HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO AVERMENT PROVISIONS IN AUSTRALIAN CUSTOMS LEGISLATION

AUSTRALIAN CUSTOMS SERVICE SUPPLEMENTARY SUBMISSION

21 July 2003

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This supplementary submission addresses issues raised in the course of the first public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into averment provisions in Customs legislation on 23 June 2003. The submission principally deals with issues arising from the oral submissions that were made by Mr Ian Rodda on behalf of Mr Peter Tomson. In addition, Customs has responded to some questions posed by Committee members.

Introductory comments

Mr Rodda conceded (Hansard page 2) that much of the material contained in his statement "goes considerably beyond the terms of reference of this inquiry". For the reasons developed in its first supplementary submission (pages 11 - 15) and further developed in this submission, Customs contends that there is no evidence that any unfairness arose in the Tomson case as a result of the use of averments. Accordingly, Customs does not believe that an examination of the Tomson case can help the Committee in its consideration of whether there is any need for legislative change to the averment regime under the Customs Act.

However, if the Committee does take the view that examining the Tomson case may assist its inquiries, Customs believes that this should be done with reference to the whole of the transcript of the trial and having regard to the terms of the informations as amended and the averments as proceeded with following the Magistrate's rulings. This point is taken up under the next heading.

Mr Rodda, on behalf of Mr Tomson, has advanced a number of allegations that have no apparent bearing on any issues relating to the use of averments. Instead these appear to be aimed at demonstrating that Mr Tomson was the subject of a malicious prosecution. It is important for the Committee to be aware that in fact a submission to similar effect was put to the trial Magistrate (transcript 27 June 1995 pages 11-15) in the context of the costs applications that were made by Tomson and Keomalavong. Those submissions were considered and rejected by the Magistrate (transcript 27 June 1995 pages 19-21). The Magistrate concluded in effect that there was nothing improper or unreasonable in the investigation and prosecution of the defendants. The Magistrate's conclusion in this regard was not disturbed on appeal, although his order that no costs were payable was overturned on another basis.

Just as an appellate Court always shows great deference to a trial court's assessment of the evidence, Customs submits that the Committee should have regard to the Magistrate's clear and contemporaneous indication that there was nothing untoward in the

conduct of the investigation and prosecution of the defendants. Having observed the conduct of the proceedings and all of the evidence over a lengthy trial the Magistrate was in the best position to judge whether there was anything unfair or improper in the conduct of Customs and he concluded that there was not.

Further, Customs does not believe that Mr Rodda has identified any evidence to support his allegations. Nor has any evidence to support them come to light in the course of Customs' own inquiries or through the inquiry by Mr Geoff Bellew of the independent bar who was engaged by Customs to review the propriety of the investigation and prosecution of Mr Tomson. A copy of Mr Bellew's advice to Customs was provided to the Committee during the hearings on 23 June 2003.

Although Customs does not believe there is any substance to or basis for these allegations, they are nevertheless very serious. For this reason, as already advised to the Committee, Customs has re-engaged Mr Bellew to review all of the relevant materials including the additional material which Mr Rodda has now provided to the Committee so that Mr Bellew may advise Customs on whether he considers there were any shortcomings.

In this submission the allegations advanced during the hearing on 23 June 2003 are dealt with primarily by reference to the four principal allegations identified by Mr Murphy (at Hansard page 50). Some allegations not covered by these four categories are addressed in a separate section of this submission. Customs may address other allegations at the next hearing or in a further submission.

Two fundamental points

Before addressing the various allegations in detail, Customs wishes to draw to the Committee's attention that Mr Rodda's submissions are misleading in two very fundamental respects.

<u>One: Reliance on Averments</u>

The first of these concerns the assertions that "the averments were used to initiate the proceedings and were relied on by the Magistrate for the purpose of deciding that there was a *prima facie* case made out" (Hansard page 35). Similar assertions were repeated a number of times throughout Mr Rodda's oral submission (Hansard pages 5, 36, 43, 44 and 45) but without any evidence being advanced to support them. The concern of Customs is that the Committee will accept these assertions as though they had been demonstrated as correct (see for example Hansard pages 43 and 45). In fact neither assertion is supported by the objective facts.

In order to correct the misleading impression that has been created by Mr Rodda's submissions that the prosecution was commenced and a *prima facie* case found only on the basis of the averments, it will be necessary to take the Committee to the averments that were actually proceeded with. Copies of each of the informations filed by Customs, as amended on 12 October 1992 (cases 1 and 5) and 26 July 1993 (cases 1, 3 and 4) and following the Magistrate's ruling on the averments (transcript 20 April 1994 pages 1-4 and 6-10) are located at Appendix A. The Committee should note that copies of the informations lodged by Mr Rodda in support of his submissions are not in all cases the versions that were proceeded with (cf. the comments by Mr Rodda at Hansard pages 35 and 36).

Customs submits that the Committee should also have regard to the transcript of the trial and consider the entirety of the prosecution's evidence. A copy of the transcript of the proceedings is located at Appendix B (save for the transcript of 28 April 1995 of which no copy has been located. That day involved only the delivery of oral submissions). Customs submits that it is abundantly clear from the transcript that the averments were not significant in the prosecution case. Indeed, this is further borne out by the fact that the averments were not even referred to during the opening of the prosecution case as one of the categories of evidence to be relied on (transcript 16 July 1993 pages 1 - 5), a point conceded by Mr Rodda before the Committee (Hansard page 30).

It is also relevant to note that the investigation of this matter, including the preparation of the brief to the DPP, was undertaken on the basis that it may result in a Crimes Act prosecution. Averments are not available in such a prosecution. The brief that went to the DPP formed the basis for the brief that was provided to AGS and ultimately comprised the documentary evidence put before the Magistrate.

Most importantly, we suggest that the Committee also look carefully at the Magistrate's ruling on the *prima facie* case (transcript 20 April 1994 pages 4-6 and 10) from which it can be seen that the Magistrate placed very little reliance on the averments.

Turning then to the averments that were proceeded with in respect of case 1 (the Steady Exports importation), the Committee will see that they essentially covered formal matters. The first information related to the smuggling charge under s.233(1)(a) of the Customs Act. Averment 1 of that information dealt with the standing of the Customs officer to bring the proceedings. Averments 2, 3, 4, 5 and 8 dealt with the details of the importation and entry. It can be noted that at page 10 of the transcript of 26 July 1993 the defendants' counsel conceded that there were no issues regarding the entries. Further, in his reasons for decision on the acquittal of the defendants, the Magistrate

noted that the issues covered by these averments were not in any serious dispute (transcript 27 June 1995 page 3).

Of greater significance for present purposes is the fact that, save for averment 1, which was purely formal, Customs led evidence to prove each of the matters averred. Customs tendered the relevant entry and called evidence from a Customs officer as to the processing of the entry. Customs tendered all of the supporting documents together with evidence from the defendant's customs agents as to the instructions given to them regarding the preparation of the entry. Customs tendered the overseas documents, which were admissible as business records. These were tendered without objection (see transcript 26 July 1993 pages 10, 11 and 28 -29 and transcript 27 July 1993 pages 40 and 28 July 1993 page 9). Customs also tendered answers to s. 38B notices and an affidavit of Tomson, sworn under his previous name of Paul Vilaysack, in the Federal Court proceedings. These were tendered to prove his involvement in organising the shipment.

Averments 6 and 7 related to what Customs alleged to be the price paid for the goods. While this was a disputed matter, Customs called expert evidence in relation to its contention that the price actually paid for the goods was in excess of that shown in the entry as well as the invoice and the export declaration that was lodged in Thailand. This was done through the witness Prelea.

The balance of the informations filed in respect of case 1 contained the same or very similar averments and the evidence just referred to was also relevant to each of these. In fact, the same pattern applies to all of the informations for the other shipments and it is the case that in respect of each relevant averment the prosecution led evidence.

Accordingly, Customs submits that the averments did not have any significant work to do in terms of making out the core elements of the offences alleged. It is plainly not the case that the prosecutions were only commenced on the basis of the averments.

The assertion that a *prima facie* case was found only on the basis of the averments should, in Customs view, be rejected for the same reasons. The actual ruling of the Magistrate in finding a *prima facie* case is critical in this assessment. Customs submits that once the Committee reads the transcript containing the Magistrate's ruling (transcript 20 April 1994 pages 4-6 and 10) it will see that there is no basis for Mr Rodda's submission.

The submission that the prosecution had established no *prima facie* case was made on behalf of Keomalavong, the defendant in relation to case 5 (the Cameron Trading shipment). At pages 4-6 of the transcript of 20 April 1994 the Magistrate details the evidence upon

which he was satisfied that a *prima facie* case had been established. The Magistrate referred, in order, to the invoice, the packing list and the airway bill and what they each indicated. He next refers to the entry and what it indicated, the export declaration, the export licence form and other overseas documentation. The Magistrate then noted that there was evidence that the defendant personally inspected the goods before he purchased them and then he referred to the evidence of Mr Prelea as to the undervaluation of the goods.

Although the Magistrate also referred to the averments that the price paid for the goods was in excess of the amount shown on the invoice and entry, it is clear from the passage at the foot of page 5 of the transcript that the principal evidence of a false price having been declared, which the Magistrate relied on, was that of Mr Prelea. While the relevant passage in the transcript has obviously been wrongly transcribed in sections, it is submitted that the meaning is nevertheless clear. It says:

> On the documentary evidence which I have summarised and the evidence of Mr Treloar [scil Prelea], there is evidence to indicate that the defendant paid a price in excess of that of price for the clothing in the country of export in excess to that amount shown on the documents which I have been referred, that is the invoices and the entry for home consumption. And accordingly, there is evidence capable of leading to conviction, that the statements on those invoices and entry for home consumption were false entries, and that the defendant did produce an untrue statement to the Customs Department. And from the same evidence, I believe it may properly be inferred for the purposes of determining whether a *prima facie* case has been established, that the defendant did so to defraud the revenue in relation to the shipment, and at the same time intentionally evaded payment of the appropriate duty. And I find that a *prima facie* case has been established in respect of the four informations before the court [that is, the informations relating to case 5].

No submissions were made on behalf of Mr Tomson that a *prima facie* case had not been established (transcript 20 April 1994 page 6). Customs considers that the Committee is entitled to conclude from this that Mr Tomson accepted that there was evidence capable of leading to his conviction. In fact, the Magistrate did determine that a *prima facie* case had been established in respect of all of the charges against Mr Tomson (transcript 20 April 1994 page 10).

On the basis of these matters, Customs repeats its submission made to the Committee on the last occasion (Hansard page 76) that the Magistrate did not rely solely or even primarily on the averments in concluding that a *prima facie* case had been established.

Further, Customs repeats its submission that because the averments did not play any major role in the prosecutions, Customs does not believe that any detailed examination of the Tomson case will be of any assistance to the Committee in its deliberations as to whether the averments regime should remain intact or not.

Two: That the prosecution did not dispute that the prices were genuine

The second respect in which Mr Rodda's oral submissions were misleading on a fundamental point is the proposition that the prosecution did not proceed on the basis that the prices were not genuine (Hansard page 18) and the apparently related proposition that the prosecution instead sought to establish that the obligation was on Tomson to declare a true Customs value based on something other than the price actually paid (Hansard page 31).

Customs did in fact dispute the price and Customs did not prosecute on the basis that Mr Tomson had a duty to declare a customs value based on something other than the transaction value. Again, there is no evidence to support the assertions that have been made but ample evidence to demonstrate that they are simply not accurate. It is important to correct the misleading impression which Mr Rodda's submissions have created, because they underpin further submissions which were advanced, namely that by using terms which were said to be "unknown in customs law" and "quite meaningless", Customs' counsel was involved "in an attempt to mislead the court" (Hansard page 31). This is a very serious allegation, which Customs submits should never have been made without some factual foundation. The second submission which Mr Rodda advanced on the basis of these assertions was that this was really a valuation matter which should have been dealt with through the Administrative Appeals Tribunal rather than being the subject of a prosecution (Hansard page 32).

The assertion that the prosecution did not dispute that the prices shown in the invoices and entries were not genuine can be dealt with as follows. As already noted, averments 6 and 7 in each of the four informations relating to the Steady Export shipment alleged that the price actually paid was in excess of the prices shown in the documents lodged with Customs. In respect of case 2 (the Gold Vincent shipment), averments 5 and 6 in each of the relevant informations similarly disputed the genuineness of the price disclosed in the relevant invoice and entry. In case number 3 (the Winelux shipment) averments 11 and 12 in each information disputed that the true price was disclosed in the documents. The same applies for each information in case 4 (the New Calcutta shipment, averments 5 and 6) and case 5 (the Cameron Trading shipment, averments 9 and 10).

It is also clear from the prosecution opening that a central part of Customs' case was that the prices shown in the invoices and entries were false (transcript 26 July 1993 at the foot of page 3, the middle of page 4 and following and the middle of page 5).

Of most significance for the Committee however, is that the submission now advanced by Mr Rodda (that an owner of goods cannot commit an offence if he correctly declares in the customs entry the amount which was actually paid or payable for the goods) was previously advanced to the Magistrate. In fact, it was on the basis of this proposition that Keomalavong submitted that no *prima facie* case had been established. The Magistrate dealt with the submission in these terms:

> Mr Parnell [counsel for Keomalavong and Tomson] submits that it's [sic] not an offence to undervalue goods and makes a submission that the prosecution has not made out a *prima facie* case against that defendant in respect of the four informations before the court. It may well be the case it is not an offence to undervalue goods however the prosecution allege that false entries were made on the invoices and entries for the home consumption by the insertion on those documents of lower prices per unit of clothing and lower total prices for each type or style of clothing than the prices which were actually paid for the goods in the country of export, and that each defendant did so with the intent of evading the appropriate duty. And it is further alleged by the prosecution that the goods were imported into Australia by each of the defendants with the intent to defraud the revenue.

In other words, the Magistrate recognised that the submission involved a *non sequitur* and did not respond to the case that the prosecution had presented. It also shows that the prosecuting counsel did not mislead the Court in the manner alleged. The case was always put on the basis that the prices shown in the invoices and entries were not the true prices paid. The case was never put on the basis that the owner of goods has a legal obligation to declare in a customs entry that the customs value is not necessarily the price paid. The prosecution case was that the prices shown in the entries and the invoices were less than the prices actually paid and that this was done with the intent of evading duty and defrauding the revenue.

There is no foundation for the allegation that the prosecution was involved in an attempt to mislead the Court.

As for the argument that this was more properly dealt with as a valuation case, with Customs re-determining the values so that Mr Tomson could dispute them through the Administrative Appeals

Tribunal, Mr Rodda conceded that this would not be applicable in cases where fraud is suspected. As conjectured by Mr Kerr (Hansard page 32), that is exactly the scenario that applied in respect of Mr Tomson. As will be developed elsewhere in these submissions, Customs had grounds to suspect that Mr Tomson was involved in significant and systematic fraud. Customs obtained advice that there was sufficient evidence to sustain a conviction (that is, that there was a *prima facie* case) and on this basis decided to prosecute. Customs remains of the view that it was not a case that was more properly dealt with under the valuation procedures.

The four principal allegations

At Hansard page 50 Mr Murphy distilled four principal allegations from the submissions made by Mr Rodda. Customs' responses to these allegations are as follows:

Allegation 1: That Customs officers who conducted the investigation failed to investigate the case in an impartial and objective manner

As first explained by Mr Rodda, this allegation is founded on the assertion that Customs officers proceeded "on the assumption that a person cannot purchase goods for a price less than the cost of production" and that this affected the entire investigation (Hansard Page 6). In response to Mr Murphy's request for concise details regarding this allegation, Mr Rodda responded to the effect that Mr Tomson was carrying on a legitimate business purchasing goods for cash (Hansard page 51) and that Customs "never address[ed] themselves to the fact that this was also an honest businessman who did things in a different way" (Hansard page 52).

In other words, Mr Rodda seeks to persuade the Committee that Mr Tomson's activities did not merit attention from Customs. Contrary to these assertions, Customs contends that there was a significant body of information that merited the continuing investigation of Mr Tomson's importing activities.

What Customs knew at the time of the first section 214 action

By 20 August 1987 - the day of the section 214 action in relation to the firm Thongson Imports and Exports - Mr Tomson had a history of non-compliance under the *Customs Act 1901* and the *Commerce (Trade Descriptions) Act 1905.*

Mr Tomson up to this time also aroused suspicions as a result of Customs' ongoing enquiries. That history and the grounds for those suspicions are as follows:

- On 11 August 1984 Mr Tomson was convicted of offences of smuggling clothing and making a false statement to Customs. Mr Rodda gave evidence to the Committee (Hansard page 16) that Mr Tomson had pleaded guilty to the charges but that Mr Rodda would have advised him not to. In fact, while Mr Tomson did plead guilty to the false entry charge, he pleaded not guilty to the more serious offence of smuggling. The Magistrate found Mr Tomson guilty of this offence and fined him $1,800 and ordered him to pay costs of $488. Mr Tomson did not appeal. It is an important point for the Committee to note because a significant factor in Customs' subsequent investigation of Mr Tomson was that he had previously been convicted of serious offences under the Customs Act. The impression which Mr Rodda's evidence sought to convey was that it had all been a misunderstanding based on language difficulties. That is not borne out by what actually happened.

- On 13 December 1984 Mr Tomson was charged but found not guilty of smuggling goods and making a false statement in relation to another importation of clothing as a disembarking passenger at Sydney Airport. This allegation related to 63 items of clothing, which Mr Tomson said were gifts for his wife and relatives. His wife owned a clothing store at the time.

- In June and July 1987, Customs Commodity Audit Section undertook examinations of importations of clothing by Mr Tomson. In a minute dated 28 July 1987 a Customs officer concluded that it would appear from the examinations "that the imported goods had been grossly undervalued".

- A note dated 3 August 1987 records that Customs Intelligence Section had been aware for some time that several clothing importers including Mr Tomson had been importing goods with unusually low values.

- On 6 August 1987 an Intelligence Report was generated which contains the following passage:

> "Comparative checks of the imports of the three owner codes since 1984-87 reveal some startling anonamolies (sic)
>
> The goods have the same origin, very similar/same classification, same/similar suppliers - however, since 1984 the Customs limit values has (sic) dropped considerably. This is a remarkable achievement in view of the type of industry (manufacturing) and the rapid decline of the Australian dollar against all currencies..."

The report concluded that preliminary research indicated "there appears to be a case of defrauding the revenue by undervaluation".

- Also on 6 August 1987 Customs officers Schroder and Taylor visited Mr Tomson at his premises with a view to discussing the unit values of a clothing shipment imported from Thailand and supplied by a company called Steady Export Co Ltd. Mr Tomson was uncooperative in response to the officers' enquiries and did not let the officers go any further than into the retail part of the shop. He refused access to further documentation in relation to the shipment and refused to answer questions in relation to the costing of the shipment or any other shipments he had in stock. Customs was entitled to be suspicious about Mr Tomson's uncooperative manner, particularly having regard to their existing suspicions of undervaluation.

- Examination by Officers Schroder and Taylor on 6 August 1987 of stock in Mr Tomson's shop showed numerous instances of commerce marking infringements which meant that this stock was imported contrary to the provisions of the *Commerce (Trade Descriptions) Act* 1905.

- On 7 August 1987 Customs discovered, as a result of a visit to Mr Tomson's accountant, that between January 1985 and June 1986 Mr Tomson had remitted a total of $196,127.53 overseas, whereas between January 1984 and 10 August 1987 a total of 79 shipments imported by Mr Tomson had a total declared Customs value of only $139,679.28. Customs was entitled to be suspicious about these discrepancies.

  (The Committee will be interested to note that it was subsequently ascertained that between 1985 and 1987 Mr Tomson remitted a total of $1,001,378.70 overseas. During that period the declared value of Mr Tomson's imports was only $109,007.88. Telegraphic transfers indicated the bulk of the funds had been remitted to overseas suppliers and the majority of the cheque butts relating to these remittances were endorsed "Payment for goods". The implications of the overseas remittances will be taken up further in relation to Customs answer to the allegation that Custom's actions destroyed Mr Tomson's business.)

- On 13 August 1987 Customs was informed by Mr Tomson's broker that an entry for home consumption lodged on 7 August 1987 had incorrectly declared a Customs value because of an incorrect deduction for freight from the actual FOB price. Customs was entitled to treat the error as suspicious and its correction with scepticism given their other

concerns. Customs point out that the correction occurred after Customs officers had visited Mr Tomson to query an earlier shipment and after the goods had been "red-lined", that is, held up for closer examination. This issue is dealt with in more detail later in these submissions.

- On 13 August 1987 Customs received information from Mr George Prelea in which he said that enquiries he had made in Thailand indicated that the invoices provided by Mr Tomson to Customs were from companies not registered with local authorities as manufacturers or suppliers in Thailand and therefore the developing country preferences were not valid. Mr Prelea further told Customs that according to his sources in Thailand such garments could not be bought so cheaply, even if purchased from the local markets.

It is noteworthy that most of the information set out above came to Customs' attention after 6 August 1987. Therefore, Officer Johnson's decision of 6 August noted on Officer Carter's minute of 4 August that "Whilst there were definite suspicions of undervaluation in this matter, there was insufficient proof to mount Section 214 Action" was made before the additional information was brought to his attention.

It is Customs' submission that the whole of the additional information described above caused Officer Johnson to change his mind when he concluded on 17 August 1987 that section 214 action was then warranted. This is plain from the terms of the minute of that date and in particular paragraph 3 (which refers to an intelligence assessment of Mr Tomson and to his prior convictions), paragraph 4 (which refers to the Prelea information and the discrepancy between the overseas remittances and the customs values of the importations) and paragraphs 8(v) and 9 (which raise doubts that the error in the Winelux entry was inadvertent - this point is addressed in more detail in answer to principal allegation 3). It is also clear from the minute that by that stage Mr Johnson considered that the unit values of the goods the subject of the Winelux shipment were grossly undervalued, even at FOB level (paragraph 8(vii)). In fact, it was suspected that all of Tomson's imports were grossly undervalued (paragraph 4).

There is no support for Mr Rodda's submissions that Customs' continuing interest in Mr Tomson was unmerited. The multi-layered decision making process within Customs in relation to taking s.214 action and the fact that at first the recommendation to take such action was not approved demonstrates, in Customs view, an appropriately objective approach.

Referral to Investigations Section and the obtaining of advice from the AGS and the DPP.

In addition to these matters, it must also be emphasised that Customs' enforcement action is subject to checks and balances. These checks and balances were applied in the Tomson case.

The Commodity Audit area of Customs first referred their early suspicions regarding Mr Tomson to the Investigations Section in June 1987. The Investigations section initially declined to investigate the matter and recommended that s.38B Notices be issued. The Investigations Section examined a second referral on 14 August 1987 and subsequently undertook an investigation.

The function of Investigations Section was to investigate possible contraventions of the Customs Act, including fraud, with a view to referring cases to either the AGS or the DPP. The Government of the day had expressed its concern about undervaluation of clothing imports. As has been shown, the initial response of the Investigations Section was an appropriately questioning one.

Customs initially raised this case with AGS who provided oral advice that this was the type of matter that appropriately should first be referred to the DPP for consideration of criminal proceedings under the *Crimes Act 1914*.

Thereafter Customs sought ongoing advice from the DPP. The DPP provided either written or oral advice on a number of occasions (12 and 13 September 1987; on about 22 June 1988; 24 February 1989; and 11 December 1990).

Accordingly it can be seen that advice was sought by Customs in respect of critical decisions during the investigation phase of the case. The involvement of the DPP during this phase provided an independent and objective check on the process.

On 11 December 1990 the DPP advised that although there was insufficient evidence for a prosecution under the Crimes Act there may be sufficient evidence to warrant the commencement of proceedings for offences under the Customs Act and so recommended that the case be referred to the AGS to consider.

In due course both AGS and independent counsel (now senior counsel) advised Customs that a *prima facie* case existed for offences under the Customs Act in relation to five of the shipments. That advice was vindicated by the decision of the Magistrate that on the basis of all of the evidence adduced by the prosecution a *prima facie*

case had been established (see the detailed submissions under the heading "Two fundamental points").

Allegation 2: Customs ignored evidence that Mr Tomson was innocent

This allegation is a re-statement of the first allegation that there was a lack of objectivity in Customs' investigation of Mr Tomson. Accordingly, Customs' responses to the first principal allegation are also relevant.

Mr Grausam's statement

In answer to Mr Murphy's request for a concise explanation of this allegation, Mr Rodda referred first to Mr Grausam's statement (Hansard page 53) and suggested that Customs did not give due regard to answers given by overseas suppliers to Mr Grausam's questions and that this evidence was ignored when the matter went to trial. At the time of making that submission Mr Rodda was not able to identify any relevant parts of the statement for the Committee.

The short answer to this allegation is that the Grausam statement was included in the brief to AGS and the brief to counsel. Both AGS and counsel nevertheless concluded that a *prima facie* case existed.

Secondly, the only reason that those parts of the Grausam statement that set out conversations with overseas suppliers were not tendered was that they were not in admissible form (transcript 26 July 1993 pages 28 - 30). In the event, there was no need for Mr Grausam to give evidence to source the overseas documents because these were admitted without objection (see transcript 26 July 1993 page 29 and transcript 27 July 1993 page 40). This point is dealt with further in the concluding section of this submission.

The most critical point is that the prosecution did serve the Grausam statement on the defendants. Contrary to Mr Rodda's submission (Hansard pages 40 - 41), this was done on the day prior to Mr Grausam being called (transcript 26 July 1993, page 28). Nevertheless, the defendants' counsel did not seek to cross-examine Mr Grausam on any of the parts of the statement dealing with the overseas investigations.

The Delmenico minute

In answer to Mr Murphy's query, Mr Rodda next referred to a minute from Customs Officer Delmenico dated 27 June 1988 that clothing could be purchased at certain times of the year by the kilo and that this suggests that it could be purchased at a very low price.

Customs submits that whether or not clothing could be purchased by the kilo is not relevant to this case. The commercial invoices that were lodged with the entries for home consumption in relation to the relevant shipments referred to the purchase of clothing by the number of items and not by weight of clothing. Irrespective of whether clothing could be purchased by weight in South East Asia, that did not occur in this case.

Customs Cooperation Council document

Mr Rodda has also referred to a Customs Cooperation Council document dealing with the sale of surplus stock. No doubt it may be possible in some markets to obtain very cheap goods that are surplus. However, this was not an issue to be dealt with in the abstract by reference to an international guideline and without recourse to actual evidence. In this case Customs had received information from Mr Prelea, an experienced buyer in the South East Asian market, that it would not be possible to purchase the type of clothing imported by Mr Tomson for the prices that he nominated in the commercial invoices.

Checks and balances

The various checks and balances that were applied in this case preserved the integrity of the investigation. These checks and balances were in place during both the investigation and prosecution phases of this matter. The various checks and balances have been detailed earlier in these submissions and demonstrate that there is no foundation whatever to the allegation that Customs, the independent prosecutor and Custom's legal advisers failed to view the material objectively. On the contrary there is abundant evidence from the various files to indicate that all of the material was tested and considered in a professional manner.

A further demonstration of the integrity of the process can be found in the conduct of the prosecution itself. Mr Tomson was represented by experienced counsel (a former Magistrate) and a reading of the transcript demonstrates that Mr Tomson's counsel made all of the usual objections and concessions that are appropriately made in the conduct of any prosecution case. The various objections and concessions were demonstrably soundly made. Two of the concessions that Mr Tomson's counsel properly made were, first, the admission of the overseas documents which had been obtained by Mr Grausam and secondly, that the prosecution had established a *prima facie* case.

The fact that a *prima facie* case was found on all the evidence is a further demonstration of the integrity of the investigation and

prosecution process in that the Magistrate concluded that there was evidence presented which was capable of sustaining a conviction.

A further indication that appropriate checks and balances were at play in relation to Mr Tomson's case was that the Magistrate ultimately concluded that following the defence case, he was left with a reasonable doubt that the offences had occurred and so he properly gave the benefit of that doubt to the defendants.

Finally, the most compelling demonstration of the integrity of the process followed by Customs is that the Magistrate also rejected the defendants' submissions that there had been anything unfair or improper in the conduct of the investigation and prosecution.

Allegation 3: Customs Officers swore false information to obtain the section 214 warrant

Mr Rodda's allegation that false information was sworn to obtain the warrant is put on the basis that the "error" in the entry for home consumption lodged on 7 August 1987 was corrected voluntarily by Mr Tomson through his broker and that Customs knew of this when the information was sworn. The error concerned the description of the price paid as being CIF rather than FOB.

Mr Rodda has sought to make much of paragraph 9 of the minute dated 17 August 1987 prepared by Mr Johnson. Mr Rodda has emphasised the reference in that paragraph to the discussion of the "moral issue" of undertaking s.214 action based on an unlawful entry that had been brought to Customs attention. Mr Rodda's submission was that the error in the entry was used to obtain the search warrant "despite the fact that they [Customs] knew it was inadvertent" (Hansard page 14).

It is Customs' submission that when paragraph 9 is read in the context of the whole minute, it does not bear the construction contended for by Mr Rodda.

The minute sets out the grounds on which Mr Johnson made his recommendation in favour of s.214 action. These included that the inquiries instigated by the agent only occurred after the goods had already been "red lined" (with the result that the shipment would be checked). In other words, Customs did not accept that the error had been inadvertent but suspected that the correction only occurred once it became known that the shipment would be checked. It was this suspicion that the false entry was deliberate which led to the conclusion that any "moral' concern fell away.

Notwithstanding the focus in the minute on the false entry, it is apparent that the principal basis upon which Mr Johnson

recommended s.214 action was the suspicion that the goods were grossly undervalued (paragraphs 4 and 8(vii)). As outlined in answer to the first principal allegation, this suspicion was based on a number of factors, including factors which only came to light after the conclusion which Mr Johnson expressed on 6 August 1987 that at that date there was insufficient evidence upon which s.214 action could be undertaken. This information included the information provided by Mr Prelea, the intelligence reports and the disparity between the overseas remittances and the declared values for goods imported. Customs submits that there is no foundation for the allegation that the s.214 action was based only on the false entry.

Customs also submits that there is nothing false or misleading about the way in which the circumstances surrounding the false entry were referred to in the documents, including the sworn information that went to the Collector of Customs for the purpose of issuing the s.214 notice on 19 August 1987. The fact that there had been an incorrect entry lodged with Customs was referred to, as was the fact that it was corrected. Accordingly, it cannot be said that the information was false in this respect or that the Collector was misled.

The Collector was given a thorough and balanced account of the information that had been collected by Customs to that point in time. This included all of the information referred to earlier in this submission under the heading "What Customs knew at the time of the first section 214 warrant action". The Collector was also advised that it was strongly suspected that there had been significant understatement of shipments imported by Tomson with potential revenue leakage of around $230,000.

Allegation 4: That Customs deliberately destroyed Mr Tomson's business

This is a very serious allegation, which Mr Rodda has also repeated on national television notwithstanding that he has provided no real evidence to support it. It amounts to a charge that Customs was involved in a deliberate abuse of statutory power based on the entire conduct of the Customs investigation, seizure and detention process (Hansard page 55). Customs has already dealt with the integrity of the conduct of the investigation in previous sections of this submission.

Customs' alleged pre-disposition

An additional matter that Mr Rodda referred to in his oral submission needs to be addressed. At Hansard pages 55 -57 he suggests that at the time Grausam conducted his overseas investigations he had already formed a strong suspicion that Tomson was involved in the deliberate undervaluation of imported goods. Other comments in the

course of the hearing before the Committee proceed on a similar footing, namely that there was something improper in Customs conducting its inquiries on the basis that they were looking for evidence to support their suspicions (for example, Hansard page 18).

Customs would have thought it self-evident that proceeding in such a manner is precisely what happens with every investigation. An investigation is not commenced without a basis for suspicion. Of course, the process must be objective, and for the reasons already given earlier in this submission, Customs is confident that the checks and balances that were applied in this case ensured the integrity of the process.

Re-valuation rather than prosecution

The next assertion made by Mr Rodda to support his allegation that Customs set out deliberately to destroy Mr Tomson's business is that Customs should have simply re-valued the goods and demanded the short-paid duty (Hansard page 57). Again, the answer is self-evident. It is clear that Customs suspected Mr Tomson was involved in fraud and believed they had evidence to support those suspicions (a view which was vindicated by the Magistrate's conclusion that there was a *prima facie* case) and so decided that it was an appropriate case to prosecute.

Seizure and detention of goods

Much was made in the course of Mr Rodda's oral submissions that the goods had been seized and not released on security (for example Hansard pages 3, 20, 28, 29). It is noteworthy that there were a number of remedies in relation to the return of these goods that Mr Tomson either abandoned or failed to take up.

Release on security

The first remedy that Mr Tomson abandoned was to seek the release of the goods on security. On 4 May 1988 the firm Arthur Young (under the hand of Mr Rodda) wrote to Customs on behalf of Thongson Imports and Exports and requested that the goods, which had been seized on 11 September 1987 be released to Mr Tomson on security. This request took place some eight months after the goods were seized. Customs initially decided not to release the goods on security because they were needed for evidence. Customs later decided to offer to release most of the goods on security (retaining some for evidentiary purposes) in June 1989. The offer to release the goods on security was not taken up by Mr Tomson. Mr Rodda has submitted that the reason for this was that the amount sought ($240,000) was too high. He also submitted that in any event the goods were by then worthless. However, this latter point is belied by the fact that in February 1991,

well after the offer to release on security, Mr Tomson's solicitors wrote to Customs foreshadowing that they would be commencing proceedings for the recovery of the goods, which suggests they were still considered to be of value at that time.

As to the amount of the security, Mr Rodda had sought release on the giving of a security set to cover the market value of the goods if sold. The security to which Customs agreed was to be a bank guarantee to cover their market value, thus protecting the revenue (on the basis that the goods would be forfeited to the Crown if Mr Tomson was convicted). The market value set by Customs was based on sale prices charged to wholesale customers by Mr Tomson for similar goods. Contrary to what was said by Mr Rodda on the *60 Minutes* program, the security did not require the payment of $240,000. It only required the payment of a bank fee for providing the guarantee. The guarantee was to be conditional on Customs successfully prosecuting Mr Tomson and the goods having been sold by Mr Tomson in the meantime.

The Federal Court proceedings

Mr Tomson commenced, but then abandoned, Federal Court proceedings under the *Administrative Decisions (Judicial Review) Act 1977*. Among other things, these proceedings sought to challenge the decision to seize various shipments of goods imported by Thongson Imports and Exports. In 1987 and 1988 a Customs officer had the power to seize goods if the officer had a reasonable belief that the goods were forfeited. The basis of forfeiture in this case was as set out in section 229 of the Customs Act, which includes a reference to goods being smuggled. Goods are smuggled if they are deliberately undervalued for duty calculation purposes because such conduct evinces an intention to defraud the revenue. Any judicial review challenge to the decision to seize the goods must therefore demonstrate that there was no basis for the reasonable belief that the goods were forfeited.

When Mr Tomson brought the Federal Court proceedings on behalf of various companies in June 1988 he was represented by experienced counsel briefed by his solicitors. Mr Tomson abandoned the Federal Court proceedings based upon advice given to him by his counsel after he had the opportunity of reading confidential material prepared on behalf of Customs, which disclosed the extent of the case that had been assembled against Mr Tomson to that point.

The evidence of Mr Rodda that the discontinuance only came about because Mr Tomson's counsel declined to read the affidavit filed by the respondents (Customs) is difficult to believe. It is also not borne out by the course of the proceedings and the decision of Justice Burchett.

His Honour's decision notes that the affidavit "was served on Friday last" (ie. 22 July 1988). The proceedings continued on Monday 25 July 1988 and then were discontinued on Tuesday 26 July 1988. It thus appears that the barrister had the affidavit during the period 22-26 July. It is unlikely that the barrister did not have regard to the affidavit in advising Mr Tomson that the proceeding should be discontinued. Customs suggests it is reasonable to conclude that this was because the barrister did not think the proceedings would be successful.

It should be noted that Justice Burchett ordered costs in favour of Customs, albeit with a small adjustment to take account of the late service of the affidavit, his Honour expressing the view that had the affidavit been served slightly earlier and in a less compendious form, the barrister might have been able to get instructions to discontinue at an earlier time. It is quite clear that his Honour thought that the decision to withdraw was appropriate. His Honour's conclusion was that the affidavit raised "quite properly" issues of public interest immunity "in the context of quite complex investigations".

Section 208A

After it became clear that Mr Tomson would not take up the offer of having the goods released to him on security, Customs took the next step in the sequence contemplated under the then Customs Act which was to issue notices under the regime contained in ss.203-208A of the Customs Act.

Mr Rodda has specifically focussed on two shipments that were seized but which were not made the subject of charges (Hansard page 55). However, what his submission ignores is that under the regime that then applied Customs could only seize goods that were or were suspected of being forfeited (s.203). Once that occurred, Customs was obliged to serve a notice on the owner (s.205(2)), which was done. Section 205(6) then provided that where such a notice was served, the goods would be deemed to be condemned as forfeited to the Crown unless, within 30 days after service, the owner made a claim for the goods. Although it is not clear which shipments Mr Rodda was referring to, Customs infers these were shipments by Lanwren Pty Ltd and Vamani Pty Ltd. Customs records indicate that no such claims were ever made for the return of these goods and so they were forfeited by operation of the statute. This is another example of the potential remedies available to Mr Tomson that was either never taken up or were abandoned. While that regime has now changed so that the onus is on Customs to take action within prescribed time limits in relation to seized goods, the previous regime had been in place for a long period and would have been well known to Mr Rodda, who was by that time advising Mr Tomson.

In respect of the other shipments, after notices were served under s.205(2), a claim for the goods was made under s.205(6). Customs then served notices in respect of the goods pursuant to s.208A(1)(b) requiring Mr Tomson to commence proceedings within 4 months for the return of the goods. No such proceedings were ever commenced, with the result that the goods were condemned as forfeited to the Crown by operation of the statute (s.208A(4)). This is a further example of a potential remedy that was not taken up by Mr Tomson, notwithstanding that he was advised by persons familiar with this regime.

It is notable that Mr Tomson has never commenced any proceedings under the general law, for example alleging misfeasance in public office or some other tort, with a view to recovering damages for the alleged destruction of his business. In this regard, the Committee's attention is drawn to the fact that in support of an application by Mr Tomson for the expedition of his appeal on costs to the Supreme Court, a lawyer with Rodda Bailey Vagg, Ms Mary-Clare Kennedy, filed an affidavit in March 1996, which included the statement (in paragraph 9) that Mr Tomson was looking to a successful application before the Supreme Court in order to fund "various claims for damages against the Australian Customs Service which include actions for malicious prosecution, negligence, conversion of property and damages". Notwithstanding that as a result of that application to the Supreme Court Mr Tomson was paid legal costs arising out of the Local Court proceedings, no claim for damages as foreshadowed by Ms Kennedy has ever been commenced.

Customs suggests that it is reasonable to conclude that the reason that no such proceedings have been commenced is that there is no basis for them.

Customs also submits that Mr Rodda has made out no nexus between any action that had been undertaken by Customs and the state of Mr Tomson's finances. For the reasons that follow, Customs is not able to ascertain the true financial position of Mr Tomson during the relevant period.

As canvassed in the earlier hearings (Hansard pages 28 and 58), it is difficult to accept that a man with an annual turnover of $1,000,000 could be ruined by the detention of goods worth, on his own valuation, $13,000. As previously noted, between 1985 and 1987 Mr Tomson transferred $1,001,378.70 overseas. Plainly Mr Tomson had control over significant assets at that time. It has also been stated that he had a number of overseas investments, including in a timber mill in Laos as well as other joint ventures. However, Mr Tomson has not provided an explanation to the Committee on how he was in a position to transfer such a large sum, whether the transfer was for investment

purposes and whether any of it was repatriated to Australia and if so, how much. Nor has he given evidence of whether his overseas investments were successful or not. Indeed, given the apparent extent of Mr Tomson's overseas investments, the financial straits he is said to have found himself in might have been because of the poor performance of these investments.

In any event, contrary to earlier suggestions, it has now become clear that Mr Tomson was not made bankrupt until 1999, well after Customs seized his goods. The Committee should note that in the intervening period, Mr Tomson made other significant transfers of money overseas.

It is difficult to understand how Mr Rodda can maintain that Mr Tomson's business was harmed by reason of him having to retain legal advisers in relation to the various actions that were taken by Customs. Mr Rodda has said in evidence before the Committee that Mr Tomson was not charged for any legal costs in relation to the appearance and advice work that had been done for Mr Tomson throughout the period in question. This evidence came as a surprise to Customs as Mr Tomson did recover costs for the Local Court proceedings. Of course an important principle in relation to the recovery of legal costs is that they are compensatory and a party cannot recover costs unless they have in fact incurred legal fees.

It is also convenient at this point to explain the reason for the length of time it took to negotiate legal costs for the Local Court proceedings. After Mr Tomson's solicitors, Barwick Boitano, presented their client's bill of costs in May 1997, AGS promptly indicated that they would not agree to the payment of the amount claimed for work done by Rodda Bailey Vagg totalling $172,666.60, of which, Mr Rodda's claim was $82,647.50. Mr Rodda's claim was rejected because he was not entitled to act as a solicitor or barrister and so his expenses could not be recovered as legal costs. This point was the subject of lengthy negotiations but was eventually conceded by Mr Tomson's solicitors in mid-1998.

Insofar as Mr Rodda has intimated on the *60 Minutes* program that part of the losses for which Mr Tomson should obtain recourse are the balance of his "legal expenses" of $240,000, the Committee should note that the settlement of the Local Court costs was on the basis that payment of the agreed amount by Customs was acknowledged by Barwick Boitano as being in full settlement of all claims for the Local Court costs.

Costs paid by Customs

It is important to note that total costs paid by Customs were:

- Net costs of $79,355.19 for the Local Court ($87,290.00 minus $7,934.81 of costs outstanding to Customs from Mr Tomson due to the discontinued Federal Court action); and
- $20,075 for Supreme Court of New South Wales costs

These payments in 1998 were not *ex gratia* as claimed by Mr Rodda to this Committee but arrived at by agreement between the parties. Copies of correspondence between the Australian Government Solicitor and Barwick Boitano regarding the calculation of costs are at Appendix C.

Cost of production vs. valuation (reference to dumping)

Mr Rodda claimed Customs had been blinded by a belief that goods could not be bought below the cost of production. The Court heard evidence from the expert produced by Customs regarding the value of goods imported. The Customs expert made some comments regarding the proposition that goods were not sold below the cost of production. This is accepted as generally true. Mr Rodda however asserts that this has some greater meaning as a flaw in Customs queries regarding the declared value of Mr Tomson's goods. He also introduces a Customs Cooperation Council document and a statement by Customs that it is known that goods are sold cheaply at certain times of the year.

These documents show that it is possible to buy cheap goods at times under certain conditions but importantly they do not show that Mr Tomson only imports such goods. The Officers involved were following an investigation that was based on the transfer of large amounts of funds overseas to the countries of origin of the goods and advice from an industry expert that the values supplied to Customs were too low. This line was also the basis of evidence produced to the Court and was accepted as *prima facie* evidence of valuation fraud.

It is important to note that Mr Tomson imported all year round and his invoices in the cases before the Court all showed prices per garment - not per kilo.

Mr Rodda also confuses the question of dumping when he suggests that Customs should have charged Mr Tomson with dumping if it thought he was importing goods below the cost of production. There was no industry complaint of dumping and therefore no dumping inquiry. Customs' case was based on its claim that Mr Tomson was

paying a higher price but declaring a lower value for Customs purposes.

Use of cash valuation records/S38B Notices

Mr. Tomson, in choosing to operate in a cash environment when purchasing goods overseas, was still subject to the general provisions requiring all importers to be able to substantiate to Customs the details they provided when they lodge Customs import entries. In choosing to operate in this way, Mr Tomson and his agents and advisers had an obligation to ensure that a proper evidence trail existed to satisfy the requirements set for all importers.

At the time that Customs was investigating Mr Tomson the Government had a concern that importers were not paying the correct duty on imports by devising various schemes to defraud the revenue. Cash transactions were one of the areas of concern for Customs as an avenue for disguising the true value of imports.

Customs overseas enquiries

It has been claimed that Customs could have easily dealt with the question of the value of Mr Tomson's imports by sending an overseas-based officer to visit Pratunam markets in Bangkok. This view does not recognise that Customs was not convinced that Mr Tomson was buying only at Pratunam markets.

Indeed, it is confirmed by Mr Rodda's submission (C.2.3.2.b) where he states, "when purchasing goods himself, Mr Tomson would visit the markets he knew (including the Pratunam markets)..."

Tomson did not exercise his legal options

Court proceedings

Mr. Tomson and his legal and other advisers have had many opportunities to pursue these claims and did not follow them through. Remedies to have his goods released and to have allegations of malprosecution dealt with were not followed through or were dismissed during the period 1987-97.

An example of such action available to Mr Tomson is his attempt to seek return of his goods, which was not followed through. Claims were not made within the statutory period in 1988 and he also discontinued action in the Federal Court in 1988. At all times Mr Tomson was represented by legal and other advisers including Mr Rodda. At the request of Mr Rodda, writing for Arthur Young representing Mr Tomson, Customs in 1989 agreed to the release of goods to Mr Tomson under security. The cost of this security was not

the $240,000 as claimed by Mr Rodda but the cost of a guarantee over that amount. Neither Mr Tomson nor his representatives responded to the Customs offer.

Claim for the return of seized goods

A shipment of 20 cartons seized from Lanwren Pty Ltd on18 October 1989 was not claimed by Mr Tomson within the statutory period and therefore was forfeited to the Crown. A shipment of 37 cartons for Lanwren Pty Ltd was seized on 29 September 1988 and a notice of requirement under s.208A was sent to Mr Tomson to take action to recover his goods in 1990. Mr Tomson did not do so and these goods also became forfeit to the Crown.

The two shipments that were not claimed were subsequently given to charity or destroyed depending on whether infringing labelling anomalies could be readily remedied. The appropriate notifications were sent to Mr Keomavalong and Lanwren without a final response being received.

Customs valuation "expert"

In the view of Customs and its legal advisers, Mr Prelea was competent to value goods of the type imported by Mr Tomson. The Magistrate put more weight on the expert produced by Mr Tomson. This is a regular process in court where two experts give a different view the court has to decide which one to prefer. Mr Rodda has attributed some other motive to what is a normal court process.

Concluding remarks

There are other matters arising from the first hearing and the initial submissions that Customs may address either at the next hearing or in a further supplementary submission.

21 July 2003

* * * * *

Appendix A: Copies of the informations filed by Customs

Please refer to hard copy.

Appendix B: Copy of the transcript of the Local Court proceedings

Please refer to hard copy.

Appendix C: Copies of letters between the Australian Government Solicitor and Barwick Boitano

787

BARWICK BOITANO
LAWYERS

Our Ref: RGB:MS 96246
Your Ref: 95029374

11 June 1998

The Principal Solicitor
Australian Government Solicitor
DX 444
SYDNEY Attention M/s Lyn Brady

Dear Madam,

RE: TOMSON AND KEOMALAVONG -v- CHIEF EXECUTIVE OFFICER OF CUSTOMS - LOCAL COURT PROCEEDINGS DEFENDANT'S COSTS

We refer to previous correspondence and recent discussions.

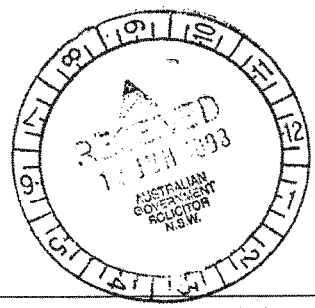
We confirm that our client has taken the view that, providing your client is prepared to improve on its offer in respect of the Local Court costs incurred by him in this matter, it would be preferable to reach a negotiated settlement rather than return to the Local Court to have the matter litigated. We have pointed out that the cost of preparing a Bill of Costs in taxable of assessable form to be submitted to the Local Court would, in itself, add many thousands of dollars to the claim. Also to be considered, as an added cost, would be the cost of conducting the litigation itself and it seems to us that the combined costs of both parties in returning to the Local Court would probably exceed the sum of $20,000.00. Further, there are added risks for each party in relation to the costs of Messrs Rodda Bailey Vagg.

Having regard to these factors and the obvious desirability of bringing an end to the matter and the risk of incurring continuing costs, our client will accept a total all-inclusive assessment of $87,290.00 - that is, your offer of $67,290.00 plus a further $20,000.00.

Please take instructions and respond.

Yours faithfully,
BARWICK BOITANO LAWYERS

Per:



29 Fennell Street North Parramatta NSW 2151 Po Box 546 Parramatta NSW 2124 Dx 28361 Parramatta
Tel: (02) 9630 0444 or 9630 4790 Fax: (02) 9630 0847 or (02) 9890 7214 Email address: bbl@ozemail.com.au
Partners: Ross Garfield Barwick dip. law (s.a.b.); Frank John Bottano dip. law (s.a.b.) acc. spec. (pers. inj.)
Associate: Janet Wehbe bec. ll.b. (hons)

Fax sent by : 612 9581 7559 IND ASSISTANCE 21/07/03 10:11 Pg: 2/7

FILE COPY

AUSTRALIAN GOVERNMENT SOLICITOR

Our Reference: 95029374
Your Reference: RGB:NC:96246

11 July 1997

Mr Barwick
Barwick Boitano
Lawyers
DX 28361
PARRAMATTA

WITHOUT PREJUDICE

Dear Mr Barwick

TOMSON & KEOMALAVONG v. CHIEF EXECUTIVE OFFICER OF CUSTOMS SUPREME COURT AND LOCAL COURT PROCEEDINGS

I refer to your letters dated 20 and 18 June 1997.

I have now had the opportunity to consider your clients' claim for costs and disbursements as advised under your letters of 14 and 6 May 1997 in respect of each of the above proceedings.

I understand that you are claiming the fees of Mr Rodda on the basis that he was engaged as an adviser and expert in these proceedings. Having considered the itemised account of Mr Rodda, however, I do not consider that his fees would be allowed on a party and party basis should this matter proceed to assessment. In this regard, I make the following observations:

1. The claims for work done by Mr Rodda do not relate to the provision of affidavit evidence or expert testimony. Accordingly, any claim for Mr Rodda's fees in his capacity as an expert is without basis.

2. Your claim that Mr Rodda "is admitted to practice as a Barrister in New South Wales and has been on the Record of Barristers since early 1990" is not supported by the records maintained by the Bar Association. Fees for legal work done by a non-practising legal practitioner are not recoverable on a party and party basis.

In light of the above, my client is not willing to pay any amount in respect of Mr Rodda's fees.

However, my client is willing to pay your clients' reasonable costs and disbursements.

Sydney Office

Piccadilly at Sydney, 133 Castlereagh Street, GPO Box 2727, Sydney NSW 2001 • Tel (02) 9581 7777 • DX 444 • Fax (02) 9581 7778
OFFICES IN CANBERRA, SYDNEY, MELBOURNE, BRISBANE, PERTH, ADELAIDE, HOBART, DARWIN, TOWNSVILLE

SUPREME COURT PROCEEDINGS

Professional Costs:

Your client's claim for professional costs is considered excessive in view of the fact that the matter only went on appeal in respect of one issue. Consequently, there appears to be a substantial element of over-servicing.

For instance, numerous telephone attendances are claimed for the purpose of taking instructions from either Mr Rodda or Mr and Mrs Tomson without the matter having progressed any further (eg. claims itemised in your letter dated 6 May 1997 for the periods 4/6/96 to 21/8/96 on p.1, 30/8/96 to 10/9/96 on p.2 and 11/9/96 to 19/9/96 on p.3).

In addition, many claims which are clearly allowable on a solicitor and own client basis are not so allowable on a party and party basis. For instance, the claim for drafting and engrossing a Notice of Change of Solicitors and the claim for inquiring with the court as to the status of the matter on the list fall within this category.

In the circumstances, I consider a more accurate reflection of professional costs on appeal to be in the sum of **$4,900.00**.

Disbursements:

Counsel's fees - Mr R.W.R. Parker QC

As a general rule, preparation is included in the fee for conference. Similarly, conferences on days of hearing are considered to be included in the fee on brief. The claim for a third conference with senior counsel is also considered to be excessive. In any case, fees for senior counsel are generally considered to be excessive.

I consider a more accurate reflection of fees for senior counsel to be in the sum of $3,950.00.

Counsel's fees - Mr J. Parnell

I do not consider that more than one conference prior to the appeal being instituted would be allowed upon assessment. Further, an advice as to the prospects of appeal is not an expense which should be borne by the defendant.

I further note that this matter was not before the court on 8 August 1995 as claimed. Rather, the court timetable merely required the plaintiff to have served any evidence upon which it wished to rely by that date. There is consequently no basis upon which costs for an appearance on 8 August 1995 can be claimed.

In addition, when this matter came before the court on 3 October 1995 and subsequently on 4 December 1995, the matter was required to be relisted due to the applicant's delay in obtaining relevant documents from the lower court on each occasion. Accordingly, the claim for counsel's appearance fees on these days are not costs that can properly be borne by the defendant. In this regard, I also draw your attention to the comments of his Honour Mr Justice Abadee in his judgment dated 27 February 1997 at p.11 where his Honour expressly stated that costs "not be inclusive of appearance before the court on 2 August 1995, 3 October 1995 and 4 December 1995".

The number of conferences claimed in 1996 and 1997 is also considered excessive.

I consider a more accurate reflection of fees for junior counsel to be in the sum of $5,000.00.

Rodda Bailey Vagg

As discussed above, no amount is considered necessary or proper in respect of Mr Rodda s fees. I note that no memorandum in respect of the claim for senior counsel's fees in the sum of $2,800.00 has been provided. In any case, fees in addition to those already claimed in counsel's memorandum dated 28 February 1997 in respect of the appeal proceedings seems difficult to justify. Also, the claim for parking, though allowable on a solicitor and own client basis, is not an expense which is considered necessary or proper. No amount is therefore considered recoverable by your client on a party and party basis in respect of these claims.

However, claims for fees incurred on behalf of Ms Kennedy are contested only upon the basis that they appear excessive.

Accordingly, my client is only willing to allow the sum of $2,075.00 in respect of this claim, representing a reasonable amount for Ms Kennedy's fees.

Photocopying

This claim is considered excessive. An amount in the sum of $445.00 is considered to be more reasonable in respect of photocopying expenses on appeal.

Facsimile

No objection is taken to this claim for facsimile charges.

Travelling and parking expenses

No reason is provided as to the reason for incurring this fee. Accordingly, no amount is considered reasonable in respect of this claim.

Telephone

In view of the earlier contention made with respect to professional costs as to over-servicing, this claim is considered excessive. The defendant is only willing to pay an amount of $9.00.

Authorised sundries

No explanation for the incurrence of these fees is provided. Accordingly, no amount is considered reasonable in respect of this claim. In the circumstances, I consider a more accurate reflection of disbursements on appeal to be in the sum of **$11,526.00**.

Counter-offer - Supreme Court Proceedings:

Accordingly, my client is willing to pay the amount of **$16,426.00** in respect of your clients' costs and disbursements on the appeal to the Supreme Court.

LOCAL COURT PROCEEDINGS

Professional Costs:

Rodda Bailey Vagg

As previously discussed, claims for Mr Rodda's fees are rejected in their entirety. Objection is similarly taken to the claim for Mrs Alexis' fees.

However, claims for fees incurred on behalf of Ms Kennedy are contested only upon the basis that they appear excessive.

In light of the above, my client is only willing to pay the sum of **$15,500.00** in respect of professional costs claimed for Rodda Bailey Vagg.

Barwick, Dechnicz and Boitano

As you point out in your letter dated 20 May 1997, the accounts of 4 August 1993 and 22 December 1994 are prepared on a solicitor/client basis. As you are probably aware, only those costs which are necessary or proper for the attainment of justice or for defending the rights of a party are allowed on a party and party basis. In this regard, costs on a party and party basis are generally much lower than that claimed on a solicitor and own client basis. Accordingly, I have considered these accounts, having regard to the assumption that they include some element of solicitor/client costs which would not be recoverable on a party and party basis.

Accordingly, my client is prepared to pay the sum of **$1,500.00** in respect of professional costs claimed for Barwick, Dechnicz and Boitano.

Disbursements:

Witness Fees

Witness fees appear excessive, particularly in view of the fact that Mrs Chonwanarat's attendance in Australia to give testimony was only brief. My client is therefore only willing to pay the sum of $17,000.00 in respect of witness fees, including the fees of Mr Balzary.

Travel/Parking

Rodda Bailey Vagg: No reason is provided as to the necessity for incurring this fee. Accordingly, my client is not prepared to pay any amount in respect of this claim.

Barwick, Dechnicz and Boitano: This claim is considered excessive. My client is therefore only prepared to pay the sum of $35.00 in respect of travelling on 26 July 1993.

Transcript

This claim is more properly made in respect of the appeal proceedings. Nonetheless, my client is prepared to pay the sum of $600.00 in respect of the appropriate portion of the transcript for the appellate proceedings, keeping in mind the fact that my client has already paid half the costs for transcript fees.

Photocopying

Rodda Bailey Vagg: This claim is considered excessive. My client is only prepared to pay the sum of $60.00 in respect of this claim.

Barwick, Dechnicz and Boitano: This claim is also considered excessive. My client is only prepared to pay the sum of $20.00 in respect of this claim.

Telephone

Barwick, Dechnicz and Boitano: These claims are considered excessive. It is considered that no amount would be recoverable in respect of mobile telephone calls. My client is therefore only prepared to pay the sum of $20.00 in respect of telephone charges.

Facsimile

Barwick, Dechnicz and Boitano: These claims are considered excessive. My client is only prepared to pay the sum of $45.00 in respect of facsimile charges.

Authorised Sundries

Barwick, Dechnicz and Boitano: No explanation for the incurrence of these fees is provided. Accordingly, no amount is considered reasonable in respect of these claims.

Postage

Barwick, Dechnicz and Boitano: No objection is taken in respect of this claim.

Counsel's Fees - Mr John Parnell

The general rule that fees for subsequent hearing days be charged at a refresher rate of two thirds is applicable in respect of claims for counsel's appearances at hearing on 27, 28 and 29 July 1993 and 19, 20 and 21 April 1994.

I also note that a claim for counsel's fees is made under cover of the account from Barwick Dechnicz and Boitano dated 4 August 1993 in the sum of $2,400.00. It is unclear whether this amount relates to fees charged by Mr Parnell of counsel for 26, 27, 28 and 29 July. If so, the amount on counsel's memoranda for those days cannot be reconciled with the amount claimed under the account. No amount has been allowed separately in respect of this claim.

In addition, the number of conferences claimed prior to this matter being reconvened on 27 June 1995 is excessive. I consider that no more than one conference prior to the hearing on 27 June 1995 would be allowed should this matter to proceed to assessment. Further, as this matter was only listed on that day for a hearing on costs and judgment, it is difficult to justify the length claimed for any conference or the necessity to confer with any witnesses.

Accordingly, my client is prepared to pay the amount of $20,000.00 for counsel's fees for Mr Parnell.

Counsel's Fees - Mr V R W Gray

No memorandum of fees has been provided in respect of the claim for Mr Gray's fees. However, given the excessiveness of the fees already claimed in respect of Mr Parnell of Counsel and the limited role which appears to have been undertaken by Mr Gray, the claim of $18,650.00 is similarly considered excessive. In the circumstances, my client is only prepared to pay the sum of $12,500.00 in respect of counsel's fees for Mr Gray.

In the circumstances, I consider a more accurate reflection of disbursements in respect of the Local Court proceedings to be in the sum of **$50,290.00**.

Counter-offer - Local Court Proceedings:

Accordingly, my client is willing to pay the amount of **$67,290.00** in respect of your clients' costs and disbursements in the Local Court.

TOTAL (Local and Supreme Court proceedings): $83,716.00

I am therefore instructed that my client is willing to pay the total sum of **$83,716.00** in full and final satisfaction of your client's claims for costs and disbursements for both proceedings. Please advise whether my client's counter-offer is acceptable to your client.

Please do not hesitate to contact me on the telephone number below if you should have any enquiries.

Yours sincerely

Per pro

Lyn Brady
Principal Solicitor
for the Australian Government Solicitor

Telephone: (02) 9581 7518
Facsimile: (02) 9581 7650