



Australian Government
Australian Customs Service

**SUPPLEMENTARY SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO
THE *CUSTOMS LEGISLATION (BORDER COMPLIANCE AND OTHER
MEASURES) BILL 2006***

APRIL 2006

Introduction

1. This supplementary submission is made by the Australian Customs Service in relation to the referral by the Selection of Bills Committee of the *Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006* to the Legal and Constitutional Legislation Committee.
2. The supplementary submission provides information in response to the submission by the Law Council of Australia relating to the following provisions of the *Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006*:
 - Restrictions on access of those holding security identification card to places prescribed under section 234AA of the *Customs Act 1901* (Customs Act); and
 - Corrections to the provisions implementing the Australia - United States Free Trade Agreement (AUSFTA).

Restrictions on access to places prescribed under section 234AA of the Customs Act

3. The proposed amendment to section 234A of the *Customs Act 1901* (the Act) will allow a Customs officer to restrict the access of security identification card (Aviation Security Identification Card (ASIC) and Visitor Identification Card (VIC)) holders to section 234AA places, ships, aircrafts and wharves.
4. The responsibility for issuing ASICs rests with ASIC Issuing Authorities, primarily airport corporations and airlines. This creates difficulties for Customs because, in effect, the ASIC issuing authorities, and not Customs, are determining who has access to places at airports that are controlled by Customs. Furthermore, persons issued with ASICs often use their access privileges to enter the Customs controlled areas for purposes unrelated to their employment. For example, there have been cases involving retail employees using the Customs controlled areas as a shortcut; airline employees greeting or farewelling friends and family; and representatives of embassies meeting officials.
5. The amendment therefore aims to give Customs greater control over those people that access Customs controlled areas (defined in section 234AA of the Act). If a person does not have an ASIC, they must have the authority of a Collector to enter or be in such an area. If a person has been issued with an ASIC, they must not enter, or be in the area if they are subject to a written direction by the Collector not to enter or be in the area. Such a direction would be issued were an ASIC holder found to be abusing their access privileges, that is, accessing the area for the purposes of transporting goods without Customs knowledge.

6. The Law Council of Australia (LCA) made a number of claims both in its submission to the Inquiry, and during the public hearing of the Inquiry on 27 April 2006 regarding Customs proposed amendment to section 234A of the Act. These claims are addressed below.

Issuance of the written direction

6.1 The LCA stated that the CEO of Customs will issue the written direction. However, the written direction will actually be issued by the Collector of Customs as defined in the Act, that is, the officer on duty at the time of the incident.

6.2 The written direction is a “real-time” instrument to ensure the sterility of the 234AA area. It will be issued when the Customs officer cannot establish the bona fides of the party the subject of the direction, and when that party cannot show legitimate cause, that is, a reason linked to their employment) for their presence in the area.

Right of review of written direction

6.3 The LCA recommends an amendment to the proposal that would enable administrative review of the written direction.

6.4 It is not considered appropriate that the decision of a Collector to issue a direction be subject to merits review as this is a decision that is related to law enforcement, by ensuring the integrity of the border. The Attorney-General’s Department (AGD) was consulted in respect of this matter and supported this position.

Legitimate cause to be in a section 234AA place

6.5 The LCA maintains that there are certain groups of people who are entitled to be in the section 234AA area, including lawyers, doctors, union delegates and translators.

6.6 However, under the current provisions, the general position is that no individual or group is entitled to be in a section 234AA area, which is in fact a sterile area designated for the clearing of passengers, crew and their baggage. While there are exceptions to this general position, these exceptions generally only relate to people who need to be in the area for purposes related to their employment and who hold an ASIC, or the passengers and crew of ships and aircraft.

6.7 In circumstances where a passenger or crew member is in need of assistance that is not otherwise available from Customs staff – such as a doctor or translator – Customs requests the provision of such assistance and provides the person providing the assistance escorted access to the section 234AA area.

7. In addition to these general comments, Customs makes the following response to specific statements contained within the LCA's submission to the Inquiry.

7.1 LCA: *"The Committee is concerned that the proposed amendment may have the affect of restricting legitimate access to the Prescribed Places [234AA places] by way of (unfettered) direction of the CEO of Customs"*.

7.2 Legitimate access of people who access the area for reasons related to their employment will not generally be subject to a written direction not to enter the area. The amendment will affect only those people who abuse their access privileges.

7.3 A security identification card (ASIC) does not by itself designate the holder of the card as being entitled to be in the 234AA area. An ASIC merely indicates to Customs that the person holding the card has undergone a security clearance. The person will also have to be in the area for the purposes of his or her employment. Questioning of ASIC holders to determine the reason for their presence in the area may be necessary to ensure sterility of the environment.

7.4 LCA: *"Parties being questioned or otherwise restrained in Prescribed Places may require (legitimate) access to parties such as Union Delegates (in the case of persons handling baggage in the areas), lawyers representing persons subject to Customs inquiry or doctors (if persons subject to inquiry are subject to a medical condition or unwell) or translators"*.

7.5 There are other ways by which access can be granted to parties to access a section 234AA area.

7.6 If parties being questioned or restrained by Customs need access to a lawyer, doctor or translator, Customs requests the attendance of such a party. On attending, the party will be issued with a Visitor Identification Card (VIC) and will be escorted by a Customs officer to the party being questioned or held.

7.7 Access to parties by Union Delegates is addressed in the Government's new Workplace Relations legislation. It is not for other government legislation to determine how Union Delegates gain access to their members. Were a Union Delegate to require access to the restricted area, they would be issued with a VIC and escorted by their relevant Union Representative.

7.8 When Customs are questioning parties suspected of having committing an offence under the Customs Act, they have not been arrested, and therefore do not have the right of automatic access a lawyer. However, Customs is currently reviewing this policy in respect of parties involved in a record of interview.

7.9 LCA: *“There is potential that such parties may hold a security identification card (as a visitor identification card) and who may have a legitimate cause to enter the prescribed [area] may be excluded by the mere expedient of a direction by the CEO”.*

7.10 Parties holding a VIC must be escorted at all times while in security restricted areas. Where a person holding a VIC enters a restricted area without the knowledge or presence of their escort, the VIC holder is in breach their access privileges and could be subject to a written direction not to enter the area.

7.11 A VIC will only be issued to those parties that have a legitimate cause to be in the prescribed area. This determination as to legitimate cause is the responsibility of the Department of Transport and Regional Services, it is not a decision made by Customs.

7.12 LCA: *“The Committee believes that a person who is to be excluded from the Prescribed Plans [234AA area] should be entitled to prior notice and an opportunity to defend their right of access”.*

7.13 Due to the time-sensitive nature of the airport environment it is not practical for a person to be given prior notice of a written direction being issued.

7.14 The purpose of a written direction is that it has immediate effect. Before issuing a written direction a Customs officer will question the party to determine if they have a legitimate cause to be in the area, that is, if they are in the area for reasons related to their employment. If the Customs officer cannot establish the party’s bona fides, a direction may be issued.

7.15 The aviation environment faces a number of criminal and security threats. The proposed amendment to allow Customs to issue a written notice not to enter the area is aimed at ensuring the security-controlled area (234AA area) is both sterile and safe.

8. The LCA made a number of recommendations regarding amendment of the proposal:

8.1 *The CEO should identify reasons why a party may be excluded from the 234AA area* – The only reason why a party may be excluded is that they are in the restricted area for reasons unrelated to their employment.

8.2 *The CEO should notify a party prior to issuing the direction to allow for reasons and objections* –

- i. The Collector of Customs as defined in the Act, not the CEO, issues the written direction. The time-sensitive nature of the airport environment makes notification prior to the direction being issued unfeasible.

- ii. A written direction will only be issued once it is determined that the party has abused their access privileges.

8.3 *Customs should not be able to issue written directions in relation to persons with a legitimate reason to be on the premises, for example, union delegates, lawyers, doctors and translators –*

- i. As noted above these parties will be requested as needed by Customs and/or the party being questioned.
- ii. The party attending will be provided with a VIC and will be escorted at all times while in the security restricted area.

8.4 *A person subject of a written direction should be entitled to seek review of the direction –*

- i. It is not considered appropriate that the decision of a Collector to issue a direction be subject to merits review as this is a decision that is related to law enforcement. This view is supported by AGD.

Corrections to the provisions implementing the AUSFTA

Voluntary disclosure and Article 5.13.4 of the AUSFTA

- 9. The LCA has submitted that the Bill should be amended so that voluntary disclosure of incorrect claims of preference under the AUSFTA is governed by a voluntary disclosure regime which is more consistent with article 5.13.4 of the AUSFTA.

- 10. Article 5.13.4 of the AUSFTA states:

The importing Party shall not subject an importer to any penalty for making an invalid claim for preferential treatment if the importer:

(a) on becoming aware that the claim is not valid, promptly and voluntarily corrects the claim and pays any duty owing; and

(b) in any event, corrects the claim and pays any duty owing within a period determined by the Party, which shall be at least one year from the submission of the invalid claim.

- 11. Customs acknowledges the fact that the voluntary disclosure exception in the above article is broader than the voluntary disclosure exception contained in subsection 243T(4) and (4A) and subsection 243U(4) and 243U(4A) of the Act. The article anticipates that a person who corrects a claim and pays any duty owing and within the determined period will not be liable for any penalty even if Customs advises the person that the claim is not valid (that is, the person has become aware the claim is not valid).

12. However, for the voluntary disclosure exception as provided by subsections 243T(4) and (4A) and subsections 243U(4) and 243U(4A) of the Act to apply, the person must voluntarily give written notice (an error notice) to an officer doing duty in relation to the matter to which the statement relates indicating that the statement is false or misleading in a material particular (or that the statement is false or misleading in a material particular due to the omission of a matter or thing). A disclosure is not considered 'voluntary' if it is given after:
- (a) An officer exercises a power under a Customs-related law to verify information in the statement; or
 - (b) An infringement notice is served for an offence against subsection 243T(1) or subsection 243U(1); or
 - (c) Proceedings are commenced against a person for an offence against subsection 243T(1) or 243U(1).

Furthermore, for the voluntary disclosure exception to apply, a notice of proposal to exercise monitoring powers must not have been given between the making of the statement and the person giving the error notice, and in the case of an offence against subsection 243T(1) the duty properly payable on the goods must be paid (or amount of refund or drawback properly payable must be repaid) before an infringement notice is served on the owner of the goods for the offence or proceedings are commenced against the owner of the goods for the offence.

13. Customs has instructed relevant officers that, despite the operation of the voluntary disclosure exceptions to offences under sections 243T and 243U of the Act, where an importer invalidly claims preferential treatment under the AUSFTA and on becoming aware that the claim is not valid, corrects and pays any duty owing, no penalty (including an infringement notice) should be issued for an offence against subsection 243T(1) or 243U(1) of the Act. To date, no person has been served with an infringement notice for an offence against subsection 243T(1) or 243U(1) of the Act in the circumstances where article 5.13.4 of the AUSFTA applies.
14. This instruction has recently been included in a revised draft of the Infringement Notice Scheme Guidelines. The inclusion of the instruction in the Infringement Notice Scheme Guidelines (once formally made) means that a decision maker must have regard to whether article 5.13.4 of the AUSFTA applies to the circumstances of the breach. The Infringement Notice Scheme Guidelines provide that if article 5.13.4 of the AUSFTA applies to the circumstances of the breach, an infringement notice should not be served.
15. The LCA has recently raised with Customs their concerns regarding prosecution for an offence against subsection 243T(1) or 243U(1) of the Act in circumstances where article 5.13.4 should apply.
16. Customs has advised the LCA that the appropriate parties will be consulted to determine whether legislation to implement article 5.13.4 is

necessary given that it would not be in the public interest to prosecute where the circumstances of article 5.13.4 of the AUSFTA would apply and consequently it would be against the CDPP Prosecution Policy to commence a prosecution. As part of this consultation, Customs will note that the United States of America has amended the relevant legislation to provide an exception to false or misleading information offences in line with article 5.13.4.

17. In regard to the LCA submission that there are further tensions as to the need to repay underpaid duty at the time of the voluntary disclosure, Customs does not consider that these tensions exist. The period referred to in paragraph (b) of the article serves to limit the period within which Customs is prevented from imposing a penalty. The period does not refer to a period beyond the making of the disclosure for the payment of the duty properly payable on the goods to be made.

Certificates of Origin and the Thailand – Australia Free Trade Agreement (TAFTA)

18. The LCA has submitted that the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006 should also be amended to make it clear that no person should be considered liable for an offence against subsection 243T(1) or 243U(1) of the Act (strict liability offences) for the incorrect (although innocent) use of Certificates of Origin to qualify for preferential treatment.
19. Customs does not consider that this specific provision is necessary given that the defence of mistake of fact (which applies to all strict liability offences) would adequately deal with this circumstance.