



**Australian Government**  
**Australian Customs Service**

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**SUBMISSION TO THE**  
**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**  
**INQUIRY INTO THE**  
**CUSTOMS LEGISLATION AMENDMENT (AUGMENTING OFFSHORE**  
**POWERS AND OTHER MEASURES) BILL 2006**

**JANUARY 2007**

## **Introduction**

1. On 7 December 2006, the Senate referred the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006 (the Bill) to the Legal and Constitutional Affairs Committee for inquiry and report by 8 February 2007.
2. The Australian Customs Service makes this submission in response to the invitation from the Committee secretariat.

## **Powers for customs officers to conduct searches and seize items immediately after boarding a ship or aircraft for border enforcement purposes**

3. Schedule 1 of the Bill proposes amendments to the *Customs Act 1901* (the Customs Act) to provide for changes to the powers of search and seizure available to officers in the offshore environment.
4. Customs regularly reviews the appropriateness of the powers of search and seizure available to it. 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.
5. Such an incident occurred during a boarding of an Indonesian fishing vessel located inside the Australian Exclusive Economic Zone. The team began to conduct an investigative boarding to determine if there was evidence of any offences. As a decision had not been made to detain the vessel, physical pat down searches were unable to be conducted. During the search of the vessel an Indonesian crew member produced a weapon and physically threatened the boarding team. A tactical withdrawal occurred to avoid physical injury to any Customs officers.
6. During another recent boarding of an Indonesian fishing vessel, the Customs boarding team identified sufficient evidence for the vessel to be detained and escorted to port for further enquiries. Subsequent pat down search of the crew located a concealed Global Positioning Satellite in the trousers of a crew member. There was potential for this piece of evidentiary material to be disposed of from the time of boarding until the search finally took place once the vessel had been detained. If no other evidence of suspected offences had been identified, it would not have been possible to detain the vessel and conduct the searches and the GPS would not have been located.
7. The amendments will allow Customs officers immediately upon boarding a ship under section 185 of the Customs Act (including a ship suspected of being involved in contraventions of prescribed Acts), to conduct a personal search for, examine, take possession of and retain items that:
  - (a) may be a weapon;
  - (b) may be used to help a person escape detention; or
  - (c) may be evidence of an offence against the specified Acts.
8. This will enable officers to respond appropriately to situations such as those outlined in paragraphs 5 and 6 thus minimising the threat of harm to officers and possible loss of evidence of offences. Currently, a vessel must be detained before this type of

search can be conducted providing time for the destruction of evidence and placing officers in danger due to the possible presence of hidden weapons that may be used at a later point.

9. 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.
10. The provisions also allow Customs officers to remove person's outer garments (including but not limited to the person's overcoat, coat, jacket, gloves, shoes and head covering).
11. This amendment addressed a need identified by officers conducting pat down searches following apprehensions of fishing vessels in the Southern Ocean. The heavy jackets and wet weather equipment made it impossible to accurately feel for concealed weapons or evidentiary items. Officers were not confident that the pat down search removed any risk due to the bulky clothing.
12. The proposed new powers are being extended to include officers boarding an aircraft that has landed in Australia as a result of a request being made under section 184D. This is to ensure consistency between the maritime and aviation environments, and to reflect the importance of aviation security in combating crime and terrorism.
13. 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.
14. These new powers mirror those that are available under the *Fisheries Management Act 1991* and are complemented by provisions regarding the proper manner in which such powers may be exercised.

### **Employment arrangements for customs brokers**

15. 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.
16. It is noted that in its submission to the Committee, the Customs Brokers and Forwarders Council of Australia Inc (CBFCA) raises a concern regarding how Customs will know that a locum or freelance customs broker is working for a

particular licensed corporate customs broker at a particular point in time. Customs response to this concern is provided at attachment A.

### **Duty recovery and payments of duty under protest**

17. 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) that has resulted in debate about the operation of the current duty recovery provisions. The proposed amendments seek to put the time available to recover customs duty beyond doubt and modernise the duty recovery provisions.
18. The amendments to the Customs Act in items 1 to 4 of Schedule 3 to the Bill place a 4-year statutory time limit on all duty recovery, other than in cases of fraud or evasion. These amendments formalise Customs' current policy on duty recovery and will provide certainty with respect to the time available to recover duty. This time frame, and its exceptions, is consistent with the regime that applies to the recovery of indirect tax under section 150-50 of Schedule 1 to the *Taxation Administration Act 1953*.
19. The amendments to the Customs Act in item 4 of Schedule 3 to the Bill eliminate the potential significant cash flow problems that owners of goods face by the existing requirement to pay an amount of duty on goods before that same amount can be received back as a refund, drawback or rebate. This kind of situation typically arises where an owner uses a Tradex order<sup>1</sup> but as a result of a Customs audit, the goods are found to be not eligible goods for the purposes of the Tradex order with the result that customs duty is payable. If the goods have been exported, it is possible that the owner of the goods is eligible for a drawback of duty on the goods. Under the current provisions of Customs Act, the duty would have to be paid to Customs before the drawback can be paid. The amendments will remedy this kind of situation by allowing the CEO to apply a notional amount of refund, rebate or drawback in respect of goods against the duty payable on the same goods.
20. The amendments to the Customs Act in item 5 of schedule 3 to the Bill relate to procedures for paying customs duty under protest. The existing requirements are replaced with requirements of a more general nature that are easier for an owner or an agent of an owner to comply with. These amendments are necessary to:
  - Enable post-entry payments of customs duty under protest to be made;
  - Enable payments of customs duty under protest to be made in relation to import entries made in COMPILE; and
  - Extend the ability to make a payment of customs duty under protest under the Accredited Client Programme (the ACP).
21. It is noted that in its submission to the Committee, the Customs Brokers and Forwarders Council of Australia Inc (CBFCA) raise some concerns about the amendments to the duty recovery and payment under protest provisions in the bill. Customs response to each of these concerns is provided at attachment A.

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<sup>1</sup> A Tradex order allows for the duty free importation of eligible goods on the understanding that the goods will be subsequently exported.

**Making false or misleading declarations when using the electronic SmartGate passenger processing system**

22. Schedule 4 of the Bill proposes amendments to the Customs Act to ensure that any false or misleading information provided using the SmartGate system is covered by the existing offence provisions relating to making false or misleading statements made to an officer of Customs.
23. Paragraph 234(1)(d) of the Customs Act makes it an offence for a person to make false or misleading statements (including omissions), directly or indirectly, to an officer of Customs.
24. It is proposed that section 234 of the Customs Act be amended so that the declarations made by incoming passengers through the SmartGate system are deemed to be a statement (or omission) made to an officer of Customs for the purposes of paragraph 234(1)(d). This will ensure that a person who makes a false or misleading statement using the SmartGate system may be prosecuted for an offence under section 234 of the Customs Act.

AUSTRALIAN CUSTOMS SERVICE

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## Attachment A

### Customs Response to Submission from Customs Brokers and Forwarders Council of Australia Inc

Issue	Customs Response
<p><b>Definition of owner and who duty may be recovered from</b></p>	<p>Current section 165 of the Customs Act limits to four years the recovery power under current section 153 of the Customs Act where the short payment of duty and overpayment of refund, rebate or drawback are the result of a Customs error.</p> <p>Current section 153 provides that all duties charged upon goods are payable by the owner of the goods. Therefore, where section 165 refers to the person who should have paid the amount short levied, this is also the owner of the goods. New section 165 replaces old sections 153 and 165 to remove the distinction between Customs and non-Customs errors, and to limit all duty recovery to four years from the time it was to be paid other than where fraud or evasion is involved. The amendments are not intended to change the effect of the provisions in relation to who is liable to pay the duty and do not affect the current definition of owner.</p> <p>Furthermore, the operation of the provision needs to be broad enough to recognise the different types of commercial arrangements as recognised by international commercial law, and enable recovery from the person who has the legal obligation to pay duty.</p> <p>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.</p>
<p><b>Period for the recovery of duty</b></p> <p>Specifically:</p> <ul style="list-style-type: none"> <li>• Exposure to claims for negligence or lack of duty of care for brokers have been based upon the existing legislative 12 months provision;</li> <li>• Customs should not take 4 years to undertake compliance audits;</li> <li>• The recovery of customs duty is different to underpayment of tax and/or GST.</li> </ul>	<p>The CBFCA concerns about the time available to recover duty are directed to the major policy intent of the proposed legislative amendments. The proposed amendments to the Customs Act in relation to the time available to recover duty formalise Customs’ current policy on duty recovery and will provide certainty with respect to the time available to recover duty.</p> <p>The current position of Customs in relation to the time available to recover customs duty is guided by the decision of the High Court in <i>Malika Holdings Pty Ltd v Stretton (2001) 204 CLR 290</i> (Malika). Prior to Malika, it was considered that the authority to recover customs duty under section 153 of the Customs Act was restricted by section 165 of the Customs Act, such that Customs must demand payment within 1 year of the short payment, or overpayment of a refund, rebate or drawback, of customs duty. If the demand was not made within that timeframe, the debt ceased to be recoverable.</p>

	<p>However, in Malika, the High Court found that the time limit in section 165 only limited the recovery power under section 153 where the short payment of duty and the overpayment of refund, rebate or drawback are the result of a Customs' error. Therefore, if the short payment of duty, or the overpayment of a refund, rebate or drawback, is not the result of a Customs' error, there is no time limit on recovery of the short payment or overpayment.</p> <p>In 2005, the time limit in section 165 of the Customs Act was extended to 4 years by the <i>Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001</i> (the ITM Act). The basis for this extension of time was that 1-year was not sufficient to undertake post-transaction audits and to follow up on any necessary duty recovery. In addition, as a matter of policy, Customs applies a 4-year time limit to all duty recovery other than in cases of fraud, notwithstanding the open-ended recovery period under section 153.</p> <p>There is no "existing legislative 12-month provision" as referred to by the CBFCA in relation to the period that claims for negligence or lack of duty of care by brokers are based upon.</p> <p>The current position and the proposed amendments to the Customs Act are consistent with Commonwealth revenue legislation and policy. For the purposes of providing certainty and clarity in legislation relating to the recovery of revenue, the amendments were modelled upon section 150-50 of Schedule 1 to the <i>Taxation Administration Act 1953</i>, which deals with the recovery of indirect tax (Goods and Services Tax, Luxury Car Tax and Wine Equalisation Tax).</p>
<p><b>Identifying the employer of a part time customs broker or locum broker</b></p>	<p>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.</p>