

## Questions on Notice to the AUSTRALIAN CUSTOMS SERVICE

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

#### *On the augmented search and seizure powers*

*Question 1: Senator Ludwig*

What consultation has taken place, and with what bodies, over the search and seizure powers proposed in the Bill?

#### **Answer**

There was considerable consultation with Defence during the development of the legislation as the Navy exercise these powers when boarding vessels under the Customs Act. The Attorney General's Department Office of International Law and Criminal Justice Divisions were also consulted extensively during the development of the legislation.

The legislation proposal was also discussed at the Maritime Legislation Working Group for the Joint Agencies Maritime Advisory Group. Agencies that attended those meetings were:

Department of Defence  
Australian Federal Police  
Australian Maritime Safety Authority  
Department of Environment and Heritage  
Department of Industry, Tourism and Resources  
Department of Transport and Regional Services  
Attorney Generals Department  
Australian Government Solicitor  
Department of Immigration and Multicultural Affairs  
Australian Quarantine and Inspection Service  
Department of Foreign Affairs and Trade  
Department of Agriculture, Forestry and Fisheries

*Question 2: Senator Ludwig*

In what circumstances are search and seizure type powers usually used by Customs Officers?

#### **Answer**

Search and seizure type powers are available to most areas of Customs and are used in day-to-day application in the passenger environment, enforcement operations, air and sea cargo examination and postal facilities. The investigations of more serious offences can involve the use of powers requiring search and/or seizure warrants.

In the time available to answer the questions, it is not possible to provide a more comprehensive answer to the Senator's question however, should it be required, a

table listing all the search and seizure provisions and the circumstances in which they are applied could be developed.

The amendments in this Bill are to powers available to officers in the unique circumstances that occur in the offshore environment after making a request to board a ship under section 184A or to land for boarding an aircraft under section 184D of the Customs Act. This usually occurs where the commander of a Commonwealth ship or aircraft has formed a view that there is a suspected contravention of an offence under the Customs Act, Division 307 of the Criminal Code or another Act.

*Question 3: Senator Ludwig*

Of the total number of boardings of aircraft and boats by Customs officials in a given year, what proportion involves the exercise of search and seizure powers?

**Answer**

The exercise of the current powers generally occurs where a request to board a ship under section 184A or to land for boarding an aircraft under section 184D of the Customs Act has been made after the commander of a Commonwealth ship or aircraft had formed a view that an offence has been committed or is being attempted. Therefore all boardings would normally involve the exercise of search powers. Seizure powers are then exercised if evidential material relating to an offence is found during a search. Seizure powers have limited application outside the Territorial Sea.

*Question 4: Senator Ludwig*

Have there been any complaints about the use by Customs officials of the existing powers to search, seize and detain? If so, how many? How many complaints have been upheld and on what basis or bases?

**Answer**

In the offshore environment there have been no complaints to Customs regarding search provisions. In relation to the broader application of search, seizure and detention powers by Customs, it is not possible to provide an answer in the time available.

*Question 5: Senator Ludwig*

What processes or systems are in place for the oversight of the existing search and seizure powers of Customs officers? How will these be utilised and/or augmented in response to the proposed new powers?

**Answer**

Australian Customs Vessels conduct programmed patrols to perform specific client taskings based on identified threats. Investigative boardings are conducted following authorisation from the central coordination unit.

The commander of the Commonwealth vessel is then responsible for determining the appropriate exercise of any powers available to them to conduct the boarding. They are provided with extensive training to assist them in making judgements based on the circumstances unique to each boarding.

There is then a central review of activity undertaken and information obtained by the boarding party to ensure correct and lawful procedure. This is achieved by requiring Commanders of Australian Customs Vessels to make a comprehensive report after every boarding. The report covers a full description of the vessel and the activities undertaken by the boarding party. The commander makes recommendations based on the evidence located during the search and this is considered by the appropriate agencies before a decision is made to apprehend the vessel.

*Question 6: Senator Ludwig*

Presumably, the additional powers would require Customs officers to be trained in their proper exercise—has the ACS determined what type and level of extra training would be required? Could you briefly explain to the Committee what that extra training might involve?

**Answer**

The amendments expand the circumstances in which the existing search powers in section 185AA may be exercised. Customs officers are currently provided with comprehensive training on search powers including the powers under section 185AA.

The additional training required will be minor in nature and will be added to the current comprehensive search training. It will cover the amended circumstances in which the powers can be exercised. Customs officers will be briefed and trained as required on the amendments to 185AA. This will be linked to ongoing re-certification for all officers. Amendments will be made to induction training for all National Marine Unit and Maritime Patrol and Response Unit officers.

*Question 7: Senator Ludwig*

What processes or systems are in place to monitor and review the exercise and ongoing necessity and adequacy of the existing and new coercive powers?

**Answer**

Commanders are required to report after every boarding or attempted boarding. Information in these reports is reviewed and used to determine the adequacy of the legislation for dealing with new and emerging circumstances encountered in the offshore environment. The amendments in this Bill are as a direct result of the analysis of these reports.

In addition, post operation reports, also completed by the Commander, provide recommendations which contribute to any review of the ongoing necessity and adequacy of the existing powers.

**On the updated duty recovery processes**

*Question 8: Senator Ludwig*

What consultation has taken place, and with what parties, over the proposed changes to duty recovery processes?

**Answer**

Customs has consulted with several parties on the proposed amendments to the duty recovery and payment under protest provisions in the *Customs Act 1901* (Customs Act).

The table below sets out details of consultation with these parties.

| <b>Date</b>      | <b>Party Consulted</b>                                   | <b>Details of consultation</b>   |
|------------------|--|--|
| 9 March 2005     | Law Council of Australia (LCA)                           | <p>The LCA was notified of the intention for Customs to develop legislative amendments to clarify the time available for Customs to recover customs duty to provide certainty and avoid unnecessary complexity.</p> <p>The LCA was also notified that the model contained in section 35 of the <i>Taxation Administration Act 1953</i> would form the basis of the amendments.</p> |
| 27 February 2006 | LCA  | <p>The LCA were provided with a detailed outline of the proposed amendments to the duty recovery and payment under protest provisions in the Customs Act and were invited to comment on those details.</p>   |
| 6 March 2006     | Department of Industry, Tourism and Resources            | <p>The Department of Industry, Tourism and Resources were invited to comment on the proposed amendments to allow the CEO to apply an amount of drawback, refund or rebate in respect of goods against an amount of customs duty in respect of the same goods.</p>  |
| 24 October 2006  | Customs Brokers and Forwarders Council of Australia Inc. | <p>The identified parties were invited to comment on a confidential exposure draft of proposed legislative amendments to the duty recovery and</p>   |

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|  | <p>Australian Chamber of Commerce and Industry</p> <p>International Air Couriers Association of Australia</p> <p>Conference of Asia Pacific Express Couriers</p> <p>LCA</p> <p>Australian Exporters and Importers Association</p> <p>Department of the Treasury</p> <p>Department of Industry, Tourism and Resources</p> | <p>payment under protest provisions of the Customs Act.</p> |
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*Question 9: Senator Ludwig*

On the issue of determining the party with intent in cases of fraud or evasion, the submission of the CBFCA claims that the Bill needs clarifying, possibly through a policy statement. Do you have a comment on this proposal?

**Answer**

Under the proposed amendments, the unlimited timeframe for the recovery of duty applies if the debt arose as a result of fraud or evasion. The CBFCA’s concerns appear to be a consequence of the issue raised in the preceding paragraph of Mr Morris’s submission about service providers being included in the definition of “owner” and therefore potentially being subject to a demand for duty when the fraud is committed by the client importer.

The operation of the provision needs to be broad enough to recognise all the parties that might be liable to pay duty under the different types of commercial arrangements as recognised by international commercial law, and that fraud or evasion might be committed by any one or more of those parties. If the person who commits the fraud is also the person with the legal obligation to pay the duty, then the demand would be issued on that person.

If a person is issued a demand and disputes their liability to pay on grounds that either:

- (a) the debt is not a result of fraud or evasion; or
- (b) they are not the ‘owner’ with the liability to pay;

it would always be open to the person on whom the demand had been issued to not pay the demand and, if proceedings were commenced in court to recover the debt, argue the absence of fraud or evasion.

Subject to the passage of the amendments by the Parliament, in accordance with usual practice upon the commencement of new or amended legislation, an Australian Customs Notice will be issued outlining the background to the legislative changes and the changes to practice and procedure resulting from the changes.

*Question 10: Senator Ludwig*

The proposed introduction of a four-year time limit for all duty recovery appears to be revenue neutral, insofar as it purports to merely formalise Customs' current policy and practice. Will the effect of the changes be revenue neutral? If not, what is the expected effect on revenue of the changes?

**Answer**

Yes.

**On the updated broker licensing arrangements**

*Question 11: Senator Ludwig*

What consultation has there been between the ACS, A-G's and other interested parties on the licensing arrangements proposed by the Bill?

**Answer**

The proposed change will simplify the current manual arrangements to allow part-time customs brokers to more easily change employment between agencies. This will benefit both brokers and Customs. The change will remove the existing cumbersome arrangements and has been requested by industry for several years.

Consultations held by Customs over the past three years on the proposed change include:

Customs Brokers and Forwarders Council of Australia Inc

- meeting in 2004 and correspondence in 2006.

Integrated Cargo System User representative

- meeting in 2004.

National Broker Licensing Advisory Committee

- meeting in 2004 and advice at hearings in 2006.

Customs National Consultative Committee

- commitments made in 2005 by Customs representatives to simplify employment arrangements for part-time brokers.

Attorney General's Department

- drafting of proposed legislative amendments in 2006.

Productivity Commission

- exemption obtained from Regulatory Impact Statement requirement in 2006 because change was of a machinery nature and did not substantially alter existing arrangements.

**On the changes enabling declarations to be made under the SmartGate system**

*Question 12: Senator Ludwig*

What consultation has taken place, and with what parties, over the proposed changes to the SmartGate declarations processes?

**Answer**

Customs consulted with the Criminal Justice Division at the Attorney Generals Department and the Department of Immigration and Multicultural Affairs. No relevant issues were identified.

*Question 13: Senator Ludwig*

What is the reason for the changes? What are the advantages of the new system?

**Answer**

The proposed amendment will ensure that any false or misleading information provided by a traveller using the automated border processing system is covered by the existing offence provisions within the *Customs Act 1901*. This will mirror the current provisions for written declarations made to a Customs Officer via the Incoming Passenger Card (arrivals declaration card).

*Question 14: Senator Ludwig*

The changes enable eligible passengers and crew under the SmartGate system to clear themselves and their personal and household effects by making electronic declarations, and ensure that penalties will apply for the making of false declarations. With airport security being a major issue these days, how vulnerable is the SmartGate system to fraud or abuse? Is the proposed system more secure than current processes?

**Answer**

In the context of declarations made under the *Customs Act 1901*, the SmartGate declaration arrangement is no more or less vulnerable or secure than the current paper based declaration arrangement.

The proposed amendment ensures that anyone trying to make false or misleading statement/s via the system will commit the same offence as a person making a false or misleading statement directly to a Customs Officer.



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#### *On the updated duty recovery processes*

*Question 1: Senator Ludwig, p. 7 of transcript*

**Senator LUDWIG**—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...

#### **Answer**

The Compliance Division of the Australian Customs Service undertakes a range of import audit activity as part of its overall compliance approach.

Post-transaction audit activity is divided into benchmark audits, focused audits and desktop audits. In 2005-06 there were total of 370 audits performed.

Of these, 109 were benchmark audits. These audits test a statistically valid sample of the importing community to provide an indication of the overall level of compliance with Customs-related law. The sample is designed to ensure that companies are not subject to a benchmark audit more than once every three years. Companies subject to other audit types are also excluded from benchmark sampling for the next three years.

There were 167 focused audits and 94 desktop audits in 2005-06. These audits are conducted in response to identified risks. As a consequence there is no set time frame which dictates how often audits should occur and it is not possible to provide a blanket assurance as to the frequency of audit activity across the importing community. As audits are based on risk factors, some sectors of the importing community may be subject to a higher level of activity than others. Companies with a poor record of compliance uncovered by previous audits may also be subject to further compliance activity, undertaken in conjunction with education visits.

Importers range from one-off small imports to very large companies with major import-based businesses. The design of the Benchmark sample frame allows Customs to filter out one-off or very small importers or exporters. In 2005-06 this resulted in a list of 11,805 clients, representing importers, exporters and Customs brokers that could potentially be subject to Customs import audit activity. Of these, 370 were audited.

**On the augmented search and seizure powers**

***Question 2: Senator Ludwig, p. 11-12 of transcript***

Legislation with similar search and seizure provisions often requires the oversight of the Commonwealth Ombudsman. Why is that not so in this case? To what extent will the Ombudsman be able to oversee the use of the search and seizure powers under its general investigative powers? Will that be sufficient?

**Answer**

The Commonwealth Ombudsman has the ability to oversight the exercise of the current powers and the proposed amendments do not alter that.

***Question 3: Senator Ludwig, p. 12 of transcript***

In cases of corrupt use or misuse of the search and seizure powers, will the Australian Commission for Law Enforcement Integrity (ACLEI) be able to investigate the Australian Customs Service?

**Answer**

Customs is not subject to ACLEI legislation however, the provisions would be applied to special members who are sworn AFP officers.

***Question 4: Senator Ludwig, p. 13-14 of transcript***

In the case of joint operations between the ACS and the AFP, the latter would clearly be subject to ACLEI. If it is the case that the ACS would not be, does that not open the way for investigations into the corrupt use or misuse of Customs' search and seizure powers to remain unresolved, and for the intent of the ACLEI Act to be undermined?

**Answer**

Where a joint operation resulted in AFP being investigated and Customs was involved Customs would co-operate with the inquiry.

Allegations of misbehaviour of custom officers are subject to the *Ombudsman Act 1976* and the *Public Service Act 1999*, which includes the APS Code of Conduct. Criminal misbehaviour by any customs officer is also embraced by the *Crimes Act 1914* and subject to investigation by the AFP.