



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

---

**SUPPLEMENTARY 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 (the Committee) for inquiry and report by 8 February 2007.
2. On 18 January 2007, the Australian Customs Service made a submission to the Committee in response to an invitation by the Committee secretariat.
3. This supplementary submission is made in response to the submissions made by the Queensland Council for Civil Liberties, the ACT Office of the Director of Public Prosecutions and the Law Council of Australia.

## **Queensland Council for Civil Liberties Submission**

4. The Queensland Council for Civil Liberties (the Council) state the “power to carry out the search seems to arise simply if a person has been found on board a ship or aircraft. There appears to be no requirement of reasonable suspicion that they have committed an offence, nor is there any requirement for a reasonable suspicion that they pose any threat to anyone.”
5. 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.
6. There are circumstances where the request to board can be made without the commander of a Commonwealth ship or aircraft forming a reasonable suspicion that the vessel or aircraft has been involved in a contravention of the Customs Act, Division 307 of the Criminal Code or another prescribed Act. However, Customs would not generally exercise the power to board a ship or aircraft without any suspicion of a contravention occurring or having occurred.
7. 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. The situations that have recently confronted officers, particularly in relation to concealed weapons being produced and used to threaten officers, prior to a ship being detained, mean that the safety 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.

8. The Committee has expressed concern that the power may be used to search, for example, passengers on board a cruise ship. Even in the unlikely event that a cruise ship has been boarded, the likelihood of any search of persons on board extending to passengers is remote.

9. The Council also raise a concern regarding the “extension of the immunity to persons other than Commonwealth officers”. The immunity from civil or criminal proceedings that the Council refer to is currently provided by subsection 185AA(6) of the Customs Act for persons who, at the request of an officer, conduct a search under section 185AA of the Customs Act. The amendment to subsection 185AA(6) extends this immunity to an officer who conducts the search under section 185AA and, as the Council notes in their submission, does not provide an absolute immunity. The immunity only exists if the officer or person acts in good faith and does not contravene subsection 185AA(7) of the Customs Act. Subsection 185AA(7) of the Customs Act is not amended by this Bill, and provides that:

“An officer or other person who conducts a search under this section must not use more force, or subject a person to greater indignity, than is reasonably necessary to conduct the search.”

10. Officers who are engaged in duties which may require them to exercise these powers are provided with extensive training equivalent to that provided to officers operating in the airport environment.

### **Office of the Director of Public Prosecutions Submission**

11. Customs has no comment on the suggestion in paragraph 1 of the submission for further amendment to the definition of frisk search.

12. The Director of Public Prosecutions raises in his submission to the Committee that “the power to board, contained in sections 185(1) and (2) is exercisable after a request to board has been made under section 184A. The circumstances in that section are quite broad and, in particular, do not require that there be any suspicion that any offence is or may have been committed.” Section 184A sets out the circumstances in which a commander of a Commonwealth ship may request the master of a ship to permit the commander, a member of the commanders crew or an officer to board the master’s ship. In most circumstances, section 184A of the Customs Act provides that the commander of a Commonwealth ship or aircraft can make a request to board if the commander reasonably suspects that the master’s ship is, will be or has been involved in a contravention, or an attempted contravention in the relevant maritime zone, of the Customs Act, Division 307 of the Criminal Code or a prescribed Act.

13. There are circumstances where the request to board can be made without the commander of a Commonwealth ship forming a reasonable suspicion that the ship has been involved in a contravention of the Customs Act, Division 307 of the Criminal Code or another prescribed Act. However, as noted above, Customs would not generally exercise the power to board a ship without any suspicion of a contravention occurring or having occurred.

14. 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.

### **Law Council of Australia Submission**

15. The Law Council of Australia (LCA) raises several issues in its submission regarding the amendments in Schedule 2 (agents and customs brokers) and Schedule 3 (recovery of duty) of the Bill.

16. A response concerning the issues in relation to the “compliance record” of locum brokers, the consistency of the amendments to the recovery of customs duty with Commonwealth revenue policy and who the debt may be recovered from, has previously been provided to the Committee in the submission made by Customs on 18 January 2007.

17. In addition to these matters, the LCA suggests the processes and practices for licensing of customs brokers should be reviewed so that applicants should disclose if they intend to operate as locums. It is also suggested that additional training or accreditation should be required. When nominee or locum brokers apply for or renew their broker licence, Customs will remind those brokers of their responsibilities in terms of privacy and confidentiality.

18. The LCA also raise a concern about linking the recovery of duty for an unlimited period to the CEO being satisfied as to the existence of fraud or evasion.

19. If a person is issued a demand and disputes their liability to pay on grounds that the debt is not a result of fraud or evasion, it would always be open to the person on whom the demand had been issued to not pay the demand and, if proceedings were commenced in court to recover the debt, argue the absence of fraud or evasion. The LCA argue that this may mean that the owner would be required to prove the absence of fraud or evasion. This is not correct. It would be incumbent on Customs to prove the existence of the debt and to demonstrate the satisfaction that the debt arose as the result of fraud or evasion to enable the debt to be recovered over the relevant period.

20. However, it would generally be expected that if the debt arose as the result of fraud or evasion then a prosecution would be commenced for the offence of fraud or evasion of duty and Customs would seek to recover the debt at the same time.

21. The final comment made by the LCA in relation to the duty recovery provisions of the Bill is with respect to period for the application of refunds. The amendments in this Bill are to clarify current policy and procedures in relation to duty recovery. The Government’s policy in relation to refunds of customs duty has not been changed.

**AUSTRALIAN CUSTOMS SERVICE**

**JANUARY 2007**