

The Use of the Averment Provisions in *Comptroller-General of Customs v Tomson and Keomalavong*

- 3.1 As indicated in Chapter 1, this chapter examines the use of the averment provisions in the Act in the case of *Comptroller-General of Customs v Tomson and Keomalavong*. Evidence relating principally to this case was received from Mr Ian Rodda of Rodda Castle & Co¹ and from Mr Noel Balzary. The case was also covered by the ACS in its evidence.

Case History

Background to the Case

- 3.2 Mr Tomson was born in Laos and migrated to Australia in 1980. He subsequently established a business importing clothing goods from various parts of Asia.² In 1987 and 1988 the business imported several consignments of clothing goods into Australia from a number of firms in Thailand, Hong Kong and Taiwan as follows:

- importation from Steady Export Co, Thailand on 16 July 1987;

1 Mr Rodda provided evidence to the Committee on the basis of his knowledge of the *Tomson* case. Much of the evidence provided by Mr Rodda was extraneous to the terms of reference for the Committee's Inquiry, as Mr Rodda himself noted. See Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.2.

2 Mr Rodda, *Submission 1*, p.9.

- importation from Gold Vincent & Co, Hong Kong on 29 July 1987;
 - importation from Winelux Enterprise Co, Taiwan on 7 August 1987;
 - importation from New Calcutta Store (1969) Ltd, Thailand on 24 September 1987; and
 - importation from Cameron Trading Co, Hong Kong on 28 March 1988.³
- 3.3 These importations became the focus of an investigation by the ACS concerning possible undervaluing of the goods for Customs purposes.⁴ In August 1987 an ACS intelligence report concluded that the importations appeared to constitute ‘ “a case of defrauding the revenue by undervaluation” ‘.⁵ The ACS began actions under section 214 of the Act to seize imported goods in August 1987.⁶
- 3.4 The ACS raised its investigation with the AGS, which advised the ACS to refer the case to the Commonwealth Director of Public Prosecutions (DPP) for possible action under the Commonwealth *Crimes Act 1914*.⁷ The ACS did so and, while the investigation was still ongoing, received advice from the DPP on several occasions between September 1987 and December 1990.⁸ The DPP ultimately advised the ACS that there was ‘insufficient evidence for a prosecution under the Crimes Act [*sic*]’ but that there was, potentially, ‘sufficient evidence to warrant the commencement of proceedings for offences under the Customs Act [*sic*]’.⁹ The DPP accordingly advised the ACS to refer the case to the AGS for further consideration.¹⁰ The ACS did so and received advice from the AGS that ‘a *prima facie* case existed for offences under the Customs Act [*sic*]’¹¹ in relation to the importations.
- 3.5 Mr Tomson and his business partner Mr Keomalavong were subsequently charged with the following offences under the Act in relation to each of the five importations:
- smuggling goods (section 233);

3 ACS, *Submission 4.2*, Appendix A.

4 ACS, *Submission 4.2*, pp.11-14.

5 ACS, *Submission 4.2*, p.12.

6 ACS, *Submission 4.2*, p.10.

7 ACS, *Submission 4.2*, p.14.

8 ACS, *Submission 4.2*, p.14; Mr Lionel Woodward, *Transcript of Evidence*, 24 July 2003 p.157.

9 ACS, *Submission 4.2*, p.14.

10 ACS, *Submission 4.2*, p.14.

11 ACS, *Submission 4.2*, p.14.

- evading payment of Customs duty payable (section 234);
- making a Customs entry false in a particular (section 234); and
- making a statement untrue in a particular (section 234).¹²

3.6 Each of the offences was alleged to have been committed on the date of the relevant importation.

Chronology of the Proceedings and Result

3.7 Informations (pleadings) for each charge were laid by an ACS officer in relation to each importation, i.e. four separate charges for each importation.¹³ The informations contained the averments that are the subject of this chapter. The informations relating to the Steady Export Co, Gold Vincent & Co, Winelux Enterprise Co, and New Calcutta Store (1969) Ltd importations were laid against Mr Tomson, and the information relating to the Cameron Trading Co importation was laid against Mr Keomalavong as second defendant. The informations commenced the Customs prosecution against both defendants and were laid at the St James Centre Local Court in Sydney on the following dates:

- 16 July 1992 (importation from Steady Export Co);
- 24 July 1992 (importation from Gold Vincent & Co);
- 6, 7, 17 August 1992 (importation from Winelux Enterprise Co);
- 3 September 1992 (importation from New Calcutta Store (1969) Ltd); and
- 3 September 1992 (importation from Cameron Trading Co).¹⁴

3.8 Corresponding summonses were issued to Mr Tomson and the second defendant.

3.9 Three separate sets of hearings were held in 1993, 1994 and 1995 before Magistrate Connors in the Downing Centre Local Court, Sydney. Mr Tomson and the second defendant pleaded not guilty to the charges. The dates of the hearings were as follows:

- 26 – 29 July 1993;

12 ACS, *Submission 4.1*, p.11.

13 ACS, *Submission 4.2*, Appendix A.

14 ACS, *Submission 4.2*, Appendix A.

- 18 – 21 April 1994; and
 - 30 January – 3 February 1995.¹⁵
- 3.10 Magistrate Connors gave judgment in the Sutherland Local Court on 27 June 1995. He found that a reasonable doubt existed in relation to each of the charges and accordingly dismissed the informations laid against the defendants. The Magistrate indicated that his application of the criminal standard of proof (beyond reasonable doubt) was as required by the Act.¹⁶
- 3.11 The defence made an application to the Magistrate for costs which was rejected.¹⁷ Upon appeal to the New South Wales Supreme Court, this ruling was overturned on the basis that the Magistrate made an error in the application of statute.¹⁸ Although the Court referred the matter back to the Magistrate for resolution, the issue of costs was finally settled between the parties in 1998.¹⁹

The Averments

The Nature of the Averments

- 3.12 Each of the informations laid by the ACS in relation to the five importations contained several averments.²⁰ The transcript of the first hearing on 26 July 1993 indicates that the averments were made by the ACS under section 255 of the Act.²¹ Proceedings at the first hearing transpired as follows:
- commencement of hearing and opening of the prosecution case;
 - overview of prosecution case and evidence;
 - initial amendments to averments (see paragraph 3.19 below);

15 ACS, *Submission 4.2*, Appendix B.

16 ACS, *Submission 4.2*, Appendix B.

17 ACS, *Submission 4.2*, Appendix B.

18 ACS, *Submission 4.1*, p.14.

19 *Exhibit 3*, p.11; ACS, *Submission 4.2*, p.24.

20 Most of the averments relating to the New Calcutta Store (1969) Ltd importation were provided to the Committee by the ACS in summons form rather than in the form of informations. See ACS, *Submission 4.2*, Appendix A.

21 ACS, *Submission 4.2*, Appendix B.

- discussion between counsel and Magistrate as to progression of hearing and adjournment;
- tendering and admission of prosecution documentary evidence;
- tendering and admission of investigation evidence;
- discussion between counsel and Magistrate as to progression of examination of investigation evidence; and
- adjournment until following hearing (27 July 1993).²²

3.13 The averments made by the ACS fell into two broad classes: those relating to formal matters, and those relating to more substantial matters.

Formal matters

3.14 A number of the averments related to straightforward formal matters and were included in all of the informations. These were:

- that the ACS officer laying the informations held a position to which the Comptroller-General of Customs had delegated his powers to bring the Customs prosecution;
- that the defendant(s) caused the goods in question to be brought into Sydney from overseas on the relevant date; and
- that the defendant(s) or the customs agent employed by the defendant(s) caused an entry form for home consumption in respect of the relevant goods to be delivered to the ACS, together with an invoice from the relevant overseas firm.²³

3.15 The informations relating to the Gold Vincent & Co, Winelux Enterprise Co, and New Calcutta Store (1969) Ltd importations also contained an averment that Mr Tomson had changed his name to Peter Tomson by instrument in September 1990.²⁴

3.16 Some of the informations also contained averments relating to foreign currency conversion rates.²⁵

22 ACS, *Submission 4.2*, Appendix B.

23 ACS, *Submission 4.2*, Appendix A.

24 ACS, *Submission 4.2*, Appendix A. Mr Tomson's former surname was Vilaysack.

25 ACS, *Submission 4.2*, Appendix A.

- 3.17 The Committee considers that these formal averments were entirely reasonable and appropriate.

Substantial matters

- 3.18 Before outlining the substantial matters that were averred in the informations, the Committee notes that a number of amendments were made to the averments over the course of several hearings from 26 July 1993 onwards.

Amendments to the averments

- 3.19 At the first hearing on 26 July 1993, the prosecution sought the Magistrate's permission to make some amendments to the averments in order to correct typographical errors and omissions.²⁶ No objection to these amendments was raised by the defence and they were accordingly made.²⁷ The relevant amendments are incorporated into the averments as set out below at paragraph 3.22.
- 3.20 At a later hearing on 18 April 1994, the defence submitted to the Magistrate that certain words in the averments amounted to averments of law and were therefore unacceptable under section 255 of the Act.²⁸ At the subsequent hearing on 20 April 1994, the Magistrate noted section 255 and, in agreement with part of the defence submission, determined that the word 'false' in the informations relating to the smuggling charge and the charge of evading Customs duty payable was an averment of law and therefore precluded.²⁹ The Magistrate also agreed with the defence in respect of the word 'duty' and determined that averments made by the ACS in some of the informations regarding Customs duty payable and a Customs duty shortfall were averments of law and must be disregarded.³⁰
- 3.21 Subsequent to this, the prosecution applied to the Magistrate for amendments to be made to the averments determined to be impermissible. The prosecution requested that the word 'false' be

26 ACS, *Submission 4.2*, Appendix B.

27 ACS, *Submission 4.2*, Appendix B.

28 ACS, *Submission 4.2*, Appendix B.

29 ACS, *Submission 4.2*, Appendix B. The Magistrate also determined however that the word 'false' in the informations relating to the charges of making a Customs entry false in a particular and making a statement untrue in a particular (section 234) was an averment of fact and therefore permissible.

30 ACS, *Submission 4.2*, Appendix B.

deleted where required and the word 'incorrect' be substituted.³¹ The Magistrate refused this on the basis that the word 'incorrect' would still constitute an averment of law.³² The Magistrate determined that the word 'false' should be deleted where required.³³ The relevant amendments are incorporated into the averments as set out below.

3.22 The substantial matters averred by the ACS in relation to the charges of smuggling and evading Customs duty payable were:

The Steady Export Co importation

1. that the defendant evaded payment of Customs duty of \$3,406.96 (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A2,462.83, which was lower than the price actually paid;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A2,462.83, which was lower than the price actually paid;
4. that the defendant caused an export declaration, together with an invoice from Steady Export Co, to be produced to Thailand Customs that specified a purchase price for the goods (\$US1,593.00) which was lower than the price actually paid;
5. that the purchase price for the goods was not less than \$A2,462.83 and US\$1,593.00; and
6. that the only importation from Steady Export Co was that specified in the entry for home consumption.³⁴

The Gold Vincent & Co importation

1. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A3,266.20, which was lower than the price actually paid;

31 ACS, *Submission 4.2*, Appendix B.

32 ACS, *Submission 4.2*, Appendix B.

33 ACS, *Submission 4.2*, Appendix B.

34 ACS, *Submission 4.2*, Appendix A.

2. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A3,266.20, which was lower than the price actually paid;
3. that Gold Vincent & Co prepared the invoice at the direction of the defendant and in accordance with the instructions of the defendant;
4. that Gold Vincent & Co, on behalf of the defendant, caused an export declaration to be produced to Hong Kong Customs and Excise that specified a purchase price for the goods of \$HK98,950.00; and
5. that Gold Vincent & Co, on behalf of the defendant, caused an export licence to be produced to Hong Kong Customs and Excise particularising the goods, specifying the manufacturers of the goods, and specifying a purchase price of \$HK98,950.00.³⁵

The Winelux Enterprise Co importation

1. that the defendant evaded payment of Customs duty (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A1,956.00, whereas the price actually paid was not less than A\$8,758.52;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A1,956.00, whereas the price actually paid was not less than A\$8,758.52;
4. that the entry for home consumption particularised the goods at certain values and that certain of the goods were manufactured and supplied by an overseas individual; and
5. that the defendant caused the Westpac Bank to remit \$A10,000 to the overseas individual in July 1987 and also sent the individual \$A81,000 in payment for goods purchased between December 1986 and September 1987.³⁶

35 ACS, *Submission 4.2*, Appendix A.

36 ACS, *Submission 4.2*, Appendix A.

The New Calcutta Store (1969) Ltd importation

1. that the defendant evaded payment of Customs duty of \$3,916.79 (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A4,442.32, which was lower than the price actually paid;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A4,442.32, which was lower than the price actually paid;
4. that New Calcutta Store (1969) Ltd prepared the invoice at the direction of the defendant and in accordance with the instructions of the defendant;
5. that New Calcutta Store (1969) Ltd, on behalf of the defendant, caused an export declaration, together with an invoice for the goods, to be produced to Royal Thailand Customs specifying a purchase price for the goods of \$US2,927.00; and
6. that the only importation from New Calcutta Store (1969) Ltd was that specified in the entry for home consumption.³⁷

The Cameron Trading Co importation

1. that the defendant evaded payment of Customs duty of \$14,066.32 (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption and the entry for warehousing delivered to the ACS stated that the purchase price for the goods was the amount nominated, which was lower than the price actually paid;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$HK104,070.00, which was lower than the price actually paid;
4. that Cameron Trading Co prepared the invoice at the direction of the defendant and in accordance with the instructions of the defendant;

³⁷ ACS, *Submission 4.2*, Appendix A.

5. that the defendant engaged Cameron Trading Co to produce an export declaration to Hong Kong Customs and Excise on behalf of the defendant's business specifying a purchase price for the goods of \$HK126,620.00;
6. that the defendant engaged Cameron Trading Co to produce an export licence to Hong Kong Customs and Excise on behalf of the defendant's business particularising the goods, specifying the manufacturers of the goods, and specifying a purchase price of \$HK126,620.00; and
7. that the goods particularised in the documents produced to Hong Kong Customs and Excise were the same goods imported into Australia and itemised in the entry for home consumption and the entry for warehousing and in the invoice delivered to the ACS from Cameron Trading Co.³⁸

3.23 In terms of the informations relating to the charges of making a Customs entry false in a particular and making a statement untrue in a particular (section 234), it was averred in the informations relating to the Steady Export Co and Cameron Trading Co importations that the defendant made the false entry and produced documentation to Customs containing the statement untrue in a particular.³⁹ These charges however were not averred in the informations relating to the Gold Vincent & Co and New Calcutta Store (1969) Ltd importations.⁴⁰ In the informations relating to the Winelux Enterprise Co importation, the production of documentation to Customs containing the statement untrue in a particular was averred but not the making of the false entry.⁴¹ Further averments concerning the entries for home consumption and the invoices delivered to the ACS differed from those set out at paragraph 3.22 above in that they stated that the entries and invoices falsely specified the purchase price for the goods.⁴² This was in accordance with the determination of the Magistrate.⁴³

3.24 It is clear that the main thrust of the substantial averments was that the purchase price for the goods specified in the documentation delivered to the ACS was lower than the price actually paid, thereby

38 ACS, *Submission 4.2*, Appendix A.

39 ACS, *Submission 4.2*, Appendix A.

40 ACS, *Submission 4.2*, Appendix A.

41 ACS, *Submission 4.2*, Appendix A.

42 ACS, *Submission 4.2*, Appendix A.

43 See note 29 above.

giving rise to the relevant offence. At the first hearing on 26 July 1993 the prosecution summarised its case as follows:

Mr Tomson in relation to the four shipments that relate to him and Mr Keomalavon [sic] relating to the one shipment that is the subject of his charge, travelled overseas and purchased items of clothing... in Thailand, Hong Kong or Taiwan... The items were paid for in those countries. Thereafter documents were prepared which included invoices which were produced to Australian Customs in due course. In each case the price value disclosed on those invoices which were produced to Australian Customs were said to be done on an FOB basis, on a Free On Board basis and in each case it is the prosecution's case that the figures disclosed were false, they were substantially less than the true value of the goods. ...the documents were effectively prepared by the overseas suppliers the figures being inserted which were false figures, but this was done to the knowledge of Mr Tomson and Mr Keomalavon [sic] and that as a result in each case there has been each of the offences alleged committed.⁴⁴

3.25 After considering the evidence presented by the prosecution, the Magistrate found that the prosecution had established a *prima facie* case in respect of the informations laid against Mr Tomson and the second defendant.⁴⁵

Claims Regarding the Use of the Averments

3.26 Mr Rodda claimed that 'the averments sworn by the Informant were false in material respects and, to that extent, amount to perjured evidence.'⁴⁶ Mr Rodda also stated elsewhere that 'The defence was able to show that the averments were false'.⁴⁷ Mr Rodda further stated that the entirety of the evidence brought before the Magistrate by the prosecution was fabricated.⁴⁸

3.27 Mr Rodda also claimed that the averments:

44 ACS, *Submission 4.2*, Appendix B.

45 ACS, *Submission 4.2*, Appendix B.

46 Mr Rodda, *Submission 1*, p.19.

47 Mr Rodda, *Submission 1*, p.11.

48 Mr Rodda, *Submission 1*, p.19.

...were relied on by the magistrate [*sic*] for the purpose of deciding that there was a *prima facie* case made out against the defendants at the close of the crown case...⁴⁹

3.28 Elsewhere Mr Rodda stated that the averments were:

...the only evidence before the Court that indicated any wrongdoing on the part of the accused.⁵⁰

3.29 Mr Rodda indicated that the formal averments made by the ACS in relation to the identity and status of the ACS officer laying the informations, the carriage of the goods into the country by the defendant, and the delivery of the home consumption entries and invoices to the ACS were not contentious.⁵¹

3.30 In response to Mr Rodda's claim that the averments were false and amount to perjured evidence, the ACS stated that it 'rejects these allegations and considers that they have been made without any proper foundation at all'.⁵² The ACS stated the following in its rejection of the claim:

- no objections were made by either defendant in relation to most of the averments and most of the defendant's submissions on averments were upheld;
- [as a result of the Court stipulating changes to the averments in agreement with the defence's submission] ...any averments in impermissible form were not relied on by the magistrate [*sic*] in determining a *prima facie* case.
- ...the Magistrate found that there was a *prima facie* case or, in other words, evidence which was capable of leading to a conviction. That necessarily means that there was a proper evidentiary basis for commencing a prosecution.
- While Mr Rodda asserts that 'the defence was able to show that the averments were false', in fact the Magistrate's ruling was that Customs had not proved its case beyond reasonable doubt. There is a world of difference between the two points.
- ...the Magistrate was asked to make an order for costs in favour of the defendants on the basis that the prosecution could never have had faith in this case. Indeed, the submission was made that it would be open to the Court

49 Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.35. See also Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.36; Mr Ian Rodda, *Transcript of Evidence*, 24 July 2003, pp.111.

50 Mr Rodda, *Submission 1*, p.11. See also Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.45.

51 Mr Rodda, *Transcript of Evidence*, 24 July 2003, p.128.

52 ACS, *Submission 4.1*, p.12.

to find bad faith. The Magistrate rejected that submission and concluded that there had been no improper or unreasonable conduct in the course of the investigation or the proceedings themselves.⁵³

3.31 The ACS also rejected Mr Rodda's claim that the averments were relied on by the Magistrate in deciding that the prosecution had established a *prima facie* case. The ACS stated that this claim is not 'supported by the objective facts',⁵⁴ and that:

It may be noted that no submissions as to whether a *prima facie* case had been made out were made on behalf of Mr Tomson, although he was invited to do so.⁵⁵

3.32 The ACS also denied Mr Rodda's claim that the averments constituted the only evidence of wrongdoing.⁵⁶

3.33 Thus the main issues for the Committee to consider regarding the use of averments in the case, as raised by Mr Rodda's evidence, are:

- the legitimacy of the averments; and
- the reliance placed on the averments by the Magistrate in finding that the prosecution had established a *prima facie* case against the defendants. As the focus of the evidence taken by the Committee was on Mr Tomson, the main issue for the Committee to consider here will be the reliance placed on the averments by the Magistrate in finding the *prima facie* case against Mr Tomson.

The legitimacy of the averments

3.34 For the Committee, the key question in examining this issue is whether the prosecution brought genuine evidence in support of the averments. This is particularly important given the statement of the ACS, noted in the previous chapter, that averments are not used without an evidential basis.

3.35 In considering the legitimacy of the averments, the Committee has had close regard to the following:

- the evidence brought by the prosecution as detailed in the transcripts of the case hearings; and

53 ACS, *Submission 4.1*, pp.13-14.

54 ACS, *Submission 4.2*, p.4.

55 ACS, *Submission 4.1*, p.12.

56 ACS, *Submission 4.1*, p.12.

- the Magistrate’s assessment of the prosecution evidence.

3.36 Before setting out its conclusions, the Committee considers it useful to briefly review the prosecution evidence brought in relation to the averred matters. This comprised the documents delivered to the ACS by the defendants, a second set of documents obtained by the ACS overseas, and valuation evidence. The Committee will also review the Magistrate’s assessment of this evidence.

The Steady Export Co importation

3.37 At the first hearing, the prosecution indicated its belief that, contrary to the single purchase price for the goods of \$A2,462.83 specified in the Customs documentation delivered to the ACS, Mr Tomson had made two separate payments for the goods – one of \$A2,462.83 and one of \$US1,593.00.⁵⁷ The prosecution gave as supporting evidence two sets of documentation – the documents supplied to the ACS, and a second set of documents from Thailand which, the prosecution stated, showed a separate bank payment for the goods of \$US1,593.00.⁵⁸

3.38 In his submission, Mr Rodda contended that the ‘ACS case was false’ in this respect.⁵⁹ Mr Rodda stated that one of the documents showing the figure of \$US1,593.00 was a ‘Thai foreign exchange control form’,⁶⁰ the purpose of which was to:

...show the amount of foreign exchange to be earned by the exporter as a result of the sale. The document was required to show the amount of the selling price in both baht and United States dollars...⁶¹

3.39 The Committee notes that there was another document in the prosecution’s evidence, a Thai export invoice, indicating a receipt value of \$US1,593.00.⁶²

3.40 Mr Rodda also stated that \$A2,462.83 was the sole payment for the goods and that the \$US1,593.00 figure referred to:

...the amount left by Tomson in payment for the goods minus the commission and charges retained by Steady Export Co

57 ACS, *Submission 4.2*, Appendix B.

58 ACS, *Submission 4.2*, Appendix B.

59 Mr Rodda, *Submission 1*, p.4.

60 Mr Rodda, *Submission 1*, p.4.

61 Mr Rodda, *Submission 1*, p.34.

62 Mr Rodda, *Submission 1*, Annexure G.

and the freight forwarding company, Trans Air Cargo, as their fees for preparing the export documentation and completing the various other export formalities.⁶³

- 3.41 At a number of hearings the defence brought evidence in relation to the differing amounts and the documentary evidence presented by the prosecution.⁶⁴

The Gold Vincent & Co importation

- 3.42 At the first hearing, the prosecution indicated its belief that the purchase price for the goods of \$A3,266.20 specified in the Customs documentation delivered to the ACS was false, and that the true purchase price was not less than \$HK98,950.00 or \$A18,113.75.⁶⁵ The prosecution gave a range of documentation as supporting evidence including an air waybill and three Hong Kong Customs and Excise export licences.⁶⁶ The prosecution contended that the export licences revealed a combined total purchase price for the goods of not less than \$HK98,950.00 or \$A18,113.75.⁶⁷

- 3.43 In his submission, Mr Rodda stated that the export licences had been applied for in advance of Mr Tomson's buying trip to Hong Kong by his buying agent,⁶⁸ and that the figures in the licences were 'not the actual selling prices of the goods, but the minimum FOB [Free On Board] values acceptable to the Hong Kong Customs.'⁶⁹

- 3.44 At a number of hearings the defence brought evidence in relation to the export licences and the documentary evidence presented by the prosecution.⁷⁰

The Winelux Enterprise Co importation

- 3.45 At the first hearing, the prosecution indicated its belief that the purchase price for the goods specified in the Customs documentation delivered to the ACS was false.⁷¹ The prosecution stated that:

63 Mr Rodda, *Submission 1*, pp.4-5.

64 ACS, *Submission 4.2*, Appendix B.

65 ACS, *Submission 4.2*, Appendix B.

66 ACS, *Submission 4.2*, Appendix B.

67 ACS, *Submission 4.2*, Appendix B.

68 Mr Rodda, *Submission 1*, p.54.

69 Mr Rodda, *Submission 1*, p.56.

70 ACS, *Submission 4.2*, Appendix B.

71 ACS, *Submission 4.2*, Appendix B.

...in relation to this case... there is [sic] no overseas documents so it is not a case where there are local documents to compare with overseas documents. This is a case that is based upon the valuation evidence.⁷²

- 3.46 The valuation evidence is noted below at paragraph 3.57. The prosecution also presented some other documentary evidence indicating the remittance of funds to an overseas individual.⁷³ The prosecution suggested that this individual was involved in the importation.⁷⁴
- 3.47 In his submission, Mr Rodda stated that the lack of any overseas evidence held by the ACS, in combination with a minute paper from the senior ACS representative in Tokyo, indicates that:
- ...the prosecution of Peter Tomson in relation to the Winelux transaction proceeded in the face of recognition by the ACS that it had no evidence whatsoever of wrongdoing on Mr Tomson's part in relation to these goods.⁷⁵
- 3.48 The minute paper from the ACS representative in Tokyo, however, states that the transacting of business in the clothing industry in Taiwan involves very little documentation.⁷⁶
- 3.49 At the hearing on 1 February 1995 the defence brought evidence in relation to the purchase price for the goods.⁷⁷

The New Calcutta Store (1969) Ltd importation

- 3.50 At the first hearing, the prosecution indicated its belief that, contrary to the single purchase price for the goods of \$A4,442.32 specified in the Customs documentation delivered to the ACS, Mr Tomson had made two payments for the goods – one of \$A4,442.32 and one of \$US2,927.00.⁷⁸ The prosecution gave as supporting evidence two sets of documentation – the documents supplied to the ACS, and a second set of documents from Thailand which, the prosecution stated, showed a separate payment for the goods of \$US2,927.00.⁷⁹

72 ACS, *Submission 4.2*, Appendix B.

73 ACS, *Submission 4.2*, Appendix B.

74 ACS, *Submission 4.2*, Appendix B.

75 Mr Rodda, *Submission 1*, p.53.

76 Mr Rodda, *Submission 1*, Annexure 8.

77 ACS, *Submission 4.2*, Appendix B.

78 ACS, *Submission 4.2*, Appendix B.

79 ACS, *Submission 4.2*, Appendix B.

- 3.51 In his submission, Mr Rodda drew a parallel between this importation and the Steady Export Co regarding the separate amounts.⁸⁰ Mr Rodda contended that the \$US2,927.00 figure was not a separate payment for the goods.⁸¹
- 3.52 At the hearings on 31 January 1995 and 1 February 1995, the defence brought evidence in relation to the differing amounts and the documentary evidence presented by the prosecution.⁸²

The Cameron Trading Co importation

- 3.53 At the first hearing, the prosecution indicated its belief that the purchase price for the goods of \$HK104,070.00 or \$A17,961.65 specified in the Customs documentation delivered to the ACS was false, and that the true purchase price was not less than \$HK126,620.00 or \$A21,853.64.⁸³ The prosecution gave a range of documentation as supporting evidence including a Hong Kong Customs and Excise export declaration, an air waybill, and two Hong Kong Customs and Excise export licences.⁸⁴ The prosecution contended that the export licences revealed a combined total purchase price for the goods of not less than \$HK126,620.00.⁸⁵
- 3.54 In his submission, Mr Rodda stated that:
- ...the goods shown in the invoice, packing list and ACS examination report are **not** the same goods shown in the Hong Kong export declaration and applications for export licences. The Hong Kong documents include reference [*sic*] to goods that were not purchased by Tomson and were not shipped to Australia. The ACS confirmed this fact by physical examination of the goods after importation.⁸⁶
- 3.55 A comparison does reveal discrepancies between the goods listed in the Hong Kong Customs and Excise export declaration and licences and those listed in the Cameron Trading Co invoice, the packing list, and the ACS examination report. There are also, however, discrepancies between the Cameron Trading Co invoice, the packing
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80 Mr Rodda, *Submission 1*, p.60.

81 Mr Rodda, *Submission 1*, p.60.

82 ACS, *Submission 4.2*, Appendix B.

83 ACS, *Submission 4.2*, Appendix B.

84 ACS, *Submission 4.2*, Appendix B.

85 ACS, *Submission 4.2*, Appendix B.

86 Mr Rodda, *Submission 1*, p.6 (author's emphasis).

list, and the ACS examination record. The examination record lists goods not registered in the invoice or packing list, and vice versa. All of the documents, with the exception of the export licences, record a total shipment of 37 cartons.

- 3.56 At a number of hearings the defence brought evidence in relation to the documentary evidence presented by the prosecution.⁸⁷

The oral valuation evidence

- 3.57 In addition to the evidence outlined above, at the hearings on 28-29 July 1993 and 18 April 1994 an expert witness for the prosecution, Mr Prelea, gave oral evidence as to the value of representative samples of the imported goods. The values arrived at by Mr Prelea were generally higher than the purchase prices for the goods specified in the Customs documentation delivered to the ACS by the defendants.⁸⁸ At the hearings on 20-21 April 1994 and 30 January 1995 – 1 February 1995, an expert witness for the defence also gave oral evidence as to the value of the goods samples. The values arrived at by this witness differed from those calculated by Mr Prelea and corresponded more to the prices for the goods specified in the Customs documentation delivered to the ACS by the defendants.⁸⁹

The Magistrate's assessment of the evidence

- 3.58 In arriving at his judgment, the Magistrate reviewed the documentary and oral evidence brought by the prosecution.⁹⁰ He also reviewed the documentary and oral evidence brought by the defence.⁹¹
- 3.59 In assessing the probative value of the documentary evidence brought by the prosecution, the Magistrate found that it did not prove beyond a reasonable doubt that the prices for the goods specified in the Customs documentation provided to the ACS by the defendants were false.⁹² Further, the Magistrate stated that:

I am satisfied that the defendants took no part in the preparation of the overseas documents, nor did they submit those documents to the overseas authorities.⁹³

87 ACS, *Submission 4.2*, Appendix B.

88 ACS, *Submission 4.2*, Appendix B.

89 ACS, *Submission 4.2*, Appendix B.

90 ACS, *Submission 4.2*, Appendix B.

91 ACS, *Submission 4.2*, Appendix B.

92 ACS, *Submission 4.2*, Appendix B.

93 ACS, *Submission 4.2*, Appendix B.

- 3.60 In assessing the probative value of the oral valuation evidence given by Mr Prelea, the Magistrate found that the sample of goods examined by him was a representative sample of the importations.⁹⁴ He found that Mr Prelea had expertise in purchasing clothes in the Asian market, but that this expertise and experience was not relevant ‘to the market in which the defendants operated’.⁹⁵ The Magistrate also found that the evidence given by the expert witness for the defence was corroborated by evidence provided by another defence witness.⁹⁶
- 3.61 In the final analysis, the Magistrate found that the evidence given by Mr Prelea did not prove beyond a reasonable doubt that the prices for the goods specified in the Customs documentation provided to the ACS by the defendants were false.⁹⁷ As noted at paragraph 3.10 above, the Magistrate indicated in his judgment that his application of the criminal standard of proof was as required by the Act.

Conclusions

- 3.62 After reviewing the evidence presented in relation to the averred matters, it seems clear to the Committee that the prosecution did not bring genuine evidence, documentary or oral, in support of the averments. For the Committee, the following factors are of particular significance:
- the overseas documentary evidence brought by the prosecution did nothing more, in essence, than indicate different monetary amounts for the imported goods to those indicated in the documentation delivered to the ACS. As noted at paragraph 3.59 above, the Magistrate concluded that the defendants had had no connection with the overseas documents;
 - the overseas documentary evidence failed to prove the prosecution case in relation to any of the charges and so did not bear out the matters stated in the averments; and
 - the oral valuation evidence of Mr Prelea, as recognised by the Magistrate, was irrelevant to the particular nature of the business conducted by the defendants.

94 ACS, *Submission 4.2*, Appendix B.

95 ACS, *Submission 4.2*, Appendix B.

96 ACS, *Submission 4.2*, Appendix B.

97 ACS, *Submission 4.2*, Appendix B.

3.63 Based on its review of the evidence in this chapter, the Committee is drawn to the conclusion that the allegations made in the averments were not supported by the evidence and that the use of the averments was manifestly wrong. If the overseas documents and the valuation obtained by the prosecution were not genuine evidence, then the substantial averments made by the ACS, which were based on this evidence, cannot have had any real legitimacy and should not have been made. Further, the Committee is distinctly unimpressed with the way in which the ACS conducted elements of its case. In particular:

- despite travelling overseas on the DPP's advice and obtaining evidence at public expense, the ACS still made use of the averment provisions in its prosecution. This is precisely the approach which, as indicated in the Committee's first recommendation, the Committee believes should not be taken. The following chronology of the investigation details the overseas travel:

22/2/1988 seizure of goods for entries 1M72680485K (New Calcutta Store); 1M71950432B (Steady Export); 1M72181152K (Winelux) and 1M72110152B (Gold Vincent) in relation to Thongson Imports & Exports.

11/4/1988 meeting held at AGS with Peter Swinton. Swinton advised that due to seriousness of the offences should be dealt with by DPP. On 18/4/1988 DPP agree to take on matter based on preliminary advice.

1/6/1988 DPP advice supporting the gathering of overseas evidential material, after exhausting evidence obtained in Australia. Meeting held with DPP on 18/1/1989 reinforces the importance of obtaining evidence from overseas.

Overseas evidence obtained in Hong Kong & Bangkok by Officers Grausam and Locker during trip between the period 9/2/1989 and 23/2/1989. DPP advice on 24/2/1989 evaluated the need to return overseas to obtain whatever evidence is available in admissible form from Thai Customs and banks, which were not available at the time from the previous trip.

3/8/1989 DPP advise further overseas trip required. Approval granted for Grausam to revisit. Visit occurs between 6/12/1989 and 15/12/1989.

14/8/1990 Prosecution Brief of Evidence forwarded to DPP comprises of 18 lever arch files pertaining to 84 importations.

27/8/1990 section 208A Notices issued with respect to entries 1M72680485K (New Calcutta Store); 1M71950432B (Steady Export); 1M72181152K (Winelux) and 1M72110152B (Gold Vincent) in relation to Thongson Imports & Exports and entry 1M80900482N (Cameron Trading) in relation to Lanwren Pty Ltd/Kongkeo Keomalavong.

11/12/1990 DPP legal advice located at folios 245-258 of file N88/07987 Part 2 advises insufficient evidence to proceed under s29D or 86A of the Crimes Act 1914. Suggest that Prosecution Brief be referred to AGS for prosecution under Customs Act 1901, whereby the averment provisions can be advantaged.

10/1/1991 Prosecution Brief referred to AGS.

Acknowledgment received 23/9/1991 and 14/10/1991 that AGS Lyn Brady has carriage of matter.⁹⁸

- a number of the substantial averments initially contained phrasing which meant that they were averments of law. These averments then had to be amended in order to render them admissible. Such amendments should not have had to be made – the averments should have been correctly framed from the beginning.
- the ACS did not call all of the witnesses indicated on its witness list for the hearings.⁹⁹

3.64 When combined with the lack of genuine evidence brought by the ACS and the way in which the averments were used, these elements present the Committee with a clear picture of substandard practice and procedure on the part of the ACS at that time. For the Committee, this confirms the need for many of the recommendations set out in the previous chapter.

Reliance on the averments

3.65 The Committee's conclusion regarding the averments brings the question of reliance into relief. As noted at paragraph 3.25 above, the Magistrate found that the prosecution had established a *prima facie* case in respect of the informations laid against the defendants.¹⁰⁰ Also, as noted at paragraph 3.33 above, the focus of the evidence taken by

⁹⁸ *Exhibit 6*, pp.2-3. *Exhibit 6* is at Appendix D.

⁹⁹ Mr Rodda, *Transcript of Evidence*, 23 June 2003, pp.39-40; *Exhibit 1*, p.2.

¹⁰⁰ ACS, *Submission 4.2*, Appendix B.

the Committee was on Mr Tomson. Consequently, the main issue for the Committee to consider will be the reliance placed on the averments by the Magistrate in finding the *prima facie* case against Mr Tomson.

- 3.66 In considering this issue, the Committee has had close regard to the Magistrate's finding of a *prima facie* case against Mr Tomson as detailed in the transcript of the case hearing on 20 April 1994.
- 3.67 In terms of the charges against Mr Tomson, the Magistrate stated that:
- BENCH: Not formerly held a prima facie case against the defendant Tomson for all the matters before the Court, on the evidence contained in the documents and the evidence from.. (not transcribable).. I in fact do so.¹⁰¹
- 3.68 Notwithstanding the second set of evidence, which cannot be identified due to the gap in the transcription of the judgment, it is apparent to the Committee that the documents referred to by the Magistrate included the averments. The averments, therefore, were relied upon by the Magistrate in finding the existence of a *prima facie* case against Mr Tomson.
- 3.69 This being the case, it is open to the Committee to conclude that, without the averments, the Magistrate may not have found a *prima facie* case against Mr Tomson.
- 3.70 The Committee notes that the ACS requested and obtained an opinion from the Acting Commonwealth Solicitor-General to the effect that the averments were not the significant factor in the establishment of the prosecution's case. The Committee considers however that the evidence suggests otherwise.

The role of the DPP

- 3.71 As cited above at paragraph 3.63, the DPP informed the ACS in 1990 that there was 'insufficient evidence'¹⁰² to prosecute the case under the *Crimes Act 1914*, advising instead that the brief be referred to the AGS for prosecution under the *Customs Act 1901* '**whereby the averment provisions can be advantaged**'.¹⁰³

101 ACS, *Submission 4.2*, Appendix B.

102 ACS, *Submission 4.2*, p.14; *Exhibit 6*, p.3.

103 *Exhibit 6*, p.3.

3.72 The Committee was not provided with a copy of the then DPP's advice by the ACS, and the current DPP declined to provide a copy of the advice to the Committee. However, correspondence from the current DPP disclosed the nature of the advice:

The evidence in this case was closely examined and it was noted that much of this evidence was inadmissible in its present form. The ACS was advised that there was insufficient evidence to establish a prima facie case against Mr Vilaysack or any of the other persons for offences against section 29D or section 86A.

Reference was made to the guidelines between the ACS, AGS and the DPP in relation to the referral of matters to the DPP for the taking of action under the Crimes Act [sic] or the referral to AGS for proceedings under the Customs Act [sic]. In particular paragraph 10 of those guidelines provided "(I)f a matter is referred to the DPP which appears, in accordance with the guidelines, to be more appropriate for pecuniary penalty action, or if the available evidence (whether presently obtained or able to be obtained) is insufficient to establish offences to the criminal standard of proof, the DPP will report to the AGS and refer the matter to it as soon as possible".

In advising the ACS that there was insufficient evidence to proceed against Mr Vilaysack or any of the others under the Crimes Act [sic], the DPP stated that there may be sufficient evidence to warrant commencement of proceedings for offences under the Customs Act [sic], e.g. section 234, and it may be that this matter should be referred to the AGS for consideration to be given to the commencement of proceedings under the Customs Act [sic]. The advice stated that as Customs Act [sic] proceedings are handled by the AGS, we were not advising on the sufficiency of evidence in relation to any possible Customs Act [sic] prosecution.

The advice noted that in proceedings pursuant to the Customs Act [sic] the prosecution can take advantage of the averment provisions in section 255 of the Customs Act [sic] and so be able to establish to a prima facie level certain facts otherwise difficult to formally prove. The advice did not refer to any such facts in this regard and did not discuss averments further. The advice also referred to the fact that Customs Act

[sic] offences were traditionally perceived as civil or at least quasi criminal in nature and hence handled by the AGS.¹⁰⁴

- 3.73 The Committee is concerned that evidence which was adjudged insufficient by the DPP in 1990 to commence a prosecution under the *Crimes Act 1914* to the criminal standard of proof was subsequently used to commence a prosecution under the *Customs Act 1901* to the very same standard. Under sections 245 – 248 of the *Customs Act 1901*,¹⁰⁵ the criminal standard of proof applies in prosecutions in the lower courts; this, as the Magistrate indicated in his judgment, was the standard that applied in the prosecution of Mr Tomson.¹⁰⁶
- 3.74 Given this, the Committee cannot help but conclude that the advice given to the ACS by the DPP in 1990 was a falsely-based option, for the evidence was eventually used for a prosecution to the same standard of proof as that under the *Crimes Act 1914*.¹⁰⁷ Furthermore, if the ACS knew that its evidence was not sufficient for a criminal prosecution under the *Crimes Act 1914*, it should not have used that same evidence to commence a prosecution under the *Customs Act 1901* to the criminal standard of proof. This is especially so given that the ACS, as the agency responsible for the administration of the *Customs Act 1901*, must have known that the criminal standard of proof would apply to its prosecution of Mr Tomson. The ACS can only have hoped to have succeeded if it believed that the averments were not going to be challenged. In the view of the Committee, this constitutes an abuse of the averment provision (section 255), because the ACS knew its evidence was not sufficient to satisfy the criminal standard.

Final Comments

The Time Period

- 3.75 The Committee considers it necessary to comment on the time interval between the first seizure of the imported goods in August 1987 and the final resolution of the costs issue between the parties in mid-1998 – a total period of almost eleven years.

104 DPP, correspondence of 15 April 2004. This correspondence is at Appendix E.

105 See paragraphs 2.74 – 2.77 above.

106 See paragraphs 3.10 and 3.61 above.

107 The Committee recognises that the current DPP was not in office in 1990.

- 3.76 Firstly, there was an interval of some five years between the 1987 seizure and the laying of the first information in July 1992. Although this was within the five-year statutory period allowed by Parliament, the Committee is unimpressed that the ACS prolonged commencement of the prosecution to the very limit of what was possible. It is clear that, during this period, the ACS did not collect evidence in a timely fashion¹⁰⁸ and indeed had been collecting evidence since 1987-1988. In the interests of procedural fairness, a much shorter interval should have elapsed between the seizures and the commencement of the prosecution. Secondly, there was a period of some six years between the institution of the case in 1992 and the final resolution of the costs issue in 1998. Notwithstanding that part of the timeline set by court scheduling, the Committee considers that this period was unacceptably long. The ACS should have done more to expedite the matter, particularly in the costs resolution phase following the decision of the New South Wales Supreme Court.
- 3.77 The gross dilatoriness displayed by the ACS over the course of the investigation and prosecution – almost 11 years – is not the Committee’s idea of justice. Nor is it the Committee’s idea of justice that the ACS instituted a prosecution to the criminal standard of proof on an evidential foundation that it knew, on advice from the DPP, to be insufficient to satisfy that standard under another Act where averments were not available. On the evidence, Mr Tomson suffered considerable pecuniary loss as a result of the investigation and prosecution and was indeed bankrupt by 1999.¹⁰⁹ The Committee believes that compensation for Mr Tomson is therefore appropriate and would go some way to repair the loss he has sustained.

The Midford Paramount Culture

- 3.78 The Committee also notes that the first stages of the ACS’s investigation into the importations by the defendants took place at the same time as the ACS was investigating importations conducted by Midford Paramount Pty Ltd. Some of the ACS officers involved in the *Tomson* case gave evidence to the subsequent Joint Committee of

¹⁰⁸ See paragraph 3.63 above and Appendix D.

¹⁰⁹ Mr Rodda, *Submission 1*, p.11; Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p. 47; Mr Lionel Woodward, *Transcript of Evidence*, 24 July 2003, p.177.

Public Accounts (JCPA) inquiry into the Midford Paramount matter.¹¹⁰ In its inquiry report, the JCPA stated that:

Evidence was received that within the Investigations arena, ACS officers displayed and frequently voiced the attitude that all importers are crooks, and it is just a matter of catching them and that 'fraud is endemic' in the clothing industry. It appears, however, that the audits conducted by Customs have not shown this to be true.¹¹¹

3.79 The report of the JCPA made a total of 134 recommendations, including a number of recommendations for improving the performance of its investigation workforce and the culture of the ACS. In November 1993 the Government announced that it accepted the 'overwhelming majority' of the 134 recommendations made by the JCPA and that it was proceeding to implementation.¹¹²

3.80 The ACS indicated to the Committee that it has undergone considerable cultural and organisational change over the past 10 years:

The Tomson matter is an old Customs investigation and prosecution case that was finalised through court proceedings. The investigation was carried out prior to changes implemented by a new administration following the Review of the Australian Customs Service. The Tomson case predates significant legislative and administrative changes to Customs processes.

The search and seizure provisions within the Customs Act [sic] were overhauled in 1995.

The *Prosecution Policy of the Commonwealth* established those factors that an agency must consider before launching legal proceedings. Customs complies fully with this policy.

The organisational culture of the Australian Customs Service has undergone significant change over the last 10 years.

110 Mr Rodda, *Submission 1.5*, pp.1-2. See also the Joint Committee of Public Accounts (JCPA), *Report 325: The Midford Paramount Case and Related Matters, Customs and Midford Shirts – The Paramount Case of a Failure of Customs*, AGPS, Canberra, Appendix A.

111 JCPA, *Report 325: The Midford Paramount Case and Related Matters, Customs and Midford Shirts – The Paramount Case of a Failure of Customs*, AGPS, Canberra, pp.473-474.

112 Press release by Senator Chris Schacht, then Minister for Science and Small Business, 10 November 1993.

In September 2003, Customs won the Prime Minister's gold award for Excellence in Public Sector Administration.¹¹³

3.81 The ACS further detailed the overhaul of the search and seizure provisions in the Act:

The *Customs Act 1901* was amended in 1995 (*Customs, Excise and Bounty Legislation Amendment Act 1995*). A principal feature of the amendments included a substantial rewriting of the search and seizure provisions within the Act. Search provisions were amended to bring them into line with the prevailing policy on the use of search warrants by Commonwealth officers (*Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*).

The amendments established a search and seizure regime that was subject to judicial oversight. Under the legislation, a judicial officer must have regard to the appropriateness and necessity of the warrant action before issuing a warrant to Customs. The amendments also introduced time frames for the retention of evidential material seized under warrant. The Act now states that Customs must return evidential material seized under warrant if:

- the reason for the seizure no longer exists; or
- Customs decides that the material is not to be used as evidence; or
- within 120 days after seizure, Customs has not commenced proceedings in which the material was to be used, and a judicial officer has not made an order for the further retention of the material within that time.

Customs prosecutions must be commenced at any time within 5 years from the date of the offence.¹¹⁴

3.82 The Committee accepts the above statements of the ACS and acknowledges that it has undergone important organisational changes over the past decade. However, it is clear to the Committee that the culture which produced the Midford Paramount prosecution also produced the *Tomson* prosecution. The *Tomson* case is unfinished business from the Midford period and must be dealt with on a similar basis.

113 ACS, *Submission 4.6*, p.9.

114 ACS, *Submission 4.5*, p.2.

Recommendation 6

- 3.83 Given the reprehensible handling exhibited by the Australian Customs Service over the course of the investigation and failed prosecution of Mr Tomson, the Committee recommends that Mr Tomson receive appropriate compensation for commercial losses directly attributable to the seizure of the goods and to the lapse of time before the resolution of the costs issue between the parties in 1998.**

Hon Bronwyn Bishop MP
Chairman
May 2004