

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
JOINT COMMITTEE OF PUBLIC ACCOUNTS

REPORT 327



Finance Minute on Report 325

Australian Government Publishing Service
Canberra

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA



REPORT 327

Finance Minute on Report 325

NOVEMBER 1993

JOINT COMMITTEE OF PUBLIC ACCOUNTS

DEPARTMENT OF THE SENATE
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<i>Mary Evans</i>

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JOINT COMMITTEE OF PUBLIC ACCOUNTS
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Secretary: Mr T R Rowe

Inquiry Officer: Dr J Carter

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1. Appointed 19 August 1993
 2. Discharged 19 August 1993
 3. Discharge 17 August 1993
 4. Discharged 18 November 1993
 5. Appointed 19 August 1993
 6. Appointed 30 September 1993
 7. Discharged 17 August 1993
 8. Appointed 5 July 1993, Discharged 19 August 1993
 9. Appointed 18 November 1993

DUTIES OF THE COMMITTEE

Section 8(1) of the *Public Accounts Committee Act 1951* reads as follows:

Subject to sub-section (2), the duties of the Committee are:

- (a) to examine the accounts of the receipts and expenditure of the Commonwealth including the financial statements transmitted to the Auditor-General under sub-section (4) of section 50 of the *Audit Act 1901*;
- (aa) to examine the financial affairs of authorities of the Commonwealth to which this Act applies and of inter-governmental bodies to which this Act applies;
- (ab) to examine all reports of the Auditor-General (including reports of the results of efficiency audits) copies of which have been laid before the Houses of the Parliament;
- (b) to report to both Houses of the Parliament, with such comment as it thinks fit, any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Parliament should be directed;
- (c) to report to both Houses of the Parliament, any alteration which the Committee thinks desirable in the form of the public accounts or in the method of keeping them, or in the mode of receipt, control, issue or payment of public moneys; and
- (d) to inquire into any question in connexion with the public accounts which is referred to it by either House of the Parliament, and to report to that House upon that question,

and include such other duties as are assigned to the Committee by Joint Standing Orders approved by both Houses of the Parliament.

PREFACE

This Report contains the Finance Minute (or formal response) on Report 325, *The Midford Paramount Case and Related Matters*, together with Committee comment on the Finance Minute and in particular, comments made by the Commonwealth Director of Public Prosecutions (DPP) in an appendix to the Finance Minute.

The Inquiry into the Midford Paramount Case and Related Matters revealed significant failings in Commonwealth administration and of necessity, resulted in a report to the Parliament which was critical of both the Australian Customs Service, and to a lesser extent the DPP. While the Committee may have anticipated that these agencies would not agree with all of its recommendations, it did not at any time foresee the gratuitous comments that would be offered by the DPP in the Finance Minute.

The DPP's comments, if read in isolation, would present a reader with a false view of the Committee's Inquiry and Report 325. Therefore to ensure that the Parliament and other interested parties are presented with a balanced view, the Committee has prepared this Report. Needless to say, the Committee is firmly of the view that Report 325 stands on its own merits as a thorough and balanced document.

I note in passing, that in recent days the Minister for Small Business and Customs, Senator the Hon Chris Schacht, has announced the Government's decision to award some \$25m to the claimants in the Midford Paramount Case and others. This decision is a strong message to the Committee that it got it right!

For and on behalf of the Committee

**L J Scott, MP
Chairman**

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Part 1 INTRODUCTION AND COMMENT

Chapter 1 - Introduction

Chapter 2 - Comment

Chapter 1

INTRODUCTION

- . Background
- . The Finance Minute Process
- . Report Structure

Background

1.1 This Report contains the Finance Minute on Report 325, *The Midford Paramount Case and Related Matters* which was tabled on 18 December 1992.

1.2 Report 325 details the Committee's investigation of the actions of the Australian Customs Service (ACS) in its prosecution of a Wollongong-based shirt manufacturer, Midford Paramount. The case, which revolved around alleged quota irregularities, collapsed during the committal proceedings in June 1989, when the prosecution's expert witnesses were discredited. The Committee was critical of the actions of the government agencies involved, including the ACS and the Director of Public Prosecutions (DPP), and could find no evidence of wrongdoing by any of the defendants in the matter.

1.3 In Report 325, the Committee made a total of 134 recommendations, five were of a policy nature and the remainder concerned matters of administration. In response to the first recommendation - *that the defendants in the Midford case and others be compensated for their unrecovered material and legal costs* - the Prime Minister created an Inter-Departmental Committee to advise the Government on the amounts of compensation to be paid. The recommendation of the Inter-Departmental Committee was conveyed to Cabinet and, on 10 November 1993, the Minister for Science and Small Business, Senator the Hon Chris Schacht, released details of the compensation. This was in the form of an ex-gratia payment and the Committee welcomes the compensation and notes that the Senator's media release included the statement, 'The Government now publicly states that it has no reservation about the integrity of any of these people.'

1.4 Earlier in the year, on 4 May 1993, Senator Schacht announced that the Government would commission an independent review of the ACS. The review, headed by Mr Frank Conroy, is inquiring into the efficiency and effectiveness of the ACS and will report by the end of 1993. The Committee awaits with interest the outcome of this review as well as the results of future audits of the ACS by the Australian National Audit Office.

1.5 Because of the tenor of the response by the DPP in the Appendix to the Finance Minute, the Committee has decided to depart from its usual practice of publishing a combined volume of all the Finance Minutes received during the year and to provide the Parliament with this separate report which contains specific comment on the Finance Minute on Report 325.

1.6 The Committee is disappointed at the comments made by the DPP, for they indicate that the Director has learnt little from the Midford case or the Committee's Inquiry. The comments within the Appendix to the Finance Minute contain simple errors of comprehension, and demonstrate a lack of understanding of basic fundamentals such as public accountability, the role and functions of parliamentary committees, and the presumption of innocence. The DPP's response calls into question the competence of those involved in its compilation.

1.7 It should be noted that, although only brief comments are made concerning the response from the ACS, publication of this report does not necessarily mean the Committee is satisfied with the response from the ACS or others referred to in the Finance Minute. The Committee reserves the right to examine these matters further in the future.

The Finance Minute Process

1.8 Arrangements to ensure that appropriate action is taken in response to comments contained in each report of the Joint Committee of Public Accounts have been in operation since 1952.¹ These procedures involve the preparation of a response, known as a Department of Finance Minute (or 'Finance Minute') as follows:

- . the Committee's report is tabled in the Senate and House of Representatives;
- . the Chairman of the Committee then forwards a copy of the report to the responsible Ministers and to the Minister for Finance with a request that the report be considered and that the Chairman be subsequently informed of actions taken or planned to address the Committee's recommendations;

1. Formal responses to the Committee's reports are not prepared in the case of discussion papers, handbooks or the Committee's Report of Activities.

- the reply takes the form of a Finance Minute which, since the Committee reviewed its procedures in 1988², and refined them in 1989³, is tabled in the Parliament as soon as is practicable after its receipt, with comment if necessary;
- in some cases, the Committee undertakes a further formal inquiry into the matters dealt with in the initial report and the corresponding Finance Minute.

1.9 It should be noted that the tabling and publication of Finance Minutes does not preclude the Committee from conducting detailed analysis of a particular Finance Minute at a later time.

Report Structure

1.10 The Report comprises two parts. Part 1 comprises two chapters - Chapter 1, which provides background to the Finance Minute, and Chapter 2, which contains the Committee's comments on responses to the Finance Minute on Report 325 by the ACS and the DPP. Part 2 of the Report is the Finance Minute on Report 325.

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2. Report 291, *Revised Procedures for Reports of the Joint Committee of Public Accounts, June 1988.*
 3. Report 301, *Finance Minutes, 1989.*

Chapter 2

COMMITTEE COMMENT ON RESPONSES IN THE FINANCE MINUTE

- . Response of the Australian Customs Service
- . Response of the Director of Public Prosecutions

Response of the Australian Customs Service

2.1 The Australian Customs Service (ACS) has accepted the vast majority of the 117 in recommendations Report 325 which relate to it, and the Committee awaits with interest the outcome of the review into the ACS which was announced on 4 October 1993 by the Minister for Science and Small Business, Senator the Hon Chris Schacht. The Committee will also monitor the outcome of future audits by the Australian National Audit Office (ANAO). It is anticipated that the ANAO will determine the extent to which recommendations in Report 325 have been implemented.

2.2 Nevertheless, the Committee is disappointed at the response to recommendation 6. The Committee is well aware of the Finance Minute process and does not appreciate the comment made by the ACS. The intention of the recommendation is clear and the response sought from the ACS is expected to contain more detail than that within the Finance Minute.

Response of the Director of Public Prosecutions

2.3 Specific responses by the Director of Public Prosecutions (DPP) to the Committee's recommendations can be found within the body of the Finance Minute. Of the 31 recommendations of relevance to the DPP, eight have not been accepted. However, it is the comments appended to the Finance Minute that have caused concern to the Committee, for they indicate that the DPP has learnt nothing from the experience of the Midford Inquiry and appears to still adhere to the belief that it was blameless.

2.4 The response by the DPP in the Appendix to the Finance Minute is a thinly veiled attack on the credibility of the Committee including, among other things, criticisms of the Committee for:

- . making findings on matters of law for which it was not competent;
- . not seeking expert assistance;
- . harassment of witnesses;
- . being selective;
- . asserting improper motives without justification; and
- . denying natural justice to officers who were criticised.

2.5 The DPP concludes:

The net result of the approach taken by the Committee ... [in] assessing the evidence before it is that findings of fact made by it must be treated with considerable caution at the very least.⁴

2.6 The Committee notes that the Department of Finance in its final paragraph in the Finance Minute sought to distance itself from the comments of the DPP, stating:

The Department of Finance gave the DPP the opportunity to reconsider those comments. In the event, the DPP confirmed that it wished its comments to be transmitted to the Committee. Accordingly, they are attached to this Finance Minute.⁵

4. Appendix, paragraph 32.

5. Finance Minute, paragraph 215.

Paragraph 5

2.7 In paragraph 5, the DPP states that the collapse of the prosecution does not mean the DPP was at fault.

2.8 The Committee's comment:

If the 'committal proceedings foundered at an early stage' it is hard to see why the competence of those running the case would not be called into question.

At the committal hearing it became apparent during cross examination that the two 'expert' witnesses for the prosecution were far from expert. If, as asserted at paragraph 28 dot point 3, 'copies of all relevant Cabinet documents were in material originally provided to the DPP by ACS and were ... given to prosecuting counsel', why were the 'expert' witnesses apparently unaware of them, or of their significance?

In short the Committee concluded in Report 325 that officers of the DPP failed to properly perform their duties and this led to a debacle.

Paragraph 6

2.9 In paragraph 6, the DPP asserts that it was incorrect to say that its 'officers failed to foresee issues that were likely to be raised in the committal proceedings or failed to see and properly understand documents that were relevant to the case.'

2.10 The Committee's comment:

That the committal proceedings failed after only two prosecution witnesses surely supports the Committee's view.

Paragraphs 7 to 12

2.11 In paragraphs 7 to 12, the DPP emphasises the difficulty in pursuing large commercial fraud cases, and that the Committee set unrealistic standards and

'failed to recognise it [was] reviewing the case with the benefit of hindsight.'⁶

2.12 **The Committee's comment:**

- . If the case was so complex, and it should be noted it was the first Customs case to be run under the Crimes Act and not the Customs Act, why was it allocated to an inexperienced and relatively junior DPP case officer?⁷ As the case progressed and became more complex, the DPP failed to recognise the need to seek expert advice, ensure the ACS and the Department of Industry, Technology and Commerce (DITAC) could support their claims with evidence, or bolster the DPP team.
- . In fact, it was the DPP, and not the Committee, who failed to understand the difficulties in commercial fraud cases. For instance, it was revealed during the Inquiry that the DPP had even neglected to examine the documentary evidence in its proper context and in the correct chronological order!⁸
- . A competent prosecutor should surely look for all likely lines of defence - it is a dereliction of duty not to do so. If the case was so large and complex, there was a need to ensure it was properly managed and controlled. Adequate planning was not evident to the Committee.
- . That the DPP failed to foresee and counter the problems that eventuated, demonstrates either lack of personnel, incompetence, or both. The Committee's standards, alleged by the DPP to be unrealistic, could reasonably be regarded as minimum by an unbiased observer.

Paragraph 13

2.13 In paragraph 13, the DPP asserts that 'the Committee made the mistake of making findings on issues of law', and continues, 'it [the Committee] has neither the competence nor the jurisdiction to make legal findings.'

6. Appendix, paragraph 12.

7. Report 325, p. 175.

8. Report 325, p. 360.

2.14 The Committee's comment:

- . This comment is mischievous. The Committee did not make any findings on issues of law and none of the recommendations in the Committee's Report relate to issues of law. The Committee notes that, in terms of its competence to deal with legal issues, a number of those who were members during the Inquiry possessed legal qualifications.

Paragraphs 14 and 15

2.15 In paragraphs 14 and 15, the DPP asserts that much of the criticism against it was based on the conclusion that the case was flawed. The DPP states that it is not possible to do this because the issues were not tested in law.

2.16 The Committee's comment:

- . The Committee made no findings on matters of law. Plain English definitions and common sense were applied to the interpretations of the Cabinet documents and quota instruments referred to in paragraph 15 and the interpretations sought by the ACS and DPP were not sustainable.⁹
- . During public hearings the interpretation of the quota instruments was discussed at length. The DPP witnesses were unable to produce authoritative documents, either during or after the hearings, to support their contention that the phrase 'sourced from' was equivalent to 'manufactured'.¹⁰
- . The relevant section of the Customs Act requires conditions to be specified on the actual quota instrument.¹¹
- . The Committee concludes that the DPP appears to be covering up for its failure to prepare adequately for the case.

9. Report 325, pp. 10 and 58.

10. Minutes of Evidence, pp. 955-960.

11. Report 325, p. 214.

Paragraph 16

2.17 In paragraph 16, the DPP again asserts that the Committee made findings on issues of law and failed to 'even record the fact that contrary views had been expressed on each of the relevant issues.'

2.18 The Committee's comment:

Again, none of the Committee's findings relate to issues of law. Even a cursory glance at Report 325 should be sufficient to refute the claim that contrary views were not recorded. One reason for the size of the Report was the Committee's endeavour to give adequate and detailed coverage of the issues involved. However, it is naive for the DPP to expect that every claim and counterclaim put to the Committee during the Inquiry should be discussed in full in the Report.

Paragraphs 17 and 18

2.19 In paragraphs 17 and 18, the DPP accuses the Committee of failing to seek expert assistance when considering legal issues and Customs administration.

2.20 The Committee's comment:

The Committee did not seek independent legal expertise, firstly because of the existing expertise available within the Committee, and secondly because it was considering the administration of the prosecution, not the legal issues involved. In addition, the Committee has acquired through its inquiry work, a significant corporate knowledge about administrative procedures.

As acknowledged by the DPP, the Committee had the assistance of a senior officer from the ANAO. It also went to great lengths to understand the issues it was dealing with and called for assistance from appropriate sources as required.

It should be noted, however, that the Committee found the DPP had failed to seek expert assistance in relation to the

financial arrangements between Midford Australia and Midford Malaysia.¹²

Paragraphs 19 and 20

2.21 In paragraphs 19 and 20, the DPP accuses the Committee of subjecting witnesses 'to personal abuse bordering on harassment', that questions often took the form of lengthy diatribes and that proceedings were sometimes 'conducted more as an inquisition than an inquiry.' The DPP adds that this treatment contravenes section 19(1) of the Public Accounts Committee Act which affords witnesses the same protection and privileges as before the High Court.

2.22 The Committee's comment:

- . The second set of examples referred to in paragraph 19 clearly demonstrate the DPP's lack of understanding of the process of public hearings conducted by parliamentary committees. Evidence was merely being read into the record. The questions themselves were brief.
- . As the Inquiry progressed the Committee found itself faced with hostile Government agencies. Massive quantities of evidence were given to the Committee but they were unindexed, often duplicated other evidence and in numerous instances were irrelevant. Witnesses were often evasive, giving evidence which was subsequently found to be incorrect. Occasionally, they altered their story whilst giving evidence.¹³ This is commented on in Report 325.¹⁴
- . The Committee was faced with the task of examining ACS officers who had lost their notebooks, had a diary page reporting events on a crucial day only affixed to the document by sticky tape, had mislaid notes of crucial conversations, had altered evidence pertaining to the case, and had lost the original of a brief sent to the DPP. This is discussed at length in the Report¹⁵.

12. Report 325, pp. 233-4.

13. For example Report 325, pp. 78 and 307.

14. Report 325, p. xxiii.

15. Report 325, pp. 332-336; 77-78; 41-42.

- . In the face of continued obfuscation the only way the Committee could extract anything resembling the truth from some witnesses was to engage in close questioning. The Chairman told the Comptroller-General of Customs that the Committee did not resile from this task.¹⁶
- . It should be noted that all witnesses were repeatedly invited to provide further comments and submissions to clarify their evidence, and to comment on the evidence of others.

Paragraph 21

2.23 In paragraph 21, the DPP accuses the Committee of having an imperfect understanding of basic matters such as the prosecution process, criminal procedure and investigative methods.

2.24 The Committee's comment:

- . It appears that the DPP has incomplete knowledge of the qualifications or expertise of the members of the Committee. The DPP appears to assume that because it disagrees with the Report, the Committee got it wrong, and therefore had an imperfect understanding of such matters.
- . The comments in section 2.14 above, relating to paragraph 13 of the DPP's comments are also relevant. It should be noted that the Committee has undertaken investigative inquiries of this type previously, for example the Inquiry into the PISO 'Unofficial Account'. The Committee was assisted in this inquiry by a senior officer from the ANAO.

Paragraphs 22 and 23

2.25 In paragraphs 22 and 23, the DPP accuses the Committee of giving 'undue status to the legal presumption of innocence' and accepting as fact everything presented by the defendants as 'proven fact'. Chapter 29 is provided as one of the examples.

16. Report 325, pp. 476-8.

The Committee's comment:

- . The Australian legal system is based on the presumption of innocence. This fact appears to have been forgotten by the DPP whose aim appears to be to obtain guilty verdicts in the courts. The Committee commented in Report 325 that it hoped that the DPP would not, as it had done with the finding of the committal magistrate, continue to maintain that Midford and others were guilty, and that the Committee 'had got it wrong'.
- . The significance of the DPP's downgrading of the presumption of innocence should not be lost on anyone.
- . The major flaw in the conduct of the investigation by the ACS was that it presumed Midford were guilty, and that all it had to do was to find the right evidence.
- . It should be noted that the Committee received huge volumes of conflicting evidence, and made no assumption that the ACS, DITAC, DPP, Midford or anyone else's material was entirely accurate.
- . In fact, the comment in paragraph 23 displays an ignorance of the parliamentary committee inquiry process and the structure of parliamentary committee reports. The structure of the Committee's Report should have been obvious. Representative evidence from the major players is quoted and the Committee then records assessments, draws conclusions, and makes recommendations.
- . Chapter 29 of the Committee's Report is a prime example of this process, where all views are canvassed and are followed by the Committee's comment.

Paragraphs 24 and 25

2.27 In paragraphs 24 and 25, the DPP accuses the Committee of placing 'considerable weight on self-serving affidavits filed in Malaysian proceedings' and made 'positive findings on the basis of the affidavits', despite the fact that:

- . the deponents were never subjected to questioning;
- . the Committee had no information about who prepared the affidavits, and in what circumstances; and

the affidavit of one of the deponents was in English even though he didn't speak the language.

2.28 The DPP states:

... it is clear that the Committee drew upon the contents of the affidavits in making findings adverse to the two Customs officers who travelled to Malaysia.¹⁷

2.29 The Committee's comment:

The Committee did not place 'considerable weight' on these affidavits. In fact, the Committee pointed out inconsistencies as well as commenting adversely on the veracity of one affidavit notwithstanding 'any inaccuracies in translation from the Malaysian'.¹⁸

The issue of the reliability of affidavits sworn in Malaysia was discussed in the Report with an extended quotation from a DPP submission.¹⁹ As indicated above, the Committee did not base its conclusions on these affidavits.

The location of the affidavits in the evidence before the Committee is footnoted in Report 325. The criminal application number before the Malaysian High Court is clearly indicated and were made before a magistrate or commissioner for oaths. The affidavit at page S525 of Committee's Submissions Volume 2 is shown to be an official translation. The evidence also shows the name of the solicitor who filed the affidavits.

When discussing whether ACS officers sent to Malaysia had received an injunction issued against them, the Committee noted a contradiction in the affidavits supporting the injunction and actually favoured the ACS officers' version of events.²⁰ The Committee's conclusions regarding the events of that day were based mainly on Telecom records, the ACS

17. Appendix, paragraph 25.

18. Report 325, pp. 322 and 324.

19. Report 325, pp. 344-5.

20. Report 325, p. 322.

officers' notebooks, their evidence at public hearing, and consideration of their obvious panic on their last day in Malaysia.

The Committee has great difficulty in explaining how the DPP was able to arrive at the assertions made on this issue. The Committee can only conclude that the DPP has not looked at the evidence critically or read with comprehension the Committee's Report.

The DPP, in making this criticism, reminds the Committee of the accusations which were frequently levelled at the ACS and the DPP throughout the Midford Inquiry.

Paragraph 26

2.30 In paragraph 26, the DPP implies, by innuendo, that the Committee fabricated an argument:

The only authority cited for that proposition is an unnamed Senator who apparently expressed that view in an ABC radio program in 1991.²¹

2.31 The Committee's comment:

The Senator referred to here was the then Shadow Minister for Foreign Affairs, Senator Robert Hill, and the transcript of the program was supplied by the Parliamentary Library.²²

The previous paragraph in the Report refers to evidence supplied by the Department of Foreign Affairs and Trade that the incident involving the ACS officers received prominent press coverage in Malaysia and that a Malaysian judge recommended the preferring of criminal and contempt

21. Appendix, paragraph 26.

22. Reference to Senator Hill by name does not appear in the Report because of a Committee policy, reaffirmed during the drafting of Report 325, that references to the names of witnesses who are the subject of an inquiry and others should not be used or kept to a minimum. The purpose of this was to focus the Report on issues and matters of principle rather than individuals.

charges.²³ It is difficult to see how this could not have contributed to bad relations between Australia and Malaysia.

To suggest that the Senator's comments were the only authority for the Committee's argument is demonstrably incorrect.

It should be noted that on the Channel 9 *Business Program* of 4 May 1993, a former export manager with CSR Ltd stated that the cost to the sugar export industry, due to the souring of relations over the incident, was some \$40m over five years.

Report 325 also details the unsuccessful efforts of the Malaysian authorities to have the documents taken by the ACS officers returned to Malaysia.²⁴

Paragraph 27

2.32 In paragraph 27, the DPP expresses perplexity that the Committee did not see anything untoward regarding a retrospective transfer of machinery title.

2.33 The Committee's comment:

The reference to retrospective transfer is to be found in paragraph 12.16 of Report 325. The previous section described Midford's consultations with DITAC. Midford's rearrangement of its Malaysian operation was made after these consultations, and apparently with the full knowledge of the Department.²⁵

It appears that the DPP has chosen to make ill-informed judgements about the Committee and its lack of reaction. In the light of the evidence before it, the Committee simply did not view the proposal in the same way as the DPP.

23. Report 325, pp. 343-4.

24. Report 325, p. 342.

25. Report 325, pp. 190-2.

Paragraph 28

2.34 In paragraph 28, the DPP accuses the Committee of selectively quoting evidence. The DPP states there were 'a number of examples' but then selected only four!

2.35 The Committee's comment:

- . The Committee had some 25 000 pages of transcripts, submissions and exhibits. To expect it not to select representative samples of evidence for quotation is ludicrous.
- . Dot point one (in paragraph 28) accuses the Committee of quoting at length from a joint advice from prosecuting council and ignoring a 'detailed' response. The advice was 55 pages long and relevant material found in Report 325 was extracted from that document.²⁶ In contrast the 'detailed' response was only six pages long!
- . This response was a minute from the Deputy Director to the Director which concurred with the view of counsel that the prospects of establishing a prima facie case had been 'significantly diminished'. Given the embarrassment at the collapse of the committal hearing, it contained some criticisms of counsel's advice. These, and the document itself were not considered significant enough for comment. Reference to the document can be found in the Chronology of Evidence in the Report.
- . Dot point two referred to Midford Malaysia having only one employee and that this was a keystone in the prosecution case. The DPP alleges that the Committee failed to make reference to this. In fact Midford Malaysia's 'sole employee' was referred to in the Report at pages 18 and 311. The Committee was unaware that it was an offence for a firm to have only one employee and notes that this keystone piece of evidence was not emphasised in either the DPP's initial or final submission in the sections dealing with the prosecution case.²⁷

26. The advice is at Evidence, S2622-76 and the extracted paragraphs are footnoted in Report 325.

27. Evidence, pp. S129-30 and S10541.

Dot point three asserts that the Committee disregarded evidence. This is untrue. Evidence that was not significant to the issue was not included in the Report. The point that was being made in that particular section of the Report was that the significance of those Cabinet documents was not realised by the inexperienced DPP case officer. Her supervisors concurred with her opinion without even sighting the documents.²⁸

Chapter 10 of Report 325 discusses the content of the briefs supplied to the DPP by the ACS and whether they were complete. The DPP's final submission stated that it contained 'no new matters of evidence'²⁹ and consisted of a summary of evidence from the DPP and gratuitous advice concerning what the Committee could rule on and the conclusions that could be drawn.³⁰ The assertion at page S10545 was weighed against other evidence detailed in Chapter 10.

It appears from the DPP's comment in the Appendix to the Finance Minute, that the prosecuting counsel was expected to realise the significance of the Cabinet documents when he received them. It was the responsibility of the DPP to prepare counsel for his task; the DPP failed in this regard.

Dot point four asserts that the Committee disregarded the evidence provided to the Committee at pages S616-31 which analysed why the committal hearings failed. In fact, the whole of Chapter 22 addressed this topic and the evidence in question was referred to in depth.³¹ The Committee is perplexed as to why it should be accused of disregarding that evidence.

Paragraph 29

2.36 In paragraph 29, the DPP accuses the Committee of asserting improper motives or conduct on the part of DPP officers.

28. Report 325, pp. 175-6.

29. Evidence, p. S10538.

30. Evidence, pp. S10539-54.

31. Report 325, pp. 365-9.

2.37 The Committee's comment:

- . The whole of Report 325 documents a continuous campaign against Midford Paramount and to say this is not supported by any evidence is incorrect. The pressure for a major prosecution case was discussed in Chapter 11.
- . The inferred innuendo cannot be justifiably drawn from paragraph 11.21 in the Report. The point that was being made was that the information provided to the DPP was incomplete, whether this was by accident or by design is the unresolved issue. The DPP comment is seen as simply mischievous.

Paragraph 30

2.38 In paragraph 30, the DPP asserts that no indication of adverse comments about its officers was given to them and that they were thus denied natural justice.

2.39 The Committee's comment:

- . The criticism displays a lack of understanding of the parliamentary committee inquiry process and is not true. During public hearings officers from the DPP were criticised for their performance and had ample opportunity to respond, both during and after the hearing.³²
- . It is ironic that the DPP should complain about natural justice when one of the complaints against the ACS' conduct of the case was that the defendants were denied meaningful opportunities to explain.³³

Paragraph 31

2.40 In paragraph 31, the DPP alleges the Committee was mischievous in recommending that an investigation be carried out into the allegation that an ACS

32. Officers from the DPP appeared before the Committee on 25 November 1991, Minutes of Evidence, pp. 814-1019.

33. Report 325, p. 47-8.

officer had forged evidence in another case. The DPP was surprised the Committee gave weight to that allegation.

2.41 The Committee's comment:

After its experience in inquiring into the Midford Paramount Case, the Committee gave sufficient weight to the allegation, to recommend that it be looked into because the incident was typical of the attitude apparently prevalent in the ACS. The Committee was reminded of the fact that the officer in question had been involved in the Malaysian debacle and that another officer involved in the Midford Case had whited-out figures on a Midford document and substituted his own.³⁴

Conclusion

2.42 Given the breadth of the Committee's Inquiry, it is significant that the DPP chose to make no comment on the vast majority of the Report even though he did not confine himself to findings relating to the DPP. The DPP's criticisms appear to be based on selective quoting, a failure to read the entire Report, a presumption of guilt on the part of the defendants, and a belief in the infallibility of the DPP.

2.43 The Committee concludes that comments by the DPP are mischievous, unfounded and can be regarded as a poor attempt at point scoring. Furthermore, they can be seen to represent a contempt for the Committee and the Parliament.



L J Scott, MP
Chairman
24 November 1993

34. Report 325, p. 77.

Part 2 FINANCE MINUTE ON REPORT 325

DEPARTMENT OF FINANCE MINUTE ON REPORT 325

This Minute has been prepared on the basis of responses received from the Commonwealth and Defence Force Ombudsman, Commonwealth Director of Public Prosecutions, the Australian Federal Police, the Australian Customs Service, the Departments of Foreign Affairs and Trade, Industry, Technology and Regional Development, Prime Minister and Cabinet, Finance and Attorney-General's Department.

2. General comments by the Attorney-General's Department, the Australian Customs Service and the Director of Public Prosecutions are attached as an Appendix

Response to Recommendations

3. Recommendations 1, 3, 64, 76, and 77 involve matters of policy and they will be the subject of a separate response by the Government. In the following paragraphs each of the Committee's recommendation is reproduced in turn and followed by the relevant responses.

Recommendation 2 (paragraph 6.105)

Customs warrants only be issued by judicial officers and only upon written applications, and the present powers under the Customs Act enabling officers of Customs to issue warrants for search and seizure action be revoked.

Response by ACS

4. This recommendation is accepted and will be taken up in the context of the Australian Law Reform Commission (ALRC) Report No. 60 proposing a new Customs and Excise Bill

Recommendation 4 (paragraph 30.7)

Matters raised in the public submissions to the Inquiry that do not relate specifically to the Midford case be investigated by the Ombudsman.

Response by the Ombudsman

5. The Ombudsman offers the general observation that the investigation of issues which are raised other than by way of an individual complaint to her office has to be

considered in terms of the exercise of her power to conduct investigations of her own motion.

6. This power is discretionary and, depending on the nature of the issue, there may be a variety of factors which are relevant to its exercise. For example, where specific individuals are affected there may be a question whether they could have pursued, or might still pursue, redress through other, more appropriate, channels (and, if so, whether there is nevertheless a broader issue of administration which warrants investigation). Where there has been a substantial lapse of time since the issue arose there may also be a question of whether an investigation is likely to be fruitful. In the case of broadly based issues there may be public interest and resource considerations to be taken into account in determining whether an investigation should be undertaken.

7. The Ombudsman is not aware of the nature and number of matters encompassed by Recommendation 4, but clearly any consideration of whether she should exercise her own motion power would necessitate examining all the relevant material. This in itself could have significant resource implications, as could any decision to undertake investigations of the matters in question. In this context the Ombudsman has noted that paragraph 17 of the Executive Summary to the JCPA Report indicates that the Committee sees recommendation 4 as being linked to recommendation 3.

Recommendation 5 (paragraph 32.139)

The Australian National Audit Office give appropriate consideration to conducting an efficiency and skills audit of the Australian Customs Service Investigations function.

8. (The Australian National Audit Office has indicated that it will provide a separate response direct to the Committee.)

Response by ACS

9. The ACS has commissioned an audit of Investigation Operations by Price Waterhouse. ANAO will be provided with a copy of the Price Waterhouse report to consider in the context of this recommendation.

Recommendation 6 (paragraph 32.139)

Customs report back to the Committee within twelve months of the tabling of this Report detailing the progress of the reforms recommended by this Inquiry.

Response by ACS

10 Considerable progress in implementing the majority of the recommendations has been made. This recommendation is considered as being met by the totality of the responses in this document.

Recommendation 7 (paragraph 11.23)

Whilst the Committee recognises the importance of test cases, the desire to obtain a prosecution and attendant publicity should not be a factor in determining whether or not the Commonwealth should prosecute a case. In particular, Commonwealth agencies should not lose sight of the legal presumption of innocence.

Response by ACS

11. The recommendation has been accepted. It reflects current practice of Commonwealth agencies. It should be recognised that appropriate publicity is useful in educating the general public on what the law is and on the consequences of breaches.

12 The Attorney-General as First Law Officer, has, through the Australian Government Solicitor (AGS) an independent responsibility to protect the position of the Commonwealth as a model litigant in the conduct of legal proceedings. If the AGS considered that the instructions given by ACS appeared improper, it would raise the matter with ACS and, if necessary, bring the matter to the attention of the Attorney-General.

Response by DPP

13. The DPP does not, and never has, prosecuted "test cases" or prosecuted for the purpose of securing publicity. The guidelines under which we operate are set out in the Prosecution Policy of the Commonwealth (p. S160). There was no departure from the guidelines in this case.

14. The guidelines set out the evidential and other tests that need to be satisfied before a prosecution can proceed. The Prosecution Policy does not need to be amended as a result of the Midford case.

Recommendations Concerning General Procedures

Recommendation 8 (paragraph 9.92)

Section 81.8g of the Customs Act 1901 be amended to allow the use of electronic accounting systems for bondstores and that this be reflected in the Customs Manual.

Response by ACS

15. The intent of this recommendation is accepted in principle. Extensive use of electronic accounting systems is currently made by bondstores and this is acceptable to Customs. Legal advice has been that this is empowered by existing legislation. The need for specific amendment of the Customs Act will be considered in the context of the ALRC Report No 60 proposing a new Customs and Excise Bill.

Recommendation 9 (paragraph 12.62)

Representatives from both the Department of Industry, Technology and Commerce and Customs attend any meetings where it is known that the discussions will involve the actions or responsibilities of both entities. Officers from both organisations should adequately prepare for such meetings, ensuring that they are in full possession of the facts within their respective areas of responsibility.

Response by ACS

16. This recommendation has been accepted. A revised Memorandum of Understanding (MOU) on coordination between ACS and the Department of Industry, Technology and Regional Development is to be prepared.

Response by the Department of Industry, Technology and Regional Development

17. Agreed. A directive is to be issued to all Departmental staff. The recommendation is being incorporated into the Departmental training program and the Agreement on the working relationship between Customs and the Department will be amended accordingly.

Recommendation 10 (paragraph 12.62)

Improved checking procedures be introduced in the Department of Industry, Technology and Commerce to ensure that advice provided to importers and their advisors correctly reflects government policy,

including where applicable, verification to source documentation such as Cabinet documents.

Response by the Department of Industry, Technology and Regional Development

18. Agreed. A directive is to be issued to all Departmental staff and the recommendation is being incorporated into the Departmental training program.

Recommendation 11 (paragraph 13.28)

The Australian Customs Service focus increased attention on the provision of all statements under the Administrative Appeals Tribunal Act within the statutory time limits and procedures be introduced within the Australian Customs Service to monitor the progress of supplying Statements under these Acts with a view to ensuring that their provision is timely.

Response by ACS

19 The recommendation has been accepted. New procedures and data bases have been implemented and instructions issued to all staff.

20 A report is to be furnished to the Deputy Comptroller-General (Operations) immediately it appears that a statement of reasons cannot be furnished within the statutory period so that he may institute corrective action.

Recommendation 12 (paragraph 13.28)

Statements of Reasons prepared within the Australian Customs Service contain full and complete disclosure of all reasons taken into consideration in arriving at the decision in question.

Response by ACS

21. The recommendation has been accepted. The ACS recognises that the Administrative Decisions (JR) (AD[JR]) Act requires a full and complete disclosure of the reasons for a decision.

Recommendation 13 (paragraph 13.28)

Statements of Reasons be prepared by the Australian Customs Service officer who made the original decision, unless valid reasons to the contrary are shown.

Response by ACS

22. The recommendation has been accepted. Under the AD(JR) Act the ACS provides statements of reasons by the decision maker unless s.17 of the Act applies (decision maker unavailable).

Recommendation 14 (paragraph 13.28)

Requests for Statements of Reasons with the Australian Customs Service shall be a means of prompting an independent review of the decision in question, irrespective of the applicant's right to pursue formal avenues of review.

Response by ACS

23. The recommendation has been accepted. All decisions in relation to which a request for a statement of reasons has been received, are to be critically re-appraised by an officer other than the original decision maker. Where this re-appraisal concludes the decision should be reviewed, a formal review is to be undertaken so that a new decision can be made.

Recommendation 15 (paragraph 18.68)

For Australian Customs Service officers travelling overseas, there should be formal briefing from the Department of Foreign Affairs and Trade, and when legal proceedings are likely to eventuate, from the Australian Government Solicitor or the Director of Public Prosecutions.

Response by ACS

24. The recommendation has been accepted and instructions now in the ACS Investigation manuals stipulate that where the Department of Foreign Affairs and Trade (DFAT) considers that a pre-departure briefing is warranted, ACS Overseas Co-ordination Section (OSCORD) will attend and ensure that the officers travelling receive the proper instruction prior to leaving Australia.

25. Where legal proceedings are likely to eventuate the DPP and the AGS have indicated that they will be available for a briefing.

Response by DPP

26. We have no difficulty with this recommendation in so far as it affects the DPP. The terms of any briefing will, of course, depend on the circumstances of the case.

Response by the Department of Foreign Affairs and Trade (DFAT)

27. This recommendation is supported.

Recommendation 16 (paragraph 18.68)

There be a review of OSCORD with a view to setting up a formal set of procedures for liaising with overseas bodies.

Response by ACS

28. A review of OSCORD has commenced. Formal procedures for liaising with overseas bodies in the context of investigations are now set out in the ACS Investigation manuals.

Recommendation 17 (paragraph 18.68)

The Australian Customs Service implement a policy of no open-ended tickets for any travel undertaken by its officers.

Response by ACS

29. The recommendation has been accepted. The ACS Manuals now state "ACS officers travelling overseas must have firm ticketing arrangements. The use of open dated tickets is not allowed".

Recommendation 18 (paragraph 18.68)

The arrangements for Australian Customs Service officers undertaking overseas activities include formal notification of Australia's representatives in that country.

Response by ACS

30. The recommendation has been accepted. The ACS manuals list the responsibilities of OSCORD in arrangements for officers travelling overseas. These include notification of ACS representatives overseas, DFAT desk officers, overseas Customs authorities, and Australian Missions.

Recommendation 19 (paragraph 28.20)

Customs not seek to redetermine values for duty purposes beyond the statutory time limit or 12 months.

Response by ACS

31. This recommendation is not accepted. There is no statutory time limit on redetermining values for duty. Where value for duty has been re-determined there is a twelve month limit on making refunds of overpayments or seeking recovery of underpaid duty. However, where there is evidence of deliberate fraud, there is no twelve month time limit for investigation and prosecution action.

Recommendations Concerning Investigations Procedures

Recommendation 20 (paragraph 6.105)

Australian Customs Service officers never again alter an importer's invoices by removing existing figures and substituting others.

Response by ACS

32. The recommendation has been accepted. The ACS Investigation Manuals have been amended to include an instruction that documents are not to be altered in any way. This will be further reinforced at training courses and by Regional Managers.

Recommendation 21 (paragraph 6.105)

Australian Customs Service Investigations officers seek appropriate expertise where they do not fully understand the technicalities of explanations provided by importers or agents.

Response by ACS

33. The recommendation has been accepted. It has been the practice for officers to seek expert opinion in complex or technical matters particularly where these matters relate to evidence to be produced in court. The practice has been reinforced by insertions in the ACS Investigation manuals and will be further reinforced in training sessions.

Recommendation 22 (paragraph 6.105)

Senior Australian Customs Investigations officers thoroughly check the work of more junior Investigations officers before agreeing to undertake raids or other action proposed.

Response by ACS

34. The recommendation has been accepted. ACS Investigation manuals have been amended to reflect this. The Investigation Case Management training course reinforces this requirement.

Recommendation 23 (paragraph 6.105)

Where Australian Customs Service Investigators seek to rely on investigatory work conducted by other groups within or outside of the Australian Customs Service, a formal meeting or meetings be held to ensure correct interpretation of that work and minutes of these meetings be made and retained.

Response by ACS

35. The recommendation is accepted. The current practice of seeking or receiving outside advice has been reinforced within the Investigation sub-program. Specific instructions now apply for those situations where the ACS seeks to rely on the investigatory work of other agencies. To avoid any misunderstanding it is now a requirement to record information upon receipt and, if the issues are complex, to meet and discuss the matter with the relevant officers of the other agency. The ACS Investigation Manuals have been amended to reflect this.

Recommendation 24 (paragraph 14.97)

Expert opinions be obtained in all cases where the evidence sought or under consideration involves technicalities beyond the competence, training or experience of the Australian Customs Service investigators assigned to the case.

Response by ACS

36. The recommendation has been accepted. Instructions have been incorporated in the ACS manuals dealing with these matters.

Recommendation 25 (paragraph 14.97)

Senior Australian Customs Service Investigations officers undertaking the role of 'Case Officer' remain alert to the potential for Investigations officers to encounter situations where the evidence or explanation necessitates expert interpretation and ensure such expertise is obtained where required.

Response by ACS

37. The recommendation has been accepted. The ACS has formalised the practice by amendments to the ACS Manual. Case officers or team leaders are required, if possible, to review all documents secured as part of an investigation. Where it is not possible to personally review all documents the case officer is required to monitor closely and where necessary identify requirements and arrange for specialist assistance.

Recommendation 26 (paragraph 14.97)

Checking mechanisms be introduced with the Australian Customs Service to detect instances where Investigations officers misconstrue or misunderstand the documentary evidence subject to their examination.

Response by ACS

38. The recommendation has been accepted. The response to this recommendation has been covered in recommendations 24 and 25.

Recommendation 27 (paragraph 17.59)

Procedures within the Australian Customs Service be implemented to ensure that its officers only take the statement of the witness, not what Customs would like the witness to say.

Response by ACS

39. The recommendation has been accepted. ACS Investigation Manuals outline the requirement for taking of witness statements. Officers taking statements will be accredited in terms of recommendation 28.

Recommendation 28 (paragraph 17.59)

Australian Customs Service Investigations officers be required to be 'accredited' prior to taking witness statements and that such accreditation involve appropriate training and testing of the officers.

Response by ACS

40. The recommendation is accepted. The ACS Investigation manuals set guidelines for interviewing which require officers to be accredited. Accreditation will be given by the National Training Co-ordinator when officers have completed training to an acceptable level.

Recommendation 29 (paragraph 18.68)

The Australian Customs Service should make more use of foreign Customs services and Australian overseas representatives to collect information in other countries.

Response by ACS

41. The recommendation is accepted. Where practicable and where trade sensitivities permit, foreign customs services may be requested to assist. Likewise Australian overseas representatives may be requested to assist where DFAT has no objections. In both cases the over-riding factor will be the requirements of State Evidence Acts and the relative costs of witnesses who may be required to travel to Australia.

Response by DPP

42. It is clearly desirable when information is required from overseas that it be obtained as quickly and cheaply as possible. In some cases it may be feasible to use an overseas customs service or Australian overseas representatives for the task. In many cases, however, it will not be practical to do so.

43. As will appear from our response to Recommendation number 30, it is our view that the Committee has understated the difficulties involved in conducting inquiries in a foreign country. There are likely to be false economies involved in entrusting an inquiry to a person who has no knowledge of the case, no knowledge of Australia's rules of legal practice and procedure, and no knowledge of the techniques of criminal investigation.

44. It is also doubtful that there will be any cost saving at the end of the day. What must be borne in mind is that it will often be necessary for a person who secures information overseas to give evidence in proceedings in Australia. If that person is not an Australian resident he or she may need to be brought to Australia at least twice, once for the committal hearing and once for the trial. Accordingly, there will often be more cost and inconvenience involved in using a foreign customs service or an Australian overseas representative to collect information.

45. There may also be protocol problems in using a foreign Customs officer to conduct inquiries for the Australian government.

46. There could be problems in securing the attendance of a foreign officer, or even an embassy official, when the matter comes to court. It is not inconceivable that the officer concerned may have changed jobs by the time the case comes on for hearing

and may have no interest in travelling to Australia. The officer would not be amenable to an Australian subpoena.

47. A decision will need to be made in each case on the most efficient and effective manner of obtaining the information in question.

48. It should be remembered that in the Midford case the officers who travelled to Malaysia were already travelling as far as Singapore on an unrelated matter. The additional cost involved in them travelling to Malaysia was minimal.

Response by DFAT

49. DFAT already has the capacity through its overseas posts to obtain copies of documents publicly available in other countries on behalf of Commonwealth agencies, including the ACS. While useful to facilitate an initial inquiry, such a service would not normally assist prosecutions as the documents obtained in such a manner would not usually be admissible in evidence.

Recommendation 30 (paragraph 18.68)

The Australian Customs Service and the Australian Government Solicitor or Director of Public Prosecutions, as appropriate, should produce a formal document to be given to foreign Customs Services and Australian overseas representatives to acquaint them with the methods and requirements for collecting information so that information conforms to State Evidence Acts.

Response by ACS

50. The recommendation is not accepted. The different State Evidence Acts, the varying provisions in overseas jurisdictions, the range of treaty obligations and agreements with foreign co-operating agencies and the specifics of particular cases create a multitude of variables. Accordingly, a document of the nature proposed would be too unwieldy to be of any use as it would have to cover far too many eventualities.

51. The DPP and the AGS have indicated that they are available to provide the ACS with advice on any legal problems associated with the collection of evidence on a case by case basis.

Response by DPP

52. This recommendation is not practical. A document of the type envisaged would need to deal with every type of inquiry a foreign service or Australian post may be

asked to undertake; would need to address the evidential requirements of each Australian jurisdictions and would need to foresee any particular problem that may arise in the jurisdiction in which the inquiries are going to be carried out.

53. The resulting document would, in effect, be a manual for the conduct of investigations in foreign countries covering the requirements of all Australian jurisdictions. We do not have the resources to prepare and constantly update a document of that kind, or to assist ACS in doing so.

54. Obviously, if a foreign Customs service or an Australian post was asked to conduct inquiries in an appropriate case it would need to be given guidance on how to go about conducting them. That can only be done on a case by case basis when we know what information we require, how and where we intend to use it, and the jurisdiction we are seeking it from.

Response by DFAT

55. This recommendation is not supported. DFAT is most concerned at the implication contained in Recommendation 30 that its officers overseas should become formally involved in collection of evidence in relation to customs prosecutions. DFAT officers have neither the training nor expertise to discharge adequately the technical function of collection of evidence for customs prosecutions, and it is doubtful that preparation of a manual setting out the requirements of the various State Evidence Acts would remedy this situation. Furthermore, if DFAT officers on posting overseas should become involved in the collection of evidence, technical requirements related to the proving of the chain of evidence might require such officers to return to Australia to give evidence in customs prosecutions. Apart from the disruption this would cause to the operations of posts with very limited numbers of Australia-based staff, DFAT is not convinced that such a practice would be any more cost-effective than current procedures.

Recommendation 31 (paragraph 19.111)

The Australian Customs Service officers manual should include a section on behaviour expected of officers engaged in overseas investigations.

That section should state that:

- **upon knowledge of a Court Order having been obtained the officers should cease activities and remain in the country and not attempt to circumvent the order:**
- **upon receipt of details of a Court Order, whether formally served or not, the officers are expected to obey it forthwith.**

Response by ACS

56. The intent of this recommendation is accepted. The ACS Manuals now set standards of behaviour for officers travelling overseas. The Manuals also outline procedures to be followed where an injunction or a subpoena is taken out in a foreign country. The Manual amendments reflect acceptance of the thrust of the recommendation.

57. However, there appears to be no legal reason why officers should not leave a country if in so doing they are not in breach of any local law or court order.

Recommendation 32 (paragraph 19.111)

Australian Customs Service Management should ensure that there is consistency in the keeping of diaries and notebooks by their officers. The correct method should be specified in the Australian Customs Service officers manual and management should ensure it is complied with.

Response by ACS

58. The recommendation is accepted. Detailed guidelines are set out in the ACS Manuals. Amendments to internal check procedures have been made to ensure that the provisions of the manual are observed.

Recommendation 33 (paragraph 19.111)

Australian Customs Service Management shall ensure that, in accordance with the Customs Manual, entries in official notebooks, besides being signed and dated, shall indicate the time at which they were made.

Response by ACS

59. The recommendation has been accepted. The ACS Manuals include a reference to time. Internal check procedures will verify compliance as for recommendation 32.

Recommendation 34 (paragraph 19.111)

The Australian Customs Service officers manual instruct officers in Australia to return documents obtained in overseas investigations which became subject to Court Orders if the return is officially requested by the equivalent Customs department of that country.

Response by ACS

60. The recommendation is not accepted. The effect of the recommendation is to require compliance with an order of a foreign court at the request of the customs department of that country even though the order might not be enforceable in Australia and regardless of the effect of compliance on legal proceedings in Australia. The ACS may also be in contempt of an Australian court by sending documents out of the country.

Response by DPP

61. This recommendation is not practical. If relevant documents are needed in connection with court proceedings in Australia, ACS could be in contempt of an Australian court by sending them out of the country.

62. The appropriate course of action if ACS receives a request for the return of overseas documents is for ACS to consult DPP, or AGS as appropriate, and determine a course of action that meets the needs of the case and particular requirements of any Court of law.

Recommendation 35 (paragraph 32.139)

The Australian Customs Service examine and implement procedures designed to ensure briefs and reports on investigations are timely, accurate and informative.

Response by ACS

63. The recommendation has been accepted. The format of the monthly and quarterly report is continually monitored. The Case Analysis and Management System (CAMS) system provides a ready access to an accurate up to date source of information for briefing purposes. Regional Managers have been reminded of the need to provide regular briefs on potentially sensitive cases.

Recommendation 36 (paragraph 32.139)

The Australian Customs Service introduce formalised systems for planning, budgeting and costing of all Investigation activities for commercial cases.

Response by ACS

64. This recommendation has been accepted. It has been implemented as part of the Investigation Management Training course and is incorporated in a new section of the ACS Investigation Manuals.

Recommendations Concerning the Seizure of Documents or Goods

Recommendation 37 (paragraph 6.105)

In accordance with the law, documents only be seized by Customs that relate to the alleged offence specified on the warrant. Customs should initiate steps to ensure that all staff are cognizant of this requirement.

Response by ACS

65. This recommendation will be considered in the context of the ALRC Report No. 60 which proposes a new Customs and Excise Bill. The present law is open to different interpretation.

Recommendation 38 (paragraph 6.105)

Certified copies of documents seized by the Australian Customs Service be provided to the owner within seven days.

Response by ACS

66. It is the intention of the ACS to implement this recommendation as far as is possible. There will be occasions where the owner does not require certified copies of documents as well as occasions when the number of documents makes it impracticable to provide copies within seven days. Under normal circumstances every effort will be made to implement the intention of the recommendation. The ACS Investigation Manuals have been amended accordingly.

Recommendation 39 (paragraph 6.105)

No document be seized without firstly recording sufficient details to ensure its identification on a receipt to be provided to the owner.

Response by ACS

67. The recommendation is accepted. Instructions have been issued in ACS Investigation Manuals.

Recommendation 40 (paragraph 8.98)

The underlying facts supporting an application for seizure action be checked within the Australian Customs Service at a suitably senior level prior to forwarding the application for approval.

Response by ACS

68. The recommendation has been accepted. Instructions have been issued in the ACS Investigation Manuals requiring a proposal for seizure to be referred to an officer at an appropriate level. Case Decision Records will be maintained on decisions made on whether to seize or not to seize.

Recommendation 41 (paragraph 8.98)

Tamper proof seals be placed on all containers of goods subject to seizure.

Response by ACS

69. The recommendation is accepted. However, it is generally recognised that no truly tamper proof seal exists. A new section in the ACS Investigation Manuals dealing with seized goods of high value instructs officers in the sealing and securing of containers.

Recommendation 42 (paragraph 8.98)

The quantity of goods seized be counted and documented as soon as possible after seizure is effected. Such documentation should be retained.

Response by ACS

70. The recommendation has been accepted and instructions issued in the ACS Investigation Manuals. These instructions emphasise the provisions of s205 of the Customs Act and state that a fully documented Seizure Notice should be issued as soon as practicable after seizure, preferably within the same day.

Recommendation 43 (paragraph 8.98)

Breaking of the tamper proof seals and Australian Customs Service verification of the quantity of seized goods be witnessed by a nominated representative of the importer.

Response by ACS

71. The recommendation is accepted. Instructions in the ACS Investigation Manuals state that seals should not be broken until after the owner or a representative of the owner has been invited to witness the event. Depending on the quantity of goods seized, verification may be done at that time or when the details of the seizure are being documented.

Recommendation 44 (paragraph 8.98)

To prevent situations arising where importers can be accused of interfering with seized goods, all such goods subject to seizure action be removed from the importer upon seizure, or actions be taken to prevent access by anyone other than the seizing officer.

Response by ACS

72. The recommendation is accepted. Seizure guidelines in the ACS Manuals detail requirements for securing seized goods.

Recommendation 45 (paragraph 8.98)

Whilst acknowledging that circumstances may arise where both seizure and prosecution are necessary, the Australian Customs Service give greater consideration to pursuing a course of prosecution without invoking seizure action where prosecution action appears warranted. That is, where appropriate, a conscious choice be made for seizure or prosecution, not both.

Response by ACS

73. This recommendation is to be considered in the context of the ALRC Report No. 60. This report's recommendations would alter the present seizure and forfeiture regime so that the Courts would determine forfeiture. Additionally, the ACS would initiate proceedings rather than the current process of statutory condemnation or requiring recovery action to be taken by the owner.

Response by DPP

74. We do not support this recommendation. It is not possible to prosecute all Customs offenders under the Crimes Act. Nor would it be appropriate to do so given that there is a range of administrative and civil measures available as an alternative to prosecution.

75. It is our view that criminal proceedings should be reserved for cases that are clearly too serious to be met by any lesser response. Prosecution should, in other words, be reserved for cases that exhibit a significant degree of criminality.

76. If such a case arises, and it can be proved, we see no reason in principle why the offender should not be both prosecuted and suffer seizure action. Indeed, to proceed otherwise could mean that some offenders will be better off if they are charged and fined, but avoid forfeiture, than if they are not prosecuted.

77. In our view, the appropriate course where charges are laid is for ACS to take the same administrative action it would have taken if charges had not been laid. If the defendant is ultimately convicted, the sentencing court will always take into account the fact that there has already been a seizure if it considers that the total penalty would otherwise be too severe.

Recommendation 46 (paragraph 8.98)

Appropriate delegations be introduced for Australian Customs Service officers supporting recommendations for seizure action such that commercial (non narcotics) cases exceeding \$50 000 must be endorsed by the National Manager, Investigations, all cases exceeding \$100 000 in value be endorsed by the Deputy Comptroller-General, and cases exceeding \$250 000 be personally endorsed by the Comptroller-General prior to forwarding an application for seizure to a judicial officer. A range of delegations should also be established for State based Australian Customs Service officers covering seizures of up to \$50 000 in value. These amounts should be regularly reviewed by the Minister, by regulation, to keep pace with the consumer price index.

Response by ACS

78. The intent of this recommendation is accepted. The move to judicially determined Forfeiture will be taken up in the context of the ALRC Report No. 60 which proposes a new Customs and Excise Bill. The delegation approach proposed will also be considered at that time.

79. In the interim, it is not possible to remove the statutory power of Customs Officers to seize goods. However, amendments to ACS Investigation Manuals now require that proposals for seizure above the value cutoffs recommended by the JCPA, be referred to the appropriate senior officer for decision.

Recommendation 47 (paragraph 8.98)

Seizure notices clearly quantify the alleged underpayment or evasion of duty.

Response by ACS

80. This recommendation is accepted. Seizure forms are being redesigned to meet this requirement (when reasonable estimates of duty not paid can be made) while remaining consistent with the Act.

Recommendation 48 (paragraph 8.98)

For commercial cases where seizure action is contemplated, the value of goods proposed to be seized be limited to no more than twice the amount of the duty allegedly underpaid or evaded.

Response by ACS

81. This recommendation is not accepted. The cutoff proposed is too rigid and does not contemplate other relevant factors such as previous shipments or the indivisibility of some shipments. The dissenting report in the Joint Committee of Public Accounts (JCPA) report supports this position.

Recommendation 49 (paragraph 8.98)

Owners of goods seized by the Australian Customs Service be promptly advised of the amount of any security bond payable for the return of those goods.

Response by ACS

82. The recommendation has been accepted. The ACS Investigation Manual contains instructions for the return of goods on payment of security.

Recommendations Concerning the Preparations for Legal Proceedings

Recommendation 50 (paragraph 4.64)

Each Australian Customs Service legal brief be checked by a suitably senior and qualified officer not involved in its preparation and that such a check be evidenced on the brief.

Response by ACS

83. The recommendation has been accepted. All briefs are checked by a senior officer within Investigation Operations and are forwarded to Legal Support for a process and completeness check prior to on forwarding to the AGS. The ACS Investigation Manual reflects this requirement. Further consideration is being given to the introduction of checks by legal qualified officers within the ACS.

Response by DPP

84. The DPP has no difficulty with legal briefs being checked by ACS Legal Services Section, or other appropriate officers of ACS, provided that the purpose of the check is limited to matters such as ensuring that the brief is complete and all annexures are attached, and provided the checking process does not cause delay.

85. The ultimate decision on whether charges should be laid, and if so under what provision, rests with the DPP (paragraphs 3.8 and 4.1 of the Prosecution Policy). Obviously the DPP will only become aware that a case exists if we are told about it by the investigators. We have attempted to address that conundrum by settling guidelines with ACS, and other investigative agencies, which give guidance on the type of cases that should be referred to us. The guidelines also provide that if the investigators have any doubt on how a matter should be dealt with they should discuss the case with the DPP. The guidelines are based on there being open lines of communication between investigators and the DPP.

86. The interposition of a review unit between investigators and the DPP would serve no useful purpose and would cause unwarranted delay and may result in a person, not being an expert in determining whether a matter is appropriate for prosecution, making a decision which would prevent the DPP from considering the matter.

Recommendation 51 (paragraph 4.64)

All documents included in Australian Customs Service briefs be fully described and indexed.

Response by ACS

87. The recommendation has been accepted. Instructions have been amplified in the ACS Investigation Manuals.

Recommendation 52 (paragraph 4.64)

Australian Customs Service officers contemporaneously document verbal legal advice received.

Response by ACS

88. The recommendation has been accepted. Instructions have been amplified in the ACS Investigation Manuals.

Recommendation 53 (paragraph 4.64)

Where additional documentation is perused by legal advisors in connection with the subject matter of briefs, all such material be complete, identified and recorded.

Response by ACS

89. The recommendation has been accepted. Any additional documentation is identified and recorded in the brief if it is to form part of the evidence, or on the particular case file if it is not relevant evidence. In the latter case a notation will be made that the legal advisor has seen the material.

Recommendation 54 (paragraph 4.64)

Australian Customs Service management should ensure that in accordance with existing Australian Customs Service procedures, all briefs be forwarded to the Legal Support Section for checking prior to on-forwarding to the appropriate external legal advisors.

Response by ACS

90. The recommendation has been accepted. The CAMS computerised case management system will document that briefs have been forwarded to Legal Support for checking. Consideration is being given to this function being performed in ACS Regions by officers of the Legal Services Component.

Response by DPP

91. See response to recommendation 50.

Recommendation 55 (paragraph 4.64)

All Australian Customs Service briefs for the large and more complex investigations or prosecutions be examined by the Legal Services Section within the Australian Customs Service before those briefs are provided to the Australian Government Solicitor, Director of Public Prosecutions or Counsel.

Response by ACS

92. This recommendation has been accepted. As noted above consideration is being given to a Legal Services Component presence being established in ACS Regions.

Response by DPP

93. See response to recommendation 50.

Recommendation 56 (paragraph 4.64)

The Australian Customs Service, in conjunction with the Australian Government Solicitor and Director of Public Prosecutions, develop a checklist of minimum requirement for legal briefs emanating from the Australian Customs Service.

Response by ACS

94. This recommendation is accepted. The three agencies will co-operate in developing a checklist.

Response by DPP

95. We have no difficulty with this proposal. We have already provided material to ACS, and other investigative agencies, outlining the matters that should be covered in a brief of evidence. We will liaise with ACS to determine whether that material can be improved.

Recommendation 57 ((paragraph 4.64)

Customs retain copies for its records of all briefs prepared. Such copies should only be destroyed or returned to source if ordered by a Court or explicitly required as part of a settlement agreement.

Response by ACS

96. The recommendation is accepted. The practice has been reinforced in the ACS Investigation Manual.

Recommendation 58 (paragraph 5.81)

Australian Customs Service officers take appropriate notes during attendance at meetings with legal advisors where legal advice is sought or provided. Such notes should be retained.

Response by ACS

97. The recommendation is accepted. This has been reinforced in ACS manuals as outlined in response to recommendation 52.

Recommendation 59 (paragraph 10.56)

Director of Public Prosecutions officers preparing or endorsing briefs and submissions check all facts contained therein to appropriate source documents.

Response by DPP

98. It is standard practice for any prosecutor preparing a case for prosecution to review all original documents relevant to the case, if that is at all possible. In some cases original documentation may not be available (it may be overseas or no longer extant). In other cases, as occurred in the Midford matter, the original documents may only be available to be examined in a specific place or under specified conditions.

99. An officer who is preparing a submission to the Director or other senior officer will ensure that he or she sees copies of key documents in the case. However, even a modest fraud case can generate thousands of documents and it is not practicable for every officer involved in reviewing a case to personally examine every piece of paper generated in it. It is a matter for the professional judgment of the officer concerned to decide how much paper he or she needs personally to examine in order to properly understand the issues raised by the case.

Recommendation 60 (paragraph 10.56)

All briefs, whether prepared by the Australian Customs Service, Australian Government Solicitor or Director of Public Prosecutions, include a listing or presentation of the available evidence in chronological order.

Response by ACS

100. The recommendation has been accepted by the ACS. Briefs will include a listing of the evidence in chronological order. This is reflected in amendments to the ACS Investigation Manuals.

Response by DPP

101. This recommendation reflects the current practice of the DPP.

Recommendation 61 (paragraph 10.56)

Cases not be prosecuted by the Director of Public Prosecutions where there is reliance on an expectation that further evidence detrimental to the defendants will emerge during the committal hearings.

Response by DPP

102. It is not and never has been the practice of the DPP to commence legal proceedings in the expectation that further evidence will emerge after charges have been laid.

103. Under the Prosecution Policy, a prosecution can not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence has been committed by the alleged offender (paragraph 2.4 of the Prosecution Policy). However, there is no requirement that every piece of evidence that might conceivably exist has been pursued and obtained.

104. It is not unusual for additional evidence to become available to the prosecution after charges have been laid. In some cases, for example, one of several defendants may decide to plead guilty and offer to give evidence against the others. In the Midford case, an opportunity arose to obtain additional evidence because two ACS investigators were travelling to Singapore on another matter and were able to travel on to Malaysia at little additional cost.

105. If additional relevant evidence becomes available the DPP would be failing in its duties if it did not take steps to secure that evidence and make appropriate use of it.

Recommendation 62 (paragraph 10.56)

The Director of Public Prosecutions and Australian Government Solicitor assume a greater role in ensuring that evidence collected and presented by Australian Customs Service investigators is thoroughly

understood by those officers and that assertions sought to be made by the investigators or other witnesses have reasonable foundation.

Response by DPP

106. If this recommendation is concerned to ensure that the DPP exercises an independent review of evidence to ensure that a prosecution is appropriate the DPP accepts the recommendation. This is, and always has been, the practice of the DPP.

Recommendation 63 (paragraph 10.56)

Evidence preparation arrangements not be entered into between the Director of Public Prosecutions or Australian Government Solicitor and the Australian Customs Service that would call into question the independence, impartiality or objectivity of the two prosecutorial entities. In particular, whilst not excluding normal consultative mechanisms, the practice of stationing Customs officers in the offices of the Director of Public Prosecutions should cease.

Response by ACS

107. The intent of this recommendation is accepted. The ACS values impartial independent and objective advice from the DPP and AGS. It also considers there must be a close working relationship between prosecutors, advisors and investigators. The consensus amongst complex crime investigators is that prosecutors need to be involved at an early stage if the investigation is to proceed efficiently.

108. Where joint evidence preparation activity between ACS and DPP is considered appropriate, this should take place in the context of a formally established task force or secondment arrangement.

Response by DPP

109. See response to recommendation 74.

Recommendation 64 (paragraph 10.56)

The Government conduct a review into the operation of the Proceeds of Crimes Act to establish whether its application by the Director of Public Prosecutions is consistent with the intention of that legislation.

Response by DPP

110. The DPP enforces the Proceeds of Crime Act in accordance with the provisions of the legislation and with what is said in the Explanatory Memorandum and the Second Reading Speech. The Act has proved to be an effective weapon in dealing both with drug offenders and serious fraud against the Commonwealth.

Recommendation 65 (paragraph 10.56)

Where officers of the Director of Public Prosecutions responsible for preparation of cases seek to dismiss documentary evidence as irrelevant, supervisory checks include an examination of that evidence to ensure that an informed corporate view on its relevance can be formed.

Response by DPP

111. It is obviously important that proper supervisory checks be carried out. However, it is not possible for a supervising officer to personally examine and consider each document looked at and discarded by case officers.

Recommendation 66 (paragraph 11.23)

Cases selected for consideration of Crimes Act prosecution be subjected to closer attention by Senior Australian Customs Service management prior to referral to the Director of Public Prosecutions.

Response by ACS

112. The recommendation is accepted. It has been emphasised in amendments to the ACS Investigation Manuals.

Response by DPP

113. The DPP has no difficulty with senior officers of ACS having greater involvement when matters are being prosecuted under the Crimes Act. However, for reasons that are outlined in relation to Recommendations 63, 71 and 74, it is important that any increase in the role of ACS management not cut across the DPP's authority in the prosecution process, or impede the lines of communication between prosecutors and investigators.

Recommendation 67 (paragraph 12.62)

Where questions of a legal nature arise or are likely to arise in cases where the importer and the Commonwealth disagree over

interpretations, the Department of Industry, Technology and Commerce seek appropriate independent legal advice.

Response by the Department of Industry, Technology and Regional Development

114. Agreed. A directive is to be issued to Director, Legal and Parliamentary Section and the recommendation is being incorporated into the Departmental training program.

Recommendation 68 (paragraph 14.97)

When preparing briefs of evidence, Australian Customs Service Investigators clearly distinguish between the inclusion of known facts based on evidence available and unsupportable assertions or suppositions.

Response by ACS

115. The recommendation has been accepted. A new section in the ACS Investigation Manuals includes specific instructions relating to brief preparation.

Recommendation 69 (paragraph 14.97)

Care be taken by the Australian Customs Service not to misrepresent or misconstrue legal opinions provided, especially in relation to the sufficiency of existing evidence to support charges.

Response by ACS

116. The recommendation has been accepted. There are a number of references in the ACS Investigation Manual which emphasise the practice.

Recommendation 70 (paragraph 14.97)

Briefs of evidence be vetted and reviewed at senior levels within the Australian Customs Service to improve accuracy and completeness prior to referral to the Australian Government Solicitor, Director of Public Prosecutions or Counsel. These officers should also, to the extent that it is possible, be those who will represent the Australian Customs Service during court proceedings.

Response by ACS

117. The recommendation is accepted. As outlined in response to recommendations 50 and 54 amendments to the ACS Investigation Manual have been made. The selection of witnesses depends on their ability to give relevant admissible evidence.

Response by DPP

118. See response to recommendation 66.

Recommendation 71 (paragraph 14.97)

The Australian Customs Service refrain from seeking legal opinions where a full brief of evidence is not available for examination by the relevant legal advisor.

Response by ACS

119. The recommendation is not accepted. Legal opinions are regularly required during the course of investigations. They will be fully documented along with the information supplied to the legal advisor.

Response by DPP

120. See response to recommendation 74.

Recommendation 72 (paragraph 14.97)

Where legal opinions are sought by the Australian Customs Service, adequate time be allowed for consideration of the evidence by the legal advisor.

Response by ACS

121. The recommendation has been accepted. It has been re-emphasised in the ACS Investigation Manual.

Response by DPP

122. The DPP accepts this recommendation, but notes that time constraints often apply.

Recommendation 73 (paragraph 14.97)

Procedures be implemented within the Australian Customs Service to ensure that explanations provided by defendants or potential defendants are not dismissed without adequate investigation.

Response by ACS

123. The recommendation is accepted. It has been re-emphasised in ACS Investigation Manuals.

Recommendation 74 (paragraph 17.59)

The Australian Customs Service provide a formal brief to the Director of Public Prosecutions for cases where the advice of the Director of Public Prosecutions is sought.

Response by ACS

124. This recommendation is not accepted. See recommendation 71.

Response by DPP

125. *The thrust of recommendations 63, 71 and 74 is that ACS should be solely responsible for the investigation of alleged offences and that the DPP should only become involved when the matter has been investigated and there is a formal brief of evidence for it to consider. Further, it is proposed that the DPP should not even be asked for advice unless there is a formal brief directed to us.*

126. These recommendations are not viable and, as such, cannot be supported.

127. The current trend in the investigation of complex commercial fraud is for the development of *greater contact between investigators and prosecutors, not the opposite.* There has been a recognition that the task of investigating commercial fraud is difficult and resource intensive. The resources that are available are not unlimited and they need to be used effectively. That can best be achieved by ensuring that the investigation is planned and coordinated from the outset.

128. There have been cases in the past where investigators have spent months, or years, pursuing an investigation only to be told by the prosecutors that much of their work was unnecessary or even that they were on the wrong track entirely and that it would not be appropriate to prosecute. The community can not afford to waste resources on exercises of that kind.

129. It is now generally recognised both in Australia and overseas that the only effective way of addressing the problem is for investigators and prosecutors to communicate with each other, to do so early and to do so often. It is essential to decide at an early stage whether the matter warrants investigation and, if so, what areas should be pursued. Investigators and prosecutors then need to meet frequently to ensure that the investigation remains on track, that any problems that arise are addressed, and that resources are not wasted pursuing lines of inquiry which are leading nowhere. In some cases the best way of running a complex inquiry is on a task force basis, where officers of one or more agencies work out of the premises of another agency.

130. In recent years the DPP and all major investigative agencies have entered arrangements that provide for early and frequent consultation. Such arrangements are typified by the guidelines recently settled between the DPP and the Australian Securities Commission that were the subject of a Report by the Joint Statutory Committee on Corporations and Securities in October 1992.

131. There is, clearly, a potential that case officers associated with an investigation may lose some objectivity. The solution lies in ensuring that the work of those officers is kept under review and that key decisions are taken, or reviewed, by officers not directly involved in the case. In appropriate cases the DPP has procedures in place to ensure that such controls are exercised.

132. The Committee's recommendations, if accepted, would turn the clock back ten years and would severely reduce the Commonwealth's capacity to detect, investigate and prosecute serious fraud.

Recommendation 75 (paragraph 17.59)

Documentation of the steps in the prosecution decision making processes be improved so that a permanent audit trail is available.

Response by ACS

133. The recommendation has been accepted. The Investigation Management Training Course is centred on the process of setting up and following a formal investigation plan. A Case Decision Record has been implemented to permanently record the decisions that are made within an investigation. The ACS Investigation Manual has been amended to reflect this requirement.

Response by DPP

134. We do not accept that there is any need to improve our procedures in this area. The Committee seems to have found fault because the DPP was not always able to

say with certainty whether a particular document was seen by a particular person on a particular day. The expectations of the Committee in this area are unrealistic. The Recommendation would lead to a great waste of resources and loss of efficiency.

Recommendation 78 (paragraph 22.29)

Witness statements and other evidence gathered by the Australian Customs Service and intended for use in Commonwealth prosecution proceedings be more critically examined by the Director of Public Prosecutions to detect errors prior to that evidence being tendered.

Response by DPP

135. The practice of the DPP is and always has been to critically examine all witness statements and other evidence intended to be used in prosecution proceedings. Having said that, it cannot be guaranteed that a witness will never depart from his or her statement under cross-examination.

Recommendation 79 (paragraph 23.19)

Potential witnesses for the Commonwealth thoroughly prepare for court proceedings and review all relevant material prior to tendering written or oral evidence.

Response by ACS

136. The recommendation has been accepted. ACS Investigation Manuals now include a section on preparation for court proceedings.

Response by DPP

137. This recommendation reflects the standard advice given to witnesses by the DPP, and indeed by every prosecuting authority.

Recommendation 80 (paragraph 23.19)

Statements and other evidence to be used in prosecution proceedings be prepared in a balanced and objective manner, disclosing all relevant facts for which the witness has first hand knowledge.

Response by ACS

138. The recommendation is accepted. It has been re-emphasised in the ACS Investigation Manual.

Response by DPP

139. This recommendation in fact reflects the standard practice of the DPP.

Recommendation 81 (paragraph 23.19)

Adequate time and resources be devoted by the Director of Public Prosecution to ensuring that witness statements obtained are relevant to the proposed proceedings and do not contain hearsay evidence or other inadmissible material.

Response by DPP

140. This recommendation reflects the present practice of the DPP in those cases where we are involved in the preparation of statements. It is axiomatic that statements should only contain relevant and admissible material.

141. It should be noted, however, that it is often difficult to say whether a particular piece of material is going to prove relevant or admissible in a complex fraud case at the stage where the matter is being prepared for a committal hearing. The prosecution usually has no idea what issues the defence intends to raise. We have difficulty in seeing how the prosecution could ever be criticised for adopting a cautious view, and including material in the committal papers rather than leaving it out.

142. It should also be noted that the preparation of statements is primarily the responsibility of the investigators rather than the DPP. In some cases we assist in drafting statements. However, that is not a common occurrence. Even when we provide advice during the investigation stage, it usually addresses more general issues than what should appear in a particular statement. It follows that in the majority of cases we have no direct control over what initially goes into the statements.

143 We often receive briefs of evidence which include some inadmissible or irrelevant material. If that occurs, the choice is between sending the investigators to take fresh statements, with consequent delay and expense, or pressing on with the statements at hand knowing that we are not going to be able to rely on parts of them. A decision needs to be made in each case on which course is appropriate. That decision will turn on the amount and nature of irrelevant or inadmissible material in the brief.

144. Finally, it should be noted that this Recommendation runs counter to Recommendations 63, 71 and 74, which would see the DPP having no role in any matter until an investigation has been completed and a brief of evidence prepared. By that time, of course, all statements will already have been taken.

Recommendation 82 (paragraph 23.19)

The Director of Public Prosecutions take a more pro-active involvement in the selection of witnesses for Commonwealth prosecution proceedings, and greater consideration be given to their selection, including increased emphasis on selection for ability to provide first hand knowledge and lesser emphasis on the standing of the witness in the bureaucracy.

Response by DPP

145. This recommendation reflects the past and present practice of the DPP, although again we note that it runs counter to what is recommended in Recommendations 63, 71 and 74, which would see the DPP as having no role until an investigation had been completed and a brief of evidence prepared. By that stage, of course, all witnesses will have been identified and will have made statements.

Recommendation 83 (paragraph 23.19)

Documents, statements or other material collected for use in prosecution proceedings be presented in a form which is logical, coherent and readily comprehensible to Counsel, the judiciary and the defendants. If this requires the material to be arranged in other than chronological order, a chronology should also be provided.

Response by ACS

146. The recommendation has been accepted. The ACS Investigation Manual now contains more specific direction in this matter.

Response by DPP

147. This recommendation reflects the past and present practice of the DPP in any matter of significant complexity.

Recommendation 84 (paragraph 25.28)

Every major case where prosecution action is recommended by the Australian Customs Service be reviewed upon finalisation by each Commonwealth entity involved to identify potential areas for improvement.

Response by ACS

148. This recommendation is accepted. ACS seeks to learn from its experience in preparing cases at all times. Post case analysis can be a matter for discussion at regular liaison meetings.

Recommendation 85 (paragraph 25.28)

The outcome of all major or significant prosecutions cases, whether resulting in success or failure, be included in the Australian Customs Service annual report.

Response by ACS

149. The recommendation is accepted.

Response by DPP

150. We see no difficulty with this recommendation, as long as case reports are prepared in a way that do not affect the privacy of people who have not been convicted of any offence and do not disclose confidential information concerning investigative techniques or matters still under investigation.

Recommendation 86 (paragraph 27.27)

The Australian Customs Service allow adequate time for proper legal consideration by the Australian Government Solicitor of any proposed terms of settlement.

Response by ACS

151. The recommendation has been accepted and it has been emphasised in the ACS Investigation Manual.

Recommendation 87 (paragraph 27.27)

The Australian Customs Service allow sufficient time for adequate consideration of the settlement provisions by other parties to any proposed settlement.

Response by ACS

152. The recommendation has been accepted and has been re-emphasised as for recommendation 86.

Recommendations Concerning Disciplinary Actions and Internal Investigations

Recommendation 88 (paragraph 5.81)

Where Australian Customs Service administrative decisions are challenged, an internal review be made by a suitably senior and qualified officer independent of the original decision.

Response by ACS

153. The recommendation has been accepted. The practice has been reinforced through amendments to the ACS Investigation Manual.

Recommendation 89 (paragraph 12.62)

An investigation be conducted into the apparently false representations made by the Australian Customs Service to the Minister in connection with his letter to Midford and its Tariff Advisor dated 18 January 1988.

Response by ACS

154. This recommendation is accepted. The investigation has been conducted and a report furnished to the Minister for Science and Small Business (Minister responsible for Customs).

Recommendation 90 (paragraph 14.97)

An independent investigation be undertaken into allegations received by the Committee in a submission that an Australian Customs Service officer forged evidence during a recent Crimes Act prosecution case.

Response by ACS

155. This recommendation is accepted. An independent investigation is being carried out by the Director Internal Affairs Unit of the ACS. This officer is a retired senior Victoria Police officer employed on contract.

Recommendation 91 (paragraph 15.80)

The Comptroller-General review the levels, functions and suitability of the Australian Customs Service officers involved in the Midford case, together with the lines of responsibility and supervision that were clearly inadequate according to the evidence before the Committee. The

Comptroller-General should report his findings to the Committee within twelve months of the tabling of this Report.

Response by ACS

156. This recommendation is accepted.

Recommendation 92 (paragraph 17.89)

All Australian Customs Service Investigations officers be informed that demonstrating a belligerent approach towards members of the import/export industry is unacceptable behaviour and that officers exhibiting such an attitude will be transferred to other more suitable duties.

Response by ACS

157. The recommendation has been accepted and has been incorporated in a new section of the ACS Investigation Manual.

Recommendation 93 (paragraph 26.31)

Leaks of confidential information which could have come from Customs, or for which Customs is accused as being the source, be investigated either internally or, in the case of serious breaches, by the Australian Federal Police.

Response by ACS

158. This recommendation is accepted.

Recommendation 94 (paragraph 26.31)

In all cases of leaks of confidential information, the Minister should be advised formally; such advice to include the accusation, if one has been made, the nature of the leak, the details of the investigation, and any resulting action.

Response by ACS

159. This recommendation is accepted.

Recommendation 95 (paragraph 26.31)

In addition to information about specific leaks, a summary sheet outlining all the leaks occurring during the year be supplied to the Minister at the time of the Annual Report.

Response by ACS

160. This recommendation is accepted. A first report will be provided to the Minister at the time of the 1992/93 annual report.

Recommendation 96 (paragraph 26.31)

Customs Central Office demonstrates to the satisfaction of the Committee that it has taken steps to reassert its authority over its NSW branch.

Response by ACS

161. This recommendation is accepted. The matters referred to in this response to the Committee have been implemented in all ACS regions including New South Wales.

Recommendation 97 (paragraph 32.139)

Internal investigation into complaints against Australian Customs Service officers be carried out by officers with no present or past connection with the area under investigation.

Response by ACS

162. This recommendation is accepted. While most Internal Affairs Unit officers have a past connection with the Investigation area, officers from interstate are used for all substantive investigations where there could otherwise be a perceived conflict of interest.

Recommendation 98 (paragraph 32.139)

Officers carrying out the internal investigation provide a summary of their findings to the Comptroller-General outlining the nature of the complaint, the findings of the investigation and the action taken. This summary should also be provided to those making the original complaint.

Response by ACS

163. The intent of this recommendation is accepted. Privacy principles may affect the extent to which reports can be provided to the original complainant, particularly where formal action has not been recommended.

Recommendations Concerning General Communications

Recommendation 99 (paragraph 12.62)

Advice provided to Ministers and/or importers concerning anticipated timing of Court proceedings be based on documented advice from the respective Court Registrar.

Response by ACS

164. This recommendation is not accepted. It would be impractical. All parties to legal proceedings are in the hands of their legal advisors. Courts communicate with litigants through their solicitors. This has been confirmed with the Registrar of the Federal Court.

Recommendation 100 (paragraph 13.28)

The Australian Customs Service include in its Annual Report a listing of all cases where Statements under the Administrative Decisions (Judicial Review) Act and the Administrative Appeals Tribunal Act were not provided within the statutory time limit, showing the extent of the delay together with the relevant reasons.

Response by ACS

165. This recommendation is accepted.

Recommendation 101 (paragraph 17.59)

Procedures must be implemented to improve the co-ordination of Australian Customs Service investigation, particularly the dealings by all agencies of the Commonwealth with representatives of persons or firms who are subject to investigations by the Australian Customs Service.

Response by ACS

166. The recommendation is accepted. A new section dealing with inter-agency liaison has been included in the ACS Investigation Manuals.

Response by DPP

167. See response to recommendation 103.

Recommendations Concerning Communications Involving the Public

Recommendation 102 (paragraph 6.105)

Documents provided by importers or agents in response to Customs queries be date stamped upon receipt by the Australian Customs Service.

Response by ACS

168. This recommendation has been accepted. Appropriate procedures are being developed and ACS manuals will be amended accordingly.

Recommendation 103 (paragraph 12.62)

Customs never again refuse to meet with representatives of entities or individuals under investigation or refuse to allow an opportunity for explanations to be provided.

Response by ACS

169. The intent of the recommendation has been accepted, subject to legal advice in particular cases. The ACS Investigation Manuals have been amended to reflect the terms of the recommendation.

Response by DPP

170. This Recommendation deals with the situation where a company or individual under investigation wants to discuss the case.

171. It must be noted that real difficulties can arise in any case where a person who is under investigation attempts to discuss details of the case with an official with imperfect knowledge of the matters under investigation.

172. The official could easily prejudice the investigation by unwittingly disclosing that a particular line of inquiry is about to be pursued or a particular person is about to be interviewed. That could give the suspect an opportunity to destroy documents, warn off potential witnesses or even leave the jurisdiction.

173. There is also a risk of an official giving undertakings or assurances that can not be met. That could create an unfairness against the suspect who may take action he or she would not otherwise have taken only to find that charges are laid in any event.

174. Traditionally, officials who have been approached by people under investigation, have declined to meet with them.

175. There may be cases where an official can properly meet with a person whose activities are under investigation, especially if the person wishes to discuss aspects of those activities that are not directly affected by the investigation. However, the official will need to exercise great care to ensure that nothing he or she says or does could impinge upon the investigation or possible prosecution.

Recommendation 104 (paragraph 12.62)

Representations from entities or individuals under investigation be formally acknowledged upon receipt and given appropriate consideration.

Response by ACS

176. The recommendation has been accepted. The guidelines have been amended in the ACS Investigation Manuals.

Recommendation 105 (paragraph 12.62)

Where representations do not fully clarify the matters at issue, this be conveyed to the affected parties.

Response by ACS

177. The recommendation has been accepted. The guidelines have been amended in the ACS Investigation Manuals.

Recommendation 106 (paragraph 15.80)

Questions placed on notice to Customs by Parliamentary Committees be answered, such responses be provided in a timely manner and where answers are provided, they be checked for relevance and accuracy at a sufficient senior level prior to forwarding the Committee.

Response by ACS

178. The recommendation has been accepted. All National Managers have been advised in terms of the recommendation.

Recommendation 107 (paragraph 17.59)

All Australian Customs Service officers be instructed not to discuss the progress of cases under investigation or before the Courts with anyone outside of the performance of their official duties.

Response by ACS

179. The recommendation has been accepted. The ACS Investigation Manuals have been amended to re-emphasise this requirement.

Recommendation 108 (paragraph 28.20)

Where redeterminations of Customs values are made, the importer be notified within seven days of the date of the redetermination, such advice to also include details of the importer's right to appeal against the decision and the mechanisms for lodging any appeals.

Response by ACS

180. This recommendation is accepted.

Recommendations Concerning Communications Involving the Department

Recommendation 109 (paragraph 12.62)

Appropriate checks be conducted to ensure that advice provided to Ministers by Customs or the Department of Industry, Technology and Commerce is factual.

Response by ACS

181. This recommendation is accepted.

Response by the Department of Industry, Technology and Regional Development

182. Agreed. A directive is to be issued to all staff and the recommendation is being incorporated into the Departmental training program.

Recommendation 110 (paragraph 16.34)

Policy requirements be more clearly spelled out within the Department of Industry, Technology and Commerce so that its officers and consultants fully understand the requirements of the policies they provide advice upon.

Response by the Department of Industry, Technology and Regional Development

183. Agreed. A directive is to be issued to all staff and the recommendation is being incorporated into the Departmental training program.

Recommendation 111 (paragraph 16.34)

Adequate and systematic liaison between the Department of Industry, Technology and Commerce and Customs be implemented to ensure that policy requirements are clearly and succinctly conveyed to the Australian Customs Service for implementation.

Response by the Department of Industry, Technology and Regional Development

184. Agreed. A directive is to be issued to all staff. The recommendation is being incorporated into the Departmental training program and the Agreement on the working relationship between Customs and the Department will be amended.

Response by ACS

185. This recommendation is accepted. The revised MOU (see recommendation No 9) between the Department of Industry, Technology and Regional Development and the ACS will address the issue.

Recommendation 112 (paragraph 16.34)

Feedback mechanisms be put in place to ensure that Customs clearly understands the policies conveyed to it by the Department of Industry, Technology and Commerce.

Response by ACS

186. This recommendation is accepted. The revised MOU between the Department of Industry, Technology and Regional Development and the ACS will address the issue.

Response by the Department of Industry, Technology and Regional
Development

187. Agreed. A directive is to be issued to all staff. The recommendation is being incorporated into the Departmental training program and the Agreement on the working relationship between Customs and the Department will be amended accordingly.

Recommendation 113 (paragraph 16.34)

Immediate remedial action be taken by the Department of Industry, Technology and Commerce where there are indications that Customs has misunderstood the policy requirement.

Response by ACS

188. The revised MOU between the Department of Industry, Technology and Regional Development and the ACS will address this issue.

Response by the Department of Industry, Technology and Regional
Development

189. Agreed. A directive is to be issued to all staff and the recommendation is being incorporated into the Departmental training program. The revised Agreement between the Department and the ACS will address this issue.

Recommendations Concerning Communications Involving Parliament

Recommendation 114 (paragraph 3.32)

Comprehensive data on the costs incurred from inception of the Midford case in September 1987 to announcement of the Inquiry in December 1990 be provided to the Senate by all Commonwealth bodies involved in the case.

Response by ACS

190. The ACS has already provided comprehensive cost data to the JCPA covering these costs. The only missing element would be a small proportion of Senior officers' time during the post committal hearing period. This is not quantifiable.

Response by the Australian Federal Police (AFP)

191. In consequence of the relatively minor role and resource commitment of the AFP in the Midford Paramount matter, the total monetary cost to the organisation has been calculated at \$1,957.21. This figure excludes consequential costs as that incurred in an internal investigation into a complaint lodged during the course of AFP assistance to the ACS.

Response by DPP

192. The DPP has already provided details of costs incurred in this matter. They appear in the first submission by the DPP (S122).

Response by DFAT, the Departments of Industry, Technology and Regional Development, Prime Minister and Cabinet and Attorney-General's Department

193. This recommendation is accepted.

Recommendation 115 (paragraph 3.32)

Departmental secretaries and their equivalents introduce procedures to ensure the completeness and accuracy of costing data provided to Parliamentary Committees.

Response by Department of Finance

194. The Department has issued a Finance Circular to draw attention to the Committee's recommendation.

Recommendations to Improve the Quality of Investigations Staff

Recommendation 116 (paragraph 14.97)

Australian Customs Service Investigations officers receive further instruction in the basic legal presumption of innocence and their responsibility to conduct investigations in a manner that is, and is seen to be, thorough and unbiased.

Response by ACS

195. The recommendation is accepted. The ACS Investigation Manuals have been amended to reflect the requirements of this recommendation. Training course

material is being revised and special modules have been programmed for all ACS regions.

Recommendation 117 (paragraph 17.59)

Training given to Australian Customs Service officers in the gathering of written statements be reviewed and improved.

Response by ACS

196. The recommendation has been accepted. Current training course material is being re-evaluated and separate modules on the taking of statements are being developed.

Recommendation 118 (paragraph 32.139)

The Australian Customs Service further develop and promptly implement effective strategies for improving the performance of its investigation workforce.

Response by ACS

197. The recommendation has been accepted. The Investigation sub-program is continuously reviewing its operation and strategies with a view to further improvements.

Response by DPP

198. The DPP generally supports measures designed to improve the skills and expertise of Commonwealth investigators. However, we do not pretend to be experts on training and offer no specific comment on the recommendations made by the Committee.

Recommendation 119 (paragraph 32.139)

The Australian Customs Service further develop the performance measures for the Investigations Sub-program.

Response by ACS

199. The recommendation has been accepted. Performance measures are continually reviewed for accuracy and usefulness.

Recommendation 120 (paragraph 32.139)

All Australian Customs Service investigators attend the Advanced Investigation Course within six months of joining the Investigations function.

Response by ACS

200. The recommendation has been accepted. The Advanced Investigation Course has been re-developed. Two courses were run in April and May on the redesigned format. Arrangements are in hand to ensure that all officers assigned to the Investigation sub-program will attend an Advanced Investigation Course as soon as possible after joining the area.

Recommendation 121 (paragraph 32.139)

Action be taken to train all current Australian Customs investigators who have not attended the Advanced Investigation Course.

Response by ACS

201. The recommendation has been accepted. See response to recommendation 120.

Recommendation 122 (paragraph 32.139)

The Australian Customs Service improve its monitoring of training delivery to detect anomalies and deficiencies as revealed in the disproportionate attendance of Victoria based investigators at the Advanced Investigations Course.

Response by ACS

202. The recommendation has been accepted. The National Training Co-ordinator is establishing a national data base of all training that has been delivered. This data base will assist in overcoming anomalies and in programming future courses in a manner designed to overcome previous shortcomings.

Recommendation 123 (paragraph 32.139)

All Australian Customs Service investigators receive structured legal training in the principles of natural justice and relevant aspects of administrative law.

Response by ACS

203. The recommendation has been accepted. The Legal Services Section is providing training to all Regions on Administrative Law, with particular emphasis on natural justice and the rights of individuals subject to investigation.

Recommendation 124 (paragraph 32.139)

Short refresher courses and updates be regularly provided to Australian Customs Service Investigators.

Response by ACS

204. The recommendation has been accepted. The establishment of the data base mentioned in response to recommendation 122 will provide information on those officers who need access to refresher courses. Courses are being developed in modular form so that training can be tailored to individual needs.

Recommendation 125 (paragraph 32.139)

A formal evaluation be conducted of the training provided to Australian Customs Service investigations officers by a panel consisting of representatives from the Attorney-General's Department, the Director of Public Prosecutions, the Australian Government Solicitor, the Law Council of Australia and the Customs Brokers Council of Australia.

Response by ACS

205. This recommendation will be considered in the light of the outcome of the Price-Waterhouse audit (see recommendation 5) which will also report on ACS Investigation training.

Recommendation 126 (paragraph 32.139)

Specific training in Crimes Act investigation requirements be provided to Australian Customs Service investigators prior to engagement in Crimes Act investigations.

Response by ACS

206. The recommendation has been accepted. Training modules specifically designed for Crimes Act operations are being developed to cater for officers' individual needs.

Recommendation 127 (paragraph 32.139)

Adequate consideration be given by the Australian Customs Service to engage or second specialists with skills and knowledge relevant to Crimes Act investigations and prosecutions.

Response by ACS

207. The recommendation has been accepted. A number of officers with relevant experience have been recruited recently. Consideration is being given to secondment of appropriate specialists as necessary.

Recommendation 128 (paragraph 32.139)

The Australian Customs Service set and monitor target rates of training for Investigations staff, with particular emphasis on technical training.

Response by ACS

208. The recommendation has been accepted. The National Training Co-ordinator will establish a national data base of training information and will use this data to set target rates of training and monitor delivery for all investigation staff. This will include technical training as well as management training.

Recommendation 129 (paragraph 32.139)

The Australian Customs Service increase its efforts to recruit and retain suitably qualified staff to the Investigations function from institutions and organisations external to the Australian Customs Service.

Response by ACS

209. The recommendation has been accepted. The ACS is reviewing its staff mobility policy as it applies to Investigation. In future consideration will be given to advertising vacancies in the press to encourage recruitment from external institutions and agencies.

Recommendation 130 (paragraph 32.139)

The Australian Customs Service conduct a review of the staffing establishment in the Investigations component to determine whether any changes are required to better match classification levels with the complexity of work required to be performed.

Response by ACS

210. This recommendation is accepted. The necessary review is being undertaken.

Recommendation 131 (paragraph 32.139)

The Australian Customs Service establish within the Investigations component a suitable number of officers with specialist knowledge and expertise in Crimes Act investigations.

Response by ACS

211. The recommendation has been accepted. The recruitment activity outlined in the response to recommendation 127 together with the training initiatives mentioned in response to recommendation 126 will provide a stream of officers available for allocation to Crimes Act cases.

Recommendation 132 (paragraph 32.139)

Where an Australian Customs Service investigation involves Crimes Act considerations, at least one member on the investigation team should have specialist knowledge and expertise in conducting such investigations.

Response by ACS

212. The recommendation is accepted. Joint operations with Australian Federal Police (AFP) are currently running. Further secondments or joint operations will be considered as the opportunity arises. The ACS Investigation Manuals reflect the thrust of this recommendation.

Recommendation 133 (paragraph 32.139)

The Australian Customs Service improve its efforts to match the allocation of commercial fraud cases with the expertise, training, experience and developmental requirements of individual Investigations officers.

Response by ACS

213. The recommendation is accepted. The structure of the operations area is being reviewed to facilitate the operation of investigation teams

Recommendation 134 (paragraph 32.139)

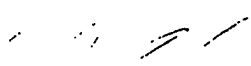
Supervision and checking of the more complex or technical work undertaken by Investigations officers be improved.

Response by ACS

214. The recommendation is accepted. As indicated in other responses Case Managers will constantly monitor the work of Case Officers.

Other Comments

215. The Commonwealth Director of Public Prosecutions (DPP) has offered some general comments on the Inquiry and Report. The Department of Finance gave the DPP the opportunity to reconsider those comments. In the event, the DPP confirmed that it wished its comments to be transmitted to the Committee. Accordingly, they are attached to this Finance Minute.



S T Sedgwick
Secretary
Department of Finance
June 1993

APPENDIX

General Comment

Comment by the Attorney-General's Department

The role of the Attorney-General's Department in relation to those recommendations in the Report that are addressed in the Department of Finance Minute is essentially that of solicitor for the Commonwealth acting on instructions from the Australian Customs Service. The Australian Government Solicitor performs this role in respect of actions for the recovery of pecuniary penalties under Customs legislation. The decision whether or not to commence Customs pecuniary penalty proceedings is made by the Australian Customs Service.

2. Accordingly, whilst at least some of these recommendations concern activities of this Department undertaken upon instructions of a client, it is considered that the Commonwealth's response should be provided by those departments and agencies which have functional responsibility for the instructions given us. This Department advised relevant departments and agencies that it was available for consultation in the course of preparing their responses. The Australian Customs Service sought comments from this Department on a number of recommendations and these were provided.

Comment by Australian Customs Service (ACS)

3. The Australian Customs Service has accepted the great majority of the recommendations in the Report and has already implemented most of those which it has accepted.

4. The fact that the recommendations have been accepted does not, however, mean that the ACS also accepts all of the content of the body of the Report. In this regard the ACS notes the views expressed by the Director of Public Prosecutions in his general comment attached to this minute.

Comment by Commonwealth Director of Public Prosecutions (DPP)

5. The Report criticises some aspects of the DPP's conduct of the Midford case. It is an undoubted fact that the committal proceedings foundered at an early stage. However, that does not mean that the DPP, or the individuals charged with running the case, failed to properly perform their duties.

6. The DPP presented three detailed submissions to the Committee (at S122, S2000 & S10538) and provided additional information on six other occasions (at S2078, S2202, S3828, S7366, S8342 & S8555). Those materials outline the DPP's

involvement in the proceedings and explain why the prosecution failed. Nothing in the Report causes us to resile from what is contained in those materials. In particular, it is just not right, and in fact is inconsistent with materials before the Committee, that DPP officers failed to foresee issues that were likely to be raised in the committal proceedings or failed to see and properly understand documents that were relevant to the case.

7. In our view the Committee made a number of errors in approaching the task before it.

8. First, the Committee failed to pay any regard to the real difficulties that face investigators and prosecutors in commercial fraud cases like the Midford matter.

9. These cases typically involve vast quantities of documents and raise difficult issues of fact, law and commercial practice. They are among the most difficult of all cases to investigate and prosecute and they represent the biggest challenge currently facing prosecutors, and indeed the criminal justice system as a whole.

10. The problem is that there is rarely any eye-witness evidence to show what occurred and suspects rarely agree to be interviewed. These cases usually stand or fall on inferences to be drawn from the documentation. There is also rarely any indication of what matters are going to be in dispute, and what will be conceded, if the matter comes before a court. The prosecution must assume that every possible line of defence that can conceivably be raised will be raised and ensure that it has evidence to negate it. There is a risk that if the prosecution fails to foresee, and put itself in a position to negate, a possible line of defence the defendant will be entitled to an acquittal, irrespective of whether the particular defence has any intrinsic merit.

11. The net effect of these considerations is that these cases become very large and very complex. At the end of the day, it often emerges that a lot of the time and effort spent investigating and preparing the case was expended on issues which turned out not to be in dispute when the case finally came to court. Even so, court proceedings in a large commercial fraud case can often take months to complete

12. These problems were pointed out to the Committee. However, there is no recognition of them in the Report. As a result, the Committee has tended to set unrealistic standards against which to judge the actions of those involved in the case. It has also failed to recognise that it is reviewing the case with the benefit of hindsight. (Prime examples appear at p 166 where the Committee criticised the DPP case officer's understanding of various documents and pp.287-289 where the Committee criticised the committal documents.)

13. Secondly, the Committee made the mistake of making findings on issues of law. In our view it has neither the competence nor the jurisdiction to make legal rulings.

14. Much of the criticism of the DPP is based on the conclusion that the prosecution case was flawed in relation to issues that were not reached and not considered in the committal proceedings and which have never been ruled on by a court of law.

15. The Committee found, for example, that there is a difference in law between the terms "sourced from" and "manufactured by" as they appear in relevant quota instruments (pp.10, 58ff, 276, 352); that the failure to specify conditions on the face of quota documents meant, as a matter of law, that the relevant quota had been issued free of conditions (pp.214, 277); and that the DPP misinterpreted the legal effect of certain Cabinet documents (p.175). The Committee concluded that on each issue the DPP had failed to properly prepare for the committal proceedings.

16. The Committee acknowledges that it is not a court of law (p.4). It clearly does not have the function of making findings on issues of law. Yet that is precisely what it proceeded to do. Indeed the Committee did not even record the fact that contrary views had been expressed on each of the relevant issues. An uninformed reader could be left with the impression that the findings of the Committee were unchallenged and unchallengeable.

17. Thirdly the Committee did not seek independent assistance when dealing with areas that require special knowledge or expertise.

18. The Committee's own procedures recognise that the Committee does not have specialist expertise. Those procedures require that an officer from the Australian National Audit Office (ANAO) and an officer from the Department of Finance attend all sessions of the Committee. Those officers are able to provide the Committee with expert assistance when the Committee is considering financial or accounting issues. One might have thought that the Committee would similarly seek expert assistance when considering issues in relation to the criminal law, commercial law, Customs administration and prosecution procedures. The Committee did not do so.

19. Indeed, when witnesses who had expertise in those areas appeared before the Committee they were often given little chance to make their views known. Many government officials who appeared before the Committee were subjected to personal abuse bordering on harassment (see pp.7-9 of the DPP's Final Submission: S10544 to S10546). Questions directed at government officials often took the form of diatribes, some of which take more than a page of transcript to reproduce (eg: p.891, 1077 & 1140). Witnesses were often interrupted and contradicted part way through their answers. On occasions the proceedings were conducted more as an inquisition than an inquiry.

20. Section 19(1) of the Public Accounts Committee Act 1951 provides that a person appearing as a witness before the Committee is entitled to the same protection

and privileges as a witness appearing before the High Court. The Committee did not always comply with section 19(1) in the present Inquiry (see further at pp.6-7 of the DPP's Final Submissions: S10545-S10546).

21. The Committee has an imperfect understanding of basic matters such as the prosecution process, criminal procedure and investigative methods. Notwithstanding that, these are all matters on which the Committee has made findings.

22. Fourthly, the Committee appears to have given undue status to the legal presumption of innocence. It seems to have assumed that it was obliged by that doctrine to accept everything said or presented by the former defendants as proven fact whether supported by credible evidence or not.

23. The Committee has tended to quote assertions by former defendants and their advisers as if they were proven fact (eg. p.174 and most of Ch. 29).

24. It also placed considerable weight on self-serving affidavits filed in Malaysian proceedings even though the deponents of the affidavits were never subjected to questioning either in Australia or Malaysia (Ch.19).

25. The Committee had no information about who prepared the affidavits, or the circumstances in which they were sworn, and had no way of knowing whether the deponents would, in fact, have confirmed the contents if called upon to do so. The evidence before the Committee was that the maker of one of the affidavits could not speak English. However, the relevant affidavit was in the English language. The matters dealt with in the affidavits were clearly in dispute. We do not see how it was reasonably open to the Committee to make positive findings on the basis of the affidavits. Yet it is clear that the Committee drew upon the contents of the affidavits in making findings adverse to the two Customs officers who travelled to Malaysia.

26. At page 344 the Committee reached the conclusion that the Midford case was "one of the causes of bad relations between Australia and Malaysia". The only authority cited for that proposition is an unnamed Senator who apparently expressed that view in an ABC radio program in 1991.

27. As a final example, at page 192 the Committee notes that at one stage Midford proposed entering an agreement under which title to machinery would pass to it retrospectively as a means of remedying an earlier failure to comply with quota requirements. The Committee seems to have had difficulty in seeing anything untoward in the proposal.

28. Fifthly, the Committee has tended to selectively quote evidence given before it. A number of examples could be given, but we will limit ourselves to four:

- At Chapter 21, the Committee quoted at length from a joint advice prepared by prosecuting counsel on 26 June 1989. The DPP prepared a detailed response to that advice on 27 June 1989. A copy of the response was provided to the Committee (S2677). The Committee made no reference to the response in its Report;
- The Committee failed to make any reference to the fact that after 1985 Midford's operations in Malaysia were limited to one employee who was, in effect, conducting a re-invoicing and relabelling operation. The fact was a keystone of the prosecution case and was also an important factor in understanding why charges were brought in the first place;
- At page 175 the Committee concluded that certain Cabinet documents were not seen during the preparation of the case by anyone other than the DPP action officer. (The footnote incidentally refers to a page of the transcript that does not deal with the issue.) The Report does not refer to the Final Submissions by the DPP which pointed out that copies of all relevant Cabinet documents were in the material originally provided to the DPP by ACS and were included in the material given to prosecuting counsel (S10545). It is not clear why the Committee disregarded that evidence; and
- The Committee failed to refer to the fact that, after the conspiracy charges had been withdrawn, a written opinion was obtained from experienced senior counsel who had not been involved in the committal proceedings. Senior counsel reviewed the available evidence, and provided advice in relation to possible further action. The then Director, who was himself an experienced senior counsel, agreed with the views expressed in relation to the evidence, although he decided that further proceedings were not warranted in the public interest. That material was provided to the Committee (See S616-S631). The opinions analysed why the committal proceedings failed. It is again not clear why the Committee disregarded that evidence.

29. Finally, the Committee has tended to assert improper motives or conduct on the part of DPP officers in circumstances where there is no evidentiary basis for such an assertion. One example of this appears at p.94 where it is asserted that the DPP and ACS were "desperate" to "get" Midford. That is a serious claim which is simply not supported by any evidence before the Committee. Another example appears at p. 185 where it is inferred, by innuendo, that DPP officers deliberately withheld information

from the then Director. The suggestion is quite scandalous and, again, is totally unsupported by evidence.

30. The DPP was given no indication that these assertions were going to be made against our officers. We were given no opportunity to respond to them. The officers concerned have been denied basic natural justice.

31. In the same vein, the Committee has referred to an allegation that an investigator in an unrelated prosecution may have gained a conviction by forging evidence (p.229). The Committee recommended that the allegation be investigated (Recommendation 90). The case in question was the prosecution of Peter Bazos and Elite Woodproducts Pty Ltd. The Committee was aware that the convictions in that case have been reviewed by the Court of Criminal Appeal, and that the Court dismissed the appeals and upheld the convictions. In these circumstances it is clear that the allegation to the Committee was mischievous. The fact that the Committee gave any weight to it was inappropriate.

32. The net result of the approach taken by the Committee in assessing the evidence before it is that findings of fact made by it must be treated with considerable caution at the very least.