The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

Consideration of legislation referred to the Committee

Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000

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CHAPTER 1

INTRODUCTION

Referral of the Bills

1.1 The *Customs Legislation Amendments and Repeal (International Trade Modernisation) Bill 2000* (the ITM Bill), the *Customs Depot Licensing Charges Amendment Bill 2000* and the *Import Processing Charges Bill 2000* were introduced into the House of Representatives on 6 December 2000.[1] On 7 March 2001, the Selection of Bills Committee referred the provisions of the Bills to the Legal and Constitutional Legislation Committee for inquiry and report by 22 May 2001.[2] The Senate agreed to this reference.

Background

Purpose

1.2 Essentially, the Bills aim to facilitate trade in a manner consistent with the requirements and demands of the modern and competitive trade environment while at the same time maintaining the capacity to target non-compliance. The ITM Bill seeks to amend the *Customs Act 1901* and the *Customs Administration Act 1985* and contains significant reforms to Customs' operations designed to modernise the movement of cargo into and out of Australia. The *Customs Depot Licensing Charges Amendment Bill 2000* and the *Import Processing Charges Bill 2000* introduce changes related to cost recovery arrangements necessary to support the modernisation process contained in the ITM Bill. As stated in the Second Reading Speech, the package of Bills aims to achieve the modernisation goal by introducing the following four key strategies:

- by establishing a legislative framework for mandatory electronic reporting of cargo movements;
- by providing for compliance management that recognises that the current 'one size fits all' approach is no longer appropriate to the many industry sectors which deal with Customs;
- by improving controls over cargo and cargo movement; and
- by introducing new cost recovery arrangements to support the changes to cargo processing.[3]

Overview

1.3 The Australian Customs Service has two vital functions to perform - preventing the importation of illicit drugs and other prohibited goods into Australia and facilitating

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1 House of Representatives, *Official Hansard,* 6 December 2001, pp. 23439-23441. The package of Bills was introduced by the Honourable Mr Truss, the Minister for Agriculture, Fisheries and Forestry on behalf of the Honourable Mr Daryl Williams, the Attorney-General

2 Selection of Bills Committee Report No. 3 of 2001

3 House of Representatives, *Official Hansard,* 6 December 2001, p. 23439

international trade.[4] Customs' experience has been that the combination of risk management and information technology delivers the dual objectives of trade facilitation and improved border control.[5] Information technology has, in fact, played a principal role in the delivery of Customs' services for more than two decades:

> Australian Customs has been at the forefront in the use of computer technology since 1972 when the first integrated national system for processing import entries was introduced. Online access to Customs by importers and brokers has been available throughout Australia since 1976 – more than 20 years. Our systems are national and cover all of Australia's major Customs ports and airports. They are also completely paperless, although we provide facilities for the very few traders and individuals who prefer to lodge manual entries.[6]

1.4 The management of cargo movement in and out of Australia is at the core of Custom's dual functions. Certain conditions, however, have challenged the effectiveness and efficiency of Customs' cargo management systems in recent times. The most significant of these has been the exponential growth in cargo over recent years that has accompanied the globalisation of trade.[7] Air cargo has increased by 59% and sea cargo by 48% in the last five years and the prediction is that air cargo will increase by a further 37% and sea cargo by 18% during the next three years.[8]

1.5 In 1996, Customs initiated a review to determine the effectiveness and efficiency of its cargo management systems in a commercial environment that is subject to constant change and ever-improving technology. The outcome of the review published in 1997 is the *Cargo Management Strategy.* The review recommended important changes to the cargo system including the introduction of accredited client arrangements and the integration of Customs' systems as well as the development of a closer working relationship with industry.[9] In addition, a review of Customs' IT infrastructure confirmed that:

> … Customs systems were complex, had little or no integration and co-ordination between different applications, and would prove increasingly costly to maintain if they were not modernised and re-hosted.[10]

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4 House of Representatives, *Official Hansard,* 6 December 2001, p. 23439

5 Australian Customs Service, *Customs Risk Management, Re-engineering the Cargo Management Process,* Text of Speech by Mr Colin Vassarotti, National Director Office of Business Systems, Australian Customs Service, to the Japanese Customs Forum, Yokohama Japan, 22 October 1998, http://www.customs.gov.au at pp. 5-6

6 Australian Customs Service, *Customs Risk Management, Re-engineering the Cargo Management Process,* Text of Speech by Mr Colin Vassarotti, National Director Office of Business Systems, Australian Customs Service, to the Japanese Customs Forum, Yokohama Japan, 22 October 1998, http://www.customs.gov.au at p. 6

7 Australian Customs Service, Cargo Management Re-engineering Business Model, March 2000 at http://www.customs.gov.au/cmr_mod/cmrmod.htm at p. 1

8 House of Representatives, *Official Hansard,* 6 December 2001, p. 23439

9 Australian Customs Service, Cargo Management Re-engineering Business Model, March 2000, http://www.customs.gov.au/cmr_mod/cmrmod.htm at p. 4

10 Australian Customs Service, Cargo Management Re-engineering Business Model, March 2000, http://www.customs.gov.au/cmr_mod/cmrmod.htm at p. 4

1.6 Customs formed the view that unless the cargo management system was significantly changed, it would be unable to competently meet either of its two responsibilities.[11] By December 1997 it was acknowledged that Customs' cargo systems needed to be re-engineered. In April 1998, the Division of Office of Business Systems was established to review Customs' business systems and processes and the first review was the Cargo Management Re-engineering (CMR) project. In October 1998, the National Director of Office of Business Services stated that although the computer systems used by Customs until then had been 'world class', changing conditions would shape future directions for Customs:

> Trade is expanding rapidly, business needs and practices are changing, technology is improving and increasingly influencing change in business processes. At the same time the enforcement challenge of Customs is increasing in complexity.
>
> We know we must move forward. It is imperative the technology we use is the most modern available. Even more importantly we must ensure our business processes are harmonised with the needs of industry and government. In short, we have recognised the need to re-engineer the cargo management system, and not simply convert our current business systems to operate on new technology. We have also determined that our business systems must be built upon sound risk management principles.[12]

1.7 Throughout the CMR project, Customs liaised with the AQIS and the ABS. Other government agencies participated through workshops, consultation and the High Level Reference Group that was attended by stakeholder agencies as appropriate. Other important elements in the process have been the Industry Reference Group chaired by Mr Richard Humphry AO, CEO of the Australian Stock Exchange and the Industry Working Group on Customs (IWGC) which provided mechanisms for industry's contribution into the CMR project. In September 1999, a draft CMR Business Model was released to industry for comment and feedback. The IWGC responded by developing an alternative Business Model (the Industry Model). Customs released the final CMR Business Model in March 2000.[13] According to Customs, the CMR project has identified the key elements necessary to

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11 Australian Customs Service, Cargo Management Re-engineering Business Model, March 2000, http://www.customs.gov.au/cmr_mod/cmrmod.htm at p. 1. See also Australian Customs Service, Fact Sheet , *Cargo Management Re-engineering - At a Glance,* http://www.customs.gov.au/cmr/cmr.htm: The fact sheet states that the decision by Customs to re-engineer its cargo management system was based on the industry trend towards integrated supply chain management, rapid expansion in Internet usage by business, commitment of the Australian Government to online service delivery by 2001, globalisation of trade, Government's aim to provide a single window to government, need to avoid duplication of data, opportunity presented by outsourcing Customs computer facilities and the need to integrate and modernise current computer applications

12 Australian Customs Service, *Customs Risk Management, Re-engineering the Cargo Management Process,* Text of Speech by Mr Colin Vassarotti, National Director Office of Business Systems, Australian Customs Service, to the Japanese Customs Forum, Yokohama Japan, 22 October 1998, http://www.customs.gov.au at p. 7

13 See the discussion in *Submission volume 1,* Cargo Brokers and Forwarders Council of Australia, pp. 12-13 and *Submission volume 1,* Australian Customs Service, pp. 82-84

successfully re-engineer cargo management systems[14] and this legislative proposal aims to give recognition to those elements.

1.8 The reforms contained in the ITM Bill arguably constitute the most significant reform to Customs' operations since the inception of the Customs Act in 1901. The proposed reforms enable Customs to adopt a contemporary approach to cargo management while at the same time strengthening its capacity to perform its border control function.[15] Key reforms include:

- the introduction of the new Accredited Client Program (ACP) which streamlines Customs' dealings (the clearance of goods) with those clients with a history of high level regulatory compliance;
- the adoption of a new means of electronic communication with Government for the Customs' clearance of goods – the new Customs Connect Facility (CCF);
- the introduction of new measures to encourage high level compliance with reporting of cargo;
- the introduction of a strict liability regime which incorporates the provision of a new system of administrative penalties (infringement notices); and
- the provision of new powers to Customs officers to enforce the new arrangements.

Conduct of the inquiry

1.9 Following the referral of the Bills to the Committee on 7 March 2001, the Committee placed advertisements on the Committee's web site and wrote to a range of interested organisations and individuals inviting submissions by 26 March 2001. The Committee received 20 submissions and some supplementary submissions. These are listed at Appendix 1. All except one, which is confidential, have been published.

1.10 The Committee held public hearings in Canberra on 2 April 2001 and in Melbourne on 3 May 2001. A list of witnesses at the public hearing is at Appendix 2.

Notes on References

1.11 References in this Report are generally to submissions in a bound volume. There are, however, some references to individual submissions that were received after the submission volumes were printed. The references to the Hansard transcript are to the official Hansard unless it is otherwise indicated in the footnote that the reference is to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

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14 Australian Customs Service, Cargo Management Re-engineering Business Model, March 2000, http://www.customs.gov.au/cmr_mod/cmrmod.htm at p. 1

15 House of Representatives, *Official Hansard,* 6 December 2001, p. 23439

CHAPTER 2

THE BILLS

Introduction

1.1 As stated in paragraph 1.2, the package of Bills essentially reforms the way that Customs manages the movement of cargo into and out of Australia and the way that business is to be conducted in relation to Custom's cargo operations. The *Customs Amendment and Repeal (International Trade Modernisation) Bill 2000* (the ITM Bill) is designed to deliver those reforms to modernise Customs' management of cargo movement. The *Customs Depot Licensing Charges Amendment Bill 2000* and the *Import Processing Bill 2000* are designed to implement cost recovery changes to support the ITM Bill's reforms.

1.2 This Chapter outlines the main provisions in the proposed legislative package. It is not intended to exhaustively describe every proposed amendment.

The ITM Bill

1.3 The ITM Bill proposes a number of significant reforms that impact on the interaction between Customs and industry. The reforms are aimed at enabling Customs to perform its border control function while simultaneously facilitating international trade. In general terms, some of the significant reforms include:

- self-assessed compliance management for Accredited (importer/exporter) Clients;
- new reporting and compliance measures in relation to imported cargo;
- allowing Customs to control the movement of cargo where it appears the cargo has been reported incorrectly or is in breach of Customs-related legislation;
- new export reporting requirements to improve compliance and combat the diversion into domestic commerce of goods intended for export;
- extension from one to four years of period for Customs to recover short paid duty or duty mistakenly refunded;
- a new system of electronic communication for the Customs clearance of goods that will enable people to communicate with Customs using a variety of electronic connection options, such as the Internet;
- a new strict liability and penalty regime (that incorporates a system for issuing 'infringement notices' in lieu of prosecution) applicable to a range of compliance breaches including for errors transmitted to Customs, late or no communication of data to Customs, and movement of cargo contrary to ACS direction; and
- new monitoring powers for Customs officers to enforce the new Customs regime.

Commencement

1.4 Most of the provisions of the ITM Bill are proposed to commence by Proclamation at various dates during the two years (rather than the usual 6 months) following the date the Act receives the Royal Assent.[1] The extended period is in recognition that the Bill, if enacted, will present significant change to industry through new cargo management processes and new technology systems (clause 2).

Communicating with Customs: The Cargo Management Re-engineering Project

1.5 The Bill amends the *Customs Act 1901* (the Customs Act) to give legislative support to some aspects associated with the newly developed system for communicating electronically with Customs in relation to the importation and exportation of cargo. Currently, the Customs Act provides for a number of electronic communication systems described in the Explanatory Memorandum as 'legacy systems'.[2] It is proposed that those systems be replaced by a 'single integrated system'. The development of the new system is known as the Cargo Management Re-engineering Project (CMR). The Explanatory Memorandum states that:

> This gives effect to the terms of the recently amended Kyoto Convention on the Simplification and Harmonisation of Customs Procedures, which requires Customs administrations to allow the lodging of information by electronic means.
>
> Generally speaking, people will be able to give Customs information via "open" communication systems that satisfy the technical requirements set down by Customs to ensure the integrity of the information received. This could include the use of the public Internet.[3]

1.6 It is important to acknowledge that the new system is not a legislative initiative as such. Rather, the system has been developed by Customs and will be implemented through Customs' contractual and business arrangements. The most significant provision in the Bill that relates to the CMR is proposed new section 126D (item 1 of part 1 of schedule 3) which requires the CEO to 'establish and maintain such information systems as are necessary to enable persons to communicate electronically with Customs'. To do so, the CEO must publish certain things in the *Gazette* including the information technology requirements to be met by those wanting to communicate with Customs, and action required to be taken to verify communication with Customs. Other gazetted requirements will relate to signatures in connection with electronic communication, electronic production of documents and alternative information technology that can be used. The Bill also makes provision for communicating with, and making payments to, Customs when the information system is temporarily inoperative (new sections 126E and 126F).

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1 The provisions to which that commencement period does not apply are those that preserve the status quo in relation to communications to Customs using the legacy systems between the date of Royal Assent and date of commencement and those that relate to certain information held by Customs: Subclause 2(1)

2 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 69

3 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, pp. 69-70

1.7 The new single integrated system for communicating electronically with Customs will have at its front end, a new Customs Connect Facility. Business processes have also been re-engineered to best take advantage of this new system. To this end, new concepts, forms and mechanisms for communicating information to Customs have been developed. These include the introduction of:

- import declarations (a term used in the Kyoto Convention)[4] and Requests for Cargo Release (RCRs): new subsection 68(3A) provides that an entry for home consumption can be made by communicating either an import declaration or an RCR to Customs. Proposed section 71K enables the CEO to approve different forms of *import declarations* reflecting the recognition that different classes of importers should make different kinds of import declarations. In some situations (for example where the value of the goods is low), a simple declaration will be appropriate providing limited information. Other situations will require a 'full' declaration to be made. An *RCR* is a request to permit goods to be released into home consumption. On receipt of an RCR, Customs must either issue a cargo release advice or advise that the goods require further examination (new section 71DE);[5] and
- self-assessed clearance declarations: these must be made (electronically) in respect of imported goods with a customs value of less than $250 not requiring a full entry (new section 71-71AAB).[6] These declarations must also be made in relation to goods in a postal consignment valued at less that $1,000. The declarations will contain little information (usually pertaining to the $250 threshold and whether the goods are subject to quarantine - section 71(2)), and are not 'entries'. After a declaration has been made, the goods may move into Australia if any charges or taxes have been paid. Under section 71AAA, persons making a self-assessed clearance declaration will be liable to pay an import processing charge[7] (see below) and under section 71AAB, such charges can be paid on a monthly basis.[8]

New export measures

1.8 One of the objectives of the ITM Bill is to improve the capacity of Customs to ensure that legal requirements in relation to the exporting of goods are complied with. In particular, the Government is concerned to prevent the export of prohibited goods, to monitor

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4 See *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 72

5 See *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 86

6 In general terms, this means that while all imported goods (commercial and non-commercial) with a value of $250 must be declared, a full entry will not be required in relation to certain goods. This particularly enhances Custom's border control powers to ensure that prohibited goods are not brought into the country

7 Note: The self-assessed clearance declaration charge will not be payable the owner of the goods has made an 'abbreviated cargo report' to Customs: Subsection 71AAA(3)

8 Other changes include changes to transhipment provisions, the introduction of warehouse declarations and provisions allowing Customs to advise owners of goods whether or not their goods are clear for entry into Australia (see *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, pp. 74-75

compliance with the GST law (given the GST-free status of exports) and to prevent the evasion of excise duty. To achieve these objectives, the Bill introduces a number of measures, two of the most significant being:

- allowing Customs officers to examine goods for export prior to these being subject to Customs' control; and
- the introduction of strict liability offences for export reporting offences.[9]

1.9 Another important change proposed to export operations is the alignment of the export entry threshold to $2000 for all cargo, with the exception of goods requiring an export licence or permit, or customable/excisable goods (item 56 of schedule 3, new paragraph 113(2)(b)).

Allowing Customs to examine goods for export prior to these being subject to Customs' control

1.10 The ITM Bill confers new powers on Customs officers to enable them to enter premises not prescribed as places for export and examine goods reasonably believed to be intended for export (new Division 3A in Part VI, item 5 of schedule 1). The significant change is that the search and entry powers are exercisable *before* the goods come under the control of Customs.

1.11 The Bill provides that the powers are conferred for the purpose of enabling Customs officers to assess whether the goods meet the requirements of the Customs Act in relation to exports (new subsection 122F(2)).[10] The powers will only be exercisable with the consent of the occupier of the premises (new subsection 122F(3)) and can only be exercised by officers whom the CEO is satisfied are 'suitably qualified' (because of the officer's abilities and experience) to exercise those powers (new subsection 122F(4)). The Bill also provides that the consent of the occupier for Customs to enter and search must be in writing (new subsection 122H(4)) and that consent may be withdrawn in writing at any time. If the consent is withdrawn, Customs officers must leave the premises (new section 122J).

1.12 Under new sections 122K-122P, authorised officers will be able to:

- search for export goods and related documents;
- examine export goods and documents relating to export goods;
- draw samples of the export goods;
- examine and make copies of documents that relate to export goods;
- question the occupier about the export goods; and

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9 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 102. Those people exporting goods are required to make a declaration either in the form of an Export Cargo Report or an Export Declaration. Offences can relate to any of the matters contained in these declarations

10 An example of goods failing to meet the requirements of the Customs Act includes the export of pharmaceuticals without the requisite export permit. Exporting pharmacueticals as 'personal effects' is an offence

- take equipment into the premises for the purpose of using it to search for or examine goods or documents.

1.13 There is also provision for compensation to be payable in circumstances where a person's property is damaged as a result of the action taken by the Customs officer exercising these powers (new section 122Q).

Introduction of strict liability for export reporting offences

1.14 The Bill seeks to encourage more accurate reporting of export data by introducing appropriate penalties to deter non-compliance with Customs' reporting requirements:

> The current administrative penalty provisions in sections 243T and 243U of the Customs Act do not reflect best practice in relation to penalties issued for errors made under self-assessment regimes. The current administrative penalty system is limited to duty errors appearing on import entries only. Administrative penalties are currently not available for errors on export entries, refunds or drawback applications, nor for late or inaccurate cargo reports or unauthorised movement of goods. The new penalty regime will address those issues.[11]

1.15 New Division 4 provides for certain offences, including those relating to the reporting of information, to be strict liability offences. The Bill also seeks to establish a three tier regime in relation to the treatment of offences. Currently, prosecutions are available under section 234 of the *Customs Act 1901.* New Division 5 provides for the issue of infringement notices and administrative penalties (fines) in lieu of prosecution for certain offences. New section 234X(1) (item 6 of schedule 2) lists the offences for which an infringement notice may be issued. This regime is discussed further below at paragraph 2.31.

Alignment of the export threshold

1.16 Item 56 of Schedule 3 repeals paragraphs 113(2)(b) and (c) of the Customs Act and replaces them with a standard export entry threshold of $2000 for goods for export, regardless of the mode of export. The purpose of this is to align the threshold that currently exists for air and sea cargo (now $500) with that for Australia Post ($2000). The effect of this amendment will be to remove a commercial advantage that has been provided to Australia Post.

Other measures to improve export control

1.17 Other measures in the ITM Bill aimed at improving export control include:

- requiring warehouse operators to allow goods to be removed from the warehouse only when they are presented with an authority to deal.[12] Details of that authority must be communicated to Customs (new subsection 99(3), item 97 of schedule 3). This is aimed at preventing the release from warehouses of high duty rate items such as alcohol and tobacco when licensees are presented with false or altered export documentation. When those goods are released under false

11 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 106

12 An authority to deal is, in general terms, an electronic statement by Customs that goods may be exported, imported or moved into warehouses as is relevant to the case: see for example new section 71C

documentation, they are often diverted into the domestic market with deleterious effects to the relevant industry and loss of Government revenue. In addition, the Bill also imposes a requirement that those goods may only be consolidated for export at a licensed depot and when they are delivered to and released from the depot, the movements must be reported to Customs (new section 117AA, item 62 of Schedule 3);

- ensuring that Customs is aware of goods delivered to a Cargo Terminal Operator (CTO) for export by requiring that CTOs report export cargo to Customs (new sections 114E and F, item 62 of schedule 3). This is to prevent the current late reporting of outward manifests by carriers which leaves Customs with insufficient time to determine whether those goods are prohibited exports or, in cases where goods are supposedly for export but are not in fact exported, are GST compliant;[13]
- allowing shipping companies and airlines to report outward manifests to Customs up to three days after departure (new section 119, item 62 of schedule 3). This will facilitate the provision of accurate export statistics for the purposes of the ABS; and
- requiring an export entry for all goods the export of which requires a permission under an Act or instrument made under an Act (new subsection 113(2A), item 4 of schedule 1). This is to counter the current situation where certain goods (such as passenger/crew baggage, lower value items) are exempt from lodging an export entry even where the exportation of goods requires a permission under Customs or other Commonwealth legislation. For example, if pharmaceuticals, which require a permit, are carried in crew luggage, they are currently not declared. This undermines Custom's ability to monitor controlled exports. The amendment means that the exemptions do not apply to goods that require a permission under an Act. Therefore, under the amended legislation, pharmaceuticals in crew luggage must be declared.

Commercial compliance measures

1.18 The underlying rationale for several major amendments in the Bill is to generally enhance management of cargo in a self assessed environment. Some of the amendments, therefore, aim to improve commercial compliance with the Customs Act while others aim to improve the accuracy of information communicated to Customs in the course of commercial transactions involving cargo. Specifically, the Bill introduces six commercial compliance measures and these are dealt with below.

Retention of commercial documentation

1.19 The Bill seeks to extend the current obligations on those who deal with the importation and exportation of cargo to retain documentation. Currently, under section 240 of the Customs Act, owners of imported or exported goods are required to keep commercial documentation about the goods. According to the Explanatory Memorandum, section 240 in

13 The latter refers to the situation where goods are diverted back into the domestic market and the GST that is therefore liable to be paid is evaded. This issue is dealt with in Chapter 3

its current form does not cover some sectors of Customs' client base or reflect technological change.[14]

1.20 The Bill makes significant changes to the requirements for document retention in relation to the importation and exportation of goods. Specifically, the Bill:

- imposes a requirement on all persons connected with the importation and exportation of cargo to retain all relevant commercial documentation for 5 years. This means that freight forwarders, for example, will also be required to retain documentation (new subsection 240(1A), item 18 of schedule 1);
- amends the current requirements as to the method of keeping commercial documents, reflecting available technology and the globalisation of the market place: New subsection 240(4)) enables documents to be kept at any place (including outside Australia) and in any form as long as certain conditions are met (compliance with Customs law must be readily ascertainable by the Collector of Customs). New subsections 240(6) and (6A) require persons to advise Customs officers about the whereabouts of documents within a reasonable time (Item 20 of schedule 1);
- introduces strict liability offences in relation to: the failure to keep documents in the manner prescribed in new subsection 240(5); the failure to advise Customs officers in the manner required under new subsection 240(6); the failure to comply with certain notices about record keeping under new subsection 240(6A) and for the altering or defacing of a document (new subsection 240(6B)). The prescribed penalty is 30 penalty units (item 20 schedule 1); and
- empowers authorised officers to require the production of records and documents in Australia within 14 days (item 20 of schedule 1, new subsections 240AA(1) and (2)). The failure to produce a commercial document following such a requirement will also constitute a strict liability offence under new section 243SB.

Retention of documentation verifying communication with Customs

1.21 The Bill proposes to impose a new requirement on those who are involved in the communication of information to Customs about the movement of cargo to retain those records for a period of 12 months (new subsection 240AB(3)). An authorised officer may require the documents to be produced (new subsection 240AB(6)) and failure to comply will constitute a strict liability offence (new section 243SB).

Monitoring powers to check commercial compliance

1.22 Part 5 of Schedule 1 of the Bill (in particular, subdivision J-sections 214AA to 214AJ) contain the new monitoring powers in the Customs Act (which will replace the current audit powers in sections 214AA, 214AB and 214AC). Generally, the new powers are to assist Customs to ensure compliance with Customs-related laws and to verify information

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14 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 76

communicated to Customs.[15] New subsection 214AB substitutes the new monitoring powers for use in searching premises and these include the power:

- to take photographs and videos and make sketches of things at the premises;
- to inspect, examine, count, measure, weigh, gauge, test, analyse and take samples;
- to inspect any document or record;
- to take extracts from, or make copies of, any document or record;[16]
- to take any equipment onto premises necessary to exercise the above powers;
- to test and operate record-keeping, accounting, computing or other systems; and
- to secure certain things found during a search for 72 hours or until a warrant is obtained. The things that may be secured are those which the monitoring officer believes, on reasonable grounds, afford evidence of the commission of an offence against a Customs-related law and may be lost, destroyed or tampered with;[17]
- to operate equipment to check information;[18] and
- to copy information found by operating equipment.[19]

1.23 New subsection 214AC describes monitoring officers as officers authorised by the CEO to enter premises and exercise monitoring powers and provides that only those officers whom the CEO is satisfied are suitably qualified and have the necessary experience and expertise to exercise such powers can be monitoring officers.

1.24 Although a monitoring officer may enter and exercise these powers at premises where the occupier has given written consent (new section 214AE),[20] monitoring officers can also apply for a warrant to exercise monitoring powers in relation to particular premises (new section 214AF). Warrants may be granted by telephone or by other electronic means (new section 214AG).

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15 The term 'customs related laws is defined to mean the Customs Act, the Excise Act and any other relevant legislation that relates to the importation and exportation of goods which is subject to any tax, duty, levy or charge: proposed new section 4B of the Customs Act

16 See items 20 and 21 of Schedule 1 of the Bill where it is stated that a commercial record or a record verifying communication with Customs can be held in 'any form'. Note also the definition of record in section 12 of the *Electronic Transactions Act 1999*

17 The powers listed here and above are contained in new subsection 214AB(1) of the Bill

18 This power is contained in new subsection 214AB(2) of the Bill

19 This power is contained in new subsection 214AB(3) of the Bill

20 Consent can also be withdrawn in writing

Recovery of short paid duty

1.25 The Bill seeks to extend the period during which the CEO can demand the recovery of short paid duty or erroneously refunded duty. Currently, section 165 provides that the period for the recovery of those monies is 12 months. According to the Explanatory Memorandum:

> This 12 months time limit means that Customs cannot recover any duty when the short payment is the result of Customs error, and that is detected during an audit conducted more than 12 months after the short payment. Where the short payment arises from a misstatement to Customs, action can be taken under section 153 of the *Customs Act* with no time limit.[21]

1.26 The Bill seeks to extend this period to 4 years which will bring the provision into line with the recovery period available under the *Taxation Administration Act 1952* for GST, Luxury Car Tax and Wine Tax (items 6 and 7 of schedule 1, amended section 165). It should be noted that the Bill also seeks to extend the period in which refund applications can be lodged for overpaid duty to 4 years. These changes will be effected by amendments to the regulations.[22]

Strict liability and penalty regime

1.27 The Bill seeks to replace the existing administrative penalty regime for false and misleading statements with strict liability offences with the administrative option of issuing an infringement notice for a reduced penalty in lieu of prosecuting for the offence. Strict liability offences are introduced for:

- failing to answer questions a person is required to answer under the Customs Act – maximum penalty 30 penalty units or 6 units if an infringement notice is issued (new section 243SA);
- failing to produce documents or records[23] - maximum penalty 30 units or 6 units if infringement notice is issued (new section 243SB);
- the making of false or misleading statements by the owner of goods to a Customs officer resulting in loss of duty (new section 243T)[24] – the maximum penalty is either: (i) the amount of excess of duty, (ii) the refund that would not have been payable or the amount of the excess, or (iii) the drawback that would have been payable or the amount of the excess whichever is relevant in the circumstances (new section 243T); or, if an infringement notice is issued, one fifth of the maximum amount a court would impose (new section 243ZB).[25] Defences under the Criminal Code are available as well as two others specified in

21 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, pp. 81-82

22 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 82

23 Not applicable to proposed sections 71DA, 71DL or 114A

24 This section does not apply to cargo reports or outturn reports

25 The penalty is in addition to the amount of duty recovered. Also, once an infringement notice is issued, Customs right to prosecute is extinguished

the Bill - voluntary notification of the false or misleading statement (subsection 243T(4))[26] and communication of uncertainty about accuracy of information (subsections 243T(5) and (6)); and

- the making of false or misleading statements by the owner of goods to a Customs officer not resulting in a loss of duty (new section 243U)[27] – the maximum penalty is 50 penalty units for each such statement or, if an infringement notice is issued, 10 penalty units or ½ a penalty unit for each false or misleading particular, whichever is the lesser (new section 243Z(4)(a)).[28]

Accredited Client Program

1.28 The introduction of accredited client arrangements is one of the main objectives of the Bill. Such arrangements have successfully been used in relation to industry's involvement with the AQIS for some years. Customs deals with approximately 96,000 clients per year.[29] The accredited client arrangements are designed to facilitate and streamline import and export processes based on the principle that 'one size does not fit all'.[30] This means that, for example, those importer clients who have a history of high level regulatory compliance with Customs' reporting requirements, will be able to enter into arrangements with Customs whereby they take delivery of their goods immediately upon arrival and account to Customs at a later time. The arrangement will similarly be available to exporter clients. In this way, clients will be 'accredited' clients. According to the Explanatory Memorandum:

> The proposed changes give effect to the International Convention for the Simplification and Harmonisation of Customs Procedures (also known as the Kyoto Convention). This Convention permits people with an acceptable record of compliance with Customs requirements, and a satisfactory system for managing their commercial records, to have their goods released by providing minimum information, with other information to be provided at a later date.[31]

1.29 Under the new arrangements, clients will enter into information contracts with Customs which enable those clients to communicate information to Customs in ways different to other clients. In addition to new legislative provisions,[32] the accredited client arrangements will be founded upon:

- business rules: the CEO will publish business rules in the *Gazette* stipulating matters relevant to information contracts (for example, the conditions

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26 Note: The timing of the disclosure is critical. The defence is not available after a notice of proposal to exercise monitoring powers has issued under section 214AD (subsection 243T(4))

27 This does not include a cargo report or an outturn report

28 Once an infringement notice is issued, Customs right to prosecute is extinguished

29 See for example, *Transcript of evidence,* 2 April 2001, p. 22

30 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 5

31 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 86

32 See new sections 273EB, 71DD, 114BB, 114BA, 71DB, 71DC, 71DE and 71DG

that have to be met by those wishing to enter into a contract and who can conduct audits to determine a person's suitability (new section 273EB); and

- information contracts: the CEO can enter into information contracts with accredited exporter and importer clients (who meet the criteria specified in the business rules) and with those companies who have piloted the new arrangements (new sections 71DD and 114BB).[33] Information contracts will set out Customs' arrangements with accredited clients that are 'tailor made' to suit their individual situation and requirements. Information contracts will include all relevant matters including which goods are covered by the contract, how information is to be communicated to Customs and when the arrangement may be terminated.

1.30 The Bill provides new mechanisms to complement the accredited client arrangements:

- Importers: A Request for Cargo Release (RCR) is a document used by importers to communicate minimum (but significant[34]) information to Customs at the time of importation and to request immediate release of goods for home consumption (new section 71DB). Customs must respond with a cargo release advice either releasing the goods or requesting further advice and importers must provide further information to Customs in a periodic declaration provided on the first day of the following calendar month (new section 71DE). In addition, importers sending RCRs and periodic declarations to Customs will be liable to pay import processing charges (new sections 71DC and 71DG) and RCRs are entries for home consumption (which means that importers are liable to pay, but can defer, duty, GST and any other charges payable);[35] and

- Exporters: Accredited client export approval numbers (ACEANs) will be provided to accredited client exporters and, using these ACEANs, exporters can enter goods for export. The only information provided to Customs at the time of export will be the ACEAN. Additional information about the goods must be provided to Customs on the first day of the calendar month following (new section 114BA). There will be no processing charge for ACEANs.

New strict liability and penalty regime

1.31 As mentioned above at paragraph 1.27, the Bill provides for a regime of strict liability offences and penalties. The provision of the regime is intended as part of the move towards a self-assessment compliance-management environment. There will be a three tiered approach to the offences and penalty regime. Under the first tier, Customs may elect to prosecute for a range of offences including the reporting of false information (section 234 of the Customs Act-'Customs offences'). Under the second tier, Customs may prosecute for a strict liability offence if Customs elects not to issue an infringement notice (under the third tier) or, after an infringement notice is issued, the person fails to make the payment required. The third tier is the option of issuing an infringement notice in lieu of prosecution for a strict

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33 New subsections 71DD(3) and 114BB(3)

34 For example, the RCR must enable Customs to identify the importer and the consignment involved and whether it might pose a risk to the community (new subsection 71DB(4))

35 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 87

liability offence. The third tier will attract the lowest penalty – one fifth of the amount that a court would impose were the matter prosecuted (new Division 5, item 6 of schedule 2).

1.32 New subsection 243X(1) lists those offences for which the issuance of an infringement notice is possible and includes:

- failure to answer a question under new subsection 243SA(1);
- failure to produce documents or records under new section 243SB(1);
- making a false or misleading statement resulting in a loss of duty under new subsection 243T(1);
- making a false or misleading statement not resulting in a loss of duty under new subsection 243U(1);
- making a false or misleading statement in cargo reports or outturn reports under new subsection 243V(1);
- failure in respect of making cargo reports under new subsections 64(13), 64AA(10), 64AAA(9), 64AAB(7), 64AAC(6), 64AB(10), and 64ABA(9); and
- failure to communicate information electronically within 24 hours when the information system is temporarily inoperative under new subsection 126E(3) and failure to comply with an undertaking in relation to the making of a payment to Customs when the information system is temporarily inoperative under new subsection 126F(3).

1.33 Infringement notices may be issued up to 12 months after the date of the offence (new subsection 243Y(2)), except in relation to certain offences that become apparent during the exercise of monitoring powers. For misleading or false statements (subsection 243T(1) and 243U(1)) detected during the exercise of monitoring powers, infringement notices can be served up to 4 years after the day on which the statement was made or one year after the offence was detected (new subsection 243Y(3)). The four year period will complement the new requirements that commercial documentation will be retained for five years.[36] Other important matters include that:

- prosecution (as opposed to issuance of infringement notice) must commence within 5 years from the commission of the offence (section 249);
- new section 243Z specifies the particulars that must be contained in an infringement notice;
- the obligation to pay duty or repay refund or drawback continues despite the issuance of an infringement notice (new paragraph 243Z(1)(d)). A period of 28 days is allowed for payment, although an extension can be arranged (new paragraph 243Z(1)(f));
- persons served with an infringement notice may seek to have the notice withdrawn (new subsection 243ZA(1));

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36 See paragraph 2.20 above

- if the infringement notice remains unpaid for 28 days or the authorised extended period (new section 243ZE), Customs may elect to prosecute (new section 243ZD);[37] and
- there is no avenue of appeal to the AAT in relation to the decision to issue an infringement notice.[38]

Border compliance measures

1.34 In addition to the above proposals in the Bill which were the prime focus of inquiry participants, the Bill also provides for a raft of new measures in relation to border compliance. These include:

- new reporting requirements in relation to impending arrival of ships and aircraft (new section 64, item 118 of schedule 3);
- separate provisions for the report of crew (new subsection 64ACA(2), (3), (6),(7) and (8)) and the reporting of passengers (new section 64AC);
- new arrival reporting provisions relating *solely* to the time of ship and aircraft arrival. As is currently required, new subsections 64AA(2) and (3) will require ship arrivals to be reported within 24 hours (or prior to the issuance of a clearance certificate whichever is first) and aircraft arrivals to be reported within 3 hours of arrival (or prior to issuance of a clearance certificate whichever is first);
- the reporting of stores and prohibited goods currently required as part of an arrival report will be a separate requirement under new section 64AAA because certain operators will be required to make an electronic arrival report;
- new provision for the notification of cargo reporters so that Customs will know from whom to expect a cargo report (new section 64AAB) and notification of persons engaged to unload cargo (new section 64AAC);
- new cargo reporting requirements allowing more time for such reports to be made in view of the provision of offences for non-compliance with reporting provisions (new subsection 64AB(2)). Reports must be made electronically and in an approved statement (new subsection 64AB(4) – this will assist Customs in identifying suspect cargo; and
- In relation to outturn reports[39], new section 64ABAA is intended to reflect commercial practice so that an obligation to make an outturn report will be

37 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 111

38 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 108

39 Outturn reports identify cargo unloaded not included on the cargo report and cargo not unloaded that is on the cargo report: *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 95

imposed on certain operators of Customs places (such as the stevedore and the operator of a Customs licensed depot).[40]

Cost Recovery

1.35 The *Import Processing Charges Bill 2000* and the *Customs Depot Licensing Charges Amendment Bill 2000* support the ITM Bill by giving legislative effect to various charges and fees in respect of Customs services associated with the modernisation process.

Customs Depot Licensing Charges Amendment Bill 2000

1.36 As stated in the Explanatory Memorandum, the *Customs Depot Licensing Charges Amendment Bill 2000* introduces new charges to support the modernised process for amending Customs depot licences contained in the ITM Bill.[41]

1.37 Part IVA of the Customs Act deals with Depots and provides for the granting of depot licences. Depot licences enable certain places to be used for the purpose of holding or unpacking imported goods that are subject to the control of Customs or for the holding, packing or examination of goods for export that are subject to the control of Customs (section 77G). Other provisions in Part IVA deal with the form and manner of applications for depot licences, matters pertaining to the decision to grant a depot licence, and conditions of a depot licence.

1.38 The *Customs Depot Licensing Charges Act 1997* imposed the charges payable in respect of such licences:

- the rate of a depot licensing application is $1,000 for a person or partnership who applies for a licence prior to 1 July 1997 and $3,000 (or a prescribed amount not exceeding $4,500) for applications after that date; and
- the annual rate of depot licence charge is: $4,000 (or, if prescribed, not more than $6,000) for depots not licensed immediately prior to the period for which the grant is sought; $4,000 (or a prescribed amount not exceeding $6,000) for licensed depots which handled more than 100 transactions during the year (ending 31 March); and $1,500 (or a prescribed amount not exceeding $2,500) where the licensed depot handled less than 100 transactions during that year.[42]

1.39 The *Customs Depot Licensing Charges Amendment Bill 2000* proposes to alter the charges payable in relation to depot licences in two ways:

- it increases the number of transactions (from 100 to 300) that are required before the higher rate of depot licensing charge is payable (item 3, amended paragraphs 6(2)(b) and (c)); and
- it imposes a new charge for a variation of a depot licence (the ITM Bill empowers the CEO of the ACS to vary a depot licence - amended section 77L,

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40 For more information see: *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, pp. 88-101

41 House of Representatives, *Official Hansard,* 6 December 2000, p. 23441

42 *Customs Depot Licensing Charges Act 1997,* sections 5 and 6

item 146 of schedule 3 of the ITM Bill). New section 6A provides that the charge payable will be $300 (or, if an amount is prescribed, not exceeding $450).

Import Processing Charges Bill 2000

1.40 The stated objective of the *Import Processing Charges Bill 2000* is to:

> … introduce[s] new cost recovery arrangements to support the proposed changes to the management and processing of cargo that are set out in the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000.[43]

1.41 The ITM Bill proposes to repeal the existing *Import Processing Charges Act 1997* (item 1, Schedule 4) and this Bill seeks to impose new import processing charges. Briefly, the Bill proposes to impose the six charges set out in proposed sections 64ABC, 71AAA, 71B, 71DC, 71DG and 71DI of the *Customs Act* (new section 4) associated with importing processes and to set the amounts payable in respect of each (new subsections 5(1)-(6)). These are:

- a screening charge for an abbreviated cargo report (new sections 64ABC of the Customs Act): the charge is set at $45 (or, if prescribed, not more than $67.50);
- a self assessed clearance declaration charge (new section 71AAA of the Customs Act): the ITM Bill requires owners (or agents) to make self assessed clearance declarations in respect of goods not required to be entered for home consumption or warehousing. The processing charge for such a declaration for a cargo report relating to 21 or more reportable documents[44] is $45 (or, if prescribed, not more than $67.50) and for all other declarations, $2.15 (or, if prescribed, not exceeding $3.23);
- an import declaration processing charge (new section 71B of the Customs Act): for an *electronic* import declaration that relates to section 68 goods that are valued between $250 - $1,000, the charge is $23.20 (or, if prescribed, not more than $34.80) and for goods valued over $1,000, the charge is $29.25 (or, of prescribed not more than $43.85). For a *documentary* import processing charge for section 68 goods, the charge is $60.00 (or, if prescribed, not more than $90.00);
- an RCR processing charge (new section 71DC of the Customs Act): the charge is set at $9.40 (or not more than $14.10 if prescribed);
- a periodic declaration processing charge (new section 71DG of the Customs Act): the charge is set at $1,275 (or not more than $1,912.50 if prescribed); and

43 House of Representatives, *Official Hansard,* 6 December 2000, p. 23441

44 Clause 3 of the Bill defines 'reportable document' as any paper or material on which there is writing, or marks, figures, symbols or perforations, photographic image, or any article or material from which sounds, images or writing is capable of being produced but does not include advertising material or paper not yet containing the writing, images or sound. This definition is currently in section 63A of the *Customs Act 1901. As the definition will be removed from that Act in these reforms, it is necessary for it to be reinserted*

- a warehouse declaration processing charge (new section 71DI of the Customs Act): An *electronic* warehouse declaration processing charge for goods valued between $250 -$1,000 is $23.20 (or, if prescribed, not more than 34.80) and for goods valued at more than $1,000, the charge is $29.25 (or if prescribed, not more than $43.85). The charge for a *documentary* warehouse declaration is $60.00 (or, if prescribed, not more than $90.00).

CHAPTER 3

ISSUES RELATING TO THE CUSTOMS REFORM PROPOSAL

Introduction

1.1 The majority of witnesses to the inquiry supported the overall thrust of the proposed legislation being to implement aspects of the Cargo Management Re-engineering (CMR) project to modernise the management of cargo movement. The purpose of the modernisation proposal is twofold - to improve Australia's trading position while at the same time protect revenue and the community as a whole.[1] The Australian Exporters and Importers Association (AEIA) summarised the importance of the legislative proposal for the trade economy and trade industries, stating that the reforms will:

> … impact upon the day-to-day business processes and costs of Australian international traders who are engaged now in the movement of goods with an aggregate value of the order of $220 billion per annum.[2]

1.2 Similarly, witnesses acknowledged the importance of Customs' responsibility to prevent prohibited imports from entering Australia. It was asserted, for example, that:

> … as citizens of Australia, we must support the thrust of the National Illicit Drugs Strategy in relation to the need to modernise and improve the manner in which information is communicated to Customs regarding the movement of goods consignments into and out of Australia.[3]

1.3 Although most witnesses perceived the proposal to modernise cargo management systems as a positive development,[4] some organisations expressed their concern that some of the proposals will benefit Customs and its operations and not industry or the community generally.[5] This Chapter deals with the concerns raised in respect of the following areas:

- processes associated with the development of the legislation;
- the strict liability and penalty regime;
- CMR electronic communication systems;
- the Accredited Client Program (ACP); and
- the new monitoring powers;

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1 *Submission volume 1,* Schenker Australia Pty Ltd, p. 39

2 *Submission volume 1,* Australian Exporters & Importers Association, p. 116

3 *Submission volume 1,* Tradegate Australia Ltd, p. 50

4 See for example, *Transcript of evidence, Proof Hansard,* Tradegate Australia Ltd, p. 42; *Transcript of evidence, Proof Hansard,* Conference of Asia Pacific Express Carriers, p. 57; *Submission volume 1,* Elogicity, p. 153; *Submission volume 1,* Business Partner Group, p. 149; *Submission volume 1,* Milne Dunkley Customs & Forwarding, p. 146; *Submission volume 1,* Customs Brokers and Forwarders Council of Australia Inc., p. 5; and *Submission volume 1,* Australian Shipping Federation, p. 44

5 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 3

Issues associated with the development of the proposed legislation

1.4 Some organisations raised concerns in relation to the processes that attended the development of the legislative proposal. In particular, it was claimed that the consultation process was inadequate and that the cost impact analysis was deficient.

Consultation process

1.5 While many industry organisations have actively participated in the consultation processes connected with the Cargo Management Re-engineering (CMR) project, some have claimed that the consultation process was flawed because industry's concerns have not been taken into account in the final CMR model. The Australian Federation of International Forwarders (the AFIF), for example, asserted that consultation was effective early in the process when Customs and industry had the same philosophical approach to the project.[6] At that time, the agreed foundation for CMR was to change importing and exporting processes to, for example, reduce costs, increase cargo efficiency and foster closer relationships between Government and industry.[7] According to AFIF, the situation changed when Customs unilaterally decided to insert a strict liability penalty regime into the model.[8]

1.6 AFIF claims that the justification for the insertion of the strict liability regime was the *National Illicit Drugs Strategy* and the $100 million funding that accompanied that strategy.[9] This is a view shared by Customs Brokers and Forwarders Council of Australia Inc. (CBFCA).[10] Other matters raised in relation to the consultation process included that:

- the Explanatory Memorandum contains errors and inconsistencies that 'raises the question as to the efficacy of statements made in the Explanatory Memorandum particularly in relation to the consultative process with industry and cost analysis impact';[11] and
- the final CMR business model has not addressed any of the major concerns or included formal proposals raised by industry during the consultation process[12] including the alternate Business Model (the Industry Model);[13]

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6 *Submission volume 2,* Australian Federation of International Forwarders, pp. 314-316

7 *Submission volume 2,* Australian Federation of International Forwarders, pp. 311-312: In particular, see the excerpts quoted from the paper entitled *Maximising Efficiency on the Waterfront Through Effective Cargo Management Re-engineering,* November 1999 on p. 312

8 *Transcript of evidence, Proof Hansard,* Australian Federation of International Forwarders, p. 52: The date provided for the turn around was 27 August 1999

9 *Submission volume 2,* Australian Federation of International Forwarders, p. 311

10 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 14

11 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., pp. 2 and 9: These errors related to whether Customs or industry created the IWGC, the 'omission' in the Explanatory Memorandum that the IRG meeting process was terminated by Customs after only 5 meetings and Customs initial decline to be involved in the IWGC process. See also *Submission volume 1,* Tradegate Australia Ltd, pp. 50-51

12 See for example *Submission volume 2,* Customs Brokers and Forwarders Council of Australia Inc., Attachment – *Position Paper Cargo Management Re-engineering, A Statement of the IWGC position re the creation and implementation of CMR Model*, May 2000, p. 252

13 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 15

- new areas of concern emerged throughout the development of the legislation that were not subject to any form of consultation;[14] and
- relevant organisations (other than industry groups) were not included in the consultation process.[15]

1.7 Customs, however, contended that the CMR and ITM Bill consultative process was extensive and on-going[16] and that organisations such as the CBFCA had extensive opportunity to provide input into the process through the Customs National Consultative Committee (CNCC), the IRG on CMR[17] and the IWGC.[18] Customs advised that the CBFCA was represented at all relevant CMR working groups (funded by Customs) and CBFCA members attended seminars held by Customs around the country on the development of the CMR model and in relation to the ITM legislation. In addition, Customs maintains regular contact with a CBFCA nominee in relation to CMR matters. The consultation process has involved a whole range of external stakeholder organisations[19]

1.8 Customs acknowledged that consensus across all the relevant industry sectors on the various elements of CMR and the consequent legislative proposal had been 'difficult to achieve'.[20] Nonetheless, Customs indicated that consultation had resulted in appropriate changes being made to the CMR and the legislation.[21] Customs acknowledged that an alternative model to the CMR Model had been put forward by the IWGC. The Industry Model proposed that imported cargo be held in depots at wharves and airports until clearance by Customs based on information supplied on import declarations lodged on behalf of importers by Customs Brokers.[22] There was no requirement for cargo reports to Customs –

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14 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 16: New areas of concern included the document retention requirements for customs and brokers and the introduction of strict liability penalties on import and export declarations

15 *Submission volume 1,* Law Council of Australia, p. 158

16 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 62

17 For a list of industry organisations invited to the IRG see: *Submission volume 2,* Customs Brokers and Forwarders Council of Australia Inc., Attachment – *Position Paper Cargo Management Re-engineering, A Statement of the IWGC position re the creation and implementation of CMR Model*, May 2000, pp. 253-254

18 For a list of the membership of the IWGC see: *Submission volume 2,* Customs Brokers and Forwarders Council of Australia Inc., Attachment – *Position Paper Cargo Management Re-engineering, A Statement of the IWGC position re the creation and implementation of CMR Model*, May 2000, pp. 255-256

19 Organisations consulted include: The Australian Federation of International Freight Forwarders; The Australian Chamber of Shipping; The International Cargo Handlers Council of Australia; The Confederation of Asia Pacific Express Carriers; The Business Council of Australia; The Federation of Automotive Industries; Expert operators in the international transport industry; and A range of importers and exporters: *Submission volume 1,* Australian Customs Service, p. 83. Note the CBFCA's criticism of Customs that it incorrectly named one of these organisations: *Submission volume 2,* Customs Brokers and Forwarders Council of Australia Inc., p. 229

20 *Submission volume 1,* Australian Customs Service, p. 83

21 Changes included a more flexible approach for underbond movements and the provision of consignee data. Customs proposes to make regulations recognising that 'short haul' voyages and flights require special considerations. Changes were also made to outturn reports and export reporting requirements: *Submission volume 1,* Australian Customs Service, p. 83

22 The CBFCA asserted that the industry model was aimed at 'improving the performance of the import and export cargo supply chain Industries by avoiding inefficient duplications in reporting requirements. It

all relevant information was to be in the import declaration. Customs had three major concerns with the Industry Model. They suggested that the model fails to recognise :

- Customs' requirements to have pre-arrival cargo information so as to assess the risk of all imported cargo and to facilitate the clearance of legitimate cargo (under the IWGC model, a large proportion of cargo would sit in depots at wharves awaiting clearance without Customs knowing it was in the country);[23]
- security at cargo depots is a world-wide Customs concern – there is a significant risk of cargo being tampered with by employees at sea and air ports;[24] and
- the importance of cargo information for border protection purposes.[25]

1.9 The Committee notes the concerns in relation to the level and quality of consultation. However, it appears to the Committee that several mechanisms were in place for full and proper consultation to occur. In addition, evidence to the inquiry clearly suggested that most, if not all, organisations, had contact with and access to Customs during the development of the CMR project. Contradictory evidence was received in relation to whether sufficient consultation occurred during the development of the legislative proposal. The Committee was assured by Customs, however, that in fact extensive consultation has taken place and is still continuing. Further, to support its contention, Customs tabled documents evidencing its consultation with external stakeholders on CMR and advising that it had released a draft exposure (that is, an outline of the legal framework) of the legislative proposals in mid 2000.[26]

Cost impact analysis and cost recovery issues

1.10 The CBFCA claimed that the Cost Impact Assessments in the Explanatory Memorandum lack substantive or appropriate empirical support and that the statements made are subjective only.[27] In its view, the legislative proposals will involve significant cost to

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also aimed to provide an increase in effectiveness of the activities conducted by Customs, AQIS and other related Government agencies through the provision of timely and accurate data for risk assessment purposes. The response also addressed a hitherto ignored aspect of the importing process, which entails an increase in security requirements at Customs' controlled premises until cargo is authorised for release or movement: *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 13

23 *Submission volume 1,* Australian Customs Service, pp. 83-84: Customs advised that the recent discovery of 78 kg of heroin was attributable to the analysis of a cargo report. Had Customs been operating in the IWGC model, that cargo could have been at the wharf for over a week without Customs knowing during which time it might have been removed. In addition, the recent outbreak of foot and mouth disease provides another example of the importance of pre-arrival reporting: 'Without advance cargo information it would not be possible to prevent possibly infected livestock or contaminated agricultural equipment from being unloaded. Under the IWGC proposal it could potentially sit on the wharf for several days without Customs even knowing it had arrived in the country'

24 *Submission volume 1,* Australian Customs Service, p. 84: Reports from Revenue Canada indicate that over 50% of illicit drugs importations at the air border are the result of internal conspiracies in depots

25 *Submission volume 1,* Australian Customs Service, p. 84

26 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 62; Tabled Documents, Australian Customs Service, 3 May 2001, Tab 1

27 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc.,, p. 30

industry including approximately $17 million for electronic commerce hardware/software requirements and staff retraining in the first year and $2.5 million per annum for document retention costs. The CBFCA claimed that industry will also be required to fund the CMR process and other Customs' cost recovery which is about $85 million per annum (note that this was expressly rejected by Customs – paragraph 3.15).[28]

1.11 The Committee was advised that the first IRG meeting agreed that a full cost benefit analysis of the CMR proposal should be conducted by Customs and Tradegate created a base document outlining issues that needed to be examined.[29] Tradegate contends, however, that the results presented to the IRG meeting in November 1999 were inconclusive and constituted a cost impact statement not a cost benefit analysis. Tradegate asserts that only 13-15 organisations were interviewed out of the current user base of 2,500. In Tradegate's view, as yet, there is no clear understanding of the cost/benefit equation to all relevant sectors. Tradegate argues that in any case, the anticipated decrease in costs to Customs mentioned in the Financial Impact Statement in the Explanatory Memorandum is small compared to the $35 million cost of the project.[30]

1.12 General concerns relating to cost recovery included that:

- Customs' cost recovery arrangements over the past two (2) years have seen cost escalation over which industry has no control;[31] Future cost reductions are not guaranteed by Customs and the Bill makes no provision for cost reductions;[32]
- the present level of cost recovery imposes a cost of about $70 million per annum on the importing community[33] - this recovery is above and beyond the actual cost of those services and distributions are made that have not been agreed to by the paying importers (eg. the software development fund);[34]
- there is a valid question as to whether Customs' cost recovery should be introduced for export services provided through Customs' infrastructure as at this time all other services except those related to barrier functions are cost recovered;
- if Customs' change process is founded on the *National Illicit Drugs Strategy* (a total barrier function), industry should not bear the cost. Industry has

28 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc.,, p. 31

29 *Submission volume 1,* Tradegate Australia Ltd, p. 58, Attachment 4

30 *Submission volume 1,* Tradegate Australia Ltd, p. 51. The Explanatory Memorandum estimates the cost savings to Customs for the first three years as being $3 million, $2.56 million and $1.92 million respective: *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 12

31 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 31

32 *Submission volume 1,* Australian Exporters & Importers Association, pp. 130-131. See also *Submission volume 1,* Law Council of Australia, p. 162

33 AEIA asserted that the fee level is based upon the Activity Based Costing Program that was developed by one of the 'big 5' accounting firms: *Submission volume 1,* Australian Exporters & Importers Association, pp. 130-131

34 *Submission volume 1,* Australian Exporters & Importers Association, pp. 130-131

> been advised that the cost of Customs' border function is not cost-recoverable because that function is essentially a community service obligation.[35]

1.13 Customs, however, rejected CBFCA's statement that costs have been escalating out of control and advised that over the last three years there has been little movement in relation to the cost of import processing. To support this advice, Customs provided the following figures in relation to the cost of import processing over the last three years: 1997/98 - $67million; 1998/99 - $73.8 million; 1999/00 - $73.4 million and 2000/01 - $73.9million (estimate).[36] According to Customs:

> The above figures include pre CMR IT development costs incurred to date. It is estimated that CMR development costs will be in the order of $30M. The greater part of this amount will be capitalised and amortised over a five to seven year period. It is anticipated that the introduction of CMR will reduce the costs involved in import processing activities by an estimated $5 million per annum which will lead to reduced cost recovery charges and an overall reduction in business costs for industry.[37]

1.14 Customs also advised that its cost recovery methodology was adopted in consultation with industry[38] and that since the introduction of cost recovery on 1 April 1997, industry has been provided bi-annually with reports, reviewed by an external auditor, detailing the costs incurred in import processing related activities. The external auditor's report is also provided to industry and industry has had the opportunity to review Customs' costing methodology.[39]

1.15 Customs advised that CBFCA's assertion that Customs' costs for consultation are recovered from industry is incorrect. CMR consultation costs are not included in the import processing charges and are funded via agency Budget appropriations.[40]

1.16 While the Committee accepts Customs' advice in relation to cost recovery arrangements, it notes that some parts of industry are left with the impression that a proper cost impact analysis has not been conducted. In this regard, the Committee notes its concern for business and strongly advocates that appropriate material should be made available to assist industry planning for the future in the face of such major changes to their operations.

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35 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., pp. 5-6. See also *Submission volume 1,* Conference of Asia Pacific Express Carriers, pp. 177-178, Attachment 2, Submission to the Productivity Commission Review of Government Cost Recovery Arrangements: CAPEC asserted that it was recognised at the inception of the current costs recovery regime that charges should only apply to commercial activities and not to Customs community protection functions relating to the detection and interception of prohibited imports and drugs. CAPEC advocates that the legislative restructuring associated with the CMR project affords an opportunity to ensure that this principle is adhered to

36 *Submission volume 1,* Australian Customs Service, p. 87

37 *Submission volume 1,* Australian Customs Service, p. 87

38 *Submission volume 1,* Australian Customs Service, p. 87: It was a Government decision that cost recovery charges are paid by importers and are not imposed on export-related activities. The rationale behind this policy was to encourage growth of this industry sector

39 *Submission volume 1,* Australian Customs Service, p. 87

40 *Submission volume 1,* Australian Customs Service, p. 82

The Committee records its concern that business still claims that it has not been provided with adequate cost impact assessments.

New export control measures

1.17 The Bill provides new export control measures aimed at enabling Customs to more effectively perform its function in relation to preventing the export of prohibited goods and monitoring compliance with the GST in relation to the tax-free status of goods for export. The most significant of the new control measures designed for these purposes include:

- empowering Customs officers to examine goods for export prior to them being subject to Customs control. To this end, the Bill introduces a range of new powers for authorised officers to enter premises and to examine goods reasonably believed to be for export (Item 5 of schedule 1 inserts new Division 3A into Part VI of the Act);
- tightening Customs' control over customable/excisable goods for export by:
  (a) prohibiting licensees of Customs warehouses from releasing prescribed goods for export until they confirm that the goods have been entered for export and export approval has been given (item 97 of schedule 3, amended section 99); and

  (b) requiring that consolidations of prescribed goods for export must be done at the wharf or airport, or at a prescribed place (item 62 of schedule 3, new section 117AA);
- requiring that operators of a prescribed place must report to Customs the arrival and departure of the goods (new section 114E and 114F, item 62 of schedule 3);
- introducing a strict liability regime which includes financial penalties for misstatement of information in relation to transactions which have a non-duty impact.[41]

1.18 The new export control measures received strong support from United Distillers & Vintners (Aust) (UDVA) which indicated that:

- the strict liability regime reflects government recognition that there is a significant risk to revenue if imports or exports are inaccurately reported (underpayment of duty and GST);
- the requirement that goods for export be consolidated at a 'prescribed place' will effectively remove the consolidation process from the hands of illicit exporters;[42]

41 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 73

42 UDVA advised that it will be seeking to have its Huntingwood premises appointed as a place where goods for export may be inspected and examined so that it may continue to have the ability to consolidate its own product for export: *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 74

- the new export control measures will have a positive effect on the quality of export data. In particular, it will reduce the likelihood of overstatement of exports. UDVA is ‘very reliant on export data for business trends and market information and ‘would be concerned that government itself would be relying on export data; for example, balance of payments figures.[43]

- the new export control measures will reduce the opportunity for undesirable activities which cause the government to lose revenue as well as adversely affect UDVA’s business. These practices include the non-export of underbond goods, the overclaim of duty drawback and manipulation of the GST-free status of exports.

Non-export of underbond goods

1.19 UDVA claims that the new export control measures will support the eradication of the practice known as the non-export of underbond goods. That practice involves goods subject to general and protective tariffs and the majority of imported goods subject to like-customable duties (equal to excise) that enter the bonded warehouse system to defer duty payment and ease cash flow issues. Some of these goods leave the bonded warehouse system, supposedly for export, upon the granting of an Export Clearance Number (ECN) to the exporter by Customs. According to UDVA, many of these goods do not leave the country but are redirected back into the domestic market. The effects of the non-export of underbond goods are many:

- the value of the duty becomes windfall profit to the exporter;

- the Government loses revenue – the non-export of a container of spirits could lead to anywhere up to $500,000 of Commonwealth revenue going astray;

- the loss of government revenue keeps pressure on current rates of excise and other taxes for the legitimate industry;

- the supply chain is distorted and placed under pressure with legitimate wholesalers operating between the importer/manufacturer; and

- retailers can be significantly undercut in the wholesale market.[44].

1.20 UDVA advised that the new export control measures, particularly those relating to the responsibilities of licensees of Customs warehouses, the consolidation of export goods at prescribed places, the new reporting procedures to Customs on the departure of goods and the provision of a range of ‘monitoring’ powers for Customs officers, will help to eradicate this

43 In particular, the strict liability regime (financial penalties for misstatement of information for non-duty transactions), the requirement that export goods be consolidated at a prescribed place and the requirement on licensees of warehouses not to release goods until the goods are approved for export by Customs: *Transcript of evidence,* United Distillers and Vintners (Aust.) Ltd, p. 16

44 UDVA asserted that where the ‘exporter’ retails alcohol, they can undercut other liquor retailers, including bottle shops, pubs and clubs. UDVA is concerned about the integrity of its premium brands and informed the Committee that ‘many of UDV’s products are now appearing on the back of trucks’, a situation which damages the reputation of those brands and undermines the distribution rights in relation to those products, that is, the value that wholesalers have to pay in terms of licensing to be sole sellers of those premium brands: *Transcript of evidence,* United Distillers and Vintners (Aust.) Ltd, p. 16

practice.[45] UDVA also asserted that the tighter export control measures will help to eliminate other undesirable practices, such as the overclaim of duty drawback on export[46] and the overstatement of the quantity and value of goods being exported (exports have a GST free status).[47]

1.21 The Government's own estimates put non-export of underbond goods at anywhere up to 30%.[48] In relation to the dollar value of the 30% figure, UDVA told the Committee 'it could be tens of millions of dollars'.[49]

1.22 AEIA, however, expressed concern that the export proposals will substantially increase Customs' intervention in the export chain. AEIA believes that the increase in Customs' functionality arises because Customs accepts the ATO's statement that diversion in Australia is comparable to overseas levels which are in the order of 30%.[50] AEIA argued that if these levels are true, they indicate long term systemic flaws in the management and control of excisable/customable goods and are beyond the criminal activities of isolated employees. In AEIA's view, these anecdotal claims should be demonstrated before legislation is enacted which may impact upon the export competitiveness of major Australian companies. AEIA stated that the export control measures are not part of the modernisation drive but are, instead, a regressive extension of the level and degree of physical examination. If the level of diversion is 30%, Customs should explain why action has not been taken to strengthen Customs' control through its existing examination powers under the Customs Act. In conclusion, however, AEIA considered that this issue should not delay the Bill's passage.[51]

1.23 The Committee notes, however, the evidence provided by Ernst & Young that supports the estimate in the Explanatory Memorandum that the non-export of underbond goods is in the vicinity of 30%.[52] The Committee is of the view that this unacceptably high figure indicates that there might be a significant problem in this area that warrants further investigation. The Committee suggests, therefore, that this might be an area that the Government should examine with a view to determining whether further action is necessary. The Committee does, however, note the favourable evidence by UDVA that the proposed new export controls will be of assistance in addressing the problem.

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45 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 70

46 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 70

47 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, pp. 70-71

48 *Explanatory Memorandum,* Customs Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 8

49 *Transcript of evidence,* United Distillers and Vintners (Aust.) Ltd, p. 19

50 *Explanatory Memorandum,* Customs Amendment and Repeal (International Trade Modernisation) Bill 2000, pp. 7-8

51 *Submission volume 1,* Australian Exporters & Importers Association, pp. 126-127

52 Submission 7A, United Distillers and Vintners (Aust.) Ltd represented by Ernst & Young, pp. 3-8: Ernst & Young state that the 30% figure is not a UDVA nor Ernst & Young figure but was taken from the Explanatory Memorandum to the ITM Bill. According to Ernst & Young, 'such a figure derives from experiences in overseas jurisdictions in regard to the diversion of export of highly taxed products back into home markets'

Quality of data supplied to the Government

1.24 UDVA is concerned about the quality of data that is supplied to Government. In UDVA's view, the provision of incorrect data occurs because the export controls are currently weak and provide little or no incentive for exporters to provide correct data. In particular, UDVA referred to:

- the adverse impact that the overstatement of the value of exports has on the quality of data provided to the ABS: The ABS utilises the data in the calculation of numerous statistics, economic indicators and forecasting. Errors will affect economic forecasting and ultimately Australia's international standing. In addition, companies such as UDVA purchase export data from the ABS for business planning purposes;[53] and
- the part that false and insufficient export data plays in facilitating the practice known as 'parallel exporting'. Essentially, parallel exporting involves a trademark infringement. In the case of UDVA's products, parallel exporters are taking valuable premium brand labels out of the authorised distribution chain and 'exporting' them overseas with the result that legitimate trader's distribution chains are disrupted and the value of those sole distribution rights is reduced.[54]

1.25 UDVA advocated the building and strengthening of export controls so as to prevent undesirable practices such as parallel exporting from flourishing.[55]

1.26 The Committee welcomed this evidence supporting the new export control measures. In addition, UDVA's concern regarding the integrity of data supplied to Customs is noted.

Strict Liability Offences and Penalty Regime

The new regime

1.27 The new cargo management system incorporates a strict liability and penalty regime. The decision to introduce the regime recognises that while isolated cases of compliance breaches appear insignificant, when viewed in entirety, breaches to the regulatory framework can have significant consequences for the community as a whole. The strict liability regime aims to preserve appropriate border control and at the same time facilitate the move towards the anticipated self-assessment regime for Customs clearance. Customs advised that:

> There is significant risk to revenue if imports or exports are inaccurately reported, as well as to the community if prohibited imports such as narcotics are not stopped at the border. Incorrect information renders ineffective Customs capacity to detect offences using risk management techniques. Under any self-assessment arrangement, unless there are penalties the integrity of the system is undermined. The proposed controls and sanctions are designed around early identification and intervention of high-risk cargo.[56]

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53 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 71

54 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 71

55 *Transcript of evidence,* United Distillers and Vintners (Aust.) Ltd, pp. 16-17

56 *Submission volume 1,* Australian Customs Service, p. 94

1.28 According to Customs, the strict liability regime is an essential part of the framework of a system aiming to reward demonstrated compliance with streamlined entry processes and port-entry reporting.[57] Customs' position is that the proposed penalty regime will assist it by:

- Improving compliance for cargo reporting thus enabling the identification of high risk cargo prior to arrival to prevent the importation of prohibited items and the proper calculation of duty owing;
- Improve the accuracy of export data, strengthen controls on prohibited and restricted goods and prevent the non export of underbond goods, particularly important given that exports have a GST free status.[58]

1.29 The current administrative penalty system is limited to duty related errors appearing on import entries and refund applications only. Penalties do not apply to errors on export entries or drawback applications, or to late or inaccurate cargo reports or unauthorised movement of goods. The Bill proposes to repeal the current administrative penalty provisions and replace them with a system of strict liability offences for a range of regulatory breaches. It also provides a new option of issuing infringement notices so that breaches of the regulatory system can be dealt with administratively. Customs advised that:

> Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. The approach in this Bill reflects overall Government policy on strict liability. Strict liability is a deliberate (and necessary) policy to catch inadvertent errors because otherwise the self-assessment regime would be seriously undermined by people failing to take sufficient care. In accordance with criminal law policy, the penalties for these offences are relatively modest. … there is no compulsion to issue a penalty – that decision must take into account the circumstances of each case.[59]

1.30 The proposed regime comprises three levels:

(1) Customs may prosecute for a strict liability offence where fault must be proved. (For example, Customs may prosecute under section 234 of the Act, as it can now, in relation to a false or misleading statement made knowingly or recklessly);

(2) Customs may prosecute for a strict liability offence where an infringement notice is not appropriate or where the person elects not to pay an infringement notice;

(3) Customs may issue an infringement notice in lieu of prosecuting for a strict liability offence. This will attract the lowest level of penalty - one fifth of the maximum that a court could impose were the matter successfully prosecuted.

1.31 Customs advised that:

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57 *Submission volume 1,* Australian Customs Service, p. 85

58 *Submission volume 1,* Australian Customs Service, p. 92

59 *Submission volume 1,* Australian Customs Service, p. 92

- a strict liability offence is one where a fault element does not have to be proved;[60]
- The characterisation of an offence as a strict liability offence does not remove Customs' discretion to either prosecute in court or to issue an infringement notice;
- Customs is under no compulsion to issue a penalty whenever an error is detected;
- The defences available for strict liability offences are those in the Criminal Code and include mistake of fact, intervening conduct or event, sudden or extraordinary emergency and duress and any specified in the offence provisions.[61]

1.32 Strict liability offences relate to:

- Reporting and accounting of cargo;
- Arrival and impending arrival reports;
- Document retention and production requirements;
- Accuracy of information communicated to Customs; and
- Confirming the status of cargo before movement.

1.33 The Bill makes special provision (a six month moratorium) for the commencement of various parts of the strict liability regime.[62] During that period, Customs will assist industry to put in place business processes that support compliance. Where an offence is identified, Customs will offer assistance to improve future compliance.[63]

1.34 The draft *Principles for administering proposed penalty regime* was released by Customs on 22 March 2001. The document is not legally binding upon decision-makers and precedes the formulation of guidelines. It does, however, give an indication of Customs' intention as to the operation of the regime by referring to many significant matters including:

- penalty thresholds for false/misleading statements (to avoid costs of imposing and collecting low monetary penalties and to ensure consistency of penalties given);[64]
- matters relevant when deciding whether a breach is 'material';[65]
- the non-application of penalties to the voluntary disclosure of information;[66]

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60 *Submission volume 1,* Australian Customs Service, p. 93: Referencing the Commonwealth Criminal Code

61 *Submission volume 1,* Australian Customs Service, p. 93

62 See the commencement provisions in clause 2

63 *Submission volume 1,* Australian Customs Service, pp. 94-95

64 *Submission volume 1,* Australian Customs Service, pp. 96-97

65 *Submission volume 1,* Australian Customs Service, p. 97

- the treatment to be accorded multiple false or misleading particulars[67] and duty and non duty related false or misleading particulars;[68]
- the relevance of prior compliance history;[69]
- grounds for withdrawal of infringement notices and effect of non-payment;[70]
- the time limit for issuing an infringement notice or commencing prosecution;[71]
- the use of warning letters by Customs;[72]
- the non-availability of remission of amounts in infringement notices;[73] and
- the non-availability of AAT review of decisions to issue an infringement notice (the recipient's courses of action are to not pay the notice and risk further prosecution or seek withdrawal of the notice).[74]

1.35 Certain matters in relation to the proposed regime were considered to the satisfaction of the Senate Standing Committee for the Scrutiny of Bills.[75]

Issues raised in relation to the new regime

Unfettered discretion conferred on decision maker

1.36 It was claimed that conferring an unfettered discretion on decision makers in relation to the imposition of penalties could have adverse effects, including:

- the inconsistent application of penalties across the entire range of Customs' cargo reporting and commercial activities; [76]
- the making of capricious or vindictive decisions due to 'cronyism'[77] and non-transparent[78] and ad hoc decision making processes.[79] It was claimed the

66 *Submission volume 1,* Australian Customs Service, p. 98

67 *Submission volume 1,* Australian Customs Service, p. 99

68 *Submission volume 1,* Australian Customs Service, p. 100

69 *Submission volume 1,* Australian Customs Service, p. 100

70 *Submission volume 1,* Australian Customs Service, p. 101

71 *Submission volume 1,* Australian Customs Service, p. 102

72 *Submission volume 1,* Australian Customs Service, p. 103

73 *Submission volume 1,* Australian Customs Service, p. 103

74 *Submission volume 1,* Australian Customs Service, p. 103

75 *Submission volume 2,* Australian Customs Service, p. 276: See Senate Standing Committee for Scrutiny of Bills, Fourth Report, 28 March 2001 – although the Minister's advice has again been requested in relation to whether 'stale' infringement notices are to be removed from the record after a period of time (in the same manner as the 'spent convictions' scheme under the Crimes Act)

76 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 2

77 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 2. See also *Submission volume 1,* Conference of Asia Pacific Express Carriers, p. 300

potential for abuse is exacerbated where an 'ill-described discretion' is conferred on officers and the relevant guidelines are non-binding;[80] and

- an unreasonable expectation on public service clerks to perform the functions of magistrates or judges.[81]

1.37 Customs rejected the suggestion, however, that decision-makers would have an unfettered discretion under section 243Y and advised that the discretion will, in fact, be circumscribed by the requirement that the CEO must have 'reasonable grounds to believe that a person has committed an offence'. In addition, the provision of additional statutory protection (defences) will also limit the exercise of the discretion.[82]. Customs explained that a certain amount of discretion is crucial to successful compliance management:

> A discretionary penalty model is critical to an effective compliance approach. It is only one aspect of a graduated approach to compliance management that begins with education and assistance. Penalties are only applied when other avenues to improve compliance have been exhausted or alternatives are inappropriate because of persistent non-compliance or intent.
>
> It is impossible to cover all fact situations prescriptively in legislation. The same set of facts could arise from a variety of circumstances as was intimated in evidence from the Law Council. In some cases an infringement notice would be warranted and in others it would not. To provide no discretion to decision-makers could render compliance management unworkable and penalise legitimate trade.[83]

1.38 Customs also noted that the provision of guidelines (yet to be formulated) is intended to provide as much transparency to avoid the occurrence of 'capricious and vindictive decisions'. In Customs' view, the arrangements will provide sufficient detail to be meaningful to industry without being overly prescriptive or imposing an inappropriate fetter on the decision-maker's discretion.

1.39 Customs also rejected the suggestion that the regime requires clerks to act in a judicial capacity and asserted that such a statement suggests a misunderstanding of the operation of the regime. Customs asserted that:

- the decision to issue an infringement notice does not actually impose a penalty and does not create a debt due to the Commonwealth (cf. Current section 243T of the *Customs Act 1901*). A person issued with a notice has a few options open to him or her - to approach the CEO to have the notice withdrawn or choose whether or not to pay the amount stipulated in the notice (new paragraph 243Z(1)(f));

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78 *Submission volume 1,* Law Council of Australia, p. 161

79 *Transcript of evidence,* Law Council of Australia, p. 9

80 *Submission volume 1,* Law Council of Australia, p. 161

81 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 3

82 These are the voluntary notification to Customs of a false or misleading statement (new subsections 243T(4) and 243U(4)) and the notification to Customs about uncertainty in relation to information in statements to Customs (new subsections 243(T)(5) and (6))

83 *Submission volume 2,* Australian Customs Service, pp. 275-276

- decision-makers are not exercising a judicial function, they are exercising a discretion taking account of all the circumstances;
- the issue of defences only arises where a prosecution ensues if a recipient has failed to pay an infringement notice – this is a matter for a magistrate or judge, but never a Customs officer.[84]

The absence of merit review

1.40 Concern was raised that the decision to issue an infringement notice is not subject to merits review. That is, there is no formal avenue to the AAT to seek review of the decision to issue an infringement notice.[85] Instead, a person served with an infringement notice may elect to either pay the penalty, try to convince the relevant decision-maker to withdraw the notice, or refuse to pay the penalty and defend the matter in Court.[86] It was claimed that:

- as most claims would be heard in the Small Claims Division of Local Courts (where costs are not awarded for claims of up to $10,000) it would not be commercially realistic for many actions to be defended and so administrative review should be available;[87] and
- The absence of review of the decision to issue an infringement notice leaves too much to the discretion of decision-makers and removes one area of jurisdictional challenge to people involved in the industry.[88]

1.41 Customs, however, rejected the argument in relation to merits review. Customs pointed out that there is currently no merits review of a decision to issue an administrative penalty notice under section 243T of the *Customs Act* (AAT review is only available for a decision about penalty remission under section 243U). In addition, Customs asserted that the operation of the proposed regime does not lend itself to merits review because:

- a person issued with an infringement notice can approach the CEO to withdraw the notice and if it is withdrawn there will be no decision to review;
- a person issued with an infringement notice has the option to pay or not to pay the penalty – there is no compulsion to pay at that time and therefore no decision imposing a penalty to be reviewed;
- payment of the infringement notice operates as a 'confession and avoidance' – payment of the lower amount prevents further proceedings being taken; and
- non-payment shifts the onus back to Customs to decide whether to prosecute – and any decision in relation to the offence is a decision of a judge or

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84 *Submission volume 2,* Australian Customs Service, pp. 276-277

85 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 3; *Submission volume 2,* Conference of Asia Pacific Express Carriers, p. 300

86 *Submission volume 1,* Law Council of Australia, p. 162

87 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 3

88 See also *Transcript of evidence,* Law Council of Australia, p. 9. See also *Submission volume 2,* Australian Federation of International Forwarders, p. 317

> magistrate. There is therefore no 'final decision' made by a decision-maker that could be reviewed by the AAT.[89]

1.42 Customs argued that the proposed system contains tighter constraints on the use of power than the current system because ultimately a court hearing may ensue during which the Commonwealth is required to prove its case. Further, under the current system, prosecutions are in accordance with Part XIV of the Customs Act and constitute an action to recover a debt whereas under the proposed model, the action is a prosecution of the offence itself. In addition, Customs advised that prosecutions instituted under section 245 of the Customs Act are not heard in the Small Claims Division of Local Court and section 263 of the Customs Act allows parties to recover costs and specifically refers to prosecutions for the recovery of penalties.[90]

Other general concerns

1.43 Other concerns included:

- strict liability regime is not appropriate to commercial activities - a system of co-regulation would provide a better balance between incentives to comply and appropriate commercial sanctions for breaches of non-compliance.[91] In the regime proposed, however, industry's understanding is infringement notices '*would, rather than could*' be issued.[92]
- there is uncertainty as to the standard of proof (criminal or civil) that is to apply to prosecutions for offences and infringement notices;[93]
- the ALRC is currently reviewing Civil and Administrative Penalties pursuant to its existing Reference. The Bills should not precede the findings of the ALRC;[94]
- the imposition of liability for offences to a 4 year period after the making of the entry or the provision of information the subject of the prosecution, makes the proper administration of justice difficult and removes certainty from transactions.[95]

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89 *Submission volume 2,* Australian Customs Service, pp. 277-278

90 *Submission volume 2,* Australian Customs Service, p. 278

91 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 6: In the Council's view, monetary or other penalties should be provided as a last resort option for the most serious breaches eg, deliberate late or misleading reporting leading to or threatening breaches of existing criminal offence provisions. See also the comments on co-regulation in *Submission volume 2,* Australian Federation of International Forwarders, pp. 321-322 and *Transcript of evidence, Proof Hansard,* Australian Federation of International Forwarders, p. 51-52

92 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 25

93 *Submission volume 1,* Law Council of Australia, p. 161. See also *Transcript of evidence,* Law Council of Australia, p. 9 and *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 32

94 *Submission volume 1,* Law Council of Australia, p. 161. See also *Transcript of evidence,* Law Council of Australia, p. 9

95 *Submission volume 1,* Law Council of Australia, p. 161

- the draft *Principles for administering proposed penalty regime* is unclear, incomplete[96] and presumably non-binding as are the yet to be formulated guidelines;[97] and
- the New Zealand Customs Service has had a strict liability offence regime in relation to face of entry errors since 1996 to encourage the taking of care in the preparation of entries.[98] The Comptroller of New Zealand Customs has publicly stated, however, that the strict liability regime has failed to meet its objective for a variety of regulatory and commercial reasons.[99]

1.44 In relation to these concerns, Customs advised that:

- legislation should not be delayed until Government policy in relation to ALRC reports is finalised: 'Legislation addressing compliance problems should not be held up solely on the basis of an ALRC reference because the problem is unlikely to lessen in the intervening period';
- the Bill seeks to do no more than maintain the status quo in relation to standard of proof pending the outcome of the ALRC reference;
- infringement notices will not automatically issue on the commission of an offence. Where there are reasonable grounds to believe that a strict liability offence has been committed, an infringement notice *may* be issued depending on the circumstances of the case. Incorrect information communicated to Customs may not attract a penalty if it has been transmitted to Customs in good faith and without alteration.[100]

Concerns about specific strict liability offences

1.45 Some organisations raised concerns with particular proposed offences within the strict liability context. Some of the main concerns are mentioned below.

1.46 It was claimed that the strict liability offence in new section 243V in relation to false or misleading statements in cargo reports or outturn reports is unreasonable and harsh because it makes those who are conduits of information obtained from overseas responsible for errors instead of the creators of the information. According to AFIF, in some cases, data

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96 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 2

97 *Submission volume 1,* Law Council of Australia, p. 161. The Law Council stated that if the guidelines are intended to be binding, they should be incorporated in the Bill: *Transcript of evidence,* Law Council of Australia, p. 9. See also *Transcript of evidence, Proof Hansard,* Australian Federation of International Forwarders, p. 51

98 The legislation provided penalties for errors or omissions that resulted in underpayment and to materially incorrect data in relation to an entry. The NZ legislation also provided details as to the meaning of materiality and an appeals mechanism: *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 27

99 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 28: The statement was made at the Barrier Clearance and International Freight Forwarding Industry Tri Nations Conference in 2000. The approach reportedly favoured by Conference participants was the provision of an accreditation standard so as to provide appropriate commercial advantages to Industry rather than punitive sanctions.

100 *Submission volume 1,* Australian Customs Service, p. 93

received electronically from overseas is simply on-forwarded to Customs directly.[101] The Committee was told that shipping companies who report cargo are totally reliant on the accuracy and timeliness of the cargo information received from overseas exporters.[102] Customs advised, however, that these concerns are met by the availability of relevant defences under the Criminal Code.[103]

1.47 It was claimed that the strict liability offence for late reporting of cargo in new section 64AB fails to take account of the real causes of late reporting.[104] The CBFCA, while accepting that late cargo reporting occurs, queried the extent of the problem quoted in the Explanatory Memorandum (59% for sea cargo and 48% for air cargo).[105] According to the CBFCA, there are three causes for late reporting and these have not been taken into account in the development of the new regime: user error in Cargo Automation systems (which could be remedied by a Customs/industry training program), inadequate systems/operating hours, and lack of data supplied from overseas source. CBFCA contended that it is unreasonable that infringement notices and penalties should apply for late reports caused by the overseas source not supplying data in the time stipulated by the Australian regulatory authorities.[106]

1.48 The Committee notes AFIF's advice that Customs has agreed to work with industry to analyse the causes of late reporting and that such work will no doubt lead to improved understanding by Customs of the challenges facing industry in relation to meeting Customs' time requirements.[107] The Committee believes that this will also improve the way that the strict liability system will be implemented.

1.49 Section 243T makes it a strict liability offence for a person to make false or misleading statements to an officer (other than in a cargo or outturn report) which results in a loss of duty. The LCA noted that although there is a defence if a person is 'uncertain', there does not appear to be a mechanism for people to identify that they are, in fact, uncertain about the information being provided to Customs.[108] It was claimed that this is compounded

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101 *Submission volume 1,* Australian Federation of International Forwarders, p. 184

102 *Submission volume 1,* Australian Shipping Federation, p. 44

103 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 63: Referring to the case where information originates from overseas and notwithstanding professional care is exercised but an error still occurs, Customs stated: 'In that case, it would be unlikely that an infringement notice would issue. … that same fact situation would give rise to a defence under the Criminal Code were this to be considered by a court, because it would operate as a mistake of fact or intervening act. So it is a fact taken into account in terms of whether or not the infringement notice is issued.'

104 An additional point raised was whether the 'cargo reporter' is in the best position to provide the requisite information to Customs: *Submission volume 2,* QANTAS, p. 220

105 Note the advice of the Australian Federation of International Forwarders that the rate of late reporting across both sea and air freight imports is 26%: *Transcript of evidence, Proof Hansard,* Australian Federation of International Forwarders, p. 51, 53 and 54

106 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., pp. 18-21. See also *Transcript of evidence,* Law Council of Australia, p. 11

107 *Transcript of evidence, Proof Hansard,* Australian Federation of International Forwarders, p. 51. See also *Submission volume 2, QANTAS,* pp. 220-221 and the comment by Customs that 'we are trying to work with Industry to reduce that unacceptable level of late reporting': *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 69

108 *Submission volume 1,* Law Council of Australia, p. 163

by the tremendous range of information that is sent to Customs originating from different sources[109] and by the fact that the regime does not distinguish between the different kinds of errors and complexity of information involved.[110]

1.50 The Committee notes, however, that proposed subsection 243T(5) states that it will not be an offence if the person specifies in the statement that the person is uncertain about information in it. In the Committee's view, this is a sufficient mechanism for people to alert Customs about the uncertainty of the information.

1.51 It was claimed that the strict liability offences in new section 243SA (a person must not fail to answer a question that an officer, pursuant to a power conferred on the officer by this Act, requires a person to answer) and in new section 243SB (the failure to produce documents or records) fail to give effect to or recognise the principle of self-incrimination. For example, the Committee was told that section 243SA:

- fails to acknowledge the rights of the individual to refuse to answer questions on the ground that it might self incriminate; and
- fails to require Customs officers to issue a warning in relation to self-incrimination - that answers can be used in legal proceedings.[111]

1.52 Customs rejected this argument by advising that the privilege against self-incrimination will be clearly preserved in proposed section 243C in the Bill.

1.53 Concerns were raised about the operation of new section 243U which creates a strict liability offence in relation to false and misleading statements (not in a cargo or outturn report) not resulting in loss of duty. In particular, it was claimed that the new section:

- should not impose a penalty if there is no loss of Customs duty.[112];
- does not define the meaning of 'material' – in relation to export declarations, a material particular could possibly include any of 27 items referenced within Customs' public policy documents[113] - and this should be clarified; and
- is unclear as to how multiple breaches of the same kind will be treated: The multiplicity of offences that can occur in relation to such statements is

109 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 7

110 See also *Transcript of evidence,* Law Council of Australia, p. 11

111 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 28. See also the discussion by the Law Council of Australia in relation to search warrants and advising people of their rights: *Submission volume 1,* Law Council of Australia, pp. 162-163. See also *Transcript of evidence,* Law Council of Australia, p. 10

112 *Submission volume 1,* Law Council of Australia, p. 163

113 According to CBFCA, this data refers to trade statistics, and prohibitions or restrictions related to exports and includes, *inter alia:* consignor or consignee details, country of origin, export value, and Australian Harmonised Export Commodity Classification (AHECC): *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 22.

> exponential even though there are specific limitations as referenced under the proposed section 243Z(4)(a).[114]

1.54 Customs explained that the rationale for new section 243U is to address the poor quality of information currently being provided to Customs. Customs requires accurate information in order to ensure compliance with exporting requirements and the GST legislation. In addition, the information is used by industry and Government for trade statistics purposes and it important that information be as accurate as possible. In relation to the concern about what is 'material', Customs asserted that a breach must be material in the context of the issue being examined.[115] The question of what constitutes 'material' is also raised in the Draft *Principles for administering proposed penalty regime.*

Conclusion

1.55 The Committee is of the view that the provision of the strict liability regime will compliment the general intention of the legislation to encourage compliance in a self-assessed environment. The Committee also accepts Customs' advice that although individual instances of non-compliance with regulatory requirements appear insignificant, there are significant ramifications for the community when the regulatory framework is breached. Such breaches will be even more significant in an environment being geared towards self-assessment. Customs stated and the Committee accepts that:

> Timely and accurate reporting is essential for Customs to be able to identify and intercept high risk cargo, and to collect the correct money of duty and tax payable on goods while offering the speed and efficiency of a self-assessment system. Late or inaccurate information directly impacts upon the integrity of the system; regardless of the reasons why the information is late or inaccurate.[116]

1.56 The Committee was concerned, however, that the guidelines to govern the operation of the strict liability regime have not yet been finalised. During the hearing in Melbourne, Customs advised that a precise timetable for the formulation of the guidelines could not be given because they had to 'wait and see, firstly, how the legislation comes out and what the terms of the legislation are. But we are already working in working groups within Customs on two sets of guidelines'. The Committee notes Customs' advice that draft guidelines will be circulated to industry for consultation[117] and Customs' assurance that it has asked industry 'to help us in the process of defining the guidelines'.[118]

1.57 The Committee finds it difficult to approve in principle a strict liability regime without at least having draft guidelines (as opposed to the already released draft *Principles for administering proposed penalty regime*) to peruse and comment upon. The Committee also notes that the power to be conferred on certain Customs officers to issue infringement

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114 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 23

115 *Submission volume 1,* Australian Customs Service, p. 86. The meaning of 'material' breaches is elaborated on in the Draft *Principles for administering the proposed penalty regime* annexed to Customs' submission. Customs also advised that for exports, a material breach will involve substantial errors in the eight critical fields on an export entry

116 *Submission volume 2,* Australian Customs Service, p. 276

117 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 65

118 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 63

notices is significant and that there is no merits review of those decisions available. In these circumstances, the Committee is of the view that the Bill should be amended to provide that the guidelines be a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* and therefore subject to the scrutiny of the Parliament.

1.58 A further issue that Committee members raised with Customs was in relation to the level and experience of Customs officers who would have the delegated authority to issue infringement notices. It was suggested to Customs at the hearing (and Customs agreed) that those officers should be given special training as to the exercise of the discretion to issue such notices and Customs agreed.[119] In addition to training, the Committee recommends that the exercise of that discretion by Customs officers should be monitored internally through an annual audit process[120]and the statistics derived from the audit process included in the Department's Annual Report.

Communicating with Customs

1.59 As explained in paragraphs 2.5-2.6, part of the CMR initiative involves the introduction of new arrangements through which clients will be able to communicate electronically with Customs. For the most part, these new arrangements are founded in Customs' contractual and business arrangements rather than the proposed ITM Bill itself. The only provision that will impact on the new systems is new section 126D which will enable the CEO to gazette the information technology requirements that must be met by those wanting to communicate with Customs.

Current contractual arrangements and associated transitional matters

1.60 Concern was raised about the impact of the CMR proposal on current contractual arrangements. Connect.com.au claimed that there has been no official advice from Customs as to how the ITM Bill will affect the contractual relationships between Customs and Tradegate and hence between Tradegate and Connect.com.au.[121] In its initial submission, Connect.com.au advised that the contractual relationship between Customs and Tradegate (and therefore Tradegate and Connect.com) was due to be terminated in June 2001. Further, although it was open to either party to seek an extension before 31 December 2000, negotiations in relation to an extension had not yet concluded. Connect.com submitted that the contractual and proprietary rights of persons and companies should not be dealt with in such a vague and uncertain manner.[122] At the Committee's hearing on 3 May 2001, however, Tradegate was able to advise the Committee that their contractual relationship with Customs would be extended to July 2002.[123]

1.61 Similarly, the Committee was told that the transitional arrangements for replacing the 'legacy systems' with the new CMR arrangements are unclear.[124] Tradegate referred to the provision for the legislation to commence at various dates to be proclaimed up to 2 years

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119 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 66

120 *Transcript of evidence, Proof Hansard,* Australian Customs Service, pp. 66 and 71-72

121 *Submission volume 1,* Connect.com.au, pp. 195-196

122 *Submission volume 1,* Connect.com.au, p. 198

123 *Transcript of evidence, Proof Hansard,* Tradegate Australia Ltd, p. 42

124 *Submission volume 1,* Connect.com.au, pp. 195-197

from the day the Act receives the Royal Assent.[125] Tradegate claimed that without formal commercial or technical transition plans, the user community cannot change from the current situation to CMR within whatever timeframe is imposed. According to Tradegate, the user community has little, if any, knowledge of what they and their software providers are facing.[126] Similarly, Connect.com.au contended that:

> Connect thus believes that very little consideration appears to have been given to the transition between the anticipated end of the 'legacy system' (which should more properly be referred to as established systems, including our and Tradegate's contracts) and the CMR systems.[127]

Performance of the Tradegate/Connect.com.au system

1.62 Concern was raised about the characterisation of the Tradegate/Connect.com.au system as a 'legacy system'. The Explanatory Memorandum does not refer to Tradegate by name but rather refers to the 'legacy systems'. Connect asserted that the characterisation of Tradegate as a 'legacy system' does no justice to 'this important facilitator of better and more efficient communication between business and the ACS' and that the term implies that the Tradegate system operated as 'a restrictive monopoly[128] which has outlived its usefulness'.[129] In Connect.com's view, the phrase is highly misleading given the range and contemporary nature of the communications options provided by Connect.[130] According to Connect.com.au, under the Tradegate/Connect.com.au arrangement:

- business has been conducted with demonstrated high levels of efficiency;
- services have been provided in a cost effective manner; and
- there is equity of access to Tradegate for all elements of Australian business – including SME's, rural companies, individuals and large companies.[131]

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125 *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 11. See also the comment by Connect.com.au that according to the Australian Customs Service Fact Sheets the '"Integrated Cargo System" is due for a phased introduction from late 2001' and that 'a detailed implementation schedule will be released once details are finalised' and that the schedule will be released in Spring 2001: *Submission volume,* Connect.com.au, p. 525

126 According to Tradegate Australia Ltd, a further complexity is the proposal to implement a digital certificate process that will authenticate all users of Customs Services. This will replace the current user name/password methodology coupled with secure, private communications methods: *Submission volume 1,* Tradegate Australia Ltd, p. 53

127 *Submission volume 1,* Connect.com.au, p. 198. See also *Transcript of evidence, Proof Hansard,* Connect.com.au, p. 32

128 See the comments rejecting the suggestion that Tradegate Australia Ltd operated as a monopoly (in particular, the advice of Connect.com.au that the Trade Practices Commission indicated that Tradegate is not a monopoly but a community cooperative enterprise to benefit the business community): *Submission volume 1,* Connect.com.au, p. 193 and *Submission volume 1,* Connect.com.au, p. 524

129 *Submission volume 1,* Connect.com.au, p. 194

130 *Submission volume 1,* Connect.com.au, p. 195. In its supplementary submission, Connect.com.au advised that a Fact Sheet published by the Australian Customs Service has identified Tradegate Australia Ltd as a 'legacy system': *Submission volume 2,* Connect.com.au, p. 523 and Attachment 3, p. 538

131 *Submission volume 1,* Connect.com.au, p. 194

1.63 The Committee notes, however, that the Explanatory Memorandum clearly indicates that the expression ‘legacy system’ is not used to refer to Tradegate.[132] The Committee also notes Customs’ confirmation that Tradegate’s delivery of service had been ‘excellent’ but advised that the introduction of the new CMR arrangements was prompted by other considerations:

> Tradegate provides an excellent service. Customs has absolutely no issue with the long relationship that we have had with Tradegate. The issue is about choice for those people who communicate to Customs. EDS get no benefit or transactional revenue stream from any of these arrangements. They will be providing the gateway, in conjunction with the provision of their IT applications. In terms of revenue stream, there is none. In terms of cost recovery, the costs of the gateway, like the costs of the current gateway, will be incorporated in their attribution to our cost recovery charges.[133]

Other matters

1.64 Other concerns and criticisms of the new arrangements for communicating electronically with Customs included:

- the larger volume user of CCF will be able to access Customs’ services at lower unit cost than the typical SME thus transferring cost from large businesses to SME’s-[134] the current equity, where users pay the same unit charge regardless of their location or size and volume of entries processed, will be lost;[135]
- Customs users already have extensive choice as to how they access Customs’ services, including the Internet;[136]
- all alternatives have not been explored by Customs;[137]

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132 See *Explanatory Memorandum*, Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 68 where the legacy systems are named. It clearly indicates that the expression is used to refer to Customs’ internal systems and not Tradegate Australia Ltd

133 *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 74

134 *Submission volume 1,* Tradegate Australia Ltd, pp. 52-53

135 Currently, users pay Customs to create, lodge and pay for their import entries. Users also pay communications network charges for the COMPILE entry process and message charges for all other Customs’ services. These charges total (about) $15 million annually and are paid to the various communications service providers: *Submission volume 1,* Tradegate Australia Ltd, pp. 52-53

136 *Submission volume 1,* Tradegate Australia Ltd, p. 52. Connect.com advised that, although the Australian Customs Service Fact Sheets imply that Internet-based communication would be new under CMR, ‘of those who prefer to use our services, the Internet is quite a popular access route. Over 300 use an internet portal jointly run by Tradegate, ourselves and a private company called TEDSIS, over 300 use the COMPILE over the Internet service and we have about 200 customers doing EDI over the Internet. There are other Internet bureau style operations (eg cargo Automators) who provide further user choices in the current environment: *Submission volume 2,* Connect.com.au, p. 524. See also *Transcript of evidence, Proof Hansard,* Tradegate Australia Ltd, p. 32

137 *Submission volume 1,* Tradegate Australia Ltd, p. 52: It was claimed that, for example, a major component of the current cost structure is related to the inflexible nature of the COMPILE (Customs entry) service as provided by Customs. The communications costs related to COMPILE could be reduced if COMPILE itself re-engineered under the CMR proposal. COMPILE users do not need specialised

- a full cost/benefit analysis has not been conducted by Customs[138] and the new arrangements will not provide cost benefits to industry;[139]
- there was insufficient consultation with Tradegate and the user community;[140]
- the prescriptive approach in section 126D may be anti-competitive by obliging industry to purchase certain IT equipment and impose additional software changes and additional encryption procedures causing additional expense;[141] and
- gazettal notices under section 126D should be disallowable instruments as they may significantly impact on the Customs/Tradegate/Connect.com arrangements. A requirement to consult should precede gazettal.[142]

Alternative views

1.65 The Conference of Asia Pacific Express Carriers (CAPEC) noted its strong support for the removal of the Tradegate arrangement. CAPEC advised that all its members have internal cargo reporting and Customs' entry systems that do not require the provision of the services supplied by Tradegate. Further, CAPEC argued that the existence of a third party into the communication line between CAPEC members and Customs, is a potential source of increased cost. CAPEC has argued for a system that minimises any potential disruption to its members' business as service providers and minimises the cost to clients through a direct connect arrangement. According to CAPEC, Customs has recognised the validity of these concerns in its proposed model. Like other organisations,[143] CAPEC asserted that:

> … we do not support the notion that parties should be forced to communicate with Customs through a sole gateway provider as has been the case with Tradegate. That arrangement has certainly fallen short of being 'equitable' as has been claimed.[144]

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software so any lowering of communications costs through re-engineering would be balanced by additional costs to the user in terms of software and computing equipment

138 *Submission volume 1,* Tradegate Australia Ltd, p. 52. See also *Submission volume 1,* Connect.com.au, p. 199

139 *Transcript of evidence,* Customs Brokers & Forwarders Council of Australia Inc., p. 6. The Council was rejecting a statement in a Customs brochure that one of the industry benefits from the Customs Connect Facility will be 'improved cash flow'. But see the Committee's comments at paragraph 3.69 in relation to cost issues associated with the new arrangements

140 *Submission volume 1,* Tradegate Australia Ltd, p. 52. See also *Transcript of evidence, Proof Hansard,* Tradegate Australia Ltd, p. 43: There are over two and a half thousand organisations involved in the electronic commerce that will be affected by the new arrangements

141 *Submission volume 1,* Law Council of Australia, p. 162 and *Submission volume 1,* Connect.com.au, p. 193

142 *Submission volume 1,* Connect.com.au, p. 198

143 See for example *Submission volume 1,* Elogicity Pty Ltd (Australia), pp. 151-153. Elogicity submitted that the Bill provides an 'opportunity to develop unique services in a previously closed market'.

144 *Submission volume 1,* Conference of Asia Pacific Express Carriers, p. 175, Attachment 1, Letter to the Hon. Christopher Ellison, Minister for Justice and Customs from Mr Ken Muldoon, Secretary, Conference of Asia Pacific Express Carriers dated 16 February 2001

1.66 Coles Myer, submitted that multi-choice options for communicating with government will reduce communication and processing costs for most traders.[145] CAPEC agreed:

> This opposition to the current Tradegate arrangement is based around the simple principle that Tradegate imposes an additional cost on all transactions processed by CAPEC members without any provision of value-add services. These charges are then passed onto the importer. This means that a broad cross section of industry and private individuals have additional costs imposed on them, despite the lack of provision of any claimed value-add service by Tradegate.[146]

1.67 CAPEC's members account for 25% of all Customs entries and CAPEC expects that all those entries would be processed via a direct connection arrangement in the CMR model. In addition, CAPEC also predicts that accredited clients will not use Tradegate's services and that smaller importers too, will probably use the Internet. CAPEC's view is that the new arrangements will be more cost effective for traders and calculated that the continuation of the current Tradegate arrangement would impose an additional $2.6 million per annum on the CAPEC import community without any value add-on.[147] This is the case, notwithstanding that CMR will result in a harmonisation of electronic entry charges (Customs' cost recovery) across all modes of transport entry and that for air cargo, this will in fact mean an increase in that specific charge (but it is not related to the communication costs).[148] CAPEC contended that:

> If Australian industry is to maximise its competitiveness in the global marketplace, it is essential that inefficient Customs arrangements and all unnecessary costs be removed. To this end it is clearly in the interest of all importers, including SME's, to have the Tradegate arrangement discontinued and for all such importers to reassess the optimum processing arrangement for their requirements. Where Tradegate can continue to provide a worthwhile value-add service then it will remain open to such parties to utilise that service.[149]

1.68 In addition, Customs advised that the position as regards cost recovery will remain substantially unchanged:

> Statements made in the CBFCA submission about the Customs Connect Facility are not accurate. Customs current cost recovery pool includes the two internal gateways that link to current systems. The new CCF will replace these two gateways and will form part of the cost pool – no different to what occurs today. The cost of the CCF has been factored in to the total IT costs and hence into the prediction of the estimated $5 million savings in cost recovery charges.[150]

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145 *Submission volume 1,* Coles Myer Ltd, p. 37

146 *Submission volume 2,* Conference of Asia Pacific Express Carriers, p. 303

147 This figure is based on 650,000 entries from CAPEC members per year

148 See the discussion in *Submission volume 2,* CAPEC, p. 304, *Submission No. 9B,* Australian Customs Service, pp.2-3 and *Transcript of evidence, Proof Hansard,* Australian Customs Service, p. 75 (the points there raised in relation to CAPEC's submission have now been clarified)

149 *Submission volume 2,* Conference of Asia Pacific Express Carriers, p. 304

150 *Submission volume 1,* Australian Customs Service, p. 88

Conclusion

1.69 The Committee notes that although the new arrangements for communicating electronically with Customs are part of the CMR project, they are not founded in the provisions of the ITM Bill. Therefore the Committee feels obliged to restrict its comments accordingly. The Committee is concerned that industry perceives that a proper cost impact analysis has not been done in terms of how the new communication arrangements will impact on business. The Committee notes that Tradegate (and Connect.com.au) believe they have not been properly consulted about the transition between the two systems. The Committee is of the view that as the contract between Tradegate and Customs is to be extended to July 2002, there is an opportunity to remedy some of those concerns about consultation. The Committee recommends that Customs be required to undertake further consultation to ensure that industry is given sufficient notice of the kinds of information standards they will be required to have to operate competently within the new system. Customs again notes the difficulties for business in an environment that is being fundamentally reformed and urges Customs to release the implementation plan[151] in relation to the commencement of the CMR system as soon as possible.

1.70 There was much evidence throughout the inquiry about whether costs under CMR would increase or decrease.[152] The Committee understands that care has to be taken not to confuse cost recovery charges with communication costs under the new arrangements. It seems to the Committee that this might have occurred at times so that evidence has been given at cross-purposes. Combined with the highly technical nature of the subject matter with which the Committee is dealing, this made the job of the Committee all the more difficult. The Committee therefore notes that the costs issues associated with this Bill, in particular, the new communication arrangements, were not always clear.

1.71 In terms of new section 126D, the Committee recommends that Customs consult with industry prior to notices being gazetted. The Committee is of the view that as notices will contain material that is highly technical, there would be no real benefit in those notices being disallowable instruments.

Accredited Client Program

1.72 The introduction of the Accredited Client Program (ACP) reflects Customs' new approach to compliance management. Those clients who demonstrate that they provide accurate information to Customs will be able to participate in the ACP which will facilitate their access to streamlined Customs clearance procedures. The clients, in essence, will be 'accredited' by Customs. The legal framework for the ACP will comprise both legislative and contractual arrangements.[153]

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151 The implementation plan was referred to by several organisations including Tradegate Australia Ltd : *Transcript of evidence, Proof Hansard,* Tradegate Australia Ltd, p. 43

152 See also the discussion in *Transcript of evidence, Proof Hansard,* Australian Customs Service, pp. 38-39 and pp.74-76. The Committee was provided with further information in relation to this issue by way of supplementary submission: *Submission 6A,* Tradegate Australia Ltd., pp. 2-3; *Submission 18C,* Connect.com.au, pp. 1-2; and *Submission 9B,* Australian Customs Service, pp. 2-3

153 *Explanatory Memorandum,* Customs Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 85

1.73 In terms of operation, accredited import clients will take delivery of cargo from Customs' control upon its arrival and retrospectively account to Customs in relation to compliance with barrier controls in a periodic activity statement. This contrasts with the current system where a Customs entry (including detailed particulars of package contents, tariff classification, origin, value and duty calculation) and payment of the relevant Customs duty are prerequisites for the release of cargo that is subject to Customs' control. The release of cargo to accredited clients without all the costly 'clerking' currently required under the present system will be more efficient and cost effective.[154]

1.74 The rationale for the introduction of the ACP is related to its dual functions. Customs is responsible for ensuring compliance by traders with legal commercial obligations as well as maintaining effective border control to prevent the importation of prohibited goods, such as heroin, guns, etc. Customs' client base is in the vicinity of 95,000. While Customs' border control function requires that it maintain a high level of examination and control in relation to all of its 95,000 clients, the same level of examination and control is not appropriate for all of its clients in relation to commercial compliance. Some of Customs' clients are, for example, 'companies that might have been involved in imports or exports for half a century'.[155] As AEIA stated, the ACP will allow Customs to separate its client base into two groups:

> … - companies with continual, long term histories of compliance and the balance of more than 90,000 individuals and small sporadic importers who are not significant cross-border traders but still pose major border control and revenue risks.[156]

1.75 According to inquiry participants, the process for developing the ACP has involved 'very robust discussion' between industry and Customs. While some areas of disagreement remain between the parties, AEIA, for example, expressed satisfaction with the process, claiming that importers and exporters, their service providers, AQIS, ABS and Customs worked hard to find solutions that will deliver benefits to both business and government. Nine companies (including their customs brokers and freight forwarders) trialed the scheme.[157]

1.76 Generally, the ACP received widespread support from inquiry participants, many noting that industry has been involved in similar schemes with the AQIS on an equitable basis in a number of activity areas over several years.[158]

Access to the Accredited Client Program

1.77 The major concern identified was in relation to access to the ACP. Some organisations were concerned that certain 'larger' parties might be given preference to the

154 *Submission volume 1,* Kodak (Australasia) Pty Ltd, p. 42-43

155 *Transcript of evidence,* Australian Exporters & Importers Association, p. 23

156 *Transcript of evidence,* Australian Exporters & Importers Association, p. 26

157 *Transcript of evidence,* Australian Exporters & Importers Association, p. 26

158 See for example *Submission volume 1,* Milne Dunkley Customs & Forwarding, pp. 145-146; *Submission volume 1,* Business Partner Group, pp. 148-149; *Submission volume 1,* Elogicity Pty Ltd (Australia), pp. 151-153; *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 34

detriment of small and medium sized businesses.[159] CBFCA stated that although SME's are the employers of a substantial workforce, they do not gain any efficiencies or cost savings under CMR. CBFCA contended that most industry will not be included in the ACP due to the prescriptive nature of the Customs' qualification arrangements, although the precise details of the manner and form of operation of the ACP have yet to be released.[160] AEIA asserted that accreditation should be available to SME's as:

> The efficiencies and cost savings from the process may be considerable and should not be confined to big business. This extension could only be achieved by accrediting systems and processes in Accredited Clients Industry Bureaus managed by reputable industry associations.[161]

1.78 UDVA utilises the bonded warehouse system and at present, utilisers of that arrangement are not part of the ACP. UDVA submitted that as the Bill, does not preclude importers and exporters who use the bonded warehouse system from participating in the CMR project, it is only a policy decision that has prevented UDVA and like entities from entering the ACP from its inception following passage of the ITM Bill. UDVA asserted that, given its compliance record, it has entitlement to prompt entry to the ACP.[162]

1.79 Although AFIF accepted that the ACP arrangements relate to importers (section 71DD) and exporters (114BB), AFIF was concerned that the pilot companies and their agents are being accorded preferential treatment. In AFIF's view, the ACP should operate on a level playing field for all traders so that access to the ACP is extended to all importers and exporters who meet the required criteria.[163] AFIF stated that post shipping export reporting would be facilitated by this scheme and provide improved efficiency in the transport chain with increased data accuracy.[164]

1.80 The Committee has examined the relevant provisions in the ITM Bill and concluded that there is nothing in the Bill to prevent companies like UDVA from accessing the ACP. The Committee's understanding is that the ACP will be available to those who decide to apply and who meet the compliance requirements. Companies will make their own business judgements in relation to whether, on a cost/benefit analysis, they want to apply to be an accredited client. There will be costs involved in being an accredited client such as audit

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159 *Submission volume 1,* Law Council of Australia, p. 162

160 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., pp. 34-35: CBFCA asserted, however, that a telling point in this regard was the observation of Price Waterhouse Coopers in its independent Cost/Benefit study on CMR which stated, *inter alia: 'Service providers indicated that the greatest benefit will be gained by those companies that become accredited clients. The impact on small to medium enterprises is likely to be marginal.* The CBFCA referenced the Cargo Management Re-engineering Industry Reference Group Meeting No.4, 22 November 2000, Minutes

161 *Submission volume 1,* Australian Exporters & Importers Association, p. 124

162 *Submission volume 1,* United Distillers and Vintners (Aust.) Ltd, p. 76. See also *Transcript of evidence,* United Distillers and Vintners (Aust.) Ltd, p. 17

163 AFIF suggested that section 71DD(2) and 114BB(2) should be expressed in positive terms. That is, the words 'CEO must not enter into …' should be amended to read 'CEO must enter into … provided the CEO is satisfied … etc'. See also *Submission No. 17A,* Australian Federation of International Forwarders, p. 22: The AFIF contends that any importer who meets the criteria must be granted accredited status

164 *Submission volume 1,* Australian Federation of International Forwarders, p. 185

costs and cost recovery charges (including RCRs and Periodic Declarations). The Committee also notes that, contrary to concerns that the pilot companies have automatic access to the ACP, the Bill merely provides that those companies do not have to complete another auditing process. The pilot companies will still be required to make an application to be accredited clients.[165]

Information contracts

1.81 The proposal is that each accredited client agreement will be tailored to suit the circumstances of the particular client and therefore each agreement will be different. Articulating the scope and rights and responsibilities of the parties will ensure certainty in the arrangements. AEIA expressed the following concerns in relation to the proposal:

- The 'sheer size of the logistical task' of creating information contracts for the 7,500 importers (using GST deferred measures implemented by Customs) and the 1,000 exporters is daunting.[166] Who would 'tailor' the contracts, how could equity be guaranteed between contracts, and what quality management processes would be employed to create a reasonably standard product?[167] and
- Although 'one size does not fit all', not everyone can afford or needs a tailor made suit: The processes of some large groups of importers are generic rather than unique. Customs should ensure quality management over its information contract process, including a significant amount of standardisation. There may be situations where it would be more appropriate for the industry association to assist in the development of pro-forma contracts[168]:

1.82 The Committee has given these matters its consideration and has determined that the task of establishing information contracts will not be as onerous as the AEIA predicts. Although there may be approximately 8,500 importers and exporters, not all of those will apply to be accredited clients. Some will conduct a cost/benefit analysis and decide not to apply. Some who apply may not meet the requirements in relation to their compliance record. Based on the evidence before it, the Committee is of the view, that the AEIA may be overstating the onerous nature of the new arrangements. Their evidence, however, does require Customs to be alert to the dangers they outline. It therefore behoves Customs to carefully monitor the situation as it progresses. Customs motivation and proposed course of action mean in theory there is no reason why the proposed information contract system could not work successfully. In practice, implementation and operation will be critical determinants of whether AEIA had valid grounds for concern.

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165 See new sections 71DD and 114BB

166 *Submission volume 1,* Australian Exporters & Importers Association, p. 121. See also *Transcript of evidence,* Australian Exporters and Importers, p. 22: The AEIA explained that those figures originated from the ATO Committee of which the AEIA is a member. The figures indicate the exact number of companies that applied for GST deferral. AEIA stated that: 'I think it is only for companies under $20 million a year in sales. So basically we think that, if there are 96,000 clients of Customs, a lot of them are spasmodic or even single users of Customs services and that really that number probably captures the repetitive and substantial importers in Australia.'

167 *Submission volume 1,* Australian Exporters & Importers Association, p. 121

168 *Submission volume 1,* Australian Exporters & Importers Association, p. 122

Perceived benefits of the ACP

1.83 Inquiry participants identified several important benefits of the ACP scheme. These included:

- the ACP arrangements promise to deliver efficiencies to both the government and traders generally by reducing unnecessary red tape;[169]
- the ACP endeavours to bring Australia in line with overseas practices.[170] It is similar to schemes in other countries and the introduction of the scheme signals Australia's commitment to resource and risk management to other countries;[171]
- the ACP rationalises Customs' clearance procedures for import/export shipments.[172] One of the principal benefits of the ACP is 'product to market in a less impeded manner along with a closer relationship with government'.[173]
- the ACP advances the dual objectives of government, that is, to prevent the illegal trade of narcotics while simultaneously facilitating commercial trade. It allows resources to be devoted to the right areas of risk management, whilst allowing businesses that have demonstrated a commitment to compliance with government rules and regulations to trade unhindered;[174] and
- the ACP is about productivity gain because it enables Customs to facilitate its business with importers and exporters who present low risk in terms of compliance with Customs' barrier controls. Customs' resources can be concentrated on those that are not categorised as low risk.[175]

1.84 The Committee was told that the proposed operational method of the ACP has in fact been applied for many years to Australian produced excisable goods (alcohol and tobacco products and petroleum products) and like customable [imported] goods:

> For the last 25 years these categories of goods have been released from customs' control to approved clients without prior provision of entry or payment of duties. Approved clients clear goods from customs without reference to the ACS, and then provide the ACS with a periodic statement together with the relevant duties.[176]

1.85 Customs rejected the assertion that the ACP might not present any efficiencies or costs savings for SME's:

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169 *Submission volume 1,* Coles Myer Ltd, p. 37. Coles Myer Ltd has been a pilot company in the ACP/CMR project since 1996

170 *Submission volume 1,* Schenker Australia Pty Ltd, p. 39

171 *Submission volume 1,* Nortel Networks, pp. 41-42

172 *Submission volume 1,* Schenker Australia Pty Ltd, p. 39

173 *Submission volume 1,* Nortel Networks, p. 42. Nortel Networks Australia Pty Ltd has been a pilot company in the CMR/ACP project since 1996

174 *Submission volume 1,* Nortel Networks, p. 41

175 *Submission volume 1,* Kodak (Australasia) Pty Ltd, p. 43. Kodak (Australasia) Pty Ltd piloted the ACP scheme

176 *Submission volume 1,* Kodak (Australasia) Pty Ltd, p. 43

> SME's will not be disadvantaged under CMR and the Customs' costs they incur today in their importing activity will not rise. The range of cost recovery charges post-CMR will be reduced and this will have a positive benefit for all importers. [177]

1.86 In addition, Coles Myer Ltd submitted that many of their suppliers are small and medium importers and any costs they incur due to inefficiencies pass down the value chain to consumers. Coles Myer advised that they have worked with the government agencies to ensure that all traders, both large and small, can share the benefits of streamlined cargo processing arrangements.[178] Schenker Australia Pty Ltd also contended that the ACP will lead to productivity gains for all importers and exporters, including SME's.[179]

1.87 AEIA stated that the outcome of accreditation is the basic deliverable that all major importers and exporters want from the ITM Bill.[180] AEIA stated that accreditation should be:

> … simple, quick, transparent and inexpensive. There will be exceptions to the principle but these need to be dealt with on a case-by-case basis. Strategically, Customs needs to quickly accredit the many and to focus on the few who may be marginally compliant, or whose activities involve compliance risks. It is not sensible to devote the majority of the Customs effort to cumbersome reviews of major traders that always were and will be compliant.[181]

Monitoring powers

1.88 The ITM Bill creates new monitoring powers which will replace the previous audit powers of 214AA, 214AB and 214AC. They will be used to assess customs compliance; record keeping, accounting, computing or other operating systems; and the correctness of information communicated to Customs.

1.89 Some concerns were raised in relation to the new powers including that:

- any extension of already extensive powers available to Customs should be resisted. The Committee was told that the new monitoring powers have euphemistically been referred to as 'fishing powers' because they go much further than the current powers and much further than a normal audit power;[182]
- the provision envisages a class of officers with particular qualifications and experience appointed by the CEO but there is no detail of the training such officers will undertake;[183]

177 *Submission volume 1,* Australian Customs Service, p. 88

178 *Submission volume 1,* Coles Myer Ltd, p. 37. Coles Myer Ltd has been a pilot company in the ACP/CMR project since 1996

179 *Submission volume 1,* Schenker Australia Pty Ltd, p. 39

180 *Submission volume 1,* Australian Exporters & Importers Association, p. 123

181 *Submission volume 1,* Australian Exporters & Importers Association, pp. 124-125

182 See also *Transcript of evidence,* Law Council of Australia, p. 10 and *Submission volume,* Law Council of Australia, p. 163

183 *Submission volume 1,* Australian Exporters & Importers Association, p. 129

- monitoring officers exercising powers pursuant to a warrant under section 214AF should be obliged to produce their identity cards; and
- parties should be advised of their right to consult with a lawyer, to give 'uncertain' answers and of their right against self-incrimination.[184]

1.90 Customs rejected the concerns in relation to the new monitoring powers. In particular, Customs advised that:

- The monitoring powers in the Bill[185] are based on the Scrutiny of Bills Committee Report, 6 April 2000 (*Entry and Search Provisions in Commonwealth Legislation*) and was cleared by the Criminal Law Policy Branch of the Attorney-General's Department; and
- the proposed powers provide more protections to occupiers of business premises than the current provisions because they can only be exercised with the consent of the occupier or under judicial warrant (new sections 214AE and 214AF). This compares favourably with the current powers under section 214AA of the Customs Act which are based on the concept of 'reasonable grounds' and do not necessarily require the occupier's consent (paragraphs 214AA(1)(c), (d) and (e)). Other safeguards include that a monitoring officer must produce an identity card and that consent to enter premises can be withdrawn at any time (new section 214AE).[186]

1.91 In addition, Customs noted that the monitoring powers are not able to be exercised for the purpose of searching for evidence of a crime but are restricted to the purposes outlined in new subsection 214AE(1) – that is, for the verification of compliance. Customs' power to search for and seize goods remains unchanged in Division 1 of Part XII of the Customs Act.[187]

1.92 The Committee accepts Customs' advice that such powers are necessary to support the introduction of a self-assessment environment and is confident that there are adequate safeguards to prevent their misuse or abuse.

Miscellaneous matters

Short paid duty and refund of overpayments

1.93 Items 6 and 7 of the Bill amend section 165 of the Customs Act to extend the period for the recovery of short paid duty and the repayment of erroneously refunded duty, for up to 4 years. Currently, these amounts can only be recovered within 12 months of the date of the short levy or refund (unless fraud is involved and action can be taken under section 153 of the Customs Act). The consequence has been that where those amounts have been detected in audits conducted more than 12 months after the erroneous levy or refund, they have not been

184 *Submission volume 1,* Law Council of Australia, pp. 163-164

185 Part 5 of Schedule 1

186 *Submission volume 2,* Australian Customs Service, pp. 279-280

187 *Submission No. 9A,* Australian Customs Service, p. 280

recoverable. Customs advised that the amendment will make the recovery consistent with GST, Luxury Car Tax and Wine Tax under the *Taxation Administration Act 1952.*[188]

1.94 The CBFCA claimed that there is no logic to the proposed consistency between customs duty and tax/GST payments:

> In fact there are major differences between these payments in a business environment. Customs duty is a cost to business which under ordinary circumstances needs to be recovered. The other taxes are either based on a proportion of income or, in the case of GST, represent no cost to business save for that of administration.[189]

1.95 Customs, however, advised that the amendment will:

- align Customs more closely with the ATO's timeframe for recovery or refund of indirect tax – Customs audits GST compliance by importers for the ATO; and
- the extension time for recovery of duty short paid complements the practical timeframe in which audit work may be conducted. Similarly, an 'overpayment' of Customs duty should be refundable for up to four year period after importation.[190]

Import threshold

1.96 CAPEC was concerned that as the ITM Bill proposes to harmonise the export threshold that applies to the cargo industry and Australia Post, it signalled a decision not to do the same in respect of the import entry thresholds.[191] Customs responded by advising that no decision has yet been made in relation to the import value threshold:

> In response to these concerns I can indicate that a decision has not as yet been taken in relation to harmonisation of the value threshold for imports. In fact the matter is currently under consideration by Ministers and when a decision has been made the outcome will be communicated to industry.[192]

Document retention requirements

1.97 The Bill imposes a requirement under proposed section 240AB that persons who communicate with Customs (such as the owner, agent, freight forwarder, cargo reporter) will be required to retain a record that verifies the contents of that communication for a period of one year after the communication was made. Failure to comply with the retention requirement is a strict liability offence carrying 30 penalty units and failure to inform a Customs officer about the whereabouts of such records when asked, is also a strict liability offence carrying 30 penalty units.

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188 *Explanatory Memorandum,* Customs Amendment and Repeal (International Trade Modernisation) Bill 2000, p. 82

189 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., pp.6-7

190 *Submission volume 1,* Australian Customs Service, p. 86

191 *Transcript of evidence, Proof Hansard,* Conference of Asia Pacific Express Carriers, p. 57

192 *Submission No. 9B,* Australian Customs Service, p. 1

1.98 In addition, the Bill imposes a requirement under proposed section 240(1B) that persons importing or exporting goods must keep all commercial documentation relevant to compliance with Customs law for a period of 5 years. Commercial documents can be kept at any place, and in any form provided that the Collector of Customs can readily ascertain whether the goods have been properly described for Customs' purposes.[193]

1.99 The AEIA, while applauding the move by Customs to accept electronic records, asserted that the new requirements will require Customs 'communicators' to keep what is, basically, a duplicate set of records which will create an unnecessary cost for traders. According to AEIA, both the Customs Act and the Income Tax Assessment Act correctly impose the responsibility for record keeping on the owner of the goods but argue that, within the context of commercial compliance, one set of records should be sufficient.[194]

1.100 In relation to new section 240AB, CBFCA stated:

- it will require airlines, container terminals, shipping companies, depots, exporters, customs brokers and others to retain records which they presently do not retain;
- as many documents belong to clients and contain confidential information, they cannot, without the client's permission, be copied or recorded;
- the new requirement will see in excess of twenty million additional documents needed to be recorded by industry to ensure compliance with the provisions of section 240AB and will cost industry in excess of $2.5 million annually[195]

1.101 Customs stated that the rationale for the document retention is to enable Customs to verify compliance with its various reporting requirements. The amendments are necessary in view of the growing class of people who communicate information to Customs. The requirement enhances flexibility so that records can be kept in a variety of forms – so long as the record verifies the content of the communication to Customs and is recorded in such a way so that a document, setting out in English the information recorded, can be readily produced. Customs advised that the record retention requirements are less onerous than those in Canada (documents must be retained for 6 years), the USA (5 years) and New Zealand (7 years).[196]

1.102 The Committee accepts Customs' advice that the document retention requirements are needed to ascertain compliance with reporting requirements. The Committee also accepts that the document retention requirements are not onerous compared with other international Customs systems.

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193 *Explanatory Memorandum,* Customs Amendment and Repeal (International Trade Modernisation) Bill 2000, pp. 76-77

194 *Submission volume 1,* Australian Exporters & Importers Association, pp. 133-134

195 *Submission volume 1,* Customs Brokers & Forwarders Council of Australia Inc., p. 24

196 *Submission volume 1,* Australian Customs Service, pp. 86-87

Review of new system

1.103 The Committee is aware that the proposed new arrangements constitute major changes in relation to the management of cargo movement in and out of Australia. The changes will have important ramifications for business and industry as well as for Customs itself. For this reason, it is incumbent on the Committee to recommend that the operation and implementation of the legislation be reviewed and reported upon within three years of the date the legislation receives the royal assent.

Recommendation

The Committee recommends that the Bills proceed subject to the following conditions:

1. The *Customs Amendment and Repeal (International Trade Modernisation) Bill 2000* should be amended to provide that the guidelines to be formulated in relation to the strict liability regime be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901* and therefore subject to the scrutiny of the Parliament (paragraph 3.57);

2. That those Customs officers with a delegated authority to issue infringement notices should be required to satisfactorily complete a training course for that purpose (paragraph 3.58);

3. That the exercise of the discretion by Customs officers to issue infringement notices should be monitored internally through an annual audit process and the statistics derived from that audit process included in the Department's Annual Report (paragraph 3.58);

4. In relation to the commencement of the new electronic arrangements for communicating with Customs under CMR, that Customs undertake further consultation with industry to ensure that industry is given sufficient notice of the kinds of information standards they will be required to have to operate competently within the new system. In addition, the Committee urges Customs to release the implementation plan in relation to the commencement of the CMR system as soon as possible (paragraph 3.69); and

5. That Customs be required to consult with industry prior to notices pursuant to section 126D being gazetted (paragraph 3.71);

6. That the operation and implementation of the legislation be reviewed and reported upon within three years of the date the legislation receives the royal assent (paragraph 1.103).

Senator M. Payne, Chair

APPENDIX 1

ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

Organisation	**Sub No.**
Customs Brokers and Forwarders Council of Australia	**1**
Customs Brokers and Forwarders Council of Australia	**1A**
Customs Brokers and Forwarders Council of Australia	**1B**
Coles Myer Taxation Services	**2**
Schenker	**3**
Nortel Networks	**4**
Australian Shipping Federation	**5**
Tradegate Australia Ltd	**6**
Tradegate Australia Ltd	**6A**
United Distillers & Vintners (Aust)	**7**
United Distillers & Vintners (Aust) represented by Ernst & Young	**7A**
Hewlett-Packard Australia	**8**
Australian Customs Service	**9**
Australian Customs Service	**9A**
Australian Customs Service	**9B**
Australian Exporters and Importers Association (AEIA)	**10**
Australian Exporters and Importers Association (AEIA)	**10A**
Kodak Australasia, Distribution Division	**11**
Milne Dunkley Customs & Forwarding	**12**
Business Partner Group	**13**
eLogicity Pty Ltd (Australia)	**14**
Law Council of Australia	**15**

Conference of Asia Pacific Express Carriers	**16**
Conference of Asia Pacific Express Carriers	**16A**
Australian Federation of International Forwarders Ltd	**17**
Australian Federation of International Forwarders Ltd	**17A**
Australian Federation of International Forwarders Ltd	**17B**
connect.com.au	**18**
CONFIDENTIAL	**18A**
connect.com.au	**18B**
connect.com.au	**18C**
Qantas	**19**
Industry Working Group on Customs (IWGC)	**20**

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Monday 2 April 2001 (Canberra)

Mr Thomas Curtis, President, Australian Exporters and Importers Association

Mr Martin Feil, Consultant, Australian Exporters & Importers Association

Mr Ernest Dean Former Chairman, Customs Brokers and Forwarders Council of Australia

Mr John Law, Solicitor, and Regional Manager New South Wales, Customs Brokers and Forwarders Council of Australian Inc.

Mr Louis Gross, Member and Past Chairman, Customs and International Transactions Committee, Law Council of Australia

Mr Andrew Hudson, Chairman, Customs and International Transactions Committee, Law Council of Australia

Mrs Carolyn Mall, Partner, Ernst & Young, representing United Distillers and Vintners (Aust.) Ltd

Mr Robert Preece, Senior Manager, Ernst & Young, representing United Distillers & Vintners (Aust.) Ltd

Miss Simone Cowley, Assistant Manager, Transaction Services, Ernst & Young, representing United Distillers and Vintners (Aust.) Ltd

Public Hearing, Thursday 3 May, 2001 (Melbourne)

Mr John Begley, Tradegate Australia Ltd

Mr Andrew Robertson, Chief Executive Officer, Tradegate Australia Ltd

Mr Peter Brown, Past Deputy Chairman, Australian Federation of International Forwarders

Mr Brian Lovell, Chief Executive Officer, Australian Federation of International Forwarders

Mr George Brownbill, Government Relations Consultant, ACIL Consulting Pty Ltd

Mrs Marion Grant, National Manager, Border Operations, Australian Customs Service

Mr Guy Harrison, National Manager, Commercial Compliance, Australian Customs Service

Mrs Jennifer Peachey, National Director, Office of Business Studies, Australian Customs Service

Mr Steve Holloway, National Manager, Cargo Management Re-engineering, Australian Customs Service

Mr Kenneth Muldoon, Secretary, Conference of Asia Pacific Express Carriers

Mr Neil Perry, General Manager, E-Commerce, Connect.com.au Pty Ltd

MINORITY REPORT BY LABOR SENATORS

PURPOSE OF BILLS

1.1 These Bills seek to improve the operation of the Australian Customs Service. That aim is to be commended. But a good intent does not guarantee that the way chosen to achieve it will be flawless. The legislation under consideration raises issues of substance in respect of the machinery proposed to bring about a better organisation.

1.2 Representatives of the Law Council of Australia (LCA) expressed their concern when they appeared before the Committee:

> "However, notwithstanding the difficulties which we acknowledge that Customs faces with very limited resources, we still think many aspects of the bill from a legal perspective are inappropriate in its current format."[1]

1.3 During the course of the committee's inquiries, the views of some industry stakeholders have evolved from initially being supportive with some reservations, to being unable to support the passage of the bills as currently drafted.

> "The IWGC [Industry Working Group on Customs] supports the general thrust of the legislation as far as Trade Modernisation is concerned. It can not, however, support the Legislation being passed by the Senate, in its current form, for the reasons stated herewith and as put forward by its members in their individual written submissions and in comments made during committee hearings."[2]

FURTHER CONSULTATION AND RE-DRAFTING

1.4 Labor Senators recognise that an important foundation of effective legislation is meaningful consultation with not only stakeholders, but institutions whose endeavours have in some way, an impact on the provisions of these Bills.

1.5 Representatives of the Law Council of Australia (LCA) expressed their concerns regarding the lack of adequate consultation in the conclusion of their written submission:

> "It is the position of the LCA that substantial additional consultation and consideration should be undertaken in relation to the Bills together with extensive re-drafting of the Bills before they are recommended for further consideration."[3]

1.6 Labor Senators believe that there is ample justification to warrant additional investigation by the Parliament into a number of the provisions of these bills. Labor Senators are of the view that these bills require substantial redrafting. It would be preferable for the Government to facilitate further consultation with industry groups regarding necessary

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1 *Transcript of evidence*, 2 April 2001, p. 9

2 *Submission 20*, Industry Working Group on Customs (IWGC), p.2

3 *Submission 15*, Law Council of Australia, p.8

amendments, and for the Government to undertake substantial redrafting before the Bill is considered by the Senate.

ENFORCEMENT PROVISIONS - DRACONIAN

1.7 The enforcement provisions set out in the legislation are draconian. It is argued they must be so to stop unacceptable conduct occurring. But that argument has been used with predictable persistence throughout history to justify harsh and oppressive laws. Due process should never be confined to accommodate even the noblest of causes. Its attenuation in the present instance ought be rejected.

1.8 Labor Senators are concerned that a number of provisions in the Bill, for example those providing for strict liability offences, and powers of information gathering and search and entry powers are inappropriate as they are currently drafted, and should not be supported.

MACHINERY AN ISSUE

1.9 People obliged to deal with the Australian Custom Service if they are to import and export lawfully must be provided with proper machinery to do so. The legislation changes the present mechanism but fails to comprehensively set out the precise details of how it is to operate not only in the longer term but in the immediate future.

1.10 The Industry Working Group on Customs observed in their submission:

> "The IWGC is mindful that the original urgency attached to the passing of the Bills may well have been overtaken by the time lag in development of the IT systems that underpin the "Trade Modernisation" initiatives of the ACS."[4]

1.11 There is also a shortage of transitional provisions. Provisions should be brought forward to remedy this flaw.

ELECTRONIC AND INFORMATION SERVICES

1.12 Through both the course of this inquiry and through evidence heard at previous Senate Estimates it has become apparent that the Customs Connect Facility (CCF), proposed by the ACS as part of the Cargo Management Re-engineering (CMR) has potentially serious implications for both the efficiency, quality and affordability of information and electronic commerce services to stakeholders.

1.13 The relationship between the bills under consideration and the CMR/CCF exists by virtue of the bills providing for the regulation (a disallowable instrument) of the proposal. Concern has been explicitly expressed by industry representatives that the charges levied by the ACS may rise disproportionately for small and medium Australian exporters to the advantage of the larger low value, high volume users.

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[4] *Submission 20*, Industry Working Group on Customs (IWGC), p.2

1.14 Labor Senators recommend that the electronic information and transaction service arrangements as they exist and as they are proposed as part of CMR/CCF be subject to specific attention in a subsequent Senate Reference Inquiry.

Senator Barney Cooney, Member

Senator Kate Lundy, Substitute Member

SUPPLEMENTARY REMARKS

SENATOR ANDREW MURRAY: AUSTRALIAN DEMOCRATS

1.1 I wish to make a few additional remarks concerning these bills and matters arising from the Inquiry and the Report. In particular the issue concerning large scale avoidance of tax and duty.

A: Chapter 2

Main Report Paragraph 2.17

1.2 In this paragraph is the following seemingly innocuous statement in the last dot point:

> Other measures in the ITM Bill aimed at improving export control include:…requiring an export entry for all goods the export of which requires a permission…certain goods (such as passenger/crew baggage, lower value items) are exempt from lodging an export entry…For example…pharmaceuticals…are currently not declared….The amendment means…that pharmaceuticals in crew luggage must be declared.

1.3 I did not pick this up before in reading the Explanatory Memorandum and in the Hearing. If airline staff are carrying prescription or over-the-counter drugs should they have to report it to Customs? Why? And if crew, will passengers too? Of any value, regardless? On the face of it this seems excessive. A requirement for all airline staff to report all their pharmaceuticals, assumingly for personal use, could become quite onerous, and seems really unnecessary unless there is a good explanation, which I will seek in the Senate.

B: Chapter 3

Main Report Paragraph 3.16

1.4 The Committee has recorded its concern that business still claims that it has not been provided with adequate cost impact assessments. The Minister should provide an assurance that they will do so.

Main Report Paragraph 3.26

1.5 This paragraph begins the discussion on the Strict Liability Offences and Penalty Regime. I am concerned about the full ramifications of strict liability provisions now sweeping through all federal legislation. I am wary that in many cases strict liability provisions may represent a permanent shift to a harsher regime, and that could be prejudicial to principles of natural justice. Given the level of concern expressed in this Inquiry by industry and the legal profession, given the claims from the New Zealand Government (see last dot point 3.43) that it did not appear to achieve the expected outcomes, and given the level of discretion which appears to be inherent in the regime, the parliament will need to carefully evaluate the consequence of these increases in the power of Customs.

1.6 The Report discusses the issue of merits review, and the absence of recourse to the AAT in certain circumstances. It should be noted that persons aggrieved or concerned by the

application of the new strict liability offences and penalty regime are still able to access the Ombudsman for investigation and report. In the absence of merits reviews or AAT access, this is a useful constraint, particularly given the perceived levels of Customs discretion in the new bills.

C: Other Matters

1.7 What is missing in the Committee Report is any significant discussion of the practical difficulties of the business processes within the Bill. Although the AEIA was the only submission to deal with them (because it was the only submission to come from a group of direct importers/exporters rather than service agencies who just pass on the costs), a number of AEIA points are still valid.

1.8 The Bill requires Accredited Clients to send electronically to Customs at least one periodic declaration not later than the first day of the following month (new section 71DF(b)). The AEIA argued that:

> The 'one day' proposal has little or no regard to either the financial reporting cycles or in-house systems of Customs' client base of importer and exporters. There is no inexorable logic in the ABS position.[1]

1.9 Also:

> Reporting times should be brought in to line with the BAS reporting times for monthly settlement, i.e. 21 days after the end of the period, through amendment to the legislation.[2]

1.10 This seems to makes sense, and I note that the Ernst & Young supplementary submission of 20 April refers to the usefulness of interacting with BAS when possible:

> More importantly, it is also seen as a 'stepping stone' to further business tax reforms, for example the reporting and payment of Customs and Excise duties via the Business Activity statement…[3]

1.11 Section 71DF (b) would see the Government introducing two different reporting cycles for revenue collection activities. This poses practical compliance difficulties for business. It would seem desirable for the ATO and ACS reporting cycles to be aligned by amending this section.

1.12 The AEIA argued that: *...business should have a right to nominate an authorised company officer to answer questions posed by a monitoring officer.*[4] Note that a failure to answer a question put under this subsection 243SA is an offence, and could therefore be a difficult experience for some junior employees. The AEIA idea seems sensible, particularly with respect to large organisations. The downside is that such an approach could be used by some companies as a delaying device. To effect the AEIA suggestion would require an

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1 *Submission 10,* Australian Exporters and Importers Association, p. 4

2 *Submission 10,* Australian Exporters and Importers Association, p. 6

3 *Submission 7A,* United Distillers & Vintners (Aust) represented by Ernst & Young, p.2, paragraph 3

4 *Submission 10,* Australian Exporters and Importers Association, p. 15

amendment to Section 214AH of the bill, which currently states *…a monitoring officer… may require any person on the premises to answer any questions put by the monitoring officer.* If AEIA's proposal were to be accepted I would suggest that in the absence of the nominated company officer then Customs should still be able to ask anyone else they need to.

D: Large Scale Avoidance of Tax and Duty

1.13 In the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000, Explanatory Memorandum General Outline, is this statement:

> The first set of powers are necessary because both Customs and the ATO have identified that goods under Customs control that are said to be bound for export are instead going into Australian commerce, with the net result that tax and duty that is properly payable is not being paid.
>
> The ATO believes diversion in Australia is comparable to levels overseas, **which are in the order of 30%.** Customs has also identified that this diversion activity is widely undertaken at various stages of the underbond process.[5] (emphasis added)

1.14 I was frankly taken aback by the allegations in the Explanatory Memorandum, especially since in the EM there was no indication that Customs, the ATO or the Police had ever done anything to recover these monies. I was just as taken back by E&Y/UDVA's supporting evidence that 30% or more of supposedly exported spirits are diverted back into the domestic market and therefore avoid tax and duty.

1.15 (It occurs to me now to question whether the concessional method recorded in 3.84 has contributed to this situation.)

1.16 The Committee's Hansard of 2 April 2001 has this exchange recorded:

> **Senator MURRA**Y—Mr Preece, at the top of page 6 of your submission it says:
>
> … the statistic of 30% of non-export of underbond goods may even be an understatement of the problem.
>
> What does 30 per cent represent in money?
>
> **Mr Preec**e—In our particular industry?
>
> **Senator MURRA**Y—Yes.
>
> **Mr Preec**e—We have had discussions on this. It could be tens of millions of dollars. It is difficult to put an exact number on it. These are very early thoughts. We are working on some studies of the export of just Scotch whisky at this stage—I should say re-export because there is no whisky made in Australia. UDV has seen some highly irregular transactions with that. For example, we have seen container loads of goods which were purportedly holding a number of litres of alcohol which physically cannot fit within the container and whisky moving to markets which are not traditional whisky markets, and so forth. There have been a number of very

5 *Explanatory Memorandum*, Customs Legislation Amendment Repeal (International Trade Modernisation) Bill 2000, pp. 7-8

unusual transactions coming out of that report and the study we are working on. Next we will move to brandy and liqueurs.

Senator MURRAY—Can I ask you on notice, through the chair: could you provide some working sheets to validate that conclusion of yours?

Mr Preece—Yes.

Senator MURRAY—If it is commercially sensitive, you can, of course, provide it in confidence. That is a substantial claim and I think we need two things: firstly, to indicate how you have arrived at it and, secondly, to indicate your estimation of the total value in your industry. Obviously, you cannot do it with other industries. Customs often do not have many friends, but the idea that they are absolutely incompetent seems a bit far-fetched to me. This parliament has one or two items stolen from it regularly. If a third of everything in the parliament disappeared, we would expect the culprits to be found pretty quickly.

….

Senator MURRAY—Let us assume a third of all these chairs, a third of all the equipment, a third of everything in the parliament—it becomes ludicrous. What the statement of yours says is that a third of all under bond goods may be going missing, being used for purposes for which they are not intended. That implies or states incompetence on a grand scale and it is very difficult to believe.

Mr Preece—The 30 per cent actually had its origin in the EM to the bill; that is where the number first came from.

Senator SCHACHT—This is a customs figure.

….

Senator MURRAY—My concern, Mr Preece, is this: if you are right, this is a national scandal of astonishing scale….

….

Senator SCHACHT—Thank you very much. I notice, Mr Preece, on the page 6, down the bottom, you also raise the GST free status of exports. Of course, exports are GST free and it is understood. It says:

> However, where an exporter overstates the quantity and the value of the goods that it is exporting, there will be a number of adverse consequences. Firstly, there will be an overstatement of the value of GST-free exports on the relevant Business Activity Statement (BAS). Primarily this means that the GST net amount will be understated.
>
> A second likely consequence, which is yet to be measured, is the GST treatment by the exporter of those goods purportedly exported, but diverted back into the domestic market. Those goods are classified as taxable supplies when sold in Australia ... The 'exporter' may on-sell to another business in Australia, then through the tax invoice/ABN/input tax credit system, we may see GST being remitted on the sale.

Is there any difference in that problem of GST not being paid on the diversion back into the domestic market, compared with the excise—the 30 per cent figure that Senator Murray and you mentioned.

Mr Preece—That is merely an MO—that is really a possibility that has not been explored. If we were to be creative, that is one way in which you could use this process.

Senator SCHACHT—You are saying that the present system could allow that to happen, but that the new proposals in this bill make it less likely that GST could be avoided if the bonded goods were re-diverted back into the Australian market?

Mr Preece—It is a support of the tightening of the export controls, the intention of which is to stop this sort of thing happening.

1.17 It will be evident that these revelations surprised a number of Senators at the Hearing. Subsequently E&Y/UDVA provided additional information to the Committee. This information is of sufficient import for me to reproduce it at Attachment A.

1.18 The Committee's coverage of what is as I understand is a hitherto unknown tax rort scandal is curiously understated. (As indeed is the coverage in the EM). Obvious questions arise – such as what have Customs or the ATO been doing about these issues? There is the matter of punishing those who (on this evidence) have engaged in large scale tax and duty evasion. Have there been police investigations? If not, why not? The extensive spreadsheets the Committee has been provided with (the E&Y/UDVA supplementary submission of the 20 April) seem to provide a sound basis for successful investigations of these matters.

1.19 Not only do Customs and the Police usually have reciprocal access to their counterparts in many countries overseas, not only do they have details of who claimed export licences, but receiving countries themselves would know whether the goods had been received by them and from whom, because duty is applicable there. On the face of it, it is difficult to see that it can be hard to establish the veracity of (for instance) claimed exports of Scotch Whisky from Australia to Scotland.

1.20 I have made just one calculation to arrive at an indicative value of what is being alleged. On p7, 3.2.8 of the E&Y supplementary submission they say:

UDVA believes that an approximate total of 463 198 lals of whisky constituted a very high risk of being diverted back into the domestic market.[6]

1.21 Excise duty on whisky is $54.56 per lal. So, if these suspicions were realised, over $25 million of excise was avoided last year. That is just whisky. Other spirits and other high value goods enlarge the alleged revenue loss considerably.

1.22 In my opinion E&Y/UDVA have provided enough prima facie material to justify an independent Inquiry or a police investigation.

1.23 The Report quotes both UDVA and AEIA to support the bills proposals' for better controls. UDVA seem to think that these bills will assist in preventing revenue leakage of a very high order.

1.24 We need to be aware of the other arguments from the rest of industry, who are concerned about the potentially wide application of these new export control measures. They

6 *Submission 7A,* United Distillers & Vintners (Aust) represented by Ernst & Young, p. 7

have recommended that the legislation be amended so as to introduce a mechanism to narrow the application of these new control measures to areas of nominated risk.

Senator Andrew Murray, Participating Member

ATTACHMENT A TO SENATOR ANDREW MURRAY'S SUPPLEMENTARY REMARKS

FROM ERNST & YOUNG/UDVA SUPPLEMENTARY SUBMISSION 20 APRIL 2001:

DIVERSION OF GOODS FOR EXPORT INTO THE AUSTRALIAN MARKET

You will recall UDVA was fully supportive of the proposed export controls, based on its experience with:

- The risk of diversion of goods back into home consumption without payment of GST and duty, or after successfully claiming duty drawback;
- The emerging trade issue of parallel exporting which the Australian Government is coming under pressure to address; and
- Falling quality of export data for research.

QUANTITATIVE EFFECT ON UDVA

Senator Murray has asked us to provide an estimate in dollar terms of the effect on UDVA of the diversion of goods for export into the Australian market. UDVA of course makes the sale into the Australian market and derives income, however, subsequent parties in the supply chain acquire the spirit for phoney export and diversion into home consumption. However, more important to UDVA than its initial sale is the damage to the reputation of its premium brands through the 'black market" back into the local supply chain. Further damage is done when licensed distributors of those premium brands find that they are no longer enjoying the sole distributor status for which they have paid, and are in fact competing against the "back of the truck" scenario which can offer duty free pricing.

Damage to a brand's reputation is difficult to quantify in dollar terms, but within the industry dollar value does become an issue if ever sole distribution rights were to be put up for sale and realised below expectation. Fortunately UDVA has not yet been put into this position.

DIVERSION OF 30% OF EXPORTED PRODUCT BACK INTO THE DOMESTIC MARKET

Senator Murray queried the estimated rate of such diversion which was put at 30% of under bond exports. The UDVA submission suggested that this figure may even be an understatement of such activity. The 30% figure is not a UDVA nor Ernst & Young figure but was taken from the Explanatory Memorandum to the *Customs Legislation Amendment*

And Repeal (International Trade Modernisation) Bill 2001 (ITM Bill).[1] Such a figure derives from experiences in overseas jurisdictions in regard to the diversion of export of highly taxed products back into home markets.

Having said that, UDVA is able to highlight a significant quantity of highly irregular and suspicious alcohol export transactions, which constitute a high risk of diversion back into the domestic market. Based on a small sample of spirits exports, namely the export of whisky during calendar year 2000, (which may or may not be representative of all exported alcoholic products) UDVA believes that there is cause for alarm.

As part of a separate exercise to this Senate Committee, UDVA did seek from Customs, under Freedom of Information legislation, a report on all whiskey exports for the year 2000. Using industry knowledge and expertise as to the patterns of distribution, UDVA was able to identify significant numbers of export transactions that in its opinion, are highly suspicious. This does not necessarily mean that every one of these suspicious transactions was actually diverted in full or in part back into the Australian market, but rather there is a high risk of it happening.

Following is our analysis of the Customs report:

Unsanctioned exports

UDVA views any unauthorised export of a UDVA product from Australia as suspicious. This is because United Distiller & Vintners (UDV) has established sole distribution licence arrangements globally for each of its brands. Under such arrangements, no UDV label should be leaving Australia unless it is either:

- by UDVA itself or an authorised user of it trade marks to licensed distributor in the regional market; or
- as part of ship or aircraft stores (where the product is consumed on board); or
- as duty free shop sales to departing passengers.

During 2000, **35,468** litres of alcohol (lals) of UDV whiskey product were reported as exported, either under bond or as duty paid (subject to drawback), for which neither UDVA nor an authorised user of UDVA's trade marks was sanctioned by UDVA giving its permission to use the trade mark.

Nor in the case of duty drawback claims, did Customs or the exporter seek certification from UDVA that duty was actually paid as per Customs guidelines.

Export consignments which appear not to physically fit within the confines of a shipping container (excluding Thailand see 3.2.4 below)

Please note that UDVA's analysis in this section is based on the size limitation of a 40-foot container. In some exports, containers would have been 20-foot in size, and in this situation the risk is double what UDVA has stated below.

1 Explanatory Memorandum to the *Customs Legislation Amendment Repeal (International Trade Modernisation) Bill 2000* at p. 5

The whisky export report from Customs reveals that there were 70 instances where the physical capacity of a 40 ft container had been well exceeded. This could in fact mean that several containers were used for one consignment, however there are two further considerations:

- firstly, a consignment is also likely to include other spirits to fill an order – for example, brandy, rum and liqueurs; and
- secondly, given the highly structured supply chains around the world, multiple container assignments are unusual and usually not required to fill gaps in another market.

Under this category of analysis, **74,430** lals were identified (extending to 148,860 lals if 20 ft containers were used).

Export of unrealistic quantities to minor markets

Please note that in this analysis UDVA has only included those minor markets that are clearly not trans-shipment or 'hub' points to other markets.

UDVA views the quantity of exports to the markets listed in the following table as suspicious as they are unrealistic given the size of the market, the fact that other spirits products will have also been imported, the cultural attributes of the market and, in some cases, the physical limitations as to the size of a ship that can enter its ports.

The following is a summary of the volume of suspicious exports to minor markets:

Market	***Number of lals***
Vanuatu	14,680
Indonesia	70,440
Fiji	14,294
TOTAL	**99,414**

Exports to markets where established distribution rights exist

UDV is not the only owner of premium brand spirits which is distributed under global licensing arrangements and so questions why so much whisky needs to leave Australia and enter markets where exclusive distributions rights have already been established with the owner of that brand. UDVA also queries how this is actually allowed to happen in the ultimate market of destination, given that products exported from Australia will clearly be

marked in English for consumption in Australia and labelling will most likely breach local labelling laws in the export market. UDVA is also aware that anti parallel importing legislation exists in most of the markets concerned and importers face penalties and forfeiture of the spirits.

The following table contains the details of the volume of suspicious exports to foreign markets where UDVA expects there would clearly established sole distribution rights:

Market	**Number of lals**
Hong Kong	39,353
Indonesia	70,440
Japan	78,870
Netherlands	31,912
TOTAL	**220,575**

Under this category there were exports of **220,575** lals of whisky product regarded as suspicious.

Exports to Thailand

Total whisky product exports to Thailand were **1,754,262** lals last year which does not fit within any logical distribution pattern unless spirit is further transhipped from this point. This represented 69% of the total volume of whisky product (in lals) exported from Australia. As the volume of exports to Thailand is so large, UDVA has not included this figure in its analysis (apart from at 3.2.2 where the consignments do not fit within a 40 ft shipping container) as it believes this number may skew its results.

However, suffice to say Thailand, like any other market has established distribution rights for premium brand spirits eg Riche Monde (Bangkok) Ltd owns the sole distribution rights for Johnnie Walker and Riche Monde Ltd's Johnnie Walker products are clearly marked for the Thai market.

Importantly, Australian market Johnny Walker product fails the local regulations surrounding packaging and an imported bottle from Australia would not conform to this standard and the importer faces having stock readily identified and seized by officials. UDVA believes a significant amount of these spirits exports are suspicious.

Exports from East Coast – Customs Drawback Claim Lodged in Adelaide

Customs reports do not show which export transactions fall into this category, however, UDVA understands from various communications with Customs that this is a regular event. UDVA is aware that Customs has certain electronic capabilities to allow for optional port lodgement, but questions why the practice appears so common in the drawback of spirits.

UDVA question Customs risk management responses, and whether they would view this as suspicious, and then how they can possibly react adequately where the documentation and the goods are dealt with by two separate Customs offices.

Scotch to Scotland

UDVA believes that it is ironic that Australia would export Scotch to the United Kingdom. This either represents a benchmark for Australian entrepreneurs - being able to sell Scotch whisky back to the Scots themselves who distilled the product (including being able to absorb the addition of freight costs to and from Australia) or a tongue-in-cheek approach to smuggling! In this light, UDVA has identified that **12,638** lals of whisky product are indeed irregular.

Ship stores

The 'ship stores' export coding is used for ship and aircraft operators to take on board whisky to be consumed by passengers during the flight or voyage.

UDVA found no less than 12 flights or voyages where crew and passengers would be required to consume anywhere up to 2000 bottles of whisky! Of those, there were two voyages where the crew would have needed to drink up to a 20-foot container load of whisky. This is obviously unrealistic and UDVA calculates that a total of **20,673** lals were exported in such dubious circumstances.

Conclusion

From the analysis undertaken above and removing all double counting of suspicious transactions from two or more categories, UDVA believes that an approximate total of **463,198** lals of whisky constituted a very high risk of being diverted back into the domestic market. This represents approximately 18.4% of the total volume (in lals) of whisky exported from Australia in the year 2000. However, this figure is a conservative estimate as UDVA used 40ft shipping container figures and did not include those exports to Thailand. Given that approximately 69% of all whisky exports from Australia went to Thailand in 2000, and this in itself is highly unusual and of great surprise to UDVA, if 20% of these exports were indeed at risk of diversion, then the EM figure of 30% as it relates to exports of whisky last year has been reached. Notwithstanding, 18.4% of whisky exports should also represent an unacceptable risk to the Government.

UDVA has since sought further information from Customs on other spirits exports under Freedom of Information, given its concerns over the extent, and the involvement of its premium brand labels.

GST-FREE NATURE OF EXPORTS

Senator Schacht requested information as to which provisions of the proposed legislation provide protection against the leakage of Commonwealth revenue through the GST system.

We believe that the primary provision which will provide such protection is proposed s117AA of the ITM Bill, which prescribes places for the consolidation of goods for export. This provision requires that prescribed goods shall be consolidated only at prescribed places, such as a wharf or an airport.

As the law stands now, an illegitimate exporter can load a container with spiritous product and deliver that container to a wharf and would be highly “unlucky” to have Customs waiting there for inspection before it is loaded and exported. Under proposed s117AA, there is scope for introducing new controls by making high-risk products, such as spirits, prescribed goods under the Customs Regulations. Consequently, a illegitimate exporter would be required to have their cargo of spiritous products consolidated at a wharf or airport by a third party, for example stevedores.

This primary control as viewed by UDVA, is then supported by the following:

- reporting to Customs by warehouses and wharves as to what is leaving bond and being packed – s114E & s114F;
- increased monitoring powers of Customs/ATO – Div 3A;
- infringement notice regime for non-duty related areas for exports s243X.

Attachments (not enclosed with this Minority Report)

A - Draft submission to Customs on CMR and warehousing

B – Customs CMR pamphlet “Customs Connect Facility”

C – Spreadsheet “Unsanctioned Exports”

D – Spreadsheet “Exports consignment not fitting within shipping containers”

E – Spreadsheet “Exports in unrealistic quantities to minor markets”

F – Spreadsheet “Exports to markets with established distribution rights”

G – Spreadsheet “Exports to Thailand”

H - Spreadsheet “Scotch to Scotland”

I – Spreadsheet “Ships stores”