Chapter 16

THE ROLE OF THE DEPARTMENT OF INDUSTRY, TECHNOLOGY AND COMMERCE

> *It was a policy matter. Why would we convey that to Customs?*
>
> *DITAC Witness to the Inquiry*[1]

Conveying the Policy

16.1 The Committee ascertained that in relation to the quota matter DITAC was responsible for the formulation or determination of policy and the ACS responsible for its implementation.

16.2 In view of the problems experienced during the committal proceedings, which the Committee noted had 'failed so lamentably,'[2] considerable efforts were expended on examining the communications between the two organisations and the mechanisms in place to ensure that Customs correctly understood the policies formulated by Cabinet with the assistance of DITAC.

16.3 It was ascertained that there was an absence of formal and effective mechanisms in place and that there was no monitoring by DITAC or feedback to that Department to ensure that Customs correctly understood and implemented policies.[3]

16.4 As indicated in other chapters of this Report, the Committee noted cases where the ACS clearly misunderstood or misrepresentated the policy requirements, yet these cases either went undetected or uncorrected by DITAC.[4]

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1. Evidence, p. 784.
2. Evidence, p. 545.
3. Evidence, pp. 529, 596-602, 617-620, 695, 700 and 706-11.
4. Evidence, pp. 642-3 and 652-3.

Misunderstandings of the Policy within DITAC

16.5 It is clear that in addition to the more obvious misunderstandings of the policy requirements, there were officers within DITAC that still misunderstood the somewhat more subtle distinctions, even up to the time of the hearings. One example is the claim by a DITAC witness that, to have obtained a quota, it was necessary for firms to have 'established a manufacturing operation offshore before quotas were introduced at the end of 1974.'[5]

16.6 This officer, who had made the identical error in preparing statements for his Division Head to sign, clearly did not learn anything from the committal proceedings or the Magistrate's comments. Later evidence from another DITAC witness made it very obvious that 'There were a lot of other people who got anomalies quotas besides (those engaged in) offshore production.'[6]

16.7 As indicated elsewhere in this Report, quotas were granted to firms who simply purchased garments from unassociated companies in any ASEAN country and there was no absolute requirement for quota holders to have established their own manufacturing operation. This was confirmed by the Secretary of the Department who acknowledged that some companies may not have had offshore ventures at the time to gain eligibility for anomalies quotas.[7]

16.8 A witness who had been a consultant to DITAC at the relevant time claimed during the hearings that special quota conditions had applied to Midford only.[8] However, his fellow witnesses confirmed that all firms who met the relevant criteria obtained quota.[9] Nonetheless, he insisted that Midford was the only firm receiving this quota after 1982, but this too was soon corrected.[10] Undeterred, this witness did not acknowledge that he misconstrued the requirements, as revealed in the following exchange:

> **Committee** - But you have misunderstood that policy. This is the point that we are making. Your statements have been blatantly incorrect.

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5. Evidence, p. 548.
6. Evidence, p. 660.
7. Evidence, p. 661.
8. Evidence, p. 593.
9. Evidence, pp. 593-4.
10. Evidence, p. 595-8.

Witness - I think we have agreed to disagree on the policy, have we not?[11]

16.9 It was clear to the Committee that some DITAC witnesses still did not have a full appreciation of the policies they were dealing with.

Ownership of Plant and Equipment

16.10 A basic argument put to the Committee by DITAC was that ownership of plant and equipment was central to the whole question of quotas.[12] It was even described by the witnesses as 'The cornerstone of the whole policy.'[13]

16.11 The Committee noted that the letter written by a DITAC officer on 2 May 1985,[14] which purported to set out the conditions, included as one of the five requirements that the Company retain ownership of its plant and equipment.[15] It was the divergence from this particular perceived requirement that DITAC considered to be Midford's downfall.[16]

16.12 The witness said that they (DITAC) had been through the:

> ... whole series of documents going back to 1974, in setting up what the tied quota conditions are, particularly through the decisions made and the advices given to the company by Ministers and government officials from 1974 right through to 1984 and 1985. The general tenor of all those is that there should be a manufacturing presence in Malaysia.
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> **Chairman** - What we had in this case was an historic use of the Crimes Act against people for a breach of the Customs quota system. We have unravelled, I think, a mess in terms of the bureaucracy on this over a very extended period of time. I want to put to you that Midford continued to operate a manufacturing organisation in Malaysia. Can you disagree with that?

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11. Evidence, p. 791.
12. Evidence, pp. 533-4.
13. Evidence, p. 534.
14. Evidence, p. S381.
15. Evidence, pp. 533 and 536-7.
16. Evidence, pp. 533-4.

Witness - Yes

Chairman - On what basis?

Witness - I would have thought an integral part of a manufacturing operation is to have plant and equipment.[17]

16.13 Discussion ensued about whether Midford did have plant and equipment. The witness expressed the view that Midford's restructured operations do 'not warrant a description that they are still running a manufacturing operation' and spoke of the difficulties of distinguishing manufacturing from work being done on contract.[18]

Witness - I am saying it is a question of where the dividing line does fall.

Chairman - If the dividing line is so hazy, we come back to why the Crimes Act was used against Australian citizens for something that may or may not at the end of the day objectively be a breach and to something that failed in the end.[19]

16.14 Nonetheless, DITAC insisted that it was necessary to retain plant and equipment. The Committee explored the basis for this belief. It discovered that the DITAC officer who wrote the letter of 2 May 1985 did not have authority to determine the conditions he sought to impose, even though the witnesses claimed he had Ministerial endorsement for what he had specified as the relevant conditions.[20] However, the Committee ascertained that there was no such endorsement, that there was no requirement to retain plant and equipment and that it appeared the officer had 'made up' this requirement.[21]

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17. Evidence, p. 535.
18. Evidence, p. 535.
19. Evidence, p. 536.
20. Evidence, p. 537.
21. Evidence, pp. 565-9 and 585-7.

16.15 DITAC witnesses sought then to explain this as 'an interpretation of policy' based on the requirement that quotas were allocated to firms who had 'invested in offshore production facilities.'[22]

> **Chairman** - Well, if I invest in BHP, in their offshore or onshore production facilities, I do not own their machines. That is a simple statement of law, and you have just hammered your own argument into the ground.[23]

16.16 Even if it was a legitimate requirement for Midford Malaysia to have owned its own plant and equipment, Midford's Tariff Advisor testified that from 1985 to the end of 1987 Midford was not asked, prior to the annual issue of quota, to indicate the status of its arrangements in Malaysia, as it had been in the earlier years from 1981 to 1984.[24]

16.17 Midford pointed out that the machinery was only sold when the joint manufacturer rejected it as too obsolete to take over.[25] Midford also advised regarding the need for machinery that the company could have quite easily leased machinery and still have complied with the DITAC officer's interpretation of the requirements.[26] For that matter, it could also have retained its obsolete machinery in storage or only used a single machine and still have met that criteria.

The Great Privilege

16.18 Evidence from a number of DITAC witnesses indicated that they believed Midford, by being granted its quotas, had received some great privilege. Repeated references were made to this belief.[27]

16.19 Midford's Tariff Advisor told the Committee:

> In the minds of most Commonwealth officers, the granting of the special quotas to Midford was seen as the granting of a

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22. Evidence, pp. 569-71 and 577.
23. Evidence, p. 571.
24. Evidence, p. 760.
25. Evidence, p. 761.
26. Evidence, p. 763.
27. Evidence, pp. 572, 578, 586-8, 608 and 653.

very special privilege. They ... resented that special privilege and had difficulty justifying it.[28]

16.20 The following exchange occurred during the examination of the witnesses from DITAC:

Chairman - You keep saying what a privilege they had. They were given a quota under the law. So let us get off the privilege bit.

Witness - I do not think we can Mr Chairman.

Chairman - I have heard on countless numbers of occasions from DITAC ... about what a privilege they had. If DITAC wants to view it as a privilege that is fine. The fact of the matter is that it is something given under the law.[29]

Conditions on Quota Instruments

16.21 The Committee put the view to DITAC that between 1982 and 1985, when the quota instruments were conditioned to merely require the garments to be 'sourced' from Midford Malaysia, that this did not mean the Company actually had to manufacture these garments.[30]

16.22 The DITAC consultant responded that the sourcing condition was 'an independent concept' to the requirement for Midford to have maintained offshore manufacturing facilities.[31] However, the Committee did not receive supporting evidence for this view, and in the absence of any other material that defined the meaning of the word 'sourced', considered that Midford were entitled to rely on the wording of the quota instrument and either manufacture itself or sub-contract the manufacturing to other Malaysian companies.[32]

16.23 As indicated in Chapter 7, the 1986 and 1987 quota instruments contained no conditions whatsoever, except for non-transferability of the quota entitlements to other companies. These documents were issued by Customs and were

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28. Evidence, p. 402.
29. Evidence, p. 608.
30. Evidence, p. 624.
31. Evidence, pp. 624-5.
32. Evidence, pp. 608-10 and 624-9.

not checked by DITAC to ensure that they correctly stipulated any conditions sought to be attached to the granting of the quotas.

16.24 The Committee's view is that firms receiving a quota instrument were entitled to rely on the conditions it specified, as required under the Customs Act.[33] If Customs failed to specify the conditions, it is inexcusable to try and prosecute the quota holder for apparent breaches of intended conditions that were not referred to on the formal quota instrument. On this aspect, however, DITAC could not be held responsible for the decision to prosecute, as that decision was clearly made within the ACS and DPP.

Where DITAC Failed in Its Responsibility

16.25 Nonetheless, DITAC did support the prosecution brought by Customs and were, in part, responsible by not promptly correcting any apparent misunderstandings by the ACS and DPP over the policy requirements for quota entitlement. The DITAC witness to the committal proceedings told the Committee that 'we were strictly there to talk about government policy - no more, no less.'[34]

16.26 The Secretary put the view that:

> Our role in the prosecution was very much a support role to the Australian Customs Service and the DPP. I believe the Department offered full cooperation to both those agencies in support of that prosecution. It had a support role.[35]

16.27 However, it was obvious that in relation to the policy, Customs pursued a different agenda to DITAC.[36] Midford was therefore placed in an unenviable position, as the Committee endeavoured to point out to DITAC in the following comment made during the hearings:

> The company must have been in an awful situation; on the one hand, who should they believe? They had discussions with DITAC which encouraged them to diversity; they were speaking with the Customs officers who were trying to

33. Evidence, p. 628.
34. Evidence, p. 684.
35. Evidence, p. 798.
36. Evidence, pp. 712-3.

squeeze them on account of the fact that they had diversified.[37]

16.28 On this matter DITAC acknowledged that the ACS misunderstood the policy and no action was taken to correct this situation.[38] Witnesses stated they 'would have' known there was a misconception at the time.[39] However, this left a problem with the inclusion of that same misconception in the first statement prepared for the committal proceedings that was signed by the key DITAC witness in March 1988.[40]

16.29 There was further confusion amongst the DITAC witnesses when the officer who had signed the statement told the Committee he had never seen the particular file note that he had directly quoted from in his statement, which continued the error regarding Midford's ability to send output from the Malaysian factory to destinations other than Australia.[41] This eventually resulted in the following exchange:

> **Committee** - So now you are saying you misinformed the Committee when you said you had not seen it?
>
> **Witness** - I clearly had seen it, yes.
>
> **Committee** - So you told us falsely that you had not seen it?
>
> **Witness** - I was mistaken, yes.[42]

16.30 This still did not resolve the problem of why it was included in his sworn statement if it was known at the time to have been wrong.[43]

16.31 Further conflicting evidence was received when the Committee later questioned another DITAC witness regarding the encouragement given to Midford to seek alternate overseas markets for the products of the Midford Malaysia operation. It was pointed out that in February 1976 Midford was advised by the then

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37. Evidence, p. 714.
38. Evidence, p. 693.
39. Evidence, p. 694.
40. Evidence, pp. 695-6.
41. Evidence, pp. 696-8.
42. Evidence, p. 698.
43. Evidence, p. 722.

Minister to 'seek other export markets to make full use of the factory's production capacity.'[44]

> **Acting Chairman** - But this was not conveyed to Customs, was it?
>
> **Witness** - No. It was a policy matter. Why would we convey that to Customs?[45]

16.32 Interestingly, the DPP case officer put a similar view, as revealed in the following extract of the transcript.

> **Committee** - You will find on DITAC's own submission that it never told Customs what the policy was, and when Customs made errors in interpreting the policy DITAC never corrected them either. There is no single piece of paper that went from DITAC to Customs to tell it what the policy was, nor when it got it wrong how it was to be corrected. Does that surprise you?
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> **Witness** - It did not need to because the eligibility aspect was settled by DITAC and then Customs -
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> **Committee** - DITAC never told Customs.
>
> **Witness** - It did not need to.[46]

16.33 Although DITAC insisted that Customs had seen the Cabinet decisions and had in its possession the same information as the Department,[47] the Committee concluded that it had established that DITAC 'obviously do not bother to tell the people who are administering the policy what it is.'[48]

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44. Evidence, p. 784.
45. Evidence, p. 784.
46. Evidence, pp. 945-6.
47. Evidence, pp. 730-2.
48. Evidence, p. 785.

Recommendations

16.34 The Committee therefore recommends that:

- policy requirements be more clearly spelled out within the Department of Industry, Technology and Commerce so that its officers and consultants fully understand the requirements of the policies they provide advice upon;

- adequate and systematic liaison between the Department of Industry, Technology and Commerce and Customs be implemented to ensure that policy requirements are clearly and succinctly conveyed to the Australian Customs Service for implementation;

- feedback mechanisms be put in place to ensure that Customs clearly understands the policies conveyed to it by the Department of Industry, Technology and Commerce; and

- immediate remedial action be taken by the Department of Industry, Technology and Commerce where there are indications that Customs has misunderstood the policy requirements.

Chapter 17

EVIDENCE GATHERING FOR COMMITTAL PROCEEDINGS

> *They came back with what they said was a statement of the interview. I did not agree with the context of what they had. When they came back on the second occasion, they asked me to review it, as amended, and I was still not happy with it.*
>
> *Former Midford General Manager*[1]

Introduction

17.1 Committal proceedings against Midford and its Tariff Advisor commenced a little more than a year after the defendants had been charged on 15 June 1988 with offences under the Crimes Act.[2] In total, Customs and the DPP had more than 18 months to collect whatever evidence was necessary to support those charges, which related solely to the quota issue. At one stage it was contemplated that the financial accommodation matter would be heard concurrently.[3] However, charges in respect of that matter were never laid and it is not clear just when the decision was made not to include this issue with the quota prosecution.

Responsibility for Prosecution Briefs

17.2 The ACS submitted that the prime objective of its Investigation Sub-program was to:

> Professionally investigate all major, sensitive or complex breaches of the Customs Act or relevant legislation and produce prosecution briefs acceptable to the AGS or the DPP.[4]

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1. Evidence, p. 155.
2. Evidence, pp. S224 and S129.
3. Evidence, p. S2703.
4. Evidence, p. S200.

17.3 As indicated earlier in this Report, the briefs prepared by Customs for the DPP in respect of the quota matter were inadequate and incomplete. Subsequent briefs to Counsel were then prepared by the DPP with input from the Customs investigation team during the period that those officers were co-located with the DPP. It was therefore difficult for the Committee to determine the specific involvement that officers from each organisation had in the resulting products for this period.

17.4 Customs submitted that 'The DPP decides whether a criminal prosecution is to be initiated and then assumes control.'[5]

17.5 However, the Committee noted that in this case Customs and the AGS had already decided to pursue the Crimes Act route. The DPP became involved in the process only after those decisions, but prior to receipt of any adequate brief on the matter. Chapter 4 provides details.

17.6 In contrast to the statement at section 17.4 above, Customs also submitted that 'The decision on whether a matter should be considered for prosecution in the criminal jurisdiction rests with the ACS.'[6]

17.7 The Committee also noted that Customs claimed 'It is the practice within the ACS that prosecution will only be mounted in appropriate circumstances.'[7]

17.8 There seems ample evidence in the Midford case and many other cases brought to the attention of the Committee, however, where the ACS view of what 'appropriate circumstances' embraces is not shared by the Committee, ACS internal legal advisors, importers and other segments of the community.

17.9 In the case of the quota matter, the Magistrate presiding over the Committal proceedings also did not share the ACS view.

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5. Evidence, p. S215.
6. Evidence, p. S216.
7. Evidence, p. S216.

Obtaining Witness Statements

17.10 Evidence was received from both Customs and the DPP that the Customs investigators prepared the documentary evidence and obtained most of the 50 or so witness statements prepared for the committal.[8] Some of these witnesses were interstate or overseas when they were interviewed.

17.11 The ACS submitted the following:

> By early February 1988, the DPP had informally indicated to the ACS investigation team that the evidence to hand established a prima facie case under Section 86A of the Crimes Act 1914 (conspiracy to defraud), but that before this could be confirmed statements should be obtained from appropriate DITAC and ACS officers in relation to the origin and administration of the Import Quota system, the offshore quota anomaly, and MP's involvement. This was subsequently broadened to include current and former MP, MM and (the Tariff Advisor's) employees and associates.
>
> In the ensuing months, the investigation team set about this task as well as identifying and reviewing all relevant departmental records and repositories of information and progressively assembling the final brief of evidence.
>
> The investigation team acted at all times under the direction on ACS management; however, DPP case officers and executives were consulted on all aspects of the investigation. All requests, suggestions and recommendations from the DPP were considered and actioned.[9]

17.12 The Committee pondered how the DPP could provide such informal advice in early February 1988, prior to receipt of the 'preliminary brief' from the ACS.[10] If such advice was provided, there was clearly a heavy reliance by the DPP on the assertions made by the Customs investigators.

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8. Evidence, pp. 894-5, 915, 997-9 and S95.
9. Evidence, p. S3267.
10. Evidence, p. S3267.

17.13 Elsewhere Customs advised that:

> By early March 1988 the investigation was nearing completion. All relevant witnesses had been identified and interviewed and most had signed statements; however, some current and former MP employees declined to co-operate.[11]

17.14 By late May 1988, the ACS investigation team had completed its examination of all material gathered and 'then set about compiling the final brief of evidence with DPP assistance.'[12] Shortly after, the charges were laid.

17.15 Prior to this, it was discovered from documentation under examination that there had been communications between Midford, its Tariff Advisor, DITAC and other officers within the ACS which occurred without the knowledge of the investigation team or the DPP. Shortly thereafter, the Director of Investigations instructed DITAC to cease its efforts to assist Midford, and the then Director of Public Prosecutions contacted the then Comptroller-General to express his concerns that the meetings and communications with Midford 'Could conceivably be used to embarrass a prosecution.'[13] Further details are at Chapters 5, 11 and 12.

Reviewing the Relevant Documents

17.16 During this period, the ACS investigation team and DPP case officer also 'Physically audited both DITAC and ACS file registries and records to identify relevant material' and undertook 'an exhaustive check of all known repositories of information.'[14]

17.17 In May 1988 the DPP formally received:

> Confirmation that it had been provided with all evidence, including papers, files and communications and any material likely to touch on an impending prosecution of (Midford).[15]

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11. Evidence, p. S3269.
12. Evidence, p. S3270.
13. Evidence, p. S3269.
14. Evidence, p. S3270.
15. Evidence, p. S3270.

17.18 Customs further submitted that the:

> DPP case officer travelled to Canberra and inspected Cabinet documents relating to offshore quota. Copies of many of these documents were already available from DITAC files and as all were considered not relevant to the prosecution no copies were requested. At this point the DPP was confident that it fully understood the Governments (sic) quota policy and intentions.[16]

Further comment on this aspect of the investigation is included in Chapter 20.

Delays in Providing Statements

17.19 In September 1988 the DPP was ordered by the Court to serve the witnesses' statements to the defendants. Even so, a number of extensions to this deadline resulted in provision of the final statements on 14 February 1989.[17]

17.20 Part of this delay was alluded to by Customs in that they submitted:

> All witnesses' statements were redrafted and retaken in the latter part of 1988, both to comply with amendments to the NSW Justices Act providing for Paper Committals and to correct defects perceived by DPP case officers and junior counsel. The ACS investigation team was responsible for presenting the finished documents to the relevant witnesses for acceptance and execution in all cases except one who, because he happened to be in Sydney at the time, signed his statement at the DPP.[18]

17.21 In the Committee's opinion, any redrafting of statements to take into consideration the changes in the NSW Justices Act was foreseeable and therefore avoidable, as the legislation was introduced long before it came into effect on 4 April 1988. The DPP advised the Committee that the amendments were enacted on 16 December 1987. It is inconceivable that the DPP, at least, would not be aware of the incoming changes to the requirements. However, when the Committee asked

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16. Evidence, p. S3270.
17. Evidence, p. S2113.
18. Evidence, p. S225.

the DPP case officer whether the Customs investigators should have been informed of the new requirements when they were initially to obtain the statements and also if she knew about the amendments in December 1987, the questions were not answered.[19]

17.22 The witness did confirm that the investigators were not told by the DPP that the statements had to comply with the amendments to the Act until after the initial statements had been taken. It seems the DPP 'were surprised' that the statements did not comply with the Act.[20] The Committee was concerned that a breakdown in communications should have occurred in such a fundamental aspect of what was considered by the DPP and ACS to be an important prosecution. The fact that the investigation officers were at the time working side by side with the DPP made this even more intriguing.

17.23 It was also observed that even though charges were laid on 15 June 1988, it took until 1 September 1988 for particulars of the alleged offences to be provided to the defendants.[21]

17.24 The Committee was concerned that, as indicated by the above, charges were laid well before sufficient evidence had been obtained. It also seemed evident in retrospect that much of the proof the ACS and DPP hoped would be available to support the charges did not eventuate. Consequently, some of the charges were dropped immediately prior to commencement of the Committal proceedings.[22] It seems, however, that for all the charges a strategy of volume to replace quality of evidence was implemented sometime earlier, in an effort to gain convictions. The dropping of some charges 'on the business day prior to the committal hearing commencing' could hardly be considered as fair and equitable treatment of the defendants.[23] No reasons for dropping those charges were provided to the defendants.[24]

ACS Experience with Crimes Act

17.25 The Committee ascertained that the ACS investigation officers involved in obtaining the witnesses statements for the committal had no prior experience in the collection of evidence for Crimes Act matters, but they had been

19. Evidence, p. 965.
20. Evidence, pp. 964-5.
21. Evidence, p. S94.
22. Evidence, p. S129.
23. Evidence, p. S39.
24. Evidence, p. 222.

involved in numerous Customs Act prosecutions, which involve a different and less onerous standard of proof.[25] Under the heading of 'Quality of Investigation' the DPP advised the Committee that:

> The investigators required assistance and advice from the DPP, which was readily provided. The assessment by the DPP officers involved in the matter is that the investigators were diligent, conscientious and quick to learn. They conducted themselves with propriety in their dealings with the DPP and, as far as this office is concerned, there is no reason to believe that there is substance to the allegations of impropriety made in the proceedings in Malaysia or otherwise.[26]

17.26 In view of other evidence made available, however, the Committee was not convinced of the ACS officers' full propriety in their dealings with the potential witnesses and defendants. In addition, the DPP also attracted some criticism for its role in the matters subject to this Inquiry.

17.27 Even the key prosecution witness from DITAC said of Customs that:

> In the dealings that I had with Customs I thought they went about their role in a professional manner, they were seen to be thorough in terms of the collection of material and addressing issues.[27]

Unfortunately, based on the evidence before it, the Committee could not agree.

Inadmissible Evidence

17.28 Evidence concerning the defects perceived by the DPP and Counsel in the original documents indicated that those statements contained hearsay and speculation, which was inadmissible in the court proceedings.[28] Notwithstanding that all the statements were re-taken, a considerable proportion of the earliest days of the committal proceedings was still spent in further excising large quantities of

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25. Evidence, pp. 964-5, 1209, 2094 and S139.
26. Evidence, pp. S139-40.
27. Evidence, p. 530.
28. Evidence, pp. 935, 998 and S2629-31.

inadmissible material. The Magistrate even made specific criticisms in relation to this matter, as disclosed at Chapter 23. Further comments on the deficiencies in the statements tendered for the committal hearings are included in Chapter 21.

17.29 The Committee was unable to ascertain the costs involved in retaking the defective statements. It was also not possible to identify the costs involved in obtaining statements and other evidence eventually ruled to be inadmissible.

17.30 Quantification of the inadmissible evidence was, however, attempted during the Inquiry.[29] The DPP put the view that very little of the evidence tendered fell into this category.[30] However, comments by both the Magistrate and the solicitor for the defence indicated otherwise. In fact, the latter described the statements as an appalling mishmash and listed seven defects in the way they had been prepared and presented, including that a large number of the documents were not relevant to the alleged charges.[31] On this matter, the Committee shared his views. However, it was submitted in December 1991 that 'the DPP did not accept the criticism when it was made (by the Magistrate) and does not accept it now.'[32] It added that:

> The DPP was aware that some of the documents were of limited relevance to the prosecution case. However, the decision was taken to err on the side of caution and include such documents rather than exclude them. The DPP could have justifiably been critized (sic) if it had attempted to provide documents on a selective basis.[33]

17.31 In the Committee's view, such comments did not sit well with the fact that documents fundamental to the failure of the prosecution case were not included in the prosecution brief.

17.32 Although the DPP claimed that it was only requested to provide copies of four missing documents,[34] correspondence between the DPP and solicitors for the defendants indicated that there were major discrepancies in the exhibit

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29. Evidence, pp. S2536-89.
30. Evidence, p. S2536.
31. Evidence, pp. S47-8.
32. Evidence, p. S236.
33. Evidence, p. S2536.
34. Evidence, p. 981.

register and numerous copies of relevant exhibits were missing when documents were provided to the defendants.[35]

17.33 In this regard it was also noted that a document which would have significantly assisted the Inquiry was allegedly lost when the court exhibits were returned by the DPP to the ACS. This is referred to in Chapter 19.

17.34 Midford also submitted that over 25 000 pages of documentation was prepared by the prosecution for the proceedings.[36]

17.35 The DPP disputed this, claiming the documentation for each of the defendant amounted to about 4 500 pages.[37] Since there were four defendants the Committee calculated that this would equate to around 18 000 documents. However, irrespective of which figure is correct, the quantity of irrelevant and inadmissible documentation was still considered by the Committee to be excessive.

17.36 Lists of the documents ruled inadmissible or withdrawn at the committal proceedings were provided by the DPP at the Committee's request. These lists certainly countered the earlier claims by the DPP that very little of the material was of this nature.[38]

Defective Statements

Improper Statement Gathering

17.37 One witness to the Inquiry pointed out that during the process of gathering statements for the prosecution, the Customs investigators presented statements for potential witnesses to sign that had been prepared prior to, rather than after, interviewing those witnesses. He submitted that:

> Customs requested I sign a statement they had prepared for presentation to the court.

35. Evidence, pp. S981 and 2611-18.
36. Evidence, pp. S4 and 221.
37. Evidence, pp. S8351-2.
38. Evidence, p. 980-1 and S2536-89.

> This statement prepared by Customs was couched in terms which could be constructed as biased towards Customs viewpoint.
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> I do not consider that Customs should have presented me with its prepared statement.
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> I believe Customs should have discussed with me, the issues they wished covered by the statement and then prepared the statement in accordance with my own words. After all, it was to be my statement.
>
> Customs must be seen to be acting fairly and its preparation of statements without the active involvement of witnesses may be viewed as contrary to the concept of justice.[39]

17.38 It therefore came as no surprise to the Committee that some witnesses refused to sign these statements and others refused altogether to give evidence.[40]

17.39 Allegations were also made that the Customs investigators inferred to potential witnesses that the defendants were guilty and that 'they intended to make an example of people associated with the Midford case so as to deter other companies from breaking the law.'[41]

17.40 One witness said that the investigators wanted to tape record an interview, which the witness declined. An interview proceeded at which the officers took notes. He added:

> They came back with what they said was a statement of the interview. I did not agree with the context of what they had. When they came back on the second occasion, they asked me to review it, as amended, and I was still not happy with it.[42]

17.41 The Committee enquired what the witness was unhappy about in respect of the statement. His response was 'What they had written was not what I

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39. Evidence, p. S1257.
40. Evidence, pp. 156, 216, 219 and 266-9.
41. Evidence, pp. S47, S1311, S5967 and S7494-5.
42. Evidence, p. 155.

had said.'[43] He added that the two statements were 'opinionated' and agreed that they reflected the officers views, not his own.[44] He also said that the officers conveyed the impression that those charged were guilty [45] and twice referred to the officers as being 'gung ho about the whole thing.'[46]

17.42 Sometime later, the DPP interviewed this same witness and prepared a fresh statement which was 'quite different in nature and style from the one that the Customs (officers) had prepared.'[47]

17.43 Another witness disclosed that Customs presented to him a prepared statement which he did not sign, and it took three or four more attempts before his statement reflected what he, rather than the Customs officers, wanted to say.[48] This witness also stated that the Customs officers suggested that his 'clients (Midford) are crooks.'[49] Fortunately, this witness retained copies of the earlier draft statements, which enabled some interesting comparisons.[50]

17.44 As indicated in other chapters of this Report, the Committee obtained firsthand experience of the ability of the ACS investigators to misconstrue statements of interview, as revealed in the examination of the interpretations placed by the ACS on the 'admissions' made when Midford representatives were interviewed by Customs investigators on 11 December 1987.

17.45 The Committee also noted that the widow of a former Midford Manager submitted that her late husband:

> ... became extremely anxious when the Customs investigators told him that 'everybody in Midford are criminals and that is why the charges are for the Directors and other.' He was worried that the 'others' might include him because he was interviewed by Customs many times. He was interviewed by Customs, many times at home and at different places.

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43. Evidence, pp. 156-8.
44. Evidence, p. 156.
45. Evidence, p. 159.
46. Evidence, pp. 159 and 176.
47. Evidence, pp. 175-6.
48. Evidence, pp. 358-362.
49. Evidence, p. 360.
50. Evidence, p. 355 and Exhibit 11.

> He discussed the problems with me always. He was very distressed when the Customs wanted him to sign the statements. The attitude of the Customs officials was disgraceful. They said with the help they would 'nail these bastards' in other words they wanted my husband to lie. He was pressed many times, but he always said he was sure nothing was done wrongly.[51]

17.46 Midford's Tariff Advisor told the Committee that:

> ... my guilt or otherwise was a topic of conversation amongst many people in industry. Senior officers in the Australian Customs Service did not appear to be averse to talking with importers, clients and industry about my prospects and their future successful prosecution. Many clients rang me to ask about the increasing rumours circulating concerning the prosecution and the implications this had for their dealings, through me, with the Department of Industry, Technology and Commerce, the Australian Customs Service and other agents. I suffered substantial loss of business from clients unwilling to be associated with a consultation whose reputation and effectiveness were seriously under question.[52]

17.47 He also said that the ACS had 'effectively turned all Commonwealth agencies and officers against us on the basis that we had lied, cheated and deceived.'[53] Chapter 26 comments on other prejudicial publicity in relation to the Midford case.

17.48 Relevant comments on the gathering of evidence in Malaysia are at Chapters 18 and 19.

Statement of Key DITAC Witness

17.49 The statement signed by the First Assistant Secretary in DITAC on 24 November 1988, which contained an attestation that the contents of that document were 'true and correct', was found not to be so during the committal

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51. Evidence, pp. S827-8.
52. Evidence, pp. 410-11.
53. Evidence, p. 402.

proceedings. In particular, the statement misrepresented the eligibility criterion and claimed that it was DITAC's 'invariable practice' to withdraw quota in cases where an importer's eligibility for quota was altered, whereas the defence was able to show that there had never been any previous cases where the Department had withdrawn these quotas. The witness acknowledged to the Committee that his statement was untrue.[54] He also admitted he did not see the relevant Cabinet documents prior to signing his statement.[55]

17.50 The Committee ascertained that the statement was prepared for the witness without his involvement in determining its contents.[56] A draft was prepared by an officer within his Division, which endured many reiterations between that officer, others in the Department, the DPP and Customs before it was finalised.[57] Unfortunately, the Committee was unable to ascertain which officers had been responsible for particular segments of his statement. The witness did, however, nominate that he relied on one of his officers to ensure the statement was accurate.[58]

Statement of Key Customs Witness

17.51 The statement signed by the Director of Quota Operations for the committal proceedings was also found to misrepresent the eligibility criterion, particularly in relation to claims that the imported goods had to be manufactured by Midford Malaysia.[59]

Standards of Proof

17.52 The Committee noted that in March 1992 the ACS Director of Investigations put the view that there was little difference in the requirements for collecting and presenting evidence under the Crimes Act from that required under

54. Evidence, pp. 558-601 and 581-2.
55. Evidence, pp. 558-9.
56. Evidence, p. 966.
57. Evidence, pp. 687, 715-23 and 966.
58. Evidence, p. 559.
59. Evidence, pp. 556-7 and 559.

the Customs Act. In fact, when questioned over his lack of prior experience in Crimes Act investigations he gave evidence that:

> ... by the same token statements are statements, a record of interview is a record of interview, and its admissibility is the same in court.[60]

17.53 In view of the evidence examined during the Inquiry, the Committee could not agree. Other witnesses from the ACS also demonstrated a degree of confusion about some of the basic distinctions between the standards of proof required under the Crimes Act as opposed to the Customs Act.[61]

Co-ordination of Investigation Activities

17.54 Comments on the apparent demarcation dispute between Customs and DITAC have been included in Chapter 12. Chapter 5 also comments on the DPP's concerns about the absence of proper co-ordination of dealings with the defendants.[62]

17.55 The Committee noted that there was a need for standard proceedures to be implemented within the ACS to ensure that the Investigation Team is aware of what dealings other staff in Customs or elsewhere may have with any persons or representatives of those being investigated. Likewise, it is incumbent on the Investigators to promptly and accurately inform these other officers in the ACS, AGS, DPP, DITAC or elsewhere of developments in the case. The Committee does not suggest that all contact with those subject to investigation be ceased, but rather that all communications be co-ordinated through one nominated central point, with prompt advice to all concerned regarding any actions taken. Because of what transpired during the Midford case, however, the Committee does not envisage that the co-ordination point should be within the Investigation Team.

17.56 It is hoped that with improved co-ordination, situations can be avoided where the Central Office of the ACS was negotiating a settlement for return of the siezed shirts at the same time as the NSW Investigators were arranging the public auction of those goods. Chapters 2, 9 and 27 refer.

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60. Evidence, p. 1608.
61. Evidence, pp. 1127-9, 1272-3 and 1392-3.
62. See also Evidence, pp. 1679-81.

Imperfections, Or Fatal Flaws?

17.57 The Comptroller-General put the view to the Committee that there were imperfections in the ACS investigation process, but not fatal flaws.[63] He was asked whether he agreed 'that even minor imperfections could have cumulative effect so as to constitute a fatal flaw,' to which he responded that 'They could, but they did not in this case.'[64]

17.58 The Committee could not agree, as clearly, 'the flaws were fatal because the whole action failed' during the committal proceedings.[65] It is also the Committee's opinion that all the other actions sought to be brought against Midford were seriously flawed as detailed elsewhere in this report. The Committee considered that the confidence expressed by the ACS in relation to these matters was severely misplaced.

Recommendations

17.59 **The Committee therefore recommends that:**

- **the Australian Customs Service provide a formal brief to the Director of Public Prosecutions for cases where the advice of the Director of Public Prosecutions is sought;**
- **documentation of the steps in the prosecution decision making processes be improved so that a permanent audit trail is available;**
- **training given to Australian Customs Service officers in the gathering of written statements be reviewed and improved;**
- **procedures within the Australian Customs Service be implemented to ensure that its officers only take the statement of the witness, not what Customs would like the witness to say;**

63. Evidence, p. 2044.
64. Evidence, p. 2050.
65. Evidence, p. 2050.

- Australian Customs Service Investigations officers be required to be 'accredited' prior to taking witness statements and that such accreditation involve appropriate training and testing of the officers;

- all Australian Customs Service Investigations officers be informed that demonstrating a belligerent approach towards members of the import/export industry is unacceptable behaviour and that officers exhibiting such an attitude will be transferred to other more suitable duties;

- all Australian Customs Service officers be instructed not to discuss the progress of cases under investigation or before the Courts with anyone outside of the performance of their official duties; and

- procedures must be implemented to improve the co-ordination of Australian Customs Service investigations, particularly the dealings by all agencies of the Commonwealth with representatives of persons or firms who are subject to investigation by the Australian Customs Service.

Chapter 18

THE MALAYSIAN VENTURE

Icing the Cake

> *This Malaysian venture was never regarded as critical to the Crown case. ... As you know, the charges were laid prior to that. It was icing on the cake. We could have easily done without it.*
>
> *Acting DPP, and DPP case officer.*[1]

Introduction

18.1 In September 1988 two ACS Senior Inspectors travelled to Malaysia to collect information to supplement the Midford prosecution in Sydney. The adequacy of the preparations for the trip became an issue during the Inquiry, and the actions of the investigators whilst in Malaysia became surrounded in controversy. The Commonwealth became embroiled in the resulting court case and was only extricated in February 1990 following a verdict of the Supreme Court of Malaysia.

The Objectives of the Malaysian Investigation

18.2 The decision to send two ACS Senior Inspectors to Malaysia was made in early 1988. They were to visit Singapore on another matter and it was considered opportune for them to travel to Malaysia to gather information relating to the Midford case. The ACS informed the Committee in a submission dated 14 May 1992 that 'there are no specific guidelines to select officers to conduct overseas inquiries.'[2] During the public hearing on 13 February 1992, the Senior Inspectors who travelled to Singapore and Malaysia revealed that they had limited experience of overseas investigations.[3]

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1. Evidence, p. 905.
2. Evidence, p. 6543.
3. Evidence, p. 1033.

18.3 During close questioning by the Committee at a public hearing, it appeared that the ACS and the DPP witnesses were confused about which organisation actually decided that the trip should be undertaken. The DPP case officer told the Committee that 'it was agreed' during a series of 'team meetings'.[4] However, one of the Senior Inspectors said:

> I believe it was the ACS's decision ... given that the ACS was the one spending the money. ... I believe that the final approval for that travel is the Comptroller-General or the Deputy CG.[5]

18.4 Letters from the DPP case officer to ACS dated 5 and 9 May 1988, that were submitted to the Committee, imply that the decision to send the Inspectors was made by the ACS but the material to be collected was determined by the DPP.[6] However, submissions from both the ACS and the DPP clearly stated that the investigations in Malaysia were carried out at the request of the DPP,[7] and this was confirmed when the Committee examined the diary of one of the Inspectors. He had noted that he had been advised by a Chief Inspector that the 'DPP will pay fares and travel allowance for ACS officers direct.'[8] This discovery called into question the evidence given by the Senior Inspector, quoted above.

18.5 *Officers from the DPP told the Committee that they had in fact* gathered enough material for a successful prosecution and the ACS officers would not have been sent had they not been nearby. They stated that, nevertheless, it was 'only proper for us to have gained all the available evidence.'[9]

18.6 The objectives set for the ACS Senior Inspectors were to:

- obtain complete records from the Registrar of Companies in respect of (Midford Malaysia), (Pen Apparel), (and two other manufacturers);
- carry out property searches on (Midford Malaysia) and (Midford Paramount);

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4. Evidence, p. 896.
5. Evidence, p. 1037.
6. Evidence, pp. S420 and S422.
7. Evidence, pp. S134 and S3270.
8. Evidence, p. K2949.
9. Evidence pp. 914-5.

- obtain details of assets held by (Midford Paramount);
- establish the circumstances surrounding the sale of the (Midford Malaysia) factory;
- establish how and by whom garments exported by (Midford Malaysia) had been manufactured;
- interview (Midford Malaysia's sole employee) in relation to matters concerning (Midford Paramount), (Midford Malaysia) and (Pen Apparel);
- interview ..., a former Technical Manager at (Pen Apparel); and
- obtain documents from government agencies relating to the activities of (Midford Malaysia).[10]

18.7 It appears the Senior Inspectors deviated from their objectives since, although they told the Committee that they 'did not pursue statements from witnesses'[11] a statement was taken on 16 September. (This is discussed in Chapter 19.)

18.8 The DPP told the Committee that in the case of the documents which were to be obtained, their existence was known of and, in some cases, the DPP already had copies![12]

18.9 The Committee asked why someone from the Australian High Commission in Kuala Lumpur wasn't asked to liaise with Malaysian Customs in obtaining information about Midford. The response from one of the Senior Inspectors was that the person would have been required to travel to Australia as a witness to produce the documents. He added that the two Inspectors were authorised under the Evidence Act to collect documents but, however, he did acknowledge that someone else could have been authorised.[13]

18.10 This issue was further addressed in an ACS submission dated 14 May 1992. Customs told the Committee that overseas Customs officers did undertake inquiries but these involved dumping and other inquires 'as workload

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10. Evidence, pp. S226-7.
11. Evidence, p. 1130.
12. Evidence, p. 896.
13. Evidence, p. 1067.

permits and where State Evidence Acts do not require the appearance in court of investigators obtaining the evidence.' ACS added that 'foreign Customs Services ... are not necessarily equipped to gather evidence in accordance with Australian law', nor would it be 'politically acceptable in most instances' to involve them. The submission concluded that embassy staff ' would not be equipped or trained to carry out investigative work', and that Evidentiary Act requirement problems would also apply.[14]

18.11 Notwithstanding this argument, the Committee feels that Customs exaggerated the difficulties of requesting foreign Customs Services or Australian overseas representatives to obtain documents in an appropriate fashion and considers that the photocopying of publicly available documents is hardly a task beyond the ability of an Australian High Commission or foreign Customs Service. The Committee feels that the sending of the two ACS Inspectors to Malaysia was an inappropriate use of public monies.

The Terms Under Which the Investigation was Carried Out

18.12 During the Inquiry, the issue emerged concerning which international treaty or agreement could have been used as an umbrella for the investigations in Malaysia.

18.13 The *Mutual Assistance in Criminal Matters Act 1987* enables requests for international assistance to be made by the Attorney-General. However, at the time of the investigation Malaysia was not a party to the Act.[15] Such a mechanism is not the only avenue available to Customs and the Committee was advised by the DPP that 'it may well have been that even if that Act was in force and did apply, that Customs would have chosen to go the Customs route.'[16] This is confirmed in an ACS submission which stated that the Act 'does not provide a satisfactory means of obtaining overseas evidence.'[17]

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14. Evidence, p. 6544.
15. Evidence, p. 913.
16. Evidence, p. 913.
17. Evidence, p. S11014.

18.14 The ACS made a request for assistance to their counterparts in Malaysia, The Royal Malaysian Customs (RMC).[18] The Attorney-General's Department understands that the ACS's:

> ... normal method of operation to be direct agency to agency requests for assistance pursuant to the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (the 'Nairobi Convention' of 9 June 1977).[19]

18.15 Australia lodged its Instrument of Accession to the Nairobi Convention on 3 November 1986, but of the eleven Annexes only accepted Annex I and Annex III which relate to communicating information between Customs bodies and verification of 'the authenticity of documents and the legality of import and export operations.'[20]

18.16 Malaysia acceded to all Annexes on 26 March 1979. Annex VII and Annex VIII enable 'the participation of officials of one Contracting Party in investigations carried out in the territory of another.' Because Australia has not accepted these Annexes, Malaysia is not legally obliged to render assistance in this area. However, the ACS suggests in a position paper on the Nairobi Convention that:

> By its accession to all the Annexes, Malaysia has recognised that there may be occasions when foreign Customs services may conduct investigations on its territory. Such Customs services may not always be Parties to the Nairobi Convention ...[21]

18.17 The Committee noted that the position paper also stated that being party to the Convention does not absolve a requesting Party from observing the laws of the country providing the assistance.[22]

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18. Evidence, p. S226.
19. Evidence, p. S183.
20. Evidence, p. S5952.
21. Evidence, p. S5952.
22. Evidence, p. S5951.

18.18 The Convention defines the limits of investigating officers. Under its terms ACS officers would be unable to:

> ... require or compel any person not resident in (Australia) to produce for examination, or allow access to, any account or record for the purpose of determining a computed value. ... (In addition,) the agreement of the producer (is required) provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.[23]

18.19 As well, Articles 6 and 7 of GATT are relevant to such overseas investigations. Article 6 allows 'investigations on the premises of a firm ... if (a) the firms so agree; and (b) the signatory in question is notified and does not object.' A similar restriction is contained in Article 7.[24] Whether such terms were adhered to becomes important when the admissibility of the evidence gathered in Malaysia is discussed in Chapter 19.

18.20 At a public hearing on 13 February 1992, the two Senior Inspectors who travelled to Malaysia appeared unsure whether their activities were covered by the Nairobi Convention.[25] However, later in the hearing, one Inspector agreed with evidence indicating that the AFP Liaison Officer had been informed by them on 17 September 1988 that they were operating under the Nairobi Convention.[26]

18.21 This position appears to be confirmed by the affidavit of the RMC officer, who assisted the Inspections, which stated that:

> I verily believe that my actions ... were taken pursuant to my authority under the (Malaysian) Customs Act 1967 and under the Nairobi Convention 1977 and were not in breach of any rules and laws of Malaysia.[27]

18.22 The ACS position paper on the Convention, dated February 1992 and quoted above, may well be a move to clarify the situation.[28] However, there still

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23. Evidence, p. 1177.
24. Evidence, p. 1177.
25. Evidence, pp. 1091-3.
26. Evidence, pp. 1167 and S3604.
27. Evidence, pp. 853-4.
28. Evidence, pp. 5951-2.

appears confusion, because a later submission, dated 28 August 1992, from the ACS stated that 'The Nairobi Convention is not an investigative tool - rather it is the basis for mutual administrative assistance, particularly in the exchange of information.'[29]

Preparations for the Trip

The Briefing of the Senior Inspectors

18.23 The ACS submission of 20 February 1991 outlined the briefing the Senior Inspectors received:

> The officers had several briefings with the ACS investigation team and DPP case officers about the inquiries generally and, in particular, the need to obtain evidence pursuant to Section 14CM of the NSW Evidence Act. The investigation team provided detailed briefing notes about the matter.[30]

18.24 The briefing material tended in evidence to the Committee, however, contained no information about procedures to be used.[31] Indeed, questioning revealed that Customs appeared to have had no written procedures for overseas investigations at that time:

> **Acting Chairman** - So there is actually no set of guidelines for any particular officer in the event of having an investigation overseas?
>
> **Witness** - To my knowledge, there was not at the time. ... There may well be something now, but at that stage I was not aware of anything.[32]

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29. Evidence, p. S11014.
30. Evidence, p. S226.
31. Evidence, pp. S7106-7912.
32. Evidence, p. 1041.

18.25 The Committee was told by a witness from the DPP that the ACS officers were not supplied with written briefing material on this matter:

> **Committee** - There is nothing in writing from the DPP spelling out to ACS what its requirements were for gathering evidence in Malaysia?
>
> **Witness** - I think that is correct, yes. There was definitely correspondence about what sorts of inquiries ought to be undertaken. There was some advice about that, but I do not recall specific instruction from the DPP saying that when you go to Malaysia, for example, you should be sure to look at the original, establish the author and so on. I do not believe there is a note about that.[33]

18.26 This has been confirmed by the DPP in a submission to the Committee. The submission makes reference to a brief conversation, which appears not to have been documented, was reported between the DPP case officer and one of the Senior Inspectors before he left for Malaysia. The Inspector was asked whether there were 'any problems in relation to the proposed visit.' The Inspector replied that there were none.[34]

18.27 The DPP in a supplementary submission, defending its performance, stated that 'it has not traditionally been seen as part of the DPP's functions to advise investigators on the manner in which an investigation should be carried out.'[35]

18.28 The Committee was told by one of the Senior Inspectors that since the events of 1988 'there have been quite a number of papers prepared which give guidelines to obtaining evidence overseas.'[36]

18.29 Despite the limited experience of the two Senior Inspectors,[37] and the fact that relations with Malaysia have been sensitive for some time, the Committee was told that there was no Department of Foreign Affairs and Trade briefing concerning acceptable behaviour in Malaysia and Singapore.[38]

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33. Evidence, p. 1074.
34. Evidence, p. S3828.
35. Evidence, p. S3828.
36. Evidence, p. 1069.
37. Evidence, p. 1033.
38. Evidence, p. 1041.

18.30 Despite the shortcomings of the senior officers' preparation for their trip to Malaysia in 1988, which the Committee uncovered, the ACS appears unrepentant. A submission dated 28 August 1992 declared that:

> Customs will continue the practice of ensuring that officers are adequately briefed by the DPP/AGS, as appropriate, before undertaking overseas enquires.[39]

18.31 The Committee considers, however, that the two ACS officers received inadequate briefing for the investigations in Malaysia.

Pre-trip Communications with Malaysia and Singapore

18.32 The ACS initial submission, dated 20 February 1991, stated that 'prior to their departure for Singapore both the Royal Malaysian Customs ... and the Australian High Commission were advised of the intending visit and its purpose.'[40] During the course of the Inquiry, however, doubts were raised concerning the veracity of this information, which led to the following exchange:

> **Chairman** - If Customs knew before February 1991 that the High Commission had not been advised, I want to know why the Committee was given that information when it is not correct.
>
> **Witness** - The Australian High Commission noted in paragraph 7.4 (of the ACS submission) is the Australian High Commission, Singapore; it is not the Australian High Commission, KL.
>
> **Committee** - It does not say that. That was a crucial point, and you know it ...
>
> **Witness** - I was unaware of the relevance of it until now.[41]

18.33 The Committee discovered that in a minute dated 22 July 1988 the overseas co-ordination section of Customs, OSCORD, had been informed of the proposed visit of the Senior Inspectors to Singapore and Malaysia together with a

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39. Evidence, p. S11014.
40. Evidence, p. S226.
41. Evidence, p. 1878.

request to 'make any arrangements necessary to notify the overseas parties concerned.'[42] OSCORD had duly advised the Singapore High Commission on 1 August 1988.[43] However, the High Commission in Kuala Lumpur was not contacted by OSCORD and the High Commission in Singapore was not asked to pass on any information to Malaysia.

18.34 ACS indicated later, in their submission of 16 June 1992, that their failure to advise the Malaysian High Commission 'went unnoticed until evidence given before (the) inquiry.'[44] The Committee considers, however, that this admission does not rest easy with the assertion made by the witness in section 18.32 above.

Travel Arrangements

18.35 The ACS Senior Inspectors told the Committee that they had two major tasks in their overseas trip - to attend court proceedings in Singapore, for which four weeks were allocated, and to gather material in Malaysia over a two week period.[45]

18.36 The Committee was surprised to learn that the airline tickets for the return trip from Singapore to Kuala Lumpur and flight to Australia were open tickets.[46] One of the Senior Inspectors explained to the Committee 'that the tickets were in fact open because there was no way of determining when the court proceedings in Singapore were going to finish.'[47]

18.37 Nevertheless, the issuing of open-ended tickets is contrary to normal Public Service practice. The Committee confronted the ACS with this fact. Customs then advised the Committee that 'specific approval for (the two Senior Inspectors) to travel overseas to Malaysia to investigate Midford related matters cannot be located.'[48]

18.38 The Committee deplores this breach of Public Service practice and expects the ACS management to ensure that such breaches will not occur again.

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42. Evidence, pp. S5947-8.
43. Evidence, pp. S5946-7.
44. Evidence, p. S7096.
45. Evidence, p. 1036.
46. Evidence, p. 1045.
47. Evidence, p. 1030.
48. Evidence, p. S8558.

The Events that Occurred in Malaysia

Preparing for the Visit and Contact with the High Commission

18.39 As their tasks in Singapore neared completion, the two ACS Senior Inspectors prepared for their visit to Kuala Lumpur. During evidence there appeared to be confusion about how the accommodation in Malaysia was arranged:

> **First Witness** - the hotel bookings in Malaysia were to be made when we knew our arrival date in Malaysia. ... That was made by us ... through the Australian High Commission, I believe, in Singapore.
>
> ...
>
> **Committee** - It would have been normal for the High Commission in Malaysia to do that, not the High Commission in Singapore?
>
> **First Witness** - I could not say what would be normal in that regard. I can only say what in fact happened in our case.
>
> ...
>
> **Second Witness** - I remember that one of us made the booking.
>
> **Committee** - So you just rang up the hotel and made the booking?
>
> **Second Witness** - That is my recollection.
>
> **Committee** - The normal thing, of course, would have been to ring the Malaysian High Commission and have it do it for you, but you did not do that.
>
> **Second Witness** - I accept that.[49]

18.40 The two ACS Senior Inspectors told the Committee that they arrived in Kuala Lumpur on Wednesday 7 September 1988 and made contact with the Royal

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49. Evidence, pp. 1037-40.

Malaysian Customs, believing that the Australian High Commission had in fact been informed by OSCORD.[50] Thus the Inspectors began their Malaysian investigation unbeknownst to Australia's official representatives in that country.

18.41 The Committee ascertained that some information had been passed to the AFP Liaison Officer in Kuala Lumpur since his counterpart in Singapore had advised him on 2 September that the two ACS officers, who were at that time in Singapore, 'were to travel to Kuala Lumpur to conduct inquiries into Midford Paramount.'[51] However, one of the Senior Inspectors told the Committee that a date of arrival was not communicated because the duration of the court case the officers were attending in Singapore was not known.[52]

18.42 It was not until Monday 12 September that the Malaysian High Commission was contacted by the ACS officers and then only by a telephone call to the AFP Liaison Officer.[53] The Committee noted that a cable from the High Commission to the Department of Foreign Affairs and Trade in Canberra on 16 September following the receipt of a Court Order (discussed in Chapter 19) confirmed this was the only contact:

> ... no advice of the visit of the ACS personnel has been received this post. (The AFP Liaison Officer) was aware of their possible presence but this was through AFP (Liaison Officer) Singapore's verbal and unofficial advice. (One of the Senior Inspectors) contacted (the Malaysian HC AFP Liaison Officer) on ... 12.9.88 to advise that they were working directly with Malaysian Customs and did not require any AFP or AHC assistance. No further contact has been made.[54]

Collecting Evidence

18.43 The Senior Inspectors told the Committee that on Thursday 8 September, the day after their arrival, they were introduced to officers of the Royal Malaysian Customs who were to assist them during the investigation. At this

50. Evidence, p. 1040.
51. Evidence, p. S3783.
52. Evidence, p. 1030.
53. Evidence, p. 1043.
54. Evidence, p. S9754.

meeting or shortly thereafter the RMC officers were briefed about the information the ACS wished to obtain in Malaysia.[55]

18.44 The Committee found in the briefing material supplied to the Senior Inspectors a submission in the form of a minute from the Chief Inspector in charge of the Midford case, which could have been used as a written brief.[56] However, the minute was detailed and a verbal summary would have been necessary. This may be the reason why the Senior Inspectors used a newspaper article[57] as an aid to explaining the case to the RMC officers.[58]

18.45 The Committee considers that the use of such material is inappropriate since it did not present information about the Midford case in an unbiased manner.

18.46 Official notebook entries detailing the Inspectors' activities on that day were unavailable to the Committee since the relevant notebook of one of the Inspectors had gone missing and the records in the other did not start until the following day.[59] (The missing notebook is discussed in Chapter 19.) The diary entries of one of the Inspectors indicated that there was a meeting in the morning, followed by a briefing of their assigned RMC officer after lunch. There then followed a reference to a club.[60] Telecom records disclosed that a reverse charge phone call was made, however, at 4.13 pm Malaysian time to the ACS office in Sydney.[61]

18.47 On the following day, Friday, after another call to Sydney,[62] the Senior Inspectors recalled that they initiated document searches at various government offices in Kuala Lumpur which continued into Saturday. Sunday was taken off.[63]

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55. Evidence, p. 1060.
56. Evidence, pp. S7116-20.
57. Evidence, pp. S117-8.
58. Evidence, p. 1101.
59. Evidence, pp. K2831-2.
60. Evidence, p. K3012.
61. Evidence, p. K7944.
62. Evidence, p. K7944.
63. Evidence, p. 1077.

18.48 It was ascertained from the witnesses that in the late afternoon of Monday 12 September the two Senior Inspectors, accompanied by two RMC officers and a driver, visited the home of the estranged husband of the Midford Malaysia employee who worked at Pen Apparel. The events that allegedly ensued formed part of the basis for the Malaysian High Court Ex-Parte Order which was granted on 16 September 1988 restraining any further information gathering activity.

18.49 The Committee received two versions concerning the events that occurred - the Customs account[64] and that of the householder.[65] The issue revolved around whether the Customs investigation team were invited into the house and whether documents were freely delivered to them. Under questioning from the Committee, the ACS officers revealed that conversations between the RMC officers and the householder were conducted in a language which was foreign to them. The Senior Inspectors admitted that they could only corroborate the RMC version by means of their observations of 'the conduct of the people and (their) demeanour.'[66]

18.50 The affidavit of the senior RMC officer, which was provided to the Committee, stated that he identified himself with his authority card and that the four investigators were then invited into the house. The householder had been 'detained by ... customs previously and ... was worried that we had come to investigate that matter. ... (He) seemed relieved that we were not investigating into his case.'[67] The RMC officer and the householder then entered the bedroom and emerged with some documents.[68] The affidavit stated that entry was by invitation, the documents were freely surrendered and that the actions 'were proper, legal and justifiable and were taken pursuant to ... authority under the (Malaysian) Customs Act 1967 and under the Nairobi Convention.'[69]

18.51 The Committee was also in receipt of the affidavit of the householder which provided a different account of the incident. It stated that the officers were met at the front door and when the householder went to retrieve his identification card from within, he was followed into the house and bedroom where he had his identity card. He felt he 'had no choice but to let them remain ... as the (senior RMC officer) implied that they had authority to search.' Mention was also made of the fact

64. Evidence, pp. S851, S233-4.
65. Evidence, pp. S523-6.
66. Evidence, p. 1096.
67. Evidence, p. S852.
68. Evidence, p. 1101.
69. Evidence, pp. S852-3.

that the householder's wife had applied to emigrate to Australia and that it would be wise to co-operate if her application was to be successful.[70] The affidavit stated:

> At no time did I voluntarily allow the four persons ... to enter my house or to conduct a search or take away any documents. I was given the impression that they were acting under lawful authority.[71]

18.52 Evidence provided to the Inquiry showed that the AFP Liaison Officer later noted that a police complaint was subsequently lodged apparently alleging 'trespass, theft and housebreaking'[72] and this was a contributing factor in the granting of the Ex-Parte Order on 16 September 1988.

18.53 The Committee expressed surprise that information about an application to emigrate to Australia would have been known to Customs officers.[73] The Committee discovered during a public hearing, through questioning an ACS officer involved with the Midford case, that the information originated from an ACS interview of a Midford Director and senior Midford employee. The Committee was told that the record of interview was part of the briefing given to the Senior Inspectors. It was added that although they were expected to be familiar with it, the record of interview had not been emphasised as being important.[74] The Committee was nonetheless concerned at the way the information had been used by the Investigators.

The Events of Tuesday 13 to Thursday 15 September 1988

18.54 On 13 September the Senior Inspectors attended a meeting at the Ministry of Trade and Industry. The next day, the two Inspectors and the senior RMC officer flew to Penang. The objective was to visit Pen Apparel and interview Midford Malaysia's sole employee.[75]

18.55 Accordingly, a visit was made to Pen Apparel that afternoon. The Committee was told by the Senior Inspectors that the meeting with the Managing Director of Pen Apparel was interrupted by a lawyer acting for Midford Malaysia.

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70. Evidence, p. S527.
71. Evidence, p. S529.
72. Evidence, p. S3604.
73. Evidence, p. 1097.
74. Evidence, pp. 1370-1.
75. Evidence, pp. K3014-5.

A heated discussion ensued about the legality of the Customs officers' activities.[76] One of the ACS Senior Inspectors recorded in his official notebook that the lawyer allegedly said 'My instructions are to do everything possible within the four corners of the law to stop you doing what you are doing'[77] The Customs officers left shortly after.

18.56 The next day, 15 September, a telephone call was made by the ACS officers to the Managing Director of Pen Apparel. It transpired that a written request would be needed before a copy of the Agreement between Midford Malaysia and Pen Apparel would be provided because the Managing Director wished to first consult his board.[78]

18.57 Evidence before the Committee showed that a call was also made to the Senior Inspectors' supervisor in the ACS office in Sydney at 11.13am Malaysian time, presumably apprising Customs of the situation.[79]

18.58 At the public hearing of 13 February 1992, however, the Inspectors appeared confused about the telephone calls that were made during this period[80] and, unfortunately, the records of conversations of calls made by their supervisor in Sydney were unavailable for scrutiny, apparently because they had not been filed. The Chief Inspector, who in fact was not involved in the Midford case at that time, detailed to the Committee his search for his missing notes:

> ... I had a recollection of keeping some notes at the time, and that I may have passed those notes to (the Senior Inspectors) on their return from Malaysia to assist them with the compilation of their trip report; and I asked whether (the Senior Inspector) had any particular knowledge of them (just before this hearing). He said, no, he did not. Basically I went through the same conversation with (the other Senior Inspector).[81]
>
> ... I personally did not put them on the Midford file. ... I did not have any access to the Midford file. It was not my case ... I am unable to say that I did not give them to (the Chief Inspector in charge of the Midford case), but I simply do not

76. Evidence, pp. 1112 and S856.
77. Evidence, p. K2794.
78. Evidence, pp. 1117 and K2795.
79. Evidence, p. K7944.
80. Evidence, pp. 1114-6.
81. Evidence, p. 1976.

remember now who I gave them to, if indeed I gave them to anybody.[82]

18.59 Despite the suggestion made by the Senior Inspectors to the Committee that there was a call to the DPP on 15 September [83], this appears to be an error. Telephone records supplied to the Committee by Telecom show that the ACS rang Malaysia on the evening of 15 September and the DPP rang the same numbers early on 16 September. File notes supplied by the DPP showed that a briefing occurred about the events two days earlier. (These events are detailed in section 18.55 above.)[84]

18.60 The Inspectors recounted to the Committee that on the afternoon of 15 September the combined Customs investigation team went to the Malaysian Customs office located in Pen Apparel to obtain Custom Form 8s, which are prepared when goods are exported from Malaysia. At the Customs office they met the Shipping Manager of Pen Apparel.[85]

18.61 Again, the Committee ascertained that there were two versions of the events that followed. The ACS Senior Inspectors recounted that a conversation ensued about the relationship between Midford Malaysia and Pen Apparel during which it was agreed that the Shipping Manager would copy stock and manufacturing records. The Committee was advised that since this would take some time, the Customs officers were to return the next day to collect them. It was added that before they left, the Senior Inspectors were given three files relating to manufacturing and stock records.[86]

18.62 The Committee received copies of the affidavits filed by the senior RMC officer in the Malaysian Courts. The affidavit of 2 December 1988 supported the account of the ACS officers.[87] However, an earlier affidavit by the same RMC officer filed on 18 October 1988 was inconsistent in chronology, suggesting that the initial meeting with the Shipping Manager occurred on 16 September.[88] Both affidavits, nevertheless, asserted that the relationship with the Shipping Manager was amicable and that documents were freely handed over.

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82. Evidence, p. 1979.
83. Evidence, p. 1116.
84. Evidence, pp. K2624 and K3017.
85. Evidence, pp. 1119-20.
86. Evidence, pp. 1119-21.
87. Evidence, p. S855.
88. Evidence, p. S853.

18.63 The affidavit of the Shipping Manager filed in the Malaysian Courts, also provided to the Committee, disputed that documents were freely surrendered:

> Before giving these documents, I asked ... 'Do we have to give the documents to them?' (The RMC officer) replied 'Yes, you must.'

18.64 It was also stated that the photocopying of documents related to the Form 8s was initiated on the following day.[89]

18.65 The Committee ascertained that later that afternoon, the Customs officers visited the forwarding agents for Pen Apparel. The affidavit of the Managing Partner of the firm, affirmed in the Malaysian Courts on 29 September 1988, suggested that a vigorous exchange took place:

> (The senior RMC officer) showed his authority card to indicate that they had full authority to require me to do what they liked. He was very aggressive and threatened that I could be prosecuted. ... (He) then demanded that I give a letter to state my company had no dealings with Midford Malaysia Sdn Bhd but acted purely on Pen Apparel Sdn Bhd's instructions and appointment. He dictated the letter. I gave the letter but marked it 'without prejudice'. The words 'without prejudice' annoyed (the RMC officer) and he immediately showed his Customs Authority card and said if I do not comply with his demand to give a letter without 'without prejudice' words on it, my company would be charged for non-compliance under certain sections of the Malaysian Customs Act. So for fear of unnecessary trouble I gave the letter as required by the (RMC officer).[90]

18.66 At a public hearing on 21 May 1992, one of the Senior Inspectors told the Committee that the RMC officer had become 'concerned there was some possible contravention of local legislation or the issue of quota in Malaysia' and had pursued the matter briefly whilst they had been present.[91]

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89. Evidence, p. S530.
90. Evidence, p. S3928.
91. Evidence, p. 1893.

18.67 The RMC officer's affidavits, copies of which were supplied to the Committee as evidence, unfortunately do not address the allegations made by the Managing Partner of Pen Apparel's forwarding agents outlined in section 18.65 above.

Recommendations

18.68 The Committee recommends that:

- for Australian Customs Service officers travelling overseas, there should be formal briefings from the Department of Foreign Affairs and Trade, and when legal proceedings are likely to eventuate, from the Australian Government Solicitor or the Director of Public Prosecutions;

- there be a review of OSCORD with a view to setting up a formal set of procedures for liaising with overseas bodies;

- the Australian Customs Service implement a policy of no open-ended tickets for any travel undertaken by its officers;

- the arrangements for Australian Customs Service officers undertaking overseas activities include formal notification of Australia's representatives in that country;

- the Australian Customs Service should make more use of foreign Customs services and Australian overseas representatives to collect information in other countries; and

- the Australian Customs Service and the Australian Government Solicitor or Director of Public Prosecutions, as appropriate, should produce a formal document to be given to foreign Customs services and Australian overseas representatives to acquaint them with the methods and requirements for collecting information so that information conforms to State Evidence Acts.

Chapter 19

THE EVENTS OF 16 SEPTEMBER 1988

It was An Unusual Day

> *As the day panned out, it was an unusual day, I suppose, and things were hurried towards the end.*
>
> *ACS Senior Inspector.*[1]

The Events at Pen Apparel on Friday 16 September 1988

19.1 Evidence before the Committee showed that the morning began with an interview with a past employee of Pen Apparel's Forwarding Agent in relation to the Customs Form 8s, and a statement was taken by the RMC officer who gave it to the ACS officers.[2] Entries recording the event were found by the Committee in the notebook of one of the Senior Inspectors; the diary of the other adds a comment that the Forwarding Agent was 'prepared to come to Aust as witness.'[3]

19.2 The officers seem to have forgotten the taking of the statement. At a public hearing one of them told the Committee:

> We did not pursue statements from witnesses, on the basis that the statements would have been of no value in the court. Our evidence about the documents and the sourcing of documents was the valuable evidence, and the documents themselves, not statements.[4]

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1. Evidence, p. 1899.
2. Evidence, p. S7197.
3. Evidence, pp. K2798 and K3017.
4. Evidence, p. 1130.

19.3 A submission from ACS responding to this issue stated that the two Senior Inspectors 'neither sought nor received any statements from Malaysian nationals concerning the Midford Paramount case.'[5]

19.4 At a public hearing on 21 May 1992 the Committee confronted the Senior Inspector with the evidence of his own notes which described the receipt of a statement. The officer's memory was still poor and he referred to the incident involving Pen Apparel's Forwarding Agent on 15 September when the RMC officer had taken a statement as part of his investigations into another matter.[6]

19.5 The Committee is concerned that in some instances Customs officers' memories were crystal clear whilst at other times and with other issues they were apparently confused. Often witnesses from Customs seemed to adhere to a theme despite evidence, often their own, to the contrary.

19.6 Records provided to the Committee by Telecom showed that on the morning of 16 September 1988 a telephone call was received by the Inspectors from the DPP in Sydney.[7] (The significance of the conversation and how it links in with the events of that afternoon is discussed at section 19.41 below.) The Committee ascertained that at about 1pm the combined Customs team returned to Pen Apparel to obtain further documents.

19.7 The affidavit of Pen Apparel's Shipping Manager filed in the Malaysian High Court alleged that the ACS Senior Inspectors offered inducements to obtain co-operation:

> (They) showed me what they represented to be a newspaper article from an Australian newspaper relating to the charges that they alleged had been preferred against Midford Paramount Pty Ltd., ...
>
> They asked me whether I would like to be a witness in Australia at their expense. I declined their invitation.
>
> Then they offered me a permanent residence status in Australia. I told them that I did not require one as I did not have a job over there. They then told me that a shipping

5. Evidence, p. S5943.
6. Evidence, pp. 1892-3.
7. Evidence, p. K8266.

> manager in Australia would earn about A$5,000 per month and it could be arranged.
>
> I replied jokingly that if they could get me a job with a salary of A$5,000 per month, then I might be interested in their offer.
>
> Then they asked me whether (Midford Malaysia's employee at Pen Apparel) could be persuaded to 'co-operate' and work with them ... They told me that (she) had applied and was keen to get permanent residence status in Australia and it could be arranged for her if she would work for them.[8]

19.8 The Committee noted that the account of the conversation in the official notebook of one of the ACS officers has the proffering of the newspaper article after the discussion about travel to Australia.[9] The conversation itself is recorded in the same notebook and is reported by one of the Senior Inspectors as:

> I said, 'Would you be willing to come to Australia as a witness?' He said, 'Yes sure, I have no commitments here. I could migrate. I have thought about that before.' ...
>
> He went on to say, 'I would have to get a job. How much does a shipping clerk earn?' I said, 'It's hard to say: perhaps $2,000 a month.'[10]

19.9 A diary entry made on that day by the ACS Inspector referred to the Shipping Manager as 'possible witness in Aust - to follow up.'[11] However, when the Committee questioned the officer he stated that, at the time, he didn't think that the Shipping Manager was being serious about emigrating. In pursuing the matter the following exchange resulted:

> **Chairman** - The question from the (Committee) is: Did you take steps then to disabuse him of the notion that you were talking about him coming to Australia as a migrant?
>
> **Witness** - No, I did not.

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8. Evidence, p. S531.
9. Evidence, p. K2801.
10. Evidence, p. 1124.
11. Evidence, p. K3017.

Chairman - Why?

Witness - It was not apparent to me that he was seriously saying he would come to Australia. At the time it was an unsolicited comment that I thought he was quite entitled to make. I did not see the need to say, 'Hang on, you look very serious about that. I cannot help you' ...[12]

19.10 Meanwhile, following the confrontation on 14 September, Midford Malaysia's lawyer had successfully sought an Ex-Parte Order from the High Court of Malaysia. The order was issued at 12.30 pm[13] and restrained the two ACS Senior Inspectors and the Commonwealth of Australia 'from conducting any unlawful searches and seizures and/or unlawfully collecting any evidence', ordered them to surrender any documents, files or statements they had obtained, and restrained the RMC from providing assistance 'in illegal searches and seizures and/or collection of evidence oral or documentary.'[14]

19.11 The Committee received several differing accounts concerning the delivery of this Order to the offices of Pen Apparel, but all agreed in that Midford's lawyer telephoned Pen Apparel and attempted to speak, first with the RMC officer and then with the ACS Inspectors. All three officers refused to speak with the lawyer.[15] According to one of the Affidavits, the lawyer subsequently sent the Order to Pen Apparel at 2.33pm via facsimile.[16]

19.12 The Committee wrote to Midford Malaysia's lawyer requesting he provide documentary evidence verifying the time of the facsimile. Unfortunately a reply had not been received at the time of tabling of this Report. The Committee noted, however,that the timing of the facsimile was not a matter that was disputed by Customs. The facsimile itself was not tendered as evidence to the Inquiry.

19.13 The Committee identified two issues to be resolved in unravelling the various versions of the events that followed. Were the Senior Inspectors present at 2.33pm when the order was taken from the facsimile machine? If not, were they aware of its existence?

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12. Evidence, p. 1123.
13. Evidence, p. S3603.
14. Evidence, p. S506.
15. Evidence, pp. 1137 and S857.
16. Evidence, p. S7548.

19.14 The Committee considers that the second question is equally important, because the investigators acknowledged in their evidence to the Inquiry that, had they known that the Order had been granted, they would have obeyed its provisions. One of the Senior Inspectors told the Committee at the public hearing on 13 February 1992 that:

> Had (the Malaysian lawyer) said he had obtained an injunction we would have been obliged to abide by the injunction.[17]

19.15 Evidence was received that the telephone call from Midford Malaysia's lawyer was received by Pen Apparel's Shipping Manager, who passed it to his superior, the Company Secretary. In an affidavit affirmed on 21 October 1988 in the Malaysian High Court, the Company Secretary stated:

> At this time, (one of the Senior Inspectors) was speaking to (their Chief Inspector) in Sydney ... It was 2.30pm. I overheard from the telephone conversation that (the Senior Inspector) was to get in touch with their solicitor in Singapore. ... I informed them that the order was being faxed to me at any moment and that they could get a copy from me. The faxed order arrived at our office at 2.33pm and they left.
>
> All the times stated in this affidavit have been verified by me from the documents which are kept by the staff of Pen Apparel Sdn Bhd during the course of business.[18]

19.16 The Malaysian High Court affidavit of the Shipping Manager, affirmed on 6 August 1991, related a different sequence of events:

> (Midford's lawyer) informed me of (the contents of the Order) and then (the Company Secretary) being my senior the call was passed on to him. (He) took the call at his desk a short distance away and then went over to the facsimile machine and got a facsimile copy of the Court restraining order ... and read it himself and passed it on to the 3 officers. All 3 of them read the Order and discussed among themselves. Then

17. Evidence, p. 1138.
18. Evidence, pp. S535-6.

they made telephone calls to Sydney to (their Chief Inspector) and a Singapore lawyer.[19]

19.17 The Customs officers all deny that they were present at Pen Apparel's premises when the Order arrived by facsimile. Responding to the Company Secretary's affidavit, the RMC officer stated in a subsequent Malaysian High Court affidavit 'Whilst I was still at Pen Apparel's office no order was faxed in to my knowledge.'[20] The official notebook of one of the Senior Inspectors, signed by both officers, contained an entry that indicated that the ACS and RMC officers 'Collected documents and departed premises at about 2.25pm.'[21]

19.18 Notwithstanding the disparities between the affidavits of the Pen Apparel employees, telephone records supplied to the Committee by Telecom lend support to the Customs version of events. A reverse-charge call was made to the telephone number of their Chief Inspector, but at 2.07pm Malaysian time.[22] The duration of the call was 11 minutes.[23]

19.19 The Committee noted that evidence from the Telecom records conflicted with the time of the call given by the Company Secretary. Also, the sequence of events given by the Shipping Manager was in conflict with this evidence, as the telephone call to Sydney was made before the Court Order arrived at 2.33pm and not, as he stated, the other way round.

19.20 If the time of arrival of the Court Order is accurate, the Committee calculated that there was a gap of fifteen minutes between the termination of the call to Sydney, at 2.18pm, and the arrival of the Court Order. If, as their record attests, the Senior Inspectors left at about 2.25pm, it would mean that they took about seven minutes to leave Pen Apparel after completing their call. The Committee feels that this is consistent with a hurried departure and supports the contention that the officers knew that an injunction had been granted and was on the way.

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19. Evidence, p. S1300.
20. Evidence, p. S857.
21. Evidence, p. K2802.
22. There is a two hour time difference so that time would be 4.07pm Australian time.
23. Evidence, p. K8265.

19.21 Pen Apparel's Company Secretary stated in his affidavit that after he received the call from Midford Malaysia's lawyer:

> I then requested (the RMC officer) to speak to (him) but he refused ... and (he) further stated that 'I am not concerned with what (the lawyer) says. I don't want to speak to him and I have not seen the Order.' ... (The lawyer) read out the Order to me and I in turn informed them of what (the lawyer) had informed me on the phone. ...
>
> Having made the call (to ACS in Sydney), they urged us to give them the documents quickly. It appeared that they were in a hurry to collect the documents before the Court Order arrived by facsimile. ...
>
> I was made aware by the (lawyer) that the High Court Order covered my company Pen Apparel Sdn Bhd and as such I asked them if they would still like to take documents. The (RMC officer) said 'Yes, you have to give us the documents.' ...
>
> I heard (the RMC officer) say that 'we better take 85% of the documents and return, if possible, to collect the rest.'[24]

19.22 In a second affidavit to the Malaysian High Court affirmed on 6 August 1991, the Shipping Manager added:

> They asked me for a lift to the Customs building in the city and I obliged. ... Throughout the short journey to the customs building, they were subdued and were quiet. All of us including himself (sic) is aware that (Midford Malaysia's lawyer) is a very serious man and does not joke with serious matters such as this.[25]

19.23 The RMC officer denied being aware of the contents of the Court Order. His affidavit, made in the Malaysian High Court on 12 December 1988 included 'I categorically state that the (Company Secretary) did not inform me of the contents of the Court Order obtained by (the lawyer).'[26] In a letter to the Senior Inspectors dated 23 March 1991, the RMC officer commented that he thought the

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24. Evidence, pp. S534-5.
25. Evidence, pp. 1300-1.
26. Evidence, p. S857.

facsimile of the Order which he eventually received was not genuine. He said that 'I believed it was (the lawyer's) idea of a joke devised to shew (sic) us away from Penang.'[27]

19.24 It appears to the Committee that the Shipping Manager's second affidavit, (see sections 19.16 and 19.22 above) was made, in part, as a response to the comments of the RMC officer above because it discusses whether the Order was genuine. As well, the affidavit contains the statement:

> I am now obliged to fill up the gaps which I thought at the time of affirming my (original) Affidavit were not significant.[28]

19.25 Even allowing for any inaccuracies in translation from the Malaysian, the Committee is surprised that the contents of the affidavit - dealing with the alleged arrival of the Court Order and its impact - should have been considered 'not significant' when the Shipping Manager's first affidavit was made on 2 November 1988. The Committee feels that this, together with the discrepancy with the affidavit of the Company Secretary regarding the timing of the call to Sydney and the arrival of the Court Order (compare sections 19.15 and 19.16 above), brings the veracity of this second affidavit of the Shipping Manager into question.

19.26 When questioned by the Committee one of the Senior Inspectors acknowledged, however, that the Shipping Manager drove the Customs officers to the Customs office. This in itself is unusual since drivers had previously been used to transport the Customs officers:

> **Committee** - What happened to his car in which you were driven out there?
>
> **Witness** - We were dropped off, from memory, by a Malaysian Customs junior officer.
>
> **Committee** - So when you went there with (the RMC officer), you had a driver who dropped you all off?
>
> **Witness** - Yes. Having drivers seems to be the normal course over there.[29]

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27. Evidence, p. S850.
28. Evidence, p. 1299.
29. Evidence, p. 1147.

The absence of a driver and car to transport the investigating team from Pen Apparel was therefore unusual and in the Committee's view is consistent with a hurried departure.

19.27 The Senior Inspector's notebook, which was tendered as evidence also reported a conversation with the Company Secretary which indicates an increased sense of urgency following the phone call from Midford Malaysia's lawyer:

> (Company Secretary) - (The lawyer) says he is getting an injunction to stop you getting those documents.
>
> (Shipping Manager) - In that case I had better get extra people to finish the copying (2 extra people on job)
>
> (Shipping Manager) made phone call. He said - If any suspicious people like lawyers or police turn up at the gate don't let them in, ring me.
>
> (Shipping Manager) - (to the ACS officers) As soon as we are finished I will drive you to the Custom Office in my car.[30]

19.28 The Committee feels it is unlikely that Midford Malaysia's lawyer would say he was getting an injunction since the High Court Order had already been granted almost two hours before. It is possible that the conversation was misunderstood. However, the Senior Inspectors told the Committee that the Company Secretary's English was 'very good.'[31]

19.29 The instructions from the Shipping Manager, as reported by the Inspectors, to deny access to lawyers or the police is noteworthy. It indicates to the Committee a compliance with the activities of the Customs officers which is absent from the Manager's affidavit. However, this unusual support may be explained if, as has been alleged, the Shipping Manager was under the impression the Senior Inspectors were going to assist his emigration to Australia (see section 19.7 above).

19.30 The Committee was intrigued as to why the instructions from the Shipping Manager to a presumably Malaysian employee at the factory gate were in English. However, this enigma was not pursued.

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30. Evidence, pp. K2801-2.
31. Evidence, p. 1137.

19.31 If the account of the Customs officers is accurate they would have become aware that at least the Shipping Manager thought a serious situation was developing. It would have been natural to have ascertained the cause of such unusual steps and thus the officers would themselves have been alerted to the situation.

19.32 To return to the moment when Midford Malaysia's lawyer telephoned Pen Apparel, the Senior Inspectors were conversing by telephone with their Chief Inspector in Sydney, who was in charge of their case in Singapore. The Chief Inspector recounted the incident to the Committee:

> At that point (the Senior Inspector) was interrupted by (his ACS colleague) who had a message. I could not hear the conversation. There was a short conversation between (them). The (first senior) inspector came back to me and said, 'There has been a message passed to us through the Pen Apparel people that (Midford's lawyer) may have obtained an injunction', or 'is getting an injunction', or 'may be coming here with an injunction', or 'there is a threat of injunction', or something to that effect.[32]

19.33 The Chief Inspector further described how he maintained the telephone connection and sought advice from his supervisors whose offices were nearby. They were absent. He then informed the Chief Inspector who was in charge of the Midford case who:

> ... undertook to ring the office of the Director of Public Prosecutions while I held the phone with (the Senior Inspector in Malaysia). Subsequently, (he) came back with advice from the DPP, which I relayed to (the Senior Inspector).[33]

19.34 That advice was to contact ACS's solicitors in Singapore. The Committee discovered that no advice was proffered concerning contact with the High Commission in Kuala Lumpur.[34]

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32. Evidence, p. 1965.
33. Evidence, p. 1966.
34. Evidence, p. 1966.

19.35 The Chief Inspector receiving the call from Malaysia was unsure of the precise wording of the conversation, but he told the Committee that he took notes:

> **Witness** - I know the significance of the words, but I cannot recall the words that were actually used. I would be wrong to say they were 'has got' or 'was getting' (an injunction).
>
> **Committee** - Would you have written that down in your notes?
>
> **Witness** - I certainly have a recollection of writing the word 'injunction'. I do recall that.
>
> **Committee** - You made notes about the injunction?
>
> **Witness** - Yes.
>
> **Committee** - These notes have disappeared?
>
> **Witness** - Yes.[35]

19.36 The Committee was also told that notes of the conversation, and of a later one to the home of the Chief Inspector from one of the Senior Inspectors from Singapore, appear not to have been filed despite their significance.[36]

19.37 The Committee is reminded of a paragraph in the ACS Advanced Investigation Officers Course manual concerning the preservation of notes:

> All notes connected with an investigation must be preserved. It is inevitable that a Court will draw a sinister interpretation from the fact that notes which an officer claims to have been made at the time of an event cannot be produced.[37]

19.38 The Committee is mindful that it is not a Court but it is still uncomfortable with the apparent loss of documents pertaining to key events. At a

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35. Evidence, p. 1966.
36. Evidence, pp. 1977-9.
37. Evidence, p. S7195.

public hearing further questioning of the Chief Inspector resulted in the following exchange:

> **Committee** - Did you not understand when you got a phone call from two officers of the Australian Government who had been injuncted in a foreign land for behaviour which the court obviously thought was improper that this could be a major incident?
>
> **Witness** - Firstly, I did not believe that they had been injuncted.
>
> **Committee** - *Why? You did not say that in your evidence.* Your opening words were that an injunction had been obtained. You then went on to use less specific language.
>
> **Witness** - Yes.
>
> **Committee** - Then you went on to water that down even further.
>
> **Witness** - Yes.
>
> **Committee** - With a few ifs, buts and maybes.
>
> **Witness** - Yes, because I have no specific recollection of the actual words used, but the words I did hear I relayed to the DPP.[38]

19.39 The Chief Inspector in charge of the Midford case, who was present in the Sydney office and acting as the intermediary in the relayed telephone conversation, stated in a submission to the Inquiry that he 'did not take notes of the conversation ... as (he) was not party to the actual conversation and ... was aware that (the other Chief Inspector) was a note taker.'[39]

19.40 In his statement to the Committee dated 21 July 1992, the Midford case Chief Inspector recollected the following:

> (The other Chief Inspector) after receiving a phone call from Malaysia asked me if I could contact the DPP because

38. Evidence, p. 1979.
39. Evidence, p. S9461.

(the Senior Inspector in Malaysia) was having difficulty contacting (the DPP) ...

(The other Chief Inspector) informed me that (the Senior Inspector) was phoning from Pen Apparel and that they (Pen Apparel) had advised (the Senior Inspector) that they had heard that Midford were trying to have an injunction issued.

I passed that information on to (the DPP case officer).

(The case officer) told me to advise (the Senior Inspector) to contact their solicitor.

I told (the other Chief Inspector) to tell the (Senior Inspector) to contact their solicitors.[40]

19.41 Fortunately, records of the DPP end of the conversation have been provided to the Committee and these shed some light on the incident. The Senior Inspectors had previously contacted the DPP about the earlier confrontation with Midford Malaysia's lawyer and requested advice.[41] This prompted the DPP case officer to discuss the incident with her supervisors. This is documented in the first paragraph of the file notes for the day. The entry for Friday 16 September 1988 is as follows:

Discussed matter of (Midford's lawyer) with (supervisors)

- we will write to ... Solicitor in Singapore immediately and get him to take action

- (supervisor) to draft letter, I to prepare briefing papers - also - when (the two Senior Inspectors) ring ACS this arvo get them to ring me and I'll give them (the Singapore solicitor's) number and get them to contact him

40. Evidence, p. S9461.
41. Evidence, pp. K2624 and K3017.

4.15pm

Telephone attendance (Midford case Chief Inspector)

- he's got (Senior Inspector) on phone from Penang
- (he) is at Pen Apparel's office and can't make a second phone call to me I said tell him to contact (the Singapore lawyer) immediately and gave his number

4.20pm

Telephone attendance (Midford's Chief Inspector)

- (Senior Inspector) is still on the phone
- (the Senior Inspector) has just heard that there is an injunction to be served on him and Malaysian Customs
- to stop investigations
- I said
- What are the details, who obtained it? Has it been served?
- (Midford case Chief Inspector) knows nothing further.[42]

19.42 It was apparent to the Committee that the decision for the Senior Inspectors to contact the DPP was made prior to the afternoon call and the instruction to ring the ACS' lawyer in Singapore was given before knowledge of Midford Malaysia's lawyer's phone call to Pen Apparel. Thus the recollection of the conversation by the ACS officer detailed in section 19.40 above seems to refer to only the first part of the conversation documented by the DPP. It is silent on the content of the third paragraph of the file notes above.

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42. Evidence, p. S7369. The first paragraph had been written under the time of 4.05pm but was crossed out. It was repeated under the time of 4.15pm as shown. If the times depicted were noted at the end of the conversations they would accord with the Telecom records that have been supplied to the Committee (K8265).

19.43 The Committee asked the Chief Inspector via a question on notice to fill in the gap in his recollection. His reply was 'I can make no comment on the file notes taken by (the DPP case officer) other than to say that the file notes indicate that I was only involved in one phone call from Malaysia.'[43]

19.44 The Committee considers that this response is inadequate and feels that it indicated, when compared to the contemporaneous notes of the DPP, that the officer's memory of the events was suspect.

19.45 If, as would seem to be the case, the DPP officer's notes accurately describe the events, it would mean that the Senior Inspectors were aware that 'Midford were trying to have an injunction issued'[44] before Midford's lawyer attempted to contact them on the afternoon of 16 September. The Committee feels that this would explain why none of the Customs officers were willing to speak with Midford's lawyer. It also supports the contention that the officers knew that the Court Order existed before they hurriedly left Pen Apparel and subsequently fled the country.

19.46 It is also clear to the Committee from a reading of the file notes above, that the DPP case officer herself felt that there was an injunction but did not know its originator or whether it had been served.

19.47 In appearing before the Committee, the Chief Inspector who was the supervisor of the officers who went to Malaysia stated:

> It is quite common in investigations for people to threaten to do all sorts of things like that and, very often, not to do them. I personally would never accept that a person had followed a certain course of action like that until I had seen the evidence of it.[45]

19.48 It appears to the Committee, therefore, that this Chief Inspector would ignore an injunction until it was physically presented to him.

19.49 This attitude conflicts with the more stringent conditions set by the Senior Investigators themselves which is discussed in section 19.14 above, and

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43. Evidence, p. S11467.
44. Evidence, p. S9460.
45. Evidence, p. 1967.

appears inconsistent with the same Chief Inspector's attitude as reported by his colleague in charge of the Midford case. His colleague had stated in a letter to the Committee dated 21 July 1992:

> ... both (the other Chief Inspector) and myself were aware of the legal standing of injunctions and the correct action to be taken if officers are aware that an injunction has been granted.[46]

The Records in the Diaries and Official Notebooks of the Inspectors

Loss of Documents

19.50 It is unfortunate that the Committee was no longer surprised to learn that there were gaps in the diaries and official notebooks supplied by the ACS covering some of the key events that occurred in Malaysia. The first instance involved the loss of one of the notebooks of the Senior Inspector (noted in Chapter 18).

19.51 *The notebook had been used in Singapore and covered the dates* before 14 September 1988. It was expected to be used in evidence in the court case involving the Singapore investigations and so had been passed to the DPP. Customs advised the Committee that it was when the documents were returned by the DPP on completion of these hearings that the Senior Inspector noticed his notebook was missing.[47] The Inspector subsequently contacted the DPP whilst also returning documents which had been mistakenly included in the documents returned to the ACS.[48]

19.52 The DPP confirmed to the Committee that the notebook was lost by them and that, although the notebook was copied, this did not extend to entries which were not relevant to the Singapore investigation.[49] The Committee was intrigued, however, that this submission from the DPP, although addressed to the Committee and dated 5 June 1982, was provided by the ACS during the final public hearing of 11 August 1992.[50]

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46. Evidence, p. S9461.
47. Evidence, p. 1053.
48. Evidence, p. S7193.
49. Evidence, p. K8151.
50. Evidence, pp. 2089-90 and 2098.

19.53 The Chief Inspector in charge of the Midford case told the Committee that notebooks are not transcribed as a matter of course hence there were no copies of the missing entries.[51]

19.54 At that final public hearing, the Chairman expressed his concern to the Comptroller-General about missing documents:

> **Chairman** - What I want to move on to is the frequent, and I have to say somewhat mysterious, disappearance of various documents that we have been informed of by officers during the case. If we could go through a quick list I have here: (A Senior Inspector's) diary; (the Senior Inspector's) official notebook; notes made by (a Chief Inspector) regarding phone calls from Malaysia; and approval for the overseas visit by (the two Senior Inspector) ... Does it concern you that you have got a parliamentary committee that is itself very concerned about this?[52]

19.55 The Comptroller-General replied that he did not share the Chairman's concerns and he felt that, apart from the last example, adequate explanations had been provided.[53] The Committee, however, did not agree.

Incomplete Record Keeping

19.56 Another gap in the official records kept by the Senior Inspectors was noted by the Committee, which covers the events after the officers left Pen Apparel on the afternoon of 16 September. In fact, only one of the Inspectors had used his note book that day and he attempted to explain the reasons for that to the Committee:

> I cannot answer that now. It is regrettable that I did not and it does not help my case at all. But, unfortunately, I did not on the day. As the day panned out, it was an unusual day, I suppose, and things were hurried towards the end. But there was no deliberate reason not to record any notes for that particular day.[54]

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51. Evidence, p. 1883.
52. Evidence, p. 2089.
53. Evidence, pp. 2089-92.
54. Evidence, p. 1899.

19.57 The Senior Inspector countersigned the entry made by his colleague. The Committee was concerned at this apparent departure from normal practice:

> **Chairman** - Gentlemen, people are trying very hard not to read anything into this, but you are going to have to explain to us if this is a normal practice ...
>
> **First Witness** - It is a normal practice, but it does not happen all the time ...
>
> **Chairman** - (To second Witness), why would you have signed the notebook?
>
> **Second Witness** - Possibly because I did not have my notebook that day, possibly I left my notebook in Malaysia, I do not know; but if I did not write something and (the first witness) has written something up in his notebook, I would have conferred. It is our normal practice when two officers are on the same job to collaborate and countersign his notebook. I have countersigned dozens of other notebooks in other investigations.[55]

19.58 The Committee did not find this explanation convincing because, although the second witness might have left his notebook with his luggage at their hotel (in itself an unacceptable practice) and thus would have been separated from it when he hurriedly left the country (see section 19.75), he would have been reunited with his effects when the other Inspector joined him in Singapore later that evening. The notebook obviously was not lost in Malaysia and so could have been completed either late that night or early the next day. Another explanation may be that, after the trauma of their exodus, human weariness prevailed.

19.59 In a submission to the Committee dated 16 June 1992, the ACS stated:

> It is perfectly proper, and indeed essential, for officers to collaborate in making notes. This is a recognised means of making sure that the correct version of the event or interview is recorded. ... Where notes are taken by one officer, with another present, it is proper that the second officer sign or initial the notes ... This adoption of the notes by an officer should include the time and date, so the

55. Evidence, p. 1903.

"contemporaneousness" does not become an issue in any Court action.[56]

19.60 The Committee noted that the records kept by the Senior Inspectors in their official notebooks, although being ascribed a date, did not indicate the time at which they were made or signed.

19.61 The notebooks contained no further information about the rest of the trip. In this regard it was noted that records in both of them recommence on Wednesday 9 November 1988. When the Committee questioned the officers' supervisor he indicated that he did not feel the Senior Inspectors had been negligent since 'what they did was a movement from one point to another.' He felt it was not a significant event and 'it would be their decision as to whether they put it in the book or not.'[57]

19.62 The Committee was assured that only one officer used a diary. It contained entries about the rest of the trip although again nothing was recorded for the late afternoon of 16 September 1988. It was observed that that page was not securely fastened to the diary. The Committee expressed concern:

> **Chairman** - I do not understand why one officer keeps a diary and one does not. I should have thought Customs had a standard practice on that ... In this diary we have the page that covers the crucial day of Friday, 16 September 1988. That page is loose; it is detached. It is in fact now held together with a piece of sticky tape. To the best of our knowledge we cannot find another page in the diary that is detached.
>
> **Witness** - I can see you are putting a very sinister overtone on the fact that one particular page is loose in the diary but it is a frequently used diary. I can state to you under oath that there is nothing sinister in that at all, but that the page came loose.[58]

19.63 The Committee's credulity was severely stretched by this explanation. There were no contemporaneous notes concerning the officers' decampment from Malaysia and the crucial page somehow had come loose. The Committee was left

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56. Evidence, p. S7195.
57. Evidence, p. 1981.
58. Evidence, p. 1892.

with the distinct impression that this 'loose page' might in fact be a substitute page from another diary.

ACS Procedures for Diaries and Notebooks

19.64 The Committee was told that at that time Customs had no set procedures regarding diaries or notebooks. The Senior Inspectors' supervisor stated that there were two schools of practice: in one officers used their notebook 'as a diary and were instructed to write down every day what they did.' The other school of practice required officers to use their notebooks 'when they feel these notes will be used, *principally in litigation, but also when there may be evidence of an offence* or some significant event that it may be necessary to recall at a later date.'[59]

19.65 In explaining why only one of his Senior Inspectors used a diary the Chief Inspector told the Committee that, although 'each officer in the Investigations Section at that time was issued a diary', their use was optional. The Chief Inspector himself never used his diary.[60]

The Events of 16 September 1988 after the Departure from Pen Apparel

19.66 Throughout the rest of 16 September 1988 the Senior Inspectors did not contact the Malaysian High Commission. One of the Inspectors admitted to the Committee:

> Bearing in mind that we understood the Australian High Commissioner was aware of our presence - in fact he was not, ... it was an oversight on our part not to call at least the AFP liaison officer before we left Penang.[61]

19.67 In fact, a memo from the AFP Liaison Officer to the High Commissioner, provided by the ACS, showed that the first indication the High Commission in Kuala Lumpur had that something untoward was occurring was when 'a telephone call from a reporter with (a Sydney daily newspaper) was received to the effect that he had received information that 2 ACS officers had been arrested in Malaysia.'[62]

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59. Evidence, p. 1968.
60. Evidence, p. 1968.
61. Evidence, p. 1162.
62. Evidence, p. S3603.

19.68 The memo described the ensuing events:

> At 2.42pm on Friday 16 September, 1988, a faxed copy of the High Court Order was received at the High Commission and brought to your attention. Enquiries (sic) were immediately commenced to:
>
> a. confirm or deny the veracity of the order, and
>
> b. locate the two ACS Officers ...[63]

19.69 The AFP Liaison Officer discovered that the Order had been issued at about 12.30pm that day but was unable to find at which hotel the ACS officers were registered.

19.70 Documents submitted to the Inquiry by DFAT showed that later that afternoon the High Commission sent that Department in Canberra a facsimile of the Order together with a cable outlining the situation. The cable stated that the High Commission was unaware of the ACS officers' presence apart from the AFP Liaison Officer having being informed via Singapore HC Liaison Officer's 'verbal and unofficial advice.'[64]

19.71 The two Senior Inspectors had not been arrested nor had they returned to their hotel. They told the Committee that the Shipping Manager had driven them to the Customs office and they arrived there at about 2.45pm.[65]

19.72 The Senior Inspectors recalled that a telephone call was made at the Customs office to the ACS lawyer in Singapore. They had informed the lawyer that there 'was a threat of an injunction', but they knew no more. The witness stated that the lawyer's reply was to 'leave immediately, be in my office at 9 o'clock, get on the first flight, bring the documents with you. We can work it out from there.'[66] The Committee received no submissions from the Singapore lawyer by way of verification.

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63. Evidence, p. S3603.
64. Evidence, p. S9754.
65. Evidence, p. 1145.
66. Evidence, p. 1160.

19.73 The Senior Inspectors acknowledged to the Committee:

> (The Singapore lawyer) may have led us to do something that, in hindsight, we should not have done. ... It was perhaps about five o'clock in the afternoon in Sydney by then and we were not easily able to access people. In any case, we had been handed over to a lawyer and our commonsense at the time said to take advice from the lawyer.[67]

19.74 The officers said they remained at the RMC offices for about 'three-quarters of an hour or one hour' and then went to an airline office in Penang.[68] Evidence submitted to the Committee shows that the Inspectors did not use their existing open-ended tickets to depart Malaysia but instead purchased fresh ones using a credit card.[69] They explained to the Committee that their tickets were not altered because there were problems in transferring it from one airline to another. The Inspectors did not travel to Singapore via Kuala Lumpur 'because at the time the advice (they) received from a lawyer in Singapore was that (they) should leave Malaysia as soon as practicable.'[70]

19.75 The Senior Inspectors told the Committee that the ticket office informed them that there was a flight leaving shortly for Singapore and so they proceeded direct to the airport. Unfortunately, all seats on the flight were booked but the Inspectors were both waitlisted. When only one seat became available, one of the Inspectors left with the documents.[71] The Inspector's 'Acquittal for Overseas Travel,' tendered as evidence, showed that he left at 6.45pm.[72]

19.76 The Committee expressed surprise that both Senior Inspectors were prepared to depart the country leaving all their luggage behind at their hotel. The Inspectors replied that had they both left they presumed that the RMC officer would have forwarded their luggage to them.[73]

19.77 After seeing his colleague safely onto the aircraft, the remaining Senior Inspector returned with the RMC officer to their hotel. An affidavit filed in the Malaysian High Court by the employee in charge of reception described the

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67. Evidence, p. 1153.
68. Evidence, p. 1158.
69. Evidence, p. K3110.
70. Evidence, p. 1134-5.
71. Evidence, p. 1153.
72. Evidence, p. K3106.
73. Evidence, p. 1161.

delivery of an envelope containing a facsimile of the Court Order sent by Midford Malaysia's lawyer together with a bill for its receipt. The charge was added to the account of one of the Inspectors and it was paid by the other Inspector. The affidavit also contained the following:

> ... at about 7.00 pm., they returned to the hotel reception when I handed the envelope to (the Senior Inspector) together with the room key. They went back to their rooms and then informed me they were checking out although they had booked until 18.9.1988. They appeared to be in hurry. (sic) They signed and paid the bill and left that evening although the hotel charged them for the full night.[74]

19.78 At a public hearing on 13 February 1992, the Senior Inspector involved confirmed that he had returned to the hotel but disputed the claim that he had been given a copy of the Court Order:

> **Witness** - I went back to the hotel following the departure of (the other Senior Inspector). There was sufficient time available for me to do that.
>
> **Committee** - Did you go back to the hotel with (the RMC officer)?
>
> **Witness** - Yes I did.
>
> **Committee** - So there were two of you?
>
> **Witness** - That is correct.
>
> **Committee** - ... the clerk who was on duty that night says that he handed you an envelope with a copy of a faxed order in it....
>
> **Witness** - I say he is mistaken. ... There was no envelope.[75]

19.79 Nevertheless, the Senior Inspector told the Committee he paid the charge for the facsimile which was listed as a miscellaneous item without questioning his bill.[76] He acknowledged, via a letter from the DPP to solicitors in

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74. Evidence, pp. 1165 and S108.
75. Evidence, pp. 1165-5.
76. Evidence, p. 1185.

Malaysia that he had received a copy of the order 'shortly before (he) boarded the aircraft for Singapore.'[77]

19.80 The version given by the RMC officer in a letter dated 23 March 1991 sent to the Senior Inspectors and included in an ACS submission, conflicts with their recollection of events:

> As you know I had dropped (one Senior Inspector) at the airport and then dropped off (the other Senior Inspector) at a restaurant. I returned alone to the hotel. The facsimile was handed to me at the reception counter. ... I handed the fax to (the Second Inspector) together with my impressions of it, while I was giving him a ride to the airport later that day.[78] (emphasis added)

19.81 The Committee decided not to pursue the issue of these differing versions of events, but is surprised that there should be a conflict of accounts. It would appear immaterial whether or not the facsimile copy of the Order was personally received by the Senior Inspector at the hotel because, by then, the documents had already left Malaysia. The lack of consistency between the accounts of the events at the hotel from the RMC and ACS officers brings into question, nevertheless, the veracity of other statements and recollections by the officers concerned.

19.82 The Committee was advised that the second Senior Inspector left for Singapore at 10.45pm whilst the RMC officer returned to Kuala Lumpur.[79]

19.83 Copies of cables from the High Commission in Kuala Lumpur, provided to the Committee by DFAT, alluded to possible erasure of departure records from Penang.[80] Although raised during a public hearing,[81] this matter was not pursued by the Committee.

19.84 It is evident to the Committee that both ACS officers had left Malaysia without further completing their inquiries. Although at a public hearing one of the Senior Inspectors agreed with the proposition that they had completed

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77. Evidence, p. S2371.
78. Evidence, p. S850.
79. Evidence, pp. 1179 and K2774.
80. Evidence, pp. S10881 and S10902.
81. Evidence, p. 1189.

all of the objectives,[82] he later acknowledged that two of the eight objectives had not been achieved.[83]

19.85 The Committee was surprised that the Senior Inspectors were prepared to decamp from Malaysia before completing their objectives, paying extra for tickets with their own credit cards, paying for accommodation they didn't use, and being prepared to abandon their luggage only, as they would have it, on the threat of an injunction and the advice of a lawyer to leave 'as soon as practicable.'

19.86 The Committee concluded that the evidence points to the Senior Inspectors being panicked into precipitous action by some unadmitted event. Such an event was the certain knowledge that an injunction had been issued and was to be served on them.

19.87 The Committee noted a comment in a report from the Acting Regional Manager, Investigation to his National Manager, dated 19 September 1988:

> ... (the two Senior Inspectors) became aware that an Injunction may have been issued but were unable to confirm.
>
> Deciding not to wait for confirmation of the Injunction, ... (they) left Penang, late p.m. 16 September for Singapore.[84]

The Events After the Senior Inspectors Left Malaysia

19.88 Evidence submitted to the Inquiry showed that on 17 September 1988 the two Senior Inspectors sent a report to Australia from Singapore listing the results of their inquiries.[85] After their appointment with the ACS lawyer in Singapore and extensive consultations involving themselves and Sydney, and between the ACS and the DPP in Sydney, it was decided that the two Senior Inspectors should return to Australia.[86] They arrived on 20 September 1988 bringing with them the documents they had obtained.[87]

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82. Evidence, p. 1075.
83. Evidence, p. 1111.
84. Evidence, p. S8979.
85. Evidence, pp. S8138 and K3120.
86. Evidence, p. 1182.
87. Evidence, pp. K2774 and K3106.

19.89 Despite the controversy surrounding their activities in Malaysia and the effect on relations with that country, evidence before the Committee indicated that the Senior Inspectors did not prepare a formal report to the ACS or the DPP of their activities apart from their account of 17 September.[88] There thus appears to have been no internal inquiry into those events. Sworn statements were prepared, however, 'for use in the prosecution which covered the full range of activities (they) undertook in Malaysia.'[89]

19.90 After their return, the Senior Inspectors spent much time in consultation with officers of the DPP who had become embroiled with the court case in Malaysia resulting from the Ex-Parte Order. A submission from the DPP stated that the Senior Inspectors were advised not to return to Malaysia nor to return the documents pending an appeal against the Order.[90]

19.91 The DPP provided the Committee with file notes of conversations between the DPP and Customs officers which took place in September 1988. The notes disclosed that there was disagreement concerning the return of the documents taken from Malaysia. A file note dated 4 October 1988 revealed that the ACS National Manager had in fact directed that the documents be returned but a letter from the DPP on 27 September 1988 had caused him to withdraw this directive.[91] The NSW Director of Investigation told the DPP on 28 September 1988 that the Controller General of the RMC was 'strongly disposed' to return the documents but the DPP again advised they should be retained.[92]

19.92 On 2 February 1989 the RMC wrote to the ACS requesting that the documents be returned to Malaysia.[93] On 21 February the DPP advised the ACS not to accede to this request,[94] and consequently, on 28 March 1989, the ACS wrote to the RMC refusing to return the documents.[95]

19.93 The DPP told the Committee in a submission that its advice to retain the documents 'was vindicated by the outcome of the (Malaysian High Court) case.'[96]

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88. Evidence, pp. 1194 and S8128.
89. Evidence, p. 1194.
90. Evidence, p. S136.
91. Evidence, p. S2332.
92. Evidence, p. S2329.
93. Evidence, pp. S865-6.
94. Evidence, p. S863.
95. Evidence, pp. S861-2.
96. Evidence, p. S137.

19.94 Meanwhile, the RMC applied to have the order set aside on technical grounds[97] whilst the Commonwealth made a similar application based on the grounds of sovereign immunity. The court was also told that the ACS officers had not been served with the Order and so were not party to the case. The High Court of Malaysia rejected the Commonwealth's application on 15 June 1989, whereupon the Commonwealth appealed to the Malaysian Supreme Court. On 9 February 1990 this appeal was upheld.[98]

19.95 The Committee noted therefore that the 'vindication' claimed by the DPP was based not on the facts of the taking of the documents but on whether representatives of the Commonwealth of Australia on official duties could be subject to injunctions in another country. The Committee deplores the apparent attitude of the DPP indicated by their submission.[99]

Relations with Malaysia

19.96 A consequence of the ACS actions against Midford has been the effect on trade between Australia and Malaysia. In 1977 concerns about trade led to the 'secret arrangement.' At a public hearing Midford told the Committee that the Malaysian government was upset about the three to one trade imbalance with Australia and that 'one of the reasons why we were encouraged to go to Malaysia by the Prime Minister's Department was to correct this imbalance.'[100] (This aspect is discussed further in Chapter 20.)

19.97 The cessation of Midford Malaysia's activities caused a significant reduction of Malaysia's exports to Australia. The submission from Midford's Tariff Advisor stated that the trade imbalance has risen 'from $55.283 million in 1988/89 to $261.719 million in 1989/90.'[101] Thus the causes of poor international relations reported in the press in July 1977[102] resurfaced just over a decade later.

19.98 A second source of friction between Malaysia and Australia stemmed from the events surrounding the departure of the Senior Inspectors from Malaysia. The evidence supplied by DFAT indicated that the Ex-Parte Order was greeted in Malaysia by 'prominent press coverage' and the subsequent disallowing of the

97. Evidence, p. S9798.
98. Evidence, pp. 136-7.
99. Evidence, p. S137.
100. Evidence, p. 53.
101. Evidence, p. S50.
102. Evidence, p. S773.

petition to set aside the Ex-Parte Court Order was similarly covered.[103] The judge recommended in his judgement the 'preferring (of) criminal charges and contempt proceedings, if any, against the Respondents who are culpable.'[104] This recommendation was subsequently reported in the press.[105]

19.99 Notwithstanding the Commonwealth's successful appeal in this matter, the actions of the Senior Inspectors were identified by a Senator in April 1991 as being one of the causes of bad relations between Australia and Malaysia. He opined that the Malaysian government had 'formed the impression that we failed to respect their courts which was on a Customs matter.'[106]

The Admissibility of the Documents Obtained in Malaysia

19.100 The Committee feels it is contentious whether the documents obtained in Malaysia would have been admissible in any subsequent trial of Midford in Australia. The ACS officers acknowledged to the Committee that 'evidence obtained by coercion or improper means' would have prevented the use of the material.[107]

19.101 Under the provisions of the Nairobi Convention and Articles 6 and 7 of the General Agreement on Tariff and Trade, both the foreign government and the firm involved has to be notified and be agreeable to the providing of information.[108]

19.102 The affidavits sworn before magistrates in Malaysia bring into question whether the documents that were obtained were freely handed over and there is an allegation of the offer of inducements. The Chief Inspector in charge of the Midford investigation, however, told the Committee that he felt that the sworn statements of his officers carried greater weight:

> The people here are subject to sanction. We are under oath and we are subject to vigorous cross-examination. The people who made those affidavits are not. In a court of law (in Australia) they would not be acceptable.[109]

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103. Evidence, p. S9629.
104. Evidence, p. S10029.
105. Evidence, p. S9770.
106. ABC Radio: *World Today*, 17 April 1991.
107. Evidence, p. 1129.
108. Evidence, p. 1177.
109. Evidence, p. 1905.

19.103 However, as stated many times during the Inquiry, the Committee is not a Court. The Committee does not agree with the witness, as the Malaysian affidavits were also made under oath and there was nothing which precluded the seeking of clarification or amplification from those witnesses if the Committee so desired. The Committee is also unaware of any lesser sanctions applying in Malaysia in respect of the giving of false evidence.

19.104 A similar comment to that of the witness was also made by the Comptroller-General at the final public hearing. He claimed that individual Customs officers were 'subjected to intensive interrogation, innuendo and unfounded allegations. In contrast, it seems the evidence of the other witnesses has been accepted at face value.'[110]

19.105 Such sentiments are totally rejected by the Committee. If Customs officers were disbelieved by the Committee it is because they lacked credibility.

19.106 The Committee considered that the fact that the conduct of the Malaysian investigation was the subject of conflicting assertions and the probable lack of co-operation by any Malaysian witnesses (those thought by the Senior Inspectors at the time to be possible witnesses had themselves alleged coercion) would surely have cast doubt on the general tenor of the investigation. In addition, a case could be made that the documents were obtained in a manner contrary to the Nairobi Convention and GATT and therefore they would have been inadmissible as evidence.

19.107 The DPP submitted to the Committee that:

> The fact that evidence may have been obtained by improper or unlawful means does not necessarily make it inadmissible. ... A judge may take a dim view if it appears that an investigator acted in flagrant and deliberate disregard of the law. The judge may take a different view if the illegality was unintended or unavoidable or if it occurred through innocent mistake. It is difficult to say whether material obtained in Malaysia ... would have ultimately been admitted into evidence in a trial ... However, it can be said with some confidence that a trial judge ... would have placed no reliance on affidavits sworn in Malaysia (unless the deponents had

110. Evidence, p. 2133.

been assessed) and they had been subjected to cross-examination.[111]

19.108 The Committee was not convinced, however, that the actions of the ACS officers in Malaysia and their hurried departure could be described as 'unintended' 'unavoidable' or ... 'innocent mistake.'

19.109 The DPP case officer acknowledged to the Committee that the prosecution had copies of some of the Malaysian documents which had been obtained from other sources and statements obtained from witnesses covering Midford's Malaysian activities.[112] Charges had been laid some three months prior to the ACS officers' trip to Malaysia and the DPP considered 'that there was sufficient evidence to satisfy a prima facies case and a reasonable prospect of conviction.'[113]

19.110 The Committee feels therefore, that the Malaysian documents were of doubtful value. In hindsight, the 'icing of the cake' could not be justified in terms of the cost and the resulting souring of relations with Malaysia. The Committee agrees with the DPP case officer that 'We could have easily done without it.'[114]

Recommendations

19.111 **The Committee recommends that in the interest of promoting good foreign relations:**

- **the Australian Customs Service officers manual should include a section on behaviour expected of officers engaged in overseas investigations;**
- **That section should state that:**
  - **upon knowledge of a Court Order having been obtained the officers should cease activities and remain in the country and not attempt to circumvent the order;**

111. Evidence, pp. S3829-30.
112. Evidence, pp. 896-7.
113. Evidence, p. 895.
114. Evidence, p. 905.

- upon receipt of details of a Court Order, whether formally served or not, the officers are expected to obey it forthwith;

. Australian Customs Service Management should ensure that there is consistency in the keeping of diaries and notebooks by investigations officers. The correct method should be specified in the Australian Customs Service officers manual and Management should ensure it is complied with;

. Australian Customs Service Management shall ensure that, in accordance with the Customs Manual, entries in official notebooks, besides being signed and dated, shall indicate the time at which they were made; and

. the Australian Customs Service officers manual instruct officers in Australia to return documents obtained in overseas investigations which became subject to Court Orders if the return is officially requested by the equivalent Customs department of that country.

Chapter 20

THE CABINET DOCUMENTS

Committee - What did she say to you about them?

Witness - That they did not tell us anything more than we already knew.

ACS Chief Inspector commenting on the Cabinet Documents seen by the DPP.[1]

Background

20.1 Chapter 7 records that the ACS Director of Quota Operations in Canberra and members of the NSW Investigations team were advised in December 1987 that Midford was entitled to its offshore quotas under the provisions of the 'secret' agreement between Australia and Malaysia entered into in 1977.

20.2 That agreement arose when the then Prime Minister of Australia met with the ASEAN Heads of Government in Kuala Lumpur on 4 August 1977. Some two or three months prior to this, Australian exports to Malaysia started to be delayed at Malaysian wharves 'in protest against the withdrawal of Australian import quotas for shirts produced in Malaysia by Midford.'[2]

20.3 As the arrangements entered into were apparently contrary to the General Agreement on Tariffs and Trade, efforts were made to disguise and not publicise certain aspects of the details.

20.4 It was ascertained by the Committee that the eligibility requirements for the quotas were never enshrined in legislation, but instead came into existence through various Cabinet Decisions.[3]

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1. Evidence, p. 1252.
2. Evidence, p. S6667.
3. Evidence, p. 548.

Who saw the Cabinet Documents?

20.5 The Committee attempted to ascertain whether and when Customs, the AGS and the DPP obtained copies of the relevant decisions, but this proved not to be a straightforward task.

20.6 It was clear that the Cabinet decisions were not provided to the AGS by Customs in December 1987 and therefore the advice provided to pursue Crimes Act charges with the DPP was based on an incomplete and incorrect understanding of the relevant provisions.[4] Chapter 4 provides details.

20.7 Also, it was established that the Director of Quota Operations cancelled the quotas without reference to either the relevant Cabinet decisions or the actual quota instruments.[5] In fact, the AGS even told this officer that it did not matter that the ACS could not locate the original quota conditions.[6]

20.8 In addition, notwithstanding that Customs claimed that copies of all significant Cabinet documents were provided by the ACS when the matter was first referred to the DPP,[7] other records, including copies of the original briefs, do not support this contention.[8] In fact, Customs went on to advise that:

> The Cabinet documents were not provided to the DPP under cover of a formal briefing document from ACS. There was no such document in the Midford case.
>
> It was not necessary for ACS to prepare formal briefing documents for the DPP in view of the way the case was prepared for prosecution. There were numerous meetings between the investigators and DPP officers during which the case was discussed and lines of inquiry were suggested. Relevant documents were discussed at those meetings. The preparation of formal briefing documents would have served no purpose. The DPP has made no complaint about the way that this matter was referred to it.

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4. Evidence, pp. 1747-51.
5. Evidence, p. 1748.
6. Evidence, pp. 2058 and S3952.
7. Evidence, pp. 2058 and S8955.
8. Evidence, p. S2224.

> The DPP did not provide written advice to ACS in relation to any Cabinet documents.[9]

20.9 The DPP case officer advised that she travelled to Canberra specifically to examine the relevant Cabinet documents.[10] The Committee discovered, however, that she did not take any copies and hence there was no opportunity for the other officers within the DPP to confirm her opinion that the documents 'did not tell us anything we did not already know.'[11] In addition, it was apparent that the ACS and DITAC only saw drafts of the Cabinet documents, rather than the actual formal Cabinet decisions.[12] Whether the DPP saw the latter was not entirely clear.[13] The Committee was told that at one stage draft copies of some of the Cabinet documents were included in the prosecution brief.[14]

20.10 In any case, the Cabinet documents were apparently dismissed by the DPP and Customs investigators as 'not relevant to the prosecution.'[15] However, it is not clear why this view was formed. As it turned out, it was a most disastrous opinion.

Access by the Defendants

20.11 Although Midford and their Tariff Advisor had not seen the actual Cabinet documents, together with their legal advisors they were aware that these documents were vital to the defence case. Attempts were therefore made to gain access to these documents and in December 1988 a subpoena as issued.[16] Initially, these attempts were resisted by the prosecution. The Department of Prime Minister and Cabinet objected to their release.[17] However, in May 1989 the AGS advised Midford's solicitors that access would be granted to all except six of the documents in question.[18] These were the actual Cabinet decisions, for which privilege was claimed against their release. A further subpoena promptly followed to obtain release of these Cabinet decisions.[19]

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9. Evidence, p. S8955.
10. Evidence, pp. 987-8 and S738.
11. Evidence, pp. 985 and 1252.
12. Evidence, p. 1700.
13. Evidence, pp. 898-903.
14. Evidence, pp. 1252-4.
15. Evidence, pp. 937, 1253 and S3270.
16. Evidence, pp. S6927 and S4157.
17. Evidence, p. 2063.
18. Evidence, pp. S6232-3.
19. Evidence, p. S6938.

20.12 On 30 May 1989, the Cabinet Office agreed to a conditional release of the documents, restricting access solely to the legal representatives of Midford.[20]

20.13 Just when these documents were provided to the defence was not disclosed. However, it was only days after they were released by the Cabinet Office that the DPP agreed to drop some of the Crimes Act charges.[21]

20.14 During the Committal proceedings, the defence successfully sought to have three 1977 Cabinet decisions tendered as evidence, although at the time this was done in such a way as to prevent public disclosure of their contents.[22]

20.15 The ACS and DPP repeatedly argued, both in the committal proceedings and to this Inquiry, that the conditions attaching to the quotas during the 1980's were the same as those applying in the late 1970's.[23] It was therefore not surprising that the Magistrate found the defendants had no case to answer, as the Cabinet decisions setting up the quota scheme as it operated until 1982 disclosed without doubt that Midford met the eligibility criteria.

20.16 However, in what appeared to be fairly obvious attempts to have it both ways, the DPP and ACS also argued following the failure of the committal proceedings that the schemes were in fact different and the post 1981 arrangements were more stringent, tying quota eligibility to goods wholly manufactured by the Midford Malaysia factory.

20.17 Support for this contention, however, was fairly limited. Customs, the DPP and DITAC between them were all unable to produce even a single authoritative document that specified the goods imported had to be 'manufactured' by Midford Malaysia. As indicated elsewhere in this Report, the requirement in this respect was merely that the goods had to be 'sourced' from that Company.

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20. Evidence, p. S6942.
21. Evidence, p. S129.
22. Evidence, p. S10527.
23. Evidence, pp. S619-20 and S6874.

What Cabinet Decided

20.18 On 15 August 1977 Cabinet decided that it would reserve 15 per cent of quotas for textiles, apparel and footwear 'for cases involving anomalies.' The Cabinet Minute records that:

> This will include firms who invested in offshore production facilities prior to the introduction of quotas with the objective of placing a substantial part of the output of these facilities on the Australian market.[24]

20.19 The relevant Minister was directed to report back to Cabinet 'as soon as possible' with the 'criteria to be applied in deciding quota allocations.'[25] Cabinet also:

> (a) noted that the proposed reservation of quota for cases involving anomalies should;
>
> (i) assist in overcoming the particular cases drawn to the Prime Minister's attention during his recent discussions with ASEAN leaders; and
>
> (ii) enable some measure of increased access to Australian markets for ASEAN countries.[26]

20.20 The following Cabinet decision of 4 October 1977 specified that for cases involving anomalies:

> . the prime criterion for special allocations of quota be to provide scope for ASEAN countries to increase their share of the available Australian market, with first priority being given to consideration of requests from firms known to have established off-shore operations in ASEAN countries prior to the introduction of quotas;
>
> . (recommendations on those firms to receive quota should take) into account the Government's intention

24. Evidence, p. S10557.
25. Evidence, p. S10557.
26. Evidence, p. S10558.

that the use of the anomalies reserve will be primarily to maximise trade opportunities for ASEAN countries; and

- where a balance of the anomalies reserve remains after consideration of applications involving sourcing on ASEAN countries, this balance be used in resolving anomalies where other sources of supply are involved.[27]

20.21 The 1977 Cabinet documents are reproduced in full at Appendix E.

20.22 The Minister's submission to Cabinet also reinforced that it was the country of origin which was important in determining eligibility, as the following extracts disclose:

> Criteria
>
> The prime criterion for special quotas to provide scope for ASEAN countries to increase their share of the available Australian market is in line with the message conveyed to ASEAN Governments by the Heads of Australian Missions and Cabinet Decision No 3634 of 15 August 1977. Giving first priority to consideration of requests from firms which invested in off-shore operations in ASEAN countries prior to the introduction of import quotas is also in line with that Cabinet Decision.[28]
>
> Monitoring
>
> With conditioned Determinations, Customs control procedures are available to check whether or not anomaly conditions are being met in respect of sourcing. If Determinations are not conditioned in relation to sourcing the quotas concerned could be utilised for goods from sources other than ASEAN.[29]

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27. Evidence, p. S10560.
28. Evidence, p. S10564.
29. Evidence, p. S10565.

Publicity

> For international relations reasons it would be desirable that there be no public mention of trade with ASEAN being a condition for receipt of a special quota.[30]

Publication of 1977 Cabinet Documents

20.23 On 10 August 1992 the Department of the Prime Minister and Cabinet advised that the Committee's request to place all the relevant Cabinet documents on the public record had been reconsidered.[31] An earlier request had been declined in May 1991.[32]

20.24 The Cabinet Office within that Department agreed to release the three documents that had come into the public domain by order of the court during the committal proceedings. However, the advice stated that:

> In relation to other Cabinet documents made available on a confidential basis in the court proceedings and also to your Committee, the view remains that as they are Cabinet documents less than 30 years old, they should continue to be treated on a confidential basis. Notwithstanding that an attempt may have been made to tender a number of them at the committal hearing, the fact is that only the three referred to above were accepted as exhibits by the Court. My advice is that the remaining documents were still subject to the earlier order of the court preventing publication to persons who were not parties to the proceedings.[33]

20.25 The other Cabinet documents referred to above mainly covered the extension of the anomalies quota scheme for the period 1982 to 1989. As indicated in the advice from the Cabinet Office, the prosecution had unsuccessfully sought to tender these later documents to support its claims that there were changes in the scheme that came into effect on 1 January 1982. Prior to this, however, the DPP had advised that the 1977 documents were part of the public record.[34] When clarification was sought, the DPP advised in April 1992 that in its opinion, the

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30. Evidence, p. S10567.
31. Evidence, p. S10527.
32. Evidence, p. S10527.
33. Evidence, pp. S10526-7.
34. Correspondence to the Secretariat dated 4 March 1992.

Magistrate had made a general order on 5 June 1989, prior to any Cabinet documents being tendered, that allowed all parties to the proceedings to have access to the documents. That order was made subject to the condition that:

> Until such other application or other order, the documents referred to as the 'Cabinet Minutes' not be published to persons who are not parties to these proceedings.

It also advised that:

> No reference was made to that order when the relevant Cabinet documents were subsequently tendered and accepted as exhibits by the Magistrate.
>
> The view the DPP took at the time was that the order admitting the documents into evidence overrode the condition attached to the earlier order and that, accordingly, the condition did not apply to the documents once they became exhibits.[35]

20.26 In time, the Cabinet Office came to accept this view, following the matter being raised in the Senate and correspondence between the Committee and the Minister for Justice.[36] It would appear the Cabinet Office had not been aware that the 1977 Cabinet documents had been accepted by the court as exhibits.[37]

Later Cabinet Documents

20.27 In the Committee's view, it is unfortunate that the remaining Cabinet documents could not be released. Examination of those documents, provided to the Inquiry in confidence, has not revealed any particularly sensitive matters that might mitigate against publication on public interest grounds. It appears that strict adherence to the '30 year rule' is the sole basis for refusing permission for publication.

20.28 The Committee is therefore constrained in commenting on the contents of those documents. Nevertheless, it can be said that they are not as

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35. Evidence, p. S5881.
36. Evidence, p. S10527.
37. Evidence, p. S10527.

supportive of the prosecution case as some witnesses have claimed to the Inquiry. In fact, a joint advice from the Senior and Junior Prosecution Counsel stated in respect of the arrangements commencing in 1982 that 'There is no reference in the Cabinet document to the criteria for eligibility for quota under the new scheme.'[38] It was also pointed out that the 'Cabinet documents have proved to be deficient in establishing that the policy for 1986 and 1987 was as represented by DITAC.'[39]

Recommendations

20.29 **The Committee recommends that:**

- **where Cabinet documents are likely to be of importance to intended Commonwealth prosecution proceedings, the Australian Government Solicitor or Director of Public Prosecutions be permitted to access and copy those documents so that adequate legal consideration can be given to their contents and relevance. By this the Committee does not, however, wish to preclude the placing by the Cabinet Office of appropriate restrictions on that access by the Commonwealth prosecuting agencies preventing any wider dissemination of the material so obtained; and**

- **the Cabinet documents pertaining to the Midford case be released into the public domain.**

38. Evidence, pp. S2635-6.
39. Evidence, p. S2674.

Chapter 21

JOINT PROSECUTION COUNSELS' ADVICE

> *A fortiori, the prospect of favourable decisions under section 41 (6) of the Justices Act is unlikely and the prospect of conviction by a jury extremely remote.*
>
> *Joint Memorandum of Advice from Counsel*[1]

Introduction

21.1 On 26 June 1989, the Senior and Junior Counsel for the Prosecution provided the DPP with a 'Joint Memorandum of Advice.'[2] The Committal hearings had commenced just three weeks before and this advice commented on the difficulties encountered during those proceedings, culminating in an opinion shared by both Counsel that:

> There are fundamental problems in submitting that ... the elements of offence of conspiracy to defraud ... have been proved. The prospect of conviction by a jury (is) extremely remote.[3]

21.2 Following an examination of this advice, the DPP concurred with their views and subsequently withdrew all charges on 30 June 1989.

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1. Evidence, p. S2676.
2. Evidence, pp. S2622-76.
3. Evidence, p. S2676.

Problems with the Prosecution Case

21.3 The joint advice makes it clear that:

- there was no direct evidence and therefore never a strong case to support the conspiracy charges, as they were based merely on inferences;[4]
- both counsels 'were not asked to advise generally before 5 June 1989', the day the committal hearings commenced;[5]
- the relevant documents for the prosecution were not examined in their proper chronological context until just prior to commencing the committal hearings;[6]
- when this was done, it was revealed that the statements and representations by the defendants previously believed to be misleading were actually true at the times they were made;[7]
- the examination of the documentation in its proper context revealed that the intentions of the defendants had been to seek to fulfil the requirements for retaining Midford's quota entitlements;[8]
- in the limited time available it was not possible for Prosecution Counsel to analyse the evidence available against each defendant individually and its sufficiency or otherwise;[9]
- there were more than 15 lever arch folders of evidence in the briefs given to Counsel. Attempting *comprehension and interpretation of this massive* volume of material prevented identification and remedying of significant omissions in that evidence and the mechanics of its proof;[10]

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4. Evidence, pp. S2625 and S2649.
5. Evidence, p. S2673.
6. Evidence, p. S2649.
7. Evidence, p. S2652.
8. Evidence, pp. S2642, S2650, S2652 and S2657-65.
9. Evidence, p. S2624.
10. Evidence, pp. S2631 and S2647-8.

- many of the omissions and defects in the form and substance of the statements detected by Counsel and advised to the DPP and Customs 'were not ultimately remedied' when those statements were re-taken, despite numerous warnings to the DPP from Counsel regarding the strict requirements of the Justices Act;[11]

- the statements tendered in the committal proceedings were 'objectionable at least in part' and contained 'indirect speech, conclusions, hearsay, secondary evidence of the contents of documents and some irrelevant material.' In addition, 'some necessary evidence had not been included;'[12]

- the final statement of a witness whose evidence was considered to be 'pivotal to proof of dishonest agreement... had a markedly different flavour from that initially prepared by Customs,' which 'weakened rather than strengthened' the prosecution case;[13]

- executive actions by DITAC and Customs, such as 'the deliberate making of unconditional Determinations', prevented any acts by the defendants from becoming a conspiracy to defraud;[14]

- it was 'impossible to identify with precision the offshore criteria'; and[15]

- in a statement to Midford of DITAC's view of the requirements to be met in order to be eligible for the quota, 'the criteria as represented are not to be found in any Cabinet document, nor in any authoritative and admissible material.'[16]

21.4 Other evidence received indicates there were a number of adjournments during the month of June 1988 in order for the prosecution to

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11. Evidence, pp. S2629-30.
12. Evidence, pp. S2630-1.
13. Evidence, p. S2653.
14. Evidence, pp. S2634 and S2674-5.
15. Evidence, p. S2636.
16. Evidence, p. S2640.

resubmit the particulars.[17] It appears this was done because the case being presented to the Magistrate by the prosecution was unclear.[18]

Evidence by DITAC and Customs Witnesses

21.5 The Counsel also commented on the evidence given during the committal proceedings by the DITAC and ACS witnesses. For the DITAC witness it was stated that:

> ... assertions in his written statement about the criteria for the allocation of quota were incorrect. Having had his attention drawn to relevant Cabinet documents he conceded that the prime criterion for such allocations was the importation of goods from ASEAN countries, with priority being given to importers who had established an offshore manufacturing facility. This became known as the 'hidden agenda'.
>
> This was a reversal of some significance because the prosecution relies upon statements in correspondence from the Commonwealth to M.P. that the criteria governing the seven year scheme from 1st January 1982 were the same as those applicable to the 'anomalies' scheme. Further, the goods imported in 1986 and 1987 were from an ASEAN country (Malaysia).
>
> He suggested that importation from an ASEAN country could itself be an anomaly and gave evidence that importers without an offshore manufacturing facility could be and, he thought, were granted quota at the same preferential rate as M.P. even during the seven year scheme.
>
> That evidence also must be considered in light of the fact that in 1986 and 1987 M.P.'s relevant importations were still from an ASEAN country.[19]

21.6 Counsel described the evidence given by the ACS witness as 'hugely damaging to the prosecution case' and commented that during the hearings this

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17. Evidence, pp. 143-4 and 223-4.
18. Evidence, pp. 223-4.
19. Evidence, pp. S2632-3.

witness 'conceded that he had heard a rumour of the true ASEAN preference criterion.'[20]

21.7 The fact that the above criticisms and comments were actually made by the two Counsel engaged by the DPP to prosecute the case was, in the Committee's view, of major significance.

21.8 With all these demonstrable flaws in the prosecution case, it is little wonder that the proceedings were withdrawn. Even disregarding the benefit of hindsight, it is hard to imagine why any of the various Counsels advising on the material confirmed that a prima facie case for prosecution existed. Nevertheless, Customs disregarded the messages contained in the joint advice and, immediately following withdrawal of the charges, applied pressure for fresh Crimes Act charges to be laid in respect of the quota matters. Ultimately, the DPP declined to proceed.

21.9 Ever undeterred in their pursuit of Midford, Customs then attempted prosecution under the Customs Act for the financial accommodation matter. Chapters 14 and 15 provide details.

20. Evidence, p. S2634.

Chapter 22

DIRECTOR OF PUBLIC PROSECUTIONS' COMMENTS ON FAILED COMMITTAL PROCEEDINGS

> *We expect senior public servants, when talking of government policy, to be able to tell you genuinely what government policy is.*
>
> *Acting Director of Public Prosecutions.*[1]

The Two Key Witnesses

22.1 Following withdrawal of the Committal proceedings, the then DPP personally examined the statements tendered by the two key witnesses[2] and the transcript for those hearings, prior to reaching the decision that fresh charges should not be laid.[3] On 18 September 1989 he signed a 15 page document setting out the reasons for his decision.[4]

22.2 In respect of these two witnesses, he recorded that each had signed their statement, which acknowledged that the contents thereof were true and correct, each had been assessed as suitable to attest to the matters set out in those statements, and 'These two witnesses were crucial to the case, and without their evidence, the charges could not have been proved.'[5]

22.3 It was the DPP's view that had the witnesses sworn up to their statements, the case of conspiracy to defraud would almost certainly have been made out. He added that:

> Regrettably, and in circumstances which it would have been difficult to have foreseen, each witness departed significantly

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1. Evidence, p. 938.
2. Evidence, p. S618.
3. Evidence, p. S628.
4. Evidence, pp. S616-31.
5. Evidence, p. S618.

> from the contents of his statement when cross-examined during the course of the committal.[6]

22.4 It is not clear whether the DPP at this time saw the Cabinet documents or other material which disproved the statements made by the witnesses. He certainly seemed to take the view that the statements were accurate and that the witnesses made 'concessions' which left 'the prosecution case in tatters.' The Committee does not agree, however, with the DPP's sentiments and suggests that a more thorough testing of the contents of those statements by the DPP prior to them being tendered would have detected the errors they contained.

22.5 Whilst it could be argued that if the DPP is provided with a sworn statement to be used in evidence, it should be able to be relied upon and the witness suffer any sanctions for providing false evidence, it would seem to the Committee to be prudent and professional for the DPP to at least test the witness and his or her statement to detect the more obvious weaknesses likely to be targeted by the defence.

22.6 The DPP noted that both witnesses had stated that the eligibility criteria and conditions for use of quota had not changed and the goods had to be produced or manufactured by the Malaysian subsidiary.[7] He said it was:

> ... astonishing, therefore, to turn to the evidence actually given by these two senior officers and to note the extent to which they departed from their earlier statements under cross-examination.[8]

22.7 He noted the ACS witness admitted he had heard of the hidden agenda to give preference to ASEAN countries and that it was a deliberate decision not to specify the conditions for the quotas in the Government Gazette, even though this was required under the Customs Act. Turning to the DITAC witness, he observed that this officer admitted he had no knowledge of the ASEAN preference and that he did 'not know the precise rules of the allocation.'[9]

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6. Evidence, p. S618.
7. Evidence, pp. S619-20.
8. Evidence, pp. S621-2.
9. Evidence, pp. S622-3.

22.8 The DPP described this as a 'staggering concession for him to have made.'[10] He added that this officer's:

> ... role as a witness was to know the precise rules of the allocation, and to attest to them. It now seems that he was not the appropriate person from within his department to give evidence about these matters. A good deal of what he had to say was based upon hearsay, and supposition. He chose to make concessions... which entirely demolished the very foundations of the prosecution case.[11]

22.9 An answer given by the witness concerning the public being deliberately deceived in the Government presentation of the scheme, was that 'non-disclosure of certain elements of the plan doesn't necessarily mislead anybody. It doesn't leave them fully informed.' The DPP considered this to be 'as devastating an answer to a prosecution case built around misrepresentation by omission as one could receive from a prosecution witness.'[12]

22.10 A number of documents subpoenaed by the defence that were not included in the prosecution brief were acknowledged by the DPP as providing 'some foundation' for the claim that there was a hidden agenda.

22.11 The DPP's comments continued with:

> (The DITAC witness) concedes that he did not know the real policy regarding quota allocation (and further) concedes that the main objective of the original scheme was to provide scope for increasing trade from ASEAN countries. He retreats entirely from what is in his statement, and accepts that had he read all material documents and not relied simply upon what he had been told by other officers, he might have produced a very different statement. It is almost as though (the witness) is going through an awaking process during the course of his cross-examination.[13]

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10. Evidence, p. S623.
11. Evidence, p. S623.
12. Evidence, p. S623.
13. Evidence, pp. S623-4.

22.12 This last comment referred to the witness acknowledging the true position as revealed in the documents subpoenaed by the defence.

22.13 One further answer commented upon by the DPP was the acknowledgment by the DITAC witness that many companies were permitted to import goods from ASEAN countries at the same rate of duty as was paid by Midford, even though those companies did not have any off-shore ventures.

Concerns Expressed by the DPP

22.14 Some legitimate but mostly unanswered questions were contained in the DPP's advice, including:

> . to what extent could it reasonably have been anticipated that the witnesses would depart from their statements?
>
> . how did they come to be chosen as the witnesses to give this crucial evidence in circumstances where they were ill-equipped to deal with cross-examination?
>
> . how was it that documents shown to them in cross-examination, having been subpoenaed by the defence, had not been drawn to the attention of the prosecution as being relevant?
>
> . were they telling the truth in cross-examination?, and
>
> . was there a hidden agenda of the kind described, or did they simply not understand the complexity underlying the policies adopted?[14]

22.15 It seems that the DPP still believed there was originally a perfectly sound case, which he noted had been confirmed by two separate Senior Counsel, and 'what occurred was that the principal prosecution witnesses departed almost entirely from their statements.'[15]

22.16 It also appears that he did not realise the extent to which the evidence provided to both Counsel and to him was selectively and misleadingly incomplete.

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14. Evidence, p. S625.
15. Evidence, p. S625.

One of the more revealing of his comments of 18 September 1989 was that 'It is worth noting that even now, Customs continue to provide different versions of what the true policy was.'[16] At that time, Customs was pushing for fresh Crimes Act charges to be laid.

Why The DPP Didn't Proceed with Further Charges

22.17 The decision by the DPP not to proceed with further charges was made on public interest grounds. Thirteen factors were listed as having been taken into account in arriving at that decision.[17]

22.18 The Committee considered there was more than a touch of irony in his following comment:

> The DPP cannot permit itself to be persuaded not to prosecute merely because of concern that the defendants have access to the best possible legal advice, and are wealthy enough to be able to take every point through the courts, and turn a prosecution into a protracted and difficult exercise. I recognise the importance of the ACS being able to rely upon the truthfulness of those with whom it deals.[18]

22.19 The Committee considers that the DPP failed to grasp the nettle. He and his officers had been fundamentally misled by Customs and DITAC witnesses and had dismissed as irrelevant the very material that resulted in the comprehensive failure of the prosecution. It is inconceivable that this could be blamed on the wealth of the defendant and their access to proper legal representation. In addition, he seems to have completely overlooked any departures from truthfulness on the part of the ACS.

The DPP's Position on the Committal Hearings

22.20 Unfortunately, the Committee was not provided with an opportunity to examine the then DPP, as his term in that position expired just prior to the relevant hearing. It seems, however, that the acting DPP, self acknowledged not to

16. Evidence, p. S625.
17. Evidence, pp. S628-9.
18. Evidence, p. S630.

have had any direct role in the case,[19] shared his views, in that he told the Committee when it was put to him that the DPP had not correctly prepared their case:

> The bottom line is that these people were very lucky. That is the bottom line, I am afraid.[20]

22.21 Even the DPP case officer insisted that the DITAC witness' statement was supported by the documents in that Department's files and said that 'Everything that he said was borne out in an examination of documents that were provided to us.'[21]

22.22 Later that same officer said 'We still maintain that the documents did not cause any trouble for our case.'[22]

22.23 In view of the evidence, the Committee could no more agree with these claims than another made by the same officer that the Magistrate had not been critical of the way the DPP had compiled the prosecution case.[23] Notwithstanding the Magistrate's advice and that of Senior and Junior Counsel, it was apparent that the DPP still considered that Midford had a case to answer. The comment made at a public hearing by the acting DPP was particularly revealing:

> You accuse us of being arrogant about that, but we still have a particular perception about it - a perception that you do not share ... We could have done it a bit better. If hindsight does not teach us that, we will repeat the mistakes. We will not repeat our mistakes ... things really unwound in a way that we could not have anticipated and that led to an unfortunate result from everyone's point of view.[24]

22.24 The Committee does not believe, however, that the defendants would agree that the result was unfortunate!

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19. Evidence, p. 853.
20. Evidence, p. 934.
21. Evidence, p. 934.
22. Evidence, p. 941.
23. Evidence, p. 875.
24. Evidence, p. 950.

Who's Blaming Whom?

22.25 The Committee noted that the initial submission to the Inquiry from DITAC sought to absolve the Department from any fault in the failure of the Midford case. In particular, the DITAC submission emphasised that all relevant documents had been provided to the ACS and DPP and that the Department was not involved in any cover-up.[25] Chapter 25 of this Report also refers.

22.26 Witnesses from the DPP, however, consistently sought to attribute the failure of the case to the performances during the committal proceedings of the two key witnesses from DITAC and the ACS.

22.27 The ACS, on the other hand, seemed to be of the opinion that the DPP was at fault.[26]

22.28 Although the agencies all blamed each other, the Committee's view is that each of these organisations should accept responsibility for their part in the failure of the case and the other shortcomings identified in this Report.

Recommendations

22.29 **The Committee recommends that:**

- **witness statements and other evidence gathered by the Australian Customs Service and intended for use in Commonwealth prosecution proceedings be more critically examined by the Director of Public Prosecutions to detect errors prior to that evidence being tendered.**

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25. Evidence, p. S742.
26. Evidence, pp. 986 and 2061-2.

Chapter 23

THE MAGISTRATE'S COMMENTS

The Magistrate's summation has been studied carefully. It is his opinion. The ACS does not share his view and in fact strongly disagrees with it.

ACS National Manager of Investigation[1]

The Comments

23.1 Following withdrawal of the prosecution proceedings on 30 June 1989,[2] the Magistrate determined what costs should be awarded to Midford and its Tariff Advisor.[3]

23.2 On 8 February 1990, costs of more than $355 000 were awarded.[4] In so doing, the Magistrate also provided the following concluding comments:

> I'm of the opinion that there are special and unusual features which operated against the Prosecution in this case. The linch-pin in the Prosecution case in my opinion, was the existence of conditions tied to the Midford import quota. It is the proof of the condition or conditions to which I directed (the Prosecutor) to present to me. I conceded that the counsels for the Defendants were embarking on a much wider broadside based on a submission regarding s273 of the Customs Act. Indeed even as the case opened there was a huge gap in the respective approaches, but which in the end would have still necessitated in establishing the conditions attaching to quota.
>
> The two principal witnesses, (from DITAC) and (Customs), at least the principal witnesses at that stage were called to prove the conditions. I have no doubt whatsoever that they

1. Evidence, p. S719.
2. Evidence, p. S239.
3. Evidence, p. S74.
4. Evidence, p. S91.

were never in a position to prove the conditions and it is an inescapable conclusion and one I find without hesitation that either these two gentlemen either misled the Prosecution or the Department officers selectively provided the information to their superiors on the basis of these conditions. As was disclosed from the Cabinet papers and other confidential papers, a cover-up permeated throughout the Department. I find it totally unbelievable that (the DITAC witness) knew very little of the Cabinet paper disclosures. In my opinion (these two officers) were totally discredited. It was either ignorance on their part, which I find too difficult to accept, or their desire to further plead ignorance in an attempt to avoid embarrassment in the carrying out of Government policy, at least at that time, which to say the least was contrary to the General Agreement on Tariff and Trade, and which had not been made public and so it seems not up until the prosecution.

This prosecution was against a major supplier of clothing and was directed to the heart of that company, and of course (Midford's tariff advisor), whose integrity and reputation must have suffered immensely. There is some reference to the publicity this case generated in the affidavits filed which was adverse to the parties.

It is my strong opinion that there was a duty cast on those whose responsibility it was to prepare the statements for the prosecution, to have done so objectively and with no other motive than to disclose facts which were a fair representation of those facts. It is my opinion that this was not done. If it had, it would have been evident that either the conditions did not exist, as asserted, or they could not be proved.

I invited the Prosecution to put evidence before me which would establish those conditions, and an adjournment was granted for that purpose. It was not done. It is also of note that the Department of Industry, Technology and Commerce were approached in April 1988 to discuss the available evidence so it was not simply an error made because there was insufficient time for preparation.

Further, as the Prosecution unfolded and evidence from reading the transcripts, a mass of statements included in the prosecution brief were inadmissible and rejected. In my opinion insufficient thought was given to the inclusion of these statements. In my opinion this was done on such a scale as to unduly prolong the preparation for committal and the committal itself which caused the Defendants to incur

> costs far beyond what they could reasonably have expected to incur in litigation of genuine issues. I bear in mind the factors applied in Fountains Selected Meats and the 'special unusual features' test expressed therein and I'm of the opinion that this case necessitates the departure from the general rule.[5]

23.3 He also said to the DPP that:

> By the way, those remarks I made regarding the preparation of the briefs were not entirely referable to the solicitors in your Department. They were referable to the persons who gave the information from the various departments - whether that was an accurate assessment of that on my part I don't know ...[6]

23.4 The Magistrate commented in his judgement in relation to the amount of costs to be awarded that governments have the entire resource of revenue behind them. They have no cost constraints at all. He said that the DPP's 'resources are limited only by their imagination. If it fails in its prosecution no one really hurts other than the Australian taxpayer.'[7] The Committee noted that individuals, however, who are on the receiving end of the exercise of that enormous power have the limits of their own financial resources to try to defend themselves and then, if they can, to seek compensation.[8]

The Ombudsman's Reaction

23.5 Midford supplied a copy of the Magistrate's comments to the Ombudsman on 23 February 1990, and called for a full public inquiry.[9]

23.6 The Ombudsman wrote to Customs on 1 March 1990, seeking urgent advice of any proposed actions by the ACS to meet the Magistrate's criticisms of the handling of the case. He also enquired as to whether any disciplinary action would be taken against the Customs and DITAC witnesses.[10]

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5. Evidence, pp. S88-9.
6. Evidence, p. S91.
7. Evidence, p. S82.
8. Evidence, p. 2127.
9. Evidence, pp. S715-8.
10. Evidence, pp. S713-4.

The Response From Customs

23.7 It is not known whether the Ombudsman's letter was seen by the Comptroller-General or his deputy. However, in April 1990, the Customs National Manager, Investigations responded that:

> The Magistrate's summation has been studied carefully. It is his opinion. The ACS does not share his view and in fact strongly disagrees with it.[11]

He also asserted that in relation to Midford's entitlement to quota:

> The fact is that, once Midford's Malaysian subsidiary had effectively ceased production, Midford was not entitled to quota.[12]

23.8 The Committee was reminded of many occasions where the ACS had been described as considering themselves always to be right, as above the law and as reluctant to abide by legal decisions that were not in agreement with the ACS views.[13]

23.9 The same officer expressed similar views to both Ministers in early May 1990. As an aside, although the Magistrate's comments were released some three months earlier, it appears that this was the first occasion that Customs included and made reference to those comments in a brief to the Ministers. The officer this time stated that:

> As to the Magistrate's summation, neither the DPP nor Customs share his view and in fact disagree with it.[14]

23.10 No documentary evidence of the DPP expressing such views was ever located in the masses of evidence taken during the Inquiry. The Acting DPP did tell

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11. Evidence, p. S719.
12. Evidence, p. S719.
13. See for example, Evidence, pp. S31-2, S60-1 and S65.
14. Evidence, pp. S3318 and S3327.

the Committee, however, that:

> We have accepted the decision of the court. If you are asking us for our path of reasoning, our path of reasoning is that the court is wrong. But we will respect the decision of the court.[15]

23.11 The ACS Senior Inspector even told the Committee that:

> My opinion of the investigative team, the people I work with, is that they carried out their duties professionally. None of the criticism from (the) magistrate falls upon the investigating team.[16]

The Committee could not agree.

23.12 Elsewhere that same officer had told the Committee that in respect of Midford and the committal hearings ' I do not believe they were acquitted. I just believe the charges were dropped.'[17]

23.13 In mid 1992 Customs submitted that the Committee had:

> ... a misunderstanding of why the committal proceedings failed. There was no finding by the Magistrate that Midford only needed to source its imports from Malaysia, and no concession to that effect was made by the prosecution.[18]

Again, the Committee could not agree with the ACS.

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15. Evidence, p. 930.
16. Evidence, p. 1251.
17. Evidence, p. 1509.
18. Evidence, p. S9035.

The Response from DITAC

23.14 One of the witnesses from DITAC apparently shared the Customs view in that he also told the Committee 'Maybe the court got it wrong'.[19] However, he later advised in respect of his comment that 'I do not hold to it strongly.'[20]

23.15 The Committee took some comfort, however, from the words of the Secretary of that Department who, after advising that officers of his Department rarely attended court hearings and 'were not professional witnesses', stated that:

> Obviously, if there was a similar situation to arise again we would take a great deal more time to ensure that there was adequate and proper preparation.[21]

23.16 He also said that the Magistrate's judgement was 'of very great concern to us all.'[22]

23.17 Although he was not very specific, the DITAC witness at the committal proceedings also said to the Committee that 'In hindsight I would do a lot of things differently.'[23]

23.18 Earlier he had responded to the question 'If you had your time again, what would you have done differently?' His answer was 'Most things.'[24]

Recommendations

23.19 **The Committee recommends that:**

- **potential witnesses for the Commonwealth thoroughly prepare for court proceedings and review all relevant material prior to tendering written or oral evidence;**

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19. Evidence, p. 646.
20. Evidence, p. 682.
21. Evidence, p. 543.
22. Evidence, p. 544.
23. Evidence, p. 801.
24. Evidence, p. 686.

- statements and other evidence to be used in prosecution proceedings be prepared in a balanced and objective manner, disclosing all relevant facts for which the witness has first hand knowledge;

- adequate time and resources be devoted by the Director of Public Prosecutions to ensuring that witness statements obtained are relevant to the proposed proceedings and do not contain hearsay evidence or other inadmissible material;

- the Director of Public Prosecutions take a more pro-active involvement in the selection of witnesses for Commonwealth prosecution proceedings, and greater consideration be given to their selection, including increased emphasis on selection for ability to provide first hand knowledge and lesser emphasis on the standing of the witness in the bureaucracy; and

- documents, statements or other material collected for use in prosecution proceedings be presented in a form which is logical, coherent and readily comprehensible to Counsel, the judiciary and the defendants. If this requires the material to be arranged in other than chronological order, a chronology should also be provided. (See separate recommendation in Chapter 10)

Chapter 24

CLAIMS FOR COMPENSATION

Nothing which either the DPP or the ACS has presented to this Committee has justified their outrageous actions or retrieved their positions.

Midford's Tariff Advisor[1]

Midford's Tariff Advisor

24.1 In June 1992, Midford's Tariff Advisor submitted that:

> The hearings before the Joint Committee of Public Accounts have established the fact that the prosecution against Midford Paramount and its consultant was unjustified. The Minister for Justice has supported this view based on the Cabinet documents released to the Court. (The) Magistrate stated, in February 1990 in his costs award, that if there had been a 'cover up' it was on the part of the Commonwealth, not on the part of the defendants.
>
> Notwithstanding the dropping of the charges and the exoneration of Midford Paramount and myself, we are left with large unrecovered legal bills and ruined businesses.[2]

24.2 His submission summarised some of the major deficiencies in the investigatory and prosecution process, and provided reasons for and requested compensation. These deficiencies included:

> i) the fact that there was no substantive evidence against me of a conspiracy to defraud the Commonwealth, and this was later established in the opinion of (Counsel engaged by the Commonwealth);

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1. Evidence, p. S7487.
2. Evidence, p. S7486.

ii) the basis of the initial raid on Midford's premises was not justified and resulted from a misunderstanding on the part of Customs concerning the costings of certain shirts;

iii) the fact that Midford's shirts were seized on an erroneous basis;

iv) the quota was withdrawn from Midford improperly and on a misunderstanding of Cabinet documents;

v) the prosecution proceeded against the strong and unequivocal opinion of the Legal Branch of the Australian Customs Service;

vi) the investigatory process caused great harm to our consultancy, including disparaging comments about me made by ACS investigators;

vii) unacceptable irregularities occurred in Malaysia in relation to the activities of the ACS investigation team;

viii) briefs were either inadequately or inaccurately prepared;

ix) there was improper and prejudicial publicity; and

x) the process of investigation and prosecution demonstrated an unreasonableness on the part of the Commonwealth.[3]

24.3 He added that:

In the light of these considerations, it is appropriate for compensation to be provided for unrecovered legal expenses and for loss of business. The request for compensation is supported by a legal opinion from an expert in administrative law.[4]

3. Evidence, p. S7486.
4. Evidence, p. S7486.

24.4 In addition, he pointed out that:

> The explanations provided, the documents tabled, and the submissions made to date by three government agencies involved in this inquiry have not in any way contradicted or vitiated the Magistrate's view that this prosecution was unjustified. The view of (the Magistrate) has been supported by the Minister for Justice, who stated in the Senate on 6 May 1992 that the release of the Cabinet documents to the Magistrates Court in June 1989 led to a 'just outcome', which otherwise might not have occurred. (Senate Hansard, 6 May 1992, p. 2303.) (This) statement is important. He is stating, as the Minister for Justice, that the Cabinet documents do support the Magistrate's findings and that the claims made before this Committee by the ACS, the DPP and DITAC about the justification for this prosecution cannot be substantiated. The claims by these three organisations appear to be contemptuous of the legal process, and contumacious.[5]

24.5 In that same submission he also said:

> Nothing which either the DPP or the ACS has presented to this Committee has justified their outrageous actions or retrieved their positions. In fact, as more documents have been disclosed, they have revealed a litany of ineptitude, prejudice, and misunderstanding of such a magnitude as to warrant a much more comprehensive review of the ACS investigatory powers and procedures.[6]

24.6 The Committee agrees with these sentiments.

Midford

24.7 In November 1989, Midford sought compensation of more than $8.8 million through representations made on its behalf by a local Federal Member of Parliament.[7]

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5. Evidence, p. S7487.
6. Evidence, p. S7487.
7. Evidence, pp. S7860 and S3343-6.

24.8 The brief to the Minister prepared by Customs said:

> The compensation figure covers -
>
> - costs attributable to the terminated committal hearing and subsequent costs hearing between Midford and the DPP
>
> - legal costs in Malaysia - these are related to the committal hearing terminated in June 1989
>
> - costs relating to quota and undervaluation issues, including the seized goods now returned to Midford.
>
> Regarding the committal hearing costs were awarded on 8 February 1990. The other costs all relate to matters covered by the settlement offered by Midford and accepted by the ACS. In terms of the settlement, the Deed of Release provides an absolute bar to any or all claims in respect of the subject matter of the Deed.[8]

The Minister's Response

24.9 The response to the Member from the Minister made reference to the above and concluded with 'Therefore, in terms of advice given to me, no consideration can be given to the question of compensation.'[9]

24.10 Midford, however, gave evidence that Customs misled their Minister regarding the terms of settlement between the Company and the Commonwealth.[10] In particular, Midford said that:

> Firstly, the subject matter of the deed did not encompass the question of compensation. Secondly, in a letter dated 28 August 1990, (addressed to Midford's Tariff Advisor) which was only about a week or two before the deed was signed, the national manager of investigations stated very clearly and unambiguously that the terms of the deed relate only to the question of seizure of the shirts and

8. Evidence, p. S3343.
9. Evidence, p. S3346.
10. Evidence, p. 12.

> reinstatement of quota. They do not in any way abrogate the rights of Midford in relation to the actions that could arise from the committal proceedings in June 1990. And (he) was the one who signed the letter.
>
> Yet he advised his Minister, saying there was an absolute bar to any or all claims. The subject matter of the deed was shirts... and reinstatement of quota. That is all the subject matter of the deed was. Yet he went on to say it covered everything, including compensation.[11]

24.11 On two further occasions Midford referred in their evidence to the ACS misleading the Minister in relation to this issue.[12] In fact, Midford put forward the view that the refusal to make public the Deed of Release was because 'the deed says something and they advised their Minister something else.'[13]

24.12 The Committee's view is that the Minister was misled and the costs awarded by the Magistrate for the failed Committal proceedings did not preclude consideration of additional compensation, especially in view of the Magistrate's acknowledgment that the awards he made were somewhat constrained by the law to purely reimbursing costs reasonably necessary for a committal proceeding.[14] He had also specifically emphasised that the costs incurred by the defendants were 'far beyond what they could reasonably have expected to incur in litigation of genuine issues.'[15]

24.13 Irrespective of any legal arguments that may be available to the Commonwealth not to award compensation, the Committee is of the view that compensation should be awarded to Midford, its Tariff Advisor and its former Customs Agent. The absence of present provisions to ensure that such compensation is, at least in part, contributed to by the officers and their Departments or Agencies involved in the apparent victimisation of the above mentioned witnesses is seen to require rectification. In this regard, the Committee fully endorses the current trend to make public servants far more accountable personally for their decisions.

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11. Evidence, pp. 86-7.
12. Evidence, pp. 229 and 239.
13. Evidence, p. 239.
14. Evidence, pp. S76-82.
15. Evidence, p. S89.

24.14 In relation to this question the Committee noted that the Comptroller-General of Customs said:

> I want our officers to abide by the law and procedures that are in place and to do a professional job. That professionalism to me means that we conduct ourselves in the proper manner, that we are accountable and responsible for our actions.[16]

Midford's Customs Agent

24.15 As indicated in Chapter 3, Midford's Customs Agent was also considered by the Committee to have suffered both personally and financially as a result of the Midford case. Further details of the alleged threat against the Agent are included in Chapter 25. It is the Committee's intention that a separate report on the allegations raised by this witness be tabled in the Senate in the near future.

Prosecution Policy of the Commonwealth

24.16 In relation to the whole Midford case and its aftermath, the Committee felt that it had to address an essential question which had also been raised in evidence to the Inquiry; it was:

> Could the failed and disastrous prosecution (and the other attempted prosecutions) be stated to have been based on the broad standards of fairness, openness, accountability and efficiency - these being the principles of the Prosecution Policy of the Commonwealth?[17]

24.17 It seemed impossible to suggest with any fairminded assessment of the facts that the answer could be yes. The Committee was also mindful that the Prosecution Policy of the Commonwealth states:

> The resources available for prosecution action are finite and should not be wasted pursing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

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16. Evidence, p. 2126.
17. Evidence, pp. 12, 88 and S160-7.

> The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.[18]

24.18 It also specifies that:

> ... ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction. Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility of witnesses and their likely impression on a jury, the admissibility of any alleged confession and the impact of any likely defence on a jury or other arbiter of fact.[19]

24.19 The Committee does not believe that the prosecution action against Midford and its Tariff Advisor adhered to the provisions of the Prosecution Policy of the Commonwealth.

Recommendations

24.20 **The Committee recommends that:**

- **the defendants in the Midford Case and others be compensated for their unrecovered material losses and legal costs.**

18. Evidence, p. S163.
19. Evidence, p. S164.

Chapter 25

OTHER SIGNS OF ILL HEALTH

> *This call is just to let you know that if you do ... give evidence you'd better not say anything that will embarrass anyone at Customs.*
>
> *Threat made to Midford's Customs Agent*[1]

Introduction

25.1 It is a common practice within modern large organisations to undertake some form of internal inquiry where situations come to the attention of Management that indicate things have gone wrong within the ambit of responsibility of that entity. Depending on the known or suspected nature of the problems, it is even not unusual for such an investigation to be conducted by some independent person or body with relevant expertise from outside of the entity.

25.2 To any of the organisations closely involved, the failure of the committal proceedings on 30 June 1989 must surely have been an event of sufficient significance to warrant the attention of the entity's most senior management.

25.3 The Committee noted that of all the Government bodies involved in the failed prosecution proceedings for the Midford case, only one appears to have conducted an inquiry into what went wrong.

DITAC's Internal Inquiry

25.4 The Committee commends DITAC for initiating an internal inquiry by officers not previously involved in the case following the withdrawal of the prosecution proceedings. The Committee did not ascertain exactly when the inquiry was initiated, but did receive evidence that the resulting report,[2] dated

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1. Evidence, p. 287.
2. Evidence, pp. K2576-90.

6 November 1990, was forwarded to the then Secretary of the Department for his consideration.[3]

25.5 The Department advised that the report:

> ... sought to present the facts as they fell within the area of responsibility of DITAC. It did not seek to speculate on possible alternative courses of action or on the correctness or otherwise of particular courses chosen.[4]

25.6 Unfortunately, the report did not contain any recommendations for action and the Committee concluded that the Department missed the opportunity to realise the full benefits of its investment of resources in conducting the review. The apparent absence of any terms of reference for the review and the contents of the report suggest to the Committee that the prime purpose of the investigation was to dispel the Magistrate's suggestions that there was a cover-up within the Department.[5]

The Review by the DPP

25.7 The Committee does acknowledge that the then DPP personally conducted a review of sorts some three months after deciding to withdraw the Crimes Act charges against Midford and its Tariff Advisor. His examination, however, was more in the nature of an examination of legal transcripts and opinions to determine as part of his statutory responsibilities whether further charges would be preferred against the defendants.[6]

Actions By Customs Following Committal Failure

25.8 The Committee noted that the ACS advised the then junior Minister on 4 July 1989[7] of the failure of the Committal proceedings. However, this seems to have been prompted more by a newspaper article of that date than any particular desire to keep the Minister informed of events that occurred within his portfolio. No evidence was forthcoming to indicate that the senior Minister's attention was drawn

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3. Evidence, pp. 545-6.
4. Evidence, p. K2576.
5. Evidence, p. K2588.
6. Evidence, pp. S616-31.
7. Evidence, p. S262.

to that article. It was also not possible to accurately ascertain when the matter was first brought to the attention of the Comptroller-General. In the absence of any information to the contrary, however, the Committee deemed it fairly safe to assume that he saw the article on the day it appeared in the newspaper.

25.9 Although the specific question was not put to the Comptroller-General, to the best of the Committee's knowledge up to the time of tabling this Report there had been no investigation whatsoever within Customs into the reasons for the failure of the Midford prosecution. The Committee did ask Customs witnesses involved in the case, who all advised that they had no knowledge of any such examinations.[8] Similarly, there has been no investigation into the international embarrassments for Australia surrounding the incidents involving the two Australian Customs officers who collected evidence for the case in Malaysia.

25.10 In the Committee's view, the raising of questions about both these matters at Senate Estimates hearings should surely have triggered some fact-finding investigations within Customs, given that none were initiated when the earlier events actually occurred. The apparent lack of familiarity with the particulars of those events displayed by the Comptroller-General and by the Minister would also tend to suggest that a closer examination was required.

25.11 The Committee noted two further occasions of significance in which Customs failed to initiate an inquiry or review where, in the Committee's judgement, the circumstances clearly warranted initiation of an investigation. The first is the series of media leaks discussed in Chapter 26. The other involves the anonymous threats made against Midford's former Customs Agent. Further details are set out below.

25.12 The failure to look into what went wrong and at least make some attempts to ensure that those mistakes are not repeated in the future is seen by the Committee to reflect very poorly on the accountability and managerial competence of the leadership within the Australian Customs Service. Taken together with a number of other concerns highlighted by the Committee in this Report, the lack of internally initiated review and improvement was seen by the Committee as a signpost to the flagging health of the organisation.

8. Evidence, pp. 1246-7.

Alleged Threats Against Midford's Customs Agent

25.13 In August 1991 Midford's former Customs Agent, now based in Adelaide, advised the Committee that he had received an anonymous STD phone call in April of that year. He had made notes immediately after the call ended and advised that the conversation with the male caller went as follows:

> The caller said , 'We have never met, but I would like to talk to you about the Midford inquiry'. I said, 'May I ask who you are and what you want to discuss'? The caller said, 'My name doesn't matter, but I want to know if you are going to give evidence before the Midford commission'? I said, 'I have not seen the terms of reference and I have not been approached. Why do you ask'? The caller said, 'This call is just to let you know that if you do make a submission or give evidence you'd better not say anything that will embarrass anyone at Customs'. I said, 'If I am called, I have to say the truth. I will not commit perjury'. The caller said, 'You have to look after yourself. If you say anything bad about Customs or some officers we will put you out of business and make it so bad for you within your industry, you'll be unemployable'. I said, 'That is a bloody good attitude. How are you going to do that? What are you frightened of'? The caller said, 'Listen, smart arse, we have ways and means, and if you don't cooperate you've had the dick. You are finished, you are upsetting people'. I said, 'Not my fault if some people do not like the truth. I told (the Comptroller-General) this matter would not go away. I do not like being dragged into this simply because Customs and the DPP fouled up'. The caller said, 'You've been warned. Just be kind; if not, it's your funeral. We've got long memories'. The caller then hung up.[9]

25.14 In March 1992 the Committee enquired of the Comptroller-General as to what action he had taken to investigate the threat made against the Customs Agent. He said 'In relation to the alleged threat, I have not done anything'.[10] He added that he was expecting the Committee to say it was a serious matter and to request him to conduct an investigation.[11] In relation to an occasion when the Agent mentioned the threat to the junior Minister's Senior Private Secretary,[12] the

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9. Evidence, pp. 287-8.
10. Evidence, p. 1851.
11. Evidence, p. 1851.
12. Evidence, p. 288.

Comptroller-General said that 'there was no indication at that stage that the threat may have come from Customs, so frankly I have not pursued it.'[13]

25.15 The transcript continued with:

> **Committee** - At the moment, we are at an impasse. We have been told that the threat was made and you have simply said, 'it was not us'. That is not good enough to be the end of it.
>
> **Witness** - I have not said, 'It is not us'.
>
> **Committee** - I thought you just said it.
>
> **Chairman** - I thought you said that, too.[14]

25.16 Further clarification elicited from the witness that:

> I have said I have not conducted an investigation, ... I have indicated my wish to join with you in pursuing whatever investigation you agree to.[15]

25.17 On this matter, the Committee was of the view that it had already thrice expressed how seriously in viewed the threats made against the Customs Agent. On the day the Agent gave his evidence, the Chairman said:

> The objective of parliamentary privilege for witnesses such as yourself who appear before us is that you can speak frankly, fully and honestly. Anyone who attempts to interfere with that may well be found guilty before the Privileges Committee of the Parliament - before the Bar of the Parliament - for what is commonly known and referred to as contempt of the Parliament. ... This is probably the worst case that I have heard of where a person has actually been threatened about giving evidence before a Parliamentary Committee, and we take an extremely poor view of this.[16]

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13. Evidence, p. 1851.
14. Evidence, p. 1852.
15. Evidence, p. 1852.
16. Evidence, p. 308.

25.18 After then taking evidence in-camera from the Agent, the Chairman, upon reconvening the public hearing stated that:

> ... on behalf of the Committee, I must say that we view this matter extremely seriously. Parliamentary privilege is one of the basic tenets of our democratic system. If this Committee were to accept a state of affairs in which people were being intimidated before they came here to give evidence, then that would render a great slur on the whole parliamentary process. Indeed, it could well become a day-to-day proposition, not only for this Committee but also for every other committee in the Parliament to contend with.[17]

25.19 A further reference was also made to 'the seriousness and unprecedented nature of this.'[18]

25.20 The Committee therefore found it difficult to accept the Comptroller-General's claim that he did not conduct an investigation because he was awaiting the Committee to 'come and say that this is a serious matter'.[19]

25.21 Up to the time of tabling this Report, the matter had still not been investigated by the ACS. It occurred to the Committee, however, that one reason why an investigation had not been initiated could be that the ACS already knew the source of the threat.

Accountability and Annual Reports

25.22 It is not unreasonable to expect that if a government agency expended hundreds of thousands of dollars and had up to fifty of its officers involved, some for more than 18 months, investigating what it claimed was a major fraud involving $4.5 million, only to have that case dropped at the committal hearing, that the matter would rate of sufficient significance to warrant a mention in the agency's annual report.

25.23 Sadly, the ACS made absolutely no reference to the failed Midford proceedings in its 1988-89 nor 1989-90 annual reports, despite this being the largest

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17. Evidence, p. 310.
18. Evidence, p. 310.
19. Evidence, p. 1851.

suspected commercial fraud case investigated in its history. In contrast, however, Customs did include in its 1988-89 Report, details of a number of smaller cases under the heading of 'Successful Prosecutions.'[20]

25.24 In the Committee's view, such deliberately selective reporting and attempted avoidance of accountability reflects very poorly on the ACS.

25.25 No reference to the Midford case could be located in any of the DITAC annual reports.

25.26 In contrast, the Committee was pleased to note that the DPP had included a reference to the Midford case, although not identified by name, in its 1989 Annual Report. Under the heading of 'Unsuccessful proceedings' the DPP reported that there were 'two very substantial prosecutions in the course of the year which did not reach a jury.'[21] It stated that:

> The second matter, in NSW, involved an alleged scheme to evade Customs duty on imported clothing which, it was alleged, cost revenue in excess of $4m. The prosecution alleged that the defendants conspired to defraud the Commonwealth by means of misrepresentations aimed at securing a grant of quota. Some evidence of the illegal misrepresentations was addressed at the committal hearing. However, the charges were withdrawn when it became evident following the cross-examination of key witnesses that the prosecution could not establish that no quota would have been granted but for the alleged misrepresentations.[22]

25.27 The Committee does not necessarily agree that the above represents a fully informative, balanced and accurate account of the events, but it is a considerable improvement on the reporting on this matter by the ACS and DITAC.

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20. ACS 1988-89 Annual Report pp. 119-120.
21. DPP Annual Report 1989, p. 76.
22. ibid.

Recommendations

25.28 The Committee recommends that:

- every major case where prosecution action is recommended by the Australian Customs Service be reviewed upon finalisation by each Commonwealth entity involved to identify potential areas for improvement; and

- the outcome of all major or significant prosecution cases, whether resulting in success or failure, be included in the Australian Customs Service Annual Report.

Chapter 26

THE MEDIA LEAKS

There Are So Many Leaks

> *It was only because of the professionalism of the journalist on that newspaper, who contacted us to ascertain our side of the story, that we were able to save the negotiations from being derailed.*
>
> *Midford Directors*[1]

Introduction

26.1 At a public hearing on 11 August 1992, the Comptroller-General told the Committee that there were guidelines which covered how ACS officers should handle contacts with the media.[2] However, during the Inquiry the Committee was told of three instances where media attention had focused on the Midford case in circumstances which suggested that confidential material had been leaked. Two of these instances had resulted in articles in major newspapers.

The Article of 22 June 1988

26.2 At a public hearing on 8 August 1991, Midford told the Committee that one of the Directors had been contacted late at night by a reporter from a major newspaper and asked for comments about an article which was to appear the following day. The Midford Director contacted a fellow director who recalled that the reporter 'had the information at his fingertips. It was all there. He had information which we did not have.'[3] Another Midford Director added 'There was no other way, I believe, that he could have got that information other than from the ACS.'[4]

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1. Evidence, p. S825.
2. Evidence, pp. 2081 and S11065-8.
3. Evidence, p. 102.
4. Evidence, p. 102.

26.3 After the hearing Midford wrote to the newspaper on 28 August 1991, in an endeavour to discover the source of the alleged leak.[5] The newspaper replied on the following day that it felt it was unable to respond to this request.[6]

26.4 The journalist had also contacted Midford's Tariff Advisor, who told the Committee, at a public hearing on 17 September 1991, that he subsequently ascertained from:

> ... other journalists and inside sources within the (newspaper's publishers), and confirmed by the current President of the New South Wales Bar Council, ... that this story was leaked to reporters.[7]

26.5 The Advisor added that the 'article was designed to maximise publicity, set an example and cause further irreparable harm to my business and reputation and that of Midford's.'[8]

26.6 The article was written by two journalists and appeared under the heading 'Exclusive' on 22 June 1988. It provided a summary of the alleged evidence pertaining to the conspiracy charges relating to Midford's Malaysian quota and included a quote from the 'deliberately vague' letter. Other parts of the article, however, indicated that its 'exclusivity' may have been solely designed to give the impression that the newspaper was in a privileged position. The authors referred to 'a detailed affidavit' used by the DPP 'in seeking restraining orders before the NSW Supreme Court this week', to 'court records', and 'numerous documents relied on by the DPP in its affidavit'.[9]

26.7 At a public hearing on 23 March 1992, the Comptroller-General told the Committee that he had spoken to one of the journalists involved and recounted his conversation. The journalist had said that, although the ACS Public Affairs Officer had been contacted and had initially been encouraging, ultimately the ACS had not been 'prepared to make any documents or information available.'[10] The Comptroller-General added that the journalist's 'recollection was that the documents

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5. Evidence, p. S1995.
6. Evidence, p. S1996.
7. Evidence, p. 418.
8. Evidence, p. 418.
9. Evidence, p. S117.
10. Evidence, p. 1855.

were obtained from the public record and it was not difficult to get access to them.'[11]

26.8 In their submission to the Inquiry dated 10 July 1992, the DPP wrote:

> Charges in this matter were laid ... on 15 June 1988. No secrecy attaches to the fact that criminal charges have been laid against a person.
>
> Restraining orders were obtained under the Proceeds of Crime Act ... (and) were returnable on 20 June 1988. ... The Supreme Court ordered that the restraining orders continue. Those proceedings took place in open court and the defendants were represented at them.
>
> ... the most likely inference is that (the journalists) became aware of the proceedings that took place on 20 June 1988 and gained access to documents filed in those proceedings. I note that (one of the authors) was court reporter for the (newspaper) in June 1988.[12]

26.9 The Committee did not pursue the matter further, concluding that there appeared to have been no leak of confidential information. It is possible, however, notwithstanding the position of one of the reporters, that Customs officers alerted the press to the pending Midford court case. The Committee makes such a suggestion in the light of the revelations by an ACS Senior Inspector made under cross-examination during a criminal trial of another Customs case. (The ACS officer was involved in the controversy in Malaysia, covered in Chapters 18 and 19.) The transcript of that other case records the following:

> **Defence Counsel** - Can you say that it was the apparent policy in Customs to maximise publicity in this case?
>
> **Witness** - I don't believe there was a policy.
>
> **Defence Counsel** - Would you look at paragraph 6 (of a Customs document pertaining to the case) ... Do you not agree that it was specified that there should be maximum publicity given to the case some time in early 1987? ...

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11. Evidence, p. 1855.
12. Evidence, p. S8345.

Witness - Yes.

Defence Counsel - Is the answer yes?

Witness - Yes.[13]

The Leak of 10 August 1990

26.10 Midford recounted to the Committee how they had prevented the appearance of an article in a major newspaper before negotiations concerning the settlement had been concluded. At a public hearing a Midford Director said:

> On 10 August 1990, a journalist from (a major newspaper) rang the company to see whether we had any comments to make about the recent settlement. ... At that time we were still in the negotiating process. ... the journalist had a letter to us from (our Tariff Adviser).[14]
>
> ... we wrote to the editor-in-chief and sent a copy to that journalist. That is why nothing appeared in the (newspaper).[15]

26.11 The Committee was told by Midford that they had contacted their Tariff Advisor in Canberra 'and apparently a meeting of Customs was convened quickly.'[16]

26.12 Midford's Tariff Advisor told the Committee that the letter contained the draft settlement because he was appraising Midford of the negotiations. Other parties that were involved were the ACS National Manager, Investigations, the Deputy Comptroller-General and the Comptroller-General. He 'was not aware until later that, in fact, those documents were also being sent to the investigations collectorate of the ACS in Sydney.'[17] For the record, at a public hearing on 17 September 1991, the Tariff Advisor denied that either he or his staff leaked the document to the national newspaper.[18]

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13. Evidence, p. 418.
14. Evidence, p. 242.
15. Evidence, p. 245.
16. Evidence, p. 242.
17. Evidence, p. 440.
18. Evidence, p. 440.

26.13 Midford's Tariff Advisor also recalled his conversation with the Deputy Comptroller-General:

> He knew nothing of it and gave me an assurance that officially nothing had been released from the Australian Customs Service. He said, however, that he would make some inquiries and ring back. He did do that within about 15 minutes and advised me that there were officers in the Sydney collectorate ... who were upset about the possible settlement with Midford, and that apparently something had happened. I said, 'What are you going to do about it?' He said, 'We will investigate it', and I asked how and he said, 'We'll have an investigation by an outside body, the Australian police'.[19]

26.14 A Midford Director expressed the opinion to the Committee that the reason for the leak might have resulted from:

> ... the friction within the Customs Service in Sydney and the ACT. I asked who leaked it. I was told it had not been leaked from Canberra, but was thought to have been leaked from Sydney. The Sydney officers were the ones who were disgruntled and wanted to carry on with whatever they wanted to do.[20]

26.15 A minute from a Senior Inspector to the AGS attached to a settlement offer by Midford's Tariff Advisor indicated to the Committee that NSW Customs did not have a constructive attitude towards the negotiations. The minute contained the following:

> (NSW Regional Manager) has asked me to drop these up to you for information. His words were 'have a talk and a laugh with (the AGS) about them and get back to me'. (The NSW Regional Manager) wishes to advise Central Office by midday tommorrow (sic) that we reject the 'offer' and I use the term loosely.

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19. Evidence, p. 437.
20. Evidence, pp. 242-3.

26.16 The Comptroller-General reinforced this impression when he told the Committee on 11 August 1992 that:

> There was a strong feeling in the Sydney office that, because of the degree of work that had been put into it and the strong legal advice, the prosecution route should have been proceeded with. ... But we have to take decisions that often are not popular right through the ranks of Customs.[21]

26.17 It appears to the Committee, therefore, that the leak of 10 August 1990, was intended to scuttle the settlement negotiations. It was thwarted by Midford's prompt actions and the professionalism of the journalist and newspaper involved. The evidence before the Committee suggests that the source was from within NSW Customs.

Had the Leak Been Investigated?

26.18 In appearing before the House of Representatives Standing Committee on Finance and Public Administration, on 5 December 1990, the Comptroller-General stated:

> We maintain a very professional internal affairs unit in Customs and any complaint against an officer alleging harassment, undue process, illegal tactics, anything of that nature, would be referred to the internal affairs unit for independent investigation.[22]

26.19 The Committee, therefore, raised the matter at a public hearing on 11 August 1992 by asking the Comptroller-General whether there had been an investigation into the leaking of information to the media. The reply was that there

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21. Evidence, p. 2075.
22. House of Representatives Standing Committee on Finance and Public Administration, Inquiry into the Australian Customs Service, Evidence, p. 401.

had been none.[23] Later questioning by the Committee resulted in the following exchange:

> **Witness** - ... if there were to be an investigation to be pursued along these lines, the best way of approaching it would be to refer it to the likes of the Australian Federal Police, as happens with many political leaks.
>
> **Committee** - But you have an internal investigations department, do you not?
>
> **Witness** - Yes.
>
> **Committee** - You did not even refer it to them?
>
> **Witness** - No.
>
> ...
>
> **Chairman** - If Customs takes no action in terms of saying, 'Look, if people are doing this and they are caught, then there is going to be trouble', then I can only take it if I am a junior Customs officer, that senior people in Customs are condoning this.
>
> ...
>
> **Witness** - ... The decision was taken not to pursue an investigation. ... That decision was put to me. I said, 'Yes that is fair enough'. It rested there. In hindsight, Mr Chairman, I accept what you are saying, that an investigation may have had a salutary effect if indeed officers of Customs had some hand in that leak.
>
> **Chairman** - But you cannot prove that they never have a hand in that leak until you launch some sort of an investigation.
>
> **Witness** - The chances are that the investigation would not establish that anyway. There are so many leaks.
>
> **Chairman** - It would scare the hell out of whoever did it.[24]

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23. Evidence, p. 2070.
24. Evidence, pp. 2077-8.

26.20 It was noted that the leaking of confidential information contravenes section 16 of the Customs (Administration) Act. The Committee is deeply concerned that Customs appeared to take a soft line on such leaks.

The Article of 7 October 1990

26.21 Information about the settlement finally appeared in an article in a national newspaper on 7 October 1990,[25] some three weeks after the Deed of Release was signed. The article referred to 'internal Customs documents', stated that the AGS and 'senior counsel concluded that charges could be proved to at least establish intentional non-payment of duty', and reported that 'Midford offered to pay the amount outstanding for alleged duty evasion and to buy back at a reasonable price the shirts seized in December 1987.'

26.22 Knowledge of the negotiations and the terms of the settlement is further indicated by the following, under the heading 'The Deal':

> Midford's offer was shown to the Government Solicitor's office, which said it could 'not possibly respond in any positive way' and as at June 1 this year Customs' plan was to 'proceed to prosecution'. But later on it was decided to do a deal. Midford offered $300,000, later increased to $335,000 - although frustrated Customs officers believed $1 million a reasonable bottom line. ... Customs claims it did as well from the deal as it would have done from a long court case.[26]

26.23 The Committee considers that the source of the information was the same as for the leak on 10 August 1990 and probably emanated from the 'frustrated Customs officers' mentioned in the article. This opinion appears to have been shared by the National Manager Investigations, as reported by Midford's Tariff Advisor. When the advisor complained about the article, the National Manager is alleged to have said 'There are some people who are extremely upset about this settlement. What can we do?'[27]

26.24 It is inconceivable that the source was Midford because the article emphasises the alleged crimes without mentioning Midford's defence. Indeed, a Midford Director wrote to the Minister complaining bitterly about the leak of

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25. Evidence, p. S119.
26. Evidence, p. S119.
27. Evidence, p. 439.

7 October 1990 as well as the attempted leak two months earlier. The letter commented on the editorial in the same paper:

> I believe the most slanderous and damming assertion was made by the same journalist's editorial, and in the same issue on page 32, where he states 'the same disturbing trend is evident in Customs, where disgruntled officers claim that if a company is big enough, rich enough, or has enough political clout, a prosecution is unlikely'.[28]

26.25 Documents provided to the Committee show that, following the article, the Comptroller-General advised the Minister during a meeting on 8 October 1990 'that a briefing note was being provided for him by the National Manager Investigation.'[29] The briefing material was duly supplied,[30] but contained no conjecture about the possible source of the information apart from stating that it was unknown[31] and confirming that the 'terms of the settlement prevent disclosure of any details'.[32]

26.26 It appears to the Committee that ACS Central Office believed that the source of the leak was from within NSW Customs. A minute to the Regional Manager through the Director Investigations, dated 9 October 1990 and signed by six customs officers, contained the following:

> We refer to this morning's meeting chaired by yourself whereby you conveyed to us accusations expressed by Senior Central Office personnel in the persons of (the) Comptroller-General, (the) Deputy Comptroller-General and (the) National Manager Investigations.
>
> Let it be known that we the undersigned utterly refute any complicity or knowledge whatever in respect of the article published ... (on) 9.10.90 in regard to the Midford matter.[33]

26.27 The Committee noted, however, that four of the six officers appear to have had no involvement with the Midford case and that none of the senior

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28. Evidence, p. S825.
29. Evidence, p. S3337.
30. Evidence, pp. S3335, S3338 and S7920.
31. Evidence, p. S7920.
32. Evidence, p. S3338.
33. Evidence, p. S3607.

management of NSW Customs appeared on the statement (the highest ranking officer was an acting Chief Inspector). The Committee was not convinced that the minute provided evidence of a serious and sustained effort to find the source of the leak. It was also curious that the meeting of 9 October 1990 referred to above was not mentioned by the Comptroller-General when he gave the evidence detailed at section 26.19 above.

26.28 At a public hearing on 23 March 1992, the Comptroller-General was questioned as to why, unlike the incident with the article of 22 June 1988, he did not contact the journalist involved. He responded that he had not, because the Committee had not expressed concern about the matter. The Committee pointed out that concerns had been expressed in Senate Estimates. The Comptroller-General then reiterated that no internal investigations had been conducted in relation to the press leaks.[34]

26.29 In the event, it is highly unlikely that a journalist in receipt of confidential information would divulge his source to a senior member of the organisation from whence the leak emanated. The Committee is concerned, however, that no attempt was made and that no serious internal or external inquiry was instigated. The meeting of 9 October 1990 indicated to the Committee that the Comptroller-General thought the leak came from the NSW Customs and, in the light of Customs oft stated view that Midford was guilty, he considered that the leak was 'fair enough'.

26.30 The Committee restates its deeply held concern that Customs Central Office and, in particular the Comptroller-General, appeared to take a soft line on leaks of confidential information. The Committee feels it is important for ACS Central Office to re-establish control of the NSW Investigations Branch and demonstrate the leadership qualities expected of senior bureaucrats.

Recommendations

26.31 **The Committee recommends that:**

- **leaks of confidential information which could have come from Customs, or for which Customs is accused as being the source, be investigated either internally or, in the case of serious breaches, by the Australian Federal Police;**

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34. Evidence, p. 1856.

- in all cases of leaks of confidential information, the Minister should be advised formally; such advice to include the accusation, if one has been made, the nature of the leak, the details of the investigation, and any resulting action;

- in addition to information about specific leaks, a summary sheet outlining all the leaks occurring during the year be supplied to the Minister at the time of the Annual Report; and

- Customs Central Office demonstrates, to the satisfaction of the Committee, that it has taken steps to reassert its authority over its NSW branch.

Chapter 27

SETTLEMENT

> *I do not want any prospective party to a settlement being able to wave a document in front of the negotiating lawyers and say 'This is the way Customs handled another case' we want the same privilege.*
>
> *ACS Comptroller-General.*[1]

Introduction

27.1 Part of the Terms of Reference for the Inquiry required the Committee to examine and report on the methods of operation of the ACS in conducting settlements in connection with prosecution matters. The Midford case was eventually settled on 13 September 1990.

27.2 For various reasons, including some referred to below, the Committee did not examine the settlement process in any depth in respect of what occurred in the Midford case nor in a wider or more general context. Some matters were, however, noted in passing and are commented upon in this Chapter.

The Deed of Release

27.3 In September 1990 the ACS agreed to settle outstanding issues with Midford and both parties signed a Deed of Release setting out the terms and conditions of that agreement. Most of the contents of the Deed were subsequently leaked to the press, as detailed in Chapter 26.

27.4 The Deed provided for Midford to pay the ACS in excess of $300 000 in return for its seized shirts and certain other conditions. One of the conditions of the Deed was that the two parties agreed not to disclose the details of the settlement entered into. It did also, however, include a provision allowing certain actions to be taken by either party if the other party did not abide by the confidentiality provisions.

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1. Evidence, pp. 1867-8.

27.5 In passing, the Committee pondered whether it was pure coincidence that the amount paid by Midford for the settlement matched very closely the amount of costs awarded earlier to the Company and its Tariff Advisor in respect of the failed committal proceedings.[2]

27.6 The Committee was provided with a copy of the Deed of Release, but not by the ACS. In fact, it was surprised that the ACS was able to inform the Committee that a copy of the Deed had been made available[3], considering that it was provided in confidence by another Department.[4] The Comptroller-General did not provide the Committee with a satisfactory explanation for how he acquired that knowledge.[5]

27.7 The initial submission from the ACS to the Inquiry in February 1991 consisted of two parts. The first was some 550 pages of public submission[6], the other comprised over 280 pages of material that the ACS requested be taken in confidence.[7] The reason given was that this latter material ostensibly referred to matters covered by the confidentiality provisions of the Deed of Release.[8]

27.8 The Committee observed, however, that for much of this material there did not appear to be any obvious connection with the matters covered by the Deed. Customs subsequently agreed with the Committee and eventually released all but 13 pages for publication.[9]

27.9 The ACS reasons given for not releasing the remaining material, nor the actual Deed of Release were that those documents 'relate specifically to the terms of the settlement between Midford ... and the ACS.'[10]

27.10 Prior to this, the Committee had noted that a number of documents in the ACS confidential submission were duplicated in its public submission anyway. Midford were provided with a copy of the ACS confidential submission, with the

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2. Evidence, pp. S90-91 and S672.
3. Evidence, p. 1868.
4. Evidence, p. 2109-10.
5. Evidence, p. 2110.
6. Evidence, pp. S184-725.
7. Evidence, p. S184.
8. Evidence, p. S184.
9. Evidence, pp. S3260-3583.
10. Evidence, p. S3260.

written agreement of the ACS, and also commented on the duplication, one of its Directors stating that 'Really, I do not understand what is going on.'[11]

27.11 The Committee observed that two of the 13 pages that Customs even now still refuses to place on the public record were actually included in its very first public submission![12] In addition, some of the documents it provided in confidence had even been tabled in the Senate and bore its stamp.[13]

27.12 This led one member of the Committee to comment that:

> I really do not see how you can adjudge that anything marked confidential in these submissions has any rhyme or reason to it.[14]

27.13 In relation to the 13 pages the Comptroller-General said in a prepared opening statement to the Committee that:

> These 13 pages relate to the deed of release in which a confidentiality clause was inserted in order to cease further publication of claims and counter claims on the dispute between the ACS and Midford. Mr Chairman, you have expressed the view that the Committee believes the settlement should be made public. Midford has also given its consent to release.
>
> I am not prepared to release the confidential Submission to the general public, via publication of those documents by the Committee. Continued confidentiality of matters concerning the Deed of Release is necessary to avoid any adverse effect on the ability of the ACS to negotiate with other parties in the future and to avoid dissemination of possible erroneous ideas as to ACS policy in respect of settlement proposals.[15]

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11. Evidence, p. 237.
12. Evidence, pp. S674 and S676.
13. Evidence, p. 236.
14. Evidence, p. 236.
15. Evidence, p. 1812.

27.14 *He later said:*

> I still have a concern in the administration of Customs that there will be settlements in the future, and I do not want any prospective party to a settlement being able to wave a document in front of the negotiating lawyers and say 'This is the way Customs handled another case' we want the same privilege.[16]

27.15 The Committee is not sure to what privilege the witness made reference, and in any case noted that the Deed was extensively leaked, following which Midford called for formal release of the document as evidence to be published by the Inquiry.[17] Comment has also already been provided in Chapter 12 covering Midford's views on why the ACS continues to refuse to publish the Deed.

What Midford Believed the Settlement Covered

27.16 The settlement between Midford and the ACS was negotiated by Midford's Tariff Advisor and the ACS National Manager, Investigations. Midford expressed surprise to the Committee when it discovered through the ACS submission to the Inquiry that it had in effect paid a penalty to Customs as part of the settlement.[18]

27.17 In Midford's view, they made a commercial decision to buy back their shirts, yet Customs:

> ... told their Minister that money was made up of different things, part of which was penalties. The matter of how they broke up that amount to say that we agreed to cop a penalty - in other words, to say that we were guilty - was a complete surprise.
>
> **Chairman** - No-one at any stage, including your legal people, agreed to a penalty in the conversations or dealings. Is that right?

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16. Evidence, pp. 1867-8.
17. Evidence, pp. 232-3 and 237.
18. Evidence, p. 230.

> **Witness** - No. We were quite adamant that no part of the money settled was to be a penalty. If they were going to incorporate that, we were not going to settle; it was as simple as that.[19]

27.18 A background paper prepared by the National Manager, Investigations detailed his reasons for accepting the settlement offer from Midford.[20] It portrayed that Midford's Tariff Advisor was aware that the settlement offer contained elements in respect of Customs penalties. However, examination of the correspondence from the Tariff Advisor to Customs clearly stated that 'Midford is prepared to offer restitution of any short paid duty and to buy from the Commonwealth the ...' seized shirts.[21]

27.19 The Committee noted that the settlement offers contained in other correspondence from the Tariff Advisor to Customs did not include any admissions of guilt nor any amounts identifiable as being in respect of penalties.[22]

27.20 The Committee did not pursue this matter. Examination of this whole settlement issue was constrained by the continuing confidentiality of vital parts of the evidence.

27.21 The reasons for accepting the settlement offer concluded with an acknowledgment by the National Manager that claims Customs had against Midford in respect of suspected breaches of the Customs Act were 'more than compensated by the probable loss to Midford as a result of withdrawal of its quota action.'[23] This referred to Midford's agreement to withdraw its proceedings before the Federal Court to seek over $5 million from Customs to compensate for its lost quotas.[24]

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19. Evidence, pp. 230-1.
20. Evidence, pp. S671-3.
21. Evidence, p. S3516.
22. Evidence, pp. S3546-50.
23. Evidence, p. S673.
24. Evidence, p. S671.

27.22 The Committee unfortunately also did not gain an opportunity to examine the claims that the ACS:

- deliberately disobeyed a ministerial direction in late 1989 to settle the Midford matter on the basis of natural justice and employment in Wollongong,[25] and
- secretly plotted to obtain endorsement by a relieving Minister of proposals for further legal action to be instituted against Midford during the absence of the Minister.[26]

Legal Input to the Settlement

27.23 The Committee noted that the ACS National Manager, Investigations did not seek any legal advice on the proposed terms of settlement to be included in the Deed of Release until after he had decided to accept Midford's offer.[27]

27.24 Documentation received by the Committee in confidence indicated that the AGS were requested to advise the ACS on the draft Deed of Release within two hours of it being provided. The Committee did not pursue the reasons for such haste, but did note that nearly three weeks then elapsed before the Deed was signed.

27.25 Ministerial representations were made on Midford's behalf on 7 September 1990 which indicated that the Company also was not afforded adequate time to consider the provisions in the Deed.[28]

27.26 The Federal Member wrote to the Minister that:

> Such a decision cannot be made before everything is adequately considered. The matter has been current for some 2 years and 9 months so it is completely unrealistic for your Department to expect Midford/Paramount (to) make a decision on such an important document within a week.[29]

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25. Evidence, pp. 59-60, 85 and 228-9.
26. Evidence, pp. 87-8.
27. Evidence, pp. 232-3.
28. Evidence, p. S7919.
29. Evidence, p. S7919.

Recommendations

27.27 The Committee recommends that:

- the Australian Customs Service allow adequate time for proper legal consideration by the Australian Government Solicitor of any proposed terms of settlement; and

- the Australia Customs Service allow sufficient time for adequate consideration of the settlement provisions by other parties to any proposed settlement.

Chapter 28

REDETERMINATIONS OF CUSTOMS VALUES

> *In view of the operation of this Act as it was at the time the officer acted correctly - in his view - in redetermining the values for both years 1986 and 1987.*
>
> *Australian Customs Service response to the Committee*[1]

Introduction

28.1 Under the Customs Act, officers are delegated to redetermine the values of entries for the purpose of assessing the amount of Customs duty to be paid. Such provisions can be used where the ACS forms the view that the values shown on the entry are mis-stated or deductions from the invoiced price have incorrectly been made.

Obligation to Advise Importers

28.2 The Committee asked Customs whether it is obligated to advise importers of their appeal rights when there is a redetermination of the values. The Manager, Legal Services advised that:

> The normal position would be that we would tell people of that. It is better to put it in terms of Commonwealth policy of ensuring that people are informed of their rights and, to the best of my knowledge, that is a standard practice of Customs.[2]

28.3 The following exchange then occurred:

> **Chairman** - But it is not an obligation on Customs?

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1. Evidence, p. S8939.
2. Evidence, p. 1692.

Witness - Not in every circumstance. I think it is better to say it is a standard practice of Customs adopting Commonwealth policy which has been around for a long time. There are some provisions in legislation that require that, but, if you go to the valuation provisions I cannot be confident to say that there is a specific provision. I can only say that we would normally do that.

Chairman - I take it from that that Midford were advised that there was a redetermination. Would that be right?

28.4 The Senior Inspector, Investigation then responded in the affirmative.[3]

Time Limits for Redeterminations

28.5 It was noted by the Committee that the ACS Senior Inspector, Appraisements, determined on 17 June 1988 that the forwarding charges deducted by Midford were dutiable under the then section 161 (D) of the Customs Act.[4] Four days later, on 21 June 1988, the same officer determined that the financial accommodation charges for 50 entries were also dutiable under the same section of the Act.[5] The Committee's reading of the Act indicated that any redeterminations should only occur within 12 months, yet the entries redetermined extended as far back as early 1986.

28.6 Section 161(D) as it then was worded said:

Review of determinations and other decisions

161D. (1) At any time within 12 months after the making of a determination or other decision by an officer under this division, the Comptroller may review the determination or other decision and may-

(a) affirm the determination or other decision;

(b) vary the determination or other decision; or

3. Evidence, p. 1693.
4. Evidence, p. S5990.
5. Evidence, p. S5991.

(c) revoke the determination or other decision and make any other determination or decision that is required to be made for the purpose of determining the customs value of the goods concerned in accordance with this Division.

28.7 When the Committee put a question on notice to Customs on 11 June 1992, it incorrectly referred to a 90 day limit (as contained in the current Act) but within a few days following dispatch of the letter, on 15 June 1992, advised Customs that the question should be amended to read 12 months.[6]

28.8 The answer received, on 24 July 1992, did not take into account the amendment advised to Customs. That answer included that:

> The Committee's reading of Section 161 (D) is incorrect. ... As is apparent, the officer made the re-determination having due regard to the provision as it stood. ... In view of the operation of this Act as it was at the time the officer acted correctly (in his view) in re-determining the values for both years 1986 and 1987.[7]

28.9 The Committee was at a loss to understand this answer, as the Act would indicate that it was not possible for the delegate to redetermine the values for any entries made prior to June 1987. The significance of the comment that the officer acted correctly 'in his view' was also perplexing. The Committee would have preferred to have been provided with an authoritative answer reflecting the corporate viewpoint of Customs. On this matter, comments have been made elsewhere in this report on the difficulties of obtaining from the ACS a revisitation of issues, rather than a regurgitation of previous justifications for actions taken by original decision makers.[8]

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6. Correspondence file part 9.
7. Evidence, p. S8939.
8. Also see Evidence, p. 2087.

Advice to Midford of Redeterminations

28.10 Returning to the question of whether Midford were notified of the redeterminations of the values shown on entries in respect of goods it imported in 1986 and 1987, Customs advised that:

> The ACS re-determined the values on 71 entries for goods allegedly exported by Midford Malaysia. Of those 71 entries goods were seized from 21 entries. Midford were formally advised of the re-determined values relating to 12 of the 21 entries. There is no evidence on file that Midford were notified of re-determinations after the notification of 25/2/88.[9]

28.11 The Committee noted that for the twelve entries for which Midford did receive notification of the redeterminations, it was not possible to ascertain when three were redetermined, but advice was forwarded to Midford on 23 December 1987.[10] The remaining nine were redetermined on 12 January 1988,[11] with the advice forwarded to the Company on 25 February 1988.[12] Why it took six weeks for Customs to advise the Company was not explored.

28.12 For the 71 entries, the value for duty was increased by over $244 000, which increased the duty payable by almost $98 000.[13]

28.13 The Committee was particularly concerned that the submission seeking the redeterminations of the Customs values in June 1988 stated, in part, that the financial accommodation claimed by Midford was dutiable as:

> In this case there is clearly no evidence to suggest that any such financing arrangements ever existed, either with the supplies or with any third party with respect to the purchase of the goods. The admission in a record of interview, by the company secretary of Midford Aust, that no financing arrangement ever existed under Midford's current purchasing

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9. Evidence, p. S5978.
10. Evidence, p. S5993.
11. Evidence, p. S8674.
12. Evidence, p. S5992.
13. Evidence, pp. S5986-8.

> agreements supports this conclusion. Therefore the interest charges which have been deducted ... from post shipments should have been included in the Customs Value.[14] (emphasis added)

28.14 From the Committee's examination of the financial accommodation matter, it is evident that the grounds sought for redetermining the Customs values were incorrect. Chapters 6, 14 and 15 refer.

28.15 The Committee questioned Customs on why Midford were only advised for 12 of the 71 entries redetermined by the ACS. The response was:

> As the goods had been seized as forfeit the entry process was put on hold pending any detinue or prosecution action.
>
> All questions of value for duty would normally have been settled through those processes. The ACS accepts however that in the strict sense the importer should have been advised in terms of S161 (C).
>
> Whilst S. 161 (D) is silent on the matter of notification to importers, the ACS accepts that with regard to re-determinations importers should be advised.[15]

28.16 The Committee noted, however, that the goods in respect of all 71 entries had not been seized. The seizures only related to 21 entries.[16] (See Chapter 8). In addition, the entry process was only put on hold in respect to 10 entries dated 8 and 10 December 1987.[17] (See Chapters 8 and 9). The veracity of the answer provided by Customs was therefore in doubt, but this was not pursued by the Committee.

28.17 In an effort to clarify the answer referred to at section 28.3 above, however, the Committee asked Customs why the Senior Inspector had given the impression that Midford had been advised of the redeterminations, when clearly they had only been notified of 12 out of 71 cases.

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14. Evidence, pp. S5989-90.
15. Evidence, p. S8941.
16. Evidence, pp. S3438-96 and S5978.
17. Evidence, pp. S7331-41.

28.18 Customs advised that:

> In response to a question from the Chairman as to whether Midford had been advised of a re-determination, (the Senior Investigator) answered correctly that there had been.[18]

28.19 It appeared the Committee had been caught out again with another Customs answer that was correct, up to a point, but misleading. The witness had qualified his earlier answer by stating that he had advised Midford on one occasion.[19] In fact he had signed both advices referred to at section 28.11 above covering the 12 entries.[20]

Recommendations

28.20 **The Committee recommends that:**

- **Customs not seek to redetermine values for duty purpose beyond the statutory time limit of 12 months; and**
- **where redeterminations of Customs values are made, the importer be notified within seven days of the date of the redetermination, such advice to also include details of the importer's right to appeal against the decision and the mechanisms for lodging any appeals.**

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18. Evidence, p. S8942.
19. Evidence, p. 1693.
20. Evidence, p. S8942.