Law Council
OF AUSTRALIA

30 June 2004

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

Dear Secretary,

I refer to the Standing Committee for the Scrutiny of Bills ("the committee") inquiry into the operation of entry and search provisions in Commonwealth legislation and for your invitation for the Law Council of Australia to provide a submission to the inquiry.

I understand that the committee is to report by the first sitting day in March 2005.

The committee has been asked specifically to inquire into the Government's response to its previous report on entry and search provisions tabled in 2000, entry and search provisions made since that report was tabled, including provisions that authorise the power to stop and search people, and provisions that authorise the seizure of material.

As you may be aware the Law Council of Australia is the peak national representative body of the Australian legal profession. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;

- New South Wales Bar Association;
- The Northern Territory Bar Association;
- Queensland Law Society;
- the Western Australia Bar Association; and
- the Victorian Bar.

The Law Council notes that in relation to this matter separate submissions may be lodged by some of these bodies.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council of Australia welcomes the opportunity to comment to this inquiry. Given the broad range of legislation within which search and entry provisions are contained, this matter was referred to the Law Council's constituent bodes and various sections for their comment. To date it has only received comment from the Law Council's Customs and International Transactions Committee (CITC) within the *Business Law Section*. This submission contains quite detailed comment on legislation within this area and a copy of their submission is **attached** for your consideration. The CITC's submission has not been considered by a meeting of the Law Council's Directors.

By way of general comment, the Law Council also wishes to express its agreement with the recommendations of the committee in its previous report[1] that all entry and search provisions in legislation (including bills) should, wherever possible, conform with a set of fundamental principles.

In the Law Council's view it is appropriate that these principles, as the committee previously observed, conform to the requisite standard of entry and search provisions available to the Australian Federal Police (AFP) pursuant to the *Crimes Act 1914* and should only exceed these powers in exceptional circumstances.

The Law Council appreciates the Government's arguments that some Commonwealth agencies should be given powers in excess of those available to the AFP under the *Crimes Act 1914* to take account for the unique circumstances of their regulatory or enforcement activities. However, it is of the view that these circumstances will be rare and should be proven to be exceptional cases. We believe such an approach should be enshrined in the set of principles discussed above.

The Law Council's arguments against new detention warrants provided for under the *Australian Security Intelligence Organisation Legislation (Terrorism) Bill 2002* are well known to the Senate (through its previous submissions to the Legal and Constitutional Legislation committee). In the event that these

[1] Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 1999, *Entry and Search Provisions in Commonwealth Legislation*, 6 April 2000.

the Legal and Constitutional Legislation committee). In the event that these new powers are considered within the ambit of this inquiry as "new legislation" relating to the stopping and searching of people, we would draw the committee's attention to our previous comments in opposition to these powers.

We agree with the committee's previous observation that search and entry powers should be routinely monitored and a register of the exercise of any such powers is kept by an appropriate agency.

Finally, in respect of search and entry procedures relating to the premises of legal practitioners, the Law Council wishes to draw to your attention the fact that separate protocols exist between the Law Council and both the AFP and the Australian Taxation Office (ATO) in relation to this. The Law Council reserves the right to raise further issues in relation to these matters within the context of any review as agreed to by the relevant parties. This submission should not be misconstrued as providing comment on these protocols.

I trust you will find this information of assistance and thank you for providing the Law Council with the opportunity to comment to the inquiry.

Yours faithfully

PETER WEBB
SECRETARY GENERAL

Submission by the Customs and International Transactions Committee of the Law Council of Australia's *Business Law Section*

to the

Inquiry on Entry, Search and Seizure by the Senate Standing Committee for the Scrutiny of Bills

Introduction

The Customs and International Transactions Committee ("CITC") of the Law Council of Australia ("LCA") is a Committee within the Business Law Section ("BLS") of the LCA. The CITC concentrates on matters relating to the *Customs Act 1901* ("Customs Act") and other related legislation affecting the international carriage of goods. The Customs Act and related legislation contains significant Entry, Search and Seizure Provisions.

Previous Submissions of the CITC and Parliamentary Inquiries

The Standing Committee may also be aware that since the date of its report ("Report") in April 2000 into Entry, Search and Seizure Provisions in Commonwealth Legislation, the CITC has made a number of submissions to Parliamentary Inquiries into the provisions of the Customs Act and related legislation.

These submissions have included the following.

1. Submissions to the Inquiry into the Customs "Trade Modernisation Legislation" conducted by the Senate Legal and Constitutional. Committee in March, April and May 2001.

2. Submissions to the "Inquiry into Five Security Bills" by the Senate Legal and Constitutional Committee in March and April 2002. The submissions focussed on the amendments to the Customs Act effected by the Border Security Bill 2002.

3. Submissions to the Inquiry into the Application of Strict and Absolute Liability Offences in Commonwealth Legislation conducted by the Senate Standing Committee for the Scrutiny of Bills in June and July 2002.

4. Submissions to the Inquiry into the Modern-day usage of Averments in Customs Prosecutions conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The report of the Inquiry was released on 31 May 2004.

Other involvement in Law reform issues

The CITC has also been involved in other regular reviews of the Customs Act and its operation including submissions to the Reference into Civil and Administrative Penalties conducted by the Australian Law Reform Commission in 2001 and 2002. A member of the CITC was a member of the Advisory Committee to the Reference. The CITC also interacts regularly with the Australian Customs Service ("ACS") on issues of concern.

Relevantly to this Inquiry, the attention of the CITC has turned in recent times, to the Customs Legislation Amendment (Application of International Trade Modernisation and other measures) Act 2003 ("Amendment Act") which included new powers to the Minister for Justice and Customs to detain goods which otherwise satisfy all criteria for release into home consumption.

Main focus of the CITC

The intention of the CITC in its activities has focused on 2 main elements. Firstly, the practical impact on industry of legislation and proposed amendments and, secondly, concerns that the amendments to legislation and changes to practice have adverse impact on the rights of individuals and companies conducting trade. In this letter capacity, the CITC has reviewed

amendments to legislation which directly fall in the Terms of Reference of the Standing Committee.

Observations of the CITC

The CITC wishes to make the following observations regarding each of the issues within the Terms of Reference of the Standing Committee. The members of the CITC would also be pleased to provide additional submissions in person. Please note that the comments in this submission are endorsed solely by the BLS and are not comments of the Executive of the LCA. These comments also relate solely to the Customs Act and related legislation. The CITC believes this area to be of significant importance. The borders of Australia and its barriers are points of risk for Australian national interest. However, undue interference can adversely effect Australian trade, Australian traders and their service providers.

The First Term of Reference

> *"The Government's responses to the Committee's Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation and, in particular whether there has been any resultant impact on the practices and drafting of entry and search provisions."*

1. The CITC notes that the Government's response to the Report was only delivered in August 2003, over 3 years from the delivery of the Report. The CITC believes that such a period is entirely too long and that the expectation is that Government would provide a more timely response to a Report by a Standing Committee.

2. The CITC made a number of recommendations in its review of the Trade Modernisation Legislation regarding new "Entry and Search" provisions. For present purposes, many of those recommendations focussed on the new "Monitoring" and "Export examination" powers granted to the ACS. For current purposes, we will describe both powers as "monitoring powers". These new monitoring powers were matched with new obligations on parties involved in the supply chain to keep copies of relevant commercial documents or records of communications to the ACS. The intention of the amendments were to assist the ACS in determining compliance by parties with their reporting obligations, to protect the government revenue, ensure that proper reporting was taking place, assist with national statistics and aid the Government's efforts to stop the trade in illicit drugs and other materials. A number of recommendations of the CITC were adopted in amendments to the Trade Modernisation Legislation. The scheme for Monitoring Powers and Export Examination Powers now includes the following.

   (a) Obliging officers of the ACS to be duly trained and authorised to exercise those powers.

   (b) Requiring officers of the ACS to carry identity cards identifying themselves as an officer authorised o exercise the powers and the powers which they are exercising.

   (c) If the powers are being exercised with the consent of the subject to the inquiry, the ACS can only deal with an "Occupier" (defined to be the person apparently in charge). This must be a suitably senior member of the management staff of the party subject to the Inquiry.

(d) In all cases, the ACS is obliged to provide the subject of the Inquiry with a statement of their rights and obligations

(e) If the ACS is exercising powers by consent:

(i) It must seek consent in writing;

(ii) The subject of the Inquiry is entitled to have the exercise of the powers cease by notice in writing.

(f) If the ACS is exercising powers pursuant to a "Monitoring Warrant" (which entitles them to compel entry and the production of documentation), the ACS officers must still observe basic requirements such as the provision of a copy of the Warrant, providing the statement of rights and obligations and will, to the extent possible, only deal with the "Occupier".

The view of the CITC is that these elements contained in the Customs Act pursuant to the Trade Modernisation Legislation regarding the exercise of entry and search powers present a useful template as to how such powers may be exercised elsewhere in the Customs Act and related legislation. It is also instructive that the ACS has maintained that the Monitoring and other powers were based on recommendations in the Report and were cleared by the Criminal Law Policy of the Attorney-General's Department (see page 52 and footnotes 185, 186 and 187 of the report by the Senate Legal and Constitutional Committee of May 2001). It follows that anything less than that set out in the Trade Modernisation Legislation may fall short of the standard dictated by the Report.

3. The CITC would suggest that the recommendations in the Report together with the form of the monitoring powers and general practice support a number of basic elements to be contained in entry and search powers.

(a) Powers are only to be conferred for clear purposes.

(b) Powers are only able to be exercised by duly trained and authorised officers of the ACS or other regulator.

(c) The authorised officer must display their name and official capacity in an Identity Card.

(d) Powers should primarily be exercised with informed consent secured in writing, which consent can be withdrawn at any time.

(e) The subjects of inquiry must be provided with statements of their rights and obligations at the time of exercise of the powers.

(f) Where possible advance notice of inquiry should be given specifically the purpose of the inquiry and documents required.

(g) There should be no obligation to answer questions where the answer could incriminate the person answering.

(h) Any goods seized should only be held for a maximum of 6 months unless a prosecution is commenced and proper commercial compensation paid if no

prosecution is issued and/or the goods are destroyed or condemned. This is addressed is more detail below.

(i) Warrants should only be issued as a last resort (in the event of non-co-operation) or in urgent situations. Supporting evidence must be provided by affidavit to the relevant Magistrates.

(j) A positive obligation to be placed on the ACS to provide legible, organised copies of documents seized within seven (7) days of seizure, without the need to request.

(k) The exercise of warrants should be subject to the following conditions.

  (i) A monitoring warrant should identify the specific issue of interest and concern. The general nature of these warrants permits "fishing expeditions".

  (ii) The right to seek legal advice and have the exercise of the warrant delayed until the lawyer arrives and/or provides advice.

  (iii) A mechanism to resolve any disputes as to legal professional privilege on documents potentially subject to the warrant. This would involve those documents to be separately secured and subject to legal review, with the protocol established by the LCA with the ATO for claims for privilege in ATO "raids".

  (iv) If the ACS wants the exercise of the warrant or its inquiry to be kept secret, by a service provider, this should be subject to an separate order by a Magistrate and indemnity from the ACS if the service provider is held liable for breach of duty by not informing the client.

(l) Consistent guidelines for the exercise of warrants across all states of Australia.

(m) Magistrates should be trained as to specific grounds for warrants to be issued and should provide reasons for the exercise of discretion to issue warrants.

(n) Guidelines should be established for these entry and search arrangements which are subject to Parliamentary scrutiny.

(o) The exercise of entry and search powers should be subject to review both by the Commonwealth Ombudsman (for specific issues) and the Australian National Audit Office (for general review) every 12 months.

For these purposes, we would describe these essential basic elements as an "Entry and Search Protocol" to form a basis for comparison of legislation enacted since the Report and a basis for review of proposed new legislation.

4. The CITC is concerned that many of the elements of the Entry and Search Protocol have not been reflected in legislation to the Report which has conferred significant powers on people who undertake entry and search (whether of goods and persons). For example, Part 8 of the *Maritime Transport Security Act* 2003 ("Maritime Transport Security Act") confers significant additional search, seizure and entry powers on a

number of new categories of "Officers" created by that legislation. However, not all elements of the Entry and Search Protocol appear in these provisions. For example,

(a) There are many different classes of officers exercising different types of powers which can create confusion for those the subject of the inquiry.

(b) Subjects of inquiry do not receive statements of their rights and obligations

We believe that the Maritime Transport Security Act would benefit from inclusion of provisions requiring an officer exercising powers to provide the subject of their inquiry with a statement of their rights and obligations as contained in the Trade Modernisation Legislation. Similar issues arise in respect of powers being conferred on officers created under the *Aviation Transport Security Act (2004)* ("Aviation Transport Security Act").

5. The CITC is also concerned that legislation subsequent to the Report has imposed additional rights of search, seizure and detention for purposes which are not adequately defined. This creates a degree of uncertainty and a lack of transparency which is the aim in all legislation. Some examples are as follows:

(a) Amendments affected pursuant to the Amendment Act (the new Division 5 of Part IV of the Customs Act) conferred on the Minister for Justice and Customs a power to detain goods subject to the prohibited import scheme even where relevant permits have been secured if it was in the "public interest" to do so. The concept of "public interest" is not defined. It strikes the CITC that there are ample other provisions in the *Customs Act* and related legislation which provides for seizure of goods. There are provisions to seize goods for a variety of reasons. It seems unreasonable to incorporate an additional general power to detain such goods in circumstances which are less than clear.

(b) The CITC had previously objected that the grant of new "Monitoring Powers" to the ACS were too broad, insofar that they entitled the ACS to exercise powers to monitor compliance with any "Customs-related law". The term is defined as follows:

> *"Customs-related law means:*
>
> *(a) this Act; or*
>
> *(b) the Excise Act 1901 and regulations made under that Act; or*
>
> *(c) any other Act, or any regulations made under any other Act, in so far as the Act or regulations relate to the importation or exportation of goods, where the importation or exportation is subject to compliance with any condition or restriction or is subject to any tax, duty, levy or charge (however described)."*

We believe that this term is too broad. For example, there is an argument that the provisions of the Maritime Security Act and the Aviation Transport Security Act (together with "Transport Security Acts") fall within the definition of a "Customs-related law". That could confer ACS "Monitoring

Officers" or "Export Examination Officers" with the power to enter and search to establish compliance with the Transport Security Acts when those persons would not come within the categories of officers authorised to exercise powers under the Transport Security Acts. Similarly, these same ACS Officers could be entitled to exercise audit and search powers pursuant to the ACIS, Tradex and Duty Drawlock schemes which are administered by other Government Departments and whose officers have different audit and search powers. This creates significant uncertainty and is contrary to the notion that entry and search powers be conferred for specific purposes.

While we appreciate that the intention was to confer broader powers on the ACS, we believe that it is appropriate for the monitoring powers of the ACS to be limited purely to establishing compliance with the Customs Act.

6. A concern arises as to the use of warrants. As discussed above, with the grant of the new monitoring powers, the ACS was also granted a new power to require parties to answer questions and new obligations were imposed on people in the supply chain to retain commercial documents and records of communication. The ACS could require production of those materials upon notice. It was assumed that these powers were to provide ample opportunities for the ACS to undertake necessary reviews of activities without the regular need to have recourse to exercise a warrant, whether they be monitoring warrants or other types of warrants pursuant to the Customs Act (such as those relating to the seizure of evidential material).

However, recent anecdotal evidence suggest the following:

(a) Notwithstanding assurances from officers of the ACS on the introduction of the Trade Modernisation Legislation that warrants would only be used as a matter of last resort, the ACS has been seeking recourse to the exercise of warrants as a first recourse rather than exhausting all other opportunities including requesting the production of documents or the answering of questions.

(b) There appears to be inconsistency in the approach to the exercise of Customs powers (including warrants) as between ACS officers in different States of Australia. The best approach would be to have a consistent approach across Australia.

(c) Warrants have been exercised at the offices of service providers such as Customs Brokers or Freight Forwarders in relation to alleged breach by their clients. The normal professional response of the service provider is to advise the client of the exercise of the warrant, and the existence of the ACS inquiry. Indeed, it could be construed as a professional obligation by the service provider to inform the client as to the inquiry and the exercise of the warrant and to seek instructions as to co-operation. However, on occasion, officers of the ACS have placed pressure on service providers not to advise clients of the warrant or inquiry. This is unreasonable and should be addressed as in the Entry and Search Protocol.

(d) Following an audit by the ACS, when questions or issues arise, rather than putting those questions to the relevant importer or exporter or requesting the production of commercial documents, the ACS has immediate recourse to a warrant. This is inconsistent to the ACS Fact sheet entitled "A guide to Customs Audits under Compliance Improvement" dated September 2000 which is

available on the ACS website. A copy is attached marked "A". This states, in part, on page 2

"The audit team will discuss any specific errors with you"

The exercise of warrants should be addressed in the Entry and Search Protocol.

7. The CITC notes that the Government provided no substantive response to the issues raised in the Report regarding the exercise of "covert" powers. The CITC is concerned that covert powers should only be able to be exercised in very limited circumstances and subject to proper record and report. The exercise of covert powers impacts on the rights of parties to have their persons and goods transported without interference. Further, the exercise of covert powers could damage and delay goods. The absence of explanation as to the occurrence of the covert search and what transpired during the covert search can expose others to liability (for example for damage during the search). Accordingly, there should be a separate general "Covert Search Protocol" Governing;

(a) Who can conduct the search.

(b) How the search can be conducted.

(c) A proper record of the nature of the search (including damage).

(d) Indemnity from Government as to liability both through damage and delay. The existing compensation provisions are too limited

8. A specific concern arises as to the "covert" examination of cargo passing through the Container Examination Facilities ("CEF"). These searches are covert to the extent that there is a record of the hold of containers but not why or what occurs. These permit the X-ray of large containers and for those containers to be opened, the contents examined and the containers re-packed and sent. The regime for the undertaking of searches and inquiries at the CEF is not very clear. It appears that the ACS is generally relying on the provisions of Section 186 of the Customs Act but that pre-dates the establishment of the CEF and it does not really provide a comprehensive response to the type of issues which arise out of the examination of containers at the CEF. A copy of Section 186 is attached marked "B". For example, the following issues arise.

(a) The ACS seems to be claiming the benefit of Section 34 of the Customs Act to protect against liability for damage to goods in container. A copy is attached marked "C". However,

(i) The Section only applies to officers of the ACS not contractors (who are not officers). Contractors are retrained for the collection of containers and return to container depots and to assist in the unpack and re-pack of containers.

(ii) It does not cover all damage. There is still liability for deliberate and negligent act.

(b) The provisions of the Act do not address practical and procedural matters which arise from the containers being sent to the CEF. For example, there is no record available to importers and exporters (or their agents) which identify when the goods were delivered to the CEF, who packed or unpacked those goods, what

search was undertaken, what was the result of the search, the state of the original seals on the containers and the way in which the contents of the containers were handled. These issues are vital when it comes to allocating responsibility as between shippers, carriers, agents and importers and exporters for damage arising to containers or goods within those containers. They are also effect the ability of plaintiffs to recover for damage through absence of evidence.

(c) Issues have arisen as to delays in the return of containers sent to the CEF. Although these appear to be a relatively small amount, they are still a very relevant issue for those whose containers are delayed which leads to costs in terms of container damage and demurrage.

(d) Customs Brokers are generally placed under pressure not to inform clients of the reason their goods are detained is due to examination in the CEF. This seems unreasonable in the absence of specific reason from the ACS.

(e) Thee are other provisions authorising the search of containers under Subdivision D of Division 2 of Part XII (Section 203 to 203D). The ACS should be clear if the CEF is being conducted subject to those provisions.

It is the view of the CITC that a more comprehensive regime needs to be established to govern the passage of goods through the CEF, the handling of those goods, the reporting of the handling of goods and liability for damage and delay. We would describe this as the "CEF Search Protocol". More detail is set out in the Recommendation of this Submission.

The Second Term of Reference

> *"A review of fairness, purpose, effectiveness and consistency of entry and search provisions in Commonwealth legislation made since the Committee tabled its Fourth Report of 2000 on 6 April 2000."*

From the commentary in the preceding paragraphs, we believe that even with the areas falling within the review of the CITC, there is inconsistency in the exercise of entry, search and seizure powers. Examples can be found in the following.

1. Inconsistency between the means used by the ACS exercises their monitoring powers when compared to the exercise of search and seizure powers by officers under the Maritime Transport Security Act and the Aviation Transport Security Act.

2. The absence of a proper and comprehensive regime for Covert Searches and the recording of the transport and review of containers at the CEF.

3. The increased grant of powers to the ACS to undertake examination and search (both of persons and containers) for ill-defined purposes.

4. The use of detention powers "in the public interest" despite ample specific powers.

The Third Term of Reference

> *"A review of the provisions in Commonwealth legislation that authorise the seizure of material and, in particular:*

(a) the extent and circumstances surrounding the taking of material that is not relevant to an investigation and the use and protection of such material; and

(b) whether the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material."

1. There are concerns that recent episodes of seizure and search have been undertaken in a manner which exceeds the requirements of the ACS. The approach seems to be that the ACS will exercise each and every of their powers without full regard as to whether the full exercise is absolutely required and whether additional information or documentary evidence can be secured directly from the person under inquiry. This approach is, unfortunately, supported by the very general nature of monitoring warrants.

2. The Customs Act permits the seizure of significant quantities of material and a scheme for its return or copies to be made on request. This is inconvenient and the ACS should have a positive obligation to provide copies.

3. There are problems associated with the seizure of goods by the ACS at the request of holders of copyright and trademark of goods in Australia. The current scheme provides that Australian holders of copyright and trademark rights may advise the ACS that they believe that goods are being imported which infringe their rights. On that basis, the ACS is then empowered to seize those goods pending prosecution by the holder of the intellectual property. If the holder of the intellectual property rights does not exercise a prosecution then the goods are released to the recipients of the goods in Australia. However, that creates a significant degree of uncertainty as to the whereabouts of the goods and their status pending prosecution or their release to the Australian importers.

4. There are tensions and inconsistencies between the various regimes for seizure of goods by the ACS. Some examples are as follows.

   (a) The scheme for the seizure of "intellectual property" described above seems to confer power on the ACS to protect the proprietary rights of an individual. This seems unreasonable especially when there is no guarantee that prosecution will follow. The Allen Report contained proposed review of these provisions which should be considered. Further, it is our view that an alternative scheme could entail the following.

      (i) The holder of the intellectual property notifying the ACS of their rights.

      (ii) The holder of the intellectual property advising the ACS of likely shipments of infringing goods.

      (iii) The ACS advising of the pre-report of the shipments (or similar). This should be able to be done with new Intergrated Cargo System requirements and increased pre-notice obligations.

      (iv) The holder of the intellectual property arranging its own orders from a Court and its own seizure rather than relying on the ACS once the goods have "arrived".

(b) The scheme for seizure of goods believed to be forfeited goods (Subdivision G of Division 1 of Part XII) and those seized in transit (Subdivision GA of Division 1 of Part XII) is different to the scheme applying to goods detained in the public interest pursuant to Division 5 of Part IV (added by the Trade Modernisation Amendment Act). The offences include the following.

(i) There are special forms of notice of seizure for "forfeit" goods (Section 205A) and "in-transit" goods (Section 209E). However, there is no prescribed form of notice for goods detained "in the public interest".

(ii) The service of notices for seizure for forfeit goods (Section 205) and in-transit goods (Section 209D) is different to that for goods detained in the public interest (Section 77AB). There is no time limit under Section 77EB and no provision for alternative public notice.

(iii) There are different provisions for compensation. The amount payable for "forfeit" goods (Section 205F) and for "in-transit" goods (Section 209H) is based on sale proceeds (if goods sold) or market value (if destroyed). However, compensation for "public interest" goods depends on Section 4AB. A copy of this Section is attached (marked "D"). This requires payment of compensation for the acquisition of 'property' on the basis set out in Section 51 (XXXI) of the Constitution (otherwise known as "The Castle" compensation). It is doubtful that it should apply to goods seized "in the public interest" Market value would appear to be more appropriate.

As a result we would recommend that seizure provisions be revised to incorporate a new scheme for goods subject to intellectual property claims (as set out in paragraph 4 (a) above) and for all other goods be subject to the same scheme set out for "forfeit goods" and "in-transit goods".

Recommendations

1. Review all legislation passed since the date of the Report to establish any inconsistency to the Entry and Search Protocol described above. Any inconsistency should be remedied by amendment. Examples of amendments could include.

(a) No detention of goods "in the public interest" as in Section 77EA (being too broad a concept).

(b) Monitoring powers only exercisable to establish compliance with the Customs Act not Customs – related Law"

(c) Requiring that monitoring warrants only be exercisable in relation to specific items rather than permitting general seizure of a variety of documents.

(d) Requiring exercise of search powers under the Transport Security Acts to be subject to production of statements of rights and obligations to the subject of the inquiry.

2. Ensure that all proposed legislation involving entry and search powers against Entry and Search Protocol to ensure that they are consistent.

3. Establishment of a "Covert Search" protocol as described above. This should remedy the failure by the Government to respond to the recommendation in the Report.

4. Establish a separate specific CEF Search Protocol as described above to address concerns as to use of the CEF. This should include the following.

   (a) A proper reporting on the new Integrated Cargo System that the goods are subject to examination at the CEF.

   (b) A report of the delivery to and collection of containers from the CEF.

   (c) A report as to who handled the goods in which way in the CEF together with proper records of any damage to the goods and the circumstances of damage.

   (d) A Proper mechanism for authorising those undertaking examination of goods who are not officers of the ACS.

   (e) A proper scheme to compensate for damage and delay.

   (d) As a general matter Brokers and Freight Forwarders should be able to advise their clients that goods are in the CEF and are subject to due examination. The ACS should not normally request such agents to withheld details from their clients. Any request for confidentiality should be in writing and include an indemnity against actions for non-disclosure by clients.

5. Review the seizure of goods subject to intellectual property claims in the manner recommended in paragraph 4(a) of the comments regarding the Third Term of Reference.

6. All other seizures of goods by the ACS should be subject to the scheme set out for "forfeit" goods and "in-transit" goods. This requires a change to "public interest" process described in paragraph 4(b) of the comments regarding the Third Term of Reference.

7. The Commonwealth Ombudsman being specifically authorised to review the exercise of these powers by the ACS.

8. A regular review of the exercise of search and seizure powers, whether pursuant to a warrant or otherwise. This should be conducted by the ANAO no later than once in every 12 months. This should be conducted by way of Public Inquiry with representations sought from all interested parties.