



RODDA CASTLE & CO
CUSTOMS AND INTERNATIONAL TRADE CONSULTANTS

Submission 1.7

OUR REF:

**CONFIRMATION
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The Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

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Dear Secretary,

**Inquiry Into Averment Provisions in Customs Legislation -
Further Submission on Behalf of Peter Tomson -
Response to the Submission Dated 21 July 2003 of the
Australian Customs Service**

The submission of the Australian Customs Service (ACS) dated 21 July 2003 to this Inquiry ("the ACS submission") responds to the various matters raised in the written submission made by me on 24 April 2003 ("my submission"), and to other matters raised in my oral evidence at the hearing conducted on 23 June 2003.

The ACS has been entirely disingenuous in its response to the issues raised on Mr Tomson's behalf. Its submission canvasses a wide range of issues, each of which deserves a detailed rebuttal. I am mindful however of the fact that the Committee may consider it inappropriate to examine matters which go beyond its terms of reference, such as the question of whether the proceedings commenced against Mr Tomson in July 1993 may have amounted to a malicious prosecution.

In relation to that aspect of the matter for example, the ACS claimed on page 3 of its submission that the magistrate concluded "in effect" that there was nothing improper or unreasonable in the investigation and prosecution of Mr Tomson. Whether such a "conclusion" is open on the facts is questionable. I make the point however that, had Mr Tomson's legal representatives been in possession in June 1995 of all of the material that has come to light since his acquittal, the submissions in relation to costs would have been considerably more persuasive and may very well have led to the magistrate forming the view that the prosecution of Mr Tomson was malicious.

Copies of attachments to this submission
available on request.

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Those matters will not be pursued here however. This submission confines itself to examples of the misuse of the averment power in the prosecution of Peter Tomson, and issues necessarily connected to such misuse.

Reliance on Averments

Commencing on page 5 of its submission, the ACS seeks to refute my allegation that the magistrate relied on the averments for the purpose of deciding that a *prima facie* case had been made out against the accused. The ACS claims that the allegation is not supported by the objective facts, and that the averments were not significant in the prosecution case. This rebuttal of my allegation is deceitful and misleading, and does not withstand objective scrutiny.

The ACS supports its argument by claiming that the averments were not referred to during the opening of the prosecution case as one of the categories of evidence to be relied on (ACS submission p.5). The statements of (alleged) fact set out in the averments were however broadly outlined in the prosecution's opening address as the substance of its case. So whilst it is correct that the averments were not referred to as one of the *five categories of evidence* outlined during the first stage of the prosecution's opening address, the claim is nevertheless misleading.

To illustrate, I attach pages 5 to 7 of the transcript dated 26 July 1993 (Attachment A). A discussion concerning the averments begins at the foot of page 5 of the transcript. The opening remarks relate to amendment of certain averments. At the top of page 6, the discussion continues with the prosecutor explaining the averment procedure to the magistrate. It includes the comment by the prosecutor -

"I don't know if your Worship has had an opportunity to hear a matter such as this before and is familiar with the averment provisions of the Customs Act itself. It is section 255 of the Act **and it permits in a customs prosecution of this type the prosecutor to aver matters which are prima facie evidence of the matters averred ...**" (my emphasis)

There then follows a detailed discussion of each of the amendments made to the averments, commencing with amendment of those relating to the smuggling charge in the Steady Export matter. The prosecutor then referred the magistrate to the amendments made to the averments in each of the other cases where alterations had been made. It is palpable nonsense therefore for the ACS to claim, as it has, that the averments were not significant in the prosecution case. Would the ACS have us believe that the magistrate put these matters from his

mind after the prosecutor had provided the information recorded in the transcript?

It should be noted also that, after the trial commenced, numerous amendments were made to the averments utilised in all of the Summonses and Informations sworn to initiate the proceedings against Mr Tomson. Those amendments were made as the result of objections from counsel for the defence. It is not unreasonable to conclude that none of those amendments would have been made but for the fact that Mr Tomson was represented during the proceedings.

The ACS submission refers on pages 5 to 7 to the averments utilised in two of the sets of charges, viz, those relating to the smuggling charge in respect of the Steady Export Co shipment (pages 5 and 6), and those utilised in respect of the Cameron Trading Co shipment (pages 6 and 7). I will illustrate the accuracy of my allegation by examining the factual basis underlying the particular averments which the ACS itself refers to in its submission.

Before commencing though, I invite the Committee to note that the averments set out in the Summonses and amended Informations included at Annexures 12 and 13 of my submission are the Summonses and Informations given to me by Mr Tomson prior to commencement of his trial. I did not receive a copy of the amended Information referred to at pages 5 and 6 of the ACS submission until after the 24 July 2003 hearing.

The amended Information referred to above was delivered to the court on the morning the trial commenced, i.e., 26 July 1993. The discussion concerning the amendments commences in the middle of page 6 of the transcript (Attachment A) and continues to the top of page 7. The amended Information adds two new averments (numbers 7 and 8) to the six set out in the original Summons (Attachment 12 of my submission). The amended Information is attached (Attachment B).

As examination of Attachment B shows, averment 7 states -

"The price paid for the goods was not less than \$A2,432.83 and \$US 1,593".

The prosecutor then took the magistrate through the documents relied on by the prosecution, and outlined the case against Mr Tomson in relation to the Steady Export Co transaction, commencing in the middle of page 12 and ending at the top of page 16 of the transcript dated 26 July 1993 (Attachment C).

In the middle of page 14 of the transcript, the prosecutor states -

" ... This is a shipment where the prosecution says that the true value of the goods is a figure of not less than the value disclosed on the invoice produced to Australian Customs of two thousand four hundred and sixty-two dollars and eighty-three cents and the figure shown there of US\$1593.

In other words the prosecution says that these are two separate payments which have been made for the one shipment to the extent that there is evidence that 2462.83 was paid. The prosecution notes that and points to the US1593 and says that there is evidence that that was paid as well and that arises from the document TH45V(d)".¹

The prosecutor's statement is therefore an amplification of what is averred in averment 7.

The prosecution subsequently opened its witness evidence. The entry and invoice documents lodged with the ACS by Mr Tomson were identified - there is nothing contentious in this material. Evidence was then given by Mr Prelea regarding the cost of manufacture of representative samples of the various items seized. This evidence was objected to on the grounds of relevance by the defence, but the objection was overruled.²

It is at this point that the true significance of the averments emerges. The prosecution statement quoted above relies on two items of evidence. The documents lodged with the ACS by Mr Tomson provide the basis for that part of the statement that says that A\$2,462.83 was paid for the goods, and the documents obtained overseas provide the basis for the other part of the statement that says that US\$1,593.00 was an additional payment for the goods.

Exhibits TH45V (the exchange control document lodged with the Bank of Thailand - Attachment D) and TH45W (the dummy invoice attached to that document - Attachment E) were intended to constitute the evidence that a second payment had been made for the goods. No evidence was called in relation to these documents however, despite the fact that two ACS officers (Messrs Grausam and Delmenico) had been shown in the witness list for this case (Attachment F - page 2) as the persons who would give evidence in

¹ This appears to be a mistaken reference - there is no document TH45V(d). Please note also the misleading reference to "true value" and "value" in the quotation. This was not a case about the "value" of the goods - it was a case about the actual price paid. The terms "price" and "value" are not interchangeable in this context.

² The magistrate observed in his reasons for the decision to acquit Mr Tomson that he accepted that Mr Prelea was involved in different sector of the market to Mr Tomson. It is not known why this obvious fact was ignored by the ACS in the preparation of its case against Mr Tomson. Despite the fact that the defence objection regarding evidence of manufacturing cost was overruled, this evidence was ultimately given little weight in any event.

relation to these documents. (The ACS claimed in its 23 July 2003 oral submissions to this Committee that the defence had conceded that it did not require evidence to be led in relation to the overseas documents. That is not correct. The defence conceded only that it did not require Mr Grausam's statement regarding his conversation with persons interviewed overseas to be tendered, and that is the matter conceded on page 40 of the transcript of 27 July 1993 during the examination in chief of Mr Grausam).

Consider now the state that the prosecution's case would have been in without averment 7 being in evidence. There was evidence concerning the payment of the sum of A\$2,462.83 (which Mr Tomson had said all along was the amount he had paid for the goods) and there was the evidence of Mr Prelea that each of the items had cost a certain sum to manufacture. Apart from averment 7, there was no evidence that a second payment had been made for the goods, despite the fact that this was the most critical element of the prosecution case.

It is clear therefore that the prosecution case would have failed at this point but for the fact that averment 7 was in evidence. Leaving aside for the moment the fact that averment 7 was false anyway in that it stated that US\$1,593.00 had been paid for the goods in addition to A\$2,462.83, averment 7 was the only evidence before the court that a second payment had been made for the goods.

Averments 4 and 5 (as amended) in Attachment B claim that the price paid for the goods shown in the entry and invoice respectively was an amount in excess of A\$2,462.83. Again, apart from the averments themselves, there was no evidence before the court to support these allegations of fact. Averment 6 (which alleged as a fact that an amount in excess of US\$1,593.00 had been paid for the goods) was also entirely unsupported by evidence.

But for the averment power, and the consequent swearing of the averments referred to above, I consider that the ACS would not have been able to establish the *prima facie* case found by the magistrate in this matter. The power has clearly been used in the circumstances of this case as a means through which the necessity to lead genuine evidence of wrongdoing on Mr Tomson's part was circumvented.

In addition to this perceived abuse of the averment power, there remains unresolved the fact that the person or persons who arranged the swearing of averments 4, 5, 6 and 7 either knew or ought to have known that the facts averred were false. The Thai export declaration and invoice attached to the Bank of Thailand exchange control document showing a value in US dollars for the goods was not evidence of a second payment for the goods. Nothing put to this Committee by the ACS seeks to suggest otherwise.

I will refer briefly also to the Cameron Trading Co matter, referred to by the ACS on pages 6 and 7 of its submission. The facts of this Hong Kong transaction are detailed in section D.6 of my submission. The only point I wish to make in relation to this transaction is that averments 10, 12, 13 and 14 in the Summons relating to the smuggling charge state -

- (i) that the invoice [produced to the ACS] contained a statement that was false in a particular, namely, that the price paid for the .. goods was \$HK104,070,
- (ii) that the price paid for the goods was \$HK126,620,
- (iii) a price of \$HK64,860 appears on [export] licence number 6103527, a price of \$HK61,760 appears on [export] licence number 2070876 and the combined price of the goods on the licences is \$HK126,620, and
- (iv) the goods particularised in the documents produced to the Hong Kong Customs and Excise Department ... are the same goods which were imported into Australia ...

See Attachment G. Averments in the same form and to the same effect are contained in the Summonses relating to the other charges laid in respect of this transaction.

The submission I made to this Inquiry on 24 July 2003 provided a detailed analysis of the Cameron Trading Co transaction, including an itemised summary (from the import documents) of the contents of every carton invoiced, packed and delivered. Mr Grausam had examined the contents of these cartons and made his own itemised summary of the contents of every carton shortly after importation.

As the summary in my 24 July 2003 submission proves, the goods shown in the export licence applications are **not** the goods referred to in the export licence applications, although most of the items shipped appear to have a corresponding reference in the Hong Kong export declarations.

Allowing for the fact that some of the items purchased were not delivered to Australia, the quantity and description of the goods invoiced and shipped to Australia is a substantially lesser quantity than that shown in the export declarations, with a correspondingly lower purchase price. Mr Grausam cannot have been unaware of this fact - his own cargo examination report demonstrates that he had carefully counted and listed every item imported in this shipment.

It is simply beyond belief that Mr Grausam did not compare the results of his physical examination of the goods with the both the import documents themselves as presented to the ACS, and with the export documents obtained in Hong Kong. Despite this fact, the averments shown above were sworn.

Averments 12, 13 and 14 are demonstrably false having regard to the contents of the documents referred to, and nothing was led during the trial to suggest that the price paid for the goods was anything other than the HK\$104,070 shown in the invoice produced to the ACS at the time of importation.

The ACS points out on page 6 of its submission that the magistrate found that a *prima facie* case had been established in relation to the defence submission that there was no case to answer. It refers to the ruling given on pages 4 to 6 and 10 of the transcript of 20 April 1994.

I suggest that the magistrate's ruling provides cold comfort for the ACS. It is clear from the ruling that the magistrate did not undertake the kind of analysis that I provided to the Committee on 24 July last because, if he had, he could not have reached the conclusion he did. The ACS appears to be attempting to make a virtue out of the fact that it managed to deceive the magistrate in relation to the veracity of the facts set out in the averments utilised in the Cameron Trading Co case. I further suggest that, with the exception of the averments, there was certainly no evidence that the magistrate could have relied upon for the purpose of making the ruling actually made.

In referring to the magistrate's ruling however, the ACS appears to have overlooked two observations made by the magistrate on page 5 of the transcript of 20 April 1994 (Attachment H). After reviewing the evidence led by the prosecution, he refers to the fact that it was the averments that stated that the price paid for the goods was in excess of the amount shown on the relevant invoices and entries (para 1). He also states his view of the law thus (at para 5)

"The court, in determining whether a *prima facie* case has been established in respect of each information, is required to take the prosecution evidence at its highest and disregard any evidence which may be favourable to the defendant".

And that, I respectfully suggest, is the reason the charges were not dismissed in the Cameron Trading Co matter at the close of the prosecution case.

Other Matters

The ACS claimed that one of the reasons Mr Tomson remained under scrutiny for a lengthy period of time was the fact that he had sent over \$1.0 million

dollars out of Australia between 1985 and 1987 and had imported in the same period goods having "a declared customs value of only just over \$139,000". It added that Customs was entitled to be suspicious about "these discrepancies" (LCA transcript 24 July 2003, p152).

This claim is no doubt based on an analysis of Mr Tomson's overseas remittances which formed the basis of a report prepared by Mr Grausam as an annexure to the affidavit he swore for the purposes of the Federal Court proceedings in June 1988. A copy of that document is attached (Attachment I).

Mr Tomson can account for all of funds remitted overseas throughout this period. The total was actually about \$915,000 - over \$81,000 of the \$1.0 million claimed by the ACS to have been sent out of Australia was actually double-counted by Mr Grausam.

The FOB value of goods imported in that period has been calculated by Mr Tomson to be about \$144,000 (close to the \$139,000 referred to in the LCA transcript). The sum assessed by the ACS for freight costs included only those transactions in which the freight had been paid for by bank remittance from Australia (\$23,450). As the ACS is well aware however from the transactions which were the subject of the proceedings against Mr Tomson, most of his freight payments were made overseas at the time of purchase of the goods. The freight payments paid in cash outside Australia amounted to about \$95,000.

Mr Tomson's summary of what was done with the remainder of the money sent out of Australia is attached (Attachment J). There were no "discrepancies" of the kind referred to by the ACS.

I understand that Mr Tomson's legal advisers will be providing detailed information relating to Mr Tomson's financial affairs in a separate submission.

Yours faithfully



(Ian Rodda)