Chapter 8

THE SEIZURE OF MIDFORD'S STOCK

I do not feel that we used excessive zeal at all.

ACS Senior Investigator[1]

The Proposal to Seize

8.1 On 21 December 1987 the Senior Investigator prepared a further minute to his Senior Inspector, in which he again claimed that the company had admitted that Midford Malaysia did not extend any credit to Midford Australia.[2] He then appears to have argued that this point established the falsity of the agreement between Midford Australia and Midford Malaysia relating to the financial accommodation charges deducted from the invoiced price of the goods[3] whereupon he claimed that the amount of extra duty payable from December 1985 to December 1987 was $98 000.[4] No basis for this calculation was disclosed. He concluded that:

- there were reasonable grounds to conclude that the goods were forfeited,
- twelve entries which he listed and the supporting invoices were false.
- the goods subject to those entries were smuggled, and
- a document produced to support the establishment of the Customs value (the agreement between the companies) was false.[5]

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1. Evidence, p. 1508.
2. Evidence, p. K7765.
3. Evidence, p. K7766.
4. Evidence, p. K7766.
5. Evidence, pp. K7766-7.

8.2 He put forward the proposal to exercise his powers under section 203 of the Customs Act and seize the goods forthwith.[6]

8.3 In relation to the powers of Customs officers to seize an importer's goods, the Committee was advised that the only requirement was for an officer of Customs, at any level within the organisation, to form the belief on reasonable grounds that the goods are forfeited.[7] Every officer has the delegation to seize goods and, in practice, more junior officers who intend to undertake seizure action allow opportunities for their supervising officers to veto the seizure before seizure action occurs.[8]

8.4 In this case the supervisor directed that the officer firstly:

> ... attach a schedule showing value for duty of the goods, short payment against undervaluation and short payment against non eligibility of quota plus total duty short paid.[9]

8.5 The significance of the last two parts of his direction to the Senior Investigator is discussed at section 8.67 below.

8.6 The schedule was attached on that same day[10] and is reproduced below in Table 8.1

8.7 According to the Customs submission, the officer 'proposed to seize eight of the more recent shipments.'[11]

8.8 However, the Committee's reading of the documentation shows that he intended to seize the goods from twelve entries shown on the schedule.[12] According to the Committee's count, there are actually seven shipments covered by those twelve entries.

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6. Evidence, p. K7767.
7. Evidence, pp. S218 and S8642.
8. Evidence, p. S218.
9. Evidence, p. K7767.
10. Evidence, pp. K7767 and K7770.
11. Evidence, p. S3265.
12. Evidence, pp. K7766-7 and K7770.

Table 8.1

FOLIO	LODGEMENT NUMBER	VFD AS ENTERED	QUANTITY	FINANCIAL ACCOM IN $A	V.F.D. AS SHOULD HAVE BEEN ENTERED	DUTY SHORTPAID F/A (@40%)	DUTY SHORTPAID QUOTA (+$5 ea)	TOTAL DUTY SHORTPAID
1	1S72810681K	$ 16606.89	8054	1347.62	17954.51	539.05	$ 40270	$ 40809.05
2	1S72810675N	$ 20688.02	7598	1672.43	22360.45	668.97	$ 37990	$ 38658.97
3	1S72660013B	$140375.85	49698	11345.61	151721.46	4538.24	$ 248490	$ 253028.24
4	1S72470003D	$ 38706.32	10637	3120.56	41826.88	1248.22	$ 53105	$ 54353.22
5	1S72470002C	$ 38707.53	10014	3047.09	40854.62	1218.84	$ 50010	$ 51288.84
6	1S72470001B	$ 8734.30	1921	702.91	9437.21	281.16	$ 9605	$ 9886.16
7	1S70771110C	$ 29427.81	8342	2374.44	31802.25	949.78	$ 41710	$ 42659.78
8	1S73010754P	$119239.66	45803	9648.14	128887.82	3873.66	$ 229015	$ 232888.66
9	1S73220011J	$ 96787.88	34784	7829.47	104617.35	3131.79	$ 173920	$ 177051.79
10	1S73450419N	$ 53417.27	14130	4306.22	57723.54	1722.49	$ 70650	$ 72372.49
12	1S73450523M	$ 563.35	226	45.62	608.97	18.25	$ 1130	$ 1148.25
11	1S73450550A	$ 31486.25	9379	2541.17	34027.47	1016.47	$ 46895	$ 47911.47
	TOTALS	$593841.13	200586	$47981.28	$641822.53	$19206.92	$1002850	$1022056.92

VFD = Value For Duty
FA = Financial Accommodation[13]

13. Evidence, p. K7770.

Approval of the Seizure Action

8.9 The Customs submission continued by stating that:

> (The officer's) proposal was considered by his superiors, up to executive levels, in accordance with established practice. In the end, all officers reviewing the proposal gave their support.[14]

8.10 In this regard it was noted that his Senior Inspector recorded on 18 December 1987, three days prior to the seizure being approved, that he had read the officer's report, accessed the documents referred to and agreed that they would support forfeiture of the relevant goods.[15] A particular difficulty the Committee experienced with this information was the claims by Customs that the report he agreed with on 18 December 1987 was not written until 21 December 1987.[16] Faced with the choice, the Committee concluded that the report by the Senior Investigator was actually dated on or before 18 December and that the evidence given during the hearings was incorrect.

8.11 In a minute dated 21 December 1987 the Chief Inspector advised the Acting Director that the recent section 214 action against Midford disclosed certain irregularities, including:

> ... its failure to comply with the conditions associated with a special quota allocation; and
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> ... the reduction of customs values for financial accommodation which does not exist.[17]

8.12 He referred to the cancellation of the quota and the Senior Investigator's report, pointing out that in his view, although some $20 000 duty had been shortpaid on those particular shipments, approximately $100 000 had been shortpaid over the previous two years 'which, quite apart from the likely evasion arising from the quota irregularity, must be considered significant.'[18]

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14. Evidence, p. S3266.
15. Evidence, p. K7771.
16. Evidence, pp. 1312-3.
17. Evidence, p. K7790.
18. Evidence, p. K7790.

8.13 How he arrived at the figure of $100 000 is not clear, but it appears to have been a basic extrapolation of the figures in the table applied to the total value of Midford's imports over the previous two years. The Chairman commented:

> Somebody said recently to me here that it is very similar to my running two red lights in 1984 and then a film being developed or something of my having done it in 1992 and someone saying, 'Well you did it twice there in one month; therefore, you have been doing it twice every month since 1984, probably at the same speed.[19]

8.14 The use of unfounded extrapolation to justify extreme seizure action caused great concern to the Committee.

8.15 Also included in the minute was an acknowledgment that the rate of duty evasion equated to slightly more than 3 per cent of the value of the goods and that this would ordinarily be considered disproportionately low to justify seizure action. The ACS procedure manual advised that in considering such decisions, other considerations such as previous shipments where duty was shortpaid, should be taken into consideration.[20]

8.16 Nonetheless, he recommended that the seizure proceed and added that 'It is confidently anticipated that the evidence will support a successful prosecution.'[21]

8.17 In fact, the financial accommodation issue did not eventuate in Court proceedings. The Acting Director agreed to the proposed seizure and also approved storage of the seized goods at Midford's bond store.[22]

8.18 The Committee did not receive any evidence to support the claim made in the Customs submission that the seizure was approved at executive levels within Customs.[23] Other Customs witnesses, in later submissions to the Inquiry, appear to confirm the Committee's view that this did not occur.[24]

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19. Evidence, p. 1338.
20. Evidence, p. K7790.
21. Evidence, p. K7791.
22. Evidence, p. K7791.
23. Evidence, p. S3266.
24. Evidence, pp. S3876 and S3610.

The Seizure of Midford's Goods

8.19 In all, there were four separate occasions where Midford's goods were seized. The dates of each seizure and respective garments involved are detailed in Table 8.2 below.

Table 8.2 Seizures from Midford.[25]

DATE	QUANTITY
21-12-87	133 937
29- 2-88	26 369
2- 3-88	514
17- 3-88	1 080
TOTAL	161 900

8.20 Figures quoted for the total value of the seized goods varied considerably from source to source and time to time. The Committee accepted that they were valued at $1.8 million.[26] Even the quantities of goods seized was similarly subject to fluctuation.[27] Chapter 9 provides further details.

8.21 Dealing with the largest seizure first, on 21 December 1987 the Senior Investigator verbally seized the 133 937 shirts using eight Notices of Seizure. It was noted that 23 735 of these garments were in two containers at Port Botany and were removed direct to storage at St Marys.[28] All other garments seized that day were retained in Midford's bond store at Kembla Grange. Physical removal of these goods did not occur until March 1988. Further details are provided in Chapter 9.

8.22 Customs submitted that:

> ... seizure notices were issued at the time of seizure or shortly afterwards. The Notices of Seizure reflected the goods imported described on documents produced to ACS with Customs entries. It was stated on Notices of Seizure that

25. Evidence, p. S3858.
26. Evidence, pp. 1451 and S11.
27. Evidence, pp. S6003 and S6135.
28. Evidence, p. S3888.

> actual quantities seized would be notified later. Some of the goods seized had been duty paid and released from Customs control. The ACS did not propose seizure of goods from innocent third parties.[29]

8.23 Elsewhere Customs submitted that the purpose of the formal seizure was to put Midford on notice as to seizure and to prevent any further dealing with those goods.[30]

Quantifying the Security Value

8.24 The Committee was told that Customs expected the seized goods to be released to Midford after payment of a security.[31] The amount of that security was calculated using a standard formula and equated to $1.72 million.[32] When the Committee asked Customs from where it thought Midford was going to obtain that sum as a security bond, the answer was not very enlightening. They said 'establishment of securities was a matter for Midford and their financial advisors to decide.'[33]

8.25 Other evidence indicates Customs was well aware that Midford was already suffering severe liquidity problems.[34] Midford submitted that:

> The A.C.S. took this action at a time when it did most harm to the company. December is not only a high sales period, for the Christmas fashion market, but it also is a high sales period for schoolwear deliveries before the annual January back to school.[35]

8.26 It was observed that the figure of $1.72 million provided by Customs as being the assessed market value of the goods for purposes of determining the quantum of any security bond was not in fact calculated until more than five months after the first seizure.[36] A minute dated 27 April 1988 also indicated that the

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29. Evidence, p. S3858.
30. Evidence, p. S3266.
31. Evidence, pp. 1460, 1474-7 and S3876.
32. Evidence, p. S8645.
33. Evidence, p. S8645.
34. Evidence, p. 1752.
35. Evidence, p. S11.
36. Evidence, pp. S8646-9.

Customs investigators believed it unlikely that Midford would submit an application for delivery of the seized goods on security.[37] The Committee did not receive any evidence to indicate that Midford was advised of the figure Customs sought as a security bond when the amount was formally determined by the Collector in May 1988.[38] Midford indicated to the Committee that $2.5 million was required.[39] It is likely that this is what they were informally advised around the time of the first seizure.

Committee's Concerns on Seizures

8.27 Many aspects of the decisions to seize Midford's stock were of concern to the Committee. As already stated, the foremost concern is that the whole matter proceeded on a misconstruction of the facts by a relatively junior officer whose assertions were accepted at face value by his superiors. For such a significant action, some checking of the basic facts by those approving the proposed seizure action surely must be mandatory.

8.28 The known damage that the seizures would effect on Midford's business and the resulting compoundment of its liquidity problems has also been commented upon above. It is fairly clear that Customs did not expect that the goods would be released to Midford on security.

Seizure Policy

8.29 During the Inquiry, the Committee requested that Customs provide copies of the procedure manuals in force at the time of commencement of the investigation of Midford and as amended since then.[40]

8.30 Because of their significance and relevance the sections applicable to commercial seizures are reproduced in their entirety below. Of particular interest was whether the ACS adhered to their policy covering seizure action at the time.

37. Evidence, p. S8646.
38. Evidence, p. S8646.
39. Evidence, p. 1477.
40. Evidence, p. K7274.

EXTRACTS FROM ACS MANUAL - VOLUME 19 - INVESTIGATION PROCEDURE

4/3/2 OPERATIONAL GUIDELINES

(4) The following are guidelines for officers. Every possible situation cannot be covered but officers should apply the general policy with discretion and common sense and at all times be conscious of what is equitable and fair.

(5) (a) It is important that seizure action not be instituted arbitrarily and that the full circumstances of each case be examined before the ultimate decision is taken. Before any seizure is effected, the owner of the goods should normally be given the opportunity to show cause why the goods should not be seized, either by enquiry, interview or statement.

(b) Seizure involves the physical taking into possession of the goods and officers are to ensure any seized goods are removed from the premises forthwith. Importers are not to be requested to hold goods on Customs' behalf.

(c) Seizure may be effected verbally, but vide section 205(2) a seizure notice must be served as soon as is practicable.

(7) Where goods have been seized, any duty outstanding should not normally be called up unless action is taken to return the goods (section 208).

(8) Despite the broad bases that exist for the forfeiture of goods, seizure should only be considered when certain elements or conditions exist. Such elements or conditions include:

- imports by recidivists;
- goods prohibited absolutely by legislation;
- a deliberate breach of legislation has been perpetrated, including where goods are conditionally prohibited;
- unentered enclosure of reasonable value within package or FCL (Full Container Load) cargo especially where the importer had foreknowledge.

Seizure should not normally occur for:

- *Commerce Infringements, initial shipments;*
- Legitimate errors, including where investigation conclusively establishes the Agent acted without foreknowledge, contrary to direction or consent of the importer.

(9) HIGH VALUE GOODS

Discretion should be exercised in considering seizure action when the amount of evasion or attempted evasion is disproportionately low to the total value of the goods involved. *In deciding whether to seize or not, other* considerations (eg. previous shipments where duty shortpaid, past performance etc.) may be taken into account.

Prosecution without seizure may be an acceptable alternative.[41]

Did the ACS adhere to their Policy on Seizure?

8.31 The Committee concluded that there were a number of departures from the official operational guidelines in respect of the seizures in the Midford case.

8.32 Firstly, it is doubtful that the policy was applied with discretion and common sense in consciousness of what is equitable and fair. (part 4) It is arguable whether the seizure was initiated arbitrarily, but it is certain that the full circumstance of the case had not been examined prior to making the decisions.

8.33 Customs would probably argue that Midford was given an opportunity to show cause why the goods should not be seized, (part 5 (a)) but the Committee's view is that if the interview of 11 December 1987, which was initiated by Midford, not Customs, was the opportunity provided, there was no mention of the contemplation of seizure action and, in fact, Midford did show reasonable cause for the action not to proceed. The facts that the Customs investigators misconstrued the answers they received and failed to comprehend and further investigate the explanations provided anyway would not assist their claims. There were no communications to Midford following the interview conducted on 11 December 1987

41. Evidence, pp. K3842-3.

indicating that the explanations provided were not acceptable to the ACS nor any approaches for further explanation.

8.34 When the goods were seized, apart from a relatively small quantity of goods sent directly to the Commonwealth storage facilities at St Marys near Sydney, they were left in Midford's bond store at Kembla Grange. Part 5(b) specifies that the goods be removed from the importer forthwith and not be held on Customs' behalf. Had this guideline been followed, many of the later disputes about what was seized and whether other garments had been substituted would not have arisen. Further comment on these matters is included at Chapter 9 of this Report.

8.35 Part (8) requires that seizure should only be considered when certain elements or conditions exist. In the Committee's view, Midford's situation did not fit into the four categories listed. They had a good record for past imports over the previous decade or more and in fact Customs submitted that:

> Records were maintained in a generally satisfactory manner;
>
> Overall, errors detected were not so atypical of those encountered in other bond stores to warrant excessive attention by control officers;[42] and
>
> The Midford Paramount bond was subject to 43 control checks over the period January 1976 to March 1988. Discrepancies detected were generally of a minor nature and attempts were made by management to rectify the problems following requests by Customs field officers.[43]

8.36 The most serious error Customs could locate was the loss of five cartons of goods in April 1978 requiring the payment of $600 in duty.[44]

8.37 There was also no evidence that a deliberate breach of the legislation had occurred. Customs was fully aware that Midford continued to operate using certain procedures endorsed by the ACS that it simply failed to review and modify when it restructured its Malaysian operations.[45] Further comment on whether there was evidence of intent to defraud, necessary to effect a successful prosecution of an importer, is contained at Chapter 21 of the Report.

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42. Evidence, p. S4253.
43. Evidence, p. S4253.
44. Evidence, p. S4253.
45. Evidence, p. K7762.

8.38 The second strand of part (8) says that seizure should not occur for legitimate errors. This reinforces the Committee's view that inadvertent breaches should not result in seizure action.

8.39 Part (9) concludes with the guideline that prosecution without seizure may be an acceptable alternative. There is no evidence that Customs contemplated such action. To the contrary, there is evidence that both seizure and prosecution action was envisaged.[46]

8.40 As indicated in part (9) of the guidelines above, there is provision for discretion to be exercised in considering seizure action when the amount evaded is disproportionately low to the total value of the goods involved. In the Committee's view, Customs also failed to adhere to this part of the guidelines, and not just because Midford had a proven good prior record for its imports. Further comment is included at section 8.56 below.

The Murphy v Farmer Case

8.41 A Customs case that was considered by the High Court resulted in a fundamental change in the interpretation of the Customs Act. Prior to the decision, Customs took the view that it could effect forfeitures and seizures of goods where there was any error in an entry document, even if that error amounted to only one cent. The effect of the *Murphy v Farmer* case was to limit such actions by Customs to cases where there was evidence of intentional error. In other words, mere mistakes, rather than deliberately false entries, could no longer result in such severe penalties being dealt out by Customs.[47]

8.42 Instead, an administrative penalties regime was introduced to cover inadvertent errors. Due to time and resource constraints, the Committee did not receive an opportunity to examine the administrative penalties system, notwithstanding that numerous indicators of problems with that system were bought to the attention of the Committee during the Inquiry. The Law Reform Commission, however, recently reviewed the operations of that system and recommended certain changes.[48] Matters have also been raised in the Senate on this topic.

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46. Evidence, p. K7790.
47. Evidence, pp. 1545 and 1706.
48. See Chapter 6.

8.43 In relation to the timing of the High Court Decision in *Murphy v Farmer*, the Committee was advised by the Customs NSW Director, Investigation that:

> I think it was in 1987; the High Court decision might have been in 1987 - 88. It would have been before the seizures at Midford.[49]

8.44 Given such a scenario, the Committee enquired whether the decision in the High Court case was taken into consideration in deciding to seize Midford's goods. In the Committee's view, it clearly had not. However, the witness said:

> We would have to go back and look at the timing of the Murphy v. Farmer case. But notwithstanding that, I would be of the view that that change said that there had to be some sort of intention in relationship to the forfeiture provisions. I think it could be still argued that there was an intention relative to the seized goods.[50]

8.45 The Committee could not agree. The following exchange then took place:

> **Chairman** - I understand that that is the theory of it, ... But what we are really looking for - let me be very clear on this point - in this instance is this: where are the words, the document, the evidence, that led you to the conclusion that there was a deliberate attempt to evade customs duty. In the light of Murphy v. Farmer, where was the deliberate attempt? What can you point to to say, 'There is the deliberate attempt'?
>
> **Witness** - I think there was a degree of intent in what had happened.
>
> **Chairman** - In what respect?
>
> **Witness** - I think they represented it as financial accommodation when in fact we would say that there was not a financial accommodation consideration. I think that

49. Evidence, p. 1545.
50. Evidence, p. 1545.

judgment would be backed up. When we got an advice on the matter of an imposing by a senior counsel, that was the sort of view he put up to us.

Chairman - Did you tell that senior counsel that Midford was, in effect, perhaps only continuing with arrangements that had previously been cleared by Customs?

Witness - Whatever we put before the senior counsel would have been the full facts that we had.

Chairman - The senior counsel may have only really given you advice on part of the information, that being the only part that you gave him.

Witness - With respect, I do not think we would be selective.[51]

8.46 However, the Committee subsequently noted overwhelming evidence of just how selective Customs had been in compiling its 'evidence' in relation to the financial accommodation issue, as disclosed elsewhere in this Report.

8.47 The Committee later asked the ACS Manager, Legal Services regarding the date of the High Court decision in *Murphy v Farmer*. He said it was 'in June 1988,'[52] which the Committee then noted would put it as occurring just after the last of Midfords' goods had been seized. Needless to say, Customs did not review its seizure decisions in respect of Midford in the light of the High Court decision at the time.

Every ACS Officer has the Power to Seize

8.48 Another policy aspect that was of particular interest to the Committee was the notion of Customs officers at all levels possessing the power to seize goods.[53] The Committee commends the practice of supervisory powers of veto before seizure occurs,[54] which does not, unfortunately, appear to be formalised in the procedure manuals. However, the Committee was disappointed to see that in practice the veto option is not effective, especially if, as in this case, there is no

51. Evidence, p. 1546.
52. Evidence, p. 1706.
53. Evidence, pp. 1468 and 1846.
54. Evidence, p. 1465.

serious attempt to check the basis for the seizure by those reviewing the proposed action. It was also apparent that the veto option is rarely exercised.[55]

8.49 What also surprised the Committee was any lack of real policy or procedural distinction between narcotics and commercial seizures. Whilst powers of seizure in narcotics cases should correctly extend to Customs officers at all exit and entry points of the nation, in the Committee's view there seems to be no valid reason for identical treatment of normal commercial import or export operations. The absence of limits on the value of seizures intended by officers at various levels within the organisation also perplexed the Committee. That a multi-million dollar seizure could be effected by an officer at the middle of the Administrative Service Officer range and sanctioned by an officer acting in a position at the top of that range, left the Committee bewildered. The implications that such decisions could conceivably be made quite legally by a new recruit during their first day on the job in Customs did not escape the attention of the Committee.

8.50 The anomaly between the requirement for establishing the existence of sworn information before obtaining a search warrant as opposed to an officer simply forming a view that goods are forfeited and should therefore be seized, was also of concern to the Committee.

The Timing of the Decision to Seize

8.51 Evidence was received indicating that the first discussions about seizing Midford's goods arose during consultations by the ACS with the AGS and Counsel on 10 December 1987.[56] Chapter 7 provides details.

8.52 When witnesses from the ACS appeared before the Committee they insisted that the decision to seize was made on 21 December 1987.[57] As indicated at section 8.10 above there is evidence to refute the position put to the Committee by those witnesses. Questioning of ACS witnesses in relation to why certain entries lodged by Midford in early December 1987 were not processed also reinforces the impression that the decision to seize the goods had effectively been made long before 21 December 1987.[58] One witness stated that the entries of 6 and 8 December 1987 were not processed because the decision had been made to seize the goods,[59] but when the Committee pointed out the obvious contradiction with earlier evidence

55. Evidence, p. 1468.
56. Evidence, p. 1305.
57. Evidence, pp. 1312-3.
58. Evidence, p. S8913.
59. Evidence, pp. 2025-6.

given indicating that such a decision was not made until 21 December 1987,[60] the following response was received:

> At pages 2025 and 2026 of the Transcript, (the witness) states:
>
> My recollection of those events was that the goods were to be seized and that the decision was made not to go ahead and process the entries.
>
> By way of explanation (the witness) did not mean that the decision to seize was made at that time, the decision that was made was not to process the entries further.[61]

8.53 It was more than a little frustrating for the Committee to be told that the reason why certain entries were not processed is that Customs did not process them!

8.54 The Committee concluded that Customs intended to pursue seizure action against Midford on and from at least 10 December 1987 in respect of the undervaluation issue and that when this avenue collapsed following the interview with Midford on 11 December 1987, the grounds for intended seizure were simply switched to the issue of financial accommodation.

8.55 It is also the Committee's view that the seizures were timed to effect the maximum impact on Midford's business.

Disproportionate Seizure

8.56 According to the schedule prepared by the Senior Investigator for the purposes of gaining endorsement for the seizure action, the duty evaded was $19 206.92.[62] The seizure notices issued to Midford did not specify the amount of duty claimed by Customs to have been evaded, but merely stated that the entered values should have been higher.[63]

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60. Evidence, p. S8913.
61. Evidence, p. S8913.
62. Evidence, p. K7770.
63. Evidence, pp. K7773-89.

8.57 It is therefore not surprising that Midford was shocked to learn that $1.8 million of its stock was to be seized for what Customs put to them as an unquantified but obviously minor underpayment of duty. It is somewhat less than helpful for Customs to tell an importer that the value should have been higher without specifying what that higher amount should be.

8.58 Even after all four seizures had been effected and all seized stock counted and matched to the respective invoices and entries, the best that Customs could claim as the amount of underpaid duty was still a figure of relative insignificance. Customs advised the Committee that the duty shortpayment was 'Approximately $16 000.'[64] That $1.8 million worth of stock was seized for an alleged $16 000 duty shortfall did not impress the Committee. Even the DPP queried the disproportionate seizures.[65]

8.59 When Customs later contemplated pursuing charges in respect of the financial accommodation issue they arrived at a figure of $83 000 for what was 'allegedly evaded overall.' It seems that this figure is the sum total of the amounts of financial accommodation deducted by Midford over the years 1986 - 1988 and is based on the unproved assumption that no interest was paid whatsoever by Midford Malaysia to Midford Australia over that period. As discussed in Chapters 14 and 15 below, the Committee did not share the ACS view about the absence of an interest component for goods imported by Midford from Midford Malaysia.

8.60 Customs maintained that the seizure of $1.8 million in stock for an alleged $16 000 underpayment 'Accords with the ... instructions' reproduced at section 8.30 above.[66] The Committee totally rejects this claim.

8.61 Even if Customs could successfully prove that Midford had evaded duty of $83 000, seizure of such a disproportionate value of stock would still be no more acceptable to the Committee. Likewise, if Customs could, in addition, prove that the evasion was deliberate and Midford had a prior record of convictions, the Committee would still view such a disproportionate seizure as a thorough and overzealous abuse of the powers vested in ACS officers.

8.62 The Committee agreed with Midford that it was not a case of the ACS using a sledgehammer to crack a nut. They used a steamroller.[67]

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64. Evidence, p. S3610.
65. Evidence, p. S4000.
66. Evidence, p. S3610.
67. Evidence, p. 266.

8.63 The Committee does not accept the claim by Customs that 'In this case, the seizure was based purely upon revenue considerations and not as a measure of penalising the company.'[68]

Addressing the Problem

8.64 The overzealousness displayed over the seizure action led the Committee to consider mechanisms to more appropriately regulate the powers of junior and middle ranking Customs officers to undertake seizures. Of particular concern was the apparently unlimited value of goods that may be seized. The Committee believes that executive level approval should be mandatory for high value seizures. Also of concern was that although the seizure policy as set out in the guidelines reproduced at section 8.30 above appeared to be reasonable, there was a rather unorthodox interpretation attached to those guidelines by the investigation team in this case. Customs as an organisation appears to still endorse such action.

8.65 Accordingly, the Committee believes that for seizure approvals in non-narcotics suspected fraud cases more stringent guidelines are necessary and a more formalised system of delegation levels is required.

8.66 Delegation limits should apply to the cumulative market value of seizure proposals to prevent circumvention of the limits via effecting multiple smaller value seizures.

Relationship Between Quota Matter and Seizure Action

8.67 Customs repeatedly argued before the Committee that the financial accommodation matter was the sole reason for undertaking the seizures of Midford's stock.[69] The ACS maintained the position even when questioned about the disproportionate values of the duty allegedly evaded and shirts seized.[70] Witnesses pointed to the absence of mention of the quota issue both on the seizure notices and a later Statement of Reasons provided to Midford under the Administrative Decisions (Judicial Review) Act as evidence supporting this stance.[71] Comment on that Statement of Reasons is included at Chapter 13 of this Report.

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68. Evidence, p. S3610.
69. Evidence, pp. 1308 and S3610.
70. Evidence, pp. 1470-1, 1473 and 1477.
71. Evidence, p. S8643.

8.68 Close examination of the evidence extracted from Customs, however, led the Committee to explore possible alternate considerations that may have influenced the decision by Customs investigators to implement the unprecedented massive seizures.

8.69 The Committee noted that Customs initially contemplated seizure on the basis of the perceived $1 million undervaluation fraud.

8.70 When it became obvious that the undervaluation position was unsustainable, the focus switched to the financial accommodation issue, then estimated at $100 000. By this time Midford's offshore quotas had been revoked. In examining the documentation put forward to gain endorsement for the seizure proposal, the Committee noted that on 21 December 1987 the Senior Inspector directed the Senior Investigator to prepare a schedule showing, amongst other things, the 'short payment against non eligibility of quota.'[72]

8.71 The resulting schedule purported that more than $1 million in quota duty was shortpaid using the prevailing rate of $5 quota per garment. The schedule is reproduced at Table 8.1 above.

8.72 The Chief Inspector on that same day in his minute to the Director recommending seizure action, made reference to the 'likely evasion arising from the quota irregularity.'[73]

8.73 Little more than a week later, on 30 December 1987, the Chief Inspector advised the Director that in relation to the seizure action 'Further grounds of forfeiture are envisaged once formal advice on the quota misuse is received.'[74] This referred to the forthcoming written legal advice from the AGS dated that same day.[75]

8.74 Quite apart from this latter comment being reminiscent of frequently made claims that Customs made decisions or undertook actions and then formulated the reasons for doing so after the events,[76] the Committee judged the observations referred to above to seriously call into question the evidence given by the witnesses.

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72. Evidence, p. K7767.
73. Evidence, p. K7790.
74. Evidence, p. K7843.
75. Evidence, pp. S406-9.
76. Evidence, pp. S31 and S55-6.

8.75 The above observations were put to Customs witnesses during the hearings. Despite the evidence, Customs maintained that the quota issue had no effect on the decisions to seize shirts.[77] Again the matter was raised and the same response was received.[78] The Committee made one further attempt, in June 1992, questioning Customs as follows:

> On page S.4358 you say:
>
> (The Senior Investigator) confirms that the quota issue had no effect on the decision to seize shirts.
>
> The Committee is at a loss to understand this stance when the evidence before it clearly points to the quota issue being an influence on the decision to seize. Could you explain where we seem to be getting it wrong please?[79]

8.76 The two page response, which failed to acknowledge that the quota issue had any influence on the decision to seizure, included that:

> It should be noted that at no stage did (the officer) state that his reasons for seizure included the quota issues and as stated previously he was bound by law to notify Midford as to his reasons for seizure.
>
> There was no mention of the quota issues in his reasons.
>
> One test that may be applied is that in December 1987, when (the officer) decided to seize the goods, if the Financial Accommodation issues had not been established, the goods would not have been seized.[80]

8.77 The Committee was more than a little disappointed that Customs remained resolute notwithstanding the evidence in respect of both the quota influence on the seizure decision and the inability of that organisation to 'establish' the financial accommodation issue. Comments made elsewhere in this Report about the regurgitation of established positions by original decision makers without revisitation of the issues involved apply equally here. Chapter 13 also comments upon the Statement of Reasons produced by the officer.

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77. Evidence, p. 1308.
78. Evidence, p. S4348.
79. Evidence, p. S8642.
80. Evidence, p. S8643.

Seizure Quantities

8.78 The ACS advised the Committee that:

> ... the seizure of goods occurred as a consequence of an officer forming a belief from the evidence obtained, that they were forfeited. As forfeited goods are the property of the Crown, *their prompt seizure to prevent diversion is normal* practice.[81]

8.79 This latter statement does not sit well with the Guidelines issued to ACS officers on seizures in relation to alternate courses of action available. Nothing in any of the formal ACS policy or procedures indicates that every forfeited item had to be seized.

8.80 The Committee was particularly concerned that Customs seized every item of Midford's available stock imported from Malaysia that had not already been dispersed to retailers. Considerable effort was made by Customs to identify all stock possibly subject to forfeiture and it was subsequently seized. Even during the removal of the seized goods when Customs found additional stock in Midford's bond store that had already been duty paid, these additional garments were also seized. Efforts by Customs to justify these actions did not win favour with the Committee.

8.81 The pursuit of Midford by Customs was relentless. Even quantities as low as 500 garments were taken in March 1988 when more than 160 000 shirts were already subject to seizure. One of the seizures was for only 38 shirts.[82] An indication of the attitude in Customs at the time is revealed in a file note made by the Manager, Tariff Concessions and Quota Branch on 17 December 1987. He recorded that:

> It is understood from speaking to the Chief Inspector Investigation in Sydney that in relation to 50,000 units already entered for Bond there are grounds for forfeiture of the goods. ACS is waiting the entry of a further 150,000 before initiating action.[83]

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81. Evidence, p. S3691.
82. Evidence, p. S3490.
83. Evidence, p. S2773.

8.82 Four days later the first seizures were undertaken. Customs did not include a copy of that file note in the submissions it made to the Committee. Efforts by Customs to retrospectively explain away what is revealed in the file note only worsened their position.[84] Further details are at Chapter 12 of this Report.

8.83 Customs submitted to the Committee in February 1991 that:

> It is also claimed that Customs intended to seize an additional 150,000 shirts which had recently arrived at Sydney and Melbourne, and which MP subsequently shipped back to Malaysia. These shirts had not been entered at the time and the NSW investigation team, being aware of their existence, consulted with MP's customs agent as to how they should be dealt with. No threat of seizure was made and it was MP's decision that they be re-exported.[85]

8.84 Unfortunately, it seems to have escaped the notice of Customs that:

- the file note recording the ACS intention to seize the forthcoming shipment was made a month or two prior to the arrival of the shipment, which was subsequently returned to Malaysia;
- Midford thwarted the intentions of Customs by re-exporting the goods in question;
- Customs at the time had no idea that such would be Midford's reaction; and
- entries had apparently been lodged in respect of those goods but were withdrawn by Midford following the seizure by Customs of a small sample shipment entered to test whether payment of the full rate of duty without deduction of the financial accommodation amounts would appease Customs.[86]

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84. Evidence, pp. 1482-3 and S3592.
85. Evidence, p. S3592.
86. Evidence, p. S4246.

Attempts to Frustrate the Inquiry

8.85 As an example of the difficulties faced during the Inquiry, when the Committee queried Customs' contention that the shirts had not been entered, the answer provided sought to make out that although the entries had been lodged, Customs did not consider that an entry had been made until such time as that entry was fully processed and the respective duty paid.

8.86 The claim by Customs that there was no threat of seizure was totally rejected by the Committee.

8.87 Customs also argued that the small sample shipment was seized because it contained deductions from the value for duty in respect of financial accommodation charges. The Committee pointed out that there was already evidence before it showing that Midford specifically instructed its Customs Agent to ensure that the trial shipment entries did not exclude the financial accommodation component.[87] Notwithstanding this evidence, Customs reiterated that if the financial accommodation was included in the entered value, they would not have seized the shipment. In what was, prior to this particular inquiry, an unprecedented step the Committee called for and examined the relevant entry documents. The Chairman said:

> We may have a difference of opinion there. As has been the case right throughout this, we have a claim and a counterclaim. So to settle this matter, we called for the tabling of the entries and invoices.
>
> I am not aware, in the nearly decade that I have been here in this building, of members of a parliamentary committee going back to entries and invoices to establish a fact themselves.[88]

8.88 Customs further frustrated the Committee by explaining that because the entries were withdrawn before they were fully processed, copies of the associated documents, such as the invoices, were probably not retained.[89] Midford was therefore requested to provide their copies.

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87. Evidence, pp. 2033-4 and S8095.
88. Evidence, p. 2084.
89. Evidence, p. 2035.

8.89 Close inspection by the Committee of the entry documents and related invoices, however, clearly showed that there had been no deduction for financial accommodation. That is, the total invoiced value of the goods matched exactly the figures on the entry.[90]

8.90 However, Customs then claimed that the entry and invoice provided did not relate to the entry specified on the Notice given to Midford.[91] It appears that three airfreight entries were made at the relevant time but only one was referred to on the Notice.[92]

8.91 Episodes like this were not infrequent during the Inquiry and go some way to enlighten those not closely following the Inquiry about the difficulties experienced by the Committee. They also provide an insight into why so much documentation was called for by the Committee. Comments on the swamping of the Inquiry with unrequested and irrelevant material are included elsewhere in this Report.

8.92 It is stressed that the Committee did not have either the time or resources during this Inquiry to investigate, or if it did to report upon, all the conflicts and contradictions in the evidence provided by Customs. The difficulties placed in the way to prevent ready access to the evidence required for completion of the tasks required of the Committee cannot be dismissed lightly. That such behaviour reflects very poorly on the organisation concerned and on its attitude to proper public accountability should not be under emphasised.

The Customs Attitude

8.93 An additional matter that puzzled the Committee in relation to the purported financial accommodation fraud was the evident corporate mindset within Customs that a leading company established for more than forty years and worth more that $12 million,[93] would risk everything to evade a mere $16 000 in Customs duty. One submission to the Inquiry quoted Customs as saying 'Every importer is a crook, and it is just a matter of catching them.'[94]

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90. Evidence, pp. S8093-105.
91. Evidence, p. S11020.
92. Evidence pp. S7352-5 and S8096.
93. Evidence, p. 183.
94. Evidence, p. S14.

8.94 A witness to the Inquiry pointed to the expressed concerns:

> ... of members of the Judiciary, the Ombudsman, academics; practitioners and others about the operation of the Australian Customs Service ... These concerns are that the Australian Customs Service is 'inward looking', harsh in its treatment of importers, inflexible in its view and sees itself as above the law.[95]

8.95 Revelations during the Inquiry about the operations of the ACS certainly did little to dispel such concerns.

8.96 Notwithstanding the deficiencies identified above by the Committee, Customs investigators continued to defend their action. The Chief Inspector told the Committee that:

> We take every precaution. When I look back on this - and here we are examining the seizure situation - I could say that exactly the same process would occur again. I cannot see anything wrong with that.[96]

8.97 However, the Comptroller-General told the Committee in March 1992 in respect of the seizure policy that 'I would not resile from the fact that the policy could well need revision.'[97] In relation to the ability of any officer within the ACS to effect a seizure, he said:

> I think the onus is on the organisation to have very prescriptive guidelines so that the concern that you have expressed over the policy outline, and that I have acknowledged, can be accommodated.[98]

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95. Evidence, p. S29.
96. Evidence, p. 1475.
97. Evidence, p. 1845.
98. Evidence, p. 1846.

Recommendations

8.98 The Committee recommends that:

- the underlying facts supporting an application for seizure action be checked within the Australian Customs Service at a suitably senior level prior to forwarding the application for approval;

- tamper proof seals be placed on all containers of goods subject to seizure;

- the quantity of goods seized be counted and documented as soon as possible after seizure is effected. Such documentation should be retained;

- breaking of the tamper proof seals and Australian Customs Service verification of the quantity of seized goods be witnessed by a nominated representative of the importer;

- to prevent situations arising where importers can be accused of interfering with seized goods, all such goods subject to seizure action be removed from the importer upon seizure, or actions be taken to prevent access by anyone other than the seizing officer;

- whilst acknowledging that circumstances may arise where both seizure and prosecution are necessary, the Australian Customs Service give greater consideration to pursuing a course of prosecution without invoking seizure action where prosecution action appears warranted. That is, where appropriate, a conscious choice be made for seizure or prosecution, not both;

- appropriate delegations be introduced for Australian Customs Service officers supporting recommendations for seizure action such that commercial (non narcotics) cases exceeding $50 000 must be endorsed by the National Manager, Investigations, all cases exceeding $100 000 in value be endorsed by the Deputy Comptroller-General, and cases exceeding $250 000 be personally endorsed by the Comptroller-General prior to forwarding an application for seizure to a judicial officer. A range of delegations should also be

established for State based Australian Customs Service officers covering seizures of up to $50 000 in value. These amounts should be regularly reviewed by the Minister, by regulation, to keep pace with the consumer price index;

- seizure notices clearly quantify the alleged underpayment or evasion of duty;

- for commercial cases where seizure action is contemplated, the value of goods proposed to be seized be limited to no more than twice the amount of the duty allegedly underpaid or evaded; and

- owners of goods seized by the Australian Customs Service be promptly advised of the amount of any security bond payable for the return of those goods.

Chapter 9

BOND STORE DISCREPANCIES

The Numbers Don't Add Up

> *I walked through the factory. I observed total calm. People were working. ... there was nothing abnormal, apart from the fact that goods were being moved.*
>
> *ACS Chief Inspector*[1]

The Operation of the Bond Store

9.1 Midford operated a bond store at Kembla Grange for receipt of imported shirts. The procedure for entering such imports through Customs is via a series of 'Nature' documents. The Nature 10 document allows entry into the country, the Nature 20 authorises removal to the bond store, while Nature 30 documents allow release of shirts into home consumption.[2] Duty is paid at the Nature 30 stage. (A Nature 20 document can have several associated Nature 30 documents because the importer may want to enter a consignment covered by a Nature 20 document in a series of smaller batches.)

9.2 Before duty is paid the imported goods are under Customs control and are housed in a bond store. Midford's bond store was situated in the basement of the building. Midford described the layout to the Committee:

> **First Witness** - If we take this as the basement, the bond store occupied about half of that and that was a cyclone fence with a big double gate.
>
> **Chairman** - So it was clearly separated?
>
> **First Witness** - Clearly separated.

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1. Evidence, pp. 1498-9.
2. Evidence, p. 1333.

> **Second Witness** - Outside there were goods that had been either cleared or locally manufactured or from Taiwan or some other place.[3]

9.3 The witnesses added that the area outside the fenced off bond store was used to store goods which had been cleared or which were 'seasonal merchandise' which 'may have been produced locally or imported from other areas.'[4] If it was the winter season the area was used to store summer style garments.[5]

9.4 In a submission dated 27 October 1992, Midford provided a diagram of the basement area showing the layout of the bond store; loading, unloading and transfer area; out of season storage area; fabric store; and machinery and fixtures store areas. The diagram is reproduced as Figure 9.1.

9.5 In a submission to the Committee Midford described how the store operated:

> Cartons were taken out of the Bond Store after advice from the Customs Agent was received that all the formalities were completed. The outwards information was recorded in the Bond Book.
>
> Cartons were never opened in the Bond Store. They were opened after they were cleared, and then only in the warehouse on the next level up, as the garments were being placed on the appropriate shelves.[6]

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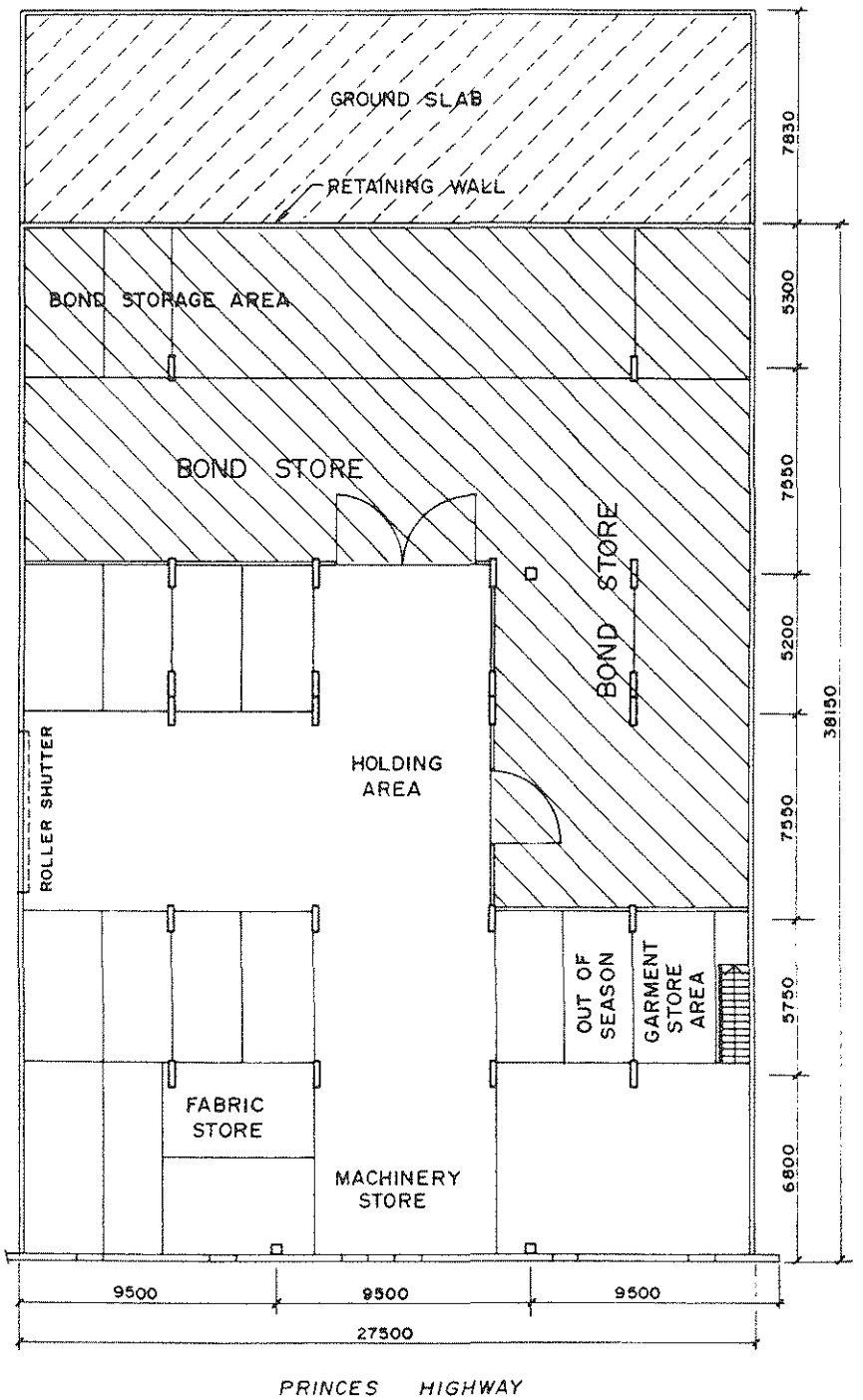
3. Evidence, p. 252.
4. Evidence, p. 252.
5. Evidence, p. 147.
6. Evidence, p. S5827.

Figure 9.1 BOND STORE FLOOR PLAN[7]



7. Source, S11560.

9.6 Midford had operated a bond store since 1976 and regular inspections had been carried out by Customs 'at intervals ranging from 3 - 9 months.'[8] The ACS submission concluded with:

> Discrepancies detected were generally of a minor nature and attempts were made by management to rectify the problems following requests by customs field officers. (Prior to the Midford investigation) there were no instances of illegal movement or substitution of goods ...[9]

9.7 Midford told the Committee that eventually the bond licence was allowed to lapse:

> **Witness** - ... a formal application for us to renew the bond store licence came from Customs ... After the proceedings were terminated. ... we said, 'No'. Once bitten, twice shy.
>
> **Chairman** - Who offered you the renewal of your bond store licence?
>
> **Witness** - I think it may have been some other office within another section. It is a revenue raiser; I think it costs about $6 000 for a bond store licence.[10]

9.8 Midford added that in fact the company was still able to import garments but from countries other than Malaysia.

9.9 A letter dated 25 September 1989 from the ACS to the AGS, however, stated that 'Midford surrendered their Bond License (sic) soon after the seizure' and had applied for re-instatement.[11] At a public hearing Midford's account was later confirmed by a Senior Inspector who said that Midford 'let the bond licence expire and did not renew it.'[12]

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8. Evidence, p. S4252.
9. Evidence, p. S4253.
10. Evidence, p. 257.
11. Evidence, pp. S6031-2.
12. Evidence, p. 1502.

The Customs Activities at the Bond Store

9.10 The events surrounding the seizure notices concerning Midford's stock have been covered in detail in Chapter 8. In outline, on 8 and 10 December Midford's Customs Agent lodged ten Nature 30 entries for a total of 29 411 shirts.[13] These entries were not processed by Customs.[14]

9.11 On 21 December 1987 the initial seizure notices were issued by Customs and, on the next day, the Sub-Collector of Customs at Port Kembla visited the bond store to identify the stock liable for seizure. Due to time constraints it was not possible to ascertain the exact number of shirts so the stocktake only detailed the number of cartons present.[15] (Seizure notices were also issued on 29 February, 3 March and 17 March 1988.[16])

The Reconciliation of the Stock

9.12 The ACS submission of 21 April 1992 detailed that on Thursday 18 February two Customs officers visited the bond store to ascertain the numbers of shirts through:

> ... a reconciliation of under bond stock to the underbond register ... (by the next afternoon) it became apparent that not all the underbond stock was where it should have been and there appeared to be shortages, figures were pencilled into the bond register.[17]

9.13 A submission from the ACS stated that the Warehouse Manager explained to the Customs officers that some of the 'cartons of shirts were being repacked because of water stainage' and that the keeper of the register who was absent on leave would be available for explanation after the weekend.[18]

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13. Evidence, pp. S7331-41.
14. Evidence, pp. 2025, S7101 and S8913.
15. Evidence, p. K7850.
16. Evidence, p. S6002.
17. Evidence, p. S6001.
18. Evidence, p. S6001.

9.14 A submission from Midford referred to the water stainage issue:

> ... it was noticed that water was lying at the bottom of the (shipping) container. Port Kembla Customs were contacted and their permission was sought to open the cartons inside the Bond Store to check for water damage. Under their supervision some of the cartons were opened and the goods were put out for airing.[19]

9.15 The statement of the ACS investigating officer, contained in the Customs investigation file, noted that 'the carton count was agreeing with the pencilled in figure and not the correct balance figure.' The Warehouse Manager was alleged to have said 'I think the pencilled in figure is what we instruct the agent to clear with customs and we repack it into cartons ready to go out.'[20]

9.16 The ACS officer's statement described the events on Monday 22 February when the officers returned. The bond register and relevant Customs documents had been removed by a Midford director and given to Midford's solicitor. Instructions had been left that 'no company personnel ... (were) to answer any questions from Customs.' Questions had to be directed through the solicitor. The Warehouse Manager was alleged to have told the ACS officers that a full stocktake was to be carried out on the following weekend.[21]

9.17 A draft brief supplied to the Committee by the ACS on 21 April 1992 stated that the bond register was returned after a written demand from the Port Kembla Sub-Collector of Customs whereupon 'it was noticed that the pencilled in figures had been erased.' The reconciliation of stock recommenced on 1 March 1988 and was completed the next day.[22]

9.18 At a public hearing, the Committee asked the supervising Customs officer whether he had pursued the matter of the markings in the bond register with the Midford employee responsible - although unable to speak with the employee, questions could have been directed through Midford's solicitor. The witness said that he had not pursued the matter.[23] This matter is discussed further at section 9.40 below in relation to the operation of the bond register.

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19. Evidence, p. S5827.
20. Evidence, p. K4089.
21. Evidence, p. K4089.
22. Evidence, p. S6135.
23. Evidence, p. 1938.

The Removal of the Shirts from the Bond Store

9.19 On 3 March 1988 at 7.30am Customs commenced the removal of the seized shirts. The cartons were loaded onto four semi-trailers and three pantechnicon trucks. Four ACS officers were involved with 'approximately 12 DAS officers in attendance.'[24] The task was completed at 8.30pm, with 2 707 cartons having been loaded.

9.20 The ACS officer in charge told the Committee that the trucks drove to the DAS store at Zetland where they were left in a secure area. The following day, a truck at a time, the trucks travelled to the DAS store at St Marys where they were unloaded. The cartons were checked as they were moved into storage. The unloading phase of the operation was completed on 9 March 1988.[25]

9.21 A submission from the ACS dated 21 April 1992 recorded that a further eighteen cartons arrived on 18 March 1988. The cartons had been left in the bond store because they 'were not covered by the seizure Notices.' A Notice had subsequently been issued on 17 March.[26]

9.22 The submission also stated that the Warehouse Manager 'was present and gave full co-operation.'[27] This comment is at variance with that of the Warehouse Manager who wrote to the Committee 'I said to them if they needed any help I would be in my office. They said, "We prefer to do it alone. We have all the information required"'.[28] (This issue becomes important in ascertaining whether Customs seized the correct cartons and is discussed at section 9.48 below.)

9.23 A submission from the Production Co-ordinator described the affect the removal of the shirts had on the staff, many of whom had come from Eastern Bloc countries:

> Some of the older women could not cope and they became very emotional and distressed, and by 10 a.m. 15 women had to leave work, because they felt they were reliving another nightmare.[29]

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24. Evidence, p. S3858.
25. Evidence, pp. 1585-7 and S6135.
26. Evidence, p. S6002.
27. Evidence, p. S6002.
28. Evidence, p. S11468.
29. Evidence, p. S4458.

9.24 The Chief Inspector present disputed this description of the pervading atmosphere during the uplift of shirts on 3 March. He told the Committee:

> I went there the day the seizure was effected. I went there primarily to look first-hand from a management point of view at what was happening. ... I walked through the factory. I observed total calm. People were working. The uplift was occurring ... on a different level altogether. ... It was right away from the manufacturing side of the business. I can say that there was nothing abnormal, apart from the fact that goods were being moved.[30]

9.25 The Committee considers that the work force at Midford could easily have been distressed by the removal of stock by Customs officers. It is quite possible that workers in a state of shock could be perceived by a Customs officer to be calmly pursuing their duties.

The Counting of the Shirts at St Marys

9.26 The ACS draft brief of evidence written in August 1988 stated that the counting of the shirts began on Thursday 10 March and was completed on 28 March.[31] Two discoveries were made - a shortfall in the expected number of shirts and the presence of a significant number of shirts of non-Malaysian origin. The ACS submission of 2 February 1992 stated:

> Of the 155,053 articles supposedly in the bond, a total of 154,731 articles were verified as having been removed of which some 15,824 were apparently substituted goods of mainly local manufacture ... leaving a final deficiency of 16,146 articles.
>
> On further examination it was noticed that the customs entries lodged on 6 and 8 December (this was later corrected to 8 and 10 December at p. S7101) sought to clear 29,411 garments and included the above deficiency.[32]

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30. Evidence, pp. 1497-9.
31. Evidence, p. S6135.
32. Evidence, p. S3268.

9.27 The Committee notes that this tally does not match that reported in the draft brief written in August 1988:

> The final count of underbond goods removed is 134,361 shirts of Malaysian origin, (and a total of 15,497 shirts of non-Malaysian origin). There should have been 150,896 shirts of Malaysian origin only. Not only was there 16,535 shirts of Malaysian origin not accounted for but substitution of these shirts had occurred.[33]

9.28 Notwithstanding this discrepancy, the implication of both documents is clear. Midford was accused of removing shirts from the bond store without authority and attempting to cover up the deficiency by substituting non-Malaysian shirts many of which had been made on the premises. There are thus two issues. Firstly, was there actually a shortfall in the numbers of Malaysian shirts, and secondly, how did non-Malaysian shirts become included in those removed by Customs?

The Shortfall in the Numbers of Malaysian Shirts

9.29 In determining whether there was a shortfall in the number of Malaysian shirts removed from the bond store it is important to ascertain how many should have initially been present. Apart from physically counting them, the number of shirts can be calculated from the Customs Nature 10, 20 and 30 documents or by examining the bond register.

9.30 A submission from Midford indicated that the usual procedure did not involve the physical counting of shirts as they entered the bond store. Cartons of shirts 'were opened after they were cleared, and then only in the warehouse on the next level up, as the garments were being placed on the appropriate shelves.'[34]

9.31 During the public hearing of 23 March 1992 the Committee was told by a Senior Investigator that the numbers present in the bond could be determined via entries in the bond register.[35] The same officer stated that the first time Customs actually counted the shirts was when they were at the DAS store at St Marys.[36]

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33. Evidence, pp. S6135-6.
34. Evidence, p. S5827.
35. Evidence, p. 1723.
36. Evidence, p. 1739.

9.32 An opening statement by two ACS officers involved with the seizure, received by the Committee at a public hearing on 19 February 1992, listed the number of garments involved in the Notices of Seizure.[37] The officers stated:

> The Notices of Seizure reflected the goods imported described on documents produced to ACS with Customs entries ie Nature 10 and Nature 20. ... Midford's Bond register book was used as were Customs records of all goods entered for warehousing (Nature 20) and all goods entered for home consumption ex warehouse (Nature 30). The balance ... should have equated to the actual numbers of garments in the bond subject to seizure.[38]

9.33 In other words, the Nature 20 entries indicate the number of garments entering the bond store, the Nature 30 entries indicate the number entering home consumption and therefore the difference should be the number remaining in the bond store.

9.34 The section 208A Notices together with their supporting Notices of Seizure giving the number of shirts subject to the Notices were submitted to the Committee.[39] Table 9.1 below compares the numbers of garments the two ACS officers had reported in their opening statement as seized, with the numbers shown in the 208A Notice, as well as with the numbers shown in the Notices of Seizure supporting the 208A Notices.

9.35 The amounts shown in the 208A Notices corroborate the statement of the ACS officers (apart from a minor error), but there is a major discrepancy between the 208A Notices and their supporting documents. The supporting Notices of Seizure total to 1 176 garments more than the number indicated in the 208A Notices.

9.36 As well, it appears that when the number of shirts that were seized at Port Botany are taken into account, the number of Malaysian shirts expected to be in the bond store is close to the number of Malaysian shirts counted at St Marys. Based on the Notices of Seizure documents there is a shortfall of shirts of 434. However, based on the ACS officers' statement and the 208A Notices, Customs removed 742 more Malaysian shirts than were anticipated to be present in the bond store!

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37. Evidence, pp. S3858-9.
38. Evidence, pp. S3858-9.
39. Evidence, pp. S3455-96.

Table 9.1

Number of Malaysian shirts involved in the four seizures based on ACS statements and seizure notices

Date	No. based on ACS officers' statement (S3858)	No. based on Section 208A Notices	No. based on Notice of Seizures
21/12/88	133 937	133 937 (S3455)	134 563 (S3456-71)
29/2/88	26 369	25 439 (S3472)	26 441 (S3473-87)
3/3/88	514	1 444 (S3489)	992 (S3490-2)
17/3/88	1 080	1 080 (S3494)	1 080 (S3495)
TOTAL	161 900	161 900	163 076
No. seized in Port Botany (S6003)	23 735	(23 735)	23 735 (S3450, S3470)
No. expected in bond store	138 165	138 165	139 341
No. of Malaysian Shirts counted at St Marys (S6003)	138 907	138 907	138 907
Discrepancy	Excess of 742	Excess of 742	Deficiency of 434

9.37 In their initial submission the ACS stated that the stocktake of seized goods 'revealed a shortfall between what was physically seized and what was shown in the bond register as being in storage.' There was a deficiency of 16 146 shirts.[40]

40. Evidence, p. S3268.

The Operation of the Bond Register

9.38 Midford maintained two records of the number of shirts in the bond store - in their bond computer and in the bond book. In their submission of 30 October 1992, Midford described the procedure:

> As goods were taken out of the Bond store after the necessary receipt of the Customs Warrant number, the data was entered thus reducing the stock in (the computer records). This system perpetually gave immediate management information and established accurate financial reporting and control ... In compliance of (the Customs Act), Customs officers instructed us to maintain a Bond Register in a specific manner. ... (It) was required to be always maintained in the Bond Store. Customs officers established the procedure and by their regular auditing ensured exact compliance at all times.[41]

9.39 Thus, the accurate numbers were stored electronically and the bond book was updated, since it was this that Customs officers periodically stamped. The Committee noted the comment of the ACS investigating officer that the bond store book contained pencilled in figures which were agreeing with the carton count of the contents of the bond store.[42] It is alleged that these figures were subsequently erased when the book was returned from Midford's lawyer.[43]

9.40 Customs appear to have relied on the bond book rather than Midford's computer records. They had noted that the pencilled in figures seemed to be accurate but when these disappeared failed to pursue the matter with the Midford employee charged with its upkeep. Had they relied on their own Nature documents the numbers might have added up. In the event the issue did not reach the courts and so the methods employed and the discrepancies between the Section 208A Notice and supporting Notices of Seizure were not tested.

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41. Evidence, p. S11561.
42. Evidence, p. K4089.
43. Evidence, p. S6135.

How Did Non-Malaysian Shirts Become Part of the Seizure?

9.41 Despite uncertainties about the numbers of Malaysian shirts present there still remains the puzzle concerning how shirts of non-Malaysian origin became mixed in with the shirts that were seized and removed.

9.42 Unfortunately, the unpacking of cartons of shirts to check for water damage complicated the issue. The Committee noted that Customs documents indicated that some 441 seized cartons had been repacked.[44] There seem to be four possibilities: cartons of non-Malaysian shirts became incorrectly labelled; ACS officers gathered up everything in sight; open cartons were repacked by ACS officers and their DAS colleagues; or cartons marked as Malaysian were packed by Midford employees with non-Malaysian shirts.

Were Incorrectly Labelled Cartons Uplifted?

9.43 In the statement of the supervising Customs officer which formed part of the draft brief the officer noted the presence of 'many unmarked cartons in the bond'[45] on 18 and 19 February 1988. The explanation that was proffered by the Warehouse Manager was that there had been some water damage. (This is discussed in section 9.14 above.) However, the same ACS officer stated to the Committee that when reconciling cartons to the bond register he used the unique markings on the cartons.[46] When the Committee asked him to explain this apparent inconsistency he said:

> When we first started to do the reconciliation there were cartons identifiable to the bond register ... In the bond area there were also cartons which were unmarked that were full of loose shirts. Our reconciliation was interrupted half way through (due to the removal of the bond register.) ... When we continued that reconciliation, the unmarked cartons that were open with the exposed shirts were no longer there. Cartons were all there - wrapped, sealed with masking tape and strapped, with identifying the (sic) unique invoice and style numbers on the outside.[47]

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44. Evidence, p. 1935.
45. Evidence, pp. S6135, K4089.
46. Evidence, p. 1934.
47. Evidence, p. 1935.

9.44 It is possible that Midford employees in preparing an order for non-Malaysian shirts had used cartons with markings identified in the seizure notice.[48]

Did ACS Officers Seize or Gather up Everything in Sight?

9.45 A Midford director told the Committee that on the day of the seizure, ACS officers:

> ... descended on the bond store and the stores. They said, 'Stand aside', and they started slapping stickers on goods inside and outside the bond store. ... They were left there, we dared not even look at them, and they picked them up two or three months later.[49]

9.46 A submission from Midford dated 27 October 1992 elaborated:

> ... Customs officers came into the basement area and placed red circular Customs stickers on all the cartons in the basement store. They advised they were merely acting under instructions from Sydney Customs.
>
> (The Warehouse Manager) complained to them that not all the garments were under Customs control. Their reply was that it will all be sorted out later.[50]

9.47 Customs later denied that they had placed stickers on goods in the bond store.[51]

9.48 Accounts differ concerning whether the Warehouse Manager was present during the uplift of seized shirts. If the four ACS officers did not closely supervise the dozen DAS workmen in attendance it is possible that the wrong cartons could have been removed. However, if stickers had been placed on the wrong

48. Evidence, p. 1935.
49. Evidence, p. 249.
50. Evidence, p. S11558.
51. Evidence, p. 1932.

cartons, such as 'seasonal merchandise' stored near the bond store,[52] these goods would have also been removed.

9.49 The Warehouse Manager's submission related that he offered his help in locating stock but was told they preferred 'to do it alone. (He) left the area and went back to (his) office.'[53] The ACS submission of 21 April 1992, however, stated that the Warehouse Manager 'was present and gave full co-operation.'[54]

9.50 The Committee noted that this comment appeared after the events at the bond became an issue in the public hearings. Such information was absent from the undated draft brief of evidence to the DPP[55], the statement of the ACS officer in charge of the uplift[56], and the original ACS submission dated 20 February 1991.[57]

9.51 A Midford director told the Committee that although he was not present, his Warehouse Manager relayed to him the events of that day:

> **Witness** - When the gentlemen were there, our management were horrified ... all these fellows were doing was helping themselves and loading shirts all day. Just imagine the scene. There were orders ready to be delivered.
>
> **Chairman** - ... you are saying that they were taking shirts from not just the bond store but from elsewhere?
>
> **Witness** - Yes, of course. ... They were helping themselves - loading shirts from everywhere. We were not there to supervise them.[58]

52. Evidence, p. 252.
53. Evidence, p. S4311.
54. Evidence, p. S6002.
55. Evidence, pp. S6134-6.
56. Evidence, pp. K4089-90.
57. Evidence, pp. S3267-9.
58. Evidence, pp. 1496-7.

9.52 The Warehouse Manager wrote to the Committee on 2 October 1992 and suggested that the reason for non-Malaysian shirts being found in the uplifted garments was that Customs:

> ... not only loaded goods in the Bond store but also stock outside the store. It happened because they did not want Midford staff to be there. Outside the bond store there were shirts that were made in Australia and in other overseas countries, as well as cleared Malaysian stock on which duty was paid.[59]

9.53 The ACS have denied these allegations. A submission dated 8 May 1992 stated:

> ... the ACS only uplifted cartons that were intact and identifiable from exterior markings of invoice and style number. All cartons were found to be strapped and sealed by masking tape. Cartons liable for seizure were identified by the style number and invoice number appearing on each carton. Paper seals ... were placed on those cartons outside of the bond area which had been duty paid but nonetheless were liable for seizure. [60]

9.54 The ACS officer in charge of the operation added, during a public hearing:

> ... we identified the outside markings of the cartons, which were strapped, to the invoices and the bond register that we worked off and to the seizure notices. I thought there were Malaysian shirts inside them because of the outer markings.[61]

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59. Evidence, pp. S11469-70.
60. Evidence, pp. 1933-4 and S6479.
61. Evidence, p. 1584.

9.55 The Committee is intrigued, however, by an alleged exchange between a Senior Inspector involved in the uplift and the Warehouse Manager. In a signed statement dated 17 November 1989 the officer wrote:

> During the operation I asked ... the Warehouse Manager, 'Are there any shirts of Australian origin in the cartons.' (He) replied, 'Oh, probably about one hundred.'[62]

9.56 If the ACS officers were removing cartons which they were confident contained Malaysian shirts, why was the question asked? The question suggests Customs were not sure as to the contents of the cartons which further suggests that incorrect cartons might have been taken.

Did Customs Officers Repack Open Cartons With Non-Malaysian Shirts?

9.57 The ACS has denied that their officers repacked opened cartons. The officer in charge of the removal of shirts told the Committee that the unmarked open cartons which had been present when he first visited the bond store were absent on a subsequent visit. The cartons which were present were all 'wrapped, sealed with masking tape and strapped.'[63]

9.58 As well, the ACS submission of 8 May 1992 also stated that 'the ACS did not repack any loose shirts into cartons prior to the cartons being removed from Midford's premises.'[64] This was reiterated in a further Customs submission on 28 August 1992,[65] which sought to clarify a comment made by the Comptroller-General at a public hearing on 11 August 1992. The Comptroller-General had said:

> I believe that there may well have been another circumstance where Customs was doing part of the repacking of the shirts in that Bonds store at Port Kembla, Unanderra or wherever it was.[66]

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62. Evidence, p. K4072.
63. Evidence, p. 1935.
64. Evidence, pp. 1933 and S6479.
65. Evidence S11001.
66. Evidence, p. 2073.

Did Midford Substitute Shirts?

The Placing of Seals on the Seized Cartons

9.59 A key question is whether the initial ACS investigating officers from Port Kembla had placed seals on the seized cartons - had Midford attempted to add non-Malaysian shirts these seals would have shown evidence of tampering. Midford told the Committee in a submission on 27 October 1992 that Customs officers had 'placed red circular Customs stickers on all the cartons in the basement store.'[67]

9.60 At a public hearing on 17 March 1992 the supervising ACS officer told the Committee that he thought 'seals were only placed on goods that had been seized that had been duty paid and were outside the bond area.' [68] Later, on 21 May 1992 he said he was not absolutely sure about cartons outside the bond area but he knew 'that there were no seals on the goods in the bond area.'[69]

The Draft Brief of August 1988

9.61 The ACS provided to the Committee a draft concerning the section 33 breach. The brief was written in August 1988 and addressed to the DPP but 'never left the ACS.'[70] The brief alleged that the pencilled entries in the bond register occurred when the agent had been directed to enter goods for home consumption. (This is referred to at section 9.15 above.) After this event and prior to the seizures being announced goods were removed from the bond store. Substitution was alleged to have occurred after knowledge of the reconciliation of cartons and before Midford were informed that Customs were going to actually count the number of shirts. The brief also stated:

> With all the lines where goods were unaccounted for, and there was amounts pencilled in, there was either an entry lodged in an attempt to obtain an authority to release the goods from bond or a direction by Midford Paramount Pty. Ltd. (sic) to the agent to create an entry in order to obtain authority to remove the goods from bond. No authority was given by the Australian Customs Service.[71]

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67. Evidence, p. S11558.
68. Evidence, p. 1583.
69. Evidence, p. 1932.
70. Evidence, p. S6010.
71. Evidence, p. S6136.

9.62 The Committee sought clarification from the ACS about the entries lodged to gain approval to enter the goods into home consumption. The ACS responded to the Committee's inquiry via a submission dated 27 October 1992. It stated that the entries referred to were in fact those on 8 and 10 December 1987 which were made before the Malaysian garments were seized.[72]

9.63 The submission contained the following:

> The ACS has never said that the entries were created to cover the deficiency as mentioned. It appears that Midford directed their agent to enter the goods but did not wait for any authority from the ACS to release the goods. They simply delivered the goods.[73]

The ACS did not suggest a motive for Midford's alleged illegal action.

9.64 The Committee feels that the statement in section 9.61 above to be found in the draft brief intended for the DPP, is ambiguous and could be interpreted as an allegation that Midford endeavoured to cover up their breach of the Customs Act section 33 by attempting to retrospectively clear goods from bond.

9.65 Responding to the Committee's request to demonstrate how the numbers and styles of the garments shown on the entry documents of 8 and 10 December 1987 related to the 16 146 garments that were alleged to be deficient, Customs provided details of the number of garments entered, the alleged deficiency and the number of non-Malaysian shirts found in cartons carrying the bond mark associated with that entry (i.e. the number of shirts allegedly substituted).[74] The information is summarised in Table 9.2.

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72. Evidence, p. S11499.
73. Evidence, p. S11498.
74. Evidence, pp. S11496-8.

Table 9.2

Details of the Customs entries of 8 and 10 December 1987 and their relations to the alleged deficiency and alleged substitution

Entry Number	No. of shirts to be cleared	Alleged Deficiency	Non-Malaysian Shirts found in the cartons	Discrepancy in the numbers
1	1 390	719	1 716	+ 997
2	854	986	879	- 107
3	3 011*	781	507	- 274
4	400	400	402	+ 2
5	880	818	798	- 20
6	834	648	414	- 234
7	2 040	369	305	- 64
8	480	175	168	- 7
9	11 666	7 038	6 771	- 267
10	7 856	3 595	3 152	- 443
Totals	29 411	15 529	15 112	----

* The ACS document gives 2 571 but the Nature 30 document gives 2 571 under style 1006 and 440 under style 1111 totalling 3 011.

9.66 From an examination of this information the Committee noted several discrepancies, the most obvious being that the numbers of non-Malaysian shirts allegedly substituted do not match the alleged deficiency. Indeed, for entry number 1 Customs would have the Committee believe that an excess of almost one thousand shirts were substituted! In only two cases could it be argued that the 'substituted' shirts matched the 'deficiency' and, as well, the totals do not match. Furthermore, if the alleged breach did occur, entry number 2 shows that Midford removed 132 shirts more than the number for which they had sought clearance.

9.67 The Committee further compared the numbers of the alleged deficiency in various Customs documents before it. The ACS draft brief written in August 1988 gave a value of 16 535 garments; the ACS submission of 2 February 1992 gave 16 146; the ACS submission of 27 October also gave the value

of 16 146, but the total of the deficiency pertaining to the ten Customs entries was 15 529 resulting in a deficiency of 617 unaccounted for.

9.68 The Committee is left with the impression that Customs either does not know itself how large the deficiency is, or that other Malaysian garments not covered by the ten entries showed a deficiency. If this is the case, it throws doubt on the allegation that Midford's premature removal of shirts against the entries of 8 and 10 December was the cause of the deficiency. The Committee noted that, in their draft brief, Customs did not allege a deficiency against other lines of garments in the bond store, but wrote on 27 October 1992 that 'Midford had moved an additional 132 items upon which no Home Consumption entry had been lodged.'[75] Even then Customs were still 485 shirts short in their reckoning!

9.69 As well, the Committee noted that the total of 15 112 non-Malaysian shirts allegedly found in the cartons associated with bond marks of the ten entries was less than the total number of non-Malaysian shirts uplifted - either 15 497 (draft brief[76]) or 15 824 (2 February 1992 submission[77]). The ACS did not volunteer where the other 385 or 712 non-Malaysian shirts fitted into the picture. Once again this cast doubt on the allegation that non-Malaysian shirts were substituted for deficiencies caused by premature delivery of goods covered by the December 1987 entries.

The Alleged Statement by the Warehouse Manager

9.70 A comment made by the Warehouse Manager was also reported in the brief and the initial ACS submission.[78] The manager was told that:

> ... he would be advised of the exact number of shirts. At this point (he) commented that there may be about a hundred Australian made shirts in the cartons but would not elaborate.[79]

9.71 The comment appears to have been distorted by Customs as it has a different complexion when recounted by the ACS officer actually involved. In his

75. Evidence, p. S11496.
76. Evidence, p. S6135.
77. Evidence, p. S3268.
78. Evidence, p. S3268.
79. Evidence, p. S6135.

signed statement dated 17 November 1989 the officer reported a response to a direct question:

> During the operation I asked ... the Warehouse Manager, 'Are there any shirts of Australian origin in the cartons.' (He) replied, 'Oh, probably about one hundred.'[80]

9.72 The Committee considers that such manipulation of evidence is inappropriate.

9.73 The Warehouse Manager, responding to the alleged conversation as reported in the original ACS submission, wrote to the Committee that 'There is absolutely no truth in the statement.'[81]

9.74 When Customs had finished counting the shirts, they had found 15 824 non-Malaysian shirts of which 12 846 had been made in Australia,[82] which represents a considerable asset.

Conclusion

9.75 At the time when the events took place Midford knew that it was under investigation by Customs and so would surely have been careful to observe the letter of the law. The Committee finds it hard to believe that Midford would illegally remove the shirts from bond, and risk further incriminating themselves by substituting shirts. Midford must have known that the origin of the shirts would have easily been ascertained if the cartons were opened and this is indeed what occurred.

9.76 Moreover, the total number of shirts removed to St Marys was 154 731 which is 322 short of the number which Customs expected to be present.[83] If Midford had substituted shirts, they didn't get the numbers right. If they had initially thought that only the number of cartons were going to be counted, as alleged, why add shirts at all? Why waste almost 16 000 shirts when they could have filled the cartons with the same weight of packaging material?

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80. Evidence, p. K4072.
81. Evidence, p. S11469.
82. Evidence, p. S6003.
83. Evidence, p. S3268.

9.77 The Committee notes that the ACS stated that during Midford's operation of the bond store 'there were no instances of illegal movement or substitution of goods on the scale uncovered during the investigation.'[84]

9.78 Also, the Committee was told by the Director of Investigations, NSW, at a public hearing that the errors discovered in the bond register were not pursued by Customs.[85] Midford told the Committee at the public hearing of 8 August 1991 that they only became aware of the charge of garment substitution when it was mentioned in the ACS submissions.[86]

9.79 It appears to the Committee, on the evidence before it, that Customs took close to the correct number of Malaysian shirts from the bond store. Therefore, there was no substitution of garments to hide an alleged shortfall of some 16 000 garments. The Committee considers the allegation in the draft brief to be unsustainable. It further appears that ACS officers took garments of non-Malaysian origin in error - they were incorrectly seized or, during the uplift, cartons which Midford was storing in the basement area were incorrectly removed.

9.80 Whether Customs genuinely believed that a section 33 breach had occurred or was covering up its mistake has not been resolved by the Committee.

Legal Consultations

9.81 Documents before the Committee show that after the discovery of an apparent shortfall in the number of shirts seized from the bond of 16 888 units and the apparent substitution of 15 328 shirts, the ACS sought advice from the DPP on 24 June 1988.[87] The issue was whether the ACS could sue Midford for a 'tort of conversion' concerning the deficiency and had a 'common law lien' over the non-Malaysian shirts. In other words, could Customs sue Midford for unauthorised removal of shirts from the bond store and could Customs keep the non-Malaysian shirts?

9.82 An interchange of correspondence ensued over the next month concerning whether the DPP should pursue the matter or whether the AGS was the

84. Evidence, p. S4253.
85. Evidence, p. 1727.
86. Evidence, p. 147.
87. Evidence, pp. S6108-9.

more appropriate avenue.[88] The DPP advised that the AGS should have carriage since it was a civil matter.[89]

9.83 Consequently, Customs sought advice from the AGS on 8 September 1988.[90] The reply on 28 October 1988 advised that Customs was 'not entitled to maintain possession of the goods that have not been subject to forfeiture or seizure.' In fact, Midford could sue Customs for 'conversion' if they were not returned![91] Advice was also given that for a tort of conversion it would have to be established that the goods were properly forfeited.[92] Customs provided the AGS with a brief of evidence concerning the grounds for forfeiture on 29 December 1988 as well as indicating that 'steps will be taken to return the substituted shirts.'

9.84 After considering the brief of evidence, the AGS advised that grounds for forfeiture seemed to exist[93] and Customs subsequently asked that the AGS consider the 'proposition to sue for damages pertaining to the unauthorised removal of a quantity of goods considered forfeited.'[94] There the matter appears to have stopped, being overtaken by Customs' concentration on the quota prosecution. After the failure of that prosecution the matter became part of the consideration in arriving at the settlement.

The Fate of the Seized Shirts and the Bond Store

9.85 Following the advice of the AGS about the probity of keeping the shirts of non-Malaysian origin, they were repacked on 9-10 April and returned to Midford on 11 April 1989.[95]

9.86 On 13 May 1988 notices were issued to Midford under the Customs Act requiring them to bring an action for recovery of the seized Malaysian shirts.[96] Under the Act goods can be returned upon payment of security. In this case an

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88. 8 July 1988, the DPP wrote to ACS: Evidence, pp. S6110-1; 12 July 1988, ACS wrote to the DPP: Evidence, S6115; 22 July 1988, the DPP wrote to ACS: Evidence, pp. S6112-4.
89. Evidence, pp. S6112-4.
90. Evidence, p. S6023-5.
91. Evidence, p. S6020.
92. Evidence, p. S6021.
93. Evidence, p. S6028.
94. Evidence, p. S6029.
95. Evidence, pp. K4073 and S2128.
96. Evidence, p. S3266.

amount of $1.7 million was required.[97] An ACS Chief Inspector appearing before the Committee stated that this value was 'an opined market value based on a formula ... (consisting of) the value of the goods plus the duty, plus the penalty duty, plus an uplift of 10 per cent.' He acknowledged that the final value 'should not be misread as being the commercial value.'[98]

9.87 Midford had to take action within four months otherwise the goods would be deemed condemned as forfeited to the Crown.[99] Midford took no action. They advised the Committee that they reached this decision based on legal advice received.[100] An ACS record of a meeting with Midford representatives said that Midford had made 'an economic decision', their quota had been withdrawn, their assets frozen and they had no money.[101] At a public hearing a Midford director declared:

> Where would we get that money from? They know that it is impossible for this to be done by a private company with our stocks (taken by Customs) and all that business.[102]

9.88 The NSW Director of Investigations told the Committee that once goods are condemned the 'normal procedure is that (Customs) wait for 12 months' and then proceed to auction them.[103] However, current legislative provisions enable disposal action to be taken within six months.[104] The shirts were listed for auction for 6-7 December 1989 upon direction of the Director but were withdrawn on 30 November.[105] The National Manager told the Committee that the Central Office in Canberra had become aware of the auction and he had directed the shirts be withdrawn as it had been decided that their fate would rest upon the outcome of the DPP quota prosecution.[106]

9.89 A Midford director told the Committee that after the prosecution collapsed the shirts were subsequently returned to Midford as part of the settlement upon payment of 'a very minimum price.'[107]

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97. Evidence, p. S3610.
98. Evidence, pp. 1457-8.
99. Evidence, p. S3266.
100. Evidence, p. 187.
101. Evidence, p. S649.
102. Evidence, p. 1477.
103. Evidence, p. 1524.
104. Evidence, pp. 1522 and 1526.
105. Evidence, p. S3273.
106. Evidence, pp. 1520-1.
107. Evidence, p. 1477.

9.90 A submission from Midford dated 27 October 1992 alleged that even then the numbers didn't add up:

> In the Deed of Release Customs state a figure of 162,642 shirts. That was the quantity that we paid for when we purchased our own goods ...
>
> When (the Regional Manager Investigations) was requested to have officers of Sydney Customs present to counter-check the garments as they were being loaded on the trucks in St Marys, to be returned to Wollongong, his reply was, 'we say the quantity is 162,642. We know it is right. We are not going to check it!'
>
> The actual quantity that was counted when the garments were being loaded on the trucks at St Marys was 161,658.
> **A difference of 984.**[108]

9.91 The Committee has decided not to pursue this allegation of discrepancies in the Customs warehouse but feels that a final quote from the same submission is appropriate:

> Suddenly Sydney Customs having taken complete control, seized everything in the basement store, removed them to their own premises, carried out a 'stocktake', lost 984 shirts, and then to cover up the bungling, alleges 'substitution.'[109]

Recommendations

9.92 **The Committee recommends that:**

- **section 81.1g of the *Customs Act 1901* be amended to allow the use of electronic accounting systems for bondstores and that this be reflected in the Customs Manual.**

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108. Evidence, p. S11559.
109. Evidence, p. S11559.

Chapter 10

DPP BRIEFS AND SUBMISSIONS ON QUOTA ISSUE

At no stage, even after three opening statements and the lodgement of Overt Acts, was it clear what conspiracy, if any, had occurred.

Comment by Midford's Tariff Advisor on presentation of prosecution case[1]

Introduction

10.1 Because of the inordinate difficulties suffered by the prosecution case during the Committal hearings, the Committee took a special interest in the briefs and submissions prepared by officers of the DPP. As noted at Chapter 4, members of the Customs Investigation team worked closely with the DPP's officers from around late February 1988 and had an indeterminable input to the material produced by the DPP.

Initial Consideration by the DPP

10.2 On 28 January 1988, two weeks after receiving the first 'brief' from the ACS, the DPP case officer provided a minute to the First Deputy Director and Senior Assistant Director setting out 'the available evidence ... with a view to recommending prosecution.'[2]

10.3 It is evident that at this stage the DPP noted the claim by the ACS and DITAC that 'the quotas were granted on the basis of Midford being an offshore manufacturer,'[3] even though the officer had 'not been provided with a copy of the original Ministerial Determination of 1977'[4] and had noted the requirement from

1. Evidence, p. 415.
2. Evidence, pp. S2221-32.
3. Evidence, p. S2222.
4. Evidence, p. S2224.

the 1985 determination was 'merely ... that the garments are to be sourced from Midford Malaysia.'[5]

10.4 This officer seems to have become confused about the possible sale of Midford Malaysia that was contemplated by Midford in mid - 1983. Some of the documents quoted as 'telling the story' in fact related to attempts during 1984 to sell the combined Australian and Malaysian operations.[6] From the documents examined by the Committee it is evident that Midford attempted to sell its entire Australian and Malaysian operations and it was only when this sale fell through in January 1985 that plans were made to separately sell the Malaysian factory.

10.5 Another error, which was carried right through to the Committal proceedings where it was disproved by the defence, was the claim that DITAC had invariably cancelled offshore quotas where the quota holder had ceased production.[7] The DPP case officer also erroneously claimed in her minute that 'Midford did not control the garments during (the) production process.'[8]

10.6 The Senior Assistant Director prepared a minute to the Director of the DPP in mid-March 1988, based on the earlier minute by the case officer and another minute of 15 March 1988.[9] Not surprisingly, this officer repeated that the quota entitlement was based on the imported garments being 'manufactured' by Midford Malaysia's plant.[10] However, it was of interest to the Committee that he recorded 'Despite numerous requests by this office we have yet to receive all information concerning the quota and conditions.'[11]

10.7 Notwithstanding that the full picture was not at that time known to the DPP, he added:

> A major area of concern in this matter is the question of the conditions on the quota (if any). It appears that the annual determination of the quota did not in every instance specify conditions and when they were specified wording of the conditions were general, for example, sometimes reference was made to the garments as being 'sourced' from Malaysia,

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5. Evidence, pp. S2225-6.
6. Evidence, p. S2226.
7. Evidence, p. S2228.
8. Evidence, p. S2230.
9. Evidence, pp. S2210-20 and S2223-52.
10. Evidence, pp. S2211-2.
11. Evidence, p. S2211.

> meaning that the garments be manufactured in Malaysia. In another instance reference was made to the manufacturing of the garments in Malaysia as opposed to the garments being manufactured by Midford Malaysia. Nevertheless, the conditions were explained and expanded upon in correspondence between the parties but it is open to argument that such conditions do not come within Section 273 Customs Act 1901. In addition the determination for the quota was published on relevant occasions without specifying conditions.[12]

10.8 Undeterred by any difficulties the above may have presented, these matters were brushed aside as in his view 'the matter does not so much rest on the adherence of conditions but rather on the criteria for eligibility and granting of the quota.'[13]

10.9 In his view, even though he had not seen the quota conditions or Cabinet documents, the quota would not have been granted to Midford if the shirts it imported were not manufactured at the Midford Malaysia plant.[14]

10.10 This officer also recorded concerns about pressure being placed on the investigation team and the DPP, relevant material and communications not being provided to the team, contrary legal opinions by ACS in-house legal officers, and discussions by DITAC and ACS officers with Midford and the Tariff Advisor.[15]

10.11 In addition, he included a reference to Midford undervaluing imports and underpaying $100 000 for Customs duty. This referred to the financial accommodation matter.[16]

10.12 During April 1988 the DPP case officer prepared a further minute to the Senior Assistant Director which recommended that charges under the Crimes Act proceed.[17] It was also stated that 'I believe that I have now been provided with all relevant material.'[18]

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12. Evidence, p. S2212.
13. Evidence, p. S2212.
14. Evidence, p. S2212.
15. Evidence, pp. S2214-20.
16. Evidence, p. S2214.
17. Evidence, pp. S2256-70.
18. Evidence, p. S2260.

10.13 Without going in to extensive detail, the Committee concluded this officer misread and selectively interpreted and represented the documentation in question, which was clearly taken out of context. Words such as 'sourced' were conveniently interpreted to mean 'manufactured', problems with the admissibility of some evidence were acknowledged and the 'invalidity of the instruments of determination' and lack of evidence of any intent to defraud were naively assumed not to have any deleterious effect on the proposed prosecution action.[19]

Considerations by Counsel

10.14 A brief, containing essentially the same material, was forwarded to Senior Counsel for an opinion during that same month.[20]

10.15 In a minute from the Senior Assistant Director to the Director, dated 21 April 1988, it was stated that:

> I felt it necessary that Senior Counsel's advice be sought due to the novel and complex issues involved in this matter, especially in light of my previous concerns raised in my minute of March 1988.[21]

10.16 It is also clear from this minute that further evidence favourable to the prosecution case was expected to emerge during the committal proceedings.[22]

10.17 Another fundamental error made by the DPP case officer was the statement that in respect of the quotas announced on 17 August 1977:

> Applications were only called for from companies which had invested in off-shore production facilities prior to the introduction of quotas with the objective of placing a substantial part of the output from these facilities on the Australian market.[23] (emphasis added)

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19. Evidence, pp. S2259-65.
20. Evidence, pp. S2430-55.
21. Evidence, p. S2255.
22. Evidence, p. S2255.
23. Evidence, p. S2431.

This error was repeated in the brief given to Counsel.[24]

10.18 The Committee noted that the relevant press releases were not restrictive. They actually stated that:

> Application for allocations from the 15 per cent anomalies reserve are invited from all parties who consider they are experiencing difficulties due to anomalies associated with the operation of the quota system.[25]

10.19 It is clear that 'first priority' would be given to firms who had invested in off-shore production facilities, but it is equally clear that applications were sought, and indeed quotas granted, to firms who had not done so.[26] The Cabinet documents also confirm this.[27]

DPP Considerations After Receiving Advice from Counsel

10.20 On 3 May 1988 the Senior Counsel advised that 'the evidence discloses a strong prima facie case' for charges under the Crimes Act.[28] However, on 26 May 1988 the First Assistant Director wrote to the Director that:

> (Senior Counsel) was asked to advise whether there was a prima facie case. He concluded there was. However, he did so on the basis of assumed facts contained in the observations on brief.[29]

10.21 This officer also said of the DITAC letter to Midford's Tariff Advisor dated 2 May 1985, which purportedly set out the quota conditions, that:

> In terms of conveying a clear meaning the first part of DITAC's letter is disappointing. The lack of clarity would, in my view, make it difficult to establish to the requisite

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24. Evidence, pp. S2431 and S2258.
25. Evidence, pp. S6685 and S6689.
26. Evidence, p. S624.
27. See Appendix E.
28. Evidence, pp. 2273-82.
29. Evidence, p. S2318.

standard that (Midford) failed to comply with the conditions as outlined.

In effect, DITAC's letter said that the quota would cease 'if (Midford) were to sell all of its interests in M.M.' (it did not).

Additionally DITAC stated that for the quota to continue:

- '(Midford) should continue its ownership in M.M.' (it did) and
- 'Imports of garments by (Midford) are to be directly tied to the products of the M.M. operation' (it is arguable that they were)
- 'In addition to M.M. being engaged in the production of the garments it should also be involved in the export of the products.' (again it is arguable that M.M. were so 'engaged' and 'involved').[30]

10.22 He went on to note that the only requirement in the letter that Midford did not comply with was to retain ownership of the plant and equipment.

10.23 However, he concluded, apparently through a misreading of a handwritten note made by the Tariff Advisor, that there was a 'deliberate misrepresentation' in respect of Midford's intention to retain its plant. He said this was 'not simply a statement of intention which ultimately could not be carried out due to changed circumstances.'[31]

10.24 In fact, that is exactly what happened.[32]

10.25 Comments on the Tariff Advisor's handwritten note are included in Chapter 29.

10.26 In addition, this officer incorrectly claimed that the Tariff Advisor was to receive $100 000 if the quota was continued and that this was 'a compelling motive.'[33]

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30. Evidence, pp. S2319-20.
31. Evidence, p. S2320.
32. Evidence, pp. S2650-3 and S7490-1.
33. Evidence, p. S2322.

10.27 In fact, evidence was received that the amount paid to the Tariff Advisor's firm was $10 000, of which the Tariff Advisor ultimately received only some few hundred dollars.[34] The DPP officer also expected 'the case to become stronger as more evidence becomes available'[35] and incorrectly stated that the Tariff Advisor had been interviewed by Customs.[36]

10.28 The Tariff Advisor had in fact tried on no less than five occasions to discuss the matters under consideration but had been refused in all instances.[37]

10.29 The First Assistant Director also recommended that the defendants:

> ... each be given the opportunity to comment on the allegation that they conspired to defraud the Commonwealth and that in the absence of a satisfactory explanation each be charged with conspiracy to defraud.[38]

10.30 Unfortunately, the opportunity to comment was not provided to those defendants. No satisfactory explanation for this was provided.[39]

10.31 In respect of the DITAC letter of 2 May 1985 referred to at section 10.21 above, both Senior and Junior Counsel later said that 'perhaps the Commonwealth has misinterpreted the true effect of the letter of 2 May 1985.'[40]

Activities after DPP advised ACS

10.32 On 10 June 1988 the then DPP wrote to the ACS advising that there was sufficient evidence available for laying the charges.[41]

10.33 Between April and June of that year a separate branch within the DPP also undertook the identification of the defendant's assets with a view to

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34. Evidence, pp. S7507, S8348 and S11576-7.
35. Evidence, p. S2324.
36. Evidence, p. S2324.
37. Evidence, pp. 414 and S31.
38. Evidence, p. S2324.
39. Evidence, pp. S8349-50.
40. Evidence, p. S2667.
41. Evidence, p. S8332.

obtaining restraining orders under the Proceeds of Crime Act.[42] Midford's Tariff Advisor commented upon some apparently fundamental misunderstandings by those officers.[43]

10.34 Shortly after the charges were laid, a further brief was prepared by the DPP case officer and directed to the Junior Counsel.[44] This eleven page brief indicated that four folders containing some 250 documents were attached, including:

> Cabinet minutes, briefing papers, correspondence etc from the Department of Industry, Technology and Commerce. (Documents numbered 86-160).[45]

10.35 Copies of the attached documents were not provided to the Committee and therefore it was unable to ascertain which Cabinet Minutes had been provided to Counsel.

10.36 From July 1988 to mid February 1989 the Customs Investigators and the DPP concentrated on retaking the witness statements and serving them on the defendants.[46]

A Second Brief to Counsel

10.37 On 17 March 1989 a ten page brief was provided by the DPP to a new Senior Counsel.[47] It is not clear why the DPP switched Senior Counsels at this time. The brief was essentially similar to that provided to Junior Counsel some nine months beforehand, but only certain selected documents and three of the witness statements were attached.[48]

10.38 On that same day the DPP officer briefly discussed matters with Senior Counsel. From that officer's file note it is clear that Counsel requested a chronological list of the available material be prepared.[49] Unfortunately, this was

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42. Evidence, pp. S2399-2416, S2427-9 and S224.
43. Evidence, pp. S7507 and S11576-7.
44. Evidence, pp. S2477-87.
45. Evidence, p. S2487.
46. Evidence, pp. S224, S2113 and S11580-7.
47. Evidence, pp. S2466-76.
48. Evidence, p. S2704.
49. Evidence, p. S2701.

not done until just prior to commencement of the committal hearings,[50] as commented upon in Chapter 21.

10.39 During the period February to May 1989 the Tariff Advisor's legal representative corresponded with the DPP seeking the withdrawal of the charges and pointing out the complete absence of evidence of any wrongdoing by the defendants. These representations were responded to, but did not sway the ACS and DPP from the path to which they had already committed themselves.[51]

10.40 The next conference between officers of the DPP and Senior Counsel occurred on 8 May 1989. The DPP file note records that Counsel's 'preliminary view was that the case was a fairly strong one',[52] even though it was evident from another comment that he had yet to 'read the brief more closely.'[53]

10.41 It is also clear that at that time he had not discussed any of the evidence with the witnesses planned to be called to give evidence.[54]

10.42 The final part of that file note records:

> We discussed briefly the following questions:
>
> . Whether the Cabinet decision relating to the anomalies quota was in breach of GATT, if so, the impact (if any) on the prosecution.
>
> . The problems in relation to the instruments of Ministerial Determination under Section 273 of the Customs Act in relation to the years 1986-1987.[55]

10.43 It seems that about five weeks later, on 21 June 1989, when the committal proceedings had failed dismally,[56] a retrospective addition to the file

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50. Evidence, p. S2649.
51. Evidence, pp. S2097, S2115, S2113, S2128, S2138, S8333, S2141-2, S2143, S2140 and S2145.
52. Evidence, p. S2705.
53. Evidence, p. S2706.
54. Evidence, p. S2706.
55. Evidence, p. 2708.
56. The last day of the hearings was 20 June 1989 - See S2489.

note was made. It said 'N.B. (Counsel) did not see either of the above issues as having any significant problems.'[57]

10.44 By May 1989, Counsel had still not spoken to any of the witnesses,[58] even though the hearings commenced less than three weeks later.[59] It is not known whether he did in fact discuss the matters with any witnesses prior to the hearings. However, it is evident that by 1 June it was decided to drop some of the charges.[60] On 5 June Counsel provided an advice setting out in writing the reasons for his decision.[61]

10.45 The Committee noted that there was nothing in the evidence made available to it to indicate when, or even if, the Senior Counsel was provided with the full brief of evidence prior to the commencement of the hearings.

10.46 Further elaboration on just how poorly the case had been prepared is revealed in the following comments from Midford's Tariff Advisor that:

> By the end of the prosecution's opening statement we did not know, nor did the magistrate know, what the essence of the case was. The opening statement in fact needed to be presented several times. At no stage, even after three opening statements and the lodgement of Overt Acts, was it clear what conspiracy, if any, had occurred.[62]

10.47 He added that:

> People who are charged with major criminal conspiracy facing 20 years imprisonment and fines of $200 000 have a right to know the basis upon which such cases have been founded.[63]

10.48 The Committee agreed. Further comment on this matter is included at Chapters 17 and 20 to 23.

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57. Evidence, p. S2703.
58. Evidence, p. S2710.
59. Evidence, p. S129.
60. Evidence, p. S129.
61. Evidence, pp. S2692-2700.
62. Evidence, p. 415.
63. Evidence, pp. 415-6.

Further briefs to Counsel after the Committal failure

10.49 Following the failure of the committal proceedings, Customs and the DPP sought to bring fresh charges against the defendants. Briefs to Advise were prepared for yet another Senior Counsel.[64] This Senior Counsel was also engaged to advise on the financial accommodation issue. The actions, however, did not proceed.

DPP Case Officer

10.50 The Committee ascertained that the DPP officer who had prime carriage of the case had commenced with that office only two years before the case commenced, after previously spending a period of one year with a Sydney law firm.[65] It was also ascertained that although the officer had 'Handled plenty of prosecutions under the Crimes Act', she had not handled a case such as Midford or any other Customs cases before.[66]

10.51 The officer said that 'at least three other people at a higher level within the office' were closely supervising her work.[67] The Committee was still concerned that a landmark case of this magnitude and nature had not been led at a higher level, with the more junior officers of the DPP assisting.[68] The DPP witnesses suggested, however, that the case was not seen in those terms at the time.[69] It was also claimed by the DPP that 'Two years experience is substantial.'[70]

10.52 However, the Committee could not agree that it was sufficient in this case.

10.53 The Committee was also concerned that the 'close supervision' of the DPP case officer did not extend to a check of her interpretation of the Cabinet Documents that were not sighted by anyone else in the DPP during the preparation of the case.[71] As indicated elsewhere in this Report, that officer dismissed the

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64. Evidence, pp. S2488-98.
65. Evidence, pp. 870-1.
66. Evidence, p. 870.
67. Evidence, p. 873.
68. Evidence, p. 873.
69. Evidence, p. 873.
70. Evidence, p. 874.
71. Evidence, pp. 920-1.

Cabinet Documents as being irrelevant. Her supervisors agreed without actually examining the documents themselves. Legal Counsels engaged by the DPP therefore did not gain an opportunity to independently assess the relevance of the Cabinet material until just days prior to commencement of the Committal proceedings.

10.54 Notwithstanding the views expressed by Customs and the DPP that it was the departures from prepared statements by the two key witnesses that led to the withdrawal of the charges, the Committee is of the opinion that the effect of the tendering of the Cabinet documents during the Committal proceedings should not be understated.

10.55 It was noted that the DPP had changed its policy on the resources applied to large cases following the Midford case. The Acting DPP told the Committee that:

> The resource aspect is important and it is clear now in such a case it would be true to say throughout the whole of Australia that we would not do a case of this size with but one preparation officer being the primary person. That is now our policy. We would have a team of at least two, and on a case of this size we might even try to have three people directly involved in the team.[72]

Recommendations

10.56 **The Committee recommends that:**

- **Director of Public Prosecutions officers preparing or endorsing briefs and submissions check all facts contained therein to appropriate source documents;**
- **all briefs, whether prepared by the Australian Customs Service, Australian Government Solicitor or Director of Public Prosecutions, include a listing or presentation of the available evidence in chronological order;**

72. Evidence, p. 1002.

- cases not be prosecuted by the Director of Public Prosecutions where there is reliance on an expectation that further evidence detrimental to the defendants will emerge during the committal hearings;

- the Director of Public Prosecutions and Australian Government Solicitor assume a greater role in ensuring that evidence collected and presented by Australian Customs Service investigators is thoroughly understood by those officers and that assertions sought to be made by the investigators or other witnesses have reasonable foundation;

- evidence preparation arrangements not be entered into between the Director of Public Prosecutions or Australian Government Solicitor and the Australian Customs Service that would call into question the independence, impartiality or objectivity of the two prosecutorial entities. In particular, whilst not excluding normal consultative mechanisms, the practice of stationing Customs officers in the offices of the Director of Public Prosecutions should cease;

- the Government conduct a review into the operation of the Proceeds of Crime Act to establish whether its application by the Director of Public Prosecutions is consistent with the intention of that legislation; and

- where officers of the Director of Public Prosecutions responsible for preparation of cases seek to dismiss documentary evidence as irrelevant, supervisory checks include an examination of that evidence to ensure that an informed corporate view on its relevance can be formed.

Chapter 11

PRESSURE FOR MAJOR CRIMINAL PROSECUTION

> *A small number of successful prosecutions should send a very powerful message to flagrantly dishonest importers and Customs agents.*
>
> *Joint Submission to Attorney-General and Minister for Industry, Technology and Commerce from DPP and Customs.*[1]

Use of the Crimes Act

11.1 On 6 October 1987, some two months prior to the preliminary decision of the ACS to proceed with a criminal prosecution in the Midford case, the report on a review of the systems for dealing with fraud on the Commonwealth was tabled. The report stated that:

> As far as the review can determine, no case of customs fraud has been dealt with as a criminal matter in recent years. It is not appropriate to suggest that there now be a radical departure from established procedures in the majority of ACS prosecutions .... It is desirable, however, that for deterrent and exemplary reasons substantial instances of fraud in the customs area should be considered for prosecutions of criminal matters.[2]

11.2 The Report specifically recommended that the Comptroller-General of Customs and the Director of Public Prosecutions consider the use of criminal sanctions in appropriate cases involving fraud on customs programs.

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1. Evidence, p. K7460.
2. Evidence, p. S34.

11.3 The 1987-88 Annual Report of the Director of Public Prosecutions states that following discussions between the then DPP and the then Comptroller-General of Customs, agreement was reached that:

> More should be done to utilise full criminal sanctions, with imprisonment as a likely final outcome, in the case of major fraudulent activity causing or calculated to cause loss to the Commonwealth by way of customs duty ... The advantage of following this course in a selected number of cases is that it will serve to remind and warn major fraudsters that those inclined to behave in that manner that the consequences should be loss of liberty. A small number of successful prosecutions should set a very powerful message to flagrantly dishonest importers and customs agents.[3]

Reference to a $4.7 million loss of revenue in a customs fraud case was also included.[4]

11.4 There is no doubt whatsoever that this referred to the Midford Case.

11.5 The Crimes Act charges laid in the Midford case carried imprisonment terms of up to 20 years plus pecuniary penalties.[5]

Purposes of the Crimes Act

11.6 Midford advised the Committee that following the laying of Crimes Act charges:

> We were advised by Senior Counsel that the ACS and the DPP had decided to use the Crimes Act in this case, as it gave them an opportunity to test in court for the first time, the legislation in a non-narcotics related matter. The proceeds of Crime Act when enacted by Parliament was intended to be used only for narcotics related offences.

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3. Evidence, p. S43.
4. Evidence, p. S43.
5. Evidence, p. S43.

> The ACS also ensured that the laying of the charges were given maximum publicity, appearing on front page banner headline of (a major Sydney newspaper) in an 'exclusive' article. The need for this publicity by the ACS was to counter the plan (at that time) of the Federal Government to reduce the staffing levels of the ACS by 5%. We were advised that publicity such as this would show that the ACS need the extra staffing levels.[6]

11.7 The Committee questioned witnesses from the DPP regarding the original intentions for the Proceeds of Crimes Act, which was used in this case to freeze all the assets of Midford and also restrained the residence of Midford's Tariff Advisor. The DPP witnesses argued that the legislation and explanatory material associated with its introduction did not restrict its application to narcotics cases. They submitted that the Act had equal application to major fraud as it did to narcotics cases, and pointed to the then Attorney-General's Second Reading Speech which identified 'major crime, particularly drug trafficking and serious fraud on the revenue' as the target for the legislation.[7]

11.8 When the Committee questioned the DPP as to the justification of restraining the residence of Midford's Tariff Advisor, it was stated that:

> A restraining order was sought against (him) because he had been charged with an indictable offence and there was considered to be a realistic prospect that a pecuniary penalty order would eventually be made against him. The purpose of a restraining order under the *Proceeds of Crime Act* is to ensure that the assets of a person against whom a pecuniary penalty order may ultimately be made can not be dissipated while the criminal process runs its course.
>
> There is no need under the Act to show that the person's assets are being dissipated, or are likely to be dissipated, before a restraining order can be sought.
>
> The restraining order prevented him from disposing of a residential property in the ACT. It is the DPP's policy that, wherever possible, restraining orders are sought over assets like residential property, rather than income producing

6. Evidence, p. S14.
7. Evidence, p. S8129.

assets, so that the effects on the person concerned will be minimal.[8]

11.9 The Committee noted that if this was true, the DPP did not adhere to its policy in respect of the Midford directors as the assets of the company and not their residences were restrained. However, the Committee did not purse this matter with the DPP.

11.10 Nonetheless, the Committee was concerned that there was little, if any, nexus between the alleged activity and the Tariff Advisor's residence. It could not be said to be tainted property. The Committee remains of the view that the DPP was excessive in seeking restraining orders against the Tariff Advisor's residence.

11.11 Traditionally, evasion of Customs duties was dealt with under the provisions of the *Customs Act 1901.* Offenders were subject to pecuniary penalties but did not face imprisonment.

11.12 The Committee was advised that:

> In 1986, the Australian Customs Service had set up a working party, advised by a senior officer of the Attorney-General's Department, to review the customs valuation legislation in the light of serious difficulties which the Australian Customs Service stated it was experiencing in dealing with avoidance activity by importers and customs agents as a result of which substantial revenue was apparently being lost. As a result, legislation was originally introduced into Parliament to substantially tighten the valuation provisions of the Customs Act. In December 1987, Parliament did not approve these changes.
>
> A second review had been established in January 1987 following the submission to the Comptroller-General through the Secretary of the Attorney-General's Department of a paper prepared by a senior officer of the Australian Government Solicitor's Office in December 1986 dealing with a number of concerns about the effectiveness of the customs and excise legislation and the procedures used to administer it.[9] A task force, comprising three senior officers from the Australian Customs Service, the Attorney-General's

8. Evidence, p. S8346.
9. This was the same AGS officer referred to in Chapter 4 of this Report.

Department and the Department of Finance submitted its report at the end of March 1987.[10]

Prevailing Attitude to Prosecution Action

11.13 During this period the public administration environment was such that action was currently being taken by the Australian Taxation Office against perpetrators of tax evasion schemes and there were numerous reports circulating that massive Customs duty evasion was occurring.[11]

11.14 That there was general pressure to achieve high profile Crimes Act prosecutions and specific pressure in relation to the Midford case is clear. Complaints by the then DPP made to the then Comptroller-General about this pressure have been discussed at Chapter 5 of this Report.

11.15 Customs even submitted that:

> On 1 March 1988, DITAC advised the ACS investigation team that the Minister, (for Industry, Technology and Commerce) was under considerable pressure to intervene in the Midford case; he had recently indicated his reluctance to become involved. The Minister was anxious about the progress of the investigation and whether or when charges would be laid. DITAC was briefed on the then current position and DPP were advised accordingly.[12]

11.16 The then Comptroller-General also met with the then Minister for Science, Customs and Small Business on 3 March 1988. An extract of the minutes of that meeting records that:

> The Minister asked when charges were likely to be laid by the Director of Public Prosecutions against Midford Paramount. He recalled advice some three weeks ago that charges were imminent. The Minister was told that an

10. Evidence, p. S43.
11. Evidence, p. S43.
12. Evidence, p. S3270.

approach would be made to the DPP to expedite the prosecution action.[13]

11.17 On 7 April 1988, a joint submission was put to the Attorney-General and Minister for Industry, Technology and Commerce by the then Director of Public Prosecutions and Comptroller-General of Customs.[14] In part it stated that the Heads of those two organisations were in:

> ... agreement that more should be done to utilise full criminal sanctions, with imprisonment as a likely final outcome, in the case of major fraudulent activity causing or calculated to cause loss to the Commonwealth by way of customs duty. The advantage of following this course in a selected number of cases is that it will serve to remind and warn major fraudsters, and those inclined to behave in that manner, that the consequence can be loss of liberty. A small number of successful prosecutions should send a very powerful message to flagrantly dishonest importers and customs agents.[15]

11.18 The joint submission also advised that:

> The position of Customs is that serious infractions in the Customs area which could lead to prosecution and imprisonment are to be seen by the DPP, and will be so pursued if the matter is assessed as worthy of prosecution, a prime consideration being that there are decent prospects of conviction.
>
> The position of the DPP is that such cases will be taken on and prosecuted, and further that priority will be given to the work.[16]

11.19 Crimes Act charges were laid against Midford and its Tariff Advisor only two months later.[17]

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13. Evidence, p. S251.
14. Evidence, pp. K7459-61.
15. Evidence, p. K7460.
16. Evidence, p. K7460.
17. Evidence, p. S224.

11.20 The Committee concluded that the pressure for prosecution was a significant contributing factor to the problems highlighted during the Midford case. The very real possibility was acknowledged that even if the Heads of organisations such as the DPP and Customs did not intend for prosecution to be pushed through at all costs, this was the message apparently interpreted and acted upon by the staff of those organisations.

11.21 It was pointed out to the Committee that the then DPP personally approved the decision to prosecute.[18] The Committee can do no more than respond that he made his decision on the information provided to him at the time and that what was provided to him has been found to be deficient.

11.22 The Committee reserved its judgement on whether this was by accident or design.

Recommendations

11.23 **The Committee recommends that**

- **cases selected for consideration of Crimes Act prosecution be subjected to closer attention by Senior Australian Customs Service management prior to referral to the Director of Public Prosecutions; and**

- **whilst the Committee recognises the importance of test cases, the desire to obtain a prosecution and attendant publicity should not be a factor in determining whether or not the Commonwealth should prosecute a case. In particular, Commonwealth agencies should not lose sight of the legal presumption of innocence.**

18. Evidence, pp. 921, 2045 and S2033.

Chapter 12

MISLEADING THE MINISTER

> *I understand that an opportunity was extended by the ACS to the company to make representations for reinstatement of 1987 and 1988 quota but to date no submissions have been received.*
>
> *Ministerial response of 18 January 1988 to Midford's Tariff Advisor*[1]

Advice of Quota Cancellation

12.1 The first contact with DITAC by Customs regarding the cancellation of Midford's quotas occurred on 15 December 1987.[2] The Committee noted that this exchange was not initiated to confirm Customs' understanding of the quota conditions from the Department responsible for policy formulation in respect of quota matters, but more in the nature of advising DITAC of what action Customs had taken in cancelling the quota. From the tone of the file note made by the ACS Manager, Tariff Concessions and Quota Branch on 17 December 1987, DITAC was effectively told to keep clear of any involvement in the matter of past shipments and confine their involvement to establishing possible quota entitlements for future imports.[3] The file note said:

> In relation to the action that has been taken by the ACS it must be appreciated that any representation by Midford about the current shipment, and for that matter previous shipments, and the application or otherwise of the special quota instruments is a matter for determination by the administrating body, viz the ACS. Should DITAC be of the mind that for whatever the reason the instruments should be able to be used, on the evidence the ACS has and its understanding of the conditions under which the quota may be used, Customs would not be prepared, nor could a delegate be directed, to reinstate the quota.[4]

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1. Evidence, p. S6851.
2. Evidence, p. S736.
3. Evidence, pp. S2772-3.
4. Evidence, p. S2772.

12.2 This is the same file not referred to at Chapters 5, 8 and 16 recording the misconstructions of the quota eligibility requirements by Customs that were not corrected by DITAC and the intention to await the entry of a large quantity of shirts prior to initiating seizure action.

12.3 DITAC submitted that:

> As the advice from (Customs) indicated, it was improper for DITAC to interfere with the legal process for possible past breaches of the import arrangements. This was seen as a matter between the ACS, Midford and the courts. The Department thus looked at the options to assist Midford pending resolution of the ACS action. This included the assistance options that may be available to the employees should the company close. The ACS was not directly involved in these deliberations with Midford, but was kept informed.[5]

12.4 Just how well the ACS was informed by DITAC became a matter for examination by the Committee.

Representations from Midford

Meetings of 17 December 1987

12.5 On 14 December 1987 Midford's Tariff Advisor requested a meeting with the ACS Director of Quota Operations and with DITAC. His supervisor, the Manager, Tariff Concessions and Quota Branch suggested separate meetings be held.[6] Two separate meetings were both held on 17 December 1987, although DITAC's records incorrectly indicated that the meeting its officers attended was held on 18 December 1987.[7] A file note records that the Manager, Tariff Concessions and Quota Branch did not want the ACS to be involved in any meetings with DITAC, notwithstanding that it was pointed out that 'there may be merit in avoiding duplication of meetings' and that the advice to Midford of 11 December 1987 effectively tied the ACS to meeting with Midford.[8]

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5. Evidence, p. S737.
6. Evidence, p. S.1271.
7. Evidence, pp. 738-9, 745-6, 767-8, 774 and K1096-8.
8. Evidence, p. S3938.

12.6 Midford was not informed until they arrived for the meeting with DITAC that Customs would not be attending and no reasons for this were proffered.[9] Later that day Midford did meet with the ACS internal legal advisor, as discussed elsewhere in this Report.

12.7 Midford's Tariff Advisor wrote to DITAC on the following day, levelling complaints about one of the Department's representatives at the first meeting. He wrote:

> During the course of yesterday's discussions (the officer) stated that he did not believe that an offshore venture ever existed, or that it was established to service the Australian, as opposed to the EEC or US markets. Such allegations about the company's operations in Malaysia are demonstrably false and the inference of a long-standing deception going back to the mid-1970's is also taken with the greatest seriousness.
>
> We are also concerned about the attempts by (the officer) yesterday to alienate the close association which has remained between Midford Malaysia and the Malaysian Government.[10]

12.8 The Malaysian Trade Commissioner had attended the meeting at Midford's invitation.[11]

12.9 The similarity between the allegations raised by the DITAC officer and those conveyed to the Department by Customs a few days earlier were remarkable. In fact the Committee later ascertained that the DITAC representative who made those comments had spoken to the Manager, Tariff Concessions and Quota Branch just before meeting with Midford.[12] The Committee could only conclude that there was no one from DITAC at the meeting with any knowledge of what the correct quota conditions were. This is astonishing since those DITAC representatives were functionally responsible for all policy aspects of the offshore quotas in question.

12.10 For reasons that were not explained, most of the talking from DITAC's side at the meeting was done by one of its consultants, who had flown from

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9. Evidence, pp. 93, 123, 201-2 and 727.
10. Evidence, pp. K1087-90.
11. Evidence, p. K1096.
12. Evidence, p. 794.

Melbourne to Canberra that same day.[13] It is therefore not surprising that he did not have time to check the files. As he was not at that stage a departmental employee it is also not surprising that he was not in possession of the full facts. It also seems the other DITAC representatives at the meeting were simply asked to attend, without any preparation.[14]

12.11 The Committee believes that it would not normally be expecting too much for officers attending a meeting on the cancellation of an offshore quota to check prior to attending what the criteria for eligibility were. Similarly, having attended the meeting and being alerted by Midford to possible misunderstandings on the DITAC officers' part as to those criteria, one would expect the officers to at least check out those possibilities at the stage. Sadly, it appears that DITAC did not do this.

12.12 The Committee ascertained that none of the DITAC officers handling the Midford case had any legal training and no attempts were made by the officers to obtain legal advice.[15]

The Meeting of 22 December 1987

12.13 Midford and their representatives next met with DITAC on 22 December 1987. Again there was no ACS representation at the meeting.[16] In fact, a file note records that in relation to whether the ACS should attend the meeting, the Manager, Tariff Concessions and Quota Branch said 'DITAC cannot dictate to the ACS.'[17] DITAC recorded in a file note that:

> (Its officer) had not alleged that deliberate attempts were made to mislead ... instead stated that he was aware of suggestions made to the Department that there may have been attempts ...
>
> ... we were always aware that an offshore venture was established - no suggestion made that we did not believe that it ever existed ...

13. Evidence, pp. 790-4.
14. Evidence, pp. 786-7.
15. Evidence, pp. 528 and 630-1.
16. Evidence, pp. S1279-84, S4445-8 and S4449.
17. Evidence, p. S3948.

(The Company was advised) that they would need to:

- get back into step as per the conditions in (DITAC's) letter of 1985

- (i.e. meet the offshore criteria, this may be difficult in the light of ACS action)

- satisfy the Department that in the event of quota reinstatement the long term viability of the company is sound. ...

The Company was further advised that if quota were to be allocated the following would be necessary prerequisites:

- development of a long term strategic plan to satisfy the Department that the changed operations would be on a sound footing, and

- investment from the sale of quota would be channelled into the purchase of new plant and equipment designed to improve the competitive nature of the company.[18]

12.14 An undated internal DITAC minute by the departmental consultant which commented on the meeting of 22 December and a subsequent letter from Midford's Tariff Advisor dated 24 December 1987 says:

> My view was, and still is, that if Midford can satisfy us ... on how it might rearrange its affairs to conform with the agreed terms and conditions associated with tied quota, amongst other things ... we should recommend to the Minister reinstatement of quota for 1988 and issue of PIP.
>
> I also accept that Midford communicated to DITAC their intention to substantially reduce investment in Malaysia. I also accept that exactly how it was to be done could not be communicated to the Department. However, when it was done the manner of restructuring was known and should have been but was not communicated to the Department. Information from Customs suggests that this was hardly an oversight at the time!

18. Evidence, p. S6823-5.

I am of the view that if we can be satisfied that:

- without 1988 quota and PIP Midford will go into liquidation

- Midford has a sound corporate strategy within which funds arising from sale of PIP are needed and will be used to upgrade Kembla Grange as part of that strategy

- Midford will take reasonable steps to adhere to the terms and conditions of the anomalies quota in respect of 1988 (even though this may be window dressing, we must be satisfied that all of the conditions are being and will be met)

- Midford has consulted adequately with the Malaysian Government who in turn will not seek redress from the Australian Government to offset prospective disruption arising from Midford's withdrawal

then we recommend to the Minister that the company's request be met. I also suggest that until we can be satisfied on these matters 1988 anomalies quota and PIP be withheld.[19]

12.15 The five page letter to DITAC from Midford's Tariff Advisor dated 24 December 1987 reflects an understanding that further rearrangement of Midford's affairs in Malaysia would rectify any shortcomings and enable reinstatement of the quotas.[20]

Midford's Efforts to Facilitate Restoration of Quotas

12.16 A Midford director and the Tariff Advisor then travelled to Malaysia to effect the rearrangements in the last few days of 1987.[21] On 4 January 1988 the Tariff Advisor wrote to DITAC advising of these changed arrangements, enclosing details of the new agreement between Midford and its Malaysian joint manufacturer.[22] He also telephoned DITAC officers the next day.[23] The new agreement provided for retrospective ownership by Midford of a quantity of the

19. Evidence, pp. S6836-9.
20. Evidence, pp. S410-4.
21. Evidence, p. S6833.
22. Evidence, p. S779.
23. Evidence, pp. S2218 and S6840.

machinery used to produce the garments imported to Australia, as absence of any ownership of the manufacturing plant was the only criteria for the offshore quotas that Midford had not fully complied with.[24] As pointed out by Midford's Tariff Advisor, the ACS and DPP 'construed this action as further indication of fraudulent activity'. He also said that it was 'wilfully misconstrued.'[25]

12.17 A few days later, on 7 January 1988, the Tariff Advisor wrote a further letter to DITAC which requested urgent restoration of the quotas in view of the conditions for those quotas being met in the revised agreement. A copy of the agreement was also provided.[26]

Misleading the Minister

12.18 The Committee discovered in file notes dated 5 and 8 January 1988 respectively, that DITAC recorded that copies of the representations from Midford's Tariff Advisor dated 24 December 1987 and 7 January 1988 seeking restoration of the quotas were directed to the Manger, Tariff Concessions and Quota Branch in Customs for his information.[27]

12.19 Even earlier, on 18 December 1987, the five page letter from Midford's Tariff Advisor referred to at sections 12.15 and 12.17 above, which clearly explained the misunderstandings regarding the quota conditions, had also been copied across to Customs by its author.[28] Curiously enough, Customs did not provide a copy of that letter to the Committee nor make reference to its existence in their submissions to the Inquiry. However, Customs certainly received the letter, as the Committee discovered that the Director of Quota Operations recorded in his Statement of Reasons for cancelling the quotas that:

> On 18 December 1987 Midford's representative wrote to the ACS and enclosed a copy of the Company's submissions to the Department of Industry and Commerce. The submissions addressed, inter alia the 'misunderstanding with relation to Midford Malaysia.'[29]

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24. Evidence, pp. S6833-5.
25. Evidence, p. S7497.
26. Evidence, pp. S6842-4.
27. Evidence, pp. S6840 and S6847.
28. Evidence, pp. K1087-91.
29. Evidence, p. S4070.

12.20 In that same statement he also recorded that:

> Midford's representatives met with Customs officers on 17 December 1987 and put before these officers submissions directed to the reinstatement of the quota.[30]

12.21 However, on 13 January 1988 Midford wrote to the then Minister for Small Business and Customs requesting an urgent meeting to discuss the cancellation by the ACS of its quotas and seizure of its stock.[31]

12.22 The response from the Minister dated 18 January 1988 declined the meeting but stated that:

> I understand that an opportunity was extended by the ACS to the company to make representations for reinstatement of 1987 and 1988 quota but to date no submissions have been received.[32] (emphasis added)

12.23 In view of the foregoing, the Committee concluded that the Minister had been misled. It was mindful of a statement made in another context by one ACS witness that 'when a person writes to a Minister, I expect the veracity of that to be acceptable.'[33]

12.24 Midford and their Tariff Advisor took action upon receipt of the Minister's letter on 20 January 1988 by providing him with further copies of all:

> Communications which have been faxed, hand delivered or despatched by mail to various officers in (DITAC) concerning (the) matter.[34]

12.25 DITAC wrote to the ACS Manager, Tariff Concessions and Quota Branch on the following day emphasising that copies of the Midford papers provided

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30. Evidence, p. S4070.
31. Evidence, p. S6849.
32. Evidence, p. S6851.
33. Evidence, p. 1769.
34. Evidence, p. S6853.

to DITAC had earlier all been passed on to the ACS.[35] Similar advice was also provided to Midford's Tariff Advisor.[36]

Why the Minister had been Mislead

12.26 No evidence was presented to the Committee to indicate that the apparent misleading of the Minister by a Customs officer had been investigated.

Response of the Officer Concerned

12.27 The Committee questioned Customs as to which of its officers had been involved in drafting the response provided by the Minister on 18 January 1988. It was ascertained that the officer who was responsible for providing the advice to the Minister was the Manager, Tariff Concessions and Quota Branch, the very same officer to whom DITAC had personally referred copies of the papers from Midford.[37]

12.28 Accordingly, the Committee sought his explanation for these events, which, after a number of attempts to get him to answer the Committee's questions,[38] resulted in the following exchanges:

> **Witness** - I do not think any representations had been made to Customs; there may have been representations made to DITAC.
>
> **Chairman** - Yes, and DITAC documents have indicated to us that they were forwarded to you in Customs on 5 and 8 January 1988.
>
> **Witness** - I am not sure what the submission to DITAC was. I do not have the letter here, so I am not able to address the facts of it.
>
> **Chairman** - We will show you the DITAC document in question.

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35. Evidence, p. S6854.
36. Evidence, p. S6852.
37. Evidence, pp. 1601-2.
38. Evidence, p. 1601.

Witness - At the time of the cancellation of the quota, I know that a letter was sent to Midford advising them that the quota had been withdrawn. In that letter, an opportunity was provided to make a submission within seven days. No submission came to us in response to that letter. I am sure, as far as the approach to DITAC is concerned, that we did not regard that as a submission in relation to the letter which had been sent.

... I do not think there was any intention of making a submission to Customs in response to that letter.

Chairman - So you did not actually regard it as a representation to resume those quotas?

Witness - It is pretty hard now to say what I considered four years ago, but I do not think we did.[39]

12.29 The Committee could not accept the claims by the witness that representations had not been made to Customs and that there was no intention by Midford to make representations. The letters from Midford's Tariff Advisor on and following 18 December 1987 were all clearly representations made to both DITAC and Customs seeking restoration of Midford's quotas. In addition, Midford had attempted on several occasions to meet with Customs to discuss the cancellation of the quotas, but in the main, these meetings had been refused. Further still, the Manager, Tariff Concessions and Quota Branch had been advised by phone about the outcomes of the DITAC meetings with Midford and had even been told by DITAC on 18 December 1987 that a submission was forthcoming.[40] Finally, the Committee noted that Midford was not asked to make a submission within seven days of the letter, as the advice provided for them to make representations within seven days of the return of photocopies of their documents, which as indicated in Chapter 6, took in excess of three or four months.

Response of the Officer's Subordinate

12.30 Being somewhat dissatisfied with the answers provided by the witness, the Committee therefore pursued the matter by again asking Customs to comment on why the Minister had been advised that no representations had been received when they clearly had. The answer provided was attributed to the (by then) retired Director of Quota Operations that:

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39. Evidence, pp. 1602-3.
40. Evidence, pp. 794-5.

> My records show that I was on leave at the time those letters would have been received by the ACS. It is possible in that case that (the Manager, Tariff Concessions and Quota Branch) would not have seen them.[41]

12.31 Since the letters were addressed personally to the Manager (not the Director) for his information the Committee finds it difficult to accept that:

a) he did not see them, and

b) even if he did not see them, that he could advise the Minister that nothing had been received without first checking to see if this was the case, especially as he had been told that they were forthcoming.

Suppression of Contrary Views

12.32 The contents of the letters from Midford's Tariff Advisor were strongly at odds with the expressed views of the Manager, Tariff Concessions and Quota Branch regarding the quota conditions and even to the uninitiated reader would indicate that the Manager had misconstrued the conditions. The same can be said in respect of the expressed views of the Director of Quota Operations, who had cancelled the quotas. The Committee can only speculate that this must have been the reason why those letters were suppressed and the Minister informed that no representations had been received. Contrary views expressed by the ACS internal legal advisors also seem to have been suppressed, as discussed elsewhere in this Report. The Committee was less than impressed with the standard of the evidence it received from these two ACS witnesses during the Inquiry.

Demarcation Dispute

12.33 In raising the question of whether documents he provided to DITAC had been on-forwarded to the ACS, Midford's Tariff Advisor 'Also asked whether there was a demarcation dispute between the Department and the ACS on the case.'[42]

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41. Evidence, p. S8719.
42. Evidence, p. S6852.

12.34 The Director of the Textiles, Clothing and Footwear Section in DITAC recorded in a file note that 'I indicated that I was unaware of any difficulties and that relations between the two organisations were running smoothly.'[43]

12.35 However, records made available to the Committee indicate that whilst DITAC was doing everything possible to assist Midford to regain their quotas, Customs was operating from a directly opposite perspective. The comment referred to at section 12.13 above, that 'DITAC cannot dictate to the ACS' reinforces the view that relations between the two organisations were not running smoothly.

Advice from ACS to DITAC

12.36 The demarcation matter culminated with an advice from the ACS Director of Investigations in NSW to the Secretary of DITAC on 11 March 1988.[44] The Department submitted that the Director:

> Asked that while the investigation is being undertaken, DITAC refrain from communicating with parties that act on *Midford's behalf.*
>
> DITAC ceased the active consideration of avenues to assist Midford at that time.[45]

12.37 The Director put a somewhat different interpretation to the Committee regarding his letter of 11 March 1988, saying that:

> I appended a note to, I think, (the Secretary) of DITAC at one stage, saying that in their dealings with Midford they should exercise caution and probably not do it until they go across us.[46]

12.38 The Committee could not quite accept that the gentler and more reasonable messages as portrayed by the Director could have been conveyed by his

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43. Evidence, p. S8652.
44. Evidence, p. S6906.
45. Evidence, p. S737.
46. Evidence, p. 1604.

strong words actually used in the letter, particularly that DITAC should 'refrain from communicating with parties' that act on Midford's behalf.[47]

12.39 Curiously enough, the Director's letter was another of the many documents of relevance to the Inquiry that was not included in the Customs submissions. What authority the Director had, if any, to write such a letter was unclear. In the Committee's experience such communications are normally at equivalent level and it struck the Committee as most unusual that an officer at Director level would issue instructions to the head of another Department. Nonetheless, the letter resulted in DITAC's unquestioning withdrawal of all assistance to Midford.

Customs Carries the Day

12.40 Prior to this, Customs had already achieved supremacy in the apparent power struggle with DITAC in that, notwithstanding the Department's documented willingness to restore Midford's quotas, the Minister for Industry, Technology and Commerce advised Midford that restoration of its quotas 'is a matter resting between Midford, the ACS and the Courts' and that he was 'not able to intervene in those deliberations as the Authority for administering the quota arrangements lies with the Comptroller-General of Customs.'[48]

12.41 The Committee holds a differing view on the extent of the Minister's powers in such matters.

Swift Resolution

Advice from the Minister

12.42 The Minister's letter to Midford's Tariff Advisor dated 5 February 1988 also said:

> I understand that the company can seek swift action through the courts on this matter and have it resolved in a matter of some three weeks from the date of application.[49]

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47. Evidence, p. S6906.
48. Evidence, p. S6875.
49. Evidence, p. S6875.

12.43 The Committee noted that the AGS advised Customs on 30 December 1987 that 'delays being experienced in the Supreme Court of NSW are *of the order of 5/6 years.*'[50]

12.44 Midford had in fact already applied to the Federal Court more than two weeks before the Minister's letter, on 18 January 1988.[51]

12.45 Also, in an undated file note made subsequent to the Minister's letter, DITAC recorded that Midford's Tariff Advisor expressed concern about the claim that matters could be resolved in three weeks, suggesting that instead it could take up to three years to resolve thought the Courts.[52]

12.46 In fact it took more than 18 months just to reach the stage of committal proceedings. Midford withdrew its application to the Federal Court on 30 June 1988[53] following the laying of Crimes Act charges in respect of the quota matter on 15 June 1988.[54] Following the laying of charges Midford had 'lost its enthusiasm to pursue the ADJR action.'[55]

12.47 The unrealistic advice that the matter could be resolved in the Courts in three weeks emanated from Customs. It is apparent that DITAC was unaware of the claim until contacted by Midford's Tariff Advisor.[56] However, it is also evident that internal legal advisors from both Customs and DITAC then confirmed a three to four week timeframe,[57] although one officer acknowledged that if Midford were to await the provision of a Statement of Reasons before pursuing an expedited hearing then the delays would be at least two months.[58]

Incorrect Advice to the Minister

12.48 However, the Committee sought to ascertain why such advice was provided to the Minister when it was clear that there was not going to be a Federal Court hearing within a week of him sending the letter. As it turned out, the first

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50. Evidence, p. S409.
51. Evidence, pp. S3266 and S7765.
52. Evidence, p. S6887.
53. Evidence, p. S4025.
54. Evidence, pp. S128, S224 and S3867.
55. Evidence, p. S4024.
56. Evidence, p. S6887.
57. Evidence, p. S6887.
58. Evidence, p. S3959.

Federal Court hearing on the matter was not held until 29 April 1992, even though Midford sought the most expeditious handling of the matter.[59] Concurrent applications by Midford for Statements of Reasons to be provided under the Administrative Decisions (Judicial Review) Act (ADJR Act) were also lodged.[60] The Statement covering the decision to cancel the quota was required by statutory time limits to be provided within 28 days, that is, by 25 February 1988. However, it was not provided until 18 April 1988, more than seven weeks late.[61] Another Statement of Reasons, in respect of the decision not to issue the 1988 quota, was more than 17 weeks late.[62]

12.49 By any measure, the claims of achieving resolution within three weeks were unrealistically optimistic.

Comptroller-General's Views

12.50 The Committee sought the views of the Comptroller-General regarding the advice provided to Midford through the Minister.[63] He stated that:

> I believe that that would have been the prescription that, if the matter had gone though the administrative decisions judicial review process, there may have been a decision on the quota issue in the three weeks. I think that was the timetable that officers would have been referring to, rather than the prosecutorial train.[64]

12.51 The promised clarification stated:

> The 'three or four weeks' advice advice (sic) concerning the time required for Midford to obtain a court decision on the revocation of their quota did not relate to Supreme Court proceedings.

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59. Evidence, p. S10994.
60. Evidence, p. S4030.
61. Evidence, pp. S386-95.
62. Evidence, p. S4081.
63. Evidence, p. 1711.
64. Evidence, p. 1860.

> The information related to a probable time frame had the matter gone through the administrative decisions judicial review process.[65] (emphasis added)

12.52 Supplementary material also provided indicated that 'If expedition had been sought the ADJR application would have came on for trial before the end of January 1988.'[66]

12.53 This made little sense to the Committee as expeditious treatment had been sought and the Minister's letter advising that resolution could be achieved in three weeks was dated after the end of January anyway, on 5 February 1988. A similar letter from the Minister's office which included the same claim about resolution in three weeks was sent to Midford on 15 February 1988.[67] The supplementary material also stated that:

> Rather than seek review under ADJR the company could have instituted a detinue action seeking the return of the goods and damages. This would have been a civil action and given the value of the goods it would have had to have been instituted in the NSW Supreme Court. If the company filed such an application in the General List the back-log of the Court was such that it would not have come on for trial for many years. Perhaps this was what AGS had in mind in their advice of 30 December 1987. Alternatively given the value of the goods the company could have filed a detinue action in the Commercial List of the NSW Supreme Court. This list provides a fast track procedure for matters of commercial significance. The Commercial List would certainly have afforded Midford a hearing in mid to late 1988.
>
> The AGS advice of a hearing in 5/6 years may have been a reference to the timing of a Customs Prosecution (Customs Act). Given the alleged duty evaded such a prosecution may have had to have been run in the Supreme Court.
>
> As far as a Crimes Act/DPP prosecution was concerned I appreciated that given the need for a committal hearing and delays in the criminal lists of the superior courts an eventual trial would have been some years away.[68]

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65. Evidence, p. S6407.
66. Evidence, p. S6412.
67. Evidence, p. 787.
68. Evidence, p. S6413.

12.54 All this still left a problem with the Customs statement that if ADJR action had been taken the matter would have been speedily resolved, as it was clear to the Committee that action under that Act had been taken. A briefing to the Minister on 21 June 1988 even acknowledged that 'Midford have taken action under the Administrative Decisions (Judicial Review) Act to have its anomalies quota reinstated.'[69]

Further Attempts to Gain an Explanation

12.55 A further attempt was therefore made to resolve the conflicting evidence in relation to this issue, resulting in the following exchanges:

> **Chairman** - Let me be perfectly blunt up front so that there is no suggestion of skulduggery or trickery. You might recall at pages 1859 and 1860 of the transcript that you undertook to clarify where the figure of three weeks came from. Midford had been told that it would all be settled in court in some three weeks. Your answer to that was: *I believe that that would have been the prescription that, if the matter had gone though the administrative decisions judicial review process, there may have been a decision on the quota issue in the three weeks.* Our problem with that is that if we look at the evidence we find that Midford did take the ADJR route, and in fact at S 255, a (Customs officer) briefed the Minister in June 1988 that Midford had taken action under the Administrative Decisions Judicial Review Act to have its anomalies quota reinstated. It seems that you, in fact, were given the wrong advice when you came to us with it.
>
> **Witness** - But the ADJR action was initiated, but was not continued with by Midford. So my comments to you on where the three weeks time scale may have eventuated from was that the officers could well have indicated that as being the appropriate time for it to be contemplated under ADJR. But, in the event, the ADJR was not pursued by Midford.
>
> **Chairman** - I will come back to that in a minute.[70]
>
> **Chairman** - If we go back to the other question we were asking on the ADJR, I am now advised that Midford's Federal Court application was withdrawn on 30 June 1988. Is that

69. Evidence, p. S255.
70. Evidence, p. 2109.

one and the same as the ADJR application you are saying they withdrew?

Witness - I believe it is.

Chairman - That is some six months. It is still a long way after the three weeks. We can go on about this forever. The point I am trying to make is that, just as we believe they were misled, then either through wrongful or incompetent advice, I think somebody in Customs has given you the wrong advice on exactly the same line before this Committee. I am not questioning your bona fides in what you are saying to us.

Witness - I can understand the question that your are putting.

Chairman - It serves to illustrate a point.

Witness - But I do not place a great deal of substance on the six months time period because an ADJR action can be lodged, the urgency of it is usually determined between the applicant and the court. So if there was need for it to be dealt with very quickly, the experience with the Federal Court is that it can accommodate those things. But if it is a matter that has been listed and the parties go away and determine their positions and gather their evidence and prepare statements, et cetera, it could take six months. All I was referring to was the alacrity with which the Federal Court can deal with some ADJR matters.

Chairman - Except to say that our understanding very clearly has always been that Midford were very keen to get on with it.

Witness - Many of these things would have been tested through the legal process if that ADJR proceeding had gone its full time.

Chairman - Yes, but you can see my point. At the same time as they are complaining about being given wrongful advice, you yourself have given us much the same sort of advice.

Witness - No, I do not accept that.

Chairman - I am told there was, for instance, a number of hearings with the ADJR. It just does not hold together to say that if they had taken the ADJR route, things might have

been done in three weeks. It was never going to be done in three weeks.

Witness - But the ADJR route was only testing the quota issue, as I recall.

Chairman - Yes, but let us forget that for a minute. Let us forget what the anomalies quota was about for a second. The point is still made. What I am trying to point out is that this Committee was very confused following your answer to us on a previous occasion, and when we go back through that it appears to me that you gave us a answer with wrong advice too.[71]

12.56 It is not true that Midford's ADJR actions were only in respect of the quota issue. Just for the record, the Committee ascertained that there were two ADJR hearings in the Federal Court in relation to the decisions to impound Midford's documents, not to return those documents and to seize Midford's shirts. There were also five applications made by Midford for Statements of Reasons under the Act. These covered:

a) the decision to impound Midford's documents on 3 December 1987,

b) the decision to cancel Midford's quotas on 10 December 1987,

c) two requests (combined by Customs and treated as a single request) on the decision to seize Midford's stock on 21 December 1987, and

d) the decision of 29 January 1988 to not allocate 1988 quotas to Midford.[72]

12.57 The above information was elicited in the Committee's final attempt to clarify the evidence by requesting Customs to provide a full list of Midford's ADJR and Federal Court actions.[73]

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71. Evidence, pp. 2111-2.
72. Evidence, pp. S10994-5.
73. Evidence, pp. S10993-5.,

12.58 The Committee concluded that not only the Minister, but also Midford, their Tariff Advisor, the Comptroller-General and the Committee had been misled in relation to this issue.

12.59 In terms of the advice provided to the Minister, it is not beyond the realms of possibility that Customs recommended that the Minister not meet with Midford and suggested that he defer to a speedy decision by the courts as a mechanism to stall the Midford parties whilst Customs and the DPP pressed ahead with their plans for the laying of Crimes Act charges. It also seems that, whether by accident or design, because of the excessive delays in the provision of the Statements of Reasons, Customs effectively thwarted Midford's attempts to have the decisions regarding the 1987 and 1988 quotas independently reviewed. Not only was natural justice denied to Midford initially, the actions by Customs ensured that it continued to be denied.

12.60 Another area where it appeared to the Committee that the Minister may have been misled concerned advice from DITAC over the termination, rather than surrender, of quota entitlements by other firms whose operations had changed.[74]

12.61 A further aspect where it appears the Minister was misled by the ACS concerns the question of post-settlement compensation for Midford. Chapter 24 provides details.

Recommendations

12.62 The Committee recommends that:

- representatives from both the Department of Industry, Technology and Commerce and Customs attend any meetings where it is known that the discussions will involve the actions or responsibilities of both entities. Officers from both organisations should adequately prepare for such meetings, ensuring that they are in full possession of the facts within their respective areas of responsibility;

74. Evidence, pp. 636 and 750.

- where questions of a legal nature arise or are likely to arise in cases where the importer and the Commonwealth disagree over interpretations, the Department of Industry, Technology and Commerce seek appropriate independent legal advice;

- Customs never again refuse to meet with representatives of entities or individuals under investigation or refuse to allow an opportunity for explanations to be provided;

- appropriate checks be conducted to ensure that advice provided to Ministers by Customs or the Department of Industry, Technology and Commerce is factual;

- improved checking procedures be introduced in the Department of Industry, Technology and Commerce to ensure that advice provided to importers and their advisors correctly reflects government policy, including where applicable, verification to source documentation such as Cabinet documents;

- representations from entities or individuals under investigation be formally acknowledged upon receipt and given appropriate consideration;

- where representations do not fully clarify the matters at issue, this be conveyed to the affected parties;

- an investigation be conducted into the apparently false representations made by the Australian Customs Service to the Minister in connection with his letter to Midford and its Tariff Advisor dated 18 January 1988; and

- advice provided to Ministers and/or importers concerning anticipated timing of Court proceedings be based on documented advice from the respective Court Registrar.

Chapter 13

STATEMENTS OF REASONS

> *... any person ... may ... request ... a statement in writing setting out the finding on material questions of fact ... and giving reasons for the decision. ... the person who made the decision shall ... as soon as practicable, and ... within 28 days ... prepare the statement.*
>
> *Section 13 Administrative Decisions (Judicial Review) Act 1977.*

Delays in Providing the Statements

13.1 As indicated in Chapter 12, Midford sought five Statements of Reasons under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) from Customs. Customs refused to provide one of the requested statements on the grounds that the decision involved was excluded from the operation of the Act.[1]

13.2 Initial advice from the DPP to Customs in respect of another Statement claimed that it was not necessary to provide that particular Statement of Reasons because an application on the same decision had been made to the Federal Court.[2] This view was not shared by an ACS in-house legal advisor who directed the decision maker to supply the requested Statement.[3]

13.3 Comment by the Committee on the seven week delay in the provision of the Statement of Reasons for the decision to cancel Midford's 1987 quotas has been included at Chapter 12 above. The delay in provision of the Statement of Reasons for the decision not to issue the 1988 quotas was even longer as it was not provided until 14 June 1988, some 17 weeks late.[4] As these particular Statements were crucial to Midford's actions to defend itself against the allegations and in the seeking of the restoration of its quotas, the Committee condemns Customs for unduly delaying the provision of those reasons.

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1. Evidence, p. S10994 and S4040.
2. Evidence, pp. S4029, S4035 and S4037.
3. Evidence, pp. S4030 and S4035.
4. Evidence, p. S4081.

13.4 It surprised the Committee that it could take Customs until 18 April 1988 to supply the reasons for a decision it made on 10 December 1987,[5] especially as it was anticipated at the time that such a request would be forthcoming.[6] Considered even worse was the delay from late January to mid June 1988 for the Statement of Reasons in respect of the decision not to issue Midford with its 1988 quotas. Further investigation of these delays revealed that there were several contributing factors that make a mockery of the Administrative Review provisions as applied within Customs.

13.5 Midford warned Customs in April 1988 that it would take the delays in provision of the Statements to the Federal Court.[7] Even the AGS expressed concerns about the continuing delays.[8]

Reasons for the Delays

13.6 There is evidence that the primary reason for the delays in the Statements of Reasons for the decisions is that they were vetted and amended by the ACS in house legal advisor, the AGS, Counsel and the DPP. The Committee would not have been aware of this matter, had it not discovered that an internal DPP minute stated:

> (The ACS legal advisor) formed the view that the conditions of the quota had not been correctly attached and directed (the Officer) to include this concern in his response to a request for reasons under S.13 Administrative Decisions (Judicial Review) Act in relation to the cancellation of quota. (The Officer) has since amended that statement.[9]

13.7 Further material was requested from Customs in which it was observed that in March 1988 the DPP advised Customs that they did not want the Director of Quota Operations to include in his statement that one of the reasons he decided to cancel the quotas was because he had doubts about the validity of the conditions attached to those quotas.[10] The ACS legal advisor argued that as this was one of the reasons for his decision, it should be included.[11]

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5. Evidence, pp. S386-95 and S383.
6. Evidence, p. K4422.
7. Evidence, p. S4052.
8. Evidence, pp. S4015 and S4052.
9. Evidence, p. S2220.
10. Evidence, p. S3983.
11. Evidence, pp. S3983 and S4036.

13.8 Changes were also suggested on 1 March 1988 as to what should go into the Statement and what should not. For instance, it was decided that the Statement should not make reference to the officer being concerned for the revenue.[12] However the final version did in fact include the words that the officer had 'anxiety for the revenue.'[13]

13.9 The DPP saw references to doubts about the validity of the quota conditions as, 'prejudicing their case'[14] and 'detrimental to their prosecution.'[15] An ACS officer recorded that in discussing this problem on 18 March 1988, it was pointed out that if there was no reference made to these doubts, it 'would expose us to a natural justice problem.'[16] He also recorded that the DPP was worried about the credibility of the decision maker and that they did not 'want to suggest that doubt existed within the (Department).'[17] It was then decided that the ACS would prepare 'modified reasons' for the decision and meet again with the legal advisers to discuss the acceptability of these when they were ready.[18]

13.10 To the Committee, such references more than hint that the Statements of Reasons were concocted to hide the real reasons for the decisions and present others that were more justifiable with the benefit of hindsight. The excessive delays are reflective of the manufacturing of reasons long after the decisions had been made.

13.11 When the Committee asked the Director of Quota Operations about the changes to his statements, he said 'I do not remember', and:

> I cannot at this time remember who asked me to make alterations to those statements or any reason for it. I know that I agreed with the final statement when I signed it, but I cannot remember being asked to make any alterations.[19]

The Committee found this a marked contrast with the apparent recall by this witness of other significant events during the Inquiry. Considering that the witness literally spent months 'doctoring' his Statements of Reasons, his sudden amnesia was

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12. Evidence, p. S4050.
13. Evidence, p. S392.
14. Evidence, p. S4051.
15. Evidence, p. S3987.
16. Evidence, p. S4051.
17. Evidence, p. S4051.
18. Evidence, p. S4051.
19. Evidence, p. 1791.

even more remarkable. However, at the time he gave this evidence he was unaware that the Committee would later obtain the records which detailed the extensive re-drafting of the Statements.

Other Abuses of the Administrative Review Process

13.12 These examples from the Midford case of abuses of the administrative review process would not appear to be isolated instances, as it was brought to the attention of the Committee that in the case of *Owen v Turner* the judgment included that:

> In my opinion, both the Notice of the Seizure and the Statement of Reasons, in large measure amount to reconstruction. They are not indicative of the real reasons that existed at the time of the seizure, but are afterthoughts whose purpose is retrospectively to justify the seizure on any possibly arguable ground.[20]

13.13 The Ombudsman also reported a Customs officer responding to the Ombudsman's Office in another case as saying that:

> We should have woken up that the complainant's account of events was probably true. We concentrated on trying to prove our own theory rather than on an objective search for the facts.[21]

Incorrect Information

13.14 Returning to the Midford case, there are also indications that a draft Statement of Reasons was prepared by two officers of the NSW Investigations team, rather than the officer from Canberra who actually made the decision.[22] If so, this directly conflicts with the evidence given by the officer that 'I drew up the original statement.'[23]

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20. Evidence, p. S31.
21. Evidence, p. S31.
22. Evidence, pp. S4042 and S3987.
23. Evidence, p. 1791.

13.15 It was noted that the Statement of Reasons issued on 18 April 1988 covering the cancellation of the remainder of the 1987 quota made no reference to the possibility of seizure action.[24] However, other evidence indicates that seizing the shirts was discussed on 10 December 1987 when the ACS officer cancelled the quotas.[25]

The Quota Instrument Conditions

13.16 The Statement provided to Midford also did not acknowledge the absence of conditions on the quota instruments nor disclose that concerns about this were part of the real reasons for cancelling the quotas. Instead, the Statement claimed that the criteria were published in Australian Customs Notices and 'restated in correspondence between Midford and the ACS (sic)' and that:

> As the administrative authority responsible for enforcing the arrangement the ACS applied appropriate conditions to the quota determinations.[26]

13.17 Such wording is contrasted by an earlier version of the Statement of Reasons which said:

> On legal advice the determination allocating Midford's 'off-shore' quota for 1987 was not conditioned. Reliance was placed on the computer record which identified this particular quota as 'off-shore', and resulted in a letter of advice which contained the appropriate conditions being generated on allocation. In the final resort the quota could be cancelled. During discussions in Sydney on 10 December 1987, doubts were raised whether ACS reliance on the former of these mechanisms was well placed. Further advice indicated that the determination could be conditioned under Section 273 of the Customs Act.
>
> It was also known that Midford were about to enter some 200,000 shirts for home consumption, and that this transaction would exhaust their 1987 quota. If doubts about the conditioning of the determination were valid and the garments were entered using the quota, it is possible that the

24. Evidence, pp. S386-95.
25. Evidence, pp. K4420-1.
26. Evidence, p. S387.

> ACS may not have been able to recover the additional duty which should have been payable for non-compliance with the conditions. Accordingly I decided to protect the revenue of the Commonwealth by ensuring that the intended conditions were legally enforceable. The first step in this process was the cancellation of the 1987 quota determination.[27]

13.18 Noting Customs' claim that it 'applied appropriate conditions,' the Committee examined in detail the correspondence from Customs to Midford and concluded that the company did indeed meet every requirement specified therein. That Customs, and others, chose to adopt somewhat unorthodox interpretations of the wording of those requirements is commented upon later in this Report. Although it did not eventuate to be tested in Court, the absence of conditions on the actual quota instruments, where the Act clearly requires under sub-section 273 (1) that such conditions, if any, are to be specified, was in the Committee's view a further fatal flaw in the ACS actions against Midford.

13.19 The DPP even reportedly acknowledged to Customs that in respect of the company's knowledge and understanding of the conditions 'the evidence is circumstantial and cumbersome.'[28]

13.20 In addition, when the in-house ACS legal advisor told the AGS on 23 December 1987 that Customs were unable to locate on their files any documents outlining the original conditions, the AGS responded that they 'do not see this as a problem.'[29]

The Seizure Statement of Reasons

13.21 The Statement of Reasons supplied in respect of the decision to seize Midford's shirts was 23 pages in length.[30] This was the only Statement provided within the statutory time limit.[31] Customs in April 1991 submitted a copy to the Committee in Confidence, claiming that this was 'because of its relationship to the Deed of Release between the Commonwealth and Tamota Pty Ltd (formerly Midford Paramount)'[32] Unfortunately, the Committee was unable to discover any such relationship and to this day remains mystified at such claims. The document was,

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27. Evidence, p. K8269. See also pp. S1684-5.
28. Evidence, p. S4042.
29. Evidence, p. S3952.
30. Evidence, pp. S3561-83.
31. Evidence, p. S4046.
32. Evidence, p. S849.

however, included in those that the Comptroller - General agreed to release for publication in January 1992.[33]

13.22 In essence, the reasons given for the decision to seize were that the Senior Investigator formed the opinion that the:

> a) invoices produced to Customs were false or wilfully misleading in that charges shown for interest were not payable, and
>
> b) values shown on Customs entries were understated.[34]

13.23 As far as the Statement of Reasons is concerned this did not present a problem to the Committee. What was of concern was that the officer misconstrued or disregarded some of the facts to arrive at that opinion. There was also no reference to the quota matter, which the Committee found had in fact been influential on the decision to seize (see Chapter 8).

A Missed Opportunity

13.24 In the production of Statements of Reasons the requirement was apparently used as an exercise to create or restate the reasons, rather than as an impetus to ensure that the decisions were equitable.

Statements Provided Under the AAT Act

13.25 The ACS also has a somewhat chequered history in the timely production of section 28 and 37 statements under the *Administrative Appeals Tribunal Act 1975* (AAT Act). One witness to the Inquiry informed the Committee that:

> Customs has a most cavalier attitude towards meeting (the) AAT ... statutory time limits. Its attitude is 'so what.' There is no sanction it faces under the Act.[35]

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33. Evidence, pp. S3260-1 and S3561-83.
34. Evidence, pp. S3561-83.
35. Evidence, p. 382.

13.26 He advised that he had first raised this problem with the then Minister for Customs in 1982. He revealed that only three of 17 recent section 37 statements were supplied within the statutory time limit[36] and pleaded that 'surely, after 10 years, it is time to rectify the situation so that Customs does meet it obligations.'[37]

13.27 The apparent reluctance shown by Customs to adhere to the provisions of the ADJR and the AAT Acts led the Committee to consider ways to overcome this problem.

Recommendations

13.28 **The Committee therefore recommends that:**

- **the Australian Customs Service focus increased attention on the provision of all statements under the Administrative Decisions (Judicial Review) Act and Administrative Appeals Tribunal Act within the statutory time limits and procedures be introduced within the Australian Customs Service to monitor the progress of supplying Statements under these Acts with a view to ensuring that their provision is timely;**

- **Statements of Reasons prepared within the Australian Customs Service contain full and complete disclosure of all reasons taken into consideration in arriving at the decision in question;**

- **Statements of Reasons be prepared by the Australian Customs Service officer who made the original decision, unless valid reasons to the contrary are shown;**

- **requests for Statements of Reasons within the Australian Customs Service shall be a means of prompting an independent review of the decision in question, irrespective of the applicant's right to pursue formal avenues of review; and**

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36. These did not relate to the *Midford* case.
37. Evidence, p. 382.

the Australian Customs Service include in its Annual Report a listing of all cases where Statements under the Administrative Decisions (Judicial Review) Act and Administrative Appeals Tribunal Act were not provided within the statutory time limit, showing the extent of the delay together with the relevant reasons.

Chapter 14

FINANCIAL ACCOMMODATION ISSUE

> *Chairman - Did (the DPP) have accountants look at it, though?*
>
> *Witness - I do not know. She took copies of documents away and came back but she could not make head nor tail of it.*[1]

Introduction

14.1 Earlier chapters of this Report detailed the discovery of the alleged underpayment of duty in respect of the financial accommodation arrangements between Midford Australia and Midford Malaysia and the resulting disproportionate seizures of Midford's stock between December 1987 and March 1988, which were claimed to have been based solely on this issue.

14.2 The financial accommodation issue revolved around whether or not Midford paid any interest to Midford Malaysia in respect of deferred payment for the garments it imported.

Customs Overview of the Events

14.3 Customs advised the Committee that the discovery of the alleged quota irregularities and decision to pursue the Crimes Act prosecution route in relation to those allegations resulted in the financial accommodation issue loosing precedence to that other matter. However, when the Crimes Act charges were withdrawn at the end of June 1989, Customs resurrected the financial accommodation matter and vigorously pursued prosecution under the Customs Act. Prior to this they had also sought to include the financial accommodation issue in the Crimes Act proceedings, as detailed below.

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1. Evidence, p. 1569.

14.4 It was submitted by Customs that, prior to the Committal proceedings:

> On 23 December 1988 the ACS referred a brief relating to one of a number of similar shipments, imported by Midford to the DPP (sic) requesting advice as to whether offences under the Crimes Act as opposed to the Customs Act, could be established for the financial accommodation/ undervaluation aspects. Notwithstanding that the brief from the ACS only covered one sample shipment, the DPP involvement with the quota evasion meant they had exposure and access to all documents sourced.
>
> The DPP advised on 31 June 1989 (sic) that the evidence in relation to the financial accommodation matters was sufficient to establish a prima facie case against Midford and others for offences under the Crimes Act. However, due to the primacy of the alleged quota evasion, the under evaluation (sic) aspect was not progressed further by the DPP.[2]

14.5 The Committee ascertained from other records that the DPP's advice was in fact provided on 31 January 1989.[3]

14.6 A brief was forwarded by the Senior Investigator to the AGS on 25 September 1989 covering two sample shipments for consideration of Customs Act charges in respect of the financial accommodation issue.[4]

14.7 On 17 November 1989 the AGS advised that there was a prima facie case in respect of evasion under section 234(1)(a) of the Customs Act and that there was a strong likelihood that charges could also be sustained in respect of smuggling, under section 233(1)(a).[5]

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2. Evidence, p. S6010.
3. Evidence, p. S3884.
4. Evidence, p. S3497.
5. Evidence, p. S6009.

14.8 It was submitted that:

> On 23 February 1990 at the request of the ACS the AGS referred the matter to (Counsel) with a 'brief to advise' whether a prima facie case exists to prosecute under S. 234(1)(a) in respect of the undervaluation. Counsel was also provided with the brief given to the AGS in respect of the two sample shipments. On 18 June 1990 the AGS formally communicated (Counsel's) advise to the ACS that offences under S.234(1)(a) are made out.
>
> By letter of 22 June 1990 the ACS referred to the AGS a *brief evidence (sic) covering 52 shipments, inclusive of the* two sample shipments. The AGS in their correspondence of 28 June 1990 advised preparedness to proceed on the financial accommodation offences and drew to attention difficulties in putting up volumes of charges. The matter progressed no further due to the settlement process.[6]

14.9 Obtaining comprehensive, coherent and factual evidence from the Customs witnesses in respect of the financial accommodation issue proved to be one of the more significant and protracted challenges for the Committee during the Inquiry. Earlier chapters of this report have touched upon some of these matters, others are detailed in the following sections.

DPP Involvement in Financial Accommodation Issue

First Brief to DPP

14.10 The Quota brief delivered to the DPP on 15 January 1988 included some references to the financial accommodation issue.[7] In that document it was claimed that the second paragraph of the agreement between Midford Australia and Midford Malaysia 'has been proven to be false.'[8] That paragraph says:

> Midford (Malaysia) are to manufacture shirts as ordered by Midford (Australia) and sell to Midford (Australia) at a price made up of the following:

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6. Evidence, pp. S6009-10.
7. Evidence, p. S6105.
8. Evidence, p. S6105.

CUT/MAKE/TRIM COST
FABRIC PORTION COST
FORWARDING CHARGES COST
INTEREST CHARGES[9]

14.11 It was also claimed that 'The company secretary has under caution stated that Midford Malaysia do not extend any credit because they receive no payments.'[10]

14.12 Unfortunately, these claims made by the Senior Investigator were not factual. It was the opinion of Customs that the clause 'Midford Malaysia are to manufacture shirts as ordered' was 'a deliberate untruth.'[11]

The response from the Chairman was:

> Again, we go back to our interpretation of 'manufacture'. I think it would be correct to say that there are some members on this Committee who think that Midford Malaysia was continuing to manufacture.[12]

Other chapters comment upon the interpretations Customs officers placed on the interview of Midford's representatives on 11 December 1987.

14.13 On 22 July 1988 the DPP advised Customs that it was awaiting receipt of their brief to prosecute in respect of the alleged financial accommodation fraud.[13]

Second Brief to DPP

14.14 On 23 December 1988 a four page brief, described as an example for one shipment, was forwarded to the DPP.[14] It is not clear what documents were also attached to that brief.

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9. Evidence, p. S3391.
10. Evidence, p. S3391.
11. Evidence, p. 1548.
12. Evidence, p. 1548.
13. Evidence, p. S6113.
14. Evidence, pp. S6116-9.

14.15 Customs claimed 'that the agreement (between MM and MA) in total is contrary to fact' because:

(i) the fabric used to manufacture the garments was stored in the premises of the Malaysian joint-manufacturing company;

(ii) Midford Malaysia do not manufacture in Malaysia;

(iii) Midford Malaysia do not sell to Midford Australia; and

(iv) Midford Malaysia do not charge Midford (Australia).[15]

14.16 It was also claimed that the directors had 'signed the so called agreement solely for the purposes of having the interest charge shown on the invoice accepted by the (ACS) and therefore conspired to defraud the revenue.'[16]

14.17 The Committee was not in agreement with these claims. The response from the DPP, dated 31 January 1989, did not in fact advise that the evidence was sufficient to establish a prima facie case, as had been claimed by Customs in that part of their submission quoted at section 14.4 above. Instead, it recommended that further investigatory activity be undertaken 'to obtain the necessary evidence' and also stated that:

> Subject to action in accordance with the above suggestions being undertaken and proving fruitful, and provided that the evidence as to other shipments is similar to that presented in your brief of evidence, I am of the view that the evidence is likely to be sufficient to establish a prima facie case for the offences.[17]

14.18 Customs also misrepresented the DPP's advice to the AGS (see section 14.28 below).

14.19 As an aside, it is also evident that the DPP incorrectly based the advice on a section of the Customs Act that came into force on 1 July 1987[18]

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15. Evidence, p. S6119.
16. Evidence, p. S6119.
17. Evidence, p. S6125.
18. Evidence, p. S6121.

whereas the particular shipment under examination was entered to Australia more than three months prior to that date.[19] Such fundamental mistakes call into question the credibility of the advice provided.

Third Brief to DPP

14.20 Notwithstanding that Customs had submitted that this matter was not progressed further by the DPP following the advice of 31 January 1989 (see section 14.17 above) because of the primacy of the quota matter, the Committee noted that on 17 July 1989, some two weeks after the committal proceedings failed, the Senior Investigator again raised the financial accommodation issue with the DPP with a view to pursuing charges 'either under the Crimes Act or the Customs Act.'[20] References were made to the availability of material on 'a total of 52 shipments, involving 214 Customs entries and evasion of approximately $83 000.'[21] It was also evident that the DPP had earlier met with two Customs officers to discuss this matter, on 13 July 1989.[22]

14.21 It is not clear from the evidence before the Committee whether there was a formal response from the DPP on this matter. However, less than one month later, on 15 August 1989, the DPP informed Customs that Counsel had advised that fresh Crimes Act charges could proceed against Midford in respect of the quota matter.[23]

14.22 On 29 August 1989 Customs requested that the DPP proceed with those charges,[24] but the DPP decided on 18 September 1989 that further Crimes Act charges should not be laid.[25] Although there was no specific reference to the financial accommodation issue in respect of the decision, it was obviously taken by Customs to also cover that matter.

AGS Involvement in Financial Accommodation Issue

14.23 Although the AGS was advised of the financial accommodation matter during the meetings held on 10 December 1987 to discuss the ACS decision to cancel

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19. Evidence, p. S6117.
20. Evidence, p. S6132.
21. Evidence, p. S6132.
22. Evidence, p. S6132.
23. Evidence, p. S575.
24. Evidence, p. S614.
25. Evidence, pp. S616-31.

Midford's quota, (see Chapter 7) no reference to this issue was included in the written advice provided by the AGS on 30 December 1987.[26]

14.24 From the close of 1988 through to the middle of 1990 there were numerous contacts made between the AGS and Customs on the financial accommodation issue. Table 14.1 provides an overview.

First Brief to AGS

14.25 On 29 December 1988, less than one week after referring a brief on the financial accommodation matter to the DPP (see section 14.14 above), Customs forwarded a copy of the same brief to the AGS.[27]

14.26 The one page covering letter opined that the brief 'establishes a prima facie case for the offence of smuggling and thereby grounds (for) forfeiture.'[28]

Second Brief to AGS

14.27 The brief sent to the AGS on 25 September 1989 contained documentation in relation to two shipments, although a list of 52 shipments was also included.[29] The Committee noted that Midford had entered at least 77 shipments during the relevant period, but it is evident that Customs regarded the remainder as 'too small or having insufficient reliable evidence.'[30]

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26. Evidence, p. S6015.
27. Evidence, p. S6026.
28. Evidence, p. S6026.
29. Evidence, pp. S6030-3.
30. Evidence, p. S6033.

Table 14.1

ACS/AGS Financial Accommodation Briefs and Advices

Date	From	To	Type	Contents
29.12.88	ACS	AGS	Brief	Example shipment - Ground for forfeiture and smuggle
25.09.89	ACS	AGS	Brief	Two shipments - request for advice re Customs Act charges
17.11.89	AGS	ACS	Advice	Prima facie case exists
20.02.90	-	-	Conference	ACS and AGS
23.02.90	AGS	Counsel	Brief	
01.03.90	-	-	Conference	ACS, AGS and Counsel
01.03.90	AGS	ACS	Advice	
29.03.90	ACS	AGS	Brief	Further material provided
09.05.90	-	-	Conference	ACS, AGS and Counsel
25.05.90	ACS	AGS	Brief	Further material provided
22.06.90	ACS	AGS	Brief	First 3 Volumes provided
25.06.90	ACS	AGS	Brief	Further 3 Volumes provided
28.06.90	AGS	ACS	Advice	1336 charges under Customs Act
05.07.90	AGS	ACS	Advice	1344 charges under Customs Act
18.06.90	Counsel	AGS/ACS	Advice	
20.06.90	Counsel	AGS/ACS	Advice	

14.28 Notable claims by the Senior Investigator disclosed in the brief included that:

a) the documents establish Midford Malaysia is purely a reinvoicing facility and the reinvoicing may also be completed in Australia;

b) the Company Secretary stated under caution that Midford Malaysia do not extend any credit to Midford Australia;

c) goods were imported using false values;

d) 'ADJR action in respect of the seizure was abandoned' after a Statement of Reasons was provided;

e) 'Midford surrendered their Bond License soon after the seizure';

f) 'A complaint by Midford to the Ombudsman concerning the seizure was dismissed after due enquires'; and

g) the DPP had advised on 31 January 1989 that the evidence supports charges under the Crimes Act.[31]

14.29 In the Committee's view, all of the above claims fell somewhat short of being 100 per cent correct. The evidence countering most of the above claims has been referred to in other sections of this Report, including at section 14.17 above).

AGS Response to the Second Brief

14.30 The AGS responded to Customs on 17 November 1989, offering 'the opinion that charges can be proved at least at a level sufficient to established intentional non-payment of duty.'[32]

14.31 The advice included reference to 1371 individual findings being required if each of the three defendants were charged with 457 counts in respect of the 52 shipments, stating that 'On any view, this may be an excessive number of charges for the $80 000 duty involved.'[33]

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31. Evidence, p. S6032.
32. Evidence, pp. S.6039-45.
33. Evidence, p. S6041.

14.32 Of particular note were comments such as:

> I should indicate at the outset that, for reasons of expediency, I have not been provided with a full brief of evidence. I have had to take at face value, therefore, a number of factual assertions.[34]

and

> My advice is therefore qualified to the extent that I would anticipate these matters to be capable of proof at trial and my advice is given on the basis that they can be. I would also take on board the qualifications (the DPP) has drawn attention to in his letter.[35]

14.33 Under the heading of 'Facts' the AGS listed that the agreement between the companies dated 9 July 1986 was put together only in August 1987, Midford Malaysia's only role was reinvoicing the goods and:

> You are of the opinion that since the start of 1986 there has been no role for Midford Malaysia at all in the supply and manufacturing process.[36]

14.34 However, evidence was received that Midford Malaysia's role was not limited to the simple reinvoicing claimed by Customs. The Company's employee was also responsible for cost, production and quality control.[37]

14.35 It is clear that the AGS was misinformed or at least not fully informed by Customs in relation to the basic facts of the case.

Further Discussions

14.36 Customs met with the AGS on 20 February 1990 to discuss the case[38] and a brief was provided to Counsel a few days later.[39] It included

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34. Evidence, p. S6040.
35. Evidence, p. S6040.
36. Evidence, p. S6041.
37. Evidence, pp. S3220-6.
38. Evidence, p. K4101.

references to the earlier correspondence and briefs as containing the facts[40] and highlighted that under the Customs Act averments (statements) of fact are prima facie evidence of those facts.[41] It is clear that Counsel had reservations about the record of interview of Midford's personnel for the financial accommodation matter and sought additional evidence.[42]

14.37 The record by Customs officers for misconstruing or mis-stating the facts and representing ill founded assertions in their place, as disclosed during the Inquiry, caused concern to the Committee that importers could be convicted on the basis of such statements.

14.38 The Committee was particularly concerned at allegations raised in another case that an ACS officer had gained a conviction by forging the evidence.[43]

14.39 On 1 March 1990 Customs and the AGS met together with Counsel.[44] Notes made by the Senior Investigator record that Counsel requested additional investigative activity to 'close off' possible avenues of defence by Midford.[45] It was particularly noted that the ACS was to obtain details of books of account, etc on the loan account, papers, debit notes and letters of credit to show the dates that they were paid. It was also recorded that Counsel 'stated we need to be fair and give them every opportunity.'[46]

14.40 This last statement hints that Counsel might have detected a certain level of over enthusiasm to prosecute Midford on the part of the Customs investigators.

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39. Evidence, pp. K4101-10.
40. Evidence, p. K4104.
41. Evidence, p. K.4107.
42. Evidence, p. S4101.
43. Evidence, p. S7450.
44. Evidence, p. S6046.
45. Evidence, p. S6046.
46. Evidence, p. S6047.

14.41 Towards the end of March 1990, Customs provided the AGS with Midford's 1987 financial statements, several statements by witnesses and 'a schedule showing (letter of credit) dates as against export date(s).'[47]

The covering minute commented that:

> ... payments to the manufacturer were usually within a week of export whereas payments for fabric were usually well before and the statement of accounts shows interest as nil for 1987 and $81,777 for 1986. This is consistent with the fact that during 1985 Midford Malaysia arranged for (letters of credit) in its own right.[48]

14.42 Chapter 15 discusses the letters of credit. Further comment by the Committee on the other claims is included below.

14.43 A further conference with Counsel was held on 9 May 1990 to discuss the additional material provided. More documentation was provided to the AGS on 25 May 1990 as a result of that conference, including items described in the covering minute as:

> . Manufacturing schedule showing manufacturers as known at that time. The schedule tends to further separate Midford Malaysia from the manufacturing process; and
>
> . Midford Malaysia Debit Notes for interest charged to Midford (Australia) on an outstanding loan account. These are for journal entries only. They do not relate to interest for financial accommodation on goods imported by Midford.[49]

14.44 Material on the re-determination of the Customs values of the seized goods was also included. Further comment on this issue is at Chapter 28.

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47. Evidence, p. S6049.
48. Evidence, p. S6049.
49. Evidence, p. S6051.

14.45 The Committee discovered further inaccuracies and omissions by the Customs investigators in relation to the other two matters referred to above. Details are included at sections 14.70 and 14.50 respectively.

Third Brief to AGS

14.46 Evidence relating to 52 shipments was provided to the AGS between 22 June and 5 July 1990.[50] Correspondence between the ACS and the AGS indicates that the decisions on which types of charges and how many of the more than 1 300 possible charges to be laid was left to the ACS.[51] In the event, the ACS wanted all 1 344 charges to be laid.[52] Apparently, Counsel's opinion was in agreement with this, even though the AGS recorded that his opinion was 'admittedly given without a period for consideration.'[53]

14.47 It is also clear that at the time, Counsel had only been given documentation in respect of about half the shipments involved.[54]

14.48 It is evident that the AGS was aware by early July 1990 that Customs was close to agreeing a settlement with Midford. It was stated that if authority to prosecute was not forthcoming, as the duty evaded amounted to $70 000, some $420 000 should be sought from the Company. The AGS said that this was 'befitting the nature of the fraud perpetrated.'[55]

14.49 The Committee considered that the comment by the AGS betrayed prejudgment of the case and also formed the opinion that threats of proceeding with further charges against Midford was a major bargaining chip used by the ACS in negotiating the settlement. This might also explain why Customs insisted on laying all 1 344 possible charges, despite the impracticality of this and the objections to taking such a course of action expressed by the AGS. Nevertheless, one Customs witness boldly claimed during the Inquiry that there was never an intention to proceed with all of the charges.[56]

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50. Evidence, p. S6052.
51. Evidence, pp. S6053-7.
52. Evidence, p. S6056.
53. Evidence, p. S6053.
54. Evidence, p. S6053.
55. Evidence, p. S6057.
56. Evidence, p. 1303.

Debit Notes and Intercompany Loans

14.50 When the Customs investigators interviewed the representatives of Midford on 11 December 1987 concerning the financial accommodation issue, Midford stated that the payments for interest between the company and its subsidiary were effected through debit note adjustments to the balances outstanding on the intercompany loans.[57]

14.51 The Customs investigators obtained copies of six debit notes for the period January 1986 to June 1987 and provided these to Counsel, along with an assurance that they did not relate to interest for financial accommodation on goods imported by Midford.[58]

14.52 The Committee enquired of the witnesses as to how they were able to provide such an assurance. It was ascertained that at no stage did they ask Midford or their auditors about the nature of the interest charges contained on those debit notes, what the loans were for, nor whether any other relevant debit notes existed.[59]

14.53 It seems that the officers noted a reference in Midford's Board Minutes to the existence of an inter-company loan and assumed that the debit notes referred to this.[60]

14.54 One Customs Investigator told the Committee that the journal entries did not relate to the financial accommodation in respect of the goods, as:

> We tied that up by the details in the minutes of meeting as to what the inter-company loans were, and they were not in respect of the goods. The board of directors in fact told us in their minutes.[61]

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57. Evidence, pp. S3401-18.
58. Evidence, pp. S6051 and S5824-6.
59. Evidence, pp. 1568, 1924 and 1978.
60. Evidence, p. 1568.
61. Evidence, p. 1568.

14.55 The Committee's examination of those Board Minutes could not lead it to the same conclusion.[62] The witness had earlier stated that 'We do not know exactly what the loans were taken out for.'[63]

14.56 He speculated that they related to the debt building up as a result of the losses being incurred by Midford Malaysia and also implied that because the interest was effected by a journal entry, it did not represent a real payment of interest.[64]

14.57 Customs was of the opinion that it had provided copies of the debit notes to the Committee.[65] In fact they had not.

14.58 Examination by the Committee of the corporate accounts for the companies disclosed that various interest charges had been recorded, so the Committee requested Midford to provide copies of the relevant debit notes, postings and full details of each inter-company loan, together with validation of this information from the companies' auditors.[66]

14.59 The resulting material made available to the Inquiry supported the explanations provided by the Midford personnel to Customs.[67]

Did the ACS and DPP Understand the Evidence?

14.60 It was evident the Customs officers had limited understanding of the material they were dealing with in relation to the financial arrangements between Midford Australia and Midford Malaysia. Therefore, the Committee asked whether any of the documentation had been examined by someone with expertise in such matters. The response was that:

> We sought advice on those debit notes from the office of the Director of Public Prosecutions; the Proceeds of Crime Office is there. The officer who was handling the Proceeds of Crime

62. Evidence, pp. 1565-6.
63. Evidence, p. 1564.
64. Evidence, p. 1565.
65. Evidence, p. 1567.
66. Evidence, pp. 1582-3.
67. Evidence, pp. S6602-43.

situation with Midford was asked to come down and have a look at the books of account.[68]

14.61 However the Committee thought it more likely that any examination of Midford's financial matters by the Proceeds of Crimes personnel within the DPP would have been confined solely to the identification of assets potentially subject to constraint under the Act.

14.62 Further questioning of the witness followed:

Chairman - You had people look at the books. Who looked at the books?

Witness - I think it was (an officer) from the office of the Director of Public Prosecutions. They did have accountants, as that section is stocked by accountants.

Chairman - Did you know the accountants had a look at that?

Witness - I know that she did.

Chairman - Did she have accountants look at it, though?

Witness - I do not know. She took copies of documents away and came back but she could not make head nor tail of it.

Chairman - You just said that you knew it would have been looked at by accountants because they have got accountant in the section, or words to that effect.

Witness - I would presume so.

Chairman - But you do not know that?

Witness - No.[69]

14.63 The DPP later confirmed that they had only looked at the material *in relation to the 'property tracking exercise.'*[70]

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68. Evidence, p. 1568.
69. Evidence, p. 1569.
70. Evidence, p. S8127.

Midford Attempts to Explain

14.64 The Committee was told that Customs met with Midford to allow an opportunity to clarify the purposes of the inter-company loans.[71] The Director of Investigations gave the following evidence:

> **Witness** - At that meeting, they (Midford) had an opportunity there, and they did not represent it because they could not represent it.
>
> **Chairman** - You are saying they could not. You are not a judge. The problem I have with this is that there is an awful lot of summation here. There is undoubtedly a lot of grey area, and I dare say that when this is all over there still may be grey areas. But it is up to the Committee to come to some sort of viewpoint about that. There appears to pervade right through this an assumption of their guilt, and the attitude that when the documents do not tie up that amounts to guilt rather than when the documents do not finally tie up it does not amount to a case of their guilt not being proven.[72]

14.65 Further discussion ensued regarding the representations from Midford about the financial accommodation issue. The Committee had noted that in May 1990 Customs was advised that:

> I have received advice from Midford Paramount's auditors, that the amounts owed by Midford Paramount to Midford Malaysia were added to the balance of the loans outstanding. (The firm of Auditors) has also advised that there were no changes made in 1986 to the previously established accounting treatment of those funds.[73]

14.66 Customs National Manager, Investigation said in relation to this:

> ... we took the view that it did not really advance the situation much and that in order to finalise the matter we should ... proceed to prosecution ...

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71. Evidence, p. 1568.
72. Evidence, pp. 1568-9.
73. Evidence, p. 1576.

Chairman - Can you tell me how an opinion from their auditors, stating that the amounts owed by Paramount to Malaysia added to the balance of the loans outstanding, did not advance the issue?

Witness - We concentrated more on the first part of the letter, which was the offer of settlement to pay the outstanding duty and resolve the issue. We did not follow up in any detail that point to which you referred.

Chairman - What (Midford's Tariff Advisor) was saying went back to the heart of what (Midford's Director on 11 December 1987) was saying. As far as I can see, whether or not the explanation is good enough, we have an explanation from (Midford) which (Customs) says was considered and we have a further explanation now from (Midford's Tariff advisor) sighting Midford Paramount's auditors and that was, in effect, disregarded. So the explanation that Midford Paramount gave over time appears to have been repeatedly put to one side. Customs is quite clearly capable of reading a whole letter; we do not just read the first half of a letter. Why would not (the auditors have) been questioned?

Witness - The operative prize is payment for the goods. That is the crux of what we are saying. We admit that there may have been interest incurred because of financial arrangements made between Midford Paramount and Malaysia. They could have had loans on the buildings, they could have had-

Chairman - But that is not what it says. It says that amounts owed by Midford Paramount to Midford (Malaysia) were added to the balance of the loans outstanding. Surely the question to (the Auditors) would have been: what were those amounts owed that were added? If it was the financial details required to make them comply with this then perhaps you might not have had a case. If it was not those moneys then it would appear that that would have simply vindicated your position. I am just wondering why no-one bothered to spend the extra 48 hours finding out.[74]

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74. Evidence, pp. 1578-9.

14.67 The discussion on this matter resumed with the following:

> **Chairman** - All I am saying is that there have been two explanations, not inconsistent with each other, offered-one in writing as late as May 1990, quoting Midford Paramount's auditors in respect of this issue, and it was not followed up.
>
> **Witness** - I could answer that, Mr Chairman. That is not the case.
>
> **Chairman** - (Another Customs Witness) just said it was the case.
>
> **Witness** - We knew at the time because we had the Midford (Malaysia) accounts, we had the debit notes and we had the minutes. We knew what those loans were, and they were not in respect of the goods, which is all we were interested in.
>
> **Chairman** - So as far as you were concerned, you had looked at one set of documents, you had made up your mind and that was it.
>
> **Witness** - I cannot go much further than the board minutes and the actual documents. They speak for themselves.[75]

14.68 However, as indicated at section 14.55 above, neither the Board Minutes nor the documents examined by the Customs investigators supported the inferences that they had drawn.

14.69 The evidence continued with:

> **Chairman** - What I am saying is that there is a very real, pertinent piece of evidence here.
>
> **Witness** - I do not know how pertinent that evidence is. What does it mean?
>
> **Chairman** - That is my point. No-one made any attempt to find out, by the sound of it.[76]

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75. Evidence, pp. 1579-80.
76. Evidence, p. 1580.

The Manufacturing Schedule

14.70 The schedule provided to Counsel in May 1990 as part of the supporting evidence for the case being prepared by Customs purported to list the various Malaysian sub-contractors used to manufacture specified quantities of garments imported by Midford to Australia.[77] In providing the schedule, Customs claimed that it was further evidence separating Midford Malaysia from the manufacturing process. [78]

14.71 However, the Committee noted that the joint manufacturing agreement between Midford Malaysia and its Malaysian partner provided for contracting out of any overflow production to other entities associated with the Malaysian partner.[79]

14.72 In February 1991 Customs submitted that:

> Toward the end of May 1988, the ACS investigation team had completed its examination of all material gathered. It found that (the Malaysian joint manufacturer) was one of five Malaysian manufacturers supplying MP and was responsible for less than 6% of the MM shipments after the closure of its factory.[80]

14.73 However, the schedule only listed three firms. Further discussion of this occurs below.

Use of Subcontractors

14.74 When the Committee was taking evidence in respect of the differences in costings for goods imported from Midford Malaysia in 1984 (see Chapter 6) the

77. Evidence, pp. S5788-94.
78. Evidence, p. S5788.
79. Evidence, p. S372.
80. Evidence, p. 3270.

following exchange occurred:

> **Chairman** - Midford was using different subcontractors, producers - call them what you will - even back at that stage, as we understand it.
>
> **Witness** - My understanding was that Midford did not sub-contract at that point.
>
> **Chairman** - We will double check this, but that is not our understanding.[81]

14.75 After re-examining the evidence, the Committee pointed out to Customs that Midford had disagreed with the claim that the Malaysian joint manufacturer supplied less that 6 per cent of Midford Malaysia's shipments.[82]

14.76 Midford also submitted that:

> Farming out or sub-contracting of work is the norm for virtually all clothing manufactures, both within and outside Australia. Many respected and high profile 'manufacturers' sub-contract virtually 100% of their output. Sub-contracting is done in order to meet delivery deadlines or when the other factories have specialised machinery which would be more suitable for a particular style/product.
>
> In evidence given before the Committee by DITAC and the DPP, officers of those Departments repeatedly stated that MM needed to manufacture all the products on its own premises. This was not so.
>
> In line with industry norms, MM had a long history of sub-contracting virtually from its very beginning in 1975. Companies within Malaysia to which MM sub-contracted included:
>
> (Five companies were then listed)
>
> The goods produced by these sub-contractors were invoiced and exported by MM. More importantly, the same quota

81. Evidence, p. 1293.
82. Evidence, p. S3801.

instrument was used to bring these goods in Australia as they complied with the quota conditions and in line with the true intent of being manufactured in Malaysia.

If the Committee wishes, precise details could be supplied in relation to the volume of work so sub-contracted. Suffice it to say for the present, it was substantial.[83]

14.77 The Committee had also made similar observations from other evidence received.

14.78 Customs was therefore asked whether its witness wished to correct his earlier evidence. Notwithstanding the above, the response was that:

> (The witness) said that it was his understanding that Midford did not sub-contract in Malaysia prior to 1986. This understanding was based upon the absence of any evidence to the contrary found during the course of the investigation and the fact that the factory was being underutilised (refer Exhibit Reference K7725) which would ordinarily preclude the need to sub-contract.[84]

14.79 Unfortunately, Customs demonstrated a rather prolific tendency to reach conclusions in the absence of supporting evidence. Lack of understanding of normal commercial practices and basic practices within the industry subject to examination was also evident.

Customs' Interpretation of the Evidence

14.80 Prior to receipt of that response, the Committee was given evidence by another Customs witness that:

> Pen Apparel was merely a sub-contractor to Midford Malaysia.
>
> Do not forget that not only was (Pen Apparel) sub-contracting, there were other companies such as (two

83. Evidence, pp. S3801-2.
84. Evidence, p. S8937.

firms were named) so Midford did not even stick to its so called partner.[85]

14.81 The particular witness presenting this evidence was obviously poorly informed or lacked understanding of the documents in his possession - particularly in view of the provisions expressed in the agreement between Midford and Pen Apparel.

14.82 Evidence was also given by the first witness to indicate that he had seen the submission from Midford. The Committee asked Customs who they believed the other 94 per cent of the suppliers to Midford were. The witness then made reference to those suppliers listed in Midford's submission.[86]

14.83 The Committee pointed out that it was enquiring about shipments after the closure of Midford's Malaysian factory whereas the relevant submission from Midford referred to sub-contractors from its very beginning in 1975.[87]

14.84 The following evidence emerged.

First Witness - What we were talking about there were suppliers after the closure of the factory.

Chairman - You are saying that these were suppliers as well.

First Witness - They were the manufacturers. They were people who were actually making up the articles.

Chairman - After the closure of the factory?

Second Witness - That is right, Mr Chairman - sub-contractors were used after the closure of the factory other than Pen Apparel because Pen Apparel and others were only sub-contractors.

Chairman - And it was the same sub-contractors as had been involved since 1975?

Second Witness - I would not be sure of that.

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85. Evidence, p. 1549.
86. Evidence, pp. 1765-6.
87. Evidence, p. 1766.

Chairman - Really, that is what I am asking you.[88]

14.85 The second witness then advised that the sub-contractors were different.[89]

14.86 However, the Committee's examination of the matter revealed that at least one of the firms had continuously sub-contracted over the entire period.[90]

Why Had Customs Sent Investigators to Malaysia?

14.87 Having established that Midford Malaysia had been sub-contracting some parts of its manufacturing since 1975, the Committee asked Customs why it has sent its two officers to Malaysia in 1988 (see Chapter 18). The answer provided by the second witness was 'Amongst other things, to determine whether in fact that was correct.'[91]

14.88 This statement, like so many others from the witness, was unsupportable and contrary to other evidence made available to the Inquiry.

Was Subcontracting Forbidden?

14.89 The transcript continued:

> Chairman - If that was the case and they had been sub-contracting since 1975, why were they not in trouble for doing that?
>
> Second witness - Well, I would suggest they would be.
>
> Chairman - What was done about it?
>
> Second witness - What was done about it was the preparation of a brief.

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88. Evidence, pp. 1766-7.
89. Evidence, pp. 1766-7.
90. Evidence, pp. 1549 and S3802.
91. Evidence, p. 1767.

Chairman - No, it was not.

Committee - No, it was not at all.[92]

14.90 The Committee established that no briefs on this matter were prepared, contrary to what had been claimed by the second witness, who only moments prior to making this claim assured the Committee that Customs was not even aware that sub-contracting occurred prior to the sale of Midford Malaysia's factory at the close of 1985.[93]

14.91 Returning to the transcript, it continued in relation to the continuous sub-contracting:

> **Chairman** - So what we seem to have is some sort of view that that was wrong too. And (the second witness) said that Midford should have been in trouble for that too. Clearly, Midfords did not think they were doing anything wrong. They have wandered along to the Public Accounts Committee and have said, Yes, sure; we have been doing it for ages. Here is what we have been doing. As a matter of fact, if you want to know how much each one of them did we will give you that too. They do not seem to think there was anything wrong, do they?[94]

14.92 Following all this, the Committee again asked the first witness whether he wished to correct his earlier evidence, referred to at sections 14.14, 14.28, 14.72, 14.74 and 14.78 above. The response was that the witness 'comments that he has no reason to believe that his evidence was incorrect.'[95]

The Quantities Subcontracted

14.93 Returning to the schedule Customs provided to Counsel, the Committee noted that it did not support the claim to the Committee made by Customs that Pen Apparel's productions was only 6 per cent of the total Midford Malaysia exports to Australia (see section 14.72). On the Committee's own

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92. Evidence, pp. 1767-8.
93. Evidence, p. 1768.
94. Evidence, pp. 1768-9.
95. Evidence, p. S8937.

calculations using the data in that schedule, it appeared that this figure should have been closer to 70 per cent.

14.94 Customs responded that:

> In preparing the submission at S.3270, (the officer) used an incorrect mathematical formula.
>
> He multiplied by the No. of items on the schedule by the number of items manufactured by Pen Apparel. He arrived at a figure of 6.125% and truncated that figure to 6%.[96]

The second part of this explanation was still incomprehensible to the Committee. However, whatever the explanation, the officer had given the Inquiry incorrect evidence which again fell to the Committee to detect and seek correction. Occurrences of this nature were far too frequent during the Inquiry.

14.95 The Committee also noted that another company said by Customs to have been sub-contracting during the period covered by the schedule was not listed thereon.[97]

14.96 It was also ascertained that the sub-contracting companies were wholly owned subsidiaries of Pen Apparel and that it was that firm, not Midford Malaysia, who placed the overflow orders with the subsidiary companies. However, Customs implied that it did not know this was the case at the time the schedule was prepared.[98]

Recommendations

14.97 **The Committee recommends that:**

- **when preparing briefs of evidence, Australian Customs Service Investigators clearly distinguish between the inclusion of known facts based on evidence available and unsupportable assertions or suppositions;**

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96. Evidence, p. S8938.
97. Evidence, pp. 1549, 1766-8 and S5787-94.
98. Evidence, p. S8570.

- care be taken by the Australian Customs Service not to misrepresent or misconstrue legal opinions provided, especially in relation to the sufficiency of existing evidence to support charges;

- briefs of evidence be vetted and reviewed at senior levels within the Australian Customs Service to improve accuracy and completeness prior to referral to the Australian Government Solicitor, Director of Public Prosecutions or Counsel. These officers should also, to the extent that it is possible, be those who will represent the Australian Customs Service during court proceedings;

- the Australian Customs Service refrain from seeking legal opinions where a full brief of evidence is not available for examination by the relevant legal advisor;

- an independant investigation be undertaken into allegations received by the Committee in a submission that an Australian Customs Service officer forged evidence during a recent Crimes Act prosecution case;

- Australian Customs Service Investigations officers receive further instruction in the basic legal presumption of innocence and their responsibility to conduct investigations in a manner that is, and is seen to be, thorough and unbiased;

- where legal opinions are sought by the Australian Customs Service, adequate time be allowed for consideration of the evidence by the legal advisor;

- expert opinions be obtained in all cases where the evidence sought or under consideration involves technicalities beyond the competence, training or experience of the Australian Customs Service investigators assigned to the case;

- Senior Australian Customs Service Investigations officers undertaking the role of 'Case Officer' remain alert to the potential for Investigations officers to encounter situations where the evidence or explanations necessitates expert interpretation and ensure such expertise is obtained where required;

- procedures be implemented within the Australian Customs Service to ensure that explanations provided by defendants or potential defendants are not dismissed without adequate investigation; and

- checking mechanisms be introduced within the Australian Customs Service to detect instances where Investigations officers misconstrue or misunderstand the documentary evidence subject to their examination.

Chapter 15

LETTERS OF CREDIT

> *Provided all of the facts come out, I am positive that the officers from the investigating team will come out of this okay.*
>
> *ACS Senior Inspector*[1]

Introduction

15.1 The whole crux of the financial accommodation issue was tied to the question of whether or not Midford paid interest to Midford Malaysia for deferred payment of the price of the garments imported to Australia.

15.2 Chapter 14 deals with the debit notes and inter-company loans said by Midford to have been the method by which such interest payments were effected.

15.3 Customs, however, evidently concentrated on the direct payments by Midford Australia for the goods it imported. The basic position put by the ACS witnesses was that payments for each shipment were effected, in most cases, by 'letters of credit', with a minor number of payments being made by virtually instantaneous 'telegraphic transfer' of funds.

15.4 Customs made no references in its initial public and confidential submissions to the Inquiry concerning how or why it considered that the interest charges were false,[2] apart from stating that there were:

> ... serious doubts on the amount of interest claimed by (Midford) and whether there was in fact any interest component in the export prices quoted by (Midford Malaysia).[3]

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1. Evidence, p. 1491.
2. Evidence, pp. S3270-1.
3. Evidence, p. S3264.

15.5 The only other reference seems to be that often-quoted claim that Midford admitted Midford Malaysia 'did not extend credit to Midford (Australia).'[4]

The Schedule of Payments

15.6 However, when the Committee came to examine the events leading up to the decision to impound Midford's documents, there was still no mention of the actual payments made.[5] It was only when the Committee pointed out deficiencies in the arguments and interpretation of the documentation relied on by Customs concerning the earlier refunds of duty and the so-called schemes marketed by a Customs Consultancy firm (see Chapter 6) that Customs witnesses first mentioned the existence of the schedule of payments made for the 1986 and 1987 imports by Midford as supporting evidence of their claims.[6]

15.7 The Senior Investigator said:

> I have a document in front of me at the moment. It shows the actual letter of credit dates in relation to 52 shipments we put up to the Australian Government Solicitor, and it shows clearly that there was no 180 days extended in any case. In most cases, it was paid before or shortly after the date of export. It is broken up into the shipment number, Midford Malaysia invoice date, bill of lading date, Pen Apparel letter of credit date and the fabric supplier with the letter of credit date. There appears to be no 180 days in any case.[7]

15.8 The Committee noted, however, that the schedule in fact only contained details for 41 shipments.[8]

15.9 The Committee asked who had been involved in interpreting the documentation that gave rise to the schedule. The answer alluded to involvement by the whole investigation team, but further questioning elicited that reliance, again, had been placed on the interpretations by the Senior Investigator.[9]

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4. Evidence, p. S3265.
5. Evidence, pp. 1281-1359.
6. Evidence, p. 1359.
7. Evidence, pp. 1359-60.
8. Evidence, pp. K4043-7.
9. Evidence, p. 1360.

15.10 Further clarification from that officer resulted in the following:

> **Committee** - Are you telling us now that you interpreted what that documentation meant and you concluded that 180 days was not (in) evidence. If it was not you, who was it.
>
> **Witness** - We had all the payments, the letters of credit where they are indicated and, from looking at the documentation, it clearly states that there was no credit extended.
>
> **Committee** - Whose interpretation of the documentation are we relying upon?
>
> **Witness** - Mine, initially.[10]

15.11 Still later the Customs Senior Investigator and his Senior Inspector advised the Committee:

> **Witness (Senior Inspector)** - I might also say, Mr Chairman, that the examination of all of the documents relating to the shipment revealed that on not one occasion was payment effected after the goods were exported. So, in other words, there was no delayed payment, if you like, no interest extended. Payments were made on or about the time of export.
>
> **Committee** - To Pen Apparel?
>
> **Witness** - To Pen Apparel and to the fabric manufacturers. That in itself showed us that it was a ridiculous situation to suggest there were any payments.
>
> **Witness (Senior Inspector)** - There was never 180 days extended at any time.
>
> **Chairman** - (The Senior Investigator) is saying there was no 180 days extended or anything else. What you are saying is there was no documented agreement on that method of payment. Am I correct?
>
> **Witness** - The actual payments were made either before or shortly after the export of the goods.

10. Evidence, p. 1360.

Witness (Senior Inspector) - You will recall, Mr Chairman, that we had the actual letters of credit.

Chairman - Yes.

Witness - We had them.

Chairman - Do you have a schedule of those payments?

Witness (Senior Inspector) - Yes. I have handed up a schedule of those payments.[11]

15.12 Further clarification was sought, as follows:

Witness - The schedule was showing the dates of letters of credit and payments to Pen Apparel and to the fabric manufacturers.

Chairman - No. What I am asking for is the schedule of the payments that (the Senior Inspector) referred to before.

Witness (Senior Inspector) - That is the one.

Chairman - (To Senior Investigator), you are talking about a schedule of the dates of letters of credit.

Witness (Senior Investigator) - Yes, and the payments thereon.[12]

What the Schedule Actually Revealed

15.13 However, the Committee's examination of the schedule disclosed that it listed dates that the letters of credit were issued, not the dates they were paid. It was the Committee's understanding that the date of issue would almost invariably be earlier than the date of payment, irrespective of whether the payment was to be made 'at sight'[13] or at extended terms of say 90 or 180 days.

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11. Evidence, pp. 1559-60.
12. Evidence, p. 1561.
13. Payments 'at sight' are effected when the bank receives valid copies of the documentation confirming the order is ready for shipment.

15.14 In addition, the data on the schedule and other evidence indicated to the Committee that payments, at least for the fabric suppliers, had in fact been made at deferred terms of 180 days.

15.15 It therefore seemed to the Committee that Customs made two fundamental errors in their interpretation of the evidence disclosed by the letters of credit. Later events confirmed this to be true.

Customs' Understanding of Letters of Credit

15.16 The Committee sought an explanation from Customs of how the witnesses understood a letter of credit to operate.[14]

15.17 The following exchanges then occurred:

> **Chairman** - Let me put this conjectural point to you and you tell me why it is wrong: in the Midford case there were two types, those paid on sight - that is, when the documentation arrived at the bank in Australia - and those that were payable 180 days after sight, or 180 days after the date of the letter of credit. It could be that you and other officers have made a fundamental mistake in assuming that the date of issue of the letter of credit was always the date of actual payment. Would that be the case?
>
> **Witness** - Perhaps I could answer that question. The letter of credit application generally will not bear any relevance to the actual drawing down of the letter of credit. That is the most important thing. In each case we obtained from the bank details of each drawing down on that letter of credit, including the date that it was drawn down, and those are the dates that you have on the schedule. (emphasis added)
>
> **Chairman** - We have not seen that.
>
> **Witness** - The schedule?
>
> **Chairman** - We have seen the schedule, but we have not seen the original documentation on that.

14. Evidence, p. 1905.

Witness - The letters of credit?

Chairman - You just said that you have given us information on the dates of drawing down, did you not?

Witness - The letters of credit dates that you have on that schedule will be the date of payment. (emphasis added)

Chairman - Why are you so sure about that?

Witness - My understanding from going through the brief of evidence was that we did not give any real relevance to the application date. The date of payment - the final payment - was the date that we were interested in. If we were trying to prove that there was no deferred payment, we needed to know when the drawing down occurred.

Chairman - So how did you find that out?

Witness - We went to the banks and got all of their records, including the actual irrevocable documentary credit and the actual drawing down documents which are issued to the applicant.

Chairman - So you actually had the banks' drawing down documents?

Witness - Correct.

Chairman - And you took them as being the drawing down dates?

Witness - Correct.

Chairman - I refer to the fourth column of the schedule. In the fourth column you will see L/C date. Is that the letter of credit date?

Witness - Yes, the drawing down date, I can presume without looking at the documents, but if we had a look through those -.

Chairman - But that is the point. Is it the letter of credit date or is the drawing down date?

> **Witness** - In all of these cases, not for one of them was there any extended credit of 180 days.[15]

15.18 Some discussions then ensured about this evidence being consistent with that given earlier by Customs, culminating in an admission that 'We would not want to say a different thing.'[16]

Examination by Qualified Persons

15.19 In a similar fashion to an earlier line of enquiry regarding examination of the evidence by qualified persons, the Committee asked whether anyone with expertise checked the dates of the letters of credit, and if so, who did that.[17]

15.20 The answer was:

> An officer from the DPP's proceeds of crime section. That is an accountancy situation. An accountant looked at them. We were concerned, having discussed the matter with our counsel that we should make sure, in respect of the payments on those debit notes, that they could not be traced back to be payments for the goods because that would leave an explanation for deferred payment by Midford.[18]

15.21 The Committee noted that although it had asked about letters of credit, the answer referred to debit notes. It was assumed from the earlier part of the answer, however, that the witness intended to convey that the DPP also checked the letters of credit. As stated in Chapter 14, however, the DPP later confirmed that any checks done by its officers were limited to identifying Midford's assets.

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15. Evidence, pp. 1906-7.
16. Evidence, pp. 1907-8.
17. Evidence, p. 1909.
18. Evidence, p. 1909.

Committee Challenges Customs' Evidence

15.22 Customs was put on notice that the Committee disagreed that the dates on the schedule were the dates of actual payment of the letters of credit.[19] Customs assured the Committee that it had obtained all the relevant documents from the banks used by Midford in relation to the letters of credit and the 'drawing down advices' used to advise customers that the letter of credit had been paid on a certain date.[20]

15.23 A short adjournment occurred, and the hearing resumed with the following:

> **Chairman** - I would like to move on to the issue of these dates. It is your contention that none of these have an interest component in them. Indeed, you said that to us before the break. I want to draw you attention to page S4279 of volume 15.
>
> (This page showed a letter of credit with 180 days for the payment term.)
>
> **Witness** - Could I correct something there? I did not say none of them had interest in them.
>
> **Chairman** - That is what I understood you to say, but go on.
>
> **Witness** - It may have sounded like that. The situation is that none of the drawings down in respect of Pen Apparel had interest. There was no interest paid to Pen Apparel.
>
> **Chairman** - No interest paid to Pen Apparel. What about (the fabric supplier)?
>
> **Witness** - That is the case. In the case of the fabric purchases, in some cases there was a 180 days drawing down for those letters of credit.[21]

15.24 The transcript reveals that only a few minutes before, the witness did in fact emphatically say what he now claimed he did not say. Not only had he made

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19. Evidence, p. 1908.
20. Evidence, p. 1908.
21. Evidence, p. 1911.

the claims to the Committee, but he had sat beside his Senior Investigator who had made similar claims on more than three occasions during that same hearing, without being corrected. It is fairly clear that both officers knowingly gave false evidence to the Inquiry.

Further Examination of the Schedule

Did it Show Dates of Payment?

15.25 Discussion returned to the dates shown in the schedule:

> **Committee** - I want to pursue a few things there. I think you told us earlier that, where you have the letter of credit date, that is actually the date you are assuming that payment took effect.
>
> **Witness** - That is my understanding of it and I think that is supported by some other documents which are in the submission.[22]

15.26 The Committee pointed out that the dates as listed showed prepayment for the goods, prior to shipment, in which case there would be no need for any letters of credit. However, the witness insisted that a letter of credit would still be required. When asked why, he said 'I do not know, in that particular case. I can point you to some documents.'[23]

15.27 Instead, it was the Committee who pointed to some documents. The witness was shown an example where the date on the schedule matched exactly the date of issue of the letter of credit, thereby disproving that the schedule disclosed the actual date of payment.[24]

15.28 The transcript records:

> **Chairman** - Is this one of those occasions where you would like to admit that you have got it wrong, or do we have to go through a farce, saying you just did not get something wrong

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22. Evidence, p. 1915.
23. Evidence, p. 1916.
24. Evidence, p. 1916.

on this? Tell me that we are wrong about this particular issue.

Witness - In that case, what I said is obviously incorrect, but if you remember, I assisted (the Senior Investigator) in preparing this some years ago. It was in about 1990 or something like that. I have not seen it since. As I recall, the thing that was paramount in our mind - if you will forgive the pun - was that we found out when the letters of credit were actually drawn down. We have done that and we are certain.

Chairman - Where is the evidence of them being drawn down?

Witness - I can show you some evidence.[25]

15.29 The example he pointed to proved that he was wrong.

Chairman - Clearly, the date that you said it was is not right.

(The witness agreed.)

Chairman - How many others of them are incorrect?

Witness - I have not been through them. I do not know.

Chairman - So they were the letter of credit date, were they not? They were not the date of payment.

Witness - They may be. I do not know. I could check them for you. But in any case, you are going to find that they are all around the time of export. There is no 180 days credit.

Chairman - How can you say that?

Witness - That is my understanding from examining the evidence years ago.[26]

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25. Evidence, p. 1916.
26. Evidence, p. 1918.

15.30 The Committee found that in fact they were all incorrect. Further comment on this is included below. The witness then claimed that the schedule 'was prepared quite early' and that 'It is not a recent document.'[27]

15.31 However, the Committee could not agree, as the schedule was prepared around May 1990, four months prior to settlement of the case and specifically at the request of Counsel, whereas the financial accommodation issue was initially raised by Customs in late 1987.[28]

Had Counsel Seen the Letters of Credit?

15.32 The witness then claimed that Counsel had been advised of the letters of credit showing 180 days payment terms.[29] The Committee asked for evidence. He claimed it was in the submission that went to Counsel, a copy of which had been provided to the Committee. The Committee twice more queried his claim. He responded thrice that it was in there.[30]

15.33 Not only was there no mention in any of the briefs of the existence of letters of credit disclosing payment terms of 180 days, but an advice to Counsel recorded that 'Actual copies of the letters of credit are not included but a Schedule of those documents is provided.'[31]

This was the same schedule which had just been shown to be incorrect.

15.34 Notwithstanding the above, the witness still insisted that Counsel had been provided with the letters of credit.[32]

Committee - He said no letters of credit are included.

Witness - No, he does not say that if you read it properly.[33]

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27. Evidence, p. 1919.
28. Evidence, p. S3347.
29. Evidence, p. 1920.
30. Evidence, p. 1921.
31. Evidence, p. 1924.
32. Evidence, p. 1925.
33. Evidence, p. 1926.

15.35 It was not the first nor the last time that the Committee could not agree with the witness.

15.36 Not long after this, the witness conceded that Counsel in fact did not see the actual letters of credit for 50 of the 52 shipments,[34] but this was preceded by a further claim that the briefs prepared by Customs contained the letters of credit and the advices of the drawing down of those credits.[35] Even this latter claim in respect of the advices was incorrect, as discussed below. It also emerged that letters of credit were not included for the remaining two shipments either.[36]

15.37 Just when the Committee thought that it was making some progress, the witness said that in respect of the schedule 'I do not think it would be materially wrong in respect of the letters of credit.'

> Chairman - But you do not know that because the example we chased through was wrong, was it not?
>
> Witness - But remember only two (shipments) went to Counsel.[37]

15.38 These were the two for which it had just been demonstrated that they did not contain the letters of credit!

15.39 At this stage the witness said:

> It was decided (with Counsel) that had he any queries when he had fully viewed the documents he was to get back to us. It was not the end of the matter. We did request that if there were any problems ... we could give him further documentation or assistance.[38]

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34. Evidence, p. 1930.
35. Evidence, p. 1929.
36. Evidence, pp. 1942-3.
37. Evidence, pp. 1943-4.
38. Evidence, p. 1945.

The Committee's View

15.40 It was the Committee's view, however, that both Counsel and the AGS relied on the schedule and upon Customs to make sure that it was correct. The witness appeared not to share this view.[39] There also seemed little doubt that the witness told the AGS and Counsel that the dates in the schedule were the actual dates of payment, especially as Counsel had specifically requested that the dates of payment be ascertained.

15.41 The witness also continued to stress that the dates shown on the schedule represented the dates of payment, notwithstanding that in another example drawn to his attention, the one letter of credit covered six different shipments despatched at varying times.[40]

Examination of Particular Shipments

15.42 When discussion returned to the two shipments, the witness conceded that for the first of these, the letter of credit was not in the brief and the information given to Counsel 'was deficient'.[41]

15.43 For the other shipment, the Committee again led the witness through his documentation to show that the date in the schedule was the date of application, not the date of payment.

Chairman - That is the date of the application?

Witness - Yes, that is correct.

Chairman - But that is not the date it was drawn down.

Witness - No, that is correct.

Chairman - And you have established our point.

Witness - I have.

Chairman - You admit you have established our point?

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39. Evidence, pp. 1945-6.
40. Evidence, p. 1947.
41. Evidence, pp. 1948-9.

Witness - I do.

Chairman - Your advice to counsel was wrong?

Witness - No. I admit that I am wrong in what I said to you. However, the advice to counsel would not have been in those clear terms that that was the unequivocal position with the letter of credit, because all of these documents that were given to him were for his perusal so he could establish the relevance of them.[42]

15.44 Unfortunately, this did not sit well with the revelations that the letters of credit were not given to Counsel. Even more unfortunate was the witness' steadfast refusal to accept that the dates in the schedule were wrong.[43]

15.45 He then claimed that 'what the real dates were would not have been left to supposition.'

Chairman - You keep making a reference there which is being interpreted here as though there is or was some other schedule in existence that had the correct drawing down dates on it, as opposed to this one which is clearly wrong.

Witness - I do not know of any other schedule.[44]

Had Customs Obtained Midford's Bank Statements?

15.46 In a further effort to clarify matters, the Committee asked if Customs had obtained Midford's bank statements, which would clearly show the dates payments were debited to their accounts.[45]

Witness - We were never advised (by the DPP) to actually get bank statements.

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42. Evidence, pp. 1950-1.
43. Evidence, p. 1951.
44. Evidence, p. 1952.
45. Evidence, p. 1953.

Committee - We probably could have saved a lot of time today if that course had been taken, because obviously this schedule here is completely wrong.

Witness - It may be wrong.

Chairman - Not 'may be wrong'; you have said it is wrong.

Witness - With respect, a few days. But it still proves that there was not extended credit.[46]

15.47 The Committee did not agree. In its view all the schedule proved was that Midford applied for letters of credit on the dates listed. It was impossible from the data on the schedule to determine when payments had been made. The Committee also did not agree that the schedule may have only been incorrect by a few days. Subsequent events proved that it was much more inaccurate than that. Some of the dates of payments were actually two months later than presented by Customs in the original schedule given to Counsel.[47]

Progress is Made Regarding Dates

15.48 It seemed the Committee was again making progress when it further discussed the dates in the schedule:

Chairman - We have established that it was the drawing down date and that your understanding of it at the time and until this morning was wrong.

Witness - I agree, I think I was totally wrong at the time.[48]

15.49 Discussion of the letters of credit payable 'at sight' ensued.

Chairman - How do we know they are at sight drawings?

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46. Evidence, p. 1954.
47. For example, shipment 135 at K4046 showed the letter of credit date as 7 July 1987. The second revised schedule at S9466 disclosed the date of payment to be 3 September 1987.
48. Evidence, p. 1955.

Witness - The documents which would be in the brief would show that. (emphasis added)

Committee - They were not in the brief.

Witness - No, at that time they were not.

Committee - Therefore, the counsel did not see them?

Witness - Not at that time.

Committee - Therefore he was not properly briefed; therefore his conclusions would have been incorrect too.

Witness - I cannot jump to that conclusion.[49]

Payments For Fabric

15.50 Further confusion was evident when another witness claimed that at the time of shipment of the garments to Australia, Midford had already paid for the fabric used in those shirts. It was evident to the Committee, however, that this also misrepresented the actual situation, as the fabric suppliers were generally paid with 180 day payment terms and this was evidenced on the letters of credit.[50]

15.51 The following evidence was taken:

Chairman - So what you are admitting is that these ones on this schedule do contain ones with 180 days credit on them?

Witness - Yes. On the right hand side a lot of those for textile fabric would indeed.

Chairman - Right. Did you tell the lawyer, though?

Witness - Yes, we did.

Chairman - Where did you tell him and when?

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49. Evidence, p. 1956.
50. Evidence, p. 1958.

Witness - In briefings with the AGS it would have been explained. I do not know whether (shipment) 109 shows that or not. I can check it out. (emphasis added)

Chairman - You started off today saying that there were none of these with 180 days.

Witness - But I corrected you, Mr Chairman.

Chairman - You corrected yourself; not me. you were the one who started off saying that there was no 180 days.

Witness - I think Hansard will show that I said in respect of the fabric there was 180 days.[51]

15.52 The witness had indeed claimed earlier on the day that none of the letters of credit referred to on the schedule were for 180 days. (See section 15.17 above). It was only later when the Committee presented contrary examples that he then admitted there were some at 180 days.[52]

Revised Schedule Provided By Customs

15.53 Following the above public hearing, Customs provided a revised schedule which purported to show that all the letters of credit were 'at sight', the drawing dates for payment were within a matter of days of shipment of the goods and that the revised schedule showed the date of the actual drawing of the letter of credit by the (overseas banks involved).[53]

The Quality of this Schedule

15.54 For the reasons listed below, the Committee formed the impression that the officer who had prepared the revised schedule still did not understand the data he presented to the Committee, that data had apparently not been checked by anyone else in Customs, it was incomplete and the conclusions he had drawn were not supported by the schedule and other documentation.

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51. Evidence, p. 1959.
52. Evidence, p. 1911.
53. Evidence, pp. S7203-7.

15.55 The Committee noted that:

- it was purported that for one shipment the drawing date occurred prior to the date of application for the letter of credit (this was clearly impossible);
- details for only 41 shipments were included, rather than the 52 in question;
- for several of the shipments shown, details for the letters of credit were 'not available';
- the drawing dates shown were not the dates of debiting Midford's accounts in Australia; and
- the schedule did not include any details of the suppliers of fabrics used to manufacture the garments.[54]

In a nutshell, the schedule was wrong.

Questions on Notice

15.56 In addition, it was observed that Customs had apparently failed to answer various questions put on notice by the Committee in relation to the letters of credit. Further correspondence ensued, as detailed below.

15.57 The shipments not included on the original schedule were claimed by Customs to have been cases 'without supporting banking documents.'[55] The Committee noted that these were in addition to the several instances listed on the schedule where the banking documentation was shown as 'not available'. In the absence of so much of the documentation, the Committee pondered how the ACS and the legal advisors could expect to obtain a conviction in relation to these shipments when there was an absence of proof that the payments had not been made on extended credit terms.

15.58 The Committee requested copies of the advices of drawings of Midford's accounts in Australia for each shipment and any other evidence to support the actual payment dates.

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54. Evidence, pp. S7203-7.
55. Evidence, p. S9588.

15.59 Customs claimed those documents had already been provided.[56] However, the documents that Customs pointed to did not contain the details requested by the Committee.

A Second Revised Schedule from Customs

15.60 A further revised schedule was also provided, which did not show the date of payments in Australia for the manufacturing component, but did purport to show the 'date of credit drawing advice in Australia' for the letters of credit issued to fabric suppliers.[57] The Committee was still sceptical as the schedule indicated payments were made many months prior to when they were due under the terms of the letters of credit. It was obvious, to the Committee at least, that the dates of credit drawing advice shown were not the actual dates of payment. Further discussion of this occurs below.

15.61 One of the questions put on notice to Customs was to identify any instances in the original schedule where the dates shown were correct. The question was put again in July 1992 when no response had been received following the hearing on 21 May 1992. The response eventually received was 'The dates on the schedules are correct and relate to the letter of credit date as stated on the schedule, not to the drawing down date.'[58]

15.62 The Committee took this as tacit acknowledgment that a significant proportion of the evidence previously given by the Customs witnesses in relation to the schedule was wrong. Therefore, if it had accepted the evidence as presented, it would have been misled, as was the AGS and Counsel. (Instances are referred to at sections 15.11 to 15.45 above.)

15.63 The response identified also claimed that the 'Drawing down dates, where available, were included in the evidence presented to the AGS and (Counsel).'[59]

15.64 The Committee did not agree. No schedule of the drawing down dates was ever presented to the AGS and Counsel. The inclusion of some documents that, if correctly interpreted, may have assisted to identify the approximate date of

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56. Evidence, p. S9464.
57. Evidence, pp. S9469-74.
58. Evidence, p. S9465.
59. Evidence, p. S9465.

payment for some shipments, buried within some 2 600 other documents is, in the Committee's view, insufficient to substantiate the claim made by Customs.

A Third Revised Schedule

15.65 A further schedule provided by Customs listed the shipments and where available, the 'drawing date Australia' in relation to the payments to Midford's Malaysian joint manufacturer.[60] A check to the documents used by Customs to compile this schedule revealed that more than half of the dates shown on the schedule for the date paid in Australia either were not evident or illegible on the copies of documentation specified by Customs or that documentation indicated payment was actually made on a date other than listed by Customs. The Committee surmised that this discrepancy probably resulted from the officers mistaking the date of the advice as the date of payment, whereas a proper reading of the documents would have disclosed instances where the advice specified that the account would be debited on a subsequent date.[61]

Problems With Customs Investigation

Had ACS Legal Advisors Been Fully Briefed?

15.66 Another question put on notice to Customs arose from the earlier evidence which claimed the 180 days letters of credit were drawn to the attention of the legal advisors. The Committee could detect no evidence to support this claim and requested Customs to identify all instances in the briefs that went to the AGS, DPP or Counsel where this had been done.

15.67 A response provided in July 1992 purported to identify such instances.[62] However, the documents nominated did not in fact specify that payments at 180 days existed. Amazingly, Customs also pointed to the original schedule again and said it 'listed details of fabric payments', notwithstanding all the previous evidence disproving this.[63]

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60. Evidence, pp. S9465-8.
61. See, for example, shipments 97 and 98 at S9467 showing drawing date in Australia as 24 December 1986 whereas Advices of that date at K5382 and K5433 record the account was to be debited on 5 January 1987. Both advices also show that delayed payment interest was charged.
62. Evidence, p. S8786.
63. Evidence, p. S8786.

15.68 The Committee put the question again. Customs chose once more not to answer the actual question put to them.[64] The Committee took this to be confirmation that the existence of the 180 days interest arrangements was not included in any of the briefs provided to the AGS, Counsel or the DPP. Why it was so difficult for Customs to acknowledge this was beyond the comprehension of the Committee. Nevertheless, such behaviour was by no means an isolated incident during the Inquiry.

An Easier Way

15.69 In one final attempt to lead the Customs witnesses to a better understanding of the financial accommodation issue and what documentation they should have obtained to ascertain the dates of payment for the letters of credit, the Committee pointed out that in a formal statement the ACS investigators had obtained from a bank manager, which was intended for use in the planned prosecution on this issue, clear references were made to the documents that would show the date Midford's accounts were debited in respect of the letters of credit.[65] These documents were described in the statement as 'Documentary Credit Drawing Maturity Advices' (known as Item 1115) and 'Documentary Credit Drawing Advices' (known as Item 1116). It appeared to the Committee that Customs had not obtained copies of these forms. Clarification was sought.

15.70 Customs confirmed that 'The ACS does not have copies of them.'[66]

15.71 The Committee was reminded of the claim by the ACS Director of Investigations that:

> We devoted our very best efforts to this case. Our officers were absolutely determined in their efforts to get the right evidence.[67]

Application for Credit

15.72 One further matter relating to this issue was also put to Customs. The initial ACS submission to the Inquiry contained a copy of a 1987 application

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64. Evidence, p. S11011.
65. Evidence, p. S8751.
66. Evidence, p. S11010.
67. Evidence, p. 1609.

from Midford Malaysia to its bankers seeking back to back letters of credit for M$1 million. That application also indicated that Midford Australia would issue Midford Malaysia with 180 day letters of credit.[68]

15.73 Three questions concerning this matter were put to Customs:

(i) What action was taken by the Australian Customs Service to investigate this matter;

(ii) Could you please advise whether (and if so when) copies of this document were provided to the AGS, DPP and Counsel; and

(iii) Would you please explain how this document fits in with the views expressed to the Committee by Customs that credit was not extended between Midford's Australian and Malaysian operation?

15.74 None of the responses fully answered the questions.[69] Those responses and additional comments by the Committee were:

(i) The relevant documents were forwarded to the DPP for analysis. Matters of Finance relating to Midford were forwarded to the DPP's Proceeds of Crime area.

15.75 This response could only be interpreted as an acknowledgment that no action to investigate was undertaken by the ACS. It had already been established that the DPP Proceeds of Crime area had no interest in the payment arrangements. (See section 15.21 above and Chapter 14.)

(ii) It has not been possible to ascertain when the documents we forwarded to the DPP. However the relevant documents were submitted by the DPP to the Committee in their submission.

68. Evidence, p. S3242.
69. Evidence, p. S9593.

15.76 This response was taken as confirmation that copies were not provided to the AGS and Counsel. It is also evident that the copy given to the DPP was not included in any brief in respect of the financial accommodation issue.

> (iii) As the manufacturer of the garments and the manufacturer of the fabric were paid independently of Midford Malaysia, and banking documents submitted to the Committee will confirm this, there was no basis for Midford Malaysia to extend any credit or credit terms to Midford Paramount in relation to any relevant transaction for the importation of the made up garments.[70]

15.77 The Committee could not agree. In fact, no other reasons readily sprang to mind as to why the back to back letters of credit at 180 days would have been included in that application. In addition, the Committee noted that documents that were not provided to the Inquiry by the ACS cited instances during the period in question where payments had been made by Midford Australia direct to Midford Malaysia, who then paid the sub-contracted garment manufacturer and the fabric supplier.[71]

15.78 It seems that Customs also failed to bring these cases to the attention of the AGS and Counsel. The Committee concluded that the unqualified claims by the Customs witnesses that there were never any direct payments from Midford Australia to Midford Malaysia were also false. Of particular note was the claim by the Senior Inspector that:

> One must bear in mind the amount of evidence that we had. We had so much evidence - it was incredible - to show that no payments were made to Midford Malaysia.[72]

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70. *Evidence*, p. S9593.
71. Evidence, pp. S2117 and S8132.
72. Evidence, p. 1553.

15.79 The Committee was reminded of a section of the ACS supplementary submission of February 1992 which stated that:

> The ACS maintains that once their suspicions were aroused they went to great lengths to test the validity of their suspicions.[73]

Recommendations

15.80 **The Committee recommends that:**

- **questions placed on notice to Customs by Parliamentary Committees be answered, such responses be provided in a timely manner and where answers are provided, they be checked for relevance and accuracy at a sufficiently senior level prior to forwarding to the Committee; and**

- **the Comptroller-General review the levels, functions and suitability of the Australian Customs Service officers involved in the Midford case, together with the lines of responsibility and supervision that were clearly inadequate according to the evidence before the Committee. The Comptroller-General should report his findings to the Committee within twelve months of the tabling of this Report.**

73. Evidence, p. S3612.