Ref No:

18 June 2004

The Secretary
Senate Standing Committee for the Scrutiny of Bills
Suite SG-49
Parliament House
CANBERRA ACT 2600

CBFCA
AUSTRALIA
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Dear Sir or Madam:

Re: Inquiry into Entry, Search and Seizure provisions in Commonwealth Legislation

Reference is made to the Terms of Reference to the above mentioned Inquiry which was referred to the Senate Standing Committee (the Committee) for the Scrutiny of Bills on 25 March 2004. The Customs Brokers & Forwarders Council of Australia Inc. (CBFCA) notes the Terms of Reference, the Fourth Report of the Committee and the Government Response of November 2003.

In relation to its Submission to the Inquiry the CBFCA has confined its comments to the entry and search provisions of the Customs Act 1901 (the Act) and to certain of the Government's Responses to Recommendations of the Fourth Report.

In addition the CBFCA is aware that the Customs and International Transactions Committee (CITC) of the Law Council of Australia will be making a submission to the Inquiry. The CBFCA has undertaken lengthy discussions with the CITC as regards its Submission and as to the issues addressed in the Submission as they relate to the Act the CBFCA endorses the CITC comments.

Should you require further information or comment on the Submission, please do not hesitate to contact me.

Kind regards

STEPHEN J MORRIS
Executive Director

Customs Brokers & Forwarders Council of Australia Inc.

National Office
Tel: 07 3252 1348
Fax: 07 3252 1159
PO Box 303 Hamilton Qld 4007
Brisbane Australia
Email: cbfcano@cbfca.com.au
Website: www.cbfca.com.au

ABN 92 287 746 091

Customs Brokers & Forwarders Council of Australia Inc.

Submission

Inquiry into Entry, Search and Seizure provisions in Commonwealth Legislation

Senate Standing Committee for the Scrutiny of Bills

Recommendation 3

As regards Recommendation 3 to the Committee Report the CBFCA does not understand why appropriate information could not be provided by regulatory agencies as regards their entry and search activities under respective legislation. While there may be no appropriate need for centralised records, the CBFCA does note Annual Reports of regulatory agencies provide much information on a variety of issues such as request for Freedom of Information, Ministerial correspondence, Administrative Penalties issued and a variety of other appropriate performance review data.

The CBFCA sees that it is entirely appropriate for monitoring and or search information to be provided to Parliament and / or also to the public so as to give effect to appropriate regulatory agency transparency of operation and for industry to be aware of activities being undertaken by the regulatory agency in terms of compliance activities. Such reporting is about open good governance principles and these should be supported rather than rejected by Government. The CBFCA urges this issue to be readdressed by the Committee.

Recommendation 10

The CBFCA notes the Government Response of non acceptance of Recommendation 10 to the Committee Report and in Government's comments on non acceptance:

"Furthermore copies of these details are provided to relevant persons such as the occupier of the premises being searched, who is to be provided with the details of the warrant and a receipt for anything seized during the execution of the warrant."[1]

It is the CBFCA's understanding that while search and / or monitoring powers may be appropriately exercised by the regulatory agency and / or its operatives (as to exercising powers as to monitor with consent) and there is or may be notification to the occupier of their rights and obligations the CBFCA sees that a need still exists to ensure appropriate information is provided to the occupier, in plain words not reconstituted legal text, as to rights and responsibilities in relation to any monitoring activity, or undertaken by a regulatory agency with or without the occupiers consent.

It is appropriate that an occupier be informed that the proposed exercise of monitoring is either for the purpose of monitoring compliance, for the purpose of enforcement, or for the gaining of evidence for possible prosecution. This must be a clear statement of purpose rather than a broad notification to enable *"fishing"* exercises.

As to the notice provided by the Australian Customs Service (Customs) as to monitoring activity the commentary in the notice is, in the main, so wide as to enable Customs to undertake activities over and above what the occupier might be assumed as being undertaken.

It has been the CBFCA's experience that occupiers of premises while they may have certain rights in relation to any monitoring and / or search activity are in many instances loath to exercise those rights for fear of alienating the regulatory agency in terms of future compliance activity.

As to additional reporting it is the CBFCA's opinion that rather than leave the occupier of the premise to wonder what may be the outcome of the monitoring activity (whether for statutory

[1] Government Response to the Standing Committee for the Scrutiny of Bills November 2003 P6

compliance or for the purpose of collecting evidence of a criminal breach) it is appropriate that a status report be provided. These issues having been referenced by the Committee as standard features of compliance review arrangements.

The CBFCA endorses the Committee Recommendation 3 for further review by Government.

Recommendation 16

The CBFCA notes the Committee's Recommendation in relation to *covert* searches. On this issue the CBFCA refers to the new processes of the Customs Container Examination Facility (CEF) which commenced in December 2002 and have included a significant level of what Customs perceive as *covert* searches of containers and examination of the goods therein.

The CBFCA sees that there is a distinction between these CEF instigated *covert* searches / examinations and other examinations arrangements undertaken by Customs to determine appropriate import / export compliance requirements.

In the examination of cargo Customs appropriately relies on the provisions of Section 186 of the Customs Act which states, *inter alia:*

"any officer may, subject to Sub Section (2) and Sub Section (3) examine any goods subject to the control of Customs and the expense of the examination including the cost of removal to the place of examination shall be borne by the owner."

It is inherent in terms of commercial aspects applicable to the examination of goods that such examinations are overt in manner with the owner / owner's representative in attendance with Customs so as to, in accordance with Section 186 (3):

- open any packages in which the goods are or may be contained
- test or analyse the goods,
- measure or count the goods, and

to ensure in terms of the import declaration made to Customs in accordance with the provisions of the Customs Act 1901 and the Customs Tariff Act 1995 (and other administrative acts and subordinate legislation) the goods are entered correctly.

It is precedent and practice in such examinations that appropriate records of the outcome of the examinations be agreed between Customs and the owner / owner's representative and that goods unpacked from a container are appropriately repacked and, if and where appropriate, the container resealed. This long standing practice provides appropriate evidence and protection for both Customs and the owner of the goods in terms of any rights and or obligations that may exist in terms of compliance or commercial arrangements.

The new *covert* examinations undertaken by Customs (in terms of containers searched and examination of the goods within the container) raises new regulatory and commercial issues which to date have not been discussed with industry or, to which the CBFCA is aware, subject to any public file work place instructions to Customs staff and / or sub contractors. As these new *covert* searches raises liability issues it is appropriate that good governance principles be applied and that notice be made public as to the process management of CEF searches.

The CBFCA notes under Section 186 that the examination may be conducted by Customs or other persons having the necessary experience appointed to undertake the task. The CBFCA understands that Customs has contracted with third parties to assist in the unpack and repack of containers.

On the issue of liability and other issues relating to the CEF the CBFCA's legal support Hunt & Hunt in conjunction with the CBFCA have discussed issues such as insurance and other liabilities affecting CBFCA members as the result of CEF *covert* searches / examinations. The CBFCA, with

the consent of Hunt & Hunt attaches the Commentary prepared for CBFCA members on CEF liability issues. The CBFCA endorses the Commentary and commends it to the Committee for its consideration as to CEF *covert* searches / examinations.

Conclusion

It would appear that there are a number of unresolved questions regarding liability for damage caused to goods passing through the CEF especially when such goods are subject to *covert* search / examination.

While the CBFCA's Commentary is sector specific and relates to identified *covert* search / examination arrangement it notes that the Committee's Recommendation 16 remains under Government consideration. In case of CEF *covert* search / examination, the CBFCA sees that an onus is cast upon Customs to ensure appropriate support documentation, reseal of container and if needs be any other documentary and or photographic evidence be supplied to the owner or the owner's representative for any commercial liability aspects.

The CBFCA is aware that damage has occurred to goods subject to CEF search and examination and that compensation has been offered to owners by the contractor to Customs. In terms of any such compensation it is difficult to understand how the owner of the goods would be in a position to accept same when authorisation in terms of any search or examination has been undertaken without the consent of, or advice to, the owner and the goods are subject to the control of Customs (and not the contractor).

While provisions may exist within any legal arrangements between Customs and the contractor for the contractor to be responsible to pay for damage from any negligent act, the CBFCA would see that prime liability lies with Customs as to any damage and or loss if same occurred during a Customs *covert* search / examination.

CBFCA AUSTRALIA

WEB BULLETIN

RETURN TO BULLETIN

PRINT ARTICLE

May 5, 2004

Container Examination Facility

Andrew Hudson, Hunt & Hunt Lawyers, Melbourne, Australia, former Chair of the Customs and International Transactions Committee of the Law Council of Australia provides comment on the Container Examination Facility (CEF) and liability issues for cargo loss and / or damage.

At this stage, interest in the Container Examination Facility (CEF) has concentrated on delays and difficulties associated with examination of containers in the CEF and collection of containers following examination.

However, another issue which merits consideration is the liability of the Australian Customs Service (Customs) and its contractors for damage to the contents of containers during examination.

General scheme for examination and Customs Liability

1. As a general proposition, Section 186 of the *Customs Act 1901* (Act) provides the power for Customs Officer to examine goods subject to Customs control. Sub-Section 186(2) reflects that examination may be conducted by another Customs Officer or "other person having the necessary experience" appointed to undertake that task. This contemplates that the Customs can **appoint** third parties to be involved in the examination process. Clearly, the Customs has **contracted** with parties to assist with the examination of the contents of containers, including those associated with delivering containers to the CEF and returning containers from the CEF together with those contracted to pack and unpack containers for examination. An issue arises whether those contractors have been appointed pursuant to Section 186. The relevant documents have not been made public.
2. This raises the issue of liability of the Customs or its contractors for damage to goods in containers subject to examination. Section 34 of the Act is a relatively simple section which bears repeating in its entirety.

> *The Customs shall not be liable for any loss or damage occasioned to any goods subject to the control of the Customs except by the neglect or wilful*

act of some officer."

I now turn to consider the possible application of Sections 186 and 34 of the Act to govern liability for damage to goods within the CEF.

Who is liable for damage?

1. Clearly, Section 186 of the Act contemplates that the Customs may examine containers. Section 34 then protects against liability "except by the neglect or wilful act of some officer".

   It seems unlikely that some officers of the Customs would wilfully damage goods within containers. Damage said to be caused by true accident seems not to be subject to liability. However, there is the likelihood of other damage caused by neglect by Customs – when they should have done things differently.

   Section 34 suggests that the Customs will still remain liable to the extent that damage is caused by negligence. This raises that whole range of issues associated with a negligence action including establishing whether Customs owes a duty of care to those whose containers are subject to the CEF (I would think so) and the standard of care to be exercised by the Customs. Clearly, it is in the interest of all persons that the Customs be thorough in the way in which the examination is conducted. However, that would not relieve them of an obligation to undertake that examination properly taking into account the rights of the persons whose goods are in the container.

2. The contracts between Customs and its "Contractors" are doubtlessly "commercially in confidence". We can only presume that their contracts also includes provisions by which they are "appointed" for the purposes of Section 186 of the Act.
3. The issue is raised whether contractors "appointed" by the Customs for the CEF are "Customs" to receive protection under Section 34 of the Act.

   This raises the following considerations.

   a. Contractors are just that. Contractors. As stated before, the contractual arrangements are presumably commercial in confidence. However, we can safely assume that they are not appointed as staff of the Customs under the Public Service Act. Presumably, in accordance with all normal

practice, all contracts reflect that those appointed are not treated as employees.

b. Section 34 does not expressly afford protection to Customs and "those appointed by Customs or their contractors". This can be contrasted to Section 186 which refers to the Customs and those it appoints. Such terminology is used elsewhere but not in Section 34.
c. Section 34 affords protection to "The Customs". However, that term was removed from the Act in 1992.
d. As a result of the deletion of the term "The Customs" it can only be assumed that Section 34 is to afford protection to Customs defined in Section 4 of the Act as the "Australian Customs Service".
e. Section 4 of the Customs Administration Act 1985 ("Customs Administration Act") governs the establishment of the Australian Customs Service. Sub-section 4 (3) states that the Australian Customs Service consists of the CEO and "staff" referred to in Section 15 of the Customs Administration Act. Section 15 of the Customs Administration Act identifies "staff" as those engaged under the Public Service Act. Presumably, those contractors at the CEF and their employees are not appointed pursuant to the Public Service Act.
f. Sub-Section 4(4) of the Customs Administration Act contemplates that a person can be appointed in writing by the CEO "to perform a function or only functions of a person employed by the Customs". However while the sub-section refers to the person being subject to the direction of the CEO, it does not deem that they would be treated as officers of the Customs
g. Section 16 of the Customs Administration Act provides for disclosure of certain information to persons engaged to provide services to the Customs. However, this is separate to the reference staff of the Customs contemplated by Section 34.

As a matter of statutory interpretation, this

suggests that Section 34 should only apply to the Customs Officers and not their appointers or contractors.

Accordingly, this leaves the unresolved issue as to whether contractors appointed to assist with the CEF could be treated as officers of the Customs to be afforded protection under Section 34 of the Act. Without the benefit of the commercial contracts and also without the benefit of details of any internal appointment by the Customs, it would appear that there is a serious doubt as to whether those parties contracted to undertake activities at the CEF would be treated as officers of Customs to be afforded the protection under Section 34 of the Act.

4. Even if the contractors working at the CEF are treated as officers of the Customs for the purposes of Section 34 of the Act, they would still remain liable for neglect or wilful act. Again, this raises the issue of the duty of care owed to persons whose goods are in the CEF.
5. Even should parties be liable under Section 34 of the Act for wilful act or neglect, a person wishing to recover against the Customs or its contractors faces a significant problem of proof. The CEF's are conducted in a secure and private manner. While there would be closed circuit TV monitoring of activities in the CEF, there must be some doubt as to whether that closed circuit TV coverage would be available to a plaintiff in an action to recover damages in a civil action. There would also be the further difficulties of establishing whether particular damage was caused by an officer of the Customs or a contractor or, whether it occurred during the course of examination of the CEF.

Conclusion

It would appear that there a number of unresolved questions regarding liability for damage caused to goods passing through the CEF (regardless of the issue of delay). We understand the Australian National Audit Office ("ANAO") are undertaking a review of the operation of the CEF and we would hope that the ANAO review provides additional transparency as to the operation of the CEF, the contractual arrangements effecting the CEF and the potential liability for goods damaged during examination at the CEF. We await such review with significant interest. However, in the meantime, we strongly recommend that parties review their insurances to ensure that they cover damage in the CEF or damages occasioned in the journeys to and from the CEF.

COMMENT:

This paper was prepared by Hunt & Hunt to address issues raised by the Customs Brokers & Forwarders Council of Australia Inc. on CEF arrangements.

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