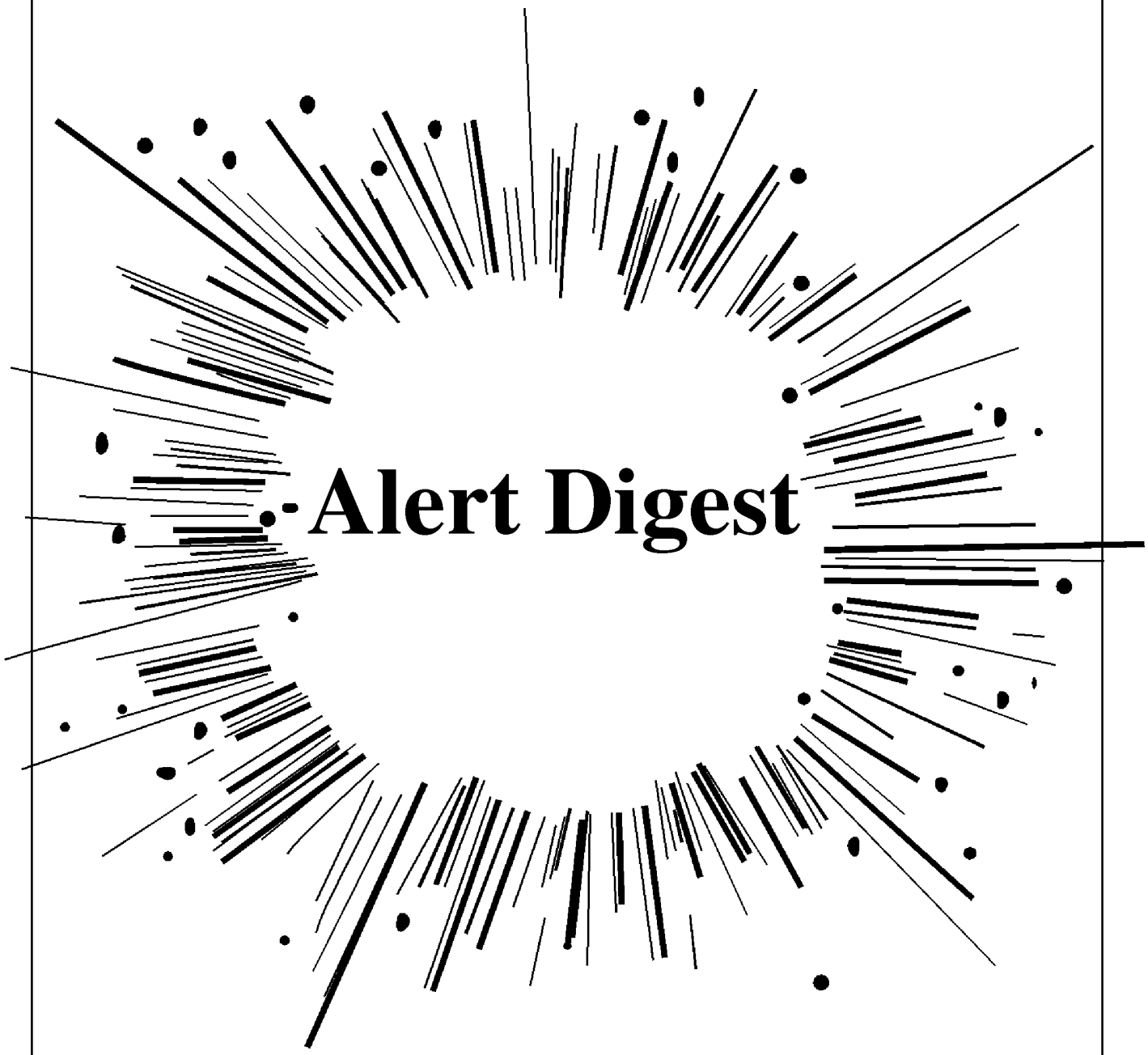
Senate Standing Committee for the Scrutiny of Bills



No. 3 of 2001

7 March 2001

Senate Standing Committee

for the

Scrutiny of Bills

Alert Digest No. 3 of 2001

7 March 2001

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Aircraft Noise Levy Collection Amendment Bill 2001

This bill was introduced into the House of Representatives on 1 March 2001 by the Minister for Forestry and Conservation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Aircraft Noise Levy Collection Act 1995* to correct an administrative oversight which resulted in Sydney (Kingsford-Smith) Airport not being declared as a 'leviable' airport from 1 July 1996 to 20 February 2001. The declaration of an airport as leviable, under section 7 of the *Aircraft Noise Levy Collection Act 1995* (the Collection Act), authorises the collection of aircraft noise levy.

In 1995, Sydney Airport was declared as leviable for the nine months to 30 June 1996. However there was no subsequent declaration until 21 February 2001, when the Assistant Treasurer gazetted Sydney as a leviable airport from that date up to and including 30 June 2006.

Retrospective validation
Proposed new subsection 7(7)

This bill proposes to insert a new subsection 7(7) in the *Aircraft Noise Levy Collection Act 1995* (the Collection Act). That Act comprises part of a regime under which aircraft noise levy is imposed and collected from aircraft operators at certain Australian airports. The funds raised through the levy are used to recover the costs incurred in providing an aircraft noise amelioration program.

Proposed new subsection 7(7) provides that the Minister is to be taken:

- to have declared that Sydney (Kingsford-Smith) Airport is a leviable airport for the period 1 July 1996 to 1 February 2001; and
- to have made that declaration by notice published in the *Gazette* before 1 July 1996.

The Minister's Second Reading Speech states that:

> The declaration of an airport as leviable, under section 7 of the Collection Act, is the trigger, which enables the levy to be collected. In 1995, Sydney Airport was declared as leviable for the

> nine months to June 1996. However, there was no subsequent declaration. This was due to an administrative oversight within the Treasury which failed to have the responsible Minister declare Sydney Airport from 1 July 1996.

The Explanatory Memorandum states that, notwithstanding the absence of a declaration, "the levy has been collected in accordance with the intent of the legislation". Therefore, an "administrative oversight" has seen almost $200 million collected from aircraft operators over a period of more than four and a half years without legislative authority. The "corrective action" proposed by this bill is to retrospectively validate the collection of this substantial amount. The Committee is concerned by any attempt to retrospectively validate actions in such circumstances.

The Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Broadcasting Services Amendment (Multi-channelling) Bill 2001

This bill is the result of the division by the Senate on 1 March 2001 of the Broadcasting Legislation Amendment Bill 2000. This bill consists of items 1 and 1A of Schedule 1 to the original bill, as amended, renumbered as items 1 and 2 respectively, together with enacting words and provisions for titles and commencement.

The bill proposes amendments to the *Broadcasting Services Act 1992* to remove the content restrictions on multi-channelling for the Australian Broadcasting Corporation and Special Broadcasting Service Corporation by repealing provisions contained in section 5A of Schedule 4 to the Principal Act. The effect of the amendments will be to allow these two broadcasters to broadcast content within their charters of any type that they choose.

The Committee has no comment on this bill.

Copyright Amendment (Parallel Importation) Bill 2001

This bill was introduced into the House of Representatives on 28 February 2001 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to enable parallel importation and subsequent commercial distribution of computer software products, including interactive computer games, books, periodical publications (such as journals and magazines) and sheet music.

The bill includes provisions to:

- ensure that copyright owners are not disadvantaged in bringing infringement actions in relation to parallel imported material;
- ensure that trademark assignments cannot be used to defeat the parallel importation that would otherwise be permitted in relation to computer products, sound recordings and books and related items; and
- make minor amendments and corrections in relation to the communication to the public of works and other subject matter using electronic networks.

The bill also proposes amendments designed to overcome errors or misdescriptions arising from amendments made in the *Copyright Amendment (Digital Agenda) Act 2000*.

Commencement
Subclause 2(2)

Schedule 2 to this bill makes provision for the parallel importation of books, periodicals and sheet music. Subclause 2(2) permits the amendments made in this Schedule to commence 12 months after Assent.

This is a departure from the practice set out in *Drafting Instruction No. 2 of 1989* issued by the Office of Parliamentary Counsel. This provides that, as a general rule, where a clause provides for commencement after assent, the preferred period should not be longer than 6 months. The *Drafting Instruction*

goes on to state that, where a longer period is chosen "Departments should explain the reason for this in the Explanatory Memorandum".

The Explanatory Memorandum accompanying this bill provides no explanation for the adoption of a longer period for the commencement of the relevant provisions in Schedule 2. The Committee, therefore, **seeks the Minister's advice** as to why these provisions may not commence until 12 months after Assent.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Retrospective commencement
Subclause 2(4)

Subclause 2(4) will permit some of the items in Schedule 3 to this bill to commence on the commencement of the *Copyright Amendment (Digital Agenda) Act 2000*. That Act was assented to on 4 September 2000, and, by virtue of subsection 2(1), must commence on 4 March 2001 at the latest. These provisions, therefore, have some retrospective application. However, the Explanatory Memorandum states that the amendments proposed in this Schedule "correct misdescriptions and minor drafting errors" in the Principal Act and make no changes to the substantive law.

In these circumstances, the Committee makes no further comment on this provision.

Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

This bill was introduced into the House of Representatives on 6 December 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Justice and Customs].

Part of a package of three bills in relation to the management and processing of cargo, the bill proposes to amend the *Customs Act 1901* and *Customs Administration Act 1985* to modernise the way in which Customs manages the movement of cargo into and out of Australia.

The bill creates the legal framework for an electronic business environment for cargo management; establishes a new approach to compliance management that recognises that 'one size doesn't fit all'; and improves controls over cargo and its movement where there has been a failure to comply with regulatory requirements.

The bill also repeals the *Import Processing Charges Act 1997*.

General comment

The Committee considered this bill in *Alert Digest No. 1 of 2001* and sought further advice from the Minister in relation to certain issues.

The Committee has since received further correspondence on the bill from the Customs Brokers & Forwarders Council of Australia Inc (CBFCA) (copy attached). However, many of the issues raised in this correspondence (for example, the level of cost impact analysis, the revenue implications of the changes proposed and the requirements for documentary compliance) are beyond this Committee's terms of reference.

CBFCA raises the issue of strict liability offences, which is clearly within the Committee's terms of reference. However, the Committee has already sought further advice on this issue in *Alert Digest No. 1 of 2001*.

CBFCA also raises the issue of the removal of the privilege against self-incrimination (in proposed new section 243SA), which is also within the

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Committee's terms of reference. However, the Committee notes that proposed new section 243SC expressly preserves this privilege.

In these circumstances, the Committee thanks CBFCA for this submission, but, for the reasons noted above, proposes to make no further comment on the issues it raises.

Employment Security Bill 2001

This bill was introduced into the House of Representatives on 26 February 2001 by Mr Bevis as a Private Member's bill, and is identical to a bill of the same name introduced into the House of Representatives by Mr Bevis on 10 April 2000 on which the Committee commented in *Alert Digest No. 6 of 2000*.

The bill proposes to amend the *Workplace Relations Act 1996* to:

- enable the Commission or the Court to extend the operation of an order for the reinstatement of an employee to a body corporate related to the employer; and
- impose liability for the payment of employees' legal entitlements on a body corporate related to the employer.

The bill also proposes to amend the *Corporations Law* in relation to:

- the liability of a company for the debts or liabilities of a related company; and
- the recovery of profits, and compensation of any loss, resulting from a contravention of a civil penalty provision in the Law.

Drafting note
Schedule 2, item 1

As the Committee noted in *Alert Digest No. 6 of 2000*, Item 1 of Schedule 2 to this bill proposes to insert a new Division 6A in the *Corporations Law*. However, the text to be inserted does not have a section number (section 588YA) or section heading to identify it. The Committee again draws the member's attention to this inadvertent omission.

The Committee has no comment on this bill.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Family and Community Services Legislation Amendment (New Zealand Citizens) Bill 2001

This bill was introduced into the House of Representatives on 28 February 2001 by the Minister representing the Minister for Family and Community Services. [Portfolio responsibility: Family and Community Services]

Part 1 of Schedule 1 to the bill proposes amendments to the *Social Security Act 1991* to effect restricted access to social security payments for New Zealand citizens who reside in Australia but who do not become permanent residents or Australian citizens. The amendments do not apply to child related social security payments or access to concession cards for all suitably qualified New Zealand citizens.

Part 2 of Schedule 1 proposes amendments to the *Social Security Act 1991* that are necessary as a result of the proposed changes to be made by the Social Security Legislation Amendment (Concession Cards) Bill 2000. These amendments ensure that the changes do not restrict access to concession cards for all suitably qualified New Zealand citizens.

Part 1 of Schedule 2 proposes amendments to the *A New Tax System (Family Assistance Act) 1999.* These amendments are a result of the proposed change to be made to the definition of ***Australian resident*** in the Social Security Act, as that definition is applicable to the family assistance law. The amendments ensure that the changes do not apply to child related payments for all suitably qualified New Zealand citizens under the family assistance law.

Part 2 of Schedule 2 proposes amendments to the *Health Insurance Act 1973* that are also necessary as a result of the proposed change to be made to the definition of ***Australian resident*** in the Social Security Act. The proposed amendments ensure that the changes do not restrict access to concession cards for low income earners for all suitably qualified New Zealand citizens.

Part 3 of Schedule 2 proposes amendments to the *Social Security (Administration) Act 1999* that are also necessary as a result of the proposed change to be made to the definition of ***Australian resident*** in the Social Security Act. The proposed amendments ensure continued access to concession cards under social security law for all suitably qualified New Zealand citizens. They also ensure that a person who is a special category visa

holder will be able to make a claim for a social security payment so that a test of that person's qualification for that payment can be decided.

Retrospective application
Proposed new subsections 7(2A) to (2D)

Item 3 in Schedule 1 to the bill inserts new subsections 7(2A) to (2D) in the *Social Security Act 1991*. Although the bill itself does not commence until Assent, these new subsections apply from 26 February 2001 to deny some New Zealand citizens the right to claim social security payments. The bill is, therefore, retrospective in effect.

However, these changes were announced by the Prime Minister on 26 February when he was in New Zealand. The bill provides that the changes will not apply to New Zealand citizens who were resident in Australia on 26 February, or who are temporarily absent from Australia and who have been in Australia for a total period of 12 months in the 2 years immediately before 26 February 2001. The bill also provides a 3 month period of grace (from 26 February 2001) for those New Zealand citizens intending to reside in Australia.

Given this, the Committee makes no further comment on these provisions.

Lake Eyre Basin Intergovernmental Agreement Bill 2001

This bill was introduced into the House of Representatives on 1 March 2001 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to give Commonwealth recognition of, and approval to, the Lake Eyre Basin Intergovernmental Agreement (the Agreement) between the Commonwealth, Queensland and South Australia which was signed in October 2000. While not legally required for implementation of the Agreement, the legislation confirms the Commonwealth's commitment to sustainable management of the Lake Eyre Basin and the protection of dependent environmental and heritage values. Consistent with the provisions of the Agreement, Commonwealth legislation will not take effect until the Queensland and South Australian Parliaments have also passed complementary enabling legislation.

The Committee has no comment on this bill.

Primary Industries and Energy Research and Development Amendment Bill 2001

This bill was introduced into the House of Representatives on 1 March 2001 by the Minister for Forestry and Conservation. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Primary Industries and Energy Research and Development Act 1989* to increase the Commonwealth contribution to the Forest and Wood Products Research and Development Corporation (FWPRDC). The amendments will enable government to match industry's R&D levy contribution, dollar for dollar, up to 0.5% of gross value for production. Previously the funding arrangement was $1 for every $2 from industry.

The Committee has no comment on this bill.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

School Funding Amendment Bill 2001

This bill was introduced into the House of Representatives on 26 February 2001 by Mr Beazley as a Private Member's bill.

The bill proposes to amend the *States Grants (Primary and Secondary Education Assistance) Act 2000* to abolish the enrolment benchmark adjustment, and to remove the increases in funds given to category 1 private schools.

The Committee has no comment on this bill.

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

Recent discussions between the Chairs and Deputy Chairs of Commonwealth, State and Territory Scrutiny Committees have again noted difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because 'national scheme' bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the early identification of national schemes of legislation, the Committee proposes to note bills that give effect to such schemes as they come before the Committee for consideration.

Lake Eyre Basin Intergovernmental Agreement Bill 2001

This objective of this bill is to give Commonwealth recognition of, and approval to, the Lake Eyre Basin Intergovernmental Agreement between the Commonwealth, Queensland and South Australia. While not legally required for implementation of the Agreement, Commonwealth legislation is intended to confirm the Government's commitment to sustainable management of the Lake Eyre Basin and the protection of dependent environmental and heritage values. Consistent with the provisions of the Agreement, Commonwealth legislation will not take effect until the Queensland and South Australian Parliaments have also passed complementary enabling legislation.

The Agreement establishes the Lake Eyre Basin Ministerial Forum, which will comprise one Minister each from the Commonwealth, Queensland and South Australia. The Ministerial Forum will be responsible for the development and adoption of policies and strategies for the integrated catchment management of water and related natural resources associated with the cross-border river systems within the Lake Eyre Basin Agreement Area.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

PARLIAMENTARY AMENDMENTS AND THE COMMITTEE'S TERMS OF REFERENCE

AMENDMENTS IN THE HOUSE OF REPRESENTATIVES (26 February - 1 March)

Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 2000: The House of Representatives agreed to a Senate amendment to this bill. This amendment raised no issues within the Committee's terms of reference.

Sydney Harbour Federation Trust Bill 2000: The House of Representatives agreed to certain Senate amendments to House of Representatives amendments to this bill. None of these amendments raised issues within the Committee's terms of reference.

Treasury Legislation Amendment (Application of Criminal Code) Bill 2000: The House of Representatives agreed to amend this bill. This amendment raised no issues within the Committee's Terms of Reference.

AMENDMENTS IN THE SENATE (26 February - 1 March)

Broadcasting Legislation Amendment Bill 2000: The Senate agreed to amend this bill. These amendments raised no issues within the Committee's Terms of Reference.

Classification (Publications, Films and Computer Games) Amendment Bill (No 2) 2000: The Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000: The Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Sydney Harbour Federation Trust Bill 2000: The Senate agreed to certain House of Representatives amendments made by the House in place of certain Senate amendments. None of these amendments raised issues within the Committee's terms of reference.

Workplace Relations Amendment (Tallies) Bill 2000: The Senate agreed to amend this bill. With the exception of the amendment noted below, these amendments raised no issues within the Committee's Terms of Reference.

Workplace Relations Amendment (Tallies) Bill 2000

The Committee considered this bill in *Alert Digest No. 10 of 2000*.

On 1 March 2001, the Senate in Committee amended subclause 2(2) of the bill to provide that Item 1 in Schedule 1 (which relates to tallies) should commence 12 months after Assent. This is a departure from the practice set out in *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. This provides that, as a general rule, where a clause provides for commencement after assent, the preferred period should not be longer than 6 months, and an explanation provided where a longer period is chosen.

In introducing the amendment, Senator Murray observed that the commencement period for this provision had originally been 6 months. Submissions had been made that this period should be extended to 18 months; the IRC had indicated 3 years. A 12 month period represented a more appropriate period than any of the others.

Given this explanation, the Committee **makes no further comment** on this amendment.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

RECEIVED
26 FEB 2001
Senate Standing C'ttee
for the Scrutiny of Bills

REF NO:

7 February 2001

Senator B Cooney
Chair
Senate Legislative Scrutiny Standing Committee
Parliament House
CANBERRA ACT 2600

CBFCA
AUSTRALIA

Dear Senator

CUSTOMS LEGISLATION AMENDMENTS AND REPEAL (INTERNATIONAL TRADE MODERNISATION) BILL 2000

As you are no doubt aware, the above mentioned Bill was introduced by Government into Parliament on 6 December 2000 and during the Autumn session the Bill will be considered in Committee and by the Parliament. As you will note in the attached Commentary on the Bill by the Customs Brokers and Forwarders Council of Australia Inc. (CBFCA), this Bill represents one of the most significant changes to customs arrangements since 1901. It is therefore appropriate to ensure that the Bill meets not only the requirements of Government but also the needs of industry.

In giving effect to the concept of mutual obligation, the Bill should, in the opinion of the CBFCA, not be solely about compliance by way of deterrence but more about incentives to comply. The Explanatory Memorandum to the Bill has serious errors and inconsistencies, which in the opinion of the CBFCA, raises the question as to the efficacy of statements made in the Explanatory Memorandum particularly in relation to the consultative process with industry and cost analysis impact.

To provide an industry overview on the Bill, representatives of the CBFCA would be happy to meet with the Committee at the earliest possible opportunity to put on record the CBFCA's position on the issues raised in the Commentary.

Yours faithfully

STEPHEN J. MORRIS
Executive Director

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Customs Brokers and Forwarders Council of Australia Inc.

Comment on the

Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000

January 2001

CONTENTS

EXECUTIVE SUMMARY

While the Customs Brokers and Forwarders Council of Australia Inc. (CBFCA) supports the concept of the Australian Customs Service (ACS) Cargo Management Re-engineering (CMR) and the legislative support to be provided by way of the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000 (the Bill), it has serious concerns in relation to the failure of the Explanatory Memorandum to provide an appropriate level of cost impact analysis. In addition, the Explanatory Memorandum contains what is seen as inconsistencies or errors as to the CBFCA's and industry's understanding of the consultative process undertaken. These flaws in the Explanatory Memorandum raises the veracity of the Explanatory Memorandum. It should be noted that these proposed amendments are the most significant changes to the Customs Act since 1901 and the new compliance arrangements add significant costs to industry as well as introducing, as perceived by the CBFCA, inappropriate administration arrangements and strict liability offences.

The Government's commitment to provide services over the Internet by the end of 2001 requires the Australian Customs Service (ACS) to introduce a delivery mechanism via its Website. This, in conjunction with the *National Illicit Drugs Strategy,* has been used as the rationale for change in ACS procedures for cargo reporting, the objective being to achieve, in the main, an improvement in the quality and timeliness of reporting. However, there is not likely to be a total compliance under any circumstances and in the opinion of the CBFCA there is a serious question about the efficacy of the proposed CMR arrangements.

In the generality the proposed changes to export procedures are supported by industry, however there is a valid question as to whether ACS cost recovery should be introduced for

export services provided through the ACS infrastructure as at this time all other services except those related to barrier functions are cost recovered. This also raises the question that if the ACS change process is founded on the *National Illicit Drugs Strategy* – this being a total barrier function – then why should industry bear the cost as it has been advised in all forums that ACS border functionality is not cost recoverable, this being a community service obligation.

The CBFCA sees that the strict liability offence as proposed in the legislation in commercial situations is not appropriate. Rather, a system of co-regulation is considered to offer an opportunity for a balance between incentives to comply and appropriate commercial sanctions for breaches or non-compliance. Monetary or other penalties should be provided as a last resort option for the most serious breaches eg, deliberate late or misleading reporting leading to or threatening breaches of existing criminal offence provisions. As to these issues, it is difficult to provide objective comment on the policy arrangements on penalties without access to administrative guidelines and these have yet to be tabled for public scrutiny and comment. One shortcoming which must however be addressed if a penalty system for errors, including non-revenue errors, is adopted is maintenance of an independent means of administrative review. This requirement should be assessed against the background to the introduction of the Government's administrative review arrangements in the 1970's.

As to revenue implications, the period for recovery of underpayments and refunds of overpayment of customs duty should not be extended to four (4) years. There is no basis in logic for claiming a similarity between customs duty payments and tax/GST payments. In fact there are major differences between these payments in a business environment. Customs duty is a cost to business which under ordinary circumstances needs to be recovered. The

other taxes are either based on a proportion of income or, in the case of GST, represent no cost to business save for that of administration.

As to documentary compliance, the requirement for persons communicating information to the ACS to retain original source documents for twelve (12) months is commercially unrealistic and has a high cost impact for little if any practical rationale. Compliance could be achieved without considerable disruption to industry generally by other industry supported means and in any event the proposed change imposes a duplication of effort and resources.

PART 1: INTRODUCTION

1.1 Background

The CBFCA has been actively involved, in concert with other Industry members, in the review of the CMR project and has consistently supported its principle objectives, being, as referenced by the ACS:

"To introduce new cargo management processes and systems to greatly improve the effective delivery of services to Government, Industry and the community." [1]

The Bill has been written to support the new electronic business environment, cost recovery model, cargo management processes and compliance regime established in accordance with the ACS CMR project.

1.2 Objective

The objective of this paper is to provide objective comment, from CBFCA's perspective, on key elements of the Bill and the CMR project.

In doing so, the paper will focus on the consultation process between industry and the ACS and highlight key issues of concern

[1] Australian Customs Service, Cargo Management RE-engineering, Business Model, March 2000, P 8

PART 2: BACKGROUND

2.1 *Industry Working Group on Customs*

The Bill and its Explanatory Memorandum, in particular the Explanatory Memorandum, exhibits a lack of uniformity, consistency in terminology, attention to appropriate detail and accuracy. These deficiencies in the Explanatory Memorandum exhibit, in the CBFCA's opinion, the ongoing lack of attention, not only to detail, but to Industry concerns of the CMR process.

The reference to Industry Working Group on Customs (IWGC) is an example of the flawed content in the Explanatory Memorandum and calls into question the efficacy of the document itself in supporting the Bill :

"This body was established by Customs for the purpose of developing and implementing Cargo Management Re-engineering Strategy which is concerned with the redevelopment of Customs electronic systems for reporting the arrival of cargo in Australia and its clearance."[2]

Industry's position on the rationale of the creation of the IWGC differs significantly from the position as referenced in the Explanatory Memorandum.

In December 1993, Industry and the Australian Quarantine and Inspection Service (AQIS) established a national consultative committee on quarantine issues. That committee is now known as the AQIS/Industry Cargo Consultative Committee

[2] Explanatory Memorandum 6.2.1

(AICCC) and includes, in addition to senior AQIS representatives, senior members of the Industry Working Group on Quarantine (IWGQ) and its membership covers all aspects of the cargo logistics and importing chain.

The AICCC is the peak consultative body for all issues arising from the management of Australia's quarantine strategy and the relationship between the cargo handling / importing Industry and AQIS.

The objectives of the AICCC include, *inter alia:*
"enabling AQIS to improve the effectiveness and efficiency of border control and, wherever possible, coordinate the functions of all concerned to avoid duplication and to enhance the smooth and seamless flow of cargo / goods through Australian sea and airports." [3]

The AICCC has proven to be a success, with Industry working closely with AQIS to develop many joint initiatives, such as co-regulation projects, that have benefited the protection of Australia's border as well as allowing Industry to carry out some low risk AQIS functions.

Although being aware of the success of the AICCC processes, **the ACS when invited to participate in a similar customs process, perceived that the Customs National Consultative Committee (CNCC) was an appropriate forum and did not see merit in the Industry proposal to form the Customs/Industry Cargo Consultative**

[3] AQIS/Industry Cargo Consultative Group Charter 1993

Committee (CICCC),[4] which would have brought together all members of the cargo handling Industry and ACS to form one consultative body.

Industry therefore decided (on the basis of the ACS position) to rationalise and coordinate it's consultative arrangement on customs issues and, in March 1999, formed the IWGC as it perceived that **the CNCC was not an appropriate forum to discuss the CMR process or other issues relating to ACS cargo barrier or commercial policy or administrative arrangements.** The membership of the IWGC at inception was as follows:

- Australian Air Transport Association
- Australian Chamber of Commerce and Industry
- Australian Container Depots Association
- Australian Federation of International Forwarders Ltd.
- Australian Shipping Federation
- Customs Brokers and Forwarders Council of Australia Inc.
- International Air Couriers Association of Australia

Since that time the following organisations have joined the IWGC:

- Australian International Movers Association
- Conference of Asia Pacific Express Carriers
- Stevedores / Container Terminals (represented by – P & O Ports)

At this time the IWGC membership covers all cargo activities subject to ACS control and are effected by the CMR arrangements.

[4] Australian Customs Service letter, 14 September, 1998

The IWGC clearly recognised the significance of CMR within the context of the Terms of Reference and in June 1999 appointed (at Industry expense) an Industry Representative charged with the sole responsibility to provide a focal point for consultation with the ACS. Based on report back from the Industry Representative, the Secretariat of the IWGC was subsequently involved in extensive correspondence with the ACS on various issues pertaining to the CMR project.

2.2 *Industry / CMR Business Model*

The CMR Business Model (the Model) is the foundation to the CMR project, outlining the broad processes and statutory responsibilities of each industry sector in the import / export process. The Draft Model was initially made available for comment in September 1999 and was subsequently presented to Industry through an extensive national "road-show" and a series of national feedback sessions.

Over eleven hundred (1,100) Industry participants attended forty-five (45) CMR Information Forums nationwide. At a conservative time sacrifice and related expense estimate in excess of $1 million has been invested by Industry in the *consultative* process. In addition the attendance of expert staff / consultants /and the Industry Representative at CMR Focus Groups meetings and other Industry related meeting / discussion sessions has seen Industry further invest in the process. The total cost to Industry is now in excess of $2 million, which is not a recoverable expense as is ACS costs in relation to CMR development. As an example of ACS costs born by Industry is the "road show", which on determined data, without referencing ACS staff costs, the direct (cost recovered) expenses would have been at or about $100,000.

The Industry Representative accompanied the ACS CMR team and reported on the results of these Industry Forums. It was evident that there were many issues of concern raised by the various Industry sectors such as the introduction of an onerous cargo reporting requirements and the sanctions regime for non-compliance. These aspects were, and remain of concern to Industry.

Industry responded to the ACS in November 1999 through the IWGC. This response was in the form of an alternate Business Model (Industry Model) clearly aiming at improving the performance of the import and export cargo supply chain Industries by avoiding inefficient duplications in reporting requirements. It also aimed to provide an increase in effectiveness of the activities conducted by the ACS, AQIS and other related Government agencies through the provision of timely and accurate data for risk assessment purposes. The response also addressed a hitherto ignored aspect of the importing process, which entails an increase in security requirements at ACS controlled premises until cargo is authorised for release or movement.

The final CMR Model was released to Industry in April 2000 after the ACS *consultation* process was completed by the ACS. The final Model did not include any of the major concerns or formal proposals raised by Industry.

2.3 Industry Position Paper on CMR

Industry in particular takes exception to the ACS attitude to the supposed *consultative* process to which Industry, as referenced, has already contributed significantly. Whilst

Industry comments, suggestions, responses etc were noted by the ACS, few were considered sufficiently relevant to be considered for inclusion in the final Model.

In all forums the ACS has consistently advised that its position on CMR is, in the main, to give effect to the Government's *National Illicit Drugs Strategy*. Commercial considerations such as congestions in ports, delays to import and export cargo, the land bridging of shipping containers and the efficient operation of port infrastructure do not appear to have been taken into account as regards the need to maintain a balance to enable an efficient and cost effective logistics chain to be achieved so that Australian business remains internationally competitive.

Some of the issues arising from the ACS CMR position which the IWGC considered would have an adverse bearing on a number of vital areas of Government, Industry and community interests included:

- the impact of CMR in maintaining the efficiencies gained in existing waterfront/ports reforms and in the import/export logistics chain generally
- efficiencies and cost savings accruing to large, in the main multi-national enterprises, at the expense of Australian Small to Medium enterprises (SME's)
- duplication by Government of commercially developed IT infrastructure with subsequent Government cost to be borne by Industry, and
- imposition of onerous reporting systems and requirements supported by a strict liability regime that relied heavily on sanctions and penalties.

The IWGC deemed it appropriate to prepare a Position Paper to outline Industry's general concerns on the *consultative* processes of the ACS. The Position Paper

provided an outline of Industry's consultative structure, an overview of the differences in the ACS and Industry positions on elements of CMR and an appendix containing relevant communications, minutes, reports etc.

Accordingly, the Industry *Position Paper* was circulated to interested parties in Government and Industry. The ACS subsequently conducted further consultation with Industry and agreed to a number of changes to key elements such as the prescriptive detail of import and export cargo reporting to be capable of fitting into realistic commercial/operational environments as well as meeting international obligations. The ACS released a revised Business Model in September 2000 which reflected many of these changes.

The ACS recognised the benefits on export controls by treating the border as the terminal gate. The downstream benefits to carriers allow for post departure reporting to allow accurate export cargo reporting to Government.

The ACS refused to adopt the IWGC model for imports. The IWGC to treat the border on imports as the terminal gate and for cargo to be held in a secure area until detailed provision of data for risk assessment is supplied on the Import Declaration. Instead, the ACS has maintained a complex set of processes, which make it incumbent on carriers to provide cargo report information prior to arrival of the ship or aircraft.

The revised Business Model has however recognised the onerous requirement to supply complete and accurate import Cargo Report data within prescribed time frames

and will allow the carrier to report in accordance with data available on commercial documents – Air Waybill / Bill of Lading.

Similarly, the revised Business Model allows more flexibility in underbond movements to facilitate the movement of low risk cargo between approved ACS controlled premises.

Copies of the Position Paper and formal response to the Draft Business Model are available from the IWGC Secretariat or from the CBFCA for interested parties.

2.4 *Trade Modernisation Legislation*

While many of the major concerns relating to the CMR processes were addressed in the Revised Business Model, a major concern remained in relation to the nature of the compliance measures to be introduced under the Trade Modernisation Legislation.

Again the ACS conducted *road shows* with a significant level of staff resource representation. At these presentations it was evident that many issues remained unresolved such as the penalty regime for late cargo reporting. New areas of concern had emerged that were not previously subject to any form of consultation. These issues included the document retention issues for customs brokers and the introduction of strict liability penalties on import and export declarations. These issues are explored further in the body of this paper.

PART 3: COMPLIANCE ISSUES

3.1 Import Cargo Report

It is in the Explanatory Memorandum that it is suggested that in an effort to meet the goals of the *National Illicit Drug Strategy* compliance measures are being introduced to improve the "*quality and timeliness*" of cargo information. [5]

Comments on these particulars aspects of the process are set out below.

3.1.1 Quality

As stipulated in the Position paper, carriers are prepared to meet the pre-arrival cargo reporting requirements outlined in the ACS Business Model provided that the requirements do not exceed the operational data that is available in the transportation of goods ie. the air waybill (AWB) , Bill of Lading (B/L) or manifest. This reporting regime would essentially be in line with the World Customs Organisation (WCO) Kyoto Convention. The ACS have accepted this reporting requirement in correspondence with industry.

While the CBFCA acknowledges the need for quality data it is of the opinion that the data referenced on the AWB, B/L and manifest is, while indicative, not the quality data that the ACS is hoping to achieve for appropriate/effective barrier assessment. This has been recognised for some time by other regulatory authorities and has been noted by Industry itself in its submissions to the ACS.

[5] Explanatory Memorandum, P 5

3.1.2 Timeliness

The ACS has focused its barrier reporting on the timeliness of cargo reports, stipulating that sea cargo information must be reported twenty-four (24) hours prior to arrival of the vessel and air cargo two hours (2) prior to aircraft arrival.

The Explanatory Memorandum is critical of Industry for its non compliance with existing legislative to ACS administrative requirements. As to these comments should compliance with current requirements have been desired, this could have been achieved by the ACS enforcing the provisions of Section 64 of the Customs Act (the Act) and allowing all AWBs to be lodged manually with the ACS within three (3) hours of flight arrival.

As background to these non compliance issues, in 1997, the ACS changed its policy in relation to Section 77G Depots and manual screening processes. This change required Air Cargo Depots participating in the Air Cargo Automation (ACA) cargo reporting system to report all cargo electronically.

The ACS gave tacit approval to non compliance with legislative and administrative policy requirements to ensure receipt of all reports electronically and to build the number of reporters within the ACA system.

Until this administrative change, airlines could lodge all AWB's for consolidated cargo with the ACS that had not been automated by freight forwarders at the time of flight arrival. However the ACS were not able to sustain an appropriate service level due to staff issues and extensive delays of air cargo ensued.

Understandable, the ACS changed the functionality of ACA to allow freight forwarders unlimited time after aircraft arrival to report electronically to overcome these deficiencies. This decision benefited airlines and the ACS as there was no longer a need to process cargo manually in parallel with the automated system.

Although this policy was clearly not in accord with the legislative intent and apparently did not give effect to Government policy, the ACS gained efficiencies with the added benefit of all information being electronically profiled and risk assessed accordingly. The systemic failure has been caused by the actions of the ACS not by the failure of Industry to comply.

The CBFCA accepts the fact that late cargo reporting occurs but questions the extent of the problem quoted in the Explanatory Memorandum. While figures of 59% for sea cargo and 48% for air cargo, no data was provided on the details of the sample used, nor has the ACS addressed the causes of late reporting.

The CBFCA is of the opinion that late reporting is generated by three causes:

- User errors in Cargo Automation systems
- Inadequate systems / operating hours
- Lack of data supplied from overseas source

In addition, both Air Cargo Automation and Sea Cargo Automation are very rigid in design. Unlike COMPILE, the Cargo Automation Systems do not have the flexibility to permit amendments to "unique identifier" data elements such as the Lloyds number,

voyage number, container number, Ocean B/L number, House Bill of Lading number, discharge port, destination port, master air waybill or house air waybill.

If any of these data elements require amendment, the cargo report has to be cancelled and re-reported. This process, in some instances, will result in a late cargo report. The CBFCA has clearly stipulated to the ACS that CMR must incorporate the ability to allow any data elements to be amended to avoid the re-design of a system with the same flaws as the legacy systems.

While it is acknowledged that many cargo reporters and their staff have (or may have) inadequate knowledge as to the use of the current cargo report systems, which in turn leads to errors in the process, this however is the result of ACS neglect of the informed compliance concept as well as Industry's failure to maintain adequate levels of staff competence. This issue could be remedied with an ACS / Industry training program with appropriate levels of agreed accreditation for access to ACS electronic systems. Unfortunately the issue of accreditation or Industry standards are concepts which have not been accepted by the ACS as appropriate remedies to existing deficiencies.

As previously commented as to the quality and timeliness of reporting many cargo reporters currently do not work a twenty-four (24) hours, seven (7) day spread of hours and do not have electronic systems that will facilitate an automatic download to the ACS of data from an overseas source. While this can be overcome with the development of systems to meet this requirement, the costs for Industry would be

considerable especially when more cost effective arrangements to meet ACS requirements could be developed.

As to report requirements, the timeliness of receipt is out of the control of the cargo reporter if the overseas data source does not supply an electronic transfer of data within the necessary ACS time frames. This is the existing major cause for late air cargo reporting and this aspect will not be subject to radical change whatever steps the ACS takes.

While the CBFCA acknowledges that steps need to be taken to improve the timeliness of cargo reporting, it sees as being unreasonable the issue of Infringement Notices (penalties) for late reports if the overseas source cannot, or will not, supply data in time to meet the particular needs of Australian regulatory authorities.

3.2 *Import and Export Declarations*

The offence provision of false or misleading statement (not resulting in a loss of duty) as covered by the new Section 243U appears to lack any justification save for overcoming administrative shortcomings. It is noted that this provision relates to a statement that is false, misleading or has an omission from the statement of a material particular. As to what constitutes a material particular is not referenced however it is noted in the Explanatory Memorandum that the issue of an Infringement Notice is to: "*improve the quality of information received by the ACS and relates to data used for trade statistics or border control purposes.*"

As to export declarations (and statements therein), it is assumed that a material particular could include any of the twenty-seven (27) items referenced within ACS public policy documents.

In the main, this data relates to trade statistics, and prohibitions or restrictions related to export and includes, *inter alia:*

- consignor or consignee details
- country of origin
- export value, and
- Australian Harmonised Export Commodity Classification (AHECC)

The materiality of the data subject to an Infringement Notice in the twenty-seven (27) data fields requires clear clarification and elaboration not just a bland administrative statement as in the Explanatory Memorandum.

As to the core issues relating to exports, there is failure to give effect to any process or procedure whereby if such information is not able to be readily ascertained, or determined by the person providing the statement for that person to request the ACS to review or clarify the data by way of an appropriate ruling or advice similar to the existing processes that exist with import declarations through Tariff and Valuation Advices. In relation to import declarations, there also exists the opportunity to enter goods by way of an *amber line* process whereby the person making the statement advises the ACS that certain information in relation to the declaration needs confirmation by the ACS and this aspect forestalls any ACS Administrative Penalty issue.

The proposed process, without any opportunity to seek confirmation from the regulatory authority responsible for the implementation of the penalty, is clearly inappropriate.

In addition, the multiplicity of offences that can occur in relation to such statements is exponential even though there are specific limitations as referenced under the proposed Section 243Z (4)(a). An incorrect AHECC code or export value over twelve (12) months of export entries (this period being the proposed retention period) where the mistake could be a single repetition of classification, of say one hundred (100) times, would see one hundred (100) penalty units being issued. As these are strict liability offences, it is the CBFCA's understanding that there is **no** provision for the ACS **not** to apply such penalties save for statutory defences of criminal liability and on the basis of Industry experience, such penalties would be applied with vigour.

3.3 Document Retention

The CBFCA notes with interest the requirements of the Bill under Section 240AB that persons who communicate information to the ACS will be required to retain and produce the record from which that communication was made for a period of up to twelve months after the communication was made to the ACS. This of course will require airlines, container terminals, shipping companies, depots, exporters, customs brokers and any other party who communicates with the ACS to maintain data source records. At this time such data is in the main "live" data and is not retained for the period proposed in the legislation. In addition, many of these documents are the property of clients and in relation to any of these documents, in particular those

relating to import declarations, information contained therein is, in many cases, confidential to the client and cannot, without the client's permission, be copied or recorded in any form.

As to data retention, it is more appropriate as to import declaration in particular that the provisions of Section 240 of the Act apply whereas the onus is on the importer of record as referenced on the import declaration to maintain such commercial documentation for a period of up to five (5) years. It is the CBFCA's opinion that this is the appropriate and correct commercial and regulatory arrangement as regards import declaration data retention.

On the basis of existing numbers of import declarations and the proposed simplified import declaration process under CMR these along with the number of manifest, B/L, AWBs and other documentation will see in excess of twenty (20) million additional documents needed to be recorded / maintained by Industry, in some manner or form, so as to ensure compliance with the provisions of Section 240AB so as to not leave a person liable to the strict liability offence of the inability to comply.

On the basis of the document recording/copying process, archival arrangements as well as resource implications, this arrangement is expected to cost Industry in excess of $2.5 million annually.

3.4 *Infringement Notices*

The referenced purpose of requiring the retention and production of data as referenced in the Explanatory Memorandum is to assess whether the person has complied with a

Customs related Act or to determine the correctness of the information communicated to the ACS. Non compliance leads to the penalty provisions, in lieu of prosecution, for these non compliance offences. Within the provisions of Section 243Y, should the ACS Chief Executive Officer (or delegate) have reasonable grounds to believe that a person has committed an offence (in relation to retention aspects of documents, it is assumed this would be the non production and as to the correctness of information, this being the verbatim transcription from documents or any other data received by the person who communicates with the customs) then an Infringement Notice is issued.

On Industry's understanding of the strict liability requirement, an Infringement Notice *would, rather then could*, be issued. In terms of strict liability there would be no discretion as the reasonableness test would clearly be able to be proven by the ACS by the document not being provided or inaccurate data transcribed.

3.5 Strict Liability Offences

Importers and licensed customs brokers who have been responsible for the creation of existing entries for home consumption (import declarations) have worked under a strict liability regime (Section 243T of the Act) since 1998. As such, the CBFCA and its members understand the implications of such arrangements and have long seen the need to have a balance between the issue of the penalty and the need for an appropriate appeal mechanism and/or remedy.

The proposed legislative change as to the issue of Infringement Notices for such strict liability offences does not contain such an appeal mechanism or any aspect of due process.

The history of the ACS in relation to the Section 243T strict liability offences and the emasculation of the existing Administrative Penalties process was created, in the CBFCA's opinion, by the ACS's own administration shortcomings.

In the case of Robert Nagle,[6] the ACS used the provision of Section 243T rather then develop a more appropriate prosecution arrangement under Section 234. In essence, the Administrative Appeals Tribunal's decision in Nagle, was a precedent decision that severely undermined the effectiveness of the Administrative Penalties Regime.

The proposed strict liability offence under Section 243Y would appear to compound the failure to construct appropriate prosecution arrangements against those who, the CBFCA and Industry, would see as clearly appropriate to other more appropriate punitive action.

Industry perceives Section 243Y as being no more than an admission of an inability to meet the challenge of existing appropriate legal sanctions. While it is acknowledged that strict liability offences divert persons out of the judicial system with savings of time and expense, it is clearly appropriate if such a strict liability arrangement is to apply for due process and an appeal mechanism to exist.

It is noted in relation to strict liability offences particularly as they relate to non revenue issues that the Australian Law Reform Commission (ALRC) in its Report

[6] Robert Nagle and Comptroller General of Customs, W89/214, May 1990

No 61 as it related to administrative penalties considered the aspect as to whether mere errors should be penalised at all. The CBFCA noted in the Report:

"On the basis that the policy goal of an administrative penalty scheme should be encouraging people to take all reasonable care in the preparation of entries and returns, the Commission is of the view that only errors that can be characterised as at least careless should be penalised and in referencing these issues noted that ***penalties should be imposed where the amount of duty has been understated as a result of carelessness.***

"It did not support penalties for declarations or statements, which did not result in an understatement of duty." *(CBFCA emphasis)* [7]

As to the proposed strict liability offences, the New Zealand Customs Service has had a strict liability offence regime in relation to face of entry errors since 1996. This process was to, *inter alia*, encourage people to take reasonable care in the preparation of entries. The legislation was two fold in terms of penalties relating to:

- errors or omission that resulted in underpayment, and
- to materially incorrect data in relation to an entry

The details as to materiality being defined in the legislation, which also provided for an appeals mechanism.[8]

In relation to the face of entry errors, the Comptroller of New Zealand Customs, Mr R Dare, at the Barrier Clearance and International Freight Forwarding Industry Tri Nations Conference held in Auckland on 13-14 October 2000, stated without

[7] The Law Reform Commission Administrative Penalties in Customs and Excise Report No. 61
[8] www.customs.govt.nz/COMMHOME/Fact14HTM

reservation that the strict liability offence regime in relation to the face of entry errors had failed to meet its objective for a variety of regulatory and commercial reasons.

In discussion with Industry representative at the Conference it was acknowledged that it would be more appropriate to provide for an accreditation standard so as to provide appropriate commercial advantages to Industry rather punitive sanctions. Obviously in relation to overcoming the regulatory impediments observed in New Zealand, particularly in relation to due process and appeal, the ACS opted for a non appeal process rather than recognise the benefits to all of a more appropriate accreditation standards.

3.6 *Self Incrimination*

The proposed Section 243SA is also of concern as regards the rights of the individual where there will be a strict liability requirement for a person to answer particular questions posed by ACS officers. It is noted within the Explanatory Memorandum that there is no comment as to a requirement for the ACS officer to issue a warning as to self incrimination and as to answers given being able to be used in any legal proceedings.

There is in the opinion of the CBFCA, an underlying principle of the right to non self incrimination which has failed to be addressed by the proposed Section 243SA.

PART 4: COMMUNICATING WITH CUSTOMS

4.1 Customs Connect Facility

Another major concern of Industry relates to the cost-recovery methodology for the ACS development of its CCF, which essentially replicates an existing commercially developed system. At this stage it is understood that the development and running costs of the CCF, which are yet to be determined, will be recovered under CMR, not just from those who actually use the CCF but from all who communicate with the ACS. This effectively penalises users of the existing commercially developed and accepted system who may wish to remain with that system due to not only its ACS options but also as a result of its many other value added components.

These aspects have apparently been overlooked by the ACS in it achieving CMR outcomes at apparently any cost (to Industry). The CBFCA on behalf of its members in the barrier clearance and international freight forwarding, while supporting the CMR concept, questions the lack of attention by the ACS to the down stream cost implications for exporters, importers and the community as a whole of compulsory communication with the ACS through its CCF.

Industry for some time now has been seeking the creation of a system that provides a *single window* to and from Government. In prior Industry studies, workshops and some focus groups, the various features of a *single window concept* were identified. These were described in detail in the Industry response to the ACS Model. The ACS has not adopted any of the recommendations of the Industry response on such an arrangement and continues data duplication from multiple sources of reporting for the purposes of ACS barrier and commercial requirements. This subsequently requires

complex cross matching of critical data fields to achieve cargo release from ACS control.

PART 5: IMPACT ANALYSIS AND COST RECOVERY

The various Impact Assessments throughout the Explanatory Memorandum lack any substantive or appropriate empirical support, which has been noted in other Bills introduced into the Parliament.

Statements such as:

"there will be costs associated with retraining personnel to familiarise them with new systems".

"...Less prescriptive legislation coupled with an open communication gateway to customs systems will allow the Industry users of those systems to select their communication channel that best suit their commercial needs.

are, as they are, subjective statements.

During the Industry *consultation*, Industry raised on more than one occasion its concerns as to the cost implications of the CMR process and the cost movement from the ACS to Industry. There is a highly repetitive mantra on cost assessment across the Explanatory Memorandum, which should be dismissed for its failure to meet even cursory cost assessment principles.

Industry in terms of its Impact Analysis (based upon its Industry review) would suggest that in the terms of electronic commerce hardware/software requirements and staff retraining, the cost to Industry will be in excess of $17 million in the first year. These not insignificant costs, will be required to be absorbed by Industry along with document retention costs in excess of $2.5 million per annum. In addition, Industry will be (and is at this time) required to fund the CMR process as well as other ACS cost recovery which at this time stands at $85 million per annum.

The ACS cost recovery arrangement over the past two (2) years has seen costs escalation over which Industry has no control. Future costs reductions are not guaranteed by the ACS and it is this guarantee which Industry seeks in any conditional or unconditional support to the CMR process. In essence, the process leaves the risk to be born by Industry without any appropriate recourse.

As to additional costs to the account of Industry, the CCF is a clear statement by the ACS of development of processes, which is currently available and acceptable to Industry and for which Industry in the future will be required to fund. The justification for such a duality of process could not be qualified or quantified to the Senate Legal and Constitutional Committee.[9] If such is the case, what hope has Industry in obtaining such information or assurances!

PART 6: OTHER ISSUES

6.1 Civil or Criminal Liability

The issue as to strict liability offences proposed under the Bill and the impact on the provisions of Part XI of the Act as it relates to licensing of customs brokers was

[9] Senate Legal and Constitutional Committee Hansard, 22 November, P 47-51

referenced by Industry at the ACS seminars on *Amendments to the Customs Act and Cost Recovery Arrangements* held nation wide in the period 17 July – 15 August 2000. While the ACS document was silent in relation to the civil or criminal liability issue,[10] the ACS legal representative at the meeting held in Brisbane on 17 July 2000 was quite specific in relation to the criminal liability aspect relating to the strict liability offences.

When questioned as to the impact of these arrangements on Section 183CQ of the Act, the ACS response provided little if any direction in relation to the impact on licensed customs brokers and this issue remains unresolved. The issue still remains as to whether an Infringement Notice rest on a civil or a criminal liability test. While it is noted that the functions and purposes of civil administrative and criminal penalties over lap in many aspects and as referenced by the Australian Law Reform Commission, [11] the difference standards of proof for civil and criminal sanctions are not always easily distinguishable, and as such this issue needs early clarification.

6.2 Quarantine Requirements

As to the report and clearance of certain goods not requiring an import entry, the proposed Section 71 is clearly deficient in addressing the requirements of other regulatory authorities, in particular AQIS as to barrier clearance. This deficiency combined with the aspect as to who in the future may create an import declaration (simplified or otherwise), particularly in relation to the ACS CCF which will provide access by self declarants, exhibits a lack of understanding of existing quarantine declaration standards. Standards for Industry on these requirements are strict and

[10] Australian Customs Service Trade Modernisation Legislation Outline of Legal Framework
[11] Australian Law Reform Commissions Civil and Administrative Penalties Consultation Paper, December 2000, P 3

based upon agreed accreditation training for importers of record or their appointed licenced customs brokers.

Accreditation is limited to those who have authority, under the Act to make customs entries as the AQIS Import Management Systems (AIMS) for quarantine barrier profiling is, and will continue to be, based upon the import declaration. All AQIS barrier profiles are related to specific import declaration data such as tariff classification, owner (ABN), supplier codes, country of origin or any other appropriate AQIS determinate. Those who will self-assess or have access to ACS entry creation provision will, if they are not accredited, have little if any understanding of the quarantine arrangements. In addition, it is expected that they would have little exposure to the full legislative requirements of the Customs Tariff Act 1995, the Act and other linked legislation including that relating to the Goods and Services Tax.

While a face of entry penalty will be applied by the ACS in relation to misclassification of goods and other aspects in which there is a customs duty or no customs duty misstatement, the impact on Australia and its community of the importation of goods infected with say bovine spongiform encephalopathy which gives rise to Creutzfeldt Jokob disease is of a major concern as to the health of the Australian community as well as its trade impact.

In the drive for CMR, the outcomes of other regulatory authorities policy and/or administration requirements appear to have been overlooked or not referenced appropriately.

6.3 Accredited Client Program

One of the many issues commented upon by Industry in its Position Paper was the Accredited Client Program (ACP). Industry, as a matter of principle, supports the ACP and Industry is currently operating a number of very successful similar schemes with the AQIS on an equitable basis in a number of activity areas.

As Government is aware SME's are the employers of a substantial workforce, however they do not gain any efficiencies or cost savings under CMR, in fact, the opposite may well be the case. Most of Industry will not have the opportunity for inclusion in the ACP due to the prescriptive nature of the ACS qualification arrangements.

A telling point in this regard was the observation of Price Waterhouse Coopers in its independent Cost / Benefit study on CMR which stated, *inter alia:*

"Service providers indicated that the greatest benefit will be gained by those companies that become accredited clients. The impact on small to medium enterprises is likely to be marginal", and

"... the revised cost recovery regime will also lead to significant cost savings for those companies which become accredited clients" [12]

[12] Cargo Management Re-engineering Industry Reference Group Meeting No.4, 22 November 1000, Minutes

To date full details as to the manner and form for operation have yet to be made public even though Industry, in terms of equity for all service providers and importers, have pressed for release.

The ACP remains closed to only those who have been targeted for inclusion.

7 March 2001

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2001

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Bills Carried over from 1999/2000							
Aboriginal and Torres Strait Islander Commission Amendment Bill 2000	18(6.12.00)	29.11.00	6.2.01	Aboriginal and Torres Strait Islander Affairs	7.12.00	15.1.01 27.2.01	1(7.2.01) 2(28.2.01)
Administrative Review Tribunal Bill 2000	10(16.8.00)	28.6.00	6.2.01	Attorney-General	17.8.00		NEG26.2.01
Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000	15(1.11.00)	12.10.00	6.2.01	Attorney-General	2.11.00		NEG26.2.01
Aviation Noise Ombudsman Bill 2000	13(4.10.00)	4.9.00		Mr Albanese MP	5.10.00	6.10.00	
Broadcasting Services Amendment Bill 2000 (previous citation: Broadcasting Services Amendment Bill (No. 4) 1999)	1(16.2.00)	9.12.99	7.11.00	Communications, Information and the Arts	17.2.00 9.11.00	4.5.00 8.1.01	16(8.11.00) 1(7.2.01)
Convention on Climate Change (Implementation) Bill 1999	14(22.9.99)		2 .9.99	Senator Brown	3.9.99		
Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (new citation: Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000)	19(1.12.99)	24.11.99	30.10.00	Justice and Customs	2.12.99	15.3.00 11.00	15(1.11.00) 2(28.2.01)
Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000	17(29.11.00)	9.11.00	7.2.01	Defence	30.11.00 1.3.01	5.12.00 7.3.01	2(28.2.01) 3(7.3.01)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Job Network Monitoring Authority Bill 2000	16(8.11.00)	30.10.00		Ms Kernot	9.11.00		
Job Network Monitoring Authority Bill 2000 [No. 2]	16(8.11.00)		31.10.00	Senator Collins	9.11.00		
Migration Legislation Amendment Bill (No. 1) 2001 (previous citation: Migration Legislation Amendment Bill (No. 2) 2000)	4(5.4.00)	14.3.00	26.2.01	Immigration and Multicultural Affairs	6.4.00	26.4.00	2(28.2.01)
Migration Legislation Amendment (Integrity of Regional Migration Schemes) Bill 2000	18(6.12.00)	9.11.00		Immigration and Multicultural Affairs	7.12.00	5.2.01	
Pig Industry Bill 2000	18(6.12.00)	30.11.00		Agriculture, Fisheries and Forestry	7.12.00	14.2.01	
Postal Services Legislation Amendment Bill 2000	5(12.4.00)	6.4.00		Communications, Information Technology and the Arts	13.4.00		
Remuneration Tribunal Amendment Bill 2000	18(6.12.00)	29.11.00		Finance and Administration	7.12.00	31.1.01	
Roads to Recovery Bill 2000	18(6.12.00)	30.11.00	5.12.00	Transport and Regional Services	7.12.00		
Bills being dealt with in 2001							
Australia New Zealand Food Authority Amendment Bill 2001	2(28.2.01)		8.2.01	Health and Aged Care	1.3.01		
Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000	1(7.2.01)	30.11.00	8.2.01	Communications, Information Technology and the Arts	8.2.01	26.2.01	2(28.2.01)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000	1(7.2.01)	6.12.00		Justice and Customs	8.2.01		
Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000	1(7.2.01)	8.2.01	6.12.00	Environment and Heritage	8.2.01	26.2.01	2(28.2.01)
Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Bill 2000	1(7.2.01)	6.12.00		Foreign Affairs and Trade	8.2.01		
Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000	1(7.2.01)		6.12.00	Justice and Customs	8.2.01	20.2.01	2(28.2.01)
National Crime Authority Legislation Amendment Bill 2000	1(7.2.01)		7.12.00	Justice and Customs	8.2.01		
Petroleum (Submerged Lands) Legislation Amendment Bill (No. 3) 2000	1(7.2.01)	6.12.00		Industry, Science and Resources	8.2.01	5.3.01	
Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000	1(7.2.01)	7.12.00		Employment, Workplace Relations and Small Business	8.2.01		
Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000	1(7.2.01)	7.12.00	1.3.01	Finance and Administration	8.2.01	28.2.01	3(7.3.01)
Therapeutic Goods Amendment Bill (No. 4) 2000	1(7.2.01)		7.12.00	Health and Aged Care	8.2.01	20.2.01	2(28.2.01)