Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2600

/ **April 2004**

Ms Gillian Gould
Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Gould

Inquiry into averment provisions in Australian Customs legislation

I refer to the present inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the use of averment provisions in Customs legislation.

Customs notes that the committee has accepted a recent supplementary submission from the Law Council of Australia (Submission 3,2). This submission canvasses the impact of the decision of the Court of Appeal of the Victorian Supreme Court in the matter of *Nazih El Hajje v Chief Executive Officer of Customs* [2003] VSCA 217.

The judgment in this case relates to the prosecution of offences contained in the *Excise Act 1901.* Buchanan, JA specifically discusses the use of the averment provision contained in the Excise Act (s.144).

This Excise prosecution was instituted on 30 August 2000, after the excise function transferred from Customs to the Australian Taxation Office (ATO). The initiation of these proceedings predated the commencement of the *Taxation Laws Amendment (Excise Arrangements) Act 2001* which came into force on 4 May 2001. Accordingly the transitional provision in item 5 to Schedule 2 of that Act applied. This meant that proceedings brought in the name of the CEO of Customs were deemed to have been brought by the Commissioner of Taxation.

Customs wishes to advise the Committee that the ATO was responsible for bringing these particular proceedings before the Victorian Supreme Court. The Committee should be aware that Customs officers played no role in the investigation and subsequent prosecution of this matter. The case did not involve Customs legislation or procedures.

At the last public hearing, the Committee sought information regarding the cost of the initial Bellew inquiry. Customs paid Mr Geoffrey Bellew a total of $14,831.77, including $1,286.77 in GST, for services he rendered in 2001.

The Committee also requested that Customs provide it with all of the information that Customs had given to Mr Bellew. Customs provided copies of all internal records examined by Mr Bellew to the Committee last year.

The Committee also sought information from Customs in relation to the length of time between seizure of goods and commencement of prosecutions. 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:

(i) the reason for the seizure no longer exists; or
(ii) Customs decides that the material is not to be used as evidence; or
(iii) 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.

In the context of valuation matters, the Chair sought information on how many times in the last twelve months payments had been paid under protest and the success rate of challenges. During 2002/03 a total of sixty valuation disputes were resolved following application to the Administrative Appeals Tribunal.

Forty-nine applications that had been brought by four individual importers resulted in the Customs valuation being set aside either in whole or in part. Forty-three of these applications related to a single-issue dispute concerning the inclusion of warranty costs in the valuation of imported passenger vehicles. A ruling by the Full Federal Court ultimately resolved this dispute *(Chief Executive Officer of Customs v AMI Toyota Limited* (2000) 102 FCR 578). Subsequently the Government amended the Customs Act to restore the intention of the legislation to be in line with Australia's GATT Commitments and the original Tribunal decision in support of Customs.

Customs valuation decisions were upheld in the remaining eleven applications that had been brought by two separate importers.

Please do not hesitate to contact my office to clarify or follow up any matters in regard to this letter or any other Customs matters before the Committee.

Yours sincerely

Marion Grant
National Director
Border Compliance and Enforcement