in this instance no attempt was made. They point out that they have been left in a difficult position. I draw your attention particularly to the second last page of their submission, relating to employment arrangements for customs brokers:

The CBFCA notes from a regulatory point of view that the implications of the amendments would be perceived as being negligible.

They accept that, but they go on to point out that there are a range of employment related issues that will be affected by this bill. There will be confidentiality provisions where they might have a customs broker already engaged and will have to seek to vary the terms of the

contract to include a confidentiality agreement because the broker will then seek to do other work for other brokers. In a business sense that would be a prudent thing to do, but it then does require a variation to the employment contract—it may even ultimately alter the primary contract to such an extent that a new contract is required. There are legal implications whereby each customs broker may have to examine how they structure their business. They rely on their digital certificates by broker; they would have to consider how they ensure that the infringement notices scheme will work and how their insurance requirements will be met. That cannot be done overnight, and input into that process would have been helpful, I suspect.

Ms Nyakuengama—These amendments take account of the business and employment practices that are already in place in the broker industry. In practice, Customs has facilitated freelance brokers in the past by manually changing their identification with the respective licensed corporate brokerages involved. There is a manual changeover each time they move around. This has been an inconvenience for both Customs and the brokers concerned. These amendments will reduce that inconvenience by allowing locum or freelance brokers to be identified with several licensed corporate brokerages at the same time on our records. In fact, they have been doing that anyway—so that is a risk that the brokers have taken on themselves in their employment and insurance arrangements. Since these arrangements have been in place for some time, the amendments really should not raise any new issues around contracts of employment or confidentiality of information. We have essentially put in place a change in the registration arrangement that reflects what is already happening.

The CBFCA also raised a concern about how records of compliance will be determined where a mistake was made by a locum or freelance customs broker while employed part time or in a locum capacity with another licensed corporate customs brokerage. Customs is able to identify on an import declaration both the identity of an individual broker by their nominee licence number, which is a field on a customs declaration, and the corporate customs brokerage that they are reporting on behalf of by the identity on the digital certificate that is attached to that communication. So we are able to identify both the individual who prepares the declaration and the corporate brokerage from which it has originated. All those circumstances around the preparation of the communication are taken into account in determining who would be most culpable or who may be liable for any offence relating to false statements under the Customs Act. The Customs Act has provisions to make both the maker and the causer of a false statement to be held liable, and flexibility has been built in there to take into account these types of arrangements. So I regret the fact that the consultation did not take place on this occasion. It was considered that the amendments put in place a request of the brokers, and the types of issues that they have raised are not new; they are already in place.

Senator LUDWIG—So ultimately you say that it will work to the advantage of brokers more generally?

Ms Nyakuengama—Yes.

CHAIR—At the same time, it seems strange to have omitted that from the table that you provided to the committee, which was meant to be a response to their submission.

Senator LUDWIG—Had you put that in, it would not have necessitated another question.

CHAIR—It seems quite strange to address the other issues and leave that one out.

Senator LUDWIG—On my reading, it seems that the main point the CBFA raise about duty recovery is the four-year period. That seems to be the central complaint, amongst others. How often are audits undertaken?

Ms Nyakuengama—How often do people get audited?

Senator LUDWIG—Yes. Do you have statistics on that—the number of audits you might undertake and how often audits are taken? Are they confidential or could they be made available to the committee?

Ms Nyakuengama—We have statistics on how often audits are undertaken and how many are undertaken, yes. I would have to get back to you on how long it takes to get around to people. Certainly people would not be audited every year.

Senator LUDWIG—Their complaint seems to be that a four-year period for recovery is a long period in which an error can be made. The liability then attaches and so the amount is compounded because of the time. It might be an ongoing error or it might be a one-off error. If it is an ongoing error, it can compound; if it is a one-off error then the records are four years old.

Ms Nyakuengama—These amendments actually bring the period in to four years, not push it out to four years.

Senator LUDWIG—I accept that. I think their argument is that they would like it brought in a bit further. You should argue your case strongly, which is what I am offering the opportunity to do.

Ms Nyakuengama—The four years in here are to formalise our current policy and procedures, which are to put in an administrative four-year limit on duty recovery when it is not a Customs error that results in the shortfall of customs duty. These amendments are in response to a High Court decision back in 2001 in the Malika case.

Senator LUDWIG—I saw that submission.

Ms Nyakuengama—We have shifted the distinction between Customs and non-Customs error, which has given us a one-year time limit versus no time limit after the Malika decision. We have taken away any distinction between a Customs error and other causes, other than fraud, and we have limited everything except fraud to four years. That is consistent with the arrangements that apply for GST under the Taxation Administration Act. There are four years available for refunds as well now, so essentially they have four years to recover their own errors as well.

Senator LUDWIG—There was a submission by the Queensland Council for Civil Liberties in which they said the bill contains—

CHAIR—The officers have not seen it—

Ms Nyakuengama—It was not on the website this morning.

CHAIR—but I can give them a copy.

Senator LUDWIG—They draw two issues. One is that the use of the power does not seem to rely on a reasonable belief or a reasonable suspicion that a person might have something in their possession. In other words, the power does not require the officer to form any view; they can simply step on board, not detain the vessel and then seek to exercise the power of a search. Is that right? Is that a greater power than, say, the Australian Federal Police would have?

Mr Whowell—I understand that we would have access to this power, if we found ourselves in that situation undertaking joint operations with Customs officers, but it would be coming forth on the basis of their normal role in border security and not ours.

Senator LUDWIG—But, in the general sense, it is a power that the Australian Federal Police does not currently have, does it?

Mr Whowell—In the general sense, no. But my understanding is that it would be like the other powers we have available to us under a range of other acts, including the Customs Act; we are authorised under those acts to exercise those powers.

Mr Hurrell—And Defence members would have the same powers under the Customs Act as we have under that act.

Senator LUDWIG—Who else would be able to access that power, apart from the Australian Federal Police and Defence?

Mr Hurrell—Yes, it would be AFP and Defence members, where a boarding has been made under that section of the Customs Act.

Senator LUDWIG—Does the Ombudsman oversight the use of that power?

Mr Hurrell—As I understand it, the Ombudsman certainly would have the ability to oversight it, if a complaint were made. There is no restriction on that.

Senator LUDWIG—But it is not prescribed in here. The bill we dealt with earlier today regarding national investigative powers and witness protection included extensive provisions for an Ombudsman's oversight of the records of the use of various powers that the AFP and the A-G were seeking. This does not have that, does it?

Mr Hurrell—Not specifically, no.

Senator LUDWIG—Why not? Don't you need oversight of the use of your power?

Mr Hurrell—My understanding is that the oversight is there; I am not sure that it has to be specifically mentioned.

Senator LUDWIG—What oversight is there then by the Ombudsman?

Mr Hurrell—The Ombudsman has the right to inquire into—

Senator LUDWIG—It is a more general power.

Mr Hurrell—A general power, yes, as the Ombudsman uses now.

Senator LUDWIG—You say that is sufficient.

Mr Hurrell—I believe it is, yes.

Senator LUDWIG—When the Australian Commission for Law Enforcement Integrity gets up and running, the Australian Customs Service will not be responsible to it; therefore, if these powers are misused or involve corruption, the Australian Commission for Law Enforcement Integrity could not investigate their use by Customs, could it?

Mr Hurrell—I am sorry, I cannot answer that question; I do not know.

Senator LUDWIG—Can you find out?

Mr Hurrell—Certainly.

Senator LUDWIG—But it would apply if the AFP used the power.

Mr Whowell—Yes, I understand that the normal situation with the Ombudsman would apply in this case, as would be the case with our search warrants. But I guess, in a very hypothetical sense, if there were an issue where this power was exercised by an AFP member and it fell within the competence of ACLEI, the AFP would be covered.

Senator LUDWIG—In other words—we will not speak hypothetically—in a general sense, imagining circumstances where corruption might be alleged, if the power were used by the Australian Federal Police, the Australian Commission of Law Enforcement Integrity could investigate the circumstances of its use. They could not investigate the Australian Customs Service—

Mr Whowell—That is my understanding of the way it is viewed.

Senator LUDWIG—even if it were a joint operation.

Mr Whowell—That would be correct.

Senator LUDWIG—Does that seem reasonable to the Australian Federal Police in circumstances where there is an allegation? Let us say there was an allegation of theft, that someone exercising this power stole something of value or it was alleged that something of value went missing, or there was an allegation of corruption. The Australian commission protects the Australian Federal Police officers, so in that sense it ensures that there is a complaint process, the Australian commission can investigate it, find that there was no corruption and clear the Australian Federal Police of that allegation. It is a safeguard for the Australian Federal Police. When the committee examined that piece of legislation we welcomed it because it provides a protection for the Australian Federal Police. In these circumstances—if it was a joint operation—it does not quite clear the Australian Federal Police, does it? The allegation, of course, cannot be cleared for the Australian Customs Service, but it is still a joint operation so you can get to a position where there is finger pointing going on.

Mr Whowell—I am getting out of the area of my competence, I am afraid.

Senator LUDWIG—Maybe you could take it on notice.

Mr Whowell—I think the commissioner made comments about the jurisdiction of ACLEI when the committee looked at that bill. I would not have anything to add at this stage.

CHAIR—I think we were all there, Mr Whowell.

Senator LUDWIG—You might want to take it on notice. I want to understand the position of the Australian Federal Police in circumstances of joint operations where that power is exercised. The Australian Federal Police are then subject to ACLEI—I will use the acronym—and the Australian Customs Service is not. It seems that in those circumstances the Australian Commission for Law Enforcement Integrity could examine the role of the Australian Federal Police but not that of the Australian Customs Service, and that may then lead to an unhappy result whereby you cannot actually determine what happened or, alternatively, where you cannot clear all of those involved in the joint operation.

CHAIR—Do not forget, Senator Ludwig, there was a power to expand by regulation the purview of ACLEI, which the committee did not support either.

Mr Whowell—I will take that on notice.

CHAIR—Thank you for appearing this afternoon. There are a number of issues that have been taken on notice, and the committee will probably place a few more questions on notice, mostly for the ACS. I will check that, and if they are for the AFP as well, we will be in touch on those matters. The committee has a reporting date of 8 February. We currently have a reasonably full slate in terms of inquiries so we would appreciate the organisations' assistance with responses to those questions.

Committee adjourned at 3.02 pm