

The Senate

Standing Committee on
Legal and Constitutional Affairs

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

February 2007

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ISBN 978-0-642-71762-7

This document was printed by the Senate Printing Unit, Department of the Senate,
Parliament House, Canberra

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ABBREVIATIONS

ACT DPP	ACT Director of Public Prosecutions
AFP	Australian Federal Police
the Bill	Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006
CBFCA	Customs Brokers & Forwarders Council of Australia
CEO	Chief Executive Officer
Customs	Australian Customs Service
Customs Act	<i>Customs Act 1901</i>
EM	Explanatory Memorandum
LCA	Law Council of Australia
QCCL	Queensland Council for Civil Liberties
UNCLOS	United Nations Convention on the Law of the Sea

CHAPTER 1

INTRODUCTION

Background

1.1 On 7 December 2006, the Senate referred the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006 to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 8 February 2007.

1.2 The Bill proposes to amend the *Customs Act 1901* to:

- augment the powers for Customs officers to conduct searches and seize items immediately after boarding a ship or aircraft for border enforcement purposes;
- update provisions relating to duty recovery and payments of duty under protest;
- update provisions relating to employment arrangements for customs brokers; and
- enable passenger declarations to be made electronically under the SmartGate system and to introduce penalties for the making false declarations.

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 12 December 2006, and invited submissions by 19 January 2007. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to almost 160 organisations and individuals.

1.4 The committee received seven submissions, which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.5 The committee held a public hearing in Canberra on 22 January 2007. Witnesses who appeared at the hearing are listed at Appendix 2. Copies of the *Hansard* transcript are available through the internet at <http://aph.gov.au/hansard>.

Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.7 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the

proof Hansard; page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 The purpose of the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006 (the Bill) is to amend the *Customs Act 1901* (the Customs Act) and the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to:

- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences;
- update customs broker licensing arrangements to accommodate current practices in employment arrangements;
- update duty recovery processes and the payments of duty under protest system and allow refunds to be applied against unpaid duty; and
- allow declarations to be made under the new SmartGate system and to make it an offence to make false or misleading declarations under that system.¹

Schedule 1: Search powers on certain ships and aircraft

Part 1: Main amendments

2.2 The main amendments in Part 1 of the Bill will amend Division 1 of Part XII of the Customs Act in relation to certain powers that enable Customs officers to enforce the Customs Act, Division 307 of the *Criminal Code*² or any prescribed Act (the specified Acts). In particular, the amendments will empower Customs and other Commonwealth officers, immediately after boarding a ship or aircraft for an enforcement purpose, to conduct personal searches for, take possession of and retain:

- weapons;
- items that may assist a person to escape detection; and
- evidence of the commission of a relevant offence.³

1 Significant portions of text in this chapter are reproduced from the Explanatory Memorandum (EM) to the Bill and the Second Reading Speech. This brief is intended to provide an overview of the purpose and clauses of the Bill. The EM may be consulted for more detailed explanation of particular clauses.

2 Division 307 of the *Criminal Code* is concerned with serious drug offences.

3 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 7 December 2006, p. 10.

2.3 The EM states that the new powers are required due to recent incidents where Customs officers encountered 'violent resistance from persons on board...ships and attempts to escape custody and dispose of evidentiary material.'⁴

2.4 The Second Reading Speech to the Bill justifies the grant of the new powers as improving the safety of Customs officers and their capacity to obtain and retain evidence and suspects relevant to offences under the specified Acts:

The new powers ensure the personal safety of the officers in exercising their enforcement functions, help prevent the escape of any person detained as a suspect, and help prevent the disposal of evidence.⁵

2.5 The new powers will be complemented by provisions introduced by the Bill that govern the 'proper manner in which such powers may be exercised'.⁶

2.6 In addition, Part 1 of the Bill introduces a number of minor or consequential amendments to other provisions of Division 1 of Part XII of the Customs Act.

Items 1 and 2: definition of frisk search

2.7 The Customs Act currently contains two differently worded definitions of 'frisk search'.

2.8 Subsection 4(1) defines 'frisk search' for the purposes of the Customs Act as:

- (a) a quick search of the person by the rapid and methodical running of hands over the person's outer garments; and
- (b) an examination of anything worn by the person that can be conveniently removed and is voluntarily removed by the person.

2.9 However, subsection 183UA(1) defines frisk search for the purposes of Division 1 of Part XII as:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

2.10 As well as the different form of words used, the two definitions are distinguished by paragraphs 4(1)(c) and (d), which limit the purposes for which a frisk search may be carried out and empower goods to be recovered as part of a search.⁷ A frisk search may be conducted to:

4 p. 5.

5 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 7 December 2006, p. 10.

6 EM, p. 5.

7 EM, pp 6-7.

-
- (c) determine whether:
- (i) if the search is conducted in circumstances described in subsection 219L(1) or (1A)—the person is unlawfully carrying any prohibited goods; and
 - (ii) if the search is conducted in circumstances described in subsection 219L(1B) or (1C)—the person is carrying any weapon or thing capable of being used to inflict bodily injury on a person conducting a search under Division 1 of Part XII; and
- (d) recover any such goods.

2.11 Items 1 and 2 of Schedule 1 of the Bill establish a consistent definition of 'frisk search' by replacing the subsection 4(1) definition with that found at subsection 183UA(1), and repealing the definition of 'frisk search' at subsection 183UA(1). The result will be that there is a single definition of 'frisk search' in the Customs Act, thereby removing potential for confusion.⁸ The current subsection 183UA(1) definition is preferred because it is more consistent with that used in other Commonwealth legislation, such as the *Crimes Act 1914*.⁹

2.12 The removal of the limitations at paragraphs 4(1)(c) and (d) allows these matters to be dealt with more appropriately in a substantive provision of the Customs Act, rather than in its definitions section.¹⁰ The limitations on the exercise of the frisk search powers are addressed in the new subsection 219M(1A).

Item 3: Power to take possession of and retain found goods or documents

2.13 Under existing subsection 185(2) of the Customs Act, officers have the power to search a ship or aircraft and any goods on such a ship or aircraft, and to require persons on the ship or aircraft to produce documents. This includes powers to secure goods found and to take copies, or extracts, of documents found or produced.¹¹

2.14 Under existing subsection 185(4A), evidence of the commission of an offence against a law of the Commonwealth, a state or a territory obtained in the exercise of powers under section 185 may be used, or given to another body for use, in investigating or prosecuting an offence.

2.15 However, there is no explicit power in section 185 that allows an officer to take possession of and retain goods found or documents produced where such goods or documents may be evidence of the commission of an offence.¹²

8 EM, p. 7.

9 EM, p. 7.

10 EM, p. 7.

11 EM, p. 7.

12 EM, p. 7.

2.16 Accordingly, Item 3 of Schedule 1 inserts new paragraphs (cb) and (cc) into subsection 185(2). These paragraphs give officers additional powers to take possession of and retain goods found or documents produced under subsection 185(2), where such goods or evidence may afford evidence of the commission of a relevant offence.¹³ The matters that determine whether such goods or documents may afford evidence of the commission of a relevant offence are to be set out in proposed subsection 185(7).

2.17 Item 3 makes explicit Customs' power to take possession of and retain, for the purposes of investigating and prosecuting a relevant offence, evidentiary material found or produced in the exercise of the subsection 185(2) powers.¹⁴ This amendment will align the existing subsection 185(2) powers with the amended personal search power at section 185AA.

Item 6: Circumstances in which goods and documents may be used as evidence

2.18 Proposed subsection 185(7) sets out, for the purposes of new paragraphs 185(2)(cb) and (cc), the circumstances that satisfy the criteria that 'goods found or documents produced on a ship or aircraft may afford evidence of the commission of a relevant offence.'¹⁵

2.19 Under subclause 185(7), where a ship is in Australia, goods or documents may afford evidence of an offence, either inside or outside Australia, against the Customs Act, Division 307 of the *Criminal Code* or an Act prescribed consistently with the United Nations Convention on the Law of the Sea (UNCLOS).¹⁶

2.20 Where a ship is outside Australia, goods or documents may afford evidence only of an offence:

- in Australia against the Customs Act, Division 307 of the *Criminal Code* or an Act prescribed consistently with UNCLOS; and
- in Australia's exclusive economic zone against an Act prescribed consistently with UNCLOS.¹⁷

2.21 Where an aircraft is in Australia, goods or documents may afford evidence of an offence, either inside or outside Australia, against the Customs Act or Division 307 of the *Criminal Code*.¹⁸

13 EM, p. 7. The new paragraphs 185(2)(cb) and (cc) do not apply to narcotic goods. An existing power at paragraph 185(2)(e) allows the seizure without warrant of any narcotic goods found in a search conducted under subsection 185(2).

14 EM, p. 7.

15 EM, p. 8. See discussion of Item 3 above at 1.16.

16 EM, p. 8.

17 EM, p. 8.

18 EM, p. 8.

2.22 The limits on the scope of the power to take possession of and retain evidentiary material prescribed by subclause 185(7) are in accordance with Australia's jurisdiction in the various maritime zones under UNCLOS.¹⁹

Items 8 to 12: Amended search powers under section 185AA

2.23 It is proposed to amend section 185AA to expand the scope of the personal search powers and the circumstances under which they may be exercised.

2.24 Existing section 185AA of the Customs Act allows an officer to search for, take possession of, and retain items on a person, or in that person's immediate control, that could inflict bodily injury or help the person to escape.

2.25 However, these personal search powers can only be exercised where the person is on a detained ship or aircraft, or where the person is on a detained ship or aircraft and is being placed on another ship or aircraft for the purpose of being moved. Further, the existing powers do not allow officers to search for and take possession of potential evidentiary material.

2.26 Proposed subsections 185(1) and (1A) will allow a person that is found on a ship or aircraft boarded under subsection 185(2), or placed on a ship or aircraft under subsection 185(3AA), and any clothing and other property within the immediate control of that person, to be searched for the purposes of finding out if they are carrying or hiding:

- a weapon or thing capable of being used to inflict injury or help the person escape; or
- a document or other thing that may afford evidence of the commission of a relevant offence.²⁰

2.27 New subsection 185AA(1B) sets out the circumstances in which a document or other thing may afford evidence of the commission of a relevant offence. This section effectively limits the scope of the power to search for evidence. The circumstances are the same as those prescribed in subsection 185(7).²¹

2.28 New subsections 185AA(2) and (2A) will allow a person that is found on a ship or aircraft boarded under subsection 185A(2A), and any clothing and other property within the immediate control of that person, to be searched for the purposes

19 Similar limits are placed on the power to arrest a person found on board a ship under paragraph 185(2)(d) and the new power to conduct a personal search for evidentiary material under proposed subsection 185AA(1B).

20 EM, p. 9.

21 EM, p. 9.

of finding out if they are carrying or hiding a weapon or thing capable of being used to inflict injury.²²

Power to examine things found

2.29 New subsection 185AA(3) provides a new power for an officer to examine any thing found in the course of a search under section 185AA. If the thing found is a document, the examination may include reading the document directly or with the help of an electronic device.²³

2.30 Proposed subsection 185AA(3A) allows an officer to do, or arrange for another officer or another person to do, whatever is reasonably necessary to permit the examination of the thing or things being examined.²⁴

2.31 Proposed subsection 185AA(3B) limits the scope of subsection 185AA(3A) by prohibiting an officer from damaging a thing being examined by forcing it, or part of it, open unless:

- the person being searched has been given a reasonable opportunity to open the thing or part of it, or
- it is not reasonably practicable to give the person such an opportunity.²⁵

Power to take possession of weapons and evidence

2.32 Proposed subsection 185AA(3C) allows an officer to take possession of:

- a weapon or other thing capable of being used to inflict injury or help a person escape; or
- a document or other thing that may afford evidence of the commission of a relevant offence,

where the weapon, thing or document is found in the course of a search under new subsection 185AA(1A).²⁶

2.33 Further, new subsection 185AA(3C) allows the retention of the weapon, document or thing for such time as the officer thinks necessary for the purposes of the

22 Under existing section 185A, officers are given the power to board certain foreign ships on the high seas and to establish the identity of a ship and its occupants. Australia has only limited jurisdiction on the high seas, and officers generally have no power to enforce Australian laws. Accordingly, the only purpose for which the personal search power may be used on a ship boarded under section 185A is to search for weapons or potential weapons: EM, p. 10.

23 EM, p. 10.

24 EM, p. 10. A similar power is contained in existing subsection 185(2C) in connection with the power to examine goods granted under paragraph 185(2)(b).

25 EM, p. 10. A similar limitation is contained in subsection 185(3C) in connection with the powers to board, search and examine goods under section 185.

26 EM, pp 10-11.

Customs Act, Division 307 of the *Criminal Code* or an Act prescribed under subsection 185AA(1B) (the specified Acts).²⁷

2.34 Proposed subsection 185AA(3C) also enables an officer:

- to take possession of a weapon or other thing capable of being used to inflict injury that is found in the course of a search under new subsection 185AA(2A); and
- to retain the weapon or other thing for such time as the officer thinks necessary for the purposes of the Customs Act.²⁸

Item 9: Immunity for search conducted in good faith

2.35 Existing subsection 185AA(6) gives immunity against civil or criminal proceedings to a person who conducts a search under section 185AA at the request of an officer. It is required that the person act in good faith and in accordance with subsection 185AA(7).

2.36 Existing subsection 185AA(7) prohibits an officer or other person who conducts a search under section 185AA from using more force, or subjecting a person to greater indignity, than is reasonably necessary to conduct the search.

2.37 Proposed subsection 185AA(6) would retain the current immunity and extend it under the same conditions to an officer who conducts a search under section 185AA.²⁹

Item 10: Evidence able to be used to prosecute offences

2.38 Under proposed subsection 185AA(7A), if an officer, in a search conducted under section 185AA, obtains evidence of the commission of an offence against a law of the Commonwealth, a state or territory, that evidence may be used, or given to another body for use, in investigating or prosecuting the relevant offence. New subsection 185AA(7A) does not override or limit a state's laws of evidence relating to proceedings for an offence against the laws of that state.³⁰

27 EM, p. 11.

28 EM, p. 11.

29 EM, p. 11. Along with subsection 185AA(7), existing subsections 185AA(4) and (5) constrain the scope of the use of the search powers. Subsection 185AA(4) makes it clear that section 185AA does not authorise the removal of a person's clothing or to require a person to remove their clothes, other than the person's outer garments. Subsection 185AA(5) requires that a search of a person or their clothing must be conducted by an officer or person of the same sex.

30 EM, p. 12. Existing subsection 185(4A) is a similar provision; it applies to evidence obtained during the exercise of search powers under section 185.

Item 12: Definition of 'a person found on a ship or aircraft'

2.39 Item 12 of Schedule 1 inserts new subsection 185AA(9), which extends the scope of the phrase 'a person found on a ship or aircraft' in section 185AA to include a person suspected on reasonable grounds by an officer of having landed from, or left, the ship or aircraft.³¹

Item 16: Power to conduct a frisk search

2.40 Existing section 219M establishes the manner in which a frisk search of a person detained under section 219L is to be conducted. The power to conduct a frisk search is implied from a reading of sections 219L and 219M; there is no explicit power in either section to conduct a frisk search.

2.41 Accordingly, Item 16 of Schedule 1 inserts new subsection 219M(1A), which provides the express power for a Customs officer to conduct a frisk search of a person detained under section 219L for the purpose of determining whether they are unlawfully carrying prohibited goods.³²

2.42 New subsection 219M(1A) also establishes a power to recover any prohibited goods found in the course of a frisk search.³³

Schedule 2: Agents and customs brokers

2.43 Division 3 of Part XI of the Customs Act provides for the licensing of customs brokers. Under existing section 183C, where a broker's licence is granted by the CEO of Customs, the CEO shall endorse on the licence:

- the place(s) at which the licence holder may act as a customs broker; and
- the person(s) who is a nominee of the licence holder and the corresponding place(s) at which the nominee acts as a customs broker.³⁴

2.44 Existing section 183CD sets out the conditions that must be fulfilled for a person to be eligible to be a nominee of a customs broker. Under paragraph 183CD(1)(f), a nominee of a customs broker cannot be the nominee of another customs broker. Under paragraph 183CD(1)(j), a nominee of a customs broker cannot

31 EM, p. 12.

32 EM, p. 13. The purpose for which a frisk search is allowed under section 219L is consistent with the allowable purposes under subsections 219L(1) and 219L(1A). These sections allow a frisk search where a detention officer suspects on reasonable grounds a person of carrying prohibited goods.

33 EM, p. 13.

34 EM, p. 15.

be a customs broker at a place other than a place where the first-mentioned customs broker is a customs broker.³⁵

Restrictions on the employment of locum or freelance customs brokers

2.45 The nominees of corporate customs brokers have traditionally been individual customs brokers employed full-time. However, corporate customs brokers are increasingly employing locum or freelance customs brokers as nominees on a part-time basis. Such locum or freelance customs brokers could be employed by a number of different corporate customs brokers at any one time.³⁶

2.46 Existing paragraph 183CD(1)(f) of the Customs Act means that such locum or freelance brokers may not act as nominees for more than one corporate customs broker.³⁷

2.47 Existing paragraph 183CD(1)(j), which requires that a nominee not be a customs broker at another place, further restricts the use of locum or freelance brokers as nominees. Current Customs practice is to specify for the purposes of section 183CE 'all places in the Commonwealth' as the place at which the licence holder may act as a customs broker. This policy renders the condition set out in paragraph 183CD(1)(j) redundant because, being licensed to act as a customs broker at 'all places in the Commonwealth', a locum or freelance broker can never be a customs broker at another place.³⁸

2.48 In recognition of the increasing employment of locum and freelance brokers as nominees by corporate customs brokers, the Bill proposes the repeal of paragraphs 183CD(1)(f) and 183CD(1)(j) of the Customs Act.³⁹

Schedule 3: Recovery of duty

Duty recovery

2.49 Currently, section 153 of the Customs Act makes provision for the recovery of duty by Customs. Further, section 165 of the Customs Act provides a time limit of four years for the recovery of duty by Customs where duty has been short levied or erroneously refunded.

2.50 The High Court has interpreted the time limit in section 165 as only limiting Customs' power to recover duty in situations where the short payment of duty and the overpayment of a refund are the result of a Customs' error. However, as a matter of

35 EM, p. 15.

36 EM, p. 15.

37 EM, p. 15.

38 EM, p. 16.

39 EM, p. 16.

policy, Customs applies the time limit in section 165 of the Customs Act to the recovery of *all* duty, except in cases of fraud.⁴⁰

2.51 Items 1 to 4 of Schedule 3 of the Bill implement Customs' current policy on time limits and the recovery of duty. The Bill amends the Customs Act to consolidate sections 153 and 165 of the Customs Act, and to limit the time for the recovery of customs duty to four years in all cases, except in the case of fraud or evasion where no time limit will apply.⁴¹

Payments under protest

2.52 Under section 167 of the Customs Act, if there is a dispute as to the amount or rate of duty payable on goods, the owner of the goods may pay under protest the sum demanded by a Collector as the duty payable in respect of the goods. If the duty is paid under protest, the sum paid is deemed to be the proper duty payable unless the contrary is determined in an action brought in accordance with section 167.⁴²

2.53 Section 167 also sets out how an owner makes a payment under protest, for both documentary and electronic entries. Both of these processes only allow payments under protest to be made at the time goods are originally entered for home consumption. However, if Customs conducts an audit on an owner's transactions after goods have been entered into home consumption and determines that duty, or additional duty, is payable on goods, there are currently no statutory provisions specially allowing such post-entry payments under protest to be made.⁴³

2.54 Further, there are still provisions in the Customs Act requiring payments under protest with respect to import entries under the COMPILE system to be made by a registered COMPILE user, using COMPILE. As COMPILE is no longer used and people cannot be registered COMPILE users, owners of goods cannot comply with these provisions in making a payment under protest.⁴⁴

2.55 The EM states that, for these reasons, Item 5 of Schedule 3 repeals the existing requirements relating to payments under protest and replaces them with 'requirements that are general in nature and are easier to comply with'.⁴⁵

2.56 New subsection 167(3) sets out the circumstances when a payment is taken to be made under protest, namely:

40 EM, p. 17. Emphasis in original.

41 EM, p. 17.

42 EM, p. 21.

43 EM, p. 22.

44 EM, p. 28.

45 EM, p. 28.

-
- where the owner of the goods, or agent of the owner, gives Customs notice, by document or electronically, that the payment is being made under protest; and
 - Customs receives the notice no later than seven days after the day on which the payment is made.

2.57 The requirements for the notice that a payment is being made under protest are set out in new subsection 167(3A), and do not differ substantially from existing requirements.⁴⁶

2.58 Item 7 of Schedule 3 inserts a new subsection 167(3B) into the Customs Act, which provides for a payment under protest to be made under the Accredited Client Program.

2.59 Item 8 of Schedule 3 inserts a new subsection 167(4A) into the Customs Act, which sets out the circumstances in which a person can recover duty which was paid under protest through the Accredited Client Program. Essentially, there is no action for a sum paid through the Accredited Client Program under protest, unless:

- the payment is made as a payment under protest under subsection 167(3B); and
- the action for recovery is brought within the timeframes set out in paragraph 167(4A)(b) (generally six months from when the duty would be payable if the accredited client monthly estimates were not paid).

Schedule 4: Treatment of certain information given to Customs

2.60 As part of the SmartGate process, eligible passengers and crew may be required to answer questions and make declarations electronically to Customs about their accompanied personal and household effects. These answers and declarations will be used to assess a person's eligibility for automated clearance and identify persons who may hold items of interest (such as prohibited imports and dutiable/taxable items) to Customs.⁴⁷

2.61 Existing paragraph 234(1)(d) of the Customs Act makes it an offence to make a false and misleading statement (including an omission), directly or indirectly, to an 'officer of Customs'. Currently, the provisions of the Customs Act mean that passengers and crew who make false and misleading declarations electronically using the SmartGate system would be making false and misleading statements to 'Customs', and not necessarily to an 'officer of Customs'.⁴⁸

46 EM, p. 29.

47 EM, p. 28.

48 EM, p. 28.

2.62 The amendments in the Bill ensure that any false and misleading information provided using the SmartGate system is covered by the existing offence provisions relating to making false and misleading statements to an 'officer of Customs' (Item 1 of Schedule 4).

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**

APPENDIX 1

SUBMISSIONS RECEIVED

- 1 Customs Brokers & Forwarders Council of Australia
- 1A Customs Brokers & Forwarders Council of Australia
- 2 Australian Customs Service
- 2A Australian Customs Service
- 2B Australian Customs Service
- 2C Australian Customs Service
- 3 Tasmanian Department of Police and Public Safety
- 4 Queensland Council for Civil Liberties
- 5 Police Federation of Australia
- 6 Law Council of Australia
- 7 ACT Director of Public Prosecutions
- 8 Australian Federal Police

APPENDIX 2
WITNESSES WHO APPEARED
BEFORE THE COMMITTEE

Canberra, Monday 22 January 2007

Australian Customs Service

Ms Ellen Brophy, Manager, Passenger Compliance, Passenger Operations Branch

Mr Brian Hurrell, Acting National Director, Enforcement and Investigation

Ms Alison Neil, Acting Director, Compliance Policy and Licensing

Ms Sharon Nyakuengama, Acting National Director, Compliance

Australian Federal Police

Mr Peter Whowell, Manager, Legislation

