CHAPTER 3

KEY ISSUES

3.1 This chapter considers the main issues and concerns raised in the course of the committee's inquiry.

General concerns

3.2 The Law Council of Australia (Law Council) expressed general concern and reservation that the Bill 'represents yet another amendment' to the Customs Act and is the sixth set of amendments to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*. The Law Council submitted that such frequent piecemeal amendments and corrections do not aid easy comprehension of Customs legislation by interested parties. In the Law Council's view, the Customs Act requires extensive review to remedy areas of uncertainty.[1]

3.3 At the hearing, Mr Andrew Hudson from the Law Council reiterated this concern, stating that 'some advance warning about what is being proposed to be amended may be of assistance to industry'. Referring specifically to the Bill and the three distinct areas it encompasses, Mr Hudson noted that 'all we had was the title. You would not take from the title of the Bill the areas that it addresses'.[2]

Customs response

3.4 A representative from Customs explained the reasons why the Bill contains such disparate issues:

> … all the measures in the bill, other than the duty payment arrangements for accredited clients, really are highly technical measures that relate to specific operational issues that have [raised] difficulties. They have probably arisen over the past two to three years and, being such small measures, have been waiting for a legislative vehicle to be put through. As you are aware, more generally, the government has had quite a large legislative reform agenda in other policy areas lately, and small issues like these ones that we have wanted to process for administrative or operational convenience simply have not made the priority listing to get drafting resources … I guess we would rather see a wholesale, more comprehensive review of lots of pieces of legislation as well but, when it comes to drawing a line at what is in a bill, I am afraid that is something we do in consultation with the Office of Parliamentary Counsel with measures that are completed

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1 *Submission 4*, p. 2. The Law Council noted that this view is shared by other organisations and bodies such as the Customs Brokers & Forwarders Council of Australia, the Australian Law Reform Commission and the House of Representatives Standing Committee on Legal and Constitutional Affairs.

2 *Committee Hansard*, 27 April 2006, p. 17.

> and have policy approval on a particular day. Some of these measures have been sitting on our wish list, for want of a better word, for up to 2½ years.[3]

3.5 The representative continued:

> They are measures that are very small. When they are subject to the bill and the drafting stage, they are probably regarded as cabinet in confidence. Also, all of these measures have been passed through the Office of Regulation Review and it has been indicated that they are not of significant policy concern to require a regulation impact statement and the consultation process that goes with that.[4]

3.6 The representative also revealed that Customs is currently reviewing, and consulting upon, its duty recovery provisions and payment under protest provisions. Further, and more generally, Customs is reviewing all offences in the Customs Act in response to the Australian Law Reform Commission's review into civil and administrative penalties.[5]

3.7 The amendments in the Bill need to be taken in the context of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* which was one of the biggest changes to the Customs Act in 15 years:

> I think it is quite understandable that it has taken five years to bed that down and that the amendments that have come through in that period since its passage have primarily related to bedding that down and fixing things up in line with the phased implementation of the ICS, the Integrated Cargo System.[6]

3.8 The representative also noted that administrative reform for Customs 'has taken a back seat' due to other high-priority amendments related to the threat of terrorism.[7]

Unauthorised entry – Schedule 2

3.9 The proposed changes to the current law under Schedule 2 will add a second, cumulative layer to the exemption contained in subsection 234(1A) since, for a person to be eligible to enter the areas specified in proposed subsection 234A(1B), he or she must not only be the holder of a security identification card, but must also not be subject to a written direction by a Collector of Customs not to be in the relevant area. Effectively, this not only tightens the exemption, but will also give a Collector of Customs a stronger influence over who can access certain security sensitive areas.

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3 *Committee Hansard*, 27 April 2006, pp 23-24.

4 *Committee Hansard*, 27 April 2006, p. 24.

5 *Committee Hansard*, 27 April 2006, p. 24.

6 *Committee Hansard*, 27 April 2006, p. 24.

7 *Committee Hansard*, 27 April 2006, p. 24.

3.10 The Law Council made several observations about the proposed amendments contained in Schedule 2. In particular, the Law Council was concerned that Schedule 2 'may have the affect of restricting legitimate access to [section 234AA places] by way of (unfettered) direction' of the CEO of Customs.[8]

3.11 The Law Council pointed out that there are many parties who hold security identification cards whose access to section 234AA places should be guaranteed rather than being subject to exclusion by way of direction by the CEO of Customs (for example, union delegates, lawyers representing persons subject to Customs inquiry, medical practitioners, and translators).[9] Such people may hold a security identification card (a VIC)[10] and may have a legitimate cause to enter a section 234AA place, yet they may be excluded by mere direction of the CEO.[11]

3.12 Accordingly, the Law Council argued that:

> … a person who is to be excluded from [section 234AA places] should be entitled to prior notice and an opportunity to defend their right of access. The persons being questioned or restrained by Customs should not have their rights limited by way of direction of the CEO by Customs.[12]

3.13 At the hearing, Mr Andrew Hudson again emphasised the Law Council's concern in this regard. While recognising the circumstances that Schedule 2 is attempting to deal with and conceding that there are 'extremely legitimate reasons' for Customs to restrict access to section 234AA places, Mr Hudson stated that:

> We are just concerned whether that has been fully thought through in terms of people who may actually need access but who find themselves precluded, notwithstanding a security identification card, by virtue of a written direction from the CEO of Customs, which appears to be generally unfettered. The amendments we propose are in respect of people who might otherwise have security identification cards and/or a legitimate expectation of being able to access these areas. These are areas, I understand, where questioning takes place, bags are searched and so forth.
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> ... I think we understand the principle behind it, and it is a very sound principle. We are just concerned about the downstream consequences of it. I guess we are not entirely sure of all the circumstances in which the CEO may issue written directions. [13]

3.14 Mr Hudson highlighted the possible confusion that might arise in relation to the interaction between the power conferred by the proposed amendments in Schedule

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8 *Submission 4*, p. 3.

9 *Submission 4*, p. 3.

10 See para 2.9 in Chapter 2.

11 *Submission 4*, p. 3.

12 *Submission 4*, p. 3.

13 *Committee Hansard*, 27 April 2006, pp 14-15.

2 and other pieces of legislation. This is particularly relevant where a person believes they have legitimate access to a section 234AA place but could be excluded for reasons of which they are unaware:

> DOTARS have regulation over the airports under aviation transport security. We also now have Customs and also the police presence there. There may be situations in which the CEO may be asked to issue a written direction to somebody who, for example, is otherwise authorised under the aviation transport security regulations to say, 'Could you please issue a letter excluding this person from access.'
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> …
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> … there is a variety of layers of regulation over airports and indeed ports. From our perspective, there is a concern that there is this overlay and an overlapping and not necessarily consistent regulation and just seeing how it operates.[14]

3.15 The Law Council suggested that Schedule 2 should be amended in the following manner to place limits on the ability of the CEO to issue such directions:

- the CEO should identify reasons why a person may be excluded from a section 234AA place;
- the CEO should notify a party, provide reasons for the exclusion and allow for any objections;
- the CEO should not be able to issue written directions in relation to persons with a legitimate reason to be in a section 234AA place such as union delegates, lawyers, medical practitioners and translators; and
- persons affected by a written direction from the CEO should be entitled to seek review of the direction by way of administrative and judicial review.[15]

3.16 In response to questioning by the committee about the significance of Schedule 2 in the context of potential security risks, Mr Hudson submitted that, if the purpose of the amendments is to guard against such risks, then this should be explicitly referred to in the Bill:

> That is referred to in the explanatory memorandum. It does refer to people who they might be concerned about and feel that it is inappropriate for them to be there, and they have given some examples. But the legislation is quite broad. It does give the CEO the capacity to issue a written direction precluding access to people who would otherwise be entitled to access. It does not actually go into any detail as to the grounds for that and on which it can be invoked.[16]

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14 *Committee Hansard*, 27 April 2006, p. 15.

15 *Submission 4*, p. 3.

16 *Committee Hansard*, 27 April 2006, p. 19.

3.17 Mr Hudson acknowledged that, in the case of an immediate security threat, some of the Law Council's suggested amendments to Schedule 2 may not be practical. However, in doing so, he reiterated the Law Council's apprehension about the uncertainty of Schedule 2's operation in practice:

> … If they suddenly discover that [a] person poses a particular security threat then perhaps [advance] notice [of the exclusion] may not be practical. But, presumably, that notice could be abridged in circumstances of particular urgency. I would draw the analogy with a landlord being able to enter premises with no notice in the case of emergency—if the place is falling apart or whatever. Presumably, the legislation could reflect that. You could have a scheme in which people who are going to be excluded by way of written direction might be given notice of it, except in the circumstances of national security issues or some other reason. I understand the review might not be practical. And we do not know what the notice would preclude—whether it would apply from then forever, from then for one day or from then for 12 hours.[17]

Customs response

3.18 Customs provided the committee with a detailed response to the Law Council's concerns with respect to Schedule 2.

General justification for the proposed amendments

3.19 Customs advised that, since the responsibility for issuing ASICs rests primarily with airport corporations and airlines, in effect it is these bodies, and not Customs, which currently determine who has access to places at airports that are controlled by Customs. Further, Customs informed the committee that persons issued with ASICs often use their access privileges to enter Customs-controlled areas for purposes unrelated to their employment.[18]

3.20 The proposed amendments in Schedule 2 are designed to give Customs greater control over those persons who have access to Customs-controlled areas. However, they will not affect a person's legitimate access to a section 234AA place for the purposes of his or her employment:

> If a person does not have an ASIC, they must have the authority of a Collector to enter or be in such an area. If a person has been issued with an ASIC, they must not enter, or be in the area if they are subject to a written direction by the Collector not to enter or be in the area. Such a direction would be issued were an ASIC holder found to be abusing their access privileges, that is, accessing the area for the purposes of transporting goods without Customs knowledge.[19]

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17 *Committee Hansard*, 27 April 2006, p. 20.

18 *Submission 3A*, p. 2.

19 *Submission 3A*, p. 2.

Issue of the written direction

3.21 Customs pointed out that the Law Council's assertion that the CEO of Customs will issue the written direction is not correct. The written direction 'will actually be issued by the Collector of Customs as defined in the [Customs] Act, that is, the officer on duty at the time of the incident'.[20] Customs stressed that the written direction is a 'real-time' instrument:

> It will be issued when the Customs officer cannot establish the bona fides of the party the subject of the direction, and when that party cannot show legitimate cause (that is, a reason linked to their employment) for their presence in the area.[21]

Prior notice of the written direction

3.22 Customs submitted that due to the 'time-sensitive nature of the airport environment it is not practical for a person to be given prior notice of a written direction being issued'.[22] Further:

> The purpose of a written direction is that it has immediate effect. Before issuing a written direction a Customs officer will question the party to determine if they have a legitimate cause to be in the area, that is, if they are in the area for reasons related to their employment. If the Customs officer cannot establish the party's bona fides, a direction may be issued.[23]

3.23 Customs stressed that the aviation environment faces a number of criminal and security threats and that the proposed amendments are aimed at ensuring the section 234AA place is both sterile and safe.[24]

Right of review of the written direction

3.24 Customs informed the committee that merits review of the written direction is not considered appropriate 'as this is a decision that is related to law enforcement, by ensuring the integrity of the border'.[25] Customs also advised that the Attorney-General's Department was consulted in respect of this issue and supports this position.[26]

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20 *Submission 3A*, p. 3. However, the committee notes that, under the Customs Act, a Collector of Customs does include the CEO of Customs, as well as the Regional Director for a state or territory, or any officer doing duty in the matter in relation to which the expression is used.

21 *Submission 3A*, p. 3.

22 *Submission 3A*, p. 5.

23 *Submission 3A*, p. 5.

24 *Submission 3A*, p. 5.

25 *Submission 3A*, p. 3.

26 *Submission 3A*, p. 3.

Legitimate cause to be in a section 234AA place

3.25 Customs disagreed with the Law Council's assertion that certain parties should have a guaranteed right of access to section 234AA places:

> … under the current provisions, the general position is that no individual or group is entitled to be in a section 234AA area, which is in fact a sterile area designated for the clearing of passengers, crew and their baggage. While there are exceptions to this general position, these exceptions generally only relate to people who need to be in the area for purposes related to their employment and who hold an ASIC, or the passengers and crew of ships and aircraft.[27]

3.26 Customs maintained that in circumstances where a passenger or crew member is in need of assistance that is not otherwise available from Customs staff, such as a doctor or translator, Customs requests the provision of such assistance and grants escorted access to the section 234AA place to the person providing the assistance.[28]

3.27 Customs also explained that an ASIC does not by itself entitle the holder of the card to be in the section 234AA place. Rather, an ASIC indicates to Customs that the person holding the card has undergone a security clearance. The relevant person also has to be in the section 234AA place for the purposes of his or her employment.[29]

3.28 In relation to access to lawyers, doctors and interpreters for persons being questioned or restrained, Customs requests the attendance of such a person. On attending, the lawyer, doctor or interpreter is issued with a VIC and is escorted by a Customs officer to the party being questioned or held.[30]

3.29 Moreover:

> When Customs [is] questioning parties suspected of having committed an offence under the Customs Act, they have not been arrested, and therefore do not have the right of automatic access a lawyer. However, Customs is currently reviewing this policy in respect of parties involved in a record of interview.[31]

3.30 With respect to union delegates, Customs pointed out that this is addressed in the Federal Government's new Workplace Relations legislation:

> It is not for other government legislation to determine how Union Delegates gain access to their members. Were a Union Delegate to require access to

27 *Submission 3A*, p. 3.

28 *Submission 3A*, p. 3.

29 *Submission 3A*, p. 4.

30 *Submission 3A*, p. 4.

31 *Submission 3A*, p. 4.

the restricted area, they would be issued with a VIC and escorted by their relevant Union Representative.[32]

3.31 Customs advised that a VIC will only be issued to those parties who have a legitimate cause to be in a section 234AA place. Such a determination as to legitimate cause is the responsibility of the Department of Transport and Regional Services and is not a decision made by Customs. However, a person holding a VIC who enters a section 234AA place without the knowledge or presence of his or her escort, will be in breach of access privileges and could be subject to a written direction not to enter the area.[33]

Committee view

3.32 The committee acknowledges the worth of a 'real-time' additional power for Customs to direct persons to leave a section 234AA place (or other relevant place) in extreme cases, such as where a person presents a criminal or security threat. The committee accepts that, while there will be circumstances in which exercise of the power contained in Schedule 2 will be necessary, in practice the exercise of the power will have limited application.

3.33 The committee is satisfied by assurances from Customs that exercise of the power will not interfere with the rights of persons with legitimate cause to be in a section 234AA place. In any case, the proposed amendments in Schedule 2 are designed to give Customs greater immediate powers to manage extreme circumstances pertaining to areas for which it is ultimately responsible. Since Customs is responsible for ensuring that those areas remain sterile and safe at all times, the committee considers that it would not be practicable, nor possible in many cases, to issue advance notice of written directions in circumstances in which the new power is likely to be invoked.

3.34 Nevertheless, the committee is mindful of concerns presented by the Law Council about uncertainty as to how the power will operate and the circumstances under which it may be utilised. The committee is of the view that the nature of the power, as currently expressed, is too broad. The committee agrees with the Law Council's suggestion that some parameters around the power are appropriate in order to provide greater clarity in relation to its scope and operation.

3.35 While the EM gives some examples of the types of circumstances in which the power might be invoked, the legislation itself does not. Therefore, the committee recommends that the Bill should be amended to clearly reflect the intention that the exercise of the power is to be limited to circumstances where an immediate criminal or security threat or emergency is present in a section 234AA place, or other relevant place.

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32 *Submission 3A*, p. 4.

33 *Submission 3A*, p. 5.

Recommendation 1

3.36 The committee recommends that proposed subsection 234A(1B) of the Bill be amended to limit the exercise of the power of a Collector of Customs to issue a written notice directing the holder of a security identification card not to enter into, or be in or on a section 234AA place, or other relevant place, to circumstances where an immediate criminal or security threat or emergency is present in the section 234AA place, or other relevant place.

US originating goods – Schedule 3

3.37 The Law Council welcomed the proposed amendments in Schedule 3, which correct some aspects of the implementation of the FTA. However, it expressed the view that the amendments do not go far enough.

3.38 To this end, the Law Council noted that it has stated its concern in a number of forums (and in writing to Customs) that the 'voluntary disclosure regime' for potential error in claims of preferential treatment in the Customs Act is inconsistent with the corresponding provisions in the FTA. That is, the regime by which a party can voluntarily disclose errors in claims of preference under the FTA without the imposition of penalty is quite broad, while the provisions of the Customs Act are more limited. For these purposes, the Law Council submitted that Article 5.13.4 of the FTA is to be contrasted to subsections 243T(4) and (4A) and subsections 243U(4) and (4A) of the Customs Act. [34]

3.39 Mr Andrew Hudson from the Law Council expanded on this concern at the hearing:

> The US-Australia FTA has a provision that states, 'If you voluntarily disclose an error, make reimbursement of any underpayment, you should not get any penalties.' Under the Australian legislation, voluntary disclosure is not quite that simple. There are limited circumstances in which voluntary disclosure is allowed to be made. For example, under the Australian legislation once you receive a notice of Customs' intention to exercise monitoring powers—otherwise, audit powers—it is too late to voluntarily disclose.[35]

3.40 Mr Hudson continued:

> My concern is that if you receive a notice and you say, 'Customs are coming in, we should really be doing a prudential audit to try to work out how we are going in terms of compliance,' if you do discover a problem of claiming preference under the free trade agreement, you are too late under the Australian legislation to voluntarily disclose that error to avoid liability. Whereas, under the free trade agreement, my view is that you should be able to voluntarily disclose the error and avoid liability … My

34 *Submission 4*, pp 3-4.

35 *Committee Hansard*, 27 April 2006, p. 16.

> understanding is that Customs are talking to the trade branch—presumably to DFAT—about the tension.[36]

3.41 Since many of the offences which could attract penalties for incorrect claims of preference under the FTA are strict liability provisions (such as sections 243T and 243U), affected parties may also receive infringement notices under the infringement notice scheme pursuant to the Customs Act. The Law Council submitted that this could be problematic since:

> While Customs have issued some proposed revised guidelines to govern the issue of infringement notices based on errors in claims of preferential status under [the FTA] in which 'voluntary disclosure' is intended to be taken into account, those provisions still do not recognise the tension between the [Customs] Act and the provisions of the [FTA]. In any event parties can still be prosecuted in which case the guidelines are irrelevant and the voluntary disclosure provisions of the [Customs] Act are still not entirely consistent with the provisions of the [FTA] … There are further tensions as to the need to repay underpaid duty at the time of voluntary disclosure.[37]

3.42 The Law Council suggested that further amendments should be made to the Customs Act so that voluntary disclosure of incorrect claims of preference under the FTA is governed by a voluntary disclosure regime which is more consistent with the provisions of the FTA. As Mr Hudson told the committee '(i)t is an issue that has been around for a while. We were just hoping that perhaps [the Bill] would have been an appropriate opportunity to address that'.[38]

3.43 The Law Council also highlighted its concern in relation to the incorrect (but innocent) use of Certificates of Origin to qualify for preferential treatment, particularly in the context of the Australia-Thailand Free Trade Agreement. The Law Council was of the view that a party's incorrect but innocent use of a Certificate of Origin should not trigger liability and that this issue may also have been usefully addressed in the Bill.[39]

Customs response

3.44 Customs responded to the Law Council's comments in relation to Schedule 3.

Voluntary disclosure

3.45 In its supplementary submission, Customs acknowledged that the voluntary disclosure exception in the FTA is broader than the voluntary disclosure exception

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36 *Committee Hansard*, 27 April 2006, p. 16.

37 *Submission 4*, p. 4.

38 *Committee Hansard*, 27 April 2006, p. 16.

39 *Submission 4*, p. 4.

contained in subsections 243T(4) and (4A) and subsections 243U(4) and 243U(4A) of the Customs Act.[40]

3.46 Customs advised that:

> [It] has instructed relevant officers that, despite the operation of the voluntary disclosure exceptions to offences under sections 243T and 243U of the [Customs] Act, where an importer invalidly claims preferential treatment under the [FTA] and on becoming aware that the claim is not valid, corrects and pays any duty owing, no penalty (including an infringement notice) should be issued for an offence against subsection 243T(1) or 243U(1) of the [Customs] Act. To date, no person has been served with an infringement notice for an offence against subsection 243T(1) or 243U(1) of the [Customs] Act in the circumstances where article 5.13.4 of the [FTA] applies.[41]

3.47 Further, Customs informed the committee that this instruction has recently been included in a revised draft of the Infringement Notice Scheme Guidelines. This means that a decision-maker must have regard to whether Article 5.13.4 of the FTA applies to the circumstances of the breach. The Infringement Notice Scheme Guidelines provide that if Article 5.13.4 of the FTA applies to the circumstances of the breach, an infringement notice should not be served.[42]

3.48 In response to the Law Council's concerns in relation to prosecution of offences against sections 243T and 243U of the Customs Act, Customs noted that it has advised the Law Council that the appropriate parties will be consulted to determine whether legislation to implement Article 5.13.4 of the FTA is necessary. Customs pointed out that, since it would not be in the public interest to prosecute where the circumstances of Article 5.13.4 apply, it would be against the Director of Public Prosecutions' prosecution policy to commence a prosecution. As part of this upcoming consultation, Customs advised that it will point out that the US has amended its relevant legislation to provide an exception to false or misleading information offences in line with Article 5.13.4.[43]

3.49 With respect to the Law Council's comments about the existence of further tensions as to the need to repay underpaid duty at the time of the voluntary disclosure, Customs stated that it does not consider that these tensions exist. Customs explained that the period referred to in paragraph (b) of Article 5.13.4 serves to limit the period within which Customs is prevented from imposing a penalty. The period does not

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40 *Submission 3A*, p. 7.

41 *Submission 3A*, p. 7.

42 *Submission 3A*, p. 7.

43 *Submission 3A*, pp 7-8.

refer to a period beyond the making of the disclosure for the payment of the duty properly payable on the goods to be made.[44]

Certificates of Origin

3.50 Customs expressed the view that it is not necessary to specifically amend the Bill to make it clear that no person should be considered liable for an offence for the incorrect, but innocent, use of Certificates of Origin in order to qualify for preferential treatment. According to Customs, the defence of mistake of fact (which applies to all strict liability offences) would adequately deal with this circumstance.[45]

Committee view

3.51 The committee is satisfied that, given the assurances by Customs in relation to the operation, interaction and implications of relevant provisions of the Customs Act and the FTA, no amendments to the Bill are necessary. The committee is hopeful that ongoing consultation between Customs and other bodies, including the Law Council, will resolve any outstanding issues in this regard, including uncertainties with respect to the prosecution of offences against sections 243T and 243U of the Customs Act.

Accredited clients – Schedule 5

3.52 The vast majority of evidence received by the committee related to Schedule 5 of the Bill. In submissions and evidence, the Customs Brokers & Forwarders Council of Australia (CBFCA), the Australian Federation of International Forwarders (AFIF), the Business Partner Group (BPG) and Mr Michael Cupitt commented exclusively on Schedule 5. The Law Council also made comments in relation to Schedule 5.

Consultation process

3.53 The committee received conflicting evidence with respect to industry consultation on the Accredited Client Program (ACP) set out in Schedule 5.

3.54 While supportive of accredited arrangements generally, the CBFCA expressed concern and disappointment that the content of the Bill has not been the subject of specific consultation with industry.[46] While the CBFCA (which has a membership of the majority of customs brokers operating in Australia)[47] was a participant in a consultation process between Customs and industry from 2001 until 2003 in relation to accreditation, it submitted that appropriate consultation on the Bill should have

44 *Submission 3A*, p. 8.

45 *Submission 3A*, p. 8.

46 *Submission 1*, p. 1.

47 *Committee Hansard*, 27 April 2006, p. 4.

been a key aspect in developing an ACP to provide improved Customs and other regulatory agency processes for importers and service providers.[48]

3.55 In evidence at the hearing, Mr Darryl Sharp from the CBFCA clarified that the CBFCA had been heavily involved in consultation up until approximately 18 months ago, at which time two key aspects of the ACP – the final rollout of the Cargo Management Re-engineering (CMR) project and duty deferral – were yet to be addressed.[49]

3.56 From the CBFCA's point of view, other priorities with respect to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*, seemed to have overshadowed the ACP in recent times. As Mr Sharp explained:

> I have been involved with the CBFCA for at least the last six years and, as I see it, as we headed towards key elements of the trade modernisation legislation—the CMR, the cargo management re-engineering—there was a need for the CBFCA to address a whole raft of issues, and the accredited client program was simply not on the agenda. Other, more pressing, issues took precedent, and we have been working very hard with Customs and government on all of those issues. This pretty much sat on the sideline for a little while.
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> The interesting roll out of CMR—a lot of which we felt could have been avoided—fractured the relationship a little bit between the peak association [that is, the CBFCA] and the Customs Service. We have immediately taken steps, since the appointment of Mr Carmody, to visit him and have now undertaken a very active consultation process. We look forward to the future. That pretty much outlines what has taken place, and that is why we have got to where we are today.[50]

3.57 In relation to consultation on the draft Business Rules associated with the ACP, Mr Fraser from the CBFCA told the committee that he had not seen any draft business rules pertaining specifically to measures in the Bill.[51]

3.58 In Mr Sharp's view, a new consultation process is required in relation to the ACP:

> … the preferred approach would be to bring together the relevant people involved in the process and to start a genuine consultation process. There have been a number of changes in the industry as a result of the introduction of a new computer system by the Australian Customs Service and a lot of the historical data has changed.

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48 *Submission 1*, pp 1 & 2.

49 Mr Darryl Sharp, CBFCA, *Committee Hansard*, 27 April 2006, p. 2.

50 *Committee Hansard*, 27 April 2006, p. 5.

51 *Committee Hansard*, 27 April 2006, p. 5. However, Mr Fraser stated that he had seen previous draft Business Rules under the original proposals.

> There is no simple answer to the question. The answer I would suggest is that you bring together high-level representation to work out a model that would work. At the moment, I do not know what that model would be, but the CBFCA is suggesting that, as it is put forward in the legislation, it simply does not go far enough.[52]

3.59 Mr Fraser from the CBFCA concurred with these comments:

> I think one of the objectives should be to make it more inclusive than it is probably envisaged at the moment. When it was first put up, the program would have effectively benefited—if that is the right word—less than five per cent and probably closer to two per cent of all importers in Australia. The proposal in this legislation is probably effective for even fewer than that. So, when I say 'more inclusive', I am suggesting that it should cover more of the field than what this is likely to do.[53]

3.60 In a similar vein, Mr Sharp stressed the importance of having an ACP that is of benefit to a greater number of importers and not just a select group:

> They may not be the biggest or the second biggest importers in Australia but they are high-volume importers, and I believe that they should be considered in a legitimate program.[54]

3.61 The CBFCA's views on the lack of consultation contrasted directly with those of the BPG. The BPG advised that it represents a cross-section of industry, including major importers and exporters, freight forwarders and customs brokers, and as such is 'truly representative of the importing community'.[55] Members of the BPG have acted as pilot partners in the ACP. The BPG stated that it:

> … has been actively involved at all stages in developing a practical ACP model that delivers improved levels of compliance, reduces the administrative burden on importers, supports government risk management objectives and bring Australia a step closer to cementing a Customs Supply Chain Security Program.[56]

3.62 Moreover, the BPG informed the committee that the ACP model, as set out in Schedule 5, has been discussed at broad-based industry meetings such as ministerial roundtable consultations during 2004 and 2005.[57] With respect to perceived lack of consultation by some groups, the BPG noted that:

> It is understandable, given the process has taken at least 8 years, that some other parties may have lost focus or enthusiasm for the [ACP] along the

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52 *Committee Hansard*, 27 April 2006, p. 4.

53 *Committee Hansard*, 27 April 2006, p. 4.

54 *Committee Hansard*, 27 April 2006, p. 4.

55 *Submission 5*, pp 1-2.

56 *Submission 5*, p. 2.

57 *Submission 5*, p. 2.

> way. However the BPG and its entire membership have persevered. Those companies are certain that the ACP will deliver long term outcomes that will improve productivity and reduce costs in relation to imports and exports, as well as providing better supply chain security attributes.[58]

3.63 The BPG referred specifically to the comments made in this regard by the CBFCA, stating expressly that it did not agree with those comments.[59] It submitted further that:

> The current ACP model, including the duty deferral proposals contained in the Bill, are the outcome of very detailed and protracted consultation dating back to the mid nineties.
>
> As part of this process, the pilot partners and their service providers have undergone the most rigid commencement audits in a trial program to assess the practicality of moving away from the old, inefficient importing paradigm.[60]

3.64 In response to comments made by the BPG, Mr Sharp from the CBFCA told the committee that the BPG has 'not kept us informed of anything'. He suggested that the BPG might represent 'the interests of a small number of large importers' who 'would lobby the government directly'.[61]

3.65 Mr Paul Angel from the AFIF informed the committee that the AFIF has not been directly involved in consultations in relation to the ACP in the Bill. However, he stated that he is involved in the pilot program through his private company which is a member of the BPG. He acknowledged that 'the feedback to the [AFIF] has been through that connection', although the AFIF has been involved in consultation 'to the extent that the service providers on that business partner group are members of the federation'. However:

> … the direction of the Accredited Client Program is to importers. The service providers are there as service providers. So the overriding consultation has been with the importers and with that pilot group, which has been seen to be representative.[62]

3.66 Mr Angel was of the view that adequate consultation has taken place overall:

> I believe that the pilot has been there, that members of the Business Partner Group have been involved in this for nearly 10 years, and I believe the information on what has been achieved there has been distributed although not directly to the CBFCA or AFIF. Some of the difficulty has been that it has been over such a lengthy period of time. It started and it stalled for

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58 *Submission 5*, p. 2.

59 *Submission 5*, p. 3.

60 *Submission 5*, p. 3.

61 *Committee Hansard*, 27 April 2006, p. 8.

62 *Committee Hansard*, 27 April 2006, p. 9.

> various reasons, duty deferral being the most significant of those. So it raised its head, made some progress and then slowed down and went off the radar for significant points of time, and then there would be some more consultation in the Business Partner Group or the pilot partners. It would have been very hard for anybody outside of that to follow it in great detail over that 10 years.[63]

3.67 However, despite the pilot program being in place, Mr Angel noted that there are currently no IT systems to support it (requests for cargo releases and periodic declarations cannot take place without these systems). Therefore, according to Mr Angel, in a transactional and practical sense, the pilot program has not been effectively trialled. In any case, 'teething problems' in the IT systems are envisaged once they are in place.[64]

3.68 With respect to the draft Business Rules, Mr Angel pointed out that he believed that they are available on the Customs website.[65] He also told the committee that:

> The business rules were developed through the consultative process with the pilot partners. There was significant consultation to try to get those into a workable manner to the extent that it started off that any party going on to the Accredited Client Program had to have a full audit done by a certified accountant. That obviously blew the costs of getting onto the program out significantly and really limited who could go on there. Through consultation that was changed to a self-assessed audit. Those types of things have been achieved through that consultation process.[66]

Lack of benefits

3.69 In relation to perceived benefits of the ACP, the committee again received contradictory evidence.

3.70 The CBFCA argued that the ACP, as foreshadowed, is unrealistic in efficiency or effectiveness for importers in general, and service providers in particular. Further, the CBFCA contended that the ACP appears to give little, if any, benefit to the majority of importers and service providers.[67]

3.71 At the hearing, Mr Fraser from the CBFCA repeated his organisation's concerns about the lack of benefits of the ACP:

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63 *Committee Hansard*, 27 April 2006, p. 12.

64 *Committee Hansard*, 27 April 2006, pp 10-11.

65 *Committee Hansard*, 27 April 2006, p. 9. The draft Business Rules (Version 5.0, October 2003) are available at: http://www.customs.gov.au/webdata/resources/files/Business_Rules_V5_01_October_2003.pdf

66 *Committee Hansard*, 27 April 2006, p. 9.

67 *Submission 1*, p. 1.

> I would say there would be very few, if any, of our clients who would get any benefit out of the scheme as proposed.
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> …
>
> In fact, I do not think there was much benefit in the scheme as it was originally proposed at least for the majority of importers. What is proposed in this legislation provides even less benefit as far as I can see.[68]

3.72 Conversely, Mr Angel from the AFIF expressed his organisation's support for the ACP:

> … the overriding thing is that we would be disappointed in the [duty] deferral not coming through, which certainly is the incentive, but I believe that we would be supportive of the program as a whole.[69]

3.73 Mr Angel told the committee that, for members of the AFIF, 'there is a perceived benefit that [the ACP] will cut down the transactions, but there is no empirical evidence that that would be the case. It is unquantified'.[70]

3.74 Nevertheless, Mr Angel maintained that there will be indirect benefits from the ACP:

> … Depending on how people have their internal systems organised, there is an indirect benefit of not having to reconcile every single duty payment. You have one single duty payment at the end of the month, so there is a transactional processing cost benefit—which is what the importers perceive.
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> …
>
> Some of these companies are doing 2,500 to 3,000 transactions a month. If you put the figure at $5 or $10 per transaction, they would see that as significant when they are running on the margin.[71]

3.75 The BPG expressed firm support for the current ACP model, arguing that the ACP 'represents a major advancement in the relationship between government and the importing community' in the following ways:

- periodic reporting will streamline import processing arrangements and remove layers of unnecessary red tape for highly compliant accredited clients;
- government agencies will benefit from higher levels of voluntary compliance, improved risk management capability and better use of scarce resources;
- this ACP model should attract significant importer support over the next five years; and

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68 *Committee Hansard*, 27 April 2006, pp. 3-4.

69 *Committee Hansard*, 27 April 2006, p. 9.

70 *Committee Hansard*, 27 April 2006, p. 11.

71 *Committee Hansard*, 27 April 2006, p. 11.

- the ACP is consistent with international trends in government/business cooperation.[72]

Duty deferral

3.76 The Law Council noted that the duty deferral aspect of the ACP has not been delivered despite being 'part of the raft of [Federal Government] promises of benefits associated with the ACP'.[73] The Law Council specifically questioned the benefits of the ACP if no duty deferral is offered, and argued that there appear to be few other benefits to clients of the ACP other than the use of less prescriptive entry and exit documentation in the short term.[74]

3.77 At the hearing, Mr Sharp from the CBFCA emphasised that the duty deferral mechanism had been a feature of the original proposed ACP. He explained duty deferral as follows:

> The original program, as it was pieced together … is something that the CBFCA has always wanted to pursue, but in the business rules it was considered appropriate that high-level compliant importers be given some incentives. The cornerstone, as far as incentives go, at that time was put forward to be duty deferral. The ultimate duty deferral mechanism would have been one that saw many importers having their duty liability deferred all the way through to their Business Activity Statement. It reconciled at the same time as they reconciled their other liabilities to the government, which was in line with the one window to government approach and similar things that were being suggested at the time.[75]

3.78 Mr Sharp continued:

> A member of the Customs Brokers and Forwarders Council of Australia works very closely with importers. There is a cash flow benefit in the sense that a significant cost to business is a cost of the cash, and the current protocols require that customs duty is paid before the goods are released. If regular importers of note had gone through the audit process and complied with all the other business rules as put forward by Customs, they would be given the financial incentive to have their duty liability deferred. If we were working hand in hand with an importer that had invested time and money into the Accredited Client Program, either us, our business or the importer's business would not have to physically fund the hard dollars involved.[76]

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72 *Submission 5*, p. 2.

73 *Submission 4*, p. 4.

74 *Submission 4*, p. 5.

75 *Committee Hansard*, 27 April 2006, p. 1.

76 *Committee Hansard*, 27 April 2006, p. 2.

3.79 In relation to whether a timeframe for the deferral of duty had been mooted or decided upon in past consultations, representatives from the CBFCA noted that there had not been an agreed period for deferral. However, as Mr Fraser told the committee:

> A working group was appointed by Senator Ellison, the Minister for Justice and Customs, I believe in 2001, which did report back to the minister with an industry view on what an appropriate reporting period should be for duty deferral. The consensus of that group was that deferred duty should be reported and paid within five to 10 days—I think that was the outcome—at the end of each calendar month. That would cover the period of the previous calendar month, but the reporting for that particular month would be done within five to 10 days at the end of the month and the duty that was deferred would be paid in that time as well.[77]

3.80 As to whether the proposals in Schedule 5 of the Bill constitute duty deferral, Mr Fraser noted that '(s)ome may call it duty deferral. I would not call it duty deferral … It is a bit each way. It is prepayment in a sense'.[78] That is:

> As I read it, and if my understanding is correct, the proposal is that the duty would be paid on the 15th day of the month to cover all potential duty liabilities for the whole of that particular month. So, in a sense, it is deferral for the first 15 days and then prepayment for the next 15 days.[79]

3.81 Noting these interpretations, it is not the scheme envisaged by the CBFCA as a result of its involvement in consultations with Customs up until 18 months ago.[80]

3.82 The Law Council was also critical of the 'running account' process set out in Schedule 5 as not being of significant advantage to members of the ACP, and expressed the view that the 'up front' arrangements may be extensive and time-consuming:

> There seems to be significant difficulties in requiring a member of the ACP to estimate duty and processing charges in advance, pay those amounts in advance and then attempt a monthly reconciliation together with Customs subject to payment of outstanding amounts or refund of overpayments (which can otherwise be held over for further use).[81]

3.83 The Law Council asserted that there may be difficulties in recovering monies from Customs if there is a disagreement as to whether there has been overpayment under the ACP and, for this reason, it may be likely that the ACP:

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77 *Committee Hansard*, 27 April 2006, p. 2.

78 *Committee Hansard*, 27 April 2006, p. 2.

79 *Committee Hansard*, 27 April 2006, p. 2.

80 *Committee Hansard*, 27 April 2006, p. 2.

81 *Submission 4*, p. 5.

> ... would only work for a very few importers in very limited circumstances for very limited goods in which there is no dispute as to the goods or their value for customs duty.[82]

3.84 The BPG's views in relation to duty deferral differed markedly to those of the CBFCA and the Law Council. The BPG submitted that the ACP does contain duty deferral proposals since the 'main feature of the ACP is Periodic Reporting of data to Customs' and 'Periodic Reporting cannot operate without agreed duty deferral arrangements'.[83] However, the BPG did not dispute that the duty deferral aspect is contentious, noting that it is '(t)he only obstacle to enlivening' the ACP and has been the subject of 'many years of consultation, change and uncertainty'.[84] According to the BPG, while the duty deferral arrangements are 'not ideal', they are nevertheless 'an integral aspect' of the ACP model.[85]

3.85 The BPG asserted that 'certain specific interest groups may be opposed to [the] Bill fearful of some personal disadvantage or because of misinformation'.[86]

3.86 Further, the BPG submitted that:

> The BPG would like to assure the Committee that a robust, open and in depth consultation process over many years has arrived at what is considered a sound and realistic ACP model. Although many benefits have been diluted through the passage of time, we are confident the resultant model conforms to the original intention as outlined in the I[nternational] T[rade] M[odernisation legislation]. As the Committee is no doubt aware, Periodic Reporting cannot proceed without the duty deferral proposals contained in this Bill.[87]

3.87 Mr Paul Angel from the AFIF attempted to reconcile the views of the BPG with those of the CBFCA in relation to duty deferral and the ACP more broadly:

> I do not think [the BPG] touch[es] on the fact that a duty deferral was the preferred option and the incentive. I think that they are driving it from the point that the program has been in development since 1997 and, whilst this is not ideal, it will get the program started and from there it can be developed further. It has been nine to 10 years in the making and it had a number of hurdles along the way. So they want to try and get something in and operative.[88]

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82 *Submission 4*, p. 5.

83 *Submission 5*, p. 1.

84 *Submission 5*, p. 1.

85 *Submission 5*, p. 3.

86 *Submission 5*, p. 3.

87 *Submission 5*, p. 3.

88 *Committee Hansard*, 27 April 2006, pp 9-10.

3.88 Further:

> I understand that the reason it was to be paid on the 15th with an estimate payment up front was to make it revenue neutral. In essence, you are paying two weeks in advance and two weeks in arrears. That was the only way that we could get a single payment. Without a single payment, you cannot do a periodic declaration because payment would need to be made on a transactional basis. It was a compromise to get the program moving forward.[89]

3.89 Mr Angel agreed that the preferred option was the duty deferral system in the original ACP model. In response to questioning by the committee in relation to the disappearance of duty deferral in the current ACP, Mr Angel stated that:

> My understanding, going through the pilot process, was that Customs were of the opinion that deferral would be approved and there was no parliamentary approval required for that. I think they found out late in the event that that was not the case and the government chose not to take up the financial cost of deferring the duty.[90]

Inconsistency with WCO Framework

3.90 The Law Council disputed that the ACP reflects all intended aspects of the WCO Framework claiming that, in fact, the ACP pre-dates the WCO Framework. For example, the ACP does not appear to provide affected importers with the benefits of expedited clearance of cargo or with less examination of their cargo.[91] At the hearing, Mr Hudson from the Law Council also noted that the 'authorised economic operator' concept in the WCO Framework applies to a variety of parties in the supply chain, not just to importers:

> … the authorised economic operator is a concept that applies not just to importers but also to a variety of people within the supply chain, which includes brokers, forwarders, transport companies, operators of warehouses and depots, and so forth. The current Accredited Client Program predominantly—and almost overwhelmingly—provides benefits to importers alone. This concept has not been extended to apply to other people in the supply chain.[92]

3.91 The CBFCA agreed with this view. As Mr Darryl Sharp told the committee:

> It is the CBFCA's position that [the ACP does] not meet the requirement sufficiently as outlined in the framework by the WCO.
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> …

89 *Committee Hansard*, 27 April 2006, p. 11.

90 *Committee Hansard*, 27 April 2006, p. 10.

91 *Submission 4*, p. 5.

92 *Committee Hansard*, 27 April 2006, p. 18.

> I think one of the key issues is that the framework talks about providing certain benefits to authorised traders and the like whereas the accredited client program seems to be directly levelled at the importer and it does not take into consideration the other parties to secure an efficient process.[93]

3.92 Mr Sharp and Mr Fraser made the argument that perhaps one of the main problems with the ACP is that it has not adapted and improved to take account of recent international developments. In other words, the ACP does not reflect the 2006 environment because it does not include relevant supply chain security components. Mr Fraser elaborated:

> My recollection is that the initial proposals that were made prior to even the introduction of the trade modernisation legislation were perhaps ahead of the game in terms of the World Customs Organisation and other jurisdictions. To some extent, I think I am right in saying that the World Customs Organisation was influenced by what Australia was trying to do with programs like this. But the game has moved on. We are talking about prior to September 11, when the original proposals were put up. Perhaps now, what Australia is proposing has fallen behind the rest of the world to some extent, at least in terms of this particular proposal.[94]

3.93 Mr Sharp agreed:

> There has been a change of landscape. If you go back to when the ACP was originally discussed, we were very much living in a land of facilitation. That has changed and we are now very much in a land of security and compliance. That is why the CBFCA was disappointed that Customs was able to come up with a program and prepare legislation to put forward. I still believe it is appropriate that we get together and look at what will work in the current environment, because it is different to how it was five years ago.[95]

Lack of security standards

3.94 In this sense, representatives from the CBFCA argued that, not only does the ACP do little to facilitate trade, but that it is also self-defeating in a security sense. This is because it does not provide adequate incentives to encourage participation in the first place so that corresponding security initiatives can then be implemented.[96] Mr Sharp articulated this argument as follows:

> One of the perceived limitations of the program being put forward at the moment is that the ability of importers to take advantage of it appears to be very minimal. Many of the regular importers are very highly compliant and should be given access to a program as an accredited client or on the back

93 *Committee Hansard*, 27 April 2006, p. 3.

94 *Committee Hansard*, 27 April 2006, p. 6.

95 *Committee Hansard*, 27 April 2006, p. 6.

96 *Committee Hansard*, 27 April 2006, pp 6- 7.

> of an accredited service provider. If we were able to do that, it is my belief that the Australian Customs Service and the government would then be better resourced to look at the high-risk security areas and other areas of concern. At the moment, a lot of regular, highly compliant importers and service providers are having to jump through difficult hoops. This program just does not provide the potential incentives because there do not appear to be outcomes.[97]

3.95 Mr Hudson from the Law Council also argued that a security aspect is missing from the ACP, although he attempted to rationalise the omission as follows:

> The accredited client program does not have a security aspect to it. But then, of course, there is a significant degree of security overlay for parties within industry. It may well be a simple expedient of amending the accredited client model to include a security aspect. A lot of people in industry—forwarders, for example—may be regulated air cargo agents. They comply with the security regime. Or they might be people operating at or around ports and airports and who might have to have aviation or maritime transport security plans. They are concepts that others are aware of, and that could be worked into it. Perhaps the focus has been on getting through the compliance part of the duty issue.[98]

3.96 The Law Council pointed out that, late in 2005, Customs raised the possibility of a new model to incorporate other aspects of the WCO Framework in a different way to that set out in the ACP. However, as far as the Law Council is aware, this alternative model has not been adopted or raised for discussion.[99]

3.97 Mr Angel from the AFIF gave the following possible explanation as to why security standards have not been included in the ACP:

> My recollection is that the security side of things has been left out of the Accredited Client Program because Customs wanted to proceed with a broader based security program, in that supply chain security needs to apply to everybody who is importing, not just those who choose to use the Accredited Client Program because it has some benefits to them operationally. My understanding is that they have chosen to do that so that it would apply to all importers.[100]

Customs response

3.98 Customs provided responses to concerns raised during the course of the inquiry in relation to aspects of the ACP.

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97 *Committee Hansard*, 27 April 2006, pp 6- 7.

98 *Committee Hansard*, 27 April 2006, pp 18-19.

99 *Submission 4*, p. 6.

100 *Committee Hansard*, 27 April 2006, pp 11-12.

General comments

3.99 Customs advised that the ACP is being introduced to provide streamlined processing arrangements which will benefit highly compliant importers and exporters. Under the ACP highly compliant and low-risk businesses can be approved by the ACS as an 'accredited client'. According to Customs, an 'accredited client' is eligible to receive a number of cost saving benefits, including:

- payment of one Customs duty payment each month for all import transactions (as opposed to duty on each and every import consignment);
- clearance with fewer Customs inspections;
- receipt of a monthly aggregate declaration for all imported goods (as opposed to a full import declaration for each and every consignment).[101]

3.100 At the hearing, a representative from Customs highlighted further perceived advantages of the ACP:

> … we say that the Accredited Client Program is referenced as an example of an innovative program that is consistent with where the [WCO] framework of standards wishes to see customs to business security partnership programs go. We believe that the program will assist in strengthening supply chain security.[102]

3.101 Customs also indicated that the Business Rules are being developed in consultation with industry representatives.[103]

Consultation process

3.102 The representative from Customs disagreed with assertions that the consultation process with respect to the ACP has been inadequate:

> The Accredited Client Program, as you have heard from other people, has had a very long history. Part of the difficulty we now face is that there has been a turnover of people, memories fade and there is some doubt as to what has or has not been the subject of consultation in the past. The Accredited Client Program goes back to 1997. I think it was in 2000 or 2001—and it might even have been prior to that—that the Business Partner Group started, so it has been operating for a period of at least five or six years. Firstly, that group is well known to all the organisations that are represented before the committee. There have been regular updates to representatives of organisations appearing before you in the context of the Customs National Consultative Committee—all the bodies represented on that—so the existence of the Business Partner Group is well known to them. Secondly, the Business Partner Group was a group that was formed

101 *Submission 3*, p. 2.

102 *Committee Hansard*, 27 April 2006, p. 21.

103 *Submission 3*, p. 2.

> by industry as their preferred means of engaging with Customs about the program. It was an initiative from industry rather than Customs making a decision that we would invite these dozen organisations and exclude others. It did not quite form in the way that these consultative groups might normally form.[104]

3.103 The representative continued:

> On the issue of involvement, it is probably true to say that the development of the program has gone into a hiatus of sorts over the last two years because of the difficulties pertaining to the issue around duty deferral as to whether the government was or was not comfortable with the concept. Nevertheless, there have been meetings with industry and there have been meetings with the CBFCA in particular.[105]

3.104 In the case of the CBFCA, the representative advised that its chairman was involved in meetings with the Minister through ministerial roundtable discussions concerning a range of issues, including the ACP, in January and June 2004, and February 2005. At each of these meetings, the ACP was on the agenda:

> … there were discussions about issues such as benefits and where Customs was up to in regard to the program … They have not been meetings that have been called solely for the purpose of consulting with industry around the Accredited Client Program, but they have nevertheless been significant discussions.[106]

3.105 The committee notes that the last of these meetings occurred over a year ago. Significantly, the committee also notes that participants at these meetings were not told explicitly that the duty deferral mechanism was to be removed from the ACP. The minutes from the meeting in January 2004 show that Customs was 'pursuing the issue vigorously with Treasury';[107] and at the meeting in June 2004, '(t)he Minister outlined his commitment to duty deferral'.[108]

3.106 While there was an indication of a possible change in policy at the meeting in February 2005 where the Minister mentioned that Treasury did not support duty deferral because of the financial impact on the Budget bottom line, the minutes show that 'both Customs and the Minister were still persevering in discussing the issue with

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104 *Committee Hansard*, 27 April 2006, pp 22-23.

105 *Committee Hansard*, 27 April 2006, p. 23.

106 *Committee Hansard*, 27 April 2006, p. 23. The minutes of these meetings were provided to the committee and indicate that representatives from the CBFCA were present: *Submission 3B*, pp 2-19.

107 *Submission 3B*, p. 18.

108 *Submission 3B*, p. 15.

Treasury'.[109] At this meeting, industry representatives expressed the view that the 'ACP would not progress without duty deferral'.[110]

3.107 On the other hand, minutes of a Customs meeting with the BPG in January 2005 indicate that members of the BPG present at that meeting were specifically told of the Federal Government's decision not to proceed with duty deferral but to instead proceed with the new 'revenue neutral' proposal.[111]

3.108 Therefore, on the basis of evidence provided to the committee, it is apparent that the CBFCA, and other industry groups outside the BPG, were not told directly of the Federal Government's marked change in policy in relation to duty deferral. Further, it appears that broader industry groups were not informed about the proposal that would effectively replace the original scheme; nor does it appear that they were consulted directly on it. It was not until the 2005-06 Budget that the revised proposal was announced more broadly.[112] Effectively then a new model has been bedded down in proposed legislation, seemingly without broad industry consultation and with potentially low support.

3.109 In response to the CBFCA's claims that they have been effectively excluded from the consultation process for some time, the representative offered the following explanation for such claims:

> Putting it bluntly, I think the CBFCA was particularly disappointed when Customs did not agree to their accredited service provider model in 2003 and have not been particularly interested in the issue since.[113]

3.110 However, the representative did concede that the majority of consultation has taken place through the BPG:

> Generally, the consultation has been through the Business Partnership Group and I think their submission indicates that they have been closely informed over a period of several years as to the progress of the program. We have had the expectation that there would be a process in the finalisation of things such as the business rules whereby there would be further opportunity for consultation with the Business Partnership Group and the wider industry, so organisations such as AFIF and CBFCA would have an opportunity to see draft business rules once they were approaching the point at which we were going to table them.[114]

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109 *Submission 3B*, p. 8.

110 *Submission 3B*, p. 8.

111 *Submission 3B*, p. 58.

112 See Budget Paper No. 2, Budget Measures 2005-06 at http://www.budget.gov.au/2005-06/bp2/html/revenue-01.htm (accessed 3 May 2006). In relation to the ACP, the Budget Paper states that it 'does not involve any net deferral of customs duty'.

113 *Committee Hansard*, 27 April 2006, p. 31.

114 *Committee Hansard*, 27 April 2006, p. 23.

3.111 The representative stated that, in relation to the particular amendments to the ACP contained in the Bill, Customs 'consulted with all the BPG members and we had face-to-face meetings with two-thirds or three-quarters of the members who were available on the day the meetings occurred [in January 2005]'.[115]

3.112 Relevantly, the representatives from Customs pointed out that the composition of the BPG is contained in subsection 71DD(3) the Customs Act itself:

> They are the parties that are involved in [the ACP] which would be actual importers. The current legislative framework for the Accredited Client Program that was included in the 2001 trade modernisation legislation confers benefits on importers. So the big importers that are listed there were the primary participants as importers that have the obligation to lodge customs entries. My understanding is they brought along their service providers, the freight forwarders and their brokerages, as their representatives in that forum.[116]

Benefits

3.113 The representative from Customs maintained that, although the benefits of the current ACP may not be as significant as originally put forward, they are still present for industry:

> Given that there had been such an investment of effort for both Customs and industry in developing the program to the point that it had, Customs considered that it should in all good faith continue to finalise and make the program available to industry.[117]

3.114 However, the representative accepted that 'there is a lot of wariness, given the history' of the ACP. This includes member companies of the BPG, whose views on the ACP range from 'very keen to very wary'.[118] The representative conceded that all the members of the BPG had been 'very keen up until the duty deferral proposal was changed … Since then, the level of support has been such that some of them are sitting on the sidelines to see what comes of this'.[119] However, despite this, the representative maintained that the duty deferral mechanism was 'not the only attraction' of the ACP.[120]

3.115 The representative outlined some of the benefits of the ACP as follows:

> There are a couple of benefits that have financial implications … The first benefit … is that monthly declaration reporting replaces the need to provide

115 *Committee Hansard*, 27 April 2006, p. 30; *Submission 3B*, p. 58.

116 *Committee Hansard*, 27 April 2006, p. 26.

117 *Committee Hansard*, 27 April 2006, p. 26.

118 *Committee Hansard*, 27 April 2006, p. 29.

119 *Committee Hansard*, 27 April 2006, p. 30.

120 *Committee Hansard*, 27 April 2006, p. 30.

> an entry declaration for each and every consignment. In the case of a very large corporation—for example, Coles Myer—at the moment they might be lodging 4,000 to 10,000 entries every month. With each of those entries there is a detailed data set, a payment involved and a lot of other transactions that go on within their organisation to make all that possible.[121]

3.116 Further:

> The concept with the Accredited Client Program is that they can obtain the release of the cargo with a very much abbreviated report and then, at the end of the month, they can provide us with a more detailed report that has all the financials and other information that enables the duty to be calculated. They can provide that in a consolidated format, if they like, which provides very significant savings in terms of administrative effort to bring all that information together and then enter it into IT systems. So companies such as Coles Myer are supportive of this because they see administrative efficiencies for them in reducing from 4,000 to 10,000 entries per month down to effectively one periodic declaration.[122]

3.117 There is also a benefit for Customs itself since the concept of self-assessment and policing allows Customs to provide less attention to highly compliant companies in terms of audits and inspections.[123]

3.118 The representative also submitted that there is an expected benefit for larger companies in respect of cost recovery:

> … Customs cost-recovers in relation to import declarations. The participants within the accredited client program would be subject to a different charging regime. I do not have the precise figure but it works out as being of the order of 40 entries per month. If a company has about 40 entries or more per month, they are financially better off under the accredited client program than they would be under the current system of cost-recovery charges, so that would be another benefit. There are other benefits associated with the program which are not so easily priced. We have said to the Business Partner Group that we would have account managers dealing with their companies. That would facilitate the movement of cargo in that they would have, I suppose, a more immediate point of client contact with someone who would deal with all of their issues. That is referred to in the listing of benefits.[124]

3.119 The representative speculated that over a four-year period, 50 to 100 large companies would be likely to participate in the ACP. In response to questioning by the committee as to why the ACP is not inclusive of all companies so that trade

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121 *Committee Hansard*, 27 April 2006, p. 28.

122 *Committee Hansard*, 27 April 2006, p. 28.

123 *Committee Hansard*, 27 April 2006, p. 28.

124 *Committee Hansard*, 27 April 2006, p. 28.

facilitation and supply chain security is encouraged across the board, the representative maintained that the ACP has always been aimed at larger companies:

> The original program was always anticipated as only appealing to large companies. Take the sort of analysis that I referred to when I indicated that a company would need to have 40 entries or more per month in order to derive a financial benefit. If you look at it purely in terms of those sorts of numerics, there is probably only a couple of hundred companies that have that sort of volume of imports. There are though other benefits I have referred to, which are nonfinancial. So we are talking about hundreds rather than thousands of companies that might come under this scheme, which explains why the accredited client program is only one aspect of Customs' response to the WCO framework of standards. We are in fact consulting with industry on other proposals which relate to the framework of standards as well.[125]

3.120 In relation to the pilot program, the representative disagreed with the claim that the IT systems required to support the ACP are not functional:

> To correct one point previously made, the integrated cargo system has been built with the functionality required for the Accredited Client Program. It was our view that to make the further changes required for this payment model, if I can call it the current payment model, the costs would be relatively minor.[126]

3.121 The changes that need to be made to the IT part of the integrated cargo system relate to the change of timing for periodic declarations and requests for cargo release brought about by the disappearance of duty deferral from the ACP model:

> The functionality relating to periodic declarations and requests for cargo release were built on the original concept of duty being payable on the seventh day of the following month. However, we now have an arrangement whereby an estimate is payable in the middle of one month with the reconciliation and the estimate for the following month being required in month two. So it is a slightly different arrangement for the timing of payment. The actual periodic declaration, the RCR, is essentially unchanged. We are talking about a relatively minor amendment.[127]

3.122 The representative agreed that some aspects of the pilot program have not yet been trialled:

> There has not been a trial in the sense of declarations being provided to Customs on a monthly basis. Where there has been a pilot or a trial has been in determining whether or not companies would [meet] the eligibility requirements. Perhaps one of the most significant of the eligibility requirements is that companies have a 98 per cent accuracy rate. That is a

125 *Committee Hansard*, 27 April 2006, p. 29.

126 *Committee Hansard*, 27 April 2006, p. 27.

127 *Committee Hansard*, 27 April 2006, p. 27.

> very high level of accuracy. Most of these companies had to have audits undertaken as to whether or not they could in fact meet that standard. There were preparations and work on their part to get up to the level of accuracy. So the pilot has in effect been work on their part to get across the hurdle to be eligible for the program. That explains why the companies have been listed in the legislation in that way—to recognise that they have already established their bona fides and are eligible for participation in the program.[128]

3.123 It is anticipated that the pilot program will be functional with the relevant IT systems at the beginning of 2007:

> In the lead-up to that, we would see testing taking place with particular companies that wish to go live. We would have what I would describe as a test environment available for them to send us test messages that would ensure that when they do go live there are no surprises for them or us in the processing of their declarations.[129]

3.124 Customs also provided the committee with a cost benefit analysis of Cargo Management Re-engineering (CMR) which was undertaken by PriceWaterhouseCoopers in 1999. This analysis incorporated models savings for a range of clients, including accredited clients.[130] However, the accredited client payment model used in this report was based on full monthly duty deferral. Since this arrangement is no longer intended, the committee believes that the cost benefit analysis of the ACP should be updated to reflect the features of the revised model.

Duty deferral

3.125 On the subject of duty deferral, the representative from Customs explained the concept, as first mooted for the ACP, as follows:

> The program as originally proposed included duty deferral for a full month. The concept was that all the duty payable for transactions in one month would in fact not have to be paid until a certain day in the second month. Initially I think it was indicated by the representative for AFIF that that was to occur on the first day of the month, but after some further consultation it was decided that the proposition to be put to government was that it would be payable on the seventh day of the month. So, in effect, an accredited client would receive a benefit of duty deferral of anything from one to five weeks.[131]

3.126 Treasury costed this proposal as potentially being $89 million over a four-year period, based upon certain assumptions about the size of the program. The

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128 *Committee Hansard*, 27 April 2006, p. 27.

129 *Committee Hansard*, 27 April 2006, p. 27.

130 *Submission 3B*, pp 23-45.

131 *Committee Hansard*, 27 April 2006, p. 24.

representative advised that Treasury provided advice to government about the costing of the ACP in the context of the 2004 budgetary process, 'and that the government took a decision that it had a concern about the financial impact of the [ACP] on the budget bottom line'.[132]

3.127 The representative told the committee that Customs supported the concept of duty deferral but that:

> Essentially, the decision was that the government had concerns about the financial impact of the Accredited Client Program, and the minister was tasked with consulting industry further to develop a proposal which would be acceptable to government and industry—that is, one that did not have the same financial implications for the budget.[133]

3.128 The representative advised that Treasury then provided the government with a view about the revised ACP model in the context of the 2005-06 Budget: the outcome of that was the announcement by the Federal Government that it would proceed with the ACP along the lines of the proposals in the Bill. The benefits of the current ACP model for the Federal Government in terms of budgetary considerations is that it is revenue neutral (in the sense that the ACP allows up to two weeks worth of duty that can be paid early and up to two weeks of duty that can be paid late). Further, the costs for Customs in terms of implementation of the ACP are relatively minor.[134]

3.129 The representative agreed that industry's expectation was that the duty deferral mechanism would be part of the ACP but that, post 2004, Customs informed industry that this would no longer be the case. However, the representative did not agree with the suggestion put to him by the committee that this would be considered 'a broken promise':

> I do not think so, because the discussions with industry were always predicated on the government needing to finally approve the program. It was always understood that there was to be a final sign-off to the details. Even now I think there is still an expectation that there is a sign-off of legislation that you have before you and the business rules have to be tabled in parliament, so I think industry understood that the process had a number of checks, balances and hurdles that it had yet to go through.[135]

3.130 These statements by the representative from Customs about the history of duty deferral do not accord with the Federal Government's apparent earlier commitment to duty deferral in the ACP implementation legislation. In response to a question on notice from the committee in relation to which provisions of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*

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132 *Committee Hansard*, 27 April 2006, pp 24-25.

133 *Committee Hansard*, 27 April 2006, p. 25.

134 *Committee Hansard*, 27 April 2006, pp 26 & 27.

135 *Committee Hansard*, 27 April 2006, p. 25.

inserted the duty deferral mechanism into the original ACP, Customs provided the following information:

> Section 132AA of the *Customs Act 1901 (Customs Act)* contains the head of power that enables the payment of duty at a time other than before the goods are released into home consumption. Section 132AA was inserted into the Customs Act by the *Customs Legislation Amendment Act (No. 2) 1999.*[136]

3.131 Subsection 132AA(1) of the Customs Act provides for the general rules for the payment of import duty, in three items, the second of which relates specifically to the ACP. This provision was addressed in the EM follows:

> Item 2 provides a head of power to enable the Customs Regulations to prescribe the time when import duty must be paid on goods which are required to be entered for home consumption. This item enables duty to be paid at a time other than at the time of entry for home consumption and hence enables the time for payment of duty to be deferred to a time after the entry of goods for home consumption.[137]

3.132 Customs advised that subsection 132AA(2) addresses the breadth of the regulation-making power for the duty deferral circumstances countenanced by Item 2 of the table in subsection 132AA(1). In particular, duty deferral in respect of goods can include regulations that prescribe the goods by reference to the class of persons who import them. Subsection 132AA(3) amplifies the breadth of the regulation-making power for the duty deferral circumstances countenanced by Item 2 of the table in subsection 132AA(1). In particular, this subsection permits regulations to prescribe the duty deferral time to be a time specified by the Chief Executive Officer of Customs. Subsection 132AA(4) makes provision for the exceptions to the times when import duty must be paid, as provided in the new subsection 132AA(1).[138]

3.133 In terms of the changes being made to the operation of duty deferral in the Bill, Customs made reference to Item 13 of Schedule 5 of the EM[139] which has the effect of ensuring that subsection 71DGB(1) operates as an *exception* to the general rule in subsection 132AA(1) in respect of the payment of import duty on goods entered for home consumption on an RCR.[140]

3.134 However, the committee notes with concern that this advice from Customs does not refer to measures included in the international trade modernisation

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136 *Submission 3B*, p. 46.

137 *Submission 3B*, p. 46.

138 *Submission 3B*, pp 46-47. Customs also advised that the *Customs Legislation Amendment Act (No. 2) 1999* made several consequential amendments to the Customs Act as a result of the insertion of the new section 132AA.

139 See also paras 2.68-2.70 in Chapter 2.

140 *Submission 3B*, p. 47.

legislation. The EM to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000* and the Revised EM to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001* both state specifically that the ACP *will* contain a duty deferral mechanism.

3.135 The EMs to both these bills provide that, by virtue of new subsection 68(3), when an accredited client submits to Customs a request for cargo release with an entry for home consumption, the client is liable to pay any duty, good and services tax or other charge or fee payable at the time of entering the goods.

3.136 However, the EM goes on to explicitly state that:

> … it is intended that accredited clients will be people who are allowed to defer the payment of goods and services tax and duty. To facilitate this proposal, it is intended that regulations will be made under section 132AA of the *Customs Act*, which will allow people who can defer goods and services tax to also defer the payment of duty.[141]

3.137 The proposals in the Bill therefore appear to completely alter one of the main intended benefits of the ACP, as originally put forward in the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001*; that is, the Bill *removes* the ability of the ACP framework as currently set out in the Customs Act to provide duty deferral for ACP participants. The committee considers that the measures in the Bill which alter the existing ACP in this regard effectively amount to a complete reversal of the intention of the original ACP implementation legislation, as clearly stated in the relevant EMs.

Security standards

3.138 Contrary to views expressed by some submissions and witnesses to the inquiry, Customs argued that the ACP will enhance security:

> Under accreditation standard 6 of the ACP Business Rules, it is proposed that applicant companies will be required to conduct a self-assessment against Customs-determined security criteria. This set of security requirements will mirror the requirements of the WCO Framework. Accredited Clients will need to demonstrate that the systems and processes in place mitigate identified risk areas.
>
> The self-assessment undertaken by the Accredited Client will form the basis of a comprehensive security plan that will be assessed and verified by Customs prior to accreditation status being approved. Unless the applicant can satisfy Customs that required security measures are in place, the applicant will not be given status as an accredited client.[142]

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141 EM to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000*, p. 87; Revised EM to the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001*, p. 87.

142 *Submission 3B*, p. 20.

3.139 Customs advised that the security plan developed by the applicant will address certain security issues, including:

- physical security arrangements in place for buildings and perimeters;
- access controls to the applicant's premises;
- protection of data and records through IT security controls;
- personnel security arrangements; and
- cargo and container integrity.[143]

3.140 Companies will also need to submit a yearly statement of compliance covering all aspects of the ACP, including supply chain security criteria. Customs will validate the security plans at predetermined intervals: validation will involve site visits and examinations of ACP participants' systems and procedures.[144]

3.141 In terms of precisely how security standards under the ACP will result in demonstrable security outcomes, Customs was unable to give a quantitative indication:

> Improvements in security do not lend themselves to quantitative measurement. A reasonable indicator is to look at security standards within the trading industry. However, it is impossible to know to what extent most of the improvements are specifically attributable to the introduction of specific programs such as the Accredited Client Program as distinct from other more general security related pressures (eg insurance premiums, new technologies, expectations of clients, etc).[145]

3.142 However, Customs provided the committee with some examples of where security improvements are most likely to occur as a result of the ACP. These include improvements that are most specific to cargo (that is, cargo and container integrity), education and training of staff, provision of additional intelligence to Customs, and encouragement to overseas suppliers to adopt similar security standards.[146]

Committee view

3.143 The committee acknowledges the idea of an appropriate ACP model as an important cooperative partnership between government and industry to assist in the facilitation of trade and to help achieve supply chain security. To this end, the committee notes that all affected parties who provided evidence to its inquiry expressed support for accredited arrangements generally.

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143 *Submission 3B,* p. 20.

144 *Submission 3B,* p. 20.

145 *Submission 3B,* p. 21.

146 *Submission 3B,* p. 21.

3.144 The committee is mindful of the discrepancies in evidence relating to the extent and nature of the consultation process associated with the ACP. On the whole, the committee is not satisfied that the consultation period in relation to the ACP, particularly the specific measures contained in the Bill, has encompassed all interested parties. It is evident that in the past the consultation process has been extensive and ongoing, however, in more recent times the process appears to have become fractured.

3.145 Perhaps most significantly, however, the committee notes the divergence in opinion between some of the industry bodies who provided evidence to the committee in relation to some specific aspects of the ACP. This includes conflicting views on whether or not the ACP provides tangible benefits to encourage participation.

3.146 It is apparent to the committee that the benefits of the ACP relate more to a possible reduction in transaction costs for a select group of larger companies, rather than measurable advantages for the majority of companies – which might have ensued if duty deferral had been included in the model. As currently proposed, the committee is of the view that the benefits of the ACP appear to be of limited value for the majority of importers and service providers.

3.147 Therefore, the establishment of an ACP framework may not necessarily lead to success in practice; indeed, it may be self-defeating if it cannot attract participants. Its success, or otherwise, will become apparent when it becomes fully operational. For this reason, the committee is not inclined to make specific recommendations in relation to Schedule 5 of the Bill.

3.148 However, the committee makes general comments in relation to several specific aspects of the ACP.

3.149 The committee agrees with the Law Council's assertion that, since the proposed ACP does not contain any provisions relating to disputed payments, there may be administrative difficulties if a dispute arises as to whether over- or underpayment has occurred under the ACP. Uncertainty in this area could have significant implications, including an impact upon a company's day-to-day cash flow for as long as a dispute remains unresolved, and the real possibility of legal challenges related to disputed payments.

3.150 The committee also notes concerns raised with respect to the absence of security standards in the legislation. While the committee accepts that general accounting security standards will be contained in the Business Rules, there are no criteria to be prescribed in the Customs Act or associated regulations against which assessment and compliance can be measured. Nor is there an indication in the legislative framework about who will monitor compliance or any indication of expected or anticipated security outcomes.

3.151 The committee also believes that a new independent cost benefit analysis of the ACP, updated to reflect the removal of the duty deferral mechanism, would be useful. While the cost benefit analysis undertaken by PriceWaterhouseCoopers in 1999 models savings for accredited clients, the accredited client payment model used

was based on the concept of full monthly duty deferral. Since this arrangement is no longer intended, the committee considers that new costings and valuations should be performed to fully elucidate the advantages of the ACP.

3.152 Finally, with respect to the issue of duty deferral, the committee notes the failure of Customs, in response to direct questioning about the history of the duty deferral mechanism, to bring to the committee's attention information relating to the intended inclusion of duty deferral in the original ACP, as provided for in the trade modernisation legislation.

Recommendation 2

3.153 The committee recommends that an independent cost benefit analysis of the Accredited Client Program be undertaken which takes into account the removal of the duty deferral mechanism from the proposed Accredited Client Program.

Recommendation 3

3.154 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Committee Chair