

CHAPTER 3

KEY ISSUES

3.1 The submissions and evidence received by the committee addressed a number of issues surrounding the Bill. Most submissions characterised the proposed search and seizure powers in Schedule 1 as rationalising and clarifying existing powers, and endorsed the amendments as necessary and appropriate. A number of submissions, however, identified problems with the justifications for, and scope of, the powers.

3.2 In keeping with the accepted approach to the grant of invasive powers to Commonwealth officers, the committee was concerned that the hearing provide the opportunity for a sound examination of the proposed powers against the established principles of consultation, justification, proportionality, and oversight and review.

3.3 A major issue surrounding the proposed changes to broker licensing arrangements in Schedule 2 was lack of consultation. The hearing also allowed for clarification of the intended operation of the relevant provisions in apportioning liability for mistakes or contraventions of the Customs Act.

Consultation

3.4 The committee supports the practice of extensive consultation between the agency sponsoring amending legislation and the parties administering or affected by its parent Act. In relation to the expanded search and seizure powers in Schedule 1, the Australian Customs Service (Customs) informed the committee that:

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.¹

3.5 Customs' submission explained that meetings of the Maritime Legislation Working Group for the Joint Agencies Maritime Advisory Group provided the opportunity for a range of agencies to contribute to the development of the Bill.² Mr Peter Whowell from the Australian Federal Police (AFP), confirmed to the committee that the AFP 'were consulted in the development of this power.'³

3.6 Similarly, in relation to the recovery of duty provisions in Schedule 3, Customs consulted with both government and industry stakeholders. The Law Council

1 Australian Customs Service, *Submission 2A*, p. 1.

2 *Submission 2A*, p. 1.

3 *Committee Hansard*, 22 January 2007, p. 7.

of Australia (LCA) acknowledged that its comments had been taken into account in the final form of the Bill.⁴

3.7 On the issue of consultation over the changes proposed in Schedule 2, the submission from the Customs Brokers & Forwarders Council of Australia (CBFCA) stated that:

As regards the issue of employment arrangements for licensed individual customs brokers, the CBFCA was not consulted in the development of Customs policy in relation to these arrangements.⁵

3.8 The CBFCA submission explained that, in August 2006, the CBFCA wrote to Customs to express its interest in contributing to the development of the provisions. Customs' response was that it would 'be happy to discuss' the matter with the CBFCA.⁶ Despite this correspondence, 'the first the CBFCA was aware of any further activity in relation to the proposed amendments was the tabling of the Bill'.⁷

3.9 A representative of Customs told the committee that the failure to consult with the CBFCA was due to the substance of the changes, which were considered uncontroversial because they sought only to 'take account of the business and employment practices that are already in place in the broker industry'.⁸

3.10 For example, the proposed changes would remove the need, as a freelance broker moved between corporate brokerages, to manually change their identification with a particular corporate brokerage. As the representative from Customs explained:

[Currently, 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.⁹

3.11 Nevertheless, the Customs representative assured the committee that Customs was committed to a process of inclusive consultation when developing legislation:

...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.¹⁰

4 *Submission 2A*, pp 5-6; Law Council of Australia, *Submission 6*, p. 3.

5 *Submission 1*, p. 1.

6 *Submission 1*, p. 3.

7 *Submission 1*, p. 3.

8 *Committee Hansard*, 22 January 2007, p. 9.

9 *Committee Hansard*, 22 January 2007, p. 9.

10 *Committee Hansard*, 22 January 2007, p. 9.

Schedule 1: Search and seizure powers

Justification

Safety of Customs officers

3.12 The major justification advanced for the proposed changes to search and seizure powers was that they are required to ensure the safety of Customs officers and preserve evidence.

3.13 Customs explained that, under the current section 185AA of the Customs Act, officers may not conduct personal searches until a ship or aircraft has been detained. The amendments would allow Customs officers, immediately upon boarding a ship under section 185 of the Customs Act, to conduct personal searches for, examine, take possession of and retain items that:

- may be a weapon;
- may be used to help a person escape detention; or
- may be evidence of an offence against the specified Acts.¹¹

3.14 A number of examples of such situations on ships were provided to the committee. Customs' submission explained that:

Recent escalations in the level of resistance encountered when boarding ships suspected of contraventions of the Customs Act or other prescribed Act, have threatened officer safety and created a situation where evidence of possible offences may be destroyed.¹²

3.15 An example cited in both the Customs submission and at the hearing involved an incident in which a crew member of a ship that was boarded, but not detained, produced a weapon and threatened Customs officers.¹³ In another example, a crucial piece of evidentiary material, a Global Positioning System device, was located on a crew member only after the ship was detained. This incident highlighted the opportunity for disposal of evidence from the time the ship was boarded until the decision was made to detain it.¹⁴

3.16 No examples of such situations on aircraft were provided to the committee. In evidence, a representative for Customs told the committee that, despite there having been no 'specific problems' with aircraft, it 'was sensible to expand the same provisions to aircraft.'¹⁵ The Customs submission stated that consistency between the

11 *Submission 2*, p. 2.

12 *Submission 2*, p. 2.

13 *Submission 2*, p. 2; *Committee Hansard*, 22 January 2007, p. 7.

14 *Submission 2*, p. 2; *Committee Hansard*, 22 January 2007, p. 7.

15 *Committee Hansard*, 22 January 2007, p. 5.

maritime and aviation environments reflects the 'importance of aviation security in combating crime and terrorism'.¹⁶

3.17 Submissions were largely supportive of the intent of the Bill to protect Customs officers. However, the Queensland Council for Civil Liberties (QCCL), although 'concerned about the safety of Customs officers', felt that the justification put forward for the expanded powers was not sufficient.¹⁷ The QCCL felt that the 'short remarks' in the EM did not amount to a detailed justification, as is required when an agency or department seeks a grant of powers that 'constitute a significant violation of an individual's personal liberty'.¹⁸

3.18 The QCCL further submitted that the stated justification of the safety of Customs officers did not encompass the inclusion in the Bill of the powers enabling Customs officers to search for and seize evidence:

If the legitimate purpose of this legislation is to provide protection for Customs officers, then it is the Council's submission that Section 185AA(7) ought to be removed. The existence of this provision expressly permitting the use of any evidence found in the course of the search raises questions about the real purpose for giving the powers.¹⁹

3.19 Similarly, the ACT Director of Public Prosecutions (ACT DPP) argued that the 'placing of [such] greatly enhanced powers in the hands of Customs officers...does not easily seem justifiable'.²⁰

3.20 The submission of the ACT DPP also expressed concern at the unconstrained operation of subsection 185AA(7), allowing seized evidence to be used in prosecuting offences. In failing to accommodate claims of legal professional privilege, the power went beyond its stated justification and unnecessarily threatened this important legal right and protection:

Proposed section 185AA(3) does not appear to permit legitimate claims of legal professional privilege...even though they may apply to documents.²¹

3.21 The ACT DPP noted that it would be fairly simple to accommodate claims of legal professional privilege:

It would not be difficult for documents in respect of which such claims are made to be placed in a secure container...only to be opened by consent or by order of a competent court. This would respect an important right over

16 *Submission 2*, p. 3.

17 *Submission 4*, p. 2.

18 *Submission 4*, p. 2.

19 *Submission 4*, p. 2.

20 *Submission 7*, p. 1.

21 *Submission 7*, p. 2.

which the proposed amendments clearly leave only arguably able to be protected and, indeed, possibly abrogated.²²

3.22 In responding to these issues, Customs stated that, in practice, use of the powers would be restricted to a particular range of environments and circumstances. It would be usual for the search and seizure powers to be exercised where there was an element of belief or suspicion that an offence had occurred:

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.²³

3.23 Customs' supplementary submission provided a more complete explanation of the need for the evidence-related powers:

It is generally not possible to determine whether a specific individual on that ship or aircraft has a weapon concealed on their person or has evidence of the suspected offence that caused the ship or aircraft to be boarded, without conducting the search...[S]afety of officers is under threat from any point upon a ship or aircraft being boarded until any crew that may have been involved in the suspected offence, have been searched and the possibility of concealed weapons has been eliminated.²⁴

3.24 In response to the ACT DPP's submission concerning the abrogation of legal professional privilege, Customs undertook to consider the procedure suggested in respect of documents the subject of such a claim:

Customs notes the concerns expressed in paragraph 3 regarding the rights of persons to claim legal professional privilege, or other privileges, in respect of documents. Procedures such as those suggested will be considered for inclusion in operating procedures.²⁵

Consistency with other grants of search and seizure powers

3.25 Customs' submission also justified the grant of the augmented search and seizure powers by reference to similar grants to Commonwealth officers under other Acts:

22 *Submission 7*, p. 2.

23 *Submission 2A*, p. 2.

24 *Submission 2C*, p. 1.

25 *Submission 2B*, p. 1.

These new powers mirror those that are available under the *Fisheries Management Act 1991*...²⁶

3.26 Although acknowledging that the proposed powers did not 'go as far' as, for example, allowing Customs officers to perform strip searches, the QCCL expressed a strong in-principle objection to using as the substantive justification for the grant of such powers the fact that they have been granted before:

...the fact that similar powers have been granted before is in our view no justification whatsoever for the granting of the powers. We question whether they were legitimately granted in other instances. This seems to be an example of the common bureaucratic strategy of justifying further erosion of civil liberties by reference to previous equally unjustifiable erosion of civil liberties.²⁷

Proportionality

3.27 The committee investigated at some length the potential circumstances in which the powers could be used on both ships and aircraft.

3.28 At the hearing, a representative for Customs explained that in practical terms the use of the powers would be limited by the circumstances in which they would be applied, because the powers were intended to assist Customs' actions outside the major or designated Australian ports and airports. Thus the 'focus' of the amendments was 'on the remote areas'.²⁸ The powers would be used when boarding ships or aircraft in cases of, for example, suspected people-smuggling or illegal fishing, or for the purposes of properly identifying a ship or aircraft. The representative characterised the essential change to the powers in the following way:

The main difference that we are seeking is the circumstances in which we can apply the power rather than the power itself.²⁹

3.29 However, as a matter of construction, the proposed provisions do not strictly limit the use of the powers to remote areas or a particular type of ship or aircraft. In respect of both ships and aircraft, the powers could conceivably be used on passenger ships and aircraft. On the question of whether or not this was appropriate, the Customs representative explained that it would only be in an 'unusual situation' that this would occur, and that it was appropriate that the powers be available if certain circumstances arose:

In all probability we would [use the ordinary search powers in designated areas]. 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

26 *Submission 2*, p. 3.

27 *Submission 4*, p. 2.

28 *Committee Hansard*, 22 January 2007, p. 3.

29 *Committee Hansard*, 22 January 2007, p. 3.

an Indonesian fishing vessel with four people on board or a large vessel with a lot of people on board.³⁰

3.30 Furthermore, Customs advised that the expanded search and seizure powers in proposed section 185AA would not apply in section 234AA places such as designated airports.³¹

3.31 Submissions from the QCCL and the ACT DPP argued that the scope of application of the proposed powers was too wide, because the circumstances in which they could be invoked did 'not require that there be any suspicion or belief that any offence is or may have been committed.'³² The QCCL submission argued that:

In effect, the legislation provides that simply being on board the ship or aircraft will be justification for a personal search.³³

3.32 In answer to these concerns, the Customs submission acknowledged that the proposed powers were broader than similar powers exercised under other Commonwealth legislation, but argued that the scope of the proposed powers was designed to reflect the unique operating environment of Customs officers:

It is recognised that the proposed personal search powers are wider in scope than other personal search powers under Commonwealth legislation. This is due to the remote locations in which offshore patrols are conducted and the unique circumstances facing officers when conducting personal searches in confined spaces.³⁴

3.33 Using aircraft as an example, Customs argued that the powers were appropriately pitched to their envisaged use at remote places to deal with potentially dangerous scenarios:

It is likely that the new powers will be exercised at a number of regional and remote airports where the level of security and screening may not be as extensive as that at the 11 designated airports. Indeed, it is likely that aircraft landing at these regional and remote airports will have arrived from a similarly small airport, where passengers may not have been subject to security screening. As such, it is important to ensure that officers are empowered to undertake searches to ensure their personal safety, and to take possession of any weapons or evidence discovered during that search.³⁵

30 *Committee Hansard*, 22 January 2003, p. 3.

31 *Committee Hansard*, 22 January 2003, pp. 3-4.

32 ACT Director of Public Prosecutions, *Submission 7*, p. 1.

33 *Submission 4*, p. 1.

34 *Submission 2*, p. 2.

35 *Submission 2*, p. 3.

3.34 Customs provided further detail regarding the circumstances envisaged for the use of the powers:

In order for officers to board the ship or aircraft, there firstly needs to be a request to board made under sections 184A (vessels) or 184D (aircraft) of the *Customs Act 1901* (Customs Act). In most circumstances, the request to board is contingent on the commander of a Commonwealth ship or aircraft forming a reasonable suspicion that the ship or aircraft has been involved in a contravention of the Customs Act, Division 307 of the *Criminal Code 1995* (Criminal Code) or another prescribed Act. The current personal search power is then enlivened when the ship or aircraft has been detained. The amendments will allow Customs officers, immediately upon boarding a ship or aircraft under section 185 of the Customs Act, to conduct the personal search.³⁶

3.35 Customs further stated that the powers would generally not be applied to situations where there was no element of suspicion or reasonable belief that a contravention of a relevant Act had occurred:

...Customs would not generally exercise the power to board a ship or aircraft without any suspicion of a contravention occurring or having occurred.³⁷

Oversight and review

3.36 The committee investigated the issue of oversight and review of the exercise and ongoing necessity of the proposed search and seizure powers. Customs outlined a system of oversight beginning with the commander of a Commonwealth vessel, who determines the appropriate exercise of any powers used to conduct a boarding.³⁸ Activities undertaken and information obtained by a boarding party were subject to review 'to ensure correct and lawful procedure'.³⁹ This was achieved by requiring the commander of a Customs vessel to make a comprehensive report after every boarding.⁴⁰

3.37 In terms of reviewing the ongoing necessity of the powers, the same system allowed commanders' reports to be:

...reviewed and used to determine the adequacy of the legislation for dealing with new and emerging circumstances encountered in the offshore environment.⁴¹

36 *Submission 2C*, p. 1.

37 *Submission 2A*, p. 1.

38 *Submission 2A*, p. 3.

39 *Submission 2A*, p. 3.

40 *Submission 2A*, p. 3.

41 *Submission 2A*, p. 3.

3.38 The AFP informed the committee that the Bill did not prescribe any specific mechanisms for oversight and review of the powers. However, in general terms, allegations of corruption or instances of misuse of the proposed powers by Customs officers would be open to investigation under the *Crimes Act 1914*, the *Public Service Act 1999* and the *Ombudsman Act 1976*.⁴²

Schedule 2: Licensing of customs brokers

3.39 Customs' submission outlined the purpose of the proposed changes to licensing arrangements for customs brokers:

Schedule 2 of the Bill proposes amendments to the Customs Act to update the brokers licensing provisions to recognise the changing nature of employment in the broker community. Currently the legislation only allows individual customs brokers to be employed full-time by one corporate customs brokers (being companies or partnerships) at any time. The amendments will accommodate locum or freelance customs brokers who can then be employed by a number of different corporate customs brokers at any one time.⁴³

3.40 The CBFCA submission acknowledged that 'from a regulatory point of view...the implications of the amendments would be perceived as being negligible'.⁴⁴ However the CBFCA expressed concern that, in assessing compliance, licensing arrangements needed to be sophisticated enough to accurately determine the respective liabilities of individual brokers and corporate customs brokerages.⁴⁵

3.41 In response, Customs provided the following description of the way in which Customs will identify the employer of a part-time customs broker:

The nominee licence number is stated on an import declaration. The digital certificate attached to the message that is sent to Customs when that import declaration is made will identify the licensed corporate customs brokerage. Customs will be able to identify both the locum or freelance customs broker and the licensed corporate customs brokerage the broker may be working for at the time an import declaration is made. All the circumstances of the preparation and communication of a declaration will be taken into account by Customs on a case-by-case basis in identifying the person who may be considered liable for an offence under the Customs Act.⁴⁶

42 *Submission 8*, p. 1.

43 *Submission 2*, p. 3.

44 *Submission 1*, p. 3.

45 *Submission 1*, p. 3.

46 *Submission 2*, Attachment A, p. 7.

Schedule 3: Recovery of duty

3.42 Customs' submission outlined the effect of the proposed changes to the recovery of duty system:

Schedule 3 of the Bill proposes amendments to the Customs Act in response to the High Court of Australia's decision in *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 (Malika)...The amendments...place a 4-year statutory time limit on all duty recovery, other than in cases of fraud or evasion.⁴⁷

3.43 Customs' submission noted that the proposed amendments have 'resulted in much debate about the operation of the current duty recovery provisions'.⁴⁸

Period for the recovery of duty

3.44 The CBFCA, in particular, was concerned that the proposed changes extended the period available for recovery of duty by Customs in certain cases, and that this would have negative consequences for customs brokers and other advisers who 'contributed to a situation in which customs duty may have been underpaid'.⁴⁹

3.45 Customs, however, advised that the effect of the amendments was more narrow. Changes to Customs' approach to recovery of duty had occurred following the *Malika*⁵⁰ case and the passage of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* in 2005. The effect of these was that, currently:

Customs applies a 4-year time limit to all duty recovery other than in cases of fraud...⁵¹

3.46 To this end, representatives of Customs informed the committee that the major policy intent and effect of the proposed changes in fact was to 'formalise...[Customs'] current policy and procedure'.⁵² Customs submitted that, as such, the changes would 'provide certainty with respect to the time available to recover duty'.⁵³ Therefore, the new arrangements would work to the advantage of customs brokers.⁵⁴

47 *Submission 2*, p. 4.

48 *Submission 2*, p. 4.

49 *Submission 1*, p. 3.

50 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290.

51 *Submission 2*, Attachment A, p. 7.

52 *Committee Hansard*, 22 January 2007, p. 10.

53 *Submission 2*, Attachment A, p. 7.

54 *Committee Hansard*, 22 January 2007, p. 10.

Definition of 'owner'

3.47 The CBFCA expressed concern over how the new duty recovery provisions would operate in light of the definition of 'owner' in section 4 of the Customs Act. The CBFCA submission explained that:

...the definition of *owner* within Section 4 of the Act is wider than the commercial understanding of owner and the precedent(s) of Customs seeking recovery of a debt from other than the owner (as referenced in the import declaration) remains at issue for the CBFCA and its members.⁵⁵

3.48 The LCA shared these concerns over the potential breadth of application of the term 'owner' in duty recovery processes. It explained that the broad definition of 'owner' created 'confusion as to which party is responsible for various obligations under the Customs Act.⁵⁶ The term, as defined:

...does not specify who is responsible for the payment of customs duty and leaves a range of people who could be liable.⁵⁷

3.49 On the basis of the concerns outlined, the LCA felt that the term 'owner' should be defined more precisely.⁵⁸

3.50 Customs explained that 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...and that fraud or evasion might be committed by any one or more of those parties.⁵⁹ Nevertheless, Customs acknowledged the concerns of the LCA and the CBFCA, and the desirability of a review of the term:

Customs acknowledges that the definition of "owner" in the Customs Act could benefit from review and it is intended that this will be included on the legislation program for future consideration.⁶⁰

Committee view

Consultation

3.51 The committee acknowledges Customs' efforts to involve a broad range of agencies in consultations over the proposed search and seizure powers. A number of witnesses indicated that they were consulted on the amendments.

55 *Submission 1*, p. 1.

56 *Submission 6*, p. 4.

57 *Submission 6*, p. 4.

58 *Submission 6*, p. 4. See also Customs Brokers and Forwarders Council of Australia, *Submission 1*, p. 2.

59 *Submission 2A*, p. 6.

60 *Submission 2*, Attachment A, p. 7.

3.52 In its 2006 report into entry, search and seizure provisions, the Senate Standing Committee for the Scrutiny of Bills recommended that the 'high-water mark' for search powers generally should be those powers available to the AFP under the *Crimes Act 1914*.⁶¹ Consequently, the committee notes with approval that Customs engaged in close consultation with the AFP over the augmented search and seizure powers. The committee considers that close consultation with the AFP, as the benchmark agency, is a critical element in the process of justifying a grant of search and seizure type powers to Commonwealth officers of other agencies.

3.53 Similarly, the committee received evidence that the changes to recovery of duty processes proposed in Schedule 3 were the subject of proper consultations with bodies representing the spectrum of affected interests.

3.54 The consultation in relation to the Schedule 2 amendments updating licensing arrangements for brokers was less thorough, leading to unnecessary confusion over their effects.

3.55 The committee notes the importance of consultation between the agency sponsoring a Bill and the parties to be affected by it. The committee feels that, even in cases where a Bill seems unremarkable to the sponsoring agency or purports to merely formalise established practices, affected agencies and parties must as a matter of routine be kept informed and be provided with the opportunity to comment on proposed legislation. Legislation which has limited impact in a regulatory sense may have significant impact on the business processes of industry stakeholders. The committee is pleased to note Customs' assurance that in future Customs will seek approval to issue exposure drafts of proposed legislation to affected parties.

Schedule 1: Search and seizure powers

Justification

3.56 The committee accepts the validity of the main justification put forward for the augmented search and seizure powers: that they are required to provide for the safety of Customs officers conducting boarding operations of ships or aircraft in remote areas. The submissions and evidence provided to the inquiry were supportive of this aim.

3.57 However, the committee is concerned by the somewhat cursory analysis of this justification in the EM. The committee shares the view of the Senate Standing Committee for the Scrutiny of Bills that, where invasive powers are proposed:

61 Senate Standing Committee for the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, December 2006, p. 337.

...analysis and justification for the proposed powers should be set out in appropriate detail in the explanatory memorandum to the bill, to assist the Parliament in its consideration of the legislative proposal.⁶²

3.58 In this respect, whilst the committee was ultimately able to gather enough detailed evidence to enable it to assess the need for the proposed powers, the committee was required to seek a substantial amount of information via questions on notice.

3.59 The committee notes the reasonable criticism that not all of the suggested provisions under Schedule 1 were encompassed by the justification of officer safety. In particular, the powers to seize and use evidence in prosecuting offences, without an initial suspicion or reasonable belief that an offence has been committed, were criticised as not pertaining to, or as going beyond, the strict needs of officer safety.

3.60 However, the committee accepts Customs' evidence that the evidence-related powers are necessary as an adjunct to the proposed search and seizure powers, and that the retaining of evidence for use in prosecuting relevant offences was not likely to occur where no suspicion of the commission of an offence was present prior to a search being conducted.

3.61 The committee believes that the suite of proposed powers will complement Customs' existing powers to protect Customs officers, enhance the security of Australia's borders, and allow the efficient prosecution of offences committed in the border environment.

3.62 The committee accepts as valid the concerns expressed about the lack of protection in the evidence provisions for privileged material such as material protected by legal professional privilege.

3.63 Although the committee notes Customs' undertaking to consider the ACT DPP's suggested procedure for dealing with documents the subject of a claim for legal professional privilege, it feels that such an important right should not be protected solely through procedural means.

3.64 Consequently, the committee feels that the Bill should be amended to include specific provisions dealing with the protection of legal professional privilege and any other privileges identified as requiring protection under the proposed regime of search and seizure powers.⁶³

62 Senate Standing Committee for the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, December 2006, pp 318-319.

63 The committee notes that a reasonable starting point for any such investigation would be, as suggested in the ACT DPP submission, the privileges protected under Part 3.10 of the *Evidence Act 1995*.

3.65 The committee notes the in-principle opposition of the QCCL to the justification of grants of invasive powers by reference to earlier grants of similar powers. These concerns strongly resonate with the views expressed by the Senate Standing Committee for the Scrutiny of Bills in its 2006 report, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, in which it observed:

There can be a temptation for the Government and its agencies, in proposing new laws, to reach for an ambit position which may not be justified, simply by appealing to the existence of a similar, but perhaps rarely used power, elsewhere.⁶⁴

3.66 The Senate Standing Committee for the Scrutiny of Bills recommended that:

...all new legislative proposals should be judged on their own merits, based on a careful assessment of the needs of the agency in the particular circumstances, balanced against the impact of the proposed powers on individual rights.⁶⁵

3.67 Whilst the committee agrees that reference to other grants of similar powers alone cannot be a sufficient justification for the granting of search and seizure type powers, it observes that such information can inform an assessment of their appropriateness.

Proportionality

3.68 The committee supports a general approach to powers of this nature that seeks to limit their operation to the uses for which they are required. The committee endorses the view expressed by the Scrutiny of Bills Committee in respect of similar powers that 'no greater power should be conferred than is necessary to achieve the result required'.⁶⁶

3.69 The committee's investigation revealed that the construction of the search and seizure provisions does not strictly limit the use of the powers to the circumstances for which it was claimed they were required. However, the committee heard evidence that, as a practical and operational matter, their use would be limited to remote environments and non-designated areas. The committee accepts Customs' assertion that the potential for broader application is desirable because it provides consistency across the air and sea enforcement environments, and enables flexible responses by Customs where extraordinary circumstances arise.

3.70 Nevertheless, the committee has some misgivings about the potential use of the powers in circumstances beyond those envisaged. In this, the committee emphasises the principle that powers should be limited to their intended use. In particular, the committee is concerned about the potential application of these powers

64 *Entry, Search and Seizure Provisions in Commonwealth Legislation*, December 2006, p. 318.

65 *Entry, Search and Seizure Provisions in Commonwealth Legislation*, December 2006, p. 318.

66 *Entry, Search and Seizure Provisions in Commonwealth Legislation*, December 2006, p. 325.

in relation to aircraft providing regular public transport and cruise ships. Consequently, the committee believes that the proposed search and seizure powers should be clarified through Customs publishing procedures in relation to the use of the powers.

Oversight and review

3.71 The committee observes that the main system of oversight and review of the powers will be centred on the commander of the Customs vessel involved in a boarding action undertaken under the provisions in question. The commander would be responsible for any decision to exercise the powers and would be required to make a comprehensive report whenever they were used. These reports would be subject to review.

3.72 The committee also observes that, although any exercise of the powers would be susceptible to review by the Commonwealth Ombudsman, there is no requirement for the Ombudsman to undertake such a review. The committee recommends that the Bill be amended to require, within three years of the proclamation of the Bill, a review by the Commonwealth Ombudsman of the use of the augmented search and seizure powers.

Schedule 2: Licensing of customs brokers

3.73 The committee accepts that Customs has sufficient and appropriate processes and technological means in place to effectively determine liability for the mistakes or errors of part-time or locum customs brokers. The committee is assured that Customs will be able to accurately identify the employer of a customs broker at any given time, as well as the relevant circumstances surrounding individual cases in which a question of liability for a mistake or error arises.

Recommendation 1

3.74 The committee recommends that Schedule 1 of the Bill be amended to include provisions dealing with the maintenance of legal professional privilege and other privileges identified as requiring protection when these augmented search and seizure powers are exercised.

Recommendation 2

3.75 The committee recommends that the Australian Customs Service publish procedures in relation to the exercise of the search and seizure powers in proposed section 185A.

Recommendation 3

3.76 The committee recommends that Schedule 1 of the Bill be amended to require, within three years of its proclamation, a review by the Commonwealth Ombudsman of the use of the augmented search and seizure powers by the Australian Customs Service and other agencies.

Recommendation 4

3.77 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

**Senator Marise Payne
Chair**