



Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2600

7 May 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

Attached please find a supplementary submission that summarises Customs position in relation to the Tomson case and averments generally.

We would also wish to confirm that Customs submission 4.4 can be made publicly available. The Solicitor-General has agreed to the public release of his advice and Customs waives any legal professional privilege associated with the advice.

Please do not hesitate to contact me on (02) 6275 6199 if there are specific matters on which the Committee would like further information.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'm Grant'.

Marion Grant
National Director
Border Compliance and Enforcement



Australian Government
Australian Customs Service

HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO AVERMENT PROVISIONS IN
AUSTRALIAN CUSTOMS LEGISLATION

AUSTRALIAN CUSTOMS SERVICE
SUPPLEMENTARY SUBMISSION

NON - CONFIDENTIAL

7 May 2004

The Australian Customs Service (Customs) notes that the *About the House* Magazine contains information that the House of Representatives Standing Committee on Legal and Constitutional Affairs is preparing its report in relation to the averments inquiry. Customs is also aware that the Committee has received a number of additional submissions since the Committee held its last public hearing in Sydney on 24 July 2003. As a consequence, Customs has taken the opportunity to prepare a final submission that will summarise our response to matters raised by the Committee or other interested parties.

Customs has addressed its summary comments under two headings – Averments and The Tomson (Vilaysack) Prosecution.

Averments

That averment provisions shift the onus of proof with regard to the matter averred on to the defendant¹

- The effect of section 255 of the *Customs Act 1901* is that it makes the allegation of a fact *prima facie* evidence only - it does not reverse the onus of proof in relation to that fact.²
- Averments do not make evidence admissible which is otherwise inadmissible.³
- In considering whether to use averments and what averments Customs might make in documents presented to the Court, the Australian Government Solicitor (AGS) does not go beyond the evidence in the brief. The AGS does not allege matters for which there is no factual basis among the materials provided by Customs.

That averment provisions violate fundamental principles which impose an obligation on the Crown to prove every element of its case beyond reasonable doubt⁴

- “Beyond reasonable doubt” is the criminal standard of proof. Where Customs pursues a criminal prosecution, it refers the case to the Commonwealth Director of Public Prosecutions (CDPP). In criminal matters, averments are **not** available to the prosecutor.
- Averments may be used in civil matters where the standard of proof is “the balance of probabilities”. Until a High Court decision in September last year,⁵ Customs prosecutions were regarded as civil matters subject to the *Briginshaw*⁶ principle.⁷

¹ House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into averment provisions in Australian customs legislation, Inquiry Information, April 2003, page 5

² Submission by the Australian Customs Service (Inquiry Sub No. 4), May 2003, page 4

³ *ALRC Report No. 95: Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Sydney: ALRC, December 2002), para 13.45, page 478

⁴ *Ibid*, page 6

⁵ *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49 (5 September 2003)

⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336

⁷ On a sliding scale, the standard of proof/evidence must equate to the seriousness of the charge

- In accordance with the *Prosecution Policy of the Commonwealth*, Customs meets its obligation to only institute legal proceedings where it believes sufficient evidence is available to prove the offence.
- In relation to the Tomson case, the acting Solicitor General, Henry Burmester QC, concluded that averments had very little role to play in establishing the key elements of the prosecution case.⁸

What, if any, limitations should apply to the use of averments⁹

- As a consequence of judicial scrutiny and discretion, averments have always been subject to common law limitations.
- The Australian Law Reform Commission (ALRC), in its Report No.s 60¹⁰ and 95,¹¹ recommended that averments be retained with minor changes that would formalise judicial discretions in relation to them. The ALRC also adverted to many of the reasons why averments are needed. In Report No. 95, at paragraphs 13.44 and following, is a summary of the particular utility of averments.
- For its part, Customs has no difficulty with the ALRC's recommendations regarding averments. But it is for the Government to respond to the issues raised in ALRC Report No. 95.
- Customs notes that the Committee has limited the terms of reference of this inquiry to averment provisions in Customs legislation. Section 255 of the *Customs Act 1901* is one of a number of examples of averment provisions in Commonwealth legislation. These provisions are commonly found in regulatory and revenue legislation. Customs anticipates that any limitations imposed by the Committee on averments in Customs legislation will flow on to the operation of these other statutes.

Whether any potential limitations [to averments] should be regulated by legislation¹²

- The current construction of section 255 of the *Customs Act 1901* is such that the operation of averments in a Customs prosecution is already limited. Averments are only allowed for matters of fact not intent. It is not permissible to aver assertions of guilt, irrelevant facts, opinions and interpretations of documents available in court.
- Averments cannot be used for cases investigated by Customs that are referred to the CDPP for prosecution under the Criminal Code.

⁸ Supplementary submission by the Australian Customs Service, 6 February 2004

⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into averment provisions in Australian customs legislation, Inquiry Information, April 2003, page 6

¹⁰ *ALRC Report No. 60: Customs and Excise* (Sydney: ALRC, April 1992)

¹¹ *ALRC Report No. 95: Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Sydney: ALRC, December 2002)

¹² House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into averment provisions in Australian customs legislation, Inquiry Information, April 2003, page 6

Whether averment provisions place an unreasonable burden on defendants¹³

- Since the overhaul of the search and seizure provisions within the Customs Act in 1995,¹⁴ Customs has completed over 700¹⁵ prosecutions. These cases have involved defendants that were both corporate entities and individuals and covered a range of revenue and prohibited import offences. Customs notes that not a single defendant in these cases has lodged a public submission to this inquiry claiming that their prosecution was somehow unfair.
- In relation to the Tomson case, the acting Solicitor General, Henry Burmester QC, concluded that averments had very little role to play in establishing the key elements of the prosecution case.¹⁶

Whether the lack of an averment provision would place an unreasonable burden on the Crown

- The necessity for averments arises where the prosecutor is not in a position to adduce evidence because it is from overseas and witnesses have to be willing to leave their homeland to testify, or because the obtaining of it would result in undue cost or delay. The latter, for instance, might occur in every case where goods are shipped, and statements are required from the owners of shipping lines and the captains of container vessels who land goods and return to international waters for extended periods, from stevedores and warehousemen, from every wharf, depot, freight, trucking, or courier operator involved.¹⁷
- The proliferation of illicit importations via international post now exacerbates the difficulties of proof to which the ALRC adverted in respect of air and sea cargo and personal passenger importation. Those availing themselves of the postal method of importing to circumvent border controls recognise that, in doing so, they do not risk being intercepted in person or leaving a ready documentary trail linking them to their importations. They do not engage Customs brokers, arrange delivery or sign documents.¹⁸
- Averments are regularly used in Customs prosecutions arising from the importation of prohibited goods such as firearms (including handguns), steroids, precursor chemicals (used in amphetamine manufacture), performance enhancing drugs, objectionable material and weapons such as flick knives and pistol crossbows. At the first public hearing, the Committee adopted prosecution statistics provided by Customs for 2001/02.¹⁹ Customs draws the Committee's attention to these statistics and the nature of the offences and the commodities involved. Customs maintains that the efficient prosecution of these offences acts as a valuable deterrent within the community.

¹³ House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into averment provisions in Australian customs legislation, Inquiry Information, April 2003, page 6

¹⁴ *Customs, Excise and Bounty Legislation Amendment Act 1995* (No. 85 of 1995)

¹⁵ Figure sourced from Annual Reports tabled by the Australian Customs Service

¹⁶ Supplementary submission by the Australian Customs Service, 6 February 2004

¹⁷ Submission by the Australian Customs Service (Inquiry Sub No. 4), May 2003, page 7

¹⁸ Submission by the Australian Customs Service (Inquiry Sub No. 4), May 2003, page 8

¹⁹ Received as a confidential exhibit to the inquiry (moved by Dr Washer). Refer Hansard for public hearing held 23 June 2003, page 100

The Tomson (Vilaysack) Prosecution

The outcome of the prosecution

- Customs reiterates to the Committee that Mr Tomson successfully defended the Customs charges – he won the case. The Court awarded costs to Mr Tomson and after a period of negotiation, Customs paid agreed costs of almost \$100,000.00 in 1998 to Barwick Boitano Lawyers, Mr Tomson's legal representatives.²⁰
- Both Customs and Barwick Boitano Lawyers ultimately rejected Mr Rodda's claim for expenses. 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-1998.²¹
- Mr Rodda makes offensive claims against past and present Customs staff as well as others in his submissions. Mr Rodda defends his own credibility and knowledge of Customs matters by claiming that only his view and interpretation of issues, documents and events is correct. Customs finds the tone used by Mr Rodda to be unhelpful in analysing this matter. Mr Rodda's credibility in relation to his status as a lawyer, his specific experience and knowledge of particular Customs matters and his general treatment of this case would need to be examined before any confidence can be given to his claims.
- Customs notes that Mr Tomson has not given any substantive evidence to the Committee in his own right. If the Tomson case is considered by the Committee to be critical in developing its recommendations Customs puts the view that Mr Tomson, with the aid of an independent interpreter if required, should be called on to give his own views of the issues involved and be available for testing of some of the claims by Mr Rodda.

That Mr Tomson was “an honest man” – “never convicted against Customs law”²²

- In 1985, Mr Tomson was convicted of two offences under the *Customs Act 1901* - smuggling commercial quantities of new clothing and making a false statement.
- On 18 June 2003, Customs wrote to the Director of Programming for the Nine Network to express its concerns about the poor standard of journalism reflected in the *60 Minutes* program “Stitched up” that aired on 15 June 2003. Customs has subsequently lodged a formal written complaint with the Australian Broadcasting Authority asserting that the *60 Minutes* program breached the Commercial Television Code of Practice.

²⁰ Supplementary submission by the Australian Customs Service (Inquiry Sub No. 4.2), 21 July 2003, refer page 24

²¹ Supplementary submission by the Australian Customs Service (Inquiry Sub No. 4.2), 21 July 2003, refer page 23 and letters at Appendix C

²² *60 Minutes* Program “Stitched up” aired 15 June 2003

That Customs failed to investigate the case in an impartial and objective manner²³

- Customs sought independent advice from senior counsel on the Tomson matter and after considering all the relevant Customs files, court transcripts and other relevant material he concluded that he could find no evidence to establish the allegations of malicious prosecution or conspiracy to pervert the course of justice as claimed by Mr Rodda. In his view, the material supports the conclusion that, generally speaking, the ACS adopted a proper approach to Tomson's investigation and prosecution.²⁴

That Customs ignored evidence that suggested Mr Tomson was innocent²⁵

- Based on Mr Tomson's own importing behaviour, Customs held a well-founded suspicion that he was smuggling clothing. An internal intelligence report at the time concluded that:
"Comparative checks of the imports of the three owner codes since 1984-87 reveal some startling anomalies (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".*²⁶
- In 1987 Customs officers detained some shipments of new clothing after investigating Mr Tomson's import activities. Increasing quantities of imports at dramatically decreasing prices, large sums of money sent overseas to source countries together with his prior convictions for smuggling and false statement were the basis for Customs actions.

That Customs swore false information to obtain a search warrant²⁷

- The basis for the sworn information included advice provided by Mr Prelea, prevailing intelligence reports and the disparity between the overseas remittances and the declared values for goods imported by Mr Tomson. Customs strongly suspected that there had been significant understatement of shipments imported by Mr Tomson with potential revenue leakage of around \$230,000.²⁸

²³ Hansard for public hearing held 23 June 2003, page 5

²⁴ Customs tabled the report prepared by Mr Geoffrey Bellew at the first public hearing. See Hansard for public hearing held 23 June 2003, page 71

²⁵ Hansard for public hearing held 23 June 2003, page 5

²⁶ Supplementary submission by the Australian Customs Service (Inquiry Sub No. 4.2), 21 July 2003, refer page 11

²⁷ Hansard for public hearing held 23 June 2003, page 5

²⁸ Supplementary submission by the Australian Customs Service (Inquiry Sub No. 4.2), 21 July 2003, refer page 17

That Customs generally pursued Mr Tomson for no other reason than to destroy his business and his business interests²⁹

- Independent counsel retained by Customs found that there was no evidence to support this allegation.
- Mr Rodda has commented that in the 1980s, Mr Tomson had control over significant assets. Mr Rodda has stated that Mr Tomson had a number of overseas investments, including a timber mill in Laos, as well as other joint ventures. Mr Tomson has not provided an explanation as to how he was in a position to transfer large sums of money overseas, whether the transfer was for investment purposes and whether any of it was repatriated to Australia and, if so, how much; nor has Mr Tomson given evidence of whether or not his overseas investments were successful.
- Customs acknowledges Dr Washer’s comments at the first public hearing where he remarked that “during the same period of time ... there were massive Australian dollar fluctuations compared with overseas dollars. There were interest rate changes. There were many bankruptcies in the early 1990s after the 1987 stock market crashes. There were a myriad of influences that would affect businesses that were multifactorial in his case.”³⁰
- Mr Tomson did not pursue a number of opportunities available to him to have his goods returned and to continue trading.
- Mr Rodda has produced no nexus or evidence to either Customs or the Committee to support the claim that Customs dealings with Mr Tomson led to Mr Tomson’s apparent financial position.

That Mr Tomson was bankrupt in 1990; three years after Customs had seized a number of his shipments³¹

- Mr Tomson was declared bankrupt on 15 November 1999, well after Customs seized his goods, and not in 1990 as originally claimed by Mr Rodda during his appearance on the *60 Minutes* program.
- At the first public hearing, Mr Secker asked Mr Rodda whether the bank (or mortgagee) actually bankrupted Mr Tomson. Mr Rodda’s answer was yes.³² The documents on Mr Tomson’s bankruptcy show that the petitioning creditor was Chanthakhath Bounpraseuth. Mr Bounpraseuth was a creditor for \$198,000 of total liabilities of \$291,200. Mr Bounpraseuth listed his address as Unit 4, 14 Bridge Street, Cabramatta. A person of the same name and address has a long list of convictions in NSW, including malicious wounding. Most notably, Mr Bounpraseuth was convicted in 1996 of supplying a prohibited drug and was sentenced to two years imprisonment. Customs believes the drug concerned was heroin. A copy of the publicly available personal insolvency information pertaining to Mr Tomson is at Appendix A.

²⁹ Hansard for public hearing held 23 June 2003, page 5

³⁰ Hansard for public hearing held 23 June 2003, page 58

³¹ *60 Minutes* Program “Stitched up” aired 15 June 2003

³² Hansard for public hearing held 23 June 2003, page 27

That the Customs investigation and prosecution of Mr Tomson took too long

- The investigation period and institution of court proceedings were within the 5-year statutory period provided by Parliament. There were many dealings with Mr Tomson’s legal representatives during this period.

That Customs prosecution of Mr Tomson was malicious

- Customs accepts the decision of the Magistrate in the Local Court that he was left with a reasonable doubt that the offences had occurred. Customs also accepts that the Magistrate concluded there was nothing improper in the conduct of the investigation and prosecution by Customs.
- Mr Tomson has not pursued these allegations through court action.
- Independent counsel retained by Customs found that there was no evidence to support this allegation.

That Customs overseas investigations were illegal

- With the assistance of the Director of Public Prosecutions, Customs sought authority from the NSW Government to gather evidence overseas (this was required as a precursor to utilising the NSW justice system). Officers who conducted investigations abroad in the Tomson matter were appropriately authorised under the Evidence Act 1898 (NSW) by the then NSW Attorney General, Mr John Dowd. Mr Dowd approved the officers for “the purpose of making investigations and obtaining documents or copy documents in Thailand, Hong Kong and Taiwan and elsewhere overseas.”

That Mr Rodda was Mr Tomson’s “lawyer”³³

- Mr Rodda has represented Mr Tomson since the late 1980s. In his written and oral submissions to the Committee, and to the media, Mr Rodda has expressed many strong opinions regarding Customs practices and Court procedure. At the Committee’s first public hearing the Chair stated that:

“[Mr Rodda] made it quite clear in evidence here today that he is a lawyer and that [he] has been giving [Mr Tomson] legal advice. We might bear all that in mind.”³⁴

After evidence was provided by Customs, Mr Rodda admitted that he does not have any practical experience in Court nor does he hold a practicing certificate as a solicitor or barrister.

- The public hearings have revolved around claims by Mr Rodda (Mr Tomson has barely spoken) that Customs was malicious and perverted the course of justice. Mr Rodda has criticised court and legal procedures and officials. It appears to Customs that the real purpose of this interest is in obtaining financial payments for Mr Tomson and to obtain payment for Mr Rodda’s role as a “lawyer”, which was not lawfully available to Mr Rodda.
- Customs draws the Committee’s attention to Attachment F to Mr Rodda’s latest submission (1.10) where Michael Cashion SC makes comment on evidence given by Mr Rodda to the Committee. Mr Cashion’s remarks cast some doubt over Mr Rodda’s evidence to the Committee.

³³ 60 Minutes Program “Stitched up” aired 15 June 2003
³⁴ Hansard for public hearing held 23 June 2003, page 63

Closing remarks

That Customs is locked in a Midford time warp

- The Tomson matter is an old Customs investigation and prosecution case that was finalised through court proceedings. The investigation was carried out prior to changes implemented by a new administration following the Review of the Australian Customs Service.³⁵ The Tomson case predates significant legislative and administrative changes to Customs processes.
- The search and seizure provisions within the Customs Act were overhauled in 1995.³⁶
- The *Prosecution Policy of the Commonwealth* establishes those factors that an agency must consider before launching legal proceedings. Customs complies fully with this policy.
- The organisational culture of the Australian Customs Service has undergone significant change over the last 10 years.
- In September 2003, Customs won the Prime Minister's gold award for Excellence in Public Sector Administration.
- Customs plays a vital role in protecting Australia's borders from the entry of illegal and harmful goods and unauthorised people. Australia's current level of border control and security is unprecedented. Customs is a world leader in the commitment of innovative, cutting-edge technology to border protection tasks. Customs meets the challenge of balancing urgent Government priorities while continuing to deliver day-to-day business requirements, through a robust strategic and risk planning framework.

Customs current investigative role

- The Government and the community expect that Customs will continue to effectively and efficiently prosecute serious breaches of Customs legislation. It remains vitally important that Customs powers support this function, especially in the current climate of global terrorism and organised crime.
- Other agencies such as the Australian Quarantine and Inspection Service and the Wildlife area of the Department of the Environment and Heritage recognise Customs investigative capabilities. Under current agreements with these agencies, Customs conducts investigations and prosecutions of quarantine and wildlife offences on their behalf.

May 2004

³⁵ *Review of the Australian Customs Service*, December 1993 "The Turning Point" (commonly referred to as the Conroy Report)

³⁶ *Customs, Excise and Bounty Legislation Amendment Act 1995* (No. 85 of 1995)

**Appendix A: Personal insolvency information pertaining to
Mr Peter Tomson (aka Paul Vilaysack)**

Page 1 of 1



**National Personal Insolvency Index
Insolvency Trustee Service Australia
Extract as at 01:16 pm 23-May-2003**

Name	VILAYSACK, PAUL (ALIAS)		
Date Of Birth	13-May-1947	Administration Type	Bankruptcy
Administration Number	NSW 5594/99/6	Petition Type	Sequestration
Date Filed	06-Oct-1999	Petitioning Creditor	CHANTHAKHATH BOUNPRASEUTH
Date SA Filed	<No Data Held>	Creditor's Solicitor	BURT & ALLEN
Entered On NPII	16-Nov-1999	Court Reference	N7985/99
Date Ended	16-Nov-2002	Date Hearing Set	06-Oct-1999
Result	Discharge by Law	Hearing Date	06-Oct-1999
Address	LOT 5 COWPASTURE RD GREEN VALLEY		
Occupation	UNKNOWN		
Business Name	<No Data Held>		
Business Address	<No Data Held>		
Trustee	OFFICIAL TRUSTEE IN BANKRUPTCY		

Overall Summary This individual is no longer bankrupt under this administration.

End Of Report

The information in this extract comes from ITSA's National Personal Insolvency Index database as at the time and date indicated in this document. If you consider that the information contains errors, please promptly advise ITSA.

INSOLV0070
 NSW

Insolvency

23-MAY-2003
 01:12 pm

**List of All Creditors in Estate NSW 5594/99/6 – 1
 JOINT ESTATE OF PETER TOMSON & KIM TOMSON Team A40**

<u>Name & Address</u>	<u>Disclosed</u>	<u>Liability Amount</u>	<u>Proof of Debt Status & Amount</u>
AVCO FINANCIAL SERVICES 33 BURWOOD ROAD BURWOOD NSW 2134	SA	\$21,000.00	None Lodged \$0.00
	Creditor Total	\$21,000.00	
C.G.U INSURANCE C/- C.G.U LENDERS MORTGAGE INSURANCE DX 10530 NORTH SYDNEY	SA	\$58,000.00	None Lodged \$0.00
	Creditor Total	\$58,000.00	
CHANTHAKATH BOUNPRASEUTH 4/14 BRIDGE STREET CABRAMATTA NSW 2166	SA	\$198,000.00	None Lodged \$0.00
	Creditor Total	\$198,000.00	
CUSTOM CREDIT CORP 136 EXHIBITION STREET MELBOURNE VIC 3000	SA	\$8,000.00	None Lodged \$0.00
	Creditor Total	\$8,000.00	
WESTPAC BANKING CORP LTD C/- MALWYN PTY LTD PO BOX 78 KOGARAH NSW 1485	SA	\$6,200.00	None Lodged \$0.00
	Creditor Total	\$6,200.00	
	Total Liabilities Disclosed	\$291,200.00	